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# Rhode Island's Access to Public Records Act: An Application Gone Awry

Michael W. Field\*

*A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.*<sup>1</sup>

— James Madison

## INTRODUCTION

There is little doubt the First Amendment to the United States Constitution<sup>2</sup> and Article 1, Section 21 of the Rhode Island Constitution<sup>3</sup> both embrace a citizen's right to access documents concern-

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

2. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

3. R.I. CONST. art. I, § 21 ("The citizens have a right in a peaceable manner to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or for other purposes, by petition, address, or remonstrance. No law abridging the freedom of speech shall be enacted.").

ing government affairs.<sup>4</sup> After all, one of this country's founding principles – the right to free speech – is premised upon the ability of the public to acquire, consider, and debate government information in a timely manner.<sup>5</sup> Unreasonable restrictions or delay upon the right to inspect government records can infringe upon a citizen's right to free speech and hinder the public's decision-making process, perhaps even reaching into the voting booth.<sup>6</sup>

In fact, a citizen's right to access government records is so sacrosanct that all fifty states – and the federal government – have promulgated statutes guaranteeing access to government documents.<sup>7</sup> Although designed to increase public oversight and to enhance government accountability, in reality, these “freedom of information” or “public records” laws have been applied for unintended reasons and have caused unanticipated results.

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4. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 18 (1986) (Stevens, J., dissenting) (“I have long believed that a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs.”); see also *Rake v. Gorodetsky*, 452 A.2d 1144, 1146 (R.I. 1982) (“The United States Supreme Court has recognized that the public's right to know and have access to information is an essential part of the First Amendment.”).

5. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978))); *Rake*, 452 A.2d at 1146 (“Through the Freedom of Information Act, Congress has enhanced this First Amendment interest by creating a clear right in the public and the press to have access to information held by the government.”).

6. See *Press-Enter.*, 478 U.S. at 18 (Stevens, J., dissenting) (“It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.”); *In re Perry*, 859 F.2d 1043, 1047 (1st Cir. 1988) (“Without question, the right to free speech includes the right to timely speech on matters of current importance.”); see also Charles J. Wichmann III, Note, *Ridding FOIA of Those “Unanticipated Consequences”: Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213, 1252 (1998) (“Limiting the amount of information available through [the Freedom of Information Act] does limit, in a sense, the amount of power we have over our government.”).

7. See Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 722 (1981) (observing that Rhode Island was the forty-ninth state to adopt a public records law). In 1983, Mississippi became the fiftieth state to promulgate a freedom of information law. See MISS. CODE ANN. § 25-61-1 (1999).

For instance, public records laws were once envisioned by legislators as a vehicle by which journalists, historians, citizens, and other watchdog groups could discover government abuse.<sup>8</sup> However, a General Accounting Office study revealed that only one out of twenty requests were made by a journalist, scholar, or author.<sup>9</sup> The study also disclosed that four out of five requests were made by business executives for the principal purpose of obtaining competitor information.<sup>10</sup> Others have noted that freedom of information laws have failed to achieve their intended results. For

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8. See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 665 (1984).

9. *Id.* (citing *Freedom of Information: Hearing on S. 587, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. 161, 776 (1981) (testimony of Jonathan Rose, Assistant Attorney General, Department of Justice and testimony of Jack Landau, Director, Reporter's Committee for Freedom of the Press)).

10. See *id.* at 665-66 (citing *Freedom of Information: Hearing on S. 587, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. 161 (1981) (testimony of Jack Landau, Director, Reporter's Committee for Freedom of the Press)) (noting that over 85% of the annual 33,000 Freedom of Information Act requests to the Federal Drug Administration are from regulated industries or their representatives seeking information on competitors). In 1988, Assistant U.S. Attorney General Stephen J. Markman testified before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary:

Today, a typical FOIA scenario is not, as [originally] envisioned by the Congress, the journalist who seeks information about the development of public policy when he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who informed against him; the drug trafficker trying to evade the law; the foreign requester seeking a benefit that our citizens cannot obtain from his country; the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not. And as if these uses do not diverge enough from the Act's original purpose, it is the public – the intended beneficiary of the whole scheme – who bears nearly the entire financial burden of honoring those requests while often reaping virtually none of the benefits from them.

Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 50-51 (1994) (quoting *Freedom of Information Act: Hearings Before the Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong. 2d Sess. 37 (1988) (statement of Steven J. Markman, Assistant Attorney General, Office of Legal Policy, Department of Justice)); see also *Cahill v. Hous. Auth.*, 2000 Op. R.I. Att'y Gen. PR 00-09 (unofficial finding) (requesting competitor's bid submitted pursuant to sealed bidding process), available at <http://www.riag.state.ri.us/access/docs/pr00-09.htm>.

example, more than twenty years ago United States Supreme Court Associate Justice Antonin Scalia wrote:

When one compares what the Freedom of Information Act was in contemplation with what it has turned out to be in reality, it is apparent that something went wrong. The act and its amendments were promoted as a means of finding out about the operations of government; they have been used largely as a means of obtaining data in the government's hands concerning private institutions. They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers. They were promoted as a minimal imposition on the operations of government; they have greatly burdened investigative agencies and the courts . . . . In short, it is a far cry from John Q. Public finding out how his government works.<sup>11</sup>

Modeling its act after the federal Freedom of Information Act (FOIA),<sup>12</sup> the Rhode Island General Assembly promulgated the Access to Public Records Act (APRA)<sup>13</sup> to advance the First Amendment rights of the press and the public. But, like its federal counterpart, Rhode Island's public records law is sometimes used to achieve results contrary to the precise intent of the APRA.<sup>14</sup> In this age of increased open government, its application has simply gone awry.

This Article examines Rhode Island's Access to Public Records Act and queries: How open should Rhode Island government be?<sup>15</sup> Part I traces the development of the FOIA and the APRA and discusses that the intent of both public records laws was to ensure the disclosure of "official information" pertaining to government, but to exempt documents unrelated to government activities. Part II reviews the recurring themes articulated by the Rhode Island Supreme Court, as well as document requests tendered to

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11. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 16.

12. 5 U.S.C. § 552 (1996).

13. 1979 R.I. Pub. Laws ch. 202 § 1 (codified at R.I. GEN. LAWS § 38-2-1 (West 2003)).

14. See *infra* notes 160-68 and accompanying text.

15. This question was posed in a headline printed on the front page of the May 5, 1997 edition of *The Providence Journal Bulletin*. Katherine Gregg, *Secrecy in Rhode Island: How Open Should Rhode Island Government Be?*, PROV. J. BULL., May 5, 1997, at A1.

administrative agencies. Part III proposes legislative initiatives designed to realize the original intent of the Access to Public Records Act. This Article concludes that although Rhode Island's Access to Public Records Act guarantees public access to documents concerning government activity, great care must be exercised so that records unrelated to government activity not be disclosed in the name of public information.

### I. HISTORICAL BACKGROUND

Enacted in 1979, the APRA is a direct descendent of the FOIA. The Rhode Island Supreme Court has recognized this lineage on numerous occasions<sup>16</sup> and statutory similarities between the two public records laws reinforces this conclusion.<sup>17</sup> Accordingly, the

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16. See, e.g., *Providence Journal Co. v. Convention Ctr. Auth.*, 774 A.2d 40, 46 (R.I. 2001) ("Because APRA mirrors the Freedom of Information Act (FOIA) (citation omitted), it is appropriate to look to Federal case law interpreting FOIA to assist in our interpretation of the statute."); *R.I. Fed'n of Teachers v. Sundlun*, 595 A.2d 799, 802 (R.I. 1991) ("The similarity between FOIA, as interpreted, and APRA is striking."); *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556, 558 n.3 (R.I. 1989) ("Because APRA generally mirrors the Freedom of Information Act (FOIA) (citation omitted), we find federal case law helpful in interpreting our open record law.").

17. Compare 5 U.S.C. § 552(a)(6)(A)(i) (1996) (declaring that each agency shall "determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore, and of the right of such person to appeal to the head of the agency any adverse determination"), with R.I. GEN. LAWS § 38-2-7(a) (1997) (declaring that "[a]ny denial of the right to inspect or copy records provided for under this chapter shall be made to the person or entity requesting the right by the public body official who has custody or control of the public record in writing giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial."); compare 5 U.S.C. § 552(a)(6)(C)(i) (1996) (declaring that "[a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph."), with R.I. GEN. LAWS § 38-2-7(b) (1997) (declaring that "[f]ailure to comply with a request to inspect or copy the public record within the ten (10) business day period shall be deemed to be a denial."); compare 5 U.S.C. § 552(b) (1996) (declaring that "[a]ny reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."), with R.I. GEN. LAWS § 38-2-2(4)(ii) (1997) (declaring that "any reasonably segregable portion as determined by the chief administrative officer of the public body of a public record excluded by this section shall be available for public inspections after the deletion of the information which is the basis of the exclusion, if disclosure of the segregable portion does not violate the intent of this section."). In addition to the foregoing

FOIA legislative history is instructive in ascertaining the legislative intent of the APRA.

The present version of the FOIA can be traced to June 9, 1955, when the Special Subcommittee on Government Information was created.<sup>18</sup> In his chartering letter, Representative William L. Dawson did not suggest that all information maintained by the government be available for public inspection, but instead observed that:

An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information *on government activities* is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.<sup>19</sup>

Accordingly, some of the earliest legislative history supports the conclusion that freedom of information laws were intended to relate only to documents concerning "government activities."<sup>20</sup>

As a result of the subcommittee's work, in 1958 the United States Congress promulgated its first legislation aimed at limiting the authority of executive agencies to withhold government infor-

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procedural similarities, the federal and state freedom of information laws also share similar statutory exemptions. *Compare* 5 U.S.C. § 552(b)(3) (1996) (declaring the FOIA inapplicable to matters "specifically exempted from disclosure by statute"), *with* R.I. GEN. LAWS § 38-2-2(4)(i)(S) (1997) (declaring the APRA inapplicable to "[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court"); *compare* 5 U.S.C. § 552(b)(4) (1996) (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential"), *with* R.I. GEN. LAWS § 38-2-2(4)(i)(B) (1997) (exempting "[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature"); *compare* 5 U.S.C. § 552(b)(7) (1996) (exempting "records or information compiled for law enforcement purposes" provided the records fall within one of six categories), *with* R.I. GEN. LAWS § 38-2-2(4)(i)(D) (1997) (exempting "[a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime" provided the records fall within one of six categories).

