"KNOWING AND WILLFUL":

The Need for Stronger Enforcement of Rhode Island's Open Records Law

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INTRODUCTION AND SUMMARY

The public's right to know is a cornerstone of democracy. Without access to information about the government's activities, it is impossible for self-governance to be anything more than an illusion. Rhode Islanders cannot meaningfully participate in self-government or petition public officials to take action if they are left in the dark as to what their representatives are actually doing.

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It is this basic truth that makes state freedom of information laws so critical. Unfortunately, Rhode Island's history in this regard is less than exemplary. When Rhode Island finally got around to passing the Access to Public Records Act (APRA) in 1979, it was the 49th state in the country to do so, beating only Mississippi to the punch. This tardiness appears to have left its mark, deeply embedding itself into both a political culture and bureaucracies that often simply do not take the public's right to know seriously.

In June 2012, the Rhode Island General Assembly enacted comprehensive amendments to APRA. Among the amendments were increases in the penalties that could be imposed against public bodies that violate the Act, and an expansion of the circumstances for imposing such penalties by holding public bodies liable for "reckless," as well as "knowing and willful," violations of the law. In light of these amendments, the ACLU of Rhode Island decided to examine how APRA had been enforced prior to those changes. To do that, we looked at the opinions that had been issued from 1999 to mid-2012 by the Office of the Attorney General – the state agency explicitly given enforcement powers by APRA.[1] Our review of those opinions revealed some discouraging patterns, including a lack of strong enforcement actions that may partially explain why violations still seem so widespread:

- **Violations of the same basic aspects of the law occurred repeatedly**. The vast majority of violations have not required complicated decisions over whether, for example, a document constitutes a public record or is exempt from disclosure. Rather, they involve violations of the law's basic obligations, such as responding to an open records request within the required time period, notifying requesters of their appeal rights, and not charging unreasonable fees for the inspection and copying of records.
- **The Attorney General's office (AG) rarely took legal action against violators, even for obvious violations**. In the 13 years studied, almost half of the complaints that were brought to the Attorney General's attention for resolution led to findings of violations. Yet the AG filed lawsuits against public bodies on only six occasions, less than 4% of the time where violations were found.
- **Even the most blatant violations rarely led to legal action by the Attorney General**. In one recent instance, the same public body – the Town of North Providence – was found to have violated APRA six separate times within a two-year period (the majority of which included failing to respond to a request in a timely manner). Yet even after the sixth violation, the Attorney General refused to find that the Town had engaged in a "knowing and willful" violation that warranted seeking penalties under the law.
- **Although there is reason to believe that police departments are among the worst violators of APRA, the AG did not once sue a law enforcement agency for violations during the time period covered by the review**. Advocacy groups have long complained that since the AG's office not only has strong ties with police departments, but is the state's chief law enforcement agency as well, there is an inherent conflict of interest when it comes to enforcing APRA against those entities. The result, advocates believe, is reluctance by the AG to find that police agencies have violated APRA, or to hold police agencies accountable for violations.

Although most of the examples cited in this report are recent ones, it should be emphasized that the failure of the AG's office to pursue vigorous APRA enforcement has occurred regardless of who has been in office during the time period studied in this report. In addition, it must be acknowledged that until the June 2012 amendments to APRA were adopted, the AG faced a high standard – a finding of a "knowing and willful" violation of the law – in order to obtain financial penalties against a public body. Nonetheless, since so many of the violations have been so clear, even this standard should have led to a much stronger track record in pursuing legal action and thereby helping to deter future violations by public bodies.

In any event, the standard for suing public bodies has now been reduced. A public body can be subject to financial penalties for "reckless" violations of the law as well as "knowing and willful" ones, which means the complainant need no longer prove that the violation was done with deliberate knowledge of its illegality. In order to promote respect for, and compliance with, the law, it is essential that the AG make use of the statute's strengthened penalty provisions to seek fines against public bodies that engage in clear violations of APRA's requirements. It is insufficient to consistently issue findings of APRA violations with no further repercussions when the violations should never have occurred in the first place.

We are hopeful that the recent APRA amendments will encourage a much more vigorous response than the public has seen in the past and help reverse a culture of secrecy that seems to pervade too many government agencies.

