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AN ANALYSIS OF THE GOOGLE SETTLEMENT APRA BATTLE WITH THE RI ATTORNEY GENERAL: ANOTHER REMINDER OF THE NEED TO STRENGTHEN THE OPEN RECORDS LAW

October 2018

On March 1, 2018, state Rep. Patricia Morgan filed an Access to Public Records Act (APRA) request with the Attorney General's office (AG) for documents related to that agency's use of more than $50 million dollars obtained from the settlement of a lawsuit against Google in 2012. Seven months later, the AG's response has become the subject of a great deal of discussion and concern, and with good reason. Public officials on both sides of the political aisle have criticized the AG for the exorbitant costs he has charged Rep. Morgan for the records, the extensive nature of some of the redactions, and even the paternalistic way he appears to have treated her.

The ACLU of Rhode Island shares many of the concerns that have been raised, but the discussion has thus far failed to put into context the fact that the AG's response to this request is not unique, but instead is representative of much broader problems with his implementation of APRA. In fact, this dispute highlights both the Attorney General's long-standing role in weakening the Access to Public Records Act in various ways and the clear need for legislation to strengthen the law in a number of key respects.[1] If this dispute results in fortifying APRA in ways that are long past due, it will not have been in vain.

The following analysis brings a more detailed perspective to this dispute by looking separately at the issues of (1) the costs charged for the records, (2) the redactions made to the documents, and (3) the explanation provided by the AG in responding to this APRA request. We examine not only what the AG did, but also offer our views on how the Attorney General *should* have responded, and how APRA can and should be strengthened to prevent similar responses in the future that fail to adequately protect the public's right to know.

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[1] Reports issued over the years by the ACLU of RI and by ACCSS/RI have outlined in detail the problems with both the Attorney General's enforcement of the law and loopholes in the statute that undermine public access to records. See, e.g., "Knowing and Willful: The Need for Stronger Enforcement of Rhode Island's Public Records Law," February 2013, http://riaclu.org/images/uploads/Knowing_and_Willful_Report.pdf; "Access Limited: An Audit of Compliance with the Rhode Island Public Records Law," September 2014, http://www.accessri.org/foi-audits.html

1. COSTS FOR THE GOOGLE RECORDS

What the Attorney General's Office did:

The AG required Rep. Morgan to pay $3,750 in advance to begin processing her request for copies of the requested documents.[2] Some months later, the AG provided her records generally covering the years 2013-2016, but has now demanded an additional advance payment of at least $4,000 – and potentially much more – to provide more recent documents relating to the AG's expenditure of these funds.

APRA allows public bodies to charge "the reasonable actual cost for providing electronic records," and a "reasonable charge … for the search or retrieval of documents," which cannot exceed $15 per hour. R.I.G.L. §38-2-4. In addition, APRA has been interpreted to allow public bodies to charge for the time it takes to redact documents. Since an overwhelming number of pages received by Rep. Morgan contain one or more redactions (and, as discussed below, a number of them of dubious authority), this undoubtedly helped contribute to the extremely high cost of responding to the request. To the best of our knowledge, there is no specific breakdown from the AG as to how much of the costs charged to Rep. Morgan are attributable to providing, searching for, retrieving or redacting the records.

What the Attorney General's Office should have done:

While APRA allows public bodies to charge the public for access to records, nothing *requires* them to do so, and certainly nothing requires them to charge the maximum statutory rate. In partial recognition that exorbitant costs for obtaining records can undermine the public's right to know just as much as an outright denial of records, APRA specifically authorizes courts to "reduce or waive the fees for costs charged for search or retrieval if it determines that the information requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." R.I.G.L. §38-2-4(e). Public bodies themselves are in a position to do the same, and in light of the strong public interest in these documents, the AG should have waived or significantly reduced the

[2] The AG initially provided her at no charge a spreadsheet of expenses and correspondence between his office and the U.S. Department of Justice regarding the expenditure of the Google funds.

costs for searching for and retrieving these records. As we argue below, charging fees should be the exception, not the rule, in complying with APRA requests.