18. H.R. REP. NO. 93-876, *reprinted in* 1974 U.S.C.C.A.N. 6267, 6268.

19. *Id.* (emphasis added). Representative Dawson's chartering letter charged the subcommittee with specified goals, including studying the operation of all agencies and officials within the executive branch, determining the efficiency and economy of such operation, ascertaining the trend in the availability of government information, and scrutinizing the information practices of executive agencies in the light of their propriety, fitness, and legality. *Id.*

20. *Id.* ("[W]ith this guiding purpose your Subcommittee will ascertain the trend in the availability of *Government information*." (quoting Representative Dawson's letter)) (emphasis added).

mation.<sup>21</sup> The 1958 enactment added one sentence to the 1789 "housekeeping" statute,<sup>22</sup> a law generally relied upon by federal agencies "to regulate the[ir] business" and "to withhold certain types of information from the public."<sup>23</sup> In its entirety, the 1958 amendment stated that the 1789 "housekeeping" statute "does not authorize withholding information from the public or limiting the availability of records to the public."<sup>24</sup>

The subcommittee offered other, more substantial enactments, such as Public Law 89-487, entitled the Freedom of Information Act of 1966 (1966 FOIA).<sup>25</sup> As originally promulgated, the 1966 FOIA was an amendment to section 3 of the Administrative Procedures Act of 1946.<sup>26</sup> Similar to Dawson's chartering letter, the House of Representatives Report recommending passage of the 1966 FOIA distinguished documents pertaining to the operation of government from documents pertaining to private citizens.<sup>27</sup> In fact, the House Report states:

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Gov-

21. *Id.* at 6269.

22. The "Housekeeping" statute presently states:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1996) (original version at 5 U.S.C. § 22).

23. H.R. REP. NO. 92-1419 (1972).

24. *Id.*

25. See PUB. L. NO. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

26. See H.R. REP. NO. 89-1497, at 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2418.

27. *Id.* at 8-9, *reprinted in* 1966 U.S.C.C.A.N. at 2425-26 (identifying, *inter alia*, "concurring and dissenting opinions," as well as "all final votes of multi-headed agencies in any regulatory or adjudicative proceeding" as the types of documents deemed public by the 1966 FOIA); *id.* ("The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public."); *id.* at 8, *reprinted in* 1966 U.S.C.C.A.N. at 2425 ("Subsection (b) solves the conflict between the requirement for public access to records of agency actions and the need to protect individual privacy. It permits an agency to delete personal identifications from its public records 'to prevent a clearly unwarranted invasion of personal privacy.'").



ernment to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. *The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government.*<sup>28</sup>

Further illustrating the type of information intended to be disclosed, the House Report continues:

In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

As the Federal Government has extended its activities to solve the Nation's expanding problems – and particularly in the 20 years since the Administrative Procedure Act was established – the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. *This is the material which would be made available under subsection (b) of S. 1160.*<sup>29</sup>

Similarly, the Senate Report on the 1966 FOIA notes:

The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.<sup>30</sup>

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28. *Id.* at 6, reprinted in 1966 U.S.C.C.A.N. at 2423 (emphasis added).

29. *Id.* at 7, reprinted in 1966 U.S.C.C.A.N. at 2424 (emphasis added); see also *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973) (observing that the 1966 FOIA is broadly conceived "to permit access to official information long shielded unnecessarily from public view"), *superseded by statute* (Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (West 1998))).

30. S. REP. NO. 89-813, at 7 (1965).

The 1966 FOIA was signed into law on July 4, 1966 and became effective July 4, 1967.<sup>31</sup> Prior to its effective date, United States Attorney General Ramsey Clark provided guidance concerning the intent and the requirements of the new law.<sup>32</sup> Attorney General Clark explained:

If government is to be truly of, by, and for the people, the people must know in detail the *activities of government*. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to *know the actions of their government* be secure . . . .

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the [g]overnment in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.<sup>33</sup>

Once described as “a relatively toothless beast, sometimes kicked about shamelessly by the agencies,” the 1966 FOIA tolerated agency delays and allowed its nine statutory exemptions to be interpreted broadly.<sup>34</sup> Against the backdrop of Watergate, Congress responded to these deficiencies by enacting the Freedom of

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31. See Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 27 WEEKLY COMP. PRES. DOC. 895 (July 11, 1966) (“This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”).

32. See H.R. REP. NO. 92-1419, at 5 (1972). With the exception of the 1966 FOIA and its concomitant legislative history, House Report No. 1419 describes Attorney General Clark’s memorandum as “the single most important interpretative document upon which executive departments and agencies rely to defend judgments on what information should be made available to the public under the act.” *Id.* at 64.

33. See *id.* at 5-6 (emphases added).

34. Scalia, *supra* note 11, at 15.

Information Act of 1974 (1974 FOIA).<sup>35</sup> This amendment required greater agency accountability and adopted new requirements that included providing wider availability of agency indexes; allowing citizens to request documents by description, rather than by specific title or number; requiring agencies to respond to a request within a specified time period; mandating records be segregated so that an entire category of records could not be classified as exempt; permitting attorneys' fees and court costs to a prevailing plaintiff; and granting reviewing courts authority to review documents *in camera*.<sup>36</sup> The 1974 FOIA did not alter the intent of the 1966 FOIA that records pertaining to government activities be disclosed.<sup>37</sup>

Even though the Freedom of Information Act was enacted in 1966, it would be ten more years before a similar law was proposed in Rhode Island.<sup>38</sup> Despite the dearth of Rhode Island legislative history, contemporaneous news reports demonstrate that Rhode Island legislators were motivated by the same considerations as the federal legislators.<sup>39</sup>

For instance, in 1976 East Greenwich Representative Ernest C. Torres introduced the precursor to the present version of the APRA, stating that "[t]he people have a right to know what their government is doing."<sup>40</sup> Several years later, after passage of the 1979 APRA, Newport Representative, and Chairman of the House Judiciary Committee, Jeffrey J. Teitz predicted that the new APRA "will allow people to uncover information on governmental policy making. It will allow citizens to become more aware of how government decisions are made."<sup>41</sup> One newspaper even provided an

35. See Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561 (1974); see also Scalia, *supra* note 11, at 15.

36. See H.R. REP. NO. 93-876 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6271-74; see also Cate et al., *supra* note 10, at 48.

37. See generally H.R. REP. NO. 93-876, at 6271-74 (1974).

38. See Joel H. Sekers & John P. Hackett, *Bills Would Open Public Records*, PROV. J. BULL., Jan. 28, 1976, at B4 (reporting the introduction of open records law into the House of Representatives and the Senate).

39. See, e.g., Thomas E. Walsh & Joel H. Sekers, *Sunshine Bill to Open Government Records to Public Submitted*, PROV. J. BULL., Mar. 4, 1978, at A7 (reporting that Representative Dickinson introduced freedom of information act legislation modeled after the federal law).

40. See Sekers & Hackett, *supra* note 38.

41. Thomas E. Walsh, *New Law Won't Bring Rush to Scan Records*, PROV. J. BULL., July 1, 1979, at C2.

example of the type of information now publicly available – the supporting data for a municipal budget.<sup>42</sup>

These reported legislator comments, combined with the similarities between the FOIA and the APRA, demonstrate that the APRA was modeled after the FOIA and share common goals.<sup>43</sup> Both freedom of information laws were designed to permit inspection of official government documents, but to exempt from disclosure other records unrelated to government.<sup>44</sup> As enacted, the purpose section of the APRA declared:

The public's right to access to records pertaining to the policy-making responsibilities of government and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society. The purpose of this act is *to facilitate public access to governmental records which pertain to the policy-making functions of public bodies and/or are relevant to the public health, safety, and welfare.* It is also the intent of this act to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy.<sup>45</sup>

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42. *Id.*

43. *See supra* notes 16-17 and accompanying text.

44. *See infra* notes 45-50 and accompanying text; *see also* R.I. GEN. LAWS § 38-2-2(4)(i) (1997 & Supp. 2002) (defining "public record" to include "other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency"), as enacted by 1982 R.I. Pub. Laws ch. 416 § 1 (emphasis added). *But see* R.I. GEN. LAWS § 38-2-3(a) (West 2003) (unless otherwise exempt "all records maintained or kept on file by any public body, whether or not those records are required by any law or by any rule or regulation, shall be public records."), as enacted by 1979 R.I. Pub. Laws ch. 202 § 1 (emphasis added).

45. 1979 R.I. Pub. Laws ch. 202 § 1 (emphasis added). In 1998, the General Assembly amended the purpose section by deleting references to the policy-making responsibilities of government and/or the public health, safety, and welfare. *See* 1998 R.I. Pub. Laws ch. 378 § 1. The purpose section presently provides that:

The public's right to access to public records and the individual's right to dignity and privacy are both recognized to be principles of the utmost importance in a free society. The purpose of this act is to facilitate public access to public records. It is also the intent of this chapter to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy.