APRA AND ITS ENFORCEMENT PROCEDURES

Last June, for the first time in more than a decade, the Rhode Island General Assembly passed comprehensive amendments to the state's open records law, known as the Access to Public Records Act (APRA). For years, open government groups engaged in a concerted effort to strengthen the law based on continued, and seemingly widespread, non-compliance by governmental agencies with even the most basic requirements of this statute. These revisions have come none too soon, because too many public bodies do not appear to have taken their responsibilities under APRA seriously.

TOO MANY PUBLIC BODIES DO NOT APPEAR TO HAVE TAKEN THEIR RESPONSIBILITIES UNDER APRA SERIOUSLY.

APRA provides two avenues for aggrieved individuals to challenge violations of the law. One is for the person to pursue legal action through private counsel. Since APRA's enactment in 1979, the ACLU has regularly made use of that option, being involved in more than twenty lawsuits challenging government violations of APRA, and prevailing in virtually all of them. In at least half a dozen of these cases, government agencies have been required to pay the ACLU its attorneys' fees for their violations of the law.[2]

For every lawsuit the ACLU has been forced to file, however, there can be little doubt that dozens of other violations have gone unchallenged. Being a plaintiff in a lawsuit can be time-consuming, burdensome and, if not handled by a non-profit legal entity like the ACLU, expensive for the individual. Most members of the public do not have the stamina, the will or the time to pursue a wrongful denial of records. Others may not be aware of their ability to contest other violations of APRA.

It is thus not surprising that, when private APRA lawsuits are brought, they appear to be most likely filed by either the ACLU, on behalf of itself or aggrieved residents, or by local media outlets, such as the *Providence Journal*. Although this enforcement role is extremely important, it is as time-consuming and expensive for the ACLU and media entities as it is for private individuals. These organizations also have limited resources and must be selective in the number of times they can pursue litigation under the law.

In light of those realities, APRA provides another option for holding public bodies accountable. Instead of filing suit themselves, aggrieved individuals can file a complaint with the Attorney General, who has the independent authority to investigate complaints and, if appropriate, file suit and seek injunctive relief as well as monetary damages against violators. This mechanism was designed as a key element of the law. It provides a relatively burden-free way for individuals to assert and vindicate their rights under APRA. In addition, when the power of the state itself – in particular, the power of the chief law enforcement agency in Rhode Island – is brought to bear on violators, one would presume that lessons would soon be learned and increased compliance would follow. But that will not happen if the power is hardly ever used – and it has been rarely used.

Because the Attorney General's website contains links to virtually all of the APRA opinions that office has issued since 1999, the ACLU was able to examine the AG's response to violations of this law brought to the agency's attention by members of the public since that time, and through mid-2012.[3] Unfortunately, those opinions document that the office has rarely used its power to seek penalties against violators.[4]

FINDINGS FROM A REVIEW OF ATTORNEY GENERAL OPINIONS

❖ **Violations of basic aspects of the law have occurred repeatedly**.

As with any other complex law, there can be legitimate disagreements in specific cases about APRA's scope and whether, for example, a particular document being sought is a public record or is subject to one of the law's many exemptions. But that is not what residents most often file complaints with the Attorney General about. Rather, the vast majority of violations concern the most basic of obligations under the law, such as responding to an open records request within the required time period (10 business days for most requests, and up to 20 additional days "for good cause"). It is rather astonishing how often and how blithely so many public bodies seem to treat this timeline as a suggestion, not an obligation.

The vast majority of violations concern the most basic of obligations under the law, such as responding to an open records request within the required time period.

A public body's failure to respond to an APRA request within the specified period is not merely a technical violation of the law. It denies Rhode Islanders their right to oversee government activities in a timely manner. Just as justice delayed is justice denied, a tardy response to an open records request undermines an important goal of the law.

But it is not just timeliness issues that crop up repeatedly. Other common APRA violations reported to the Attorney General include the failure by agencies to notify requesters of their appeal rights when they were denied access to records, despite a clear statutory obligation to do so, and the assessment of unlawful retrieval, search or copying costs.

The non-complicated nature of many of the violations is bad enough. As explained below, it takes on even more significance when no real consequences follow from these noticeable lapses.