This position applies even more forcefully in the context of redactions. There is something deeply offensive about making members of the public pay for the "privilege" of *not* seeing documents they have requested, but that is precisely what charging a person for the time associated with making redactions does.

Of course, given that the Attorney General has previously ruled that a public body can charge members of the public for the time it takes to compose a letter denying an open records request,[3] the AG's actions here are not surprising. But that does not make it right. It is even more problematic when, as discussed below, the redactions themselves are highly questionable.

We recognize that Rep. Morgan's APRA request is very expansive, and the AG may very well be correct, as he has argued in court papers opposing a waiver of the fees in this case, that providing such an extensive array of documents is not necessary to meet her goals in examining how the AG's office went about spending these funds. But ultimately that is the requester's determination to make, not the public body's. And while it could potentially serve as an argument for a court to conclude that Rep. Morgan's request for a waiver of *all* the fees is not in order, the general public interest in this subject is undeniable, and that is something that the AG should have taken into account before charging such exorbitant fees.

How the General Assembly Should Revise APRA:

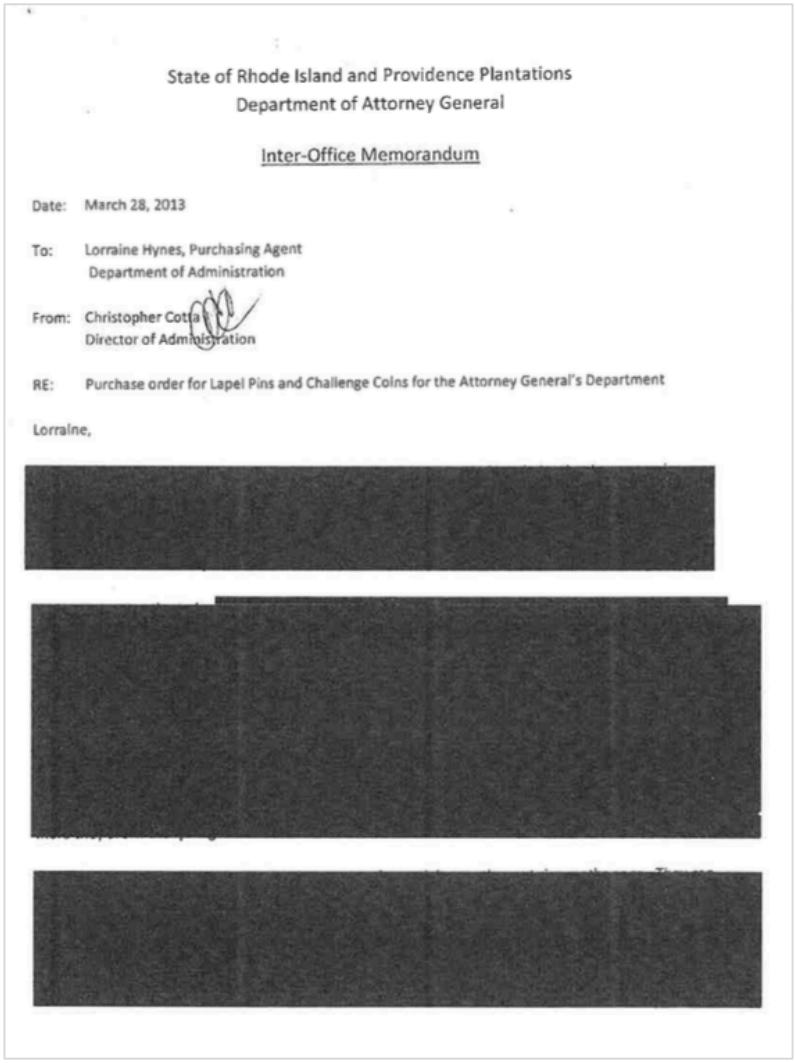
- The statute should be amended to mirror the federal Freedom of Information Act (FOIA), and create a presumption that charges should be waived for record requests that are in the public interest.
- The statute should explicitly bar public bodies from charging for time spent redacting, or otherwise denying access to, records.
- Finally, while not directly at issue here since the records were provided electronically, it is time to amend APRA to address the current, actual costs for copying records. Charging 15 cents a page may have been reasonable thirty years ago, but it is pure profit-making in this day and age. The charge for making copies should be reduced to no more than five cents a page.