*See* R.I. GEN. LAWS § 38-2-1 (1997 & Supp. 2002), amended by 1998 R.I. Pub. Laws ch. 378 § 1. The 1998 amendment to section 38-2-1 of the Rhode Island General Laws should not be considered a substantive change to the purpose section of the APRA. *See* Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 51 n.9

Similarly, the United States Supreme Court has interpreted the FOIA as creating a broad right of access to "official information."<sup>46</sup> A prominent example of this interpretation occurred in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>47</sup> where the Court examined a request for individuals' criminal records and noted that the basic purpose of the FOIA was "to open agency action to the light of public scrutiny."<sup>48</sup> The Court continued that the FOIA disclosure requirement is premised upon:

the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.<sup>49</sup>

Subsequent cases and authorities have reinforced this interpretation, which has become known as the "central purpose" doctrine.<sup>50</sup>

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(R.I. 2001) (Flanders, J., concurring in part and dissenting in part) ("In my opinion the 1998 amendments merely clarified legislative intent rather than effecting a substantive change in the legislation.").

46. See, e.g., *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within [the FOIA's] purpose." (quoting *Env'tl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973))).

47. 489 U.S. 749 (1989).

48. *Id.* at 772 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

49. *Id.* at 773 (quoting *Rose*, 425 U.S. at 360-61).

50. In *United States Department of State v. Ray*, 502 U.S. 164 (1991), the United States Supreme Court considered whether releasing the names of individual Haitians who attempted to emigrate illegally to the United States, but who were involuntarily returned, would constitute "a clearly unwarranted invasion of personal privacy." *Id.* at 166; see also 5 U.S.C. § 552(b)(6) (1996) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). After reviewing the FOIA's central purpose language in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Court determined that even though the public interest in monitoring Haiti's compliance with its obligations not to persecute returnees was cognizable under FOIA, the Court nonetheless opined that this public interest was adequately served by disclosing the requested documents with the emigrants' identities redacted. *Ray*, 502 U.S. at 178. Accordingly, the Court concluded that revealing the redacted identities of the illegal emigrants would have "constitute[d] a clearly unwarranted invasion of . . . privacy." *Id.* Several years later in *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994), the Supreme Court examined whether disclosing the home addresses of collective bargaining unit employees

## II. APPLICATION OF THE ACCESS TO PUBLIC RECORDS ACT IN RHODE ISLAND

Even though the FOIA's and the APRA's central purpose demonstrate an intent to open documents concerning government activities, in reality the APRA is also invoked by requesting parties to encroach into areas not envisioned when Rhode Island's public records law was enacted. In particular, these areas concern requests for government-maintained documents that do not relate to government operations.<sup>51</sup> The result is an expansion of the APRA to include records that not only promote public participation and government oversight, but also reveal information about private citizens unrelated to government activities.<sup>52</sup> This dichotomy is

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would constitute a clearly unwarranted invasion of personal privacy. Again the Court relied upon *Reporters Committee* and stated that in weighing the competing interests, the "only relevant public interest in the FOIA balancing analysis [was the] extent to which disclosure of the information would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Id.* at 497 (quoting *Reporters Comm.*, 489 U.S. at 773). After focusing on the FOIA's central purpose, the Court acknowledged that even though disclosure of home addresses may allow unions to communicate more effectively with employees, the public interest was "negligible, at best." *Id.* at 497. The Court stated that revealing the employees' home addresses "would not appreciably further 'the citizens' right to be informed about what their government is up to,'" *id.* (quoting *Reporters Comm.*, 489 U.S. at 773) and in fact emphasized that "such disclosure would reveal little or nothing about the employing agencies or their activities." *Id.* at 497; *see also id.* at 501 ("Moreover, when we consider that other parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions to the employee address lists sought in this case, (citations omitted) it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant."); *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997) ("[T]he *only* relevant public interest in the FOIA balancing analysis' is 'the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" (quoting *Reporters Comm.*, 489 U.S. at 773) (alteration in original); *Cate et al.*, *supra* note 10, at 67 ("The test for whether a request seeks 'official information' should be the touchstone for disclosure under the FOIA. Rather than limit the application of a 'central purpose' test to one or more of the FOIA exemptions, only information that will serve the purpose of ensuring that 'the Government's activities be opened to the sharp eye of public scrutiny' should ever be subject to disclosure under the FOIA."); *Wichmann*, *supra* note 6, at 1231 ("[T]he FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.").

51. *See infra* notes 132-68 and accompanying text.

52. *See* Scalia, *supra* note 11, at 15 ("The Freedom of Information Act is part of the basic weaponry of modern regulatory war, deployable against regulators and

highlighted by comparing the government oversight themes expressed by the Rhode Island Supreme Court to administrative level requests received by local and state public bodies.

A. *The Access to Public Records Act and the Rhode Island Supreme Court*<sup>53</sup>

Evaluation of an APRA request involves a two step pro-

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regulated alike.”); Cate et al., *supra* note 10, at 44 (“Such an extension of the FOIA violates the purpose of the Act and transforms it ‘into a vehicle serving purely private interests, to the detriment of its intended public interest.’”); Wald, *supra* note 8, at 665 (“Businesses quickly learned how to use the FOIA to get information about their competitors. Lawyers found out that they could often extract facts more quickly through FOIA requests than through the civil discovery system.”).

53. There have been thirteen APRA cases to reach the Rhode Island Supreme Court: (1) *Providence Journal Co. v. Convention Ctr. Auth.*, 774 A.2d 40 (R.I. 2001) (commercial and financial documents leading to final contract are exempt from public disclosure, but final contract is a public record subject to redacting confidential or privileged information); (2) *Robinson v. Malinoff*, 770 A.2d 874 (R.I. 2001) (police investigation records related to a particular police officer exempt from public disclosure); (3) *Bernard v. Vose*, 730 A.2d 30 (R.I. 1999) (inmate’s prison parole board records not public); (4) *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218 (R.I. 1998) (civilian complaints of police misconduct are subject to public disclosure in redacted form whenever final action occurred); (5) *Edward A. Sherman Publ’g Co. v. Carpender*, 659 A.2d 1117 (R.I. 1995) (names of teachers who received notice of non-renewal of employment are not public unless and until date of termination occurred); (6) *In re Access to Certain Records*, 637 A.2d 1063 (R.I. 1994) (decisions of Advisory Committee, advisory opinions, and data are public records); (7) *Providence Journal Co. v. Sundlun*, 616 A.2d 1131 (R.I. 1992) (records identifying state employees who received layoff notices not public until employee is terminated); (8) *R.I. Fed’n of Teachers v. Sundlun*, 595 A.2d 799 (R.I. 1991) (APRA does not provide a remedy to prevent public disclosure); (9) *Providence Journal Co. v. Kane*, 577 A.2d 661 (R.I. 1990) (records identifying individual state employees are not public); (10) *Charlesgate Nursing Ctr. v. Bordeleau*, 568 A.2d 775 (R.I. 1990) (financial record related to state reimbursement of nursing facility is public); (11) *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556 (R.I. 1989) (management study report relating to school’s principal and school’s operations is not a public record); (12) *Hydron Labs., Inc. v. Dep’t of the Attorney Gen.*, 492 A.2d 135 (R.I. 1985) (documents determined to be work-product exempt from public disclosure); (13) *Rake v. Gorodetsky*, 452 A.2d 1144 (R.I. 1982) (police department reports are not exempt from public disclosure pursuant to the personnel records exception or the investigatory records exception). Furthermore, two APRA cases are pending in the Rhode Island Supreme Court with opinions expected to be rendered during the 2002-03 term: (1) Appellant’s Brief at 1, *Direct Action for Rights & Equal. v. Gannon*, \_\_\_ A.2d \_\_\_ (R.I. 2003) (No. 99-22A) (city’s appeal of trial justice’s order awarding costs, attorneys’ fees, and waiving the cost of documents associated with *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218 (R.I. 1998)); (2) Appellant’s Brief at 1, *Providence Journal Co. v. Convention Ctr. Auth.*, \_\_\_ A.2d \_\_\_ (R.I. 2003) (No. 02-0132) (newspaper’s appeal of trial justice’s decision redacting final prices, rates,

cess.<sup>54</sup> Upon receipt of an APRA request, an agency must first determine whether a requested document falls within any of the twenty-three exemptions delineated within the APRA.<sup>55</sup> If a document falls within an enumerated exemption, that record is deemed exempt from public disclosure and no further inquiry is performed.<sup>56</sup>

If a document does not fall within an enumerated exemption, a balancing test must be performed.<sup>57</sup> With respect to this second step, the agency must balance the public interest in disclosure versus the individual's privacy interest if the document is disclosed.<sup>58</sup> If the privacy interest outweighs the public interest, the document (or portions thereof) are exempt from public disclosure.<sup>59</sup> Only after determining that a document is not exempt by any of the enumerated exemptions, and that the public interest in disclosure outweighs the individual's privacy interest, is a document deemed a public record that must be disclosed within ten business days.<sup>60</sup>

### 1. *Identifiable Records*

Among the most frequently cited exemptions – and one of the broadest – is section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws,<sup>61</sup> which exempts from public disclosure “[a]ll records which

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and references to complimentary rooms or services from the final contract in *Providence Journal Co. v. Convention Center Authority*, 774 A.2d 40 (R.I. 2001)).

54. PATRICK C. LYNCH, *THE ATTORNEY GENERAL'S GUIDE TO OPEN GOVERNMENT IN RHODE ISLAND* 61 (3d ed. 2002), available at <http://www.riag.state.ri.us/meetings/2002/2002%20OPEN%20GOV%20MANUAL.html> (last visited Mar. 23, 2003).

55. *Id.*

56. *Id.*

57. *Id.*; see also *Kane*, 577 A.2d at 663 (“Any balancing of interests arises only after a record has first been determined to be a public record.”).

58. LYNCH, *supra* note 54.

59. *Id.*

60. *Id.*; see also R.I. GEN. LAWS § 38-2-7(b) (West 2003) (“Except that for good cause this limit may be extended for a period not to exceed thirty (30) business days.”).

