THE PUBLIC'S RIGHT TO KNOW

VS.

THE PUBLIC'S RIGHT TO "NO":

HOW RHODE ISLANDERS' ACCESS TO GOVERNMENT RECORDS CONTINUES TO BE THWARTED

**A REPORT PREPARED BY THE RHODE ISLAND AFFILIATE,
AMERICAN CIVIL LIBERTIES UNION**

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THE PUBLIC'S RIGHT TO KNOW VS. THE PUBLIC'S RIGHT TO "NO": HOW RHODE ISLANDERS' ACCESS TO GOVERNMENT RECORDS CONTINUES TO BE THWARTED

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This report was prepared by the Rhode Island Affiliate, American Civil Liberties Union for ACCESS/RI, a broad-based, non-profit freedom of information coalition dedicated to improving citizen access to the records and processes of government in Rhode Island.

Executive Summary

The public's right to know is at the heart of a democratic society. This report concludes that the failure by state and local government officials to comply with the state's open records law has reached a level of disregard that demands a forceful response. As a result, a number of recommendations for strengthening the Access to Public Records Act (APRA) are proposed.

The report examines five incidents that took place this summer in which a range of agencies – the Department of Environmental Management, the Department of Administration, the R.I. State Police, the City of Providence and the Warwick Police Department – rejected requests for documents that were clearly public records.

Specifically, the report reviews the non-disclosure of police reports and DEM records in the recent Barrington boating accident tragedy that resulted in the death of a 17-year old resident; the secrecy surrounding the settlement of a lawsuit involving the Providence police department cheating scandal; the initial refusal by the Warwick Police Department to release the arrest report of an individual charged with murder; the state's refusal to release a business's application for "Minority Business Enterprise" status which was discussed and reviewed at a public meeting; and a demand by R.I. State Police troopers that a person seeking access to public records first provide his date of birth and driver's license.

Particularly alarming is the fact that in each of these cases, specific provisions of the open records law had been explicitly adopted by the General Assembly to ensure access to the particular documents that had been requested.

Perhaps even more disturbing is the fact that three of the record denials reviewed here involved access to arrest reports. It has been a long-standing source of frustration for open government advocates that police departments in particular seem all-too-eager to simply ignore the commands of the Access to Public Records Act. A review of these incidents only highlights and confirms the basis for that frustration, where law enforcement agencies seem the most willing of all to violate the law.

The report recommends a number of legislative revisions to APRA to address the troubling status of open records compliance by government agencies. The recommendations include:

- requiring agencies to certify that the individuals responsible for handling open records requests have been trained in the statute's requirements;

- increasing the fines for violations of the law;

- requiring waivers of any copying and search fees if an agency fails to produce records in a timely manner;

• clarifying that a successful open records complainant need not actually obtain a formal court judgment in order to obtain attorneys' fees;

• reducing the amount of time for public bodies to respond to open records requests;

• requiring expedited access to arrest reports; and

• prohibiting public bodies from demanding personal information of requesters before releasing public documents.

It is too late in the day for public bodies to so often and so blatantly ignore the mandates of the Access to Public Records Act. To its credit, the General Assembly has, over the years, closed many gaps in the statute that had been exploited by public agencies. Yet government entities continue to ignore the will of the legislature. We are hopeful that the General Assembly will once again step in and pass strong amendments to the law that will show public bodies that the statute means what it says and that there are consequences for violating it.

Of course, laws by themselves cannot completely resolve the deep-seated problem of government secrecy. Executive leaders at both the state and municipal level need to emphasize the priority that compliance with APRA has in their administration, and that violations of the statute will not be tolerated. We hope that, in addition to encouraging legislative action, this report will serve as a first step in starting that conversation within the executive branch as well. Rhode Islanders deserve nothing less from their elected leaders.