❖ **The AG has too rarely taken legal action against violators, even for obvious violations of the law**.

It seems apparent that obvious violations would be less likely to happen if public bodies felt a strong obligation to comply with the law. But that sense of obligation, if it exists, clearly does not come from the use of the AG's enforcement powers. Of the 339 open records opinions posted on the AG's website through mid-2012, the AG found violations of the law in 164 of the complaints – over 48% of the time. (And a number of those complaints involve multiple violations of the law.) Yet, based on the website information, the AG has filed only six lawsuits in the past thirteen years – which amounts to less than 4% of the time where violations of the law have been found.

To be fair, the poor record of enforcement documented in this report is partly due to limitations that were a product of the law itself – at least until last year, when the law's remedy provisions were strengthened. Before those amendments were adopted, the AG could seek fines against public bodies only for "knowing and willful" violations of the law, admittedly a high standard for obtaining monetary damages that were capped at $1,000. Nonetheless, the tolerance for excuses offered by public bodies for violating the law should significantly diminish after the law has been in effect for a few decades, and after the AG has issued dozens of opinions regarding APRA violations.

The absence of strong enforcement can only encourage a lackadaisical attitude among public bodies that compliance with APRA simply need not be a priority. As a result, it is the media and other private entities, not the Attorney General, that have generally had to take the lead to uphold enforcement of APRA despite the AG's key role in APRA's scheme. While both avenues of enforcement are essential, the imbalance is striking.

❖ **Even the most blatant violations of the statute rarely led to legal action by the Attorney General**.

As is so clearly suggested by the statistics showing so many violations but so few lawsuits, the Attorney General's office has appeared too willing to accept virtually any explanation offered by public bodies to let them off the hook when it comes to considering whether legal action is justified.

One need not go far back in time to see perhaps the quintessential example of this reluctance. In January 2012, the Attorney General found that the Town of North Providence had, **for the sixth time in two years,** violated APRA. The six complaints were filed by five different requesters, all seeking different records, and each led to separate findings of APRA violations by the AG's office. Four of the complaints involved the Town failing to respond to a request in a timely manner. In fact, on the sixth occasion – when the Town's excuse for not responding within 10 days was the claim by officials that they had never received the request – the complainant had even taken the effort to file his open records request by certified mail (and had received proof of its receipt).

TIME AFTER TIME, THE AG'S OFFICE APPEARS WILLING TO ACCEPT EXCUSES BY PUBLIC AGENCIES THAT SHOULD NOT BE EXCUSABLE.

Yet, despite repeatedly putting North Providence officials on notice about their failure to abide by APRA's requirements on five previous occasions within two years, the Attorney General still concluded that the sixth violation was not "knowing and willful." We have included an appendix that summarizes the six complaints and opinions.

While this may be the most extreme example, it is not an aberrant one. Time after time, the AG's office appears willing to accept excuses by public agencies that should not be excusable. Two representative illustrations are provided immediately below:

* *Waltonen v. Town of West Greenwich, (PR 11-17).* In a 2011 complaint, a resident argued that the Town of West Greenwich failed to have a procedure in place for addressing public records requests, as required by APRA. The Town's twofold response through its solicitor was that (1) though it was not written down anywhere, the Town did have a procedure, and was therefore in compliance with the law; and (2) the requester's complaint was, as a technical matter, invalid because he had not first filed an appeal with the town's administrative head. The problem with both of these arguments, as the Attorney General's opinion noted, is that they were both undeniably wrong.

Two years earlier, AG opinions had made clear that the statute's requirement that public bodies maintain procedures for access to records required that the procedure "be reduced to writing and/or otherwise communicated to the public at large."[5] This was, of course, implicit in the statutory requirement itself. A "procedure" that is never publicized or codified is not a meaningful procedure in any sense of the word. Despite the AG having confirmed that point in previous opinions, the Town sought to justify its lack of formal procedures with this meager argument.

As for the Town's contention that the complainant first had to exhaust his administrative remedies in order to file an APRA complaint, the AG opinion pointed out that the RI Supreme Court had already explicitly rejected such a strained reading of the statute in an APRA case.[6]

Yet despite the feeble defenses offered by the Town – ignoring both a Supreme Court decision directly on point as well as previous controlling AG pronouncements – the AG still found no evidence that the Town's violation of APRA was "knowing and willful." This truly rewarded ignorance of the law as an excuse to avoid sanctions under APRA.