61. From its inception in 1979 until July 1998, the statutory exemptions were numerically delineated. Chapter 378, section 1 of the 1998 Rhode Island Public Laws changed this designation to alphabetical. See 1998 R.I. Pub. Laws ch. 378 § 1. For consistency purposes, all exemptions in this Article are cited according to the present-day alphabetical designation, although the statutory provision itself references the text applicable when cited. In addition, this Article observes that section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws has been consistently referenced as the “personnel-records exemption.” See, e.g., *Kane*, 577 A.2d at 662



are identifiable to an individual applicant for benefits, client, patient, student, or employee.”<sup>62</sup> Prior to its 1991 amendment, this exemption had been read consistently to allow public bodies to redact the identities of various individuals, or when a document pertained only to one person, to exempt the entire record.<sup>63</sup>

In *Pawtucket Teachers Alliance, Local No. 920 v. Brady*,<sup>64</sup> the Pawtucket School Committee appointed a new principal to one of its schools and, shortly thereafter, received a series of complaints concerning the operation of the school and the relationship between the principal and the teaching staff.<sup>65</sup> The school committee authorized a management study of the school’s operations, and accordingly, hired an outside consultant to review the operations.<sup>66</sup>

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(stating that the Rhode Island Supreme Court also considered the personnel-record exemption in *Pawtucket Teachers Alliance v. Brady*, 556 A.2d 556 (R.I. 1989)); *Rake v. Gorodetsky*, 452 A.2d 1144, 1148 (R.I. 1982) (“For the stated reasons we conclude that the reports in question are not exempt from disclosure pursuant to the personnel-records exemption, § 38-2-2[(4)(i)(A)(I)].”). Because section 38-2-2(4)(i)(A)(I) exempts from disclosure not only personnel-records, but instead “[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee,” this Article refers to this provision as the “identifiable records exemption.”

62. R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003). In its entirety, this provision presently exempts from public disclosure:

[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee; including, but not limited to, personnel, medical treatment, welfare, employment security, pupil records, all records relating to a client/attorney relationship and to a doctor/patient relationship, and all personal or medical information relating to an individual in any files, including information relating to medical or psychological facts, personal finances, welfare, employment security, student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body; provided, however, with respect to employees, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public.

*Id.* (emphasis added by 1991 R.I. Pub. Laws ch. 208 § 1).

63. See *infra* notes 64-76 and accompanying text; see also R.I. GEN. LAWS § 38-2-2(4)(ii) (West 2003) (“[A]ny reasonably segregable portion of a public record excluded by this section shall be available for public inspections after the deletion of the information which is the basis of the exclusion, if disclosure of the segregable portion does not violate the intent of this section.”).

64. 556 A.2d 556 (R.I. 1989).

65. *Id.* at 557.

66. *Id.*

After conducting numerous interviews with the principal and the teachers, the consultant summarized the findings in a written report, which was subsequently presented to the school committee in a closed session and ordered sealed.<sup>67</sup> Requests to obtain the sealed document from the school committee were rebuffed and, after the Pawtucket Teachers Alliance filed a lawsuit, the Rhode Island Superior Court determined that the sealed report was not a public record.<sup>68</sup>

The Pawtucket Teachers Alliance appealed to the Rhode Island Supreme Court and argued that the public's right to know the contents of the report "clearly outweigh[ed] the principal's right to privacy in these circumstances," particularly since widespread media coverage had already publicized the school controversy, including the school principal's identity.<sup>69</sup> The supreme court rejected this policy argument and instead focused on the plain language of section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws, which at that time exempted all records identifiable to an individual employee.<sup>70</sup> The supreme court concluded that:

[T]he report at issue in the present case specifically relates to the job performance of a single readily identifiable individual. Even if all references to proper names were deleted, the principal's identity would still be abundantly clear from the entire context of the report.<sup>71</sup>

Consequently, as the consultant's report was not susceptible to redaction without contravening section 38-2-2(4)(i)(A)(I), the entire

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67. *Id.* The report was sealed pursuant to the Open Meetings Act, R.I. GEN. LAWS § 42-46-7 (1993 & Supp. 2002). According to the APRA, "[a]ny minutes of a meeting of a public body which are not required to be disclosed pursuant to [the Open Meetings Act]" are exempt from public disclosure. R.I. GEN. LAWS § 38-2-2(4)(i)(J) (West 2003).

68. *See Brady*, 556 A.2d at 557-58 (holding that the sealed report fell within section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws, exempting documents identifiable to an individual employee).

69. *Id.* at 559.

70. *Id.* at 558-59. Prior to its 1991 amendment, section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws exempted "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee; including, but not limited to, personnel, medical treatment, welfare, employment security, and pupil records and all records relating to a client/attorney relationship and to a doctor/patient relationship." *Id.* at 558 (quoting R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (1986)); *see supra* note 62 (present version of R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (1997 & Supp. 2002)).

71. *Id.* at 559.

document was deemed exempt from public disclosure.<sup>72</sup> Other cases have also strictly interpreted the identifiable records exemption.

For instance, in *Providence Journal v. Kane*,<sup>73</sup> a local newspaper sought personnel records that would “uniquely identify state employees.”<sup>74</sup> But again, without specific consideration to the arguably benign nature of the requested documents, the supreme court relied upon the plain language of section 38-2-2(4)(i)(A)(I), noting that the:

request for information that will uniquely identify State employees by name, address, and employment history directly contravenes the clear proscription set forth in § 38-2-2 against disclosure of all records which are identifiable to an individual employee, including personnel records.<sup>75</sup>

Accordingly, these documents were also deemed exempt from public disclosure.<sup>76</sup>

72. *Id.* at 560 (“Consequently we conclude that the trial justice committed no abuse of discretion in denying plaintiff’s request for temporary and permanent injunctive relief.”).

73. 577 A.2d 661 (R.I. 1990).

74. By letter dated February 3, 1989, a staff writer from *The Providence Journal-Bulletin* requested, in relevant part:

information that will uniquely identify state employees by name, address, and employee number, and include their employment history, qualifications, job classification, relationship to the civil service system, minority and other special status, position by agency and by other identifiers, work schedule, the components of their pay, their pay and overtime history, vacation and sick leave status.

Similarly, we need to know the history of personnel actions beginning with fiscal 1985-86, including both present and former state employees, recounting their comings and goings and how their status changed in-between.

Letter from Bruce C. Landis, Staff Writer, *The Providence Journal-Bulletin*, to John Kane, Director of Administration, State of Rhode Island (Feb. 3, 1989) (on file with author). Compared to other APRA requests, the records sought in *Kane*, although voluminous, in large part cannot be considered to invade one’s personal privacy if disclosed. *Cf. In re Div. of Motor Vehicles*, 1999 Op. R.I. Att’y Gen. PR 99-01 (Aug. 23, 1999) (stating that the request of the staff writer from *The Providence Journal-Bulletin* for “a list of all the handicap plaques issued with their numbers, the names of the recipients, the addresses of the recipients and the medical reason for granting each plaque” deemed exempt from disclosure), available at <http://www.riag.state.ri.us/opinion/docs/advpr99-01.htm>; see also *infra* notes 132-54 and accompanying text.

75. *Providence Journal Co. v. Kane*, 577 A.2d 661, 665 (R.I. 1990).

76. *Id.*

In response to *Kane*, the General Assembly amended the all-encompassing exemption for records identifiable to an individual employee.<sup>77</sup> The 1991 amendment left intact the exemption for “[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee,” but expressly delineated fourteen categories of employee records deemed public even though identifiable to a particular employee.<sup>78</sup> The last clause of amended section 38-2-2(4)(i)(A)(I) states that:

[W]ith respect to employees, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime and other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public.<sup>79</sup>

Within a year of this amendment, the Rhode Island Supreme Court in *Providence Journal Co. v. Sundlun*<sup>80</sup> was again called upon to examine section 38-2-2(4)(i)(A)(I). In that case, the supreme court examined the 1991 amendment with respect to a public records request for the “names and positions of the 129 non-union state employees who were being laid-off.”<sup>81</sup> Within days, The Providence Journal made a second APRA request seeking the “names and positions of the 492 state employees who were members of a union and who were being laid-off.”<sup>82</sup>

Despite the supreme court’s prior strict construction in *Brady* and *Kane*, The Providence Journal Company argued to the supreme court that section 38-2-2(4)(i)(A)(I) “applies exclusively to records revealing personal information relating to an identifiable

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77. See 1991 R.I. Pub. Laws ch. 208 § 1; see also Edward A. Sherman Publ’g Co. v. Carpenter, 659 A.2d 1117, 1121 (R.I. 1995).

78. See R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003).

79. *Id.*

80. 616 A.2d 1131 (R.I. 1992).

81. *Id.* at 1132.

82. *Id.* The supreme court’s opinion identifies three separate lists responsive to *The Providence Journal-Bulletin’s* request. List One identified state employees that would receive layoff notices, but that were never implemented. *Id.* at 1133. List Two concerned state employees that were issued layoff notices, but who exercised their right to “bump” an employee with less seniority and accept a lower-level position within state government. *Id.* Finally, List Three contained the names of state employees who will actually be laid-off from state employment. *Id.*

employee.”<sup>83</sup> The supreme court rejected the newspaper’s contention and recognized that:

Although the legislative intent may have been to protect against the release of personal or confidential information, it implemented this intention by prohibiting the release of all records that would be identifiable to an individual person, whether or not such records might in another context be construed as either personal or confidential.<sup>84</sup>

Continuing the same literal interpretation analyses, the supreme court concluded that there was “no question” that the identities of yet-to-be terminated employees were not public records.<sup>85</sup> In particular, the justices noted that the last clause of the 1991 amendment declared that “the name . . . and date of termination shall be public.”<sup>86</sup> Accordingly, the supreme court opined that “[i]t is not until an employee has been terminated from his or her employment that the last proviso of § 38-2-2[(4)(i)(A)(I)] becomes operative and, in effect, authorizes the release of the names of those terminated employees to the public.”<sup>87</sup>

A similar analysis was applied in *Edward A. Sherman Publishing Co. v. Carpende*,<sup>88</sup> where an APRA request was made concerning the identities of twenty-eight Portsmouth teachers who had received layoff notices, but had yet-to-be terminated.<sup>89</sup> In *Carpende*, the supreme court found *Sundlun* to be “controlling,” and concluded that the names of teachers receiving layoff notices

83. *Id.* at 1135.