I. INTRODUCTION

In 1979, Rhode Island became the 49th state in the country – behind only Mississippi – to enact a law guaranteeing the public the right to view the records of state and municipal agencies. Passage of the Access to Public Records Act (APRA) was a belated recognition by the General Assembly of the importance of the public's right to know the actions of its government in a democratic society. However, if the state's tardiness in joining the rest of the country in formally supporting this principle is any indication, it appears that a lack of enthusiasm for public records access has been transferred to executive branch government officials at the state and local level. Too many of them show little interest in complying with the law that was finally enacted after a hard-fought struggle.

Advocates for the public's right to know have long expressed concern about both weaknesses in APRA itself and, perhaps more disconcerting, routine non-compliance with the law by state and municipal agencies. The last time that any significant revisions were made to the statute was 1998, almost a decade ago. This brief report demonstrates that there is an urgent need for additional comprehensive improvements to APRA.

Looking at a handful of incidents that have been reported just this summer, it has become abundantly clear that too many government officials either have great misapprehensions about, or significant disregard for, the public's right to know and some of APRA's basic mandates. Time and again, public officials are withholding records that are undeniably public documents, while making virtually no effort to justify their decisions or comport their conduct with express provisions of the statute. This

attitude not only severely hinders the flow of governmental information to the public, it also shows a lack of respect for the General Assembly's actions over the years in closing loopholes in the law that open records' requesters had encountered. Failure to comply with APRA has always been a problem, but it seems to have reached a level of disregard that demands a forceful response.

This report briefly examines five incidents that took place over less than a two-month period this summer. The denial of records came from a range of agencies – the Department of Environmental Management, the Department of Administration, the R.I. State Police, the City of Providence and the Warwick Police Department. In and of themselves, each one of the denials is troubling enough, raising serious questions about the relevant public officials' compliance with state law. Taken together, however, this compendium of incidents demonstrates a *widespread* nonchalance (or worse) about the rule of law that is striking and extremely disturbing.

Even more alarming is that in none of these instances should there have been any legitimate question about the public's right to obtain the requested records. To the contrary, in each case, specific provisions of the open records law had been explicitly adopted by the General Assembly to ensure access to the particular documents that had been requested.

Specifically, this report reviews:

- The secrecy surrounding the settlement of a lawsuit against the City of Providence, despite an explicit provision in APRA making public all legal settlements against government agencies;

- The denial of boat registration information by the Department of Environmental Management on the grounds that the information was being used in an "investigation," despite an explicit provision in APRA that records remain public even when they are being used for investigatory purposes;

• The state's refusal to release a business's application for "Minority Business Enterprise" status which was discussed and reviewed at a public meeting, despite an explicit provision in APRA specifying that documents submitted at public meetings are public records;

• The Warwick Police Department's refusal to release the arrest report of an individual charged with murder, despite an explicit provision in APRA that arrest records and reports are public documents; and

• A demand by R.I. State Police troopers that a person seeking access to public records first provide his date of birth and driver's license, despite provisions in APRA barring the imposition of extraneous requirements that serve to hinder the public's right to know.

Another extremely disturbing aspect of these incidents is that, in addition to the Warwick Police Department incident, two of the other denials also involve access to arrest reports. It has been a long-standing source of frustration for open government advocates that police departments in particular seem all-too-eager to simply ignore the commands of the Access to Public Records Act. The events of this summer only highlight the reasonableness of that concern.

This report recommends a number of legislative revisions to APRA to address this troubling series of events:

• Agencies should be required to certify that the individuals responsible for handling open records requests have been trained in the statute's requirements.

• APRA's current fines for "knowing and willful" violations of the law are too low to serve as a deterrent. The fines should be increased and also made available for reckless violations of APRA, regardless of intent, in order to prevent public officials from being rewarded for ignorance of the law.

• To promote prompt compliance with APRA requests, copying and search fees should be waived if an agency fails to produce records in a timely manner, and courts should be able to impose per diem fines for the improper withholding of records.

• Putting Rhode Island's law more in line with the rest of New England, APRA should be amended to reduce the amount of time for public bodies to respond to open records requests and to provide copies of public records.