* *Reilly v. Providence Economic Development Partnership.*[7] In May 2011, the AG found that the Providence Economic Development Partnership (PEDP) violated the law when it failed to respond in a timely manner to a Providence resident's request for records, and then responded inadequately

once it got around to it.[8] When confronted by the AG as to the basis for the agency determination's that certain of the requested records were exempt from disclosure, the agency's attorney acknowledged, "Unfortunately, it does not appear that there is a crystal clear State or Federal statutory provision" that exempted the information. As the AG noted in his opinion, "The PEDP simply relies upon its assertion that the APRA exemptions apply without providing any substantive explanation or legal analysis." As troubling as this was, the AG nonetheless went on to find no "knowing and willful" violation of the law.

Three months later, the AG ruled on another complaint against the same agency from the same requester about another set of documents she had sought. The AG found that, in initially rejecting the complainant's request for documents, PEDP had unlawfully denied her access to certain records that were public, failed to provide her with lawfully-required notice of her appeal rights to challenge the agency's denial, and then improperly failed to provide the records in a timely manner after acknowledging that some records would be made available. It is worth quoting at length part of the AG's findings in a letter to the complainant:

> Our biggest concern in this case is why the PEDP failed to provide you the requested documents within ten (10) business days, although the record before us suggests that it may have been capable of providing these records within this time frame. Our review of the evidence presented heightens our concern given the fact that by email dated July 14, 2011, the PEDP denied your request and represented that "[it] does not have the information available in the format you have requested, and [does] not believe that the APRA requires the PEDP to provide the information in any specific format that is not maintained in the PEDP record keeping system." After you filed your July 19, 2011 APRA complaint with this Department, by letter dated July 20, 2011, the PEDP indicated its intention to provide you with the requested records. On July 25, 2011, just seven (7) business days after the PEDP denied your request and three (3) business days after you filed your APRA complaint, the PEDP provided you with documents that appear to you to be responsive to your July 1, 2011 request. This timeline, and in particular the fact that the PEDP provided you responsive documents on July 20, 2011, raises questions concerning the PEDP's July 14, 2011 response and its failure to provide these documents earlier.

After issuing this finding, the AG gave the agency an opportunity to explain why it should

not be held to have engaged in a "knowing and willful" violation of the law. The PEDP responded that the office had been in the process of moving to a new location between June 29 and July 15, and that computer connections were limited during that time period. In finding "insufficient evidence to demonstrate a willful and knowing violation," the AG explained that "[c]onsidering the move, it is quite possible that had the PEDP timely extended the time to respond to your request for 'good cause' … rather than deny your request, the PEDP would have never violated the APRA."

In other words, the AG took it upon himself to make an excuse for the PEDP to justify the agency's violations. The problem, of course, is that the agency *initially denied the request*, making a "good cause" extension of time irrelevant from their perspective. The wrongful denial was completely unrelated to any problems associated with an office move, as was the agency's initial failure to notify the complainant of her appeal rights.[9]

- **Although there is reason to believe that police departments are among the worst violators of APRA, the AG did not once sue a law enforcement agency for APRA violations during the time period covered by the review**.

The Attorney General's office not only works cooperatively every day with other law enforcement agencies, but as the top law enforcement agency itself, it has a vested interest in being cautious when it comes to pursuing legal action in cases involving police records.

The Attorney General found police departments to have violated APRA only a handful of times. By our count, there have been 38 AG opinions involving police agencies, and 10 of those have been deemed "founded" – a rate, at 26%, that is much lower than that for other complaints. In none of those instances did the AG consider legal action appropriate.