84. *Id.* at 1134. To support its conclusion, the supreme court cited section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws and emphasized that, in relevant part, this provision exempts “[a]ll records which are *identifiable* to an *individual* applicant for benefits, client, patient, student, or *employee*.” *Id.* (emphases added).

85. *Id.* at 1135 (unless delineated, section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws “explicitly exempts from disclosure records identifying an employee”); see also R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I), amended by 1991 R.I. Pub. Laws ch. 208 § 1 (“[W]ith respect to employees, the name . . . and date of termination shall be public.”).

86. *Sundlun*, 616 A.2d at 1134.

87. *Id.* at 1135.

88. 659 A.2d 1117 (R.I. 1995).

89. The written notifications were provided pursuant to section 16-13-3 of the Rhode Island General Laws. In relevant part, section 16-13-3, amended by chapter 170, section 1 of the 1992 Public Laws provides: “Whenever a tenured teacher in continuous service is to be dismissed, the notice of such dismissal shall be given to the teacher in writing on or before March 1st of the school year immediately preceding the school year in which the dismissal is to become effective.” *Id.* at 1119.

were not public records "until the layoffs [became] final at the end of the school year."<sup>90</sup>

## 2. *Police Records*

In *Rake v. Gorodetsky*,<sup>91</sup> Brown University students and editors of a quarterly tabloid newspaper wrote to the Chief of the Providence Police Department requesting "copies of all Providence police department hearing officers' reports concerning civilian complaints of police brutality" from 1973 through June 2, 1980.<sup>92</sup> When the students did not receive a response, they appealed to the Commissioner of Public Safety for the City of Providence.<sup>93</sup>

On behalf of the City, a Providence solicitor soon responded to the review petition, asserting that the City required additional time to compile the hearing officers' reports.<sup>94</sup> Later, when additional measures failed to obtain the requested reports, the students filed a lawsuit in the Rhode Island Superior Court seeking injunctive relief.<sup>95</sup> The superior court rejected the City's argument that the reports were exempt from public disclosure *en toto*, but nonetheless did agree that disclosure of the complainants' and the police officers' identities would infringe upon their privacy interests.<sup>96</sup> Accordingly, the trial justice ordered the hearing officers'

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90. *Id.* at 1122.

91. 452 A.2d 1144 (R.I. 1982).

92. *Id.* at 1146; *see also* *Rake v. Gorodetsky*, C.A. No. 81-1222, at 2 (R.I. Super. Ct. Aug. 3, 1981).

93. *Rake v. Gorodetsky*, 452 A.2d 1144, 1146 (R.I. 1982). As enacted, section 38-2-8 of the Rhode Island General Laws provided: "Any person denied the right to inspect a record of a public body by the custodian of said record may petition the chief administrative officer of that public body for a review of the determination made by his/her subordinate." 1979 R.I. Pub. Laws ch. 202 § 1.

94. *Rake*, 452 A.2d at 1146.

95. *Id.*

96. *See Rake*, at 9-10 (No. 81-1222). It is noteworthy that the trial justice's decision to redact the identities of the police officers and the civilian complainants was not based upon any specific statutory authority. Instead, the trial justice wrote:

There has been presented a persuasive argument, however, with respect to the right of privacy of the police officers and the complainants involved. As the plaintiffs have conceded that their interest lies in factual situations and the investigative officer's handling and recommendations thereof, and have offered no evidence that the intent of the consent decree or the statute would be abrogated if names were omitted, this [c]ourt sees no need to include the names of the police officers or complainants involved in the reports.

reports disseminated, but directed that the parties' names be redacted.<sup>97</sup>

On appeal, the supreme court rejected the City's dual arguments that the hearing officers' reports were exempt either by the non-final investigatory records exemption,<sup>98</sup> or by the identifiable records exemption.<sup>99</sup> The supreme court stated that since the hearing officers' reports contained the action of the police chief thereon, the reports could only be considered the "final action taken on the matter."<sup>100</sup> Moreover, the justices rejected the City's alternative argument that the reports were exempt from public disclosure by virtue of the identifiable records exemption. On this point, the supreme court wrote that since section 38-2-2(4)(i)(A)(I) requires "that the records must be identifiable to an individual applicant in order for the exemption to take effect," and since the trial justice ordered the parties' identities redacted, "an important prerequisite for application of [the identifiable records exemption] has not been met."<sup>101</sup>

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*Id.* at 9. *But see* R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003), as enacted by 1979 R.I. Pub. Laws ch. 202 § 1 (exempting "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee") (emphasis added). The balancing test, which could permit redaction of identities in the appropriate circumstances, was not recognized by the Rhode Island Supreme Court until *Providence Journal Co. v. Kane*, 577 A.2d 661 (R.I. 1990). *See In re Bristol Police Dep't*, 2000 Op. R.I. Att'y Gen. PR 00-04 (Mar. 23, 2000) (disclosing the identity of a third party witness to a crime subject to case-by-case balancing test), available at <http://www.riag.state.ri.us/opinion/docs/advpr00-04.html>; *In re Narragansett Police Dep't*, 1999 Op. R.I. Att'y Gen. PR 99-02 (Sept. 7, 1999) (disclosing the identity of crime victim subject to case-by-case balancing test), available at <http://www.riag.state.ri.us/opinion/docs/advpr99-02.html>.

97. *Rake*, at 10 (C.A. No. 81-1222).

98. R.I. GEN. LAWS § 38-2-2(4)(i)(P) (1997 & Supp. 2002) (exempting "[a]ll investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public").

99. R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003) (exempting "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee").

100. *Rake*, 452 A.2d at 1148.

101. *Id.* Despite the fact that the complainants' and the police officers' identities were redacted, the City continued to argue that the documents should be withheld from public inspection because "the facts set forth in each report could be matched with newspaper accounts of the incident that gave rise to the complaint." *Id.* at 1149. The end result, the City claimed, "would be the identification of the parties involved." *Id.* While acknowledging the City's concern, the Rhode Island

Many years later, the holding in *Rake* was applied in *Direct Action for Rights and Equality (DARE) v. Gannon*,<sup>102</sup> where similar records spanning from 1986 through September 17, 1993 were requested.<sup>103</sup> After considering the same identifiable records exemption and the same non-final investigatory records exemption as set forth in *Rake*, the *DARE* court reached a similar result, concluding that "records that do not specifically identify individuals and that represent final action" must be disclosed.<sup>104</sup>

The supreme court's latest police records case, however, offers a variation on *Rake* and *DARE*. In *Robinson v. Malinoff*,<sup>105</sup> a local newspaper, *The Newport Daily News*, was investigating alleged on-duty misconduct involving a police officer. In conjunction with its reporting, the newspaper requested "all reports of investigations concerning" that particular officer.<sup>106</sup> After the motion justice declared the requested reports public, an appeal ensued where the Rhode Island Supreme Court reversed on unrelated procedural grounds.<sup>107</sup> Although unnecessary to its disposition, the supreme

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Supreme Court rejected this argument and concluded that "on balance the public's right to know outweighs such a possibility." *Id.*

102. 713 A.2d 218 (R.I. 1998).

103. Four categories of Providence Police Department records were sought: (1) every "Providence Police Civilian Complaint report" filed from 1986 through September 1993; (2) a listing of all investigation findings conducted by the Bureau of Internal Affairs regarding all "Providence Police Civilian Complaint reports" from 1986 through September 1993; (3) all reports made by the Providence Police Department hearing officers concerning their findings related to the "Providence Police Civilian Complaints" from 1986 through September 1993; and (4) reports on all disciplinary action taken as a result of the hearing officers' recommendations from 1986 through September 1993. *Id.* at 220.

104. *Id.* at 224.

105. 770 A.2d 873 (R.I. 2001).

106. *Id.* at 874. According to the supreme court's opinion, *The Newport Daily News* reported that a college student complained to police that an officer had sexually assaulted her. *Id.* at 874 n.1. The allegations were considered by a Newport grand jury, which did not return an indictment. *Id.*

107. *Id.* The *Newport Daily News*, through its publisher, Edward A. Sherman Publishing Company (Sherman) intervened in this case. *Id.* at 875. Sherman answered Robinson's complaint and filed a cross-claim against the City of Newport. *Id.* In its motion for summary judgment, however, Sherman moved "in its favor and against plaintiff Ernest Robinson." *Id.* The supreme court's opinion emphasizes that Sherman "did not file for summary judgment on its cross-claim against the [C]ity, the sole custodian of the records being sought." *Id.* This failure to file for summary judgment against the City, the sole custodian of the requested records, was dispositive. *Id.* at 876-77. In particular, the supreme court noted that "[t]he APRA only creates a cause of action for an individual or entity denied access to records maintained by a public body against the public body that is the custo-



court did provide clear guidance on the merits of the APRA issue. In particular, the court noted that the plain language of the identifiable records exemption “expresses the Legislature’s clearly stated intention to exempt from public disclosure those records concerning a particular and identifiable individual.”<sup>108</sup>

The supreme court’s three police record cases should not be read as inconsistent despite the fact that *Rake* and *DARE* concerned police misconduct records deemed public, while *Robinson* concerned police misconduct records, which the supreme court strongly suggested fall outside the public domain. Instead, *Robinson* exemplifies the fact specific nature of the APRA. In particular, *Rake* and *DARE* concerned alleged police misconduct records spanning a seven year period, while *Robinson* examined the same type of record, but identifiable to one particular person.<sup>109</sup> Although addressing the issue only in dicta, the Rhode Island Supreme Court recognized the *Robinson* records were not susceptible to redaction in the same manner as the *Rake* and *DARE* documents, and therefore, could not be disclosed without contravening section 38-2-2(4)(i)(A)(I).<sup>110</sup>

### 3. Financial Records

In *Charlesgate Nursing Center v. Bordeleau*,<sup>111</sup> a local union embroiled in a labor dispute requested from the Department of Health a financial document known as the BM-64 Report, which was primarily designed to establish the appropriate state reimbursement rate for Medicaid services to respective nursing facili-

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dian of the records.” *Id.* at 876. Since Sherman requested summary judgment against Robinson, and not the City, “relief was not available because Robinson was not the custodian of the records sought.” *Id.* at 876-77.