• The law should be amended to clarify that a successful open records complainant need not actually obtain a formal court judgment in order to obtain attorneys' fees, in order to prevent the belated release of records after a citizen has spent thousands of dollars contesting the agency's initial denial of those records.

• In response to continuing problems with the release of arrest reports from municipal police departments, the law should require that these reports be produced "as soon as practicable," but no later than three business days. The law should further be clarified to specify that the narrative reports of an arrest are included in the definition of arrest "reports," so as to eliminate any shred of ambiguity about the scope of this requirement.

• APRA should be amended to explicitly prohibit public bodies from demanding personal information of requesters before releasing public documents, or inquiring why the documents are being sought.

The incidents highlighted in this report are a wake-up call. If government agencies feel so comfortable denying access to public records so often, in so many situations and in such a short period of time in the face of expressly controlling statutory provisions – and, in four of these instances, in response to requests from the state's major newspaper, the *Providence Journal* – it is easy to imagine the obstacles that the average citizen faces on a regular basis when trying to obtain public documents. Without the resources of organizations like the ACLU to pursue action against recalcitrant government agencies, it is likely that many residents simply give up.

It is time for the General Assembly to once again revisit APRA and strengthen its provisions, especially its remedies. It is also time for executive agency officials at the state and local level to demonstrate a commitment to the public's right to know. Perhaps first and foremost, they must disabuse themselves of the misguided homonymic notion that what is at stake is "the public's right to no."

II. PUBLIC RECORDS USED IN AN ONGOING INVESTIGATION: THE BARRINGTON BOATING ACCIDENT

> ***R.I.G.L. § 38-2-13: "All records initially deemed to be public records which any person may inspect and/or copy under the provisions of this chapter, shall continue to be so deemed whether or not subsequent court action or investigations are held pertaining to the matters contained in the records."***

On July 17, 2007, a Barrington teen died in a tragic boating accident that remains under investigation. The 17-year-old driver of the boat has been charged with a felony. In the midst of newspaper reporting about the incident, a clear-cut violation of the open records law came to light.

Seeking to determine the boat's ownership, the *Providence Journal* requested registration information about the boat from the Department of Environmental Management. The DEM did not contest the fact that this information was a matter of public record. Nonetheless, the agency refused to release it. Instead, a DEM spokesperson was quoted as saying that the record identifying the registered owner of the boat "is part of an active investigation, and therefore records are exempt from public disclosure at this time."[1] Notwithstanding this rejection, the *Journal* obtained the requested information from another source and was able to report about it in the story.

DEM's response is troubling for obvious reasons. What makes it so serious is that – just like the other incidents that are described in this report – APRA *unambiguously* addresses this situation. Over twenty years ago, in response to a highly-publicized scandal, the General Assembly amended APRA to make perfectly clear that public records used as part of an on-going investigation continue to be public.

Back in 1986, during a high-profile investigation of favoritism in lending practices at the R.I. Housing and Mortgage Finance Corporation (RIHMFC), the agency tried to withhold from the public any records regarding single-family mortgages it had issued. RIHMFC justified its refusal to release the documents solely on the basis that the records had been subpoenaed by a grand jury. RIHMFC argued that once the grand jury sought access to these public documents, they became "investigatory records" and were thus exempt from disclosure under APRA.

The *Providence Journal* filed suit to challenge this troubling interpretation of APRA. In support of that challenge, the ACLU filed a "friend of the court" brief in the case, arguing that RIHMFC's interpretation of the law would lead to a Kafkaesque situation where records already in the public domain could suddenly become classified at precisely the point when their importance as public records was most crucial. A Superior Court judge agreed, and ordered the agency to release the disputed records. As the Judge noted: "The investigatory exemption does not serve as a magic wand turning open access records into shielded records merely because they are also being used in the course of an investigation."[2]

The General Assembly acted quickly to prevent any further misinterpretation of APRA under similar circumstances. That very same year, the legislature adopted an amendment to APRA specifying that public records remained so "whether or not subsequent court action or investigations are held pertaining to the matters contained in the records." Yet 21 years later, DEM acted as if that amendment had never been adopted.