[3] Clark v. Department of Public Safety, PR 14-23, August 27, 2014.

2. REDACTIONS

What the Attorney General's Office did:

A vast number of the documents that Rep. Morgan received contained redactions of one kind or another; in some instances, virtually the entire page was blacked out. Perhaps the most emblematic example was an inter-office memo from the AG to the Department of Administration's purchasing agent, regarding a "Purchase order for Lapel Pins and Challenge Coins for the Attorney General's Department." Except for the heading, the entire document was redacted. Until the AG filed court papers this month on a request by Rep. Morgan to have the fees waived, the exact basis for this inscrutable redaction was unknown, and exemplifies a serious problem with the way redactions were made.



State of Rhode Island and Providence Plantations
Department of Attorney General

Inter-Office Memorandum

Date: March 28, 2013

To: Lorraine Hynes, Purchasing Agent
Department of Administration

From: Christopher Cotta
Director of Administration

RE: Purchase order for Lapel Pins and Challenge Coins for the Attorney General's Department

Lorraine,

[redacted]

EXAMPLE OF REDACTIONS.

In his cover letter to Rep. Morgan, Assistant Attorney General Michael Field suggested that the vast majority of redactions were based on APRA's widely-used "personnel" or "personal privacy" exemption. But at the very end of the letter, Field mentioned, without any further elucidation, that records were also redacted based on six other APRA exemptions, listed in the footnote below.[4] But it is impossible to know which of these seven exemptions

[4] In addition to the "personnel" exemption, the AG cited these six other APRA exemptions:
(B) Trade secrets and commercial or financial information obtained from a person, firm, or corporation that is of a privileged or confidential nature.
(D) All records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency.

apply to the redaction of this seemingly innocuous purchase request. The AG's failure to match the redaction with a specific APRA exemption prevents the requester, and the public, from meaningfully judging the propriety of the redaction. This is inexcusable.

In court papers, the rationale for this redaction was finally explained, but the explanation is deeply disturbing. The AG indicated that he was relying on APRA's Exemption K, which allows for the non-disclosure of *"[p]reliminary* drafts, notes, impressions, *memoranda*, working papers, and work products…" (emphasis added) Because the document regarding the purchase of lapel pins "follows the format that one may expect of a 'memoranda' and is consistent with the plain language definition of a 'memoranda,'" the AG argues, the document was completely exempt from public disclosure.

To the best of our knowledge, no public body has interpreted Exemption K in this extraordinary manner. All of the other documents referenced in Exemption K seem to follow from the initial key word of the exemption: "preliminary." The clear thrust of this exemption is to address *unfinished* business documents. Every other phrase in this exemption – drafts, notes, impressions, and working papers – all contain a clear imprint of incompleteness. If read in that context, the inclusion of 'memoranda' makes sense. But many memoranda are not "preliminary" in the sense that Exemption K is addressing, and to interpret this exemption as keeping secret *any* document of a public body that is labeled a "memorandum" opens a gaping and completely unjustifiable loophole in APRA. (Indeed, though not labeled as such, the court document in which this justification appears could be called a "memorandum of law.")

As the AG's court filing notes, "memoranda" is defined to mean, among other things, "a brief record of an event or analysis of a situation, made for one's own future reference or to inform others, and sometimes embodying an instruction or recommendation" and "a short document recording the terms of an agreement." Information contained in memoranda, and