By comparison, the ACLU alone has sued law enforcement agencies ten times over the years for APRA violations. But the difficulties associated with public access to law enforcement records are not confined to the ACLU. Two reports issued in the late 1990's in conjunction with Brown University's Taubman Center for Public Policy found widespread non-compliance with APRA by local police departments, and also found their non-compliance to be worse than that of other government agencies.[10] In 2007, when the ACLU issued a report examining a series of open records disputes that occurred over the course of a summer, three of the five controversies involved law enforcement records.[11]

However, the apparent discrepancy between the prevalence of police non-compliance with APRA and the lack of any legal action by the AG against police departments is not an unexpected one. Nor would it be surprising to discover that people denied access to law enforcement records think twice about complaining to the AG's office about it. No matter who the Attorney General has been, open government groups have long complained about the conflict of interest inherent in this dynamic.[12]

The Attorney General's office not only works cooperatively every day with other law enforcement agencies, but as the top law enforcement agency itself, it has a vested interest in being cautious when it comes to pursuing legal action in cases involving police records. As a result, the clear burden has fallen on private parties to hold law enforcement agencies accountable under APRA.

THE APRA AMENDMENTS AND FUTURE ENFORCEMENT

The APRA amendments that were approved by the General Assembly last June should encourage stronger enforcement of the law. A new statutory obligation on public bodies to certify their knowledge of the law's requirements will make it much harder for public entities to plead ignorance of the basic provisions in the statute.[13] Just as importantly, the AG is now authorized to pursue legal action and seek fines against public bodies not just for "knowing and willful" violations of the law, but also for "reckless" ones.[14]

There is a reason that APRA allows for the imposition of fines, even if the remedy is relatively small ($2,000 for "knowing" violations, and $1,000 for "reckless" ones). It is why financial penalties are a key part of so many other civil statutes: they serve as a deterrent to lawbreakers and an incentive to be familiar, and to comply, with legal obligations. That is especially important in the governmental context. Even if the penalties are small, a court order against a public agency sends an important message to other agencies. Such orders can also potentially have positive political consequences, forcing public officials to face voters for their lapses and thereby encourage greater compliance with the law.

UNFORTUNATELY, TOO OFTEN THE BURDEN IS PLACED ON THE MEMBERS OF THE PUBLIC SEEKING DOCUMENTS TO HOLD PUBLIC ENTITIES TO THEIR OBLIGATION TO PROVIDE INFORMATION.

Admittedly, going to court to seek monetary damages against public bodies is not the answer to every violation of APRA, or even every significant violation. And, until this past year, the AG was somewhat hampered by a high burden of proof in seeking fines against public bodies. But even with that high burden, there have been too many situations where seeking a financial penalty was not only appropriate, but necessary to make agencies fully aware that clear-cut violations of APRA would not be tolerated. Surely after decades of having APRA on the books, there can rarely be a legitimate excuse for a public body to fail, for example, to respond to an open records request within the ten days required by law. Unfortunately, too often the burden is placed on the members of the public seeking documents to hold public entities to their obligation to provide information.

In light of the new amendment to APRA requiring public bodies to certify their familiarity with the law, public bodies no longer have an excuse – if they ever had one – to fail to respond to requests in a timely manner, to violate other basic precepts of the open records statute, or to feign ignorance about court or Attorney General opinions interpreting the statute.

We are therefore hopeful that the public will begin to see much more vigorous enforcement of the APRA statute by the AG in light of these recent amendments. If little changes, however, the ACLU will urge the General Assembly to further strengthen the penalty sections of the law by significantly increasing the fines that can be imposed. This will encourage stronger compliance with the law, particularly to the extent it will further incentivize the filing of lawsuits by aggrieved private parties. The General Assembly should also consider whether another state agency should be tasked with the responsibility of enforcing the statute if the AG's office does not increase its pursuit of violations against recalcitrant agencies. The public's right to know demands nothing less.[15]

APPENDIX
FINDINGS OF APRA VIOLATIONS AGAINST THE TOWN OF NORTH PROVIDENCE, 2010-2012

PR 10-02 Caranci v. City of North Providence
1/22/10

Town Council member requested numerous documents including "minutes of all meetings of the Purchasing Board held between April 1, 2007 and November 10, 2009" and "any associated telephone quotes and/or actual bid documents … that were used in the process of approval of goods and services purchased by the Town." Initial request was made on August 25, 2009.