Since the Barrington boating accident story was first reported, additional violations of APRA surrounding this incident have been documented. Specifically, an August 22, 2007 *Providence Journal* article describes how both DEM and the Barrington Police Department have refused to fully release copies of the arrest report relating to the incident.[3]

According to the *Journal*:

> "The narrative portion of the DEM arrest report, which would describe what allegedly happened that night, remains under wraps. Instead, the DEM released a data sheet with no details of the alleged crime. . . . Barrington's arrest report supporting the charge of underage alcohol possession was released Aug. 16, three weeks after Greenberg appeared in court for arraignment. It was released after repeated requests by The Journal and its lawyer. The release, however, includes only a one-paragraph summary, not the full narrative that is normally part of an arrest report."

As the next section of this report notes, the refusal of law enforcement agencies to release arrest reports is a long-standing problem and, more importantly, a blatant violation of the open records law. This Barrington tragedy, unfortunately, supplies a textbook case, in more than one respect, of the low respect with which APRA is held by some agencies.

III. ACCESS TO ARREST REPORTS: THE FREDDIE BISHOP CASE

> ***R.I.G.L. § 38-2-2(4)(D): "…Records relating to management and direction of a law enforcement agency and records or reports reflecting the initial arrest of an adult and the charge or charges brought against an adult shall be public."***

Of all the public bodies in the state that have responsibility for complying with the open records law, there can be little question that it is law enforcement agencies that, ironically, have been the biggest offender in violating the statute. The ACLU has filed more open records lawsuits against police departments than against any other type of agency, by far.[4]

Occasionally, there are bound to be legitimate disputes about the availability of particular police records in particular circumstances, in light of the privacy and safety implications involved in releasing some law enforcement documents. However, there is one type of document about which there should be no dispute as to its availability to the public: arrest reports. Despite explicit language in the text of APRA, some police agencies continue to ignore the law's clear mandate and withhold these records. In fact, three of the five incidents described in this report involve the unlawful denial of arrest records.

The problems associated with police record access were thoroughly reviewed in two reports by Brown University's Taubman Center for Public Policy.[5] Both reports found widespread non-compliance with APRA by police departments, and also found their non-compliance to be worse than that of other government agencies. Yet many years later, the problem regarding access to arrest documents persists, even though the law has been amended over time to eliminate any possible ambiguity about its reach.

For example, APRA originally provided that arrest "records" were public. When some police departments responded by interpreting that term in the narrowest way possible and releasing only the most minimal information – such as the arrestee's name and charge – the law was amended in 1998 to specify that the release of both arrest records and "reports" was required.[6] Yet, in the past month, four clear violations of this APRA requirement (including the two noted in the previous section) have been brought to the ACLU's attention.[7]

One of those violations involved, quite surprisingly, the recent arrest of a convicted killer – Alfred "Freddie" Bishop. Less than a year after being released from the ACI following three decades in jail, Bishop was arrested in July 2007 and ordered held without bail on a new murder charge and six related counts. However, an August 1, 2007 *Providence Journal* article reported that the Warwick Police Department refused to release Bishop's initial arrest report. In justifying the denial, a police spokesperson was quoted as saying: "Although our arrest has been made, there are follow-up investigations to be made and issues to consider."[8]

As the previous section of this report noted, the fact that an investigation is being conducted provides no authority for denying access to a public record. The denial in this case was doubly improper because APRA also contains an explicit provision that arrest reports are public.

The importance of public access to arrest records should be obvious. Scrutiny of arrest reports is one of the most fundamental ways to oversee the activities of law enforcement, and to make sure that proper procedures are being followed and arrests are taking place in a lawful manner. If a person is locked up in jail, the public should be

able to find out how this came about. Indeed, civilian oversight of police arrests is one of the basic principles that distinguish democratic from totalitarian societies.