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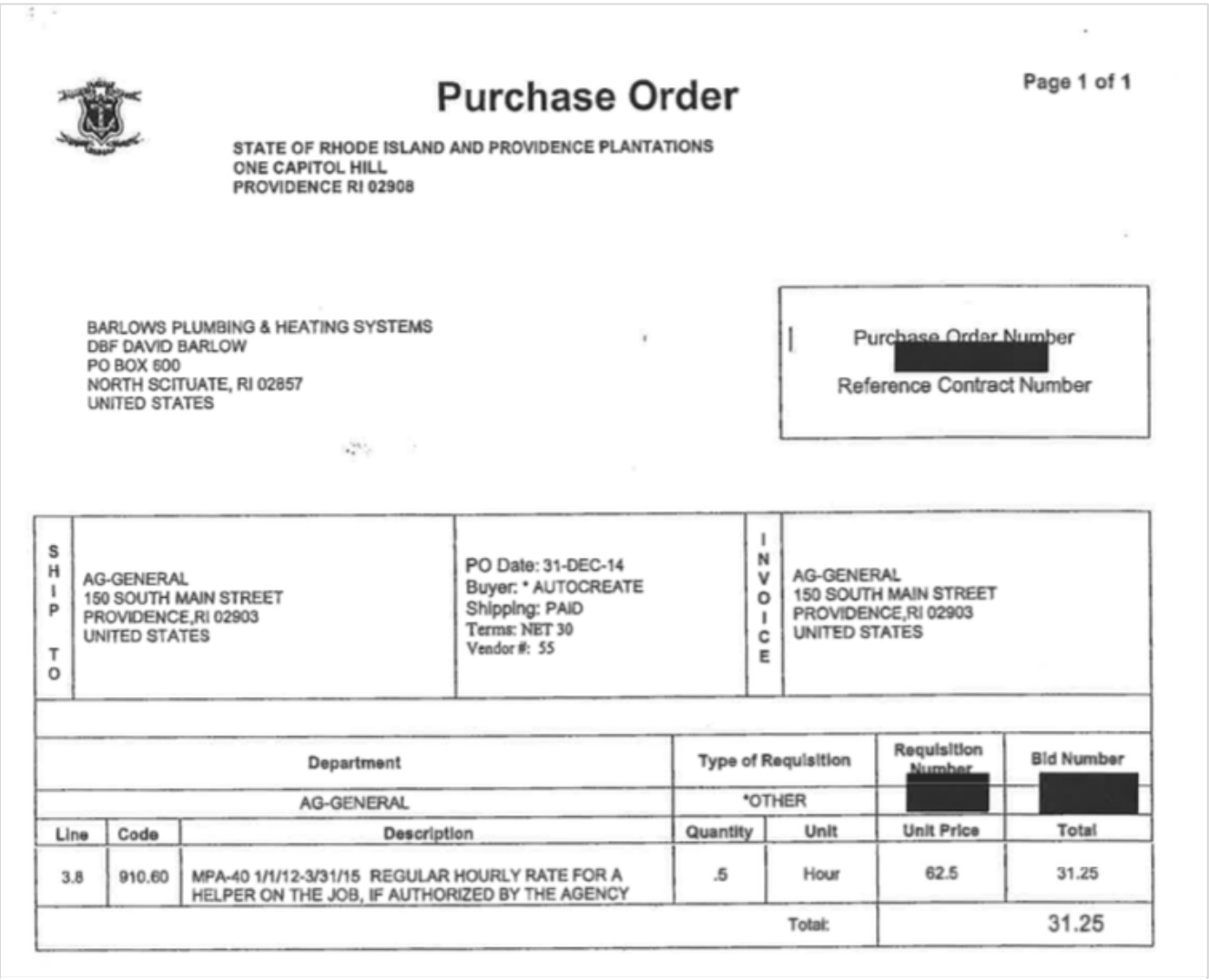
(F) Scientific and technological secrets and the security plans of military and law enforcement agencies, the disclosure of which would endanger the public welfare and security.
(K) Preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education on commercial, scientific, artistic, technical, or scholarly issues, whether in electronic or other format; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.
(S) Records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law or rule of court.
(X) Credit card account numbers in the possession of state or local government are confidential and shall not be deemed public records.