108. *Id.* at 877.

109. Compare *Rake v. Gorodetsky*, C.A. No. 81-1222, at 2 (R.I. Super. Ct. Aug. 3, 1981) (stating that the plaintiff requested “every Providence Police Department Hearing Officers’ report on civilian complaints on record with the Providence Police Department from the year 1973 to [June 1980]”), and *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218, 220 (R.I. 1998) (stating that the plaintiff requested documents relating to civilian complaint process from 1986 to September 1993), with *Robinson v. Malinoff*, 770 A.2d 873, 874 (R.I. 2001) (stating that a newspaper requested “all reports of investigations concerning” a particular police officer).

110. See R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (1997 & Supp. 2002); see also *supra* notes 71, 75, 84, and accompanying text.

111. 568 A.2d 775 (R.I. 1990).

ties.<sup>112</sup> Following the union's APRA request, the affected medical facility, Charlesgate Nursing Center (Charlesgate), filed for injunctive and declaratory relief, attempting to block disclosure of the report.<sup>113</sup> A superior court trial justice disagreed and ruled that after redacting some exempt personal information, the BM-64 Report constituted a public record and must be disclosed.<sup>114</sup>

On appeal, the supreme court affirmed, stressing the APRA's stated purpose and the public oversight function to conclude that it is "reasonably clear that the expenditure of \$118 million of public funds in a fiscal year is a matter that pertains to the policy-making responsibilities of government."<sup>115</sup> In doing so, the supreme court recognized that "the public interest in these reports of expenditure and income must be presumed to be both keen and continuous."<sup>116</sup> The justices continued:

It was obviously the intent of the Legislature that there be a role for public oversight in order to make certain that both the director and the providers were carrying out their respective obligations. It could only have been such a motivation that caused the State of Rhode Island and the overwhelming majority of the other states to have enacted freedom-of-infor-

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112. *Id.* at 776.

113. *Id.* In a subsequent case, *Rhode Island Federation of Teachers v. Sundlun*, 595 A.2d 799 (R.I. 1991), a similar so-called reverse APRA lawsuit was brought to block revealing records relating to special pension benefits authorized by the General Assembly. In *Sundlun*, the supreme court affirmed the trial justice's decision and concluded that "[n]o portion of the [APRA] purports to provide a remedy for a person or an entity that seeks to prevent disclosure." *Id.* at 801. The supreme court continued, "[o]ur statute, like the Federal FOIA statute, is directed solely toward requiring disclosure by public agencies and does not provide a reverse remedy to prevent disclosure." *Id.* at 803. Although the *Sundlun* court acknowledged it had been previously confronted with an attempt to prevent disclosure of financial information in *Charlesgate Nursing Center v. Bordeleau*, 568 A.2d 775 (R.I. 1990), the supreme court observed that "neither party [in that case] raised the issue concerning whether APRA provided a remedy to compel nondisclosure in the event that a public official or body was about to disclose material that might be entitled to an exemption under the provisions of § 38-2-2." *Id.* at 801-02. Consequently, *Sundlun* represents the first and only time the supreme court has examined this issue. *Id.* at 802.

114. *Charlesgate Nursing Ctr.*, 568 A.2d at 776.

115. *Id.* at 777. On appeal, Charlesgate Nursing Center argued, *inter alia*, that the BM-64 Report was exempt from disclosure by virtue of the identifiable records exemption. *Id.* The supreme court concluded that this exemption was rendered "noncontroversial by the deletion of [identifiable information]." *Id.*

116. *Id.*

mation laws as well as the Freedom of Information Act adopted by the Congress of the United States.<sup>117</sup>

*Charlesgate* contains among the strongest disclosure language written in any of the supreme court's APRA opinions and demonstrates the court's conviction that enhanced public oversight, particularly with respect to financial expenditures, was precisely the intent of the APRA.<sup>118</sup> This oversight function was deemed so vital that the supreme court rejected *Charlesgate's* argument that it had a subjective expectation to privacy.<sup>119</sup> However, in the court's next financial records case, the subjective expectations of privacy were not dismissed.

In *Providence Journal Co. v. Convention Center Authority*,<sup>120</sup> the supreme court examined a request to the Convention Center Authority seeking various financial records related to a Mobil Celebrity Golf Invitational Tournament (golf tournament) and a Verazano Day Banquet (banquet). Among the documents requested were the signed contracts for the banquet and the golf tournament, as well as records concerning the negotiations leading to the finalized agreements.<sup>121</sup> Citing the trade secrets and commercial or financial information exemption,<sup>122</sup> the Convention Center Authority denied the APRA request, a decision that a motion justice upheld.<sup>123</sup> An appeal to the Rhode Island Supreme Court ensued.<sup>124</sup>

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117. *Id.*

118. *See id.* at 777-78 ("In these days of enhanced public participation in government, it has obviously been a legislative consensus that documents possessed by public bodies in the course of their supervisory activities should generally be made public unless specifically exempted in the relevant act.")

119. *Id.* at 777 ("We also reject the argument that the subjective desire for confidentiality on the part of *Charlesgate* or any similar personal expectation should overcome the public interest in knowing that its tax dollars are being appropriately expended and that its public agencies are properly supervising that expenditure.")

120. 774 A.2d 40 (R.I. 2001).

121. *Id.* at 43.

122. *See* R.I. GEN. LAWS § 38-2-2(4)(i)(B) (1997 & Supp. 2002) (exempting "[t]rade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature").

123. *Convention Ctr. Auth.*, 774 A.2d at 44.

124. *Id.* at 43-44.

Relying upon federal precedent, the Rhode Island Supreme Court articulated a two-prong test.<sup>125</sup> The first prong addresses commercial or financial information that is *required* to be provided to the government.<sup>126</sup> With respect to this prong, documents are exempt if disclosure would be likely “(1) to impair the [g]overnment’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>127</sup> The second prong provides that when commercial or financial information is *voluntarily* provided to the government, that information is exempt from disclosure if the records are “of a kind that would customarily not be released to the public by the person from whom it was obtained.”<sup>128</sup>

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125. *Id.* at 47 (“We agree with the holding in *Critical Mass* and its progeny and adopt the test set forth therein, including the protection afforded to commercial and financial information the provider would not customarily release to the public.” (citing *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992))).

126. *Id.*

127. *Id.*

128. *Id.* Although the *Convention Center Authority’s* second prong appears to rely heavily upon one’s subjective expectations, the supreme court’s opinion forewarns that without legislative interaction, future documents may have to be disclosed even to the fiscal disadvantage of the State’s competitive position or other parties. *See id.* at 50 n.7 (“We recognize that this holding may have an adverse impact on the Authority’s competitiveness because its privately owned competitors are not required to make public their contracts and presumably the prices charged for the use of their facilities. However, the resolution of this issue rests with the General Assembly and not this Court.”); *see also Cahill v. Hous. Auth.*, 2000 Op. R.I. Att’y Gen. PR 00-09 (May 22, 2000) (unofficial finding) (requesting competitor’s bid submitted pursuant to sealed bidding process), available at <http://www.riag.state.ri.us/access/docs/pr00-09.htm>. Other states have promulgated exemptions to address the concerns expressed by the Rhode Island Supreme Court. *See, e.g.,* ARK. CODE ANN. § 25-19-105(b)(9)(A) (Supp. 2002) (exempting “[f]iles which, if disclosed, would give advantage to competitors or bidders”); CONN. GEN. STAT. § 1-210(5)(B) (West Supp. 2000) (exempting “[c]ommercial or financial information given in confidence”); 5 ILL. COMP. STAT. 140/7(1)(g) (Michie 1999) (exempting the “disclosure of the trade secrets or information [where disclosure] may cause competitive harm”); IOWA CODE § 22.7(6) (1998) (exempting “[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose”); NEB. REV. STAT. § 84-712.05(3) (1999) (exempting “proprietary or commercial information which if released would give advantage to business competitors and serve no public purpose”); UTAH CODE ANN. § 63-2-304(2)(a) (Supp. 2000) (exempting “commercial information or non-individual financial information obtained from a person if disclosure of the information could reasonably be expected to result in unfair competitive injury to the person submitting the information”).

Applying the voluntary disclosure prong, the supreme court concluded that the "documents regarding negotiations that led to the booking of the event" fell squarely within section 38-2-2(4)(i)(B) of the Rhode Island General Laws.<sup>129</sup> On the other hand, the court concluded that "[o]nce the negotiations are solidified into a final agreement between the parties that agreement, or at least portions of the agreement, should then be available to the public pursuant to APRA."<sup>130</sup>

The identifiable record, police record, and financial record categories demonstrate the fact specific analysis for every APRA request. At first blush, the supreme court's conclusions in *Rake* and *DARE* that redacted police investigation documents must be disclosed may seem inconsistent with *Robinson's* holding that those investigation reports are exempt *en toto*. Furthermore, *Charlesgate Nursing Center's* rejection of a subjective privacy interest may seem at odds with the *Convention Center Authority's* heavy reliance upon a subjective test. However, the supreme court's APRA precedent recognizes "a rule . . . that permits the disclosure of records that do not specifically identify individuals and that represent final action."<sup>131</sup>

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129. *Convention Ctr. Auth.*, 774 A.2d at 48. The Convention Center Authority provided six affidavits, which collectively detailed what the affiants believed "to be the anticompetitive effects of publicly disclosing the information sought by the *Journal*." *Id.* at 44. Furthermore, according to the supreme court's opinion, each affidavit concluded that "the information requested by the *Journal* contained confidential commercial and financial information of a sort that is not typically shared with the public." *Id.*

130. *Id.* at 50. With respect to the final contract, the Rhode Island Supreme Court again referenced federal case law for the proposition that "no contract could be exempted from FOIA in its entirety." *Id.* (citing *Piper & Marbury L.L.P. v. United States Postal Serv.*, No. CIV.A. 99-2383, 2001 WL 214217, at \*4 (D.D.C. Mar. 6, 2001)). The court added, however, that "[o]bviously, if the agreement includes confidential or privileged financial information of the customer, such as insurance or financing consideration and profit projections, and is segregable, that limited information is subject to redaction." *Id.* Upon remand, the trial justice redacted from the final contract, among other information, the final prices, rates, and references to complimentary rooms or services. This decision is on appeal to the Rhode Island Supreme Court. See Rule 12A Statement of Appellant, *Providence Journal Co. v. Convention Ctr. Auth.*, C.A. No. PC 97-2985 (R.I. Super. Ct. 1997) (No. 02-0132).