Yet, as has happened so often in the past, the Warwick police department saw no obstacles to denying information to an inquirer despite two separate provisions in APRA that undermined any basis for the police department's secrecy.

IV. SETTLEMENT OF LEGAL CLAIMS: THE PROVIDENCE POLICE DEPARTMENT CHEATING SCANDAL

R.I.G.L. § 38-2-14: "Settlement agreements of any legal claims against a governmental entity shall be deemed public records."

In 1984, Robert Weigner claimed that Central Falls police officers broke his neck while he was being held in police custody, making him a quadriplegic. Weigner filed a federal civil rights lawsuit against the City. In March of 1987, the City and Weigner reached an out-of-court settlement, but the details of the settlement were sealed by the federal court at the request of the parties, and the court refused a request from lawyers for the *Pawtucket Times* to unseal the document. At the same time, the *Providence Journal* filed a separate APRA lawsuit in Superior Court to obtain a copy.[9] A few months later, a Superior Court judge ruled that the settlement was a public document and ordered its release to the *Journal*. The document disclosed that the City had agreed to pay Weigner $1.5 million.[10]

It seems shocking that a municipality would argue that it could keep secret from the taxpayers a settlement of *any* public lawsuit, much less one of such obvious magnitude, but that's exactly what happened in the Central Falls case. In order to prevent any similar open records disputes from arising, the General Assembly enacted an amendment to APRA in 1991, specifying that "[r]ecords reflecting the financial settlement by public bodies of any legal claims against a governmental entity shall be deemed public records."[11] In 1998, the law was further clarified so that it applies to *all* legal settlements by a public entity, not just financial ones.[12]

Unfortunately, the clear language of the statute has not prevented public bodies from ignoring its mandate. The most recent occurrence of this was in a highly-publicized matter involving the City of Providence and its police department.

A June 28, 2007 *Providence Journal* story reported on a settlement agreement that the City of Providence had reached in response to a lawsuit filed by former Detective Sgt. Tonya King Harris and her husband, former Sgt. Michael M. Harris.[13] The Harrises were among 10 officers implicated in a Police Department promotions scandal a few years earlier. In sworn testimony, retired Police Chief Urbano Prignano Jr. had stated that he provided Detective Harris with test source sheets in advance of a promotional test for sergeant. After the Police Department initiated disciplinary action against them, the Harrises sued the City.

The June 28th *Providence Journal* article disclosed the details of the settlement agreement between the City and the Harrises. According to the article, Ms. Harris

> "won reinstatement to her job in a settlement of a lawsuit against the city, on the condition that she retire. As part of the same settlement, Michael Harris, who also was accused of cheating, agreed to retire, too. In return, pending or potential disciplinary charges against him were dropped. Neither Harris admits wrongdoing in the settlement, and the city has promised in the settlement not to suggest otherwise."

In light of the significant controversy surrounding the cheating scandal, the settlement of this lawsuit was a matter of important public interest. But buried at the bottom of the June 28th article was one of the most interesting things about the settlement: the *Journal* had obtained it from undisclosed sources, not the City or court files, because the City refused to release a copy. Rather, an Assistant City Solicitor was quoted as saying that the city, as part of the settlement, had agreed to keep the

contents confidential and, “to err on the side of caution” it would “uphold the confidentiality agreement rather than invoke the public records law.”[14]

Of course, §38-2-14 of APRA, enacted years earlier for precisely this situation, completely eradicated any basis for the city’s claim to confidentiality. Yet this did not deter the City of Providence from withholding the agreement from public scrutiny. Indeed, the settlement agreement had been entered in July, 2006, which means that a year later, the City was still defending its decision to keep this important – and clearly public – document secret despite the clear wording of the open records law.