Purchase Order

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ONE CAPITOL HILL
PROVIDENCE RI 02908

BARLOWS PLUMBING & HEATING SYSTEMS
DBF DAVID BARLOW
PO BOX 600
NORTH SCITUATE, RI 02857
UNITED STATES

Purchase Order Number [redacted]
Reference Contract Number

SHIP TO	PO Date: 31-DEC-14 Buyer: * AUTOCREATE Shipping: PAID Terms: NET 30 Vendor #: 55	INVOICE
AG-GENERAL 150 SOUTH MAIN STREET PROVIDENCE,RI 02903 UNITED STATES		AG-GENERAL 150 SOUTH MAIN STREET PROVIDENCE,RI 02903 UNITED STATES

Department	Type of Requisition	Requisition Number	Bid Number
AG-GENERAL	*OTHER	[redacted]	[redacted]

Line	Code	Description	Quantity	Unit	Unit Price	Total
3.8	910.60	MPA-40 1/1/12-3/31/15 REGULAR HOURLY RATE FOR A HELPER ON THE JOB, IF AUTHORIZED BY THE AGENCY	.5	Hour	62.5	31.25
				Total:		31.25

PURCHASE ORDER NUMBER REDACTED.

the memoranda themselves, can constitute key elements of public decision-making. The notion that anything that can be considered to be a "memorandum" is off-limits as a public record – which is precisely the argument the AG is making in court – is astonishing. While some "memoranda" might indeed have the ephemeral nature of notes and impressions – and thus be potentially exempt from disclosure on that basis – the wrenching of that term in Exemption K from its context of something "preliminary" is cause for great concern.

There is a very troubling aspect to another set of redactions that the AG made. As noted earlier, literally thousands of pages that were provided to Rep. Morgan have redactions. A major reason is that the AG saw fit to routinely redact such items as invoice numbers and purchase order numbers from the documents, items which the AG claims are of no public interest.

But these minor redactions are no small deal for at least two reasons. First, by deleting those numbers, it makes it much more difficult for Rep. Morgan (and anybody else) to match orders with purchases and to follow requisition orders across documents, something that she has said she has a specific interest in doing, whether in order to confirm proper billing procedures or for other reasons. Secondly, these redactions undoubtedly added substantially to the costs charged by the AG, since the time spent making each of these minuscule redactions was presumably charged to Rep. Morgan.

While AAG Field's cover letter calls redactions like these "self-evident," there is nothing self-evident about them. His letter also refers to these redactions as necessary to "protect the customer account information for the state." But the letter does not explain why "customer account information" such as invoice numbers must be protected from disclosure, or what APRA exemption allows for such protection. The AG's recent court filing elucidates this a bit more, by claiming that these numbers, if unredacted, "could be misused to compromise the State's customer account system." Again, it's unclear how, particularly since these numbers are, of course, widely available to the dozens of vendors the AG makes use of. Such speculation would not appear to override a requester's interest in tracking the financial information of public bodies.

What the Attorney General's Office should have done:

The AG should have been much more sparing in his redactions, and also made clear on an individual basis the rationale for those redactions. As mentioned above, he also should not have charged Rep. Morgan for the time spent making redactions. Finally, he should not have misused APRA's memoranda exemption or redacted information such as purchase and invoice numbers and greatly added to the costs that Rep. Morgan has had to bear.

How the General Assembly Should Revise APRA:

- As recommended in the previous section, the statute should clarify that time spent on redactions is not chargeable.
- The statute should be amended to require, similar to FOIA, that a specific exemption be cited with each redaction or withholding of a document, rather than through a general laundry list of exemptions as part of a cover letter.
- To avoid any confusion whatsoever, the "memoranda" exemption should be clarified, as should other APRA ambiguities or loopholes that have been raised in recent years.

3. ADDITIONAL EXPLANATIONS PROVIDED BY THE ATTORNEY GENERAL

What the Attorney General's Office did:

In comments at the end of his letter to Rep. Morgan that could easily be overlooked, AAG Field stated that invoice and purchase numbers and a wide swath of other information that was redacted "in no way advances the public interest as defined by the APRA and as asserted by you. Indeed, the only public interest you have asserted was to learn how the Attorney General has expended so-called Google funds and the redacted information in no way hinders this asserted interest." As worded, this "lack of public interest" in the redacted information appears to be cited as *an independent reason* for withholding the information. This is a very dangerous position.