The Mayor's Chief of Staff sent a letter dated September 3, 2009 requesting an additional 30 business days to respond to the request due to the "significant amount of research necessary to collect the records." A final response with records was due no later than October 9, 2009. The Town did not respond by October 9, and Mr. Caranci filed his complaint with the Attorney General's office on October 29, 2009. On November 3, 2009 the Chief of Staff requested that Mr. Caranci provide a more detailed request for records, or to contact the Town's Acting Finance Director to set up an appointment to review the records. Mr. Caranci agrees to amend his request and to receive the documents in installments. After continued back and forth, Mr. Caranci still did not have the requested documents or a denial as of January 15, 2010.

The Attorney General's office determined that the Town violated the APRA when it incorrectly interpreted the use of additional time for good cause. Rather than interpreting the law to mean 30 total business days, they assumed it was 30 additional business days for a total of 40 business days. Regardless, they were still in violation when they did not properly respond to the request in 40 business days either. The Town also never provided the documents or outright denied them, another violation of the APRA. Rather than determining whether this was a willful and knowing violation, the Attorney General gave the Town an additional 10 days to fulfill the request. There was no further finding in this matter.

PR 10-18 Kooloian v. Town of North Providence
7/9/10

Ms. Kooloian submitted a request dated April 2, 2010 requesting "all documents and correspondence related to the Town's efforts to correct the flooding and drainage problems in the vicinity of the intersection of East Avenue and Angell Avenue in North Providence." Specifically, the request sought "documents related to the Town's efforts to address flooding caused by the clogging of the culvert that runs along the side of the 'Shadoian' property on Angell Avenue and [her] home."

The Town provided what they felt to be an adequate response to Ms. Kooloian on April 29, 2010. The response included a table of dates documenting when the Town completed work on or around the area requested. When the Attorney General's office sent official correspondence to the Town requesting an explanation for their failure to respond to Ms. Kooloian's request in a timely manner, the Town Solicitor responded that, "At the time I received the request, I had the responsibility of responding to over 682 calls related to the worst catastrophic flooding that the Town of North Providence had ever experienced." He also went on to note that his staff had been significantly reduced due to budget cuts. It was determined that no further documents existed that would have satisfied Ms. Kooloian's request.

In their review of the events, the AG determined that the Town violated the APRA when it failed to respond to Ms. Kooloian's request in 10 business days. In their finding, the Attorney General, referencing the earlier Caranci complaint, notes that this was not the first instance in which the Town failed to respond in a timely manner, but felt that due to extenuating circumstances surrounding the flood, it couldn't be deemed a willful and knowing violation and no further action would be taken.

PR 10-21 Deion v. Town of North Providence
8/10/10

In a letter dated April 30, 2010, Mr. Deion requested "all records in the Town's possession relating to a 2002 easement and all records relating to a request for a zoning variance between the years of 1995 and 1996." Mr. Deion's requests were related to a specific address that has been redacted. Included in a response to the Attorney General's office by the Town Solicitor was a sworn affidavit by the Town's Zoning Enforcement Officer Edward Civito.

Mr. Civito notes that he received Mr. Deion's "extensive request" and began an "extensive search" on May 4, 2010. Mr. Civito lists 5 permits he was able to locate relating to Mr. Deion's request. He also states that the following day he visited the Town Clerk's office to review land evidence records, but was unable to find any additional information. He notes that he spoke with Mr. Deion within 10 days of his initial request to inform him that he could not locate any records relating to his request. Mr. Deion and Mr. Civito visited the Town Clerk's office about a month later to look for records relating to Mr. Deion's requests.

After reviewing Mr. Civito's affidavit, Mr. Deion submitted a response alleging that Mr. Civito was withholding information from him. Mr. Deion was subsequently provided with two out of the five permits that had been found. Initially Mr. Deion had been provided only with the summary printout of all five permits. When the Town did a search for said permits, they were only able to produce two out of the five. The remaining three were provided in the form of summary cards.

In their review of the situation, the Attorney General's office found that the Town had violated the APRA when it communicated its findings verbally rather than in writing to Mr. Deion. There was also concern with the adequacy of the search that had been performed. Before making a determination as to whether or not this instance was a willful and knowing violation, the Town was given an additional 10 days to produce a supplemental affidavit that solely addresses the search process the Town undertook.

PR 10-21B Deion v. Town of North Providence
11/24/10

Supplemental finding to address whether the Town's violation was willful and knowing; an outline below explains steps the Town took to substantiate the efforts they took in searching for the requested documents.