V. RECORDS REVIEWED AT A PUBLIC MEETING: THE MINORITY BUSINESS CERTIFICATION PROCESS

> ***R.I.G.L. § 38-2-2(4)(K): "For the purposes of this chapter, the following records shall not be deemed public: (K) Preliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public."***

Surely the documents reviewed by a public body at a public meeting to consider a public matter are public records. Amazingly, some agencies have not seen it that way. As a result, the General Assembly amended APRA in 1998 to make this seemingly obvious point explicit. Although "preliminary drafts" and "working papers" may, as a general rule, be kept confidential, an amendment to APRA clarified that "any documents submitted at a public meeting of a public body shall be deemed public."

Nonetheless, as a July 28, 2007 *Providence Journal* story demonstrates, this provision still gets ignored. That story examined in some detail the attempts by a few businesses to obtain status as a "minority business enterprise" (MBE), potentially qualifying them to obtain multi-million dollar state contracts on public works projects.[15]

At the very end of the lengthy news article, there was mention that the MBE application from one of the businesses, and a state agency official's evaluation of that application, was considered at a July 18 public meeting. At this meeting of the state's Certification Review Committee, chaired by the administrator of the Department of Administration's Minority Business Enterprise compliance office, the Committee voted to conduct a hearing on the application. Although the administrator cited no provision in APRA that would justify withholding the application, he refused to release the document to the *Journal*, saying he was "uncomfortable releasing an open application."

The administrator may have felt uncomfortable releasing it, but the language in APRA cited above – “documents submitted at a public meeting of a public body shall be deemed public” – made it abundantly clear that he had no choice in the matter. Yet it did not stop the agency from saying “no” to the request, in direct contravention of the law.

VI. ACCESS TO READILY AVAILABLE DOCUMENTS: THE R.I. STATE POLICE

> ***R.I.G.L. § 38-2-3(a): "[E]very person or entity shall have the right to inspect and/or copy [public] records at such reasonable time as may be determined by the custodian thereof."***
>
> ***R.I.G.L. § 38-2-3(c): "Each public body shall establish procedures regarding access to public records but shall not require written requests for . . . documents prepared for or readily available to the public."***

On July 26, 2007, a Guatemalan national was arrested by state troopers after a motor vehicle stop. Seeking help, the arrestee's family contacted Juan Garcia, a community activist in Providence. The next day, Mr. Garcia went to the Hope Valley Barracks in order to obtain a copy of the person's arrest report.

According to Mr. Garcia, he asked for a copy of the report from the trooper on duty. The trooper demanded that Mr. Garcia first provide his name, date of birth and a copy of his driver's license. Mr. Garcia voluntarily provided his name and birth date, but questioned the demand for his driver's license. A few moments later, Mr. Garcia was allegedly told by another trooper who joined the conversation that he was not entitled to a copy of the arrest report in any event, as only the defendant or the defendant's lawyer had such a right. The trooper then ordered Mr. Garcia to leave the barracks, which he did. He immediately contacted the ACLU, which then filed a complaint with the R.I. State Police about this incident.

The complaint noted that there was no basis in the open records law for requiring individuals to provide their driver's license as a condition of inspecting public documents. The letter further argued: "Leaving aside the apparent rudeness of the encounter …, the information the troopers provided Mr. Garcia about not being entitled

to a copy of the arrest report is blatantly false. . . There is simply no excuse at this late date for any police officer to be confused about the public's right to these records." The State Police have initiated an internal investigation of the incident, but whatever the outcome, it does not eliminate the fact that troopers both provided misinformation about the availability of the report and imposed unwarranted requirements on Mr. Garcia in order to obtain it.[16]

Of course, this incident highlights once again the never-ending struggle faced by Rhode Islanders to obtain public records relating to law enforcement – and arrest reports in particular. But it also shows how some agencies attempt to impose barriers to records access that are nowhere authorized by the law. In response to past abuses, APRA specifically goes out of its way to prevent the imposition of hurdles – including the need for written requests – to obtain records "readily available to the public." Police reports certainly fit that category – or, at least, they were meant to.