131. *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218, 224 (R.I. 1998). This rule is consistent with the FOIA's central purpose, and by extension the APRA's central purpose. See *supra* Part I.

B. *The Access to Public Records Act and the Rhode Island Administrative Agencies*

Despite the great weight of legislative and judicial authority, Rhode Island administrative agencies continue to be burdened with requests that exceed the APRA's central purpose, and that sometimes even exceed their resources. In fact, a sizeable number of APRA requests have little or no relation to the public's oversight function, but instead promote other values, such as obtaining records to learn about individual citizens or to advance a private interest to the detriment of the public at large.

1. *Document Requests Unrelated to Government Activity*

In one high-profile situation, a North Kingstown motor-vehicle accident claimed the life of a fifteen-year-old girl.<sup>132</sup> Five other juveniles were also involved in the accident, one of whom was criminally charged.<sup>133</sup> After *The Providence Journal's* request to obtain the identities of the five surviving juveniles was denied by the North Kingstown Police Department, the newspaper filed a lawsuit in the Rhode Island Superior Court seeking, *inter alia*, "the names of the occupants of [the] vehicle."<sup>134</sup>

Reporting on its own lawsuit, *The Providence Journal* noted that the early morning single motor-vehicle accident raised "questions as to why the teens were out so late and where they were going."<sup>135</sup> *The Providence Journal* added that its effort "to find out more about the tragedy, including the names of the other teenagers in the car" had been denied<sup>136</sup> and that "teenage driving has become an issue of great public concern."<sup>137</sup> However, nowhere in its newspaper article, or in its subsequent superior court complaint, did *The Providence Journal Company* explain how disclos-

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132. Paul Davis, *Teen Killed in Crash Freshman at La Salle*, PROVIDENCE J., June 5, 2001, at A1.

133. Elizabeth Abbott, *Journal Sues Police to Obtain Report of Fatal Car Crash*, PROVIDENCE J., Aug. 30, 2001, at B3; see R.I. GEN. LAWS § 14-1-64(a) (West 2003) ("All police records relating to the arrest, detention, apprehension, and disposition of any juveniles shall be kept in files separate and apart from the arrest records of adults and shall be withheld from public inspection.").

134. See Complaint at 1, *Providence Journal Co. v. North Kingstown Police Dept.*, C.A. No. 2001-0442 (R.I. Super. Ct. Aug. 22, 2001).

135. Abbott, *supra* note 133.

136. *Id.*

137. *Id.*

ing the accident's details, or revealing the identities of the juveniles, relate to the operation of government.<sup>138</sup>

In another situation, an investigation company requested from the Division of Motor Vehicles copies of drivers' license photographs,<sup>139</sup> and then one year later, sought the social security numbers of drivers.<sup>140</sup> After being denied access to both requests, the investigation company filed complaints with the Department of Attorney General.<sup>141</sup> In its finding, the Department of Attorney General concluded that the disclosure of drivers' license photographs and social security numbers would constitute "an unwarranted invasion of personal privacy" and would not advance the intent of the APRA.<sup>142</sup>

138. *Id.* See generally Complaint, Providence Journal Co. v. North Kingstown Police Dep't, C.A. No. 2001-0442 (R.I. Super. Ct. Aug. 22, 2001). Nineteen months after filing its lawsuit, The Providence Journal agreed to dismiss any and all claims against the North Kingstown Police Department without any costs or sanctions. See Dismissal Stipulation, Providence Journal Co. v. North Kingstown Police Dep't, C.A. No. 2001-0442 (R.I. Super. Ct. Mar. 26, 2003).

139. See *Marrier v. Div. of Motor Vehicles*, 1994 Op. R.I. Att'y Gen. PR 94-03 (Apr. 1, 1994) (unofficial opinion) (on file with author) [hereinafter 1994 Marrier Opinion].

140. See *Marrier v. Div. of Motor Vehicles*, 1995 Op. R.I. Att'y Gen. PR 95-09 (Mar. 28, 1995) (unofficial opinion) (on file with author), available at <http://www.riag.state.ri.us/access/docs/pr95-09.html> [hereinafter 1995 Marrier Opinion].

141. See R.I. GEN. LAWS § 38-2-8 (1997 & Supp. 2002) (providing that any person denied the right to inspect a record of a public body may petition the chief administrative officer of the public body for review, file a complaint with the Department of Attorney General, or file a civil lawsuit in the superior court).

142. See 1995 Marrier Opinion, *supra* note 140; 1994 Marrier Opinion, *supra* note 139. The type of information requested in the two Marrier APRA requests does not differ materially from the information sought by Robert John Bardo when he retained the services of a private detective to obtain the home address of Rebecca Schaeffer, an aspiring actress. See Andrea Ford, *Fan Convicted of Murder in Actress's Slaying Trial: Judge Also Rules that the Obsessed Robert Bardo Lay in Wait for Rebecca Schaeffer, Requiring a Sentence of Life in Prison Without the Possibility of Parole*, L.A. TIMES, Oct. 30, 1991, at B1. Armed with Schaeffer's home address, obtained from the California Department of Motor Vehicles, Bardo shot and killed Schaeffer at her residence. See *Rebecca Schaeffer's Murder: Things that Went Wrong*, L.A. TIMES, July 29, 1989, at B9 ("It is painfully self-evident that new laws need to be immediately enacted to protect the privacy and safety of individuals by making it considerably more difficult for someone to obtain a person's home address from the DMV or any other source in order to prevent future such tragedies."). As a result of this tragedy, the United States Congress enacted the Driver's Privacy Protection Act of 1994, which prohibits a state department of motor vehicles from knowingly disclosing personal information about an individual. See 18 U.S.C. § 2721 (West 2000); see also Angela R. Karras, Note, *The Constitutionality of the Driver's Privacy Protection Act: A Fork in the Information Access*

Although ultimately denied, other document requests seemingly unrelated to governmental activities include: public employees' home addresses,<sup>143</sup> private citizens' home addresses,<sup>144</sup> mug shots,<sup>145</sup> motor-vehicle accident reports,<sup>146</sup> police investigation reports relating to a self-inflicted fatal gunshot wound,<sup>147</sup> identities

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*Road*, 52 FED. COMM. L.J. 125, 128-29 (1999). Section 27-49-3.1(b)(3) of the Rhode Island General Laws prohibits the division of motor vehicles from disclosing "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5 digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." R.I. GEN. LAWS § 27-49-3.1(b)(3) (West 2003).

143. See *Myers/Pawtucket Sch. Comm. v. R.I. Dep't of Ed.*, 1996 Op. R.I. Att'y Gen. PR 96-11 (May 23, 1996) (unofficial finding) (requesting the names and home addresses of all certified public school teachers who reside in Pawtucket), available at <http://www.riag.state.ri.us/access/docs/pr96-11u.html>; *Robinson v. Greenville Pub. Library*, 1994 Op. R.I. Att'y Gen. PR 94-24A (Dec. 19, 1994) (unofficial opinion) (seeking home addresses of members of the Greenville Public Library) (on file with author).

144. See *Anderson v. Central Falls Police Dep't*, 1998 Op. R.I. Att'y Gen. PR 98-10 (Apr. 16, 1998) (unofficial finding) (requesting automobile accident reports from the Central Falls Police Department) (on file with author) [hereinafter 1998 Anderson Finding I]; *Anderson v. Providence Police Dep't*, 1998 Op. R.I. Att'y Gen. PR 98-05 (Apr. 16, 1998) (unofficial finding) (requesting automobile accident reports from the Providence Police Department) (on file with author) [hereinafter 1998 Anderson Finding II]; *Anderson v. Pawtucket Police Dep't*, 1998 Op. R.I. Att'y Gen. PR 98-07 (Apr. 10, 1998) (unofficial finding) (requesting automobile accident reports from the Pawtucket Police Department) (on file with author) [hereinafter 1998 Anderson Finding III].

145. See *Setera v. City of Providence*, 1995 Op. R.I. Att'y Gen. PR 95-29 (Sept. 28, 1995) (unofficial opinion) (requesting mug shot), available at <http://www.riag.state.ri.us/access/docs/pr95-29.html>.

146. See *Gardner v. Westerly Police Dep't*, 1995 Op. R.I. Att'y Gen. PR 95-10 (Mar. 31, 1995) (unofficial opinion) (requesting witness statements, a diagram, and information from the injured party's daughter relating to a fatal motor-vehicle accident), available at <http://www.riag.state.ri.us/access/docs/pr95-10.html>; *Davidson v. East Greenwich Police Dep't*, 1995 Op. R.I. Att'y Gen. PR 95-08 (Mar. 9, 1995) (unofficial opinion) (requesting accident report, including a description of how the accident occurred, the accident reconstruction report, the names of all occupants, and witness statements), available at <http://www.riag.state.ri.us/access/docs/pr95-08.html>; see also *Chappell v. West Warwick Police Dep't*, 2000 Op. R.I. Att'y Gen. PR 00-17 (July 18, 2000) (unofficial finding) (requesting accident scene photographs from son's fatal motor-vehicle accident), available at <http://www.riag.state.ri.us/access/docs/pr00-17.html>.