- 5/4/10 – Mr. Civito searched his own office for any archived documents that would be responsive to Mr. Deion's request
- 5/5/10 –
    - Mr. Civito and Leo Bernadino, the Town's building inspector, visited the Town Hall to review the land evidence records searching for responsive planning and zoning records relating to Mr. Deion's easement request. No records could be found.

- Mr. Civito and Mr. Bernadino searched approximately 20 boxes with archived documents dating back to the but were unable to locate any responsive documents.
- Finally, the two men searched documents still housed across the street in the building that was the former Division of Inspections and Zoning Enforcement Office prior to a 2006 roof collapse. Once again they were unable to produce any documents from that search.

After reviewing Mr. Civito's affidavit, the Attorney General's office determined that the Town has presented sufficient information that adequate steps had been taken to locate responsive documents. The final finding was that despite their failure to respond correctly to Mr. Deion's request, this cannot be considered a willful and knowing violation.

PR 11-22 Brady v. Town of North Providence
8/22/11

In a letter dated March 15, 2011, Ms. Brady requested "all documentation related to the purchase of new street signs between January 1, 2010 and the present. This request includes, but is not limited to, copies of all related vendor invoices received by the town, checks issued by the town to any vendors for the purchase, bids submitted to the town by vendors, bid specifications issued by the town, contracts executed between the town and any vendors and any purchasing board minutes approving said purchases and any evidence that this procurement was connected to a vendor previously approved through a state bid."

The Town did not respond to Ms. Brady's request, and she filed a complaint with the Attorney General. In responding to the Attorney General's inquiry, the solicitor states that "a complete copy of all documents responsive to Ms. Brady's request [is] enclosed herewith. Although Mr. Corrente (Public Works Director) did not respond within the statutory time frame as illustrated in his affidavit, his actions were not tantamount to willful violation of the statute." Mr. Corrente's affidavit notes that he relayed a message to the Mayor's secretary that the request would require additional time to do research and he was busy dealing with a sewer collapse. He notes that he was under the assumption that someone in the Mayor's office would handle the extension.

In a letter dated May 11, 2011, Ms. Brady questions the Town's response and contends that the documents provided were not a complete response to her request. An investigation by the Attorney General's office finds some additional documents, but also determines that no further documentation exists.

The Attorney General's office concluded that the Town violated the APRA when it not only failed to respond to the request in a timely manner, but also failed to respond completely. Despite concerns about the Town's recent record in relation to the APRA, the Attorney General's office determined that injunctive relief was not appropriate since documents were eventually provided; and they still were not willing to deem these violations as willful and knowing.

PR 11-32 Deion v. Town of North Providence
11/3/11

Mr. Deion filed a complaint with the Attorney General's office after being charged $25.00 to have the December 7, 2010 Town Council meeting burned onto a DVD.

A response from the Town Clerk stated that the employee who charged Mr. Deion was acting on information that she received from the acting Town Clerk who was filling in while the Town Clerk was out on sick leave. The Town Clerk admitted the error and noted that a reimbursement was being sent out to Mr. Deion.

The Attorney General's office found the Town to be in violation of the APRA, but was not willing to deem their actions willful and knowing. This was the fifth violation of APRA by the Town since the beginning of 2010, and only two months had passed since their previous violation, but the Attorney General felt this instance was distinguishable from the others and therefore was not a willful and knowing violation.

PR 12-02 Quirk v. Town of North Providence
1/26/12

Mr. Quirk submitted a request for public records that was received by the Town on November 9, 2011 and is evidenced by a signature on a certified mail receipt. The Town failed to respond to Mr. Quirk's request in a timely manner but challenges the validity of his complaint to the Attorney General's office. The Town appears to have responded to Mr. Quirk's complaint on December 7, 2011, only after a complaint had been filed with the Attorney General's office.

In their response to the Attorney General's inquiry, the Town notes that despite a signature being present on the certified mail receipt, no one in the Mayor's office remembers seeing Mr. Quirk's request. They state that the information being requested is kept by the Finance Department, not the Mayor, and put Mr. Quirk in touch with that Department to set up a time to inspect the requested records. The Town questions the validity of Mr. Quirk's request, stating that in their opinion it is not a valid APRA request because it is not signed and has no return address.