It is impossible to conceive of a legitimate rationale for an agency to demand a person's private information – including their date of birth or driver's license – as a condition of obtaining a copy of a public document. One can easily imagine numerous scenarios where such a requirement could chill a person from requesting documents. If a town resident wants to obtain a copy of, for example, certain records relating to an elected official, the resident may not want that official to know, due to fear of reprisal or other concerns. Demanding identification from a requester, when there is clearly no need to do so, can only deter some people from exercising their rights under the open records law. In any event, APRA provides no legal authority for such demands, contrary to the actions of the state police during this encounter.

VII. RECOMMENDATIONS

These recent examples of patent violations of APRA by a variety of public agencies demonstrate the critical need for the General Assembly to act and strengthen the law. In each of the five instances cited in this report, a public agency denied access to a public record in contravention of clear and directly controlling statutory language. Worse, in each instance, language in APRA had specifically been enacted to ensure access to precisely the type of records being sought. That agencies still felt so comfortable withholding access points to a very serious problem that requires prompt and forceful remediation.

Until the law is strengthened, there will be many more instances like those chronicled in this report. The losers are the public, since the right to know is critical if public officials are to held accountable for their actions and if Rhode Island residents are to be able to actively participate in democratic rule.

For the past few years, legislation has been introduced in the General Assembly to close up some loopholes in APRA and strengthen the remedies available for violations of the Act.[17] The need for such legislation has never been clearer. Below are some changes that are essential to strengthen the open records law and to prevent the lapses that have been documented in this report. (A number of the recommendations have already been proposed as part of the legislation mentioned above.)

• It is inexcusable for any records custodians to fail to understand some of their most basic obligations under APRA. The law should be amended to require agencies to certify that the individuals responsible for handling open records requests have been

trained in the statute's requirements. This not only helps to ensure that government employees in charge of dealing with APRA requests are familiar with the law, it promotes accountability as well. Maine recently adopted a similar requirement in its open records law.

• APRA currently authorizes the imposition of a fine of up to $1,000 for "knowing and willful" violations of the law. The current fine is too small to serve as a deterrent. There should be a significant increase in the maximum fine that can be imposed. Further, because the "knowing and willful" criterion is a very high standard to meet, it is important that a separate imposition of fines, up to $5,000, should be available for clear or reckless violations of the law, regardless of whether the denial can be shown to be "knowing and willful." Otherwise, ignorance of APRA by public officials is rewarded.

• Under the current law, prevailing plaintiffs are entitled to an award of attorneys' fees. The law should be amended to clarify that a successful open records complainant need not actually obtain a formal judgment in order to obtain attorneys' fees. Thus, if a town releases records only after a lawsuit is filed, but before a court decision is issued, the complainant should be deemed to have prevailed. A public body should not be able to withhold public records for months and release them only when an adverse court ruling is imminent and then be able to argue that the plaintiff has no right to recover attorneys' fees. Congress is poised to pass a similar amendment to the Freedom of Information Act.

• To promote prompt compliance with APRA requests, copying and search fees should be waived if an agency fails to produce records in a timely manner, and courts should be able to impose fines for the improper withholding of records on a per diem

basis, for each day that the requester was denied the right to inspect or copy the public records that had been sought.

• Putting Rhode Island's law more in line with the rest of New England, APRA should be amended to reduce the amount of time for public bodies to respond to open records requests and to provide copies of public records. Presently, public bodies have ten business days to respond, with an extension of thirty days for "good cause." The legislation that was introduced commendably changes these time frames to three and ten business days, respectively. Of the five other New England states, four require responses within five or fewer days. Only Massachusetts has a ten day response time like Rhode Island's current law.