It is true that a major goal of APRA is to allow the public to get a better understanding of the workings of government, and some government documents may shed little light on that goal. But it is deeply troubling if the Attorney General begins to take it upon himself to deny access to specific pieces of information in a document on the grounds that there is no "public interest" in them. Allowing redactions to be made completely unmoored from specific exemptions in APRA is an opportunity ripe for abuse, and undercuts the presumption of openness that should underlie any access to government documents. As happened in this instance, it also can add exponentially to any costs associated with complying with an APRA request.

What the Attorney General's Office Should Have Done:

This "public interest" explanatory language should not have been included as a basis for redacting documents. It is confusing at best, and dangerous at worst. Any redactions pursuant to such a rationale but unrelated to a specific APRA exemption should not have been made.

How the General Assembly Should Revise APRA:

- The statute should be amended to make clearer that documents can be withheld or redacted only pursuant to the specific exemptions contained within the Act, and not based on independent determinations of "public interest" or balancing a "public interest" with a lack thereof where not otherwise explicitly authorized by APRA.

4. ADDITIONAL CONCERNS

Two additional points about this controversy warrant attention:

First, the Attorney General is the public official charged with enforcing APRA. Open government groups have regularly criticized his handling of that responsibility. Rather than being a strong advocate for APRA, as one would expect from the person charged with enforcing this law, his office has often been an obstacle to reform. Numerous advisory opinions from his office have made it harder, not easier, for the public to obtain access to records; his enforcement of APRA against violators has been lackluster; and he has often been a strong critic of efforts to strengthen the law. As the enforcer of APRA, the AG sets an example with the way he responds to APRA requests directed to his own office. When the agency in charge of enforcing APRA reacts to them as it has done in this case, it should not be surprising when other public bodies fail to take their own APRA responsibilities seriously.

Second, and relatedly, the AG's response highlights a more systemic issue that pervades APRA compliance by many (though by no means all) public bodies across the state. Too often, agencies view responding to APRA requests as a nuisance and a burden instead of a key responsibility. The goal of transparency and accountability behind APRA should be inherent in government work, not considered an added workload. Put another way, providing the public information about its activities, whether through APRA or otherwise, is a core mission of any government agency and should be treated as such.

After all, we would not tolerate an AG who complained that too many crime victims were coming for help, or that a victim should bear the costs for a particularly complicated and expensive criminal trial. We would be appalled if a Town Clerk charged a resident every time one called with a question to obtain information about Town practices or policies. Yet, we routinely accept second-class status for APRA requests, considering them extra government work that we can be charged for, rather than something central to a public agency's duties. Until this attitude changes, the public's right to know will be constantly tested.

CONCLUSION

The ACLU of RI hopes that the controversy generated by this APRA dispute will encourage public officials to recognize the need for amendments to APRA to better bring to fruition its goal of a knowledgeable public and a transparent government. In the last few years, legislation that addresses some of the concerns raised here has been introduced in the General Assembly, but has died in committee.[5]

To summarize the specific recommendations for legislative changes to APRA contained herein:

- APRA should, like federal law, create a presumption of waiving charges for record requests that are in the public interest.
- The statute should explicitly bar public bodies from charging for time spent redacting, or otherwise denying access to, records.
- The charge for making copies of records should be reduced to no more than five cents a page.
- APRA should require that a specific exemption be cited with each redaction or withholding of a document.
- APRA's "memoranda" exemption should be clarified, as should other APRA ambiguities or loopholes that have been raised in recent years.
- APRA should make explicit that documents can be withheld or redacted only pursuant to the specific exemptions contained within the Act.

In the meantime, we join with Rep. Morgan and many others in calling on the Attorney General to release the remaining documents forthwith, and without cost, in light of the strong public interest in these records.

[5] See http://webserver.rilin.state.ri.us/BillText/BillText18/SenateText18/S2422.pdf