The Attorney General's office found that the Town violated APRA when it failed to respond to Mr. Quirk's request in a timely manner. Again, there was concern that this was the not the first time that the Town has been found in violation of the APRA, and the Attorney General's office gave the Town 10 business days to respond to their inquiry as to whether or not this violation was willful and knowing. Only after a substantive response is received will the Attorney General make its final determination.

PR 12-02B Quirk v. Town of North Providence
7/11/12

Supplemental finding to address whether the Town's violation was willful and knowing; an outline below explains steps the Town took to substantiate their reasons for not complying within the allotted time.

- Mayor determined that the employee who signed for the letter was a maintenance worker who often signs for certified mail and delivers it.
- Mayor's office could not locate Mr. Quirk's letter after searching.
- Mayor sent out a memo to all Department heads reminding them of the language in APRA that specifically relates to responding to requests in a timely manner.

It was determined, after reading the memo, and seeing the steps the Town took to rectify this issue, that this could not be considered a willful and knowing violation. It was also determined that substantial efforts had been made to provide Mr. Quirk with all of the responsive documents. There not being enough evidence to conclude a willful and knowing violation, the Town was once again warned about their actions.

ENDNOTES

[1] This time period was chosen because Attorney General APRA opinions since 1999 are posted on that office's website and thus readily available for review.

[2] The first APRA lawsuit to reach the R.I. Supreme Court, in 1983, was an ACLU case on behalf of a Brown University student newspaper seeking records of police misconduct. *The Rake v. Gorodetsky*, 452 A.2d 1144 (R.I. 1982). Since then, the APRA violations challenged by the ACLU have ranged considerably, but have generally involved many of the same types of violations brought to the AG's attention, such as a failure to respond to requests for documents. More than a few of those suits have, like *The Rake* case, dealt with access to various types of law enforcement records.

[3] The first 23 numbered opinions issued in 2009 are not posted on the website.

[4] The ACLU has posted online a spreadsheet that summarizes the AG opinions where violations of APRA were found during the period of this study: http://www.riaclu.org/PublicEd/Reports/2013ReportAPRAViolations.

[5] *Beagan v. Albion Fire District*, PR 09-36.

[6] *Downey v. Carcieri*, 996 A.2d 1144, 1150-51 (R.I. 2010).

[7] PR 11-09, PR 11-23, PR 11-23B.

[8] The PEDP is a quasi-public agency established to encourage economic development and job growth in the City.

[9] Although it occurred after the timeframe covered by this report, the AG issued an opinion on January 7, 2013, finding PEDP in violation of APRA once again. Also once again, however, the AG found no "knowing and willful" violation of the law. *Reilly v. Providence Economic Development Partnership*, PR 13-01.

[10] The two reports are "Access to Public Records: An Audit of Rhode Island's Cities and Towns" (1997), available on-line at http://www.accessri.org/uploads/8/1/4/9/8149073/access_audit.pdf; and "Open or Shut? Access to Public Information in Rhode Island's Cities and Towns" (1999), available online at: http://www.accessri.org/uploads/8/1/4/9/8149073/openorshut.pdf. It is also worth noting that the ACLU has filed more open records lawsuits against police departments than against any other type of agency.

[11] "The Public's Right To Know Vs. The Public's Right To 'No': How Rhode Islanders' Access to Government Records Continues to Be Thwarted." This report is available online at http://www.riaclu.org/PublicEd/Reports/2007APRAReportfinal.pdf.

[12] Concerns about this conflict go back many years and with many Attorneys-General. See, e.g., "Critics Claim Conflict in Pine's Use of Public Records Law," by Bruce Landis, *Providence Journal*, June 15, 1997; "Whitehouse Too Lax on Records Law Violations, Critics Say," by Bruce Landis, *Providence Journal*, May 8, 1999.

[13] R.I.G.L. §38-2-3.16.

[14] R.I.G.L. §38-2-9(d). Black's Law Dictionary defines recklessness as, among other things, "a state of mind in which a person does not care about the consequences of his or her actions."

[15] This report was prepared with the assistance of Megan Khatchadourian, the ACLU of Rhode Island's Assistant to the Director.