• In response to continuing problems in obtaining arrest reports from municipal police departments, the law should require that these reports be produced "as soon as practicable," but no later than three business days. There is no reason for police departments to withhold such easily accessible records for the maximum time period otherwise authorized by APRA. Especially in light of the important public interest in openness in arrest matters, such an obligation is more than reasonable. The law should further be clarified to specify that the narrative reports of an arrest are included in the definition of arrest "reports," so as to eliminate any shred of ambiguity about the scope of this requirement.

• APRA should be amended to explicitly prohibit public bodies from demanding personal information of requesters before releasing public documents, or inquiring why the documents are being sought.

It is too late in the day for public bodies to so often and so blatantly ignore the mandates of the Access to Public Records Act, as have been documented in this report. To its credit, the General Assembly has, over the years, closed many gaps in the statute that had been exploited by public agencies. Yet government entities continue to ignore the will of the legislature. We are hopeful that the General Assembly will once again step in and pass strong amendments to the law that will show public bodies that the statute means what it says and that there are consequences for violating it.

Of course, laws by themselves cannot completely resolve the deep-seated problem of government secrecy. Executive leaders at both the state and municipal level need to emphasize the priority that compliance with APRA has in their administration, and that violations of the statute will not be tolerated. We hope that, in addition to encouraging legislative action, this report will serve as a first step in starting that conversation within the executive branch as well. Rhode Islanders deserve nothing less from their elected leaders.

ENDNOTES

[1] "Barrington Teen Died from being Struck in River," by C. Eugene Emery, Jr. and Meghan Wims, *Providence Journal*, July 21, 2007.

[2] *Providence Journal v. R.I. Housing and Mortgage Finance Corporation*, 1986 WL 714235, *5 (R.I. Superior Court, February 19, 1986).

[3] "Details of Barrington Teen's Death Elusive," by C. Eugene Emery, Jr., *Providence Journal*, August 22, 2007.

[4] In the past 20 or so years, the RI ACLU has filed ten "open records" lawsuits against police departments. Every suit that has been resolved (one is pending) has resulted in the ultimate release of the requested records. Interestingly, half of the lawsuits have involved the Providence Police Department. Most recently, the ACLU successfully sued the Central Falls Police Department when it refused to release the report of a fatal shooting of a city resident by police.

[5] "Access to Public Records: An Audit of Rhode Island's Cities and Towns" (1997), available on-line at http://www.brown.edu/Departments/Taubman_Center/FOI_Study.html; "Open or Shut? Access to Public Information in Rhode Island's Cities and Towns" (1999), available on-line at: http://www.brown.edu/Departments/Taubman_Center/OpenorShut.html.

[6] P.L. 1998, ch. 378, §1.

[7] To be fair, some police departments do appear to now better recognize their obligations under APRA regarding these records. In August 2007, both the Woonsocket and North Providence Police Departments responded very promptly to open records requests from the ACLU for copies of arrest reports.

[8] "Bishop Charged with Murder," by Cynthia Needham, *Providence Journal*, August 1, 2007. After further prodding from the *Journal*, the Police Department ultimately released the arrest report.

[9] "Court Won't Release Details of Settlement in Injury Case," *Providence Journal*, June 2, 1987.

[10] "Supreme Court Justice Rules Injury Settlement Must be Made Public," by Mark Sennott, *Providence Journal*, October 31, 1987.

[11] P.L. 1991, ch. 263, §2.

[12] P.L. 1998, ch. 378, §1.

[13] "Board Approves Settlement for Accused Officers," by Gregory Smith, *Providence Journal*, June 28, 2007.

[14] In fact, the agreement provided that the settlement would be confidential "to the extent authorized by law." After the *Providence Journal* story appeared, the ACLU filed a formal open records request for a copy of the settlement agreement, and the City released it.

[15] "Panel to Explore Bid for Minority Status," by Katherine Gregg, *Providence Journal*, July 29, 2007.

[16] After the complaint was filed, the R.I. State Police promptly released the arrest report.

[17] See, e.g., 2007-S 341, available on-line at http://www.rilin.state.ri.us//BillText07/SenateText07/S0341.pdf.