147. See *Casey v. Johnston Police Dep't*, 2002 Op. R.I. Att'y Gen. PR 02-02 (Mar. 21, 2002) (unofficial finding) (requesting access to investigation records of suicide), available at <http://www.riag.state.ri.us/access/2002/2002upr.html>.



of non-resident students attending a local school,<sup>148</sup> a letter discussing another person's medical treatment,<sup>149</sup> names and addresses of students delinquent on repaying student loans,<sup>150</sup> and a tax return.<sup>151</sup> Particularly troubling are APRA requests by convicted criminals,<sup>152</sup> such as the APRA request made by a convicted felon for personal information concerning an individual who testified against him in a criminal proceeding,<sup>153</sup> and another by an

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148. See *Ellis v. East Greenwich Sch. Dep't*, 1994 Op. R.I. Att'y Gen. PR 94-12 (June 2, 1994) (unofficial opinion) (requesting access to the names of non-resident students who attended the East Greenwich School during the 1992-93 school year and the final amount of tuition payments made for each of those students) (on file with author).

149. See *Gormally v. Dep't of Mental Health, Retardation and Hosps.*, 1994 Op. R.I. Att'y Gen. PR 94-26 (Nov. 10, 1994) (unofficial opinion) (requesting copies of correspondence between Administrator for the Division and Executive Director of mental health facility concerning resident of the facility) (on file with author).

150. See *Derderian v. R.I. Higher Educ. Assistance Auth.*, 1995 Op. R.I. Att'y Gen. PR 95-12 (Apr. 19, 1995) (unofficial opinion) (requesting a listing of the names and addresses of all individuals who have been delinquent in paying their student loans back to the government), available at <http://www.riag.state.ri.us/access/docs/pr95-12.html>.

151. See *Howard v. R.I. Estate Tax Div.*, 1998 Op. R.I. Att'y Gen. PR 98-14 (May 28, 1998) (unofficial finding) (requesting a copy of estate tax return for deceased mother) (on file with author).

152. In 1992, inmate public records requests processed by the Department of Corrections totaled more than 1.5 million copies. See James Thomas Snyder, *Restricting Prisoners' Freedom of Information - Balancing Inmate Rights and Public Privacy Concerns*, 2000 DET. C. L. REV. 765, 771 (2000). These requests required twenty employees at a cost of \$900,000 to process and were billed to the requesting inmates at \$216,603. *Id.* at 771-72. The Department of Corrections collected a total of \$11,296. *Id.* Inmate requests also comprised at least 70% of the more than 800 public records requests to the Texas Department of Criminal Justice in 1994, *id.* at 776 n.59 (citing *Halting Inmate Requests for Records Called Unfair*, AUSTIN AM.-STATEMANN, Feb. 10, 1995, at B3), and more than 90% of the more than 6,000 outstanding public records requests at the Federal Bureau of Prisons in 1999. *Id.* at 787 n.140; see also Wichmann, *supra* note 6, at 1229 ("[P]risoners are among the most litigious classes of citizens in the country (citation omitted), and granting their requests priority review without requiring some additional showing that the requests are likely to uncover exculpatory information could have a crippling effect on the efficient functioning of FOIA.").

153. See *D'Amario v. Dep't of Admin.*, 1995 Op. R.I. Att'y Gen. PR 95-17 (May 2, 1995) (request included an accounting of time taken off from work to testify against the requester, as well as the "results of aptitude tests, health checks, eye exams, hearing tests, physical promotions, raises, bonuses, reprimands, job applications"), available at <http://www.riag.state.ri.us/access/docs/pr95-17.html>.

inmate who sought the civil service test and "all other documents" pertaining to a designated correctional officer.<sup>154</sup>

## 2. *Document Requests to Advance a Private Interest*

A far greater threat to the integrity of the APRA concerns the increasingly prevalent practice of using the APRA to advance a private interest or otherwise disrupt an agency's mission.<sup>155</sup> Indeed, these all-encompassing requests for public documents require public bodies, both large and small, to re-allocate resources away from other agency obligations.<sup>156</sup> While compliance with the APRA constitutes part of an agency's obligations, one must consider whether the General Assembly intended to require a public body to respond within ten business days to a public records request that does not advance the APRA's central purpose.<sup>157</sup>

One glaring example concerned the State of Rhode Island's landmark lawsuit against the lead paint industry. In March 2001, one month prior to a superior court trial justice's denial of the defendants' motion to dismiss the State's complaint,<sup>158</sup> the United States Chamber of Commerce<sup>159</sup> made a public records request for

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154. See *Lewis v. Dep't of Corrections*, 1994 Op. R.I. Att'y Gen. PR 94-25 (Nov. 7, 1994) (amended unofficial opinion) (requesting a copy of civil service test taken by correctional officer) (on file with author).

155. See Scalia, *supra* note 11, at 15 (noting that the FOIA "is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored"). This Article readily acknowledges that section 38-2-3(h) of the Rhode Island General Laws provides that "[n]o public records shall be withheld based on the purpose for which the records are sought" and this Article does not suggest that the requester's intent should be considered in approving or denying a public records request. Instead, this Article merely observes, perhaps contrary to common belief, that some APRA request are made for a purpose other than obtaining the requested documents.

156. *Id.* at 19 ("It is not only a good way to get scads of useful information; it is also a means of keeping the government's litigation team busy reviewing carloads of documents instead of tending to the trial of the case. The story is told of a criminal defense lawyer who negotiated a favorable plea for his client by filing an onerous FOIA request that would have taken weeks of the U.S. attorney's time.")

157. See R.I. GEN. LAWS § 38-2-7 (West 2003) (requiring public bodies to grant or deny access to requested documents within ten business days of the request, subject to a twenty business day extension for "good cause").

158. See *State v. Lead Indus. Ass'n*, C.A. No. 99-5226, 2001 WL 345830, at \*1 (R.I. Super. Ct. Apr. 2, 2001) (denying defendants' motion to dismiss).

159. Admittedly, the United States Chamber of Commerce is not a named defendant in *State v. Lead Industries Ass'n*, *id.* at \*1 n.1, but it is nonetheless apparent that the Chamber of Commerce has a vested interest in the lawsuit's outcome. The Chamber of Commerce proudly proclaims itself the "world's largest business

sixty-four categories of lead paint-related documents.<sup>160</sup> The re-

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federation representing more than three million businesses and organizations of every size, sector and region." See Press Release, United States Chamber of Commerce, United States Chamber of Commerce Seeks Information About Milwaukee's Culpability on Lead Paint (July 21, 2000), at <http://www.uschamber.com/press/releases/2000/july/00-117.html>. Furthermore, when the State of Rhode Island announced its decision to file its landmark lawsuit against the lead-paint industry, the Chamber of Commerce issued a press release "condemn[ing] Rhode Island's decision to sue the former manufacturers of lead paint." See Press Release, United States Chamber of Commerce, United States Chamber of Commerce Condemns Action Against Lead Paint Manufacturers (Oct. 14, 1999), at <http://www.uschamber.com/press/releases/1999/october/99-195.htm>.

160. The United States Chamber of Commerce's APRA request provided, in relevant part, that "[e]xcept as provided in a particular request, all records of any kind from 1950 through [March 8, 2001], are requested. Where a request contains a list of items, such list is by way of example and is not intended to be a limitation on the scope of the request." Letter from James Wooton, President, United States Chamber Institute for Legal Reform, to Rhode Island Department of Attorney General 1 (Mar. 8, 2001) (requesting records relating to lead-based paint hazards) (on file with author). The request listed the following categories verbatim:

1. All records relating to your policies and practices regarding the examination, screening, or diagnosis of children in the State of Rhode Island for lead poisoning or lead exposure.
2. All records relating to your policies and practices regarding reports of the results of the examination, screening, or diagnosis of children in the State of Rhode Island for lead poisoning or lead exposure made to the Rhode Island Department of Health, including sample medical reports or forms for reporting.
3. All records relating to your policies and practices regarding the reporting of suspected or diagnosed cases of lead poisoning or lead exposure to the Rhode Island Department of Health.
4. All records from the Rhode Island Department of Health Laboratory or any other laboratory relating to all children in the State of Rhode Island who have been diagnosed with lead poisoning or lead exposure.
5. All records, reports, or compilations of children in the State of Rhode Island found to have lead poisoning or lead exposure.
6. All records relating to medical records or reports of children in the State of Rhode Island found to have lead poisoning or lead exposure.
7. All records relating to your policies or practices regarding notifying the parents or legal guardians of children who have been diagnosed with lead poisoning or lead exposure.
8. All records relating to attempted or actual notification of the parents or legal guardians of children diagnosed with lead poisoning or lead exposure.
9. All other records relating to the screening of children in the State of Rhode Island for lead poisoning or lead exposure not covered in Requests Nos. 1-8 above.
10. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 1-9 above.

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11. All records relating to your policies and practices regarding the medical treatment and monitoring of children in the State of Rhode Island diagnosed with lead poisoning or lead exposure.
  12. All records relating to guidelines or policies of the Rhode Island Department of Health Childhood Lead Poisoning Prevention Program regarding the medical treatment and monitoring of children in the State of Rhode Island diagnosed with lead poisoning or lead exposure.
  13. All records relating to the medical treatment and monitoring of individual children in the State of Rhode Island diagnosed with lead poisoning or lead exposure.
  14. All records relating to and/or data compiled or stored using the methods of the Systematic Tracking of Elevated Lead Levels and Remediations ("STELLAR") developed by the Centers for Disease Control or any other methods of keeping records regarding the diagnosis, medical treatment, and monitoring of children in the State of Rhode Island diagnosed with lead poisoning or lead exposure.
  15. All records relating to your policies or practices applicable in the event the parent or guardian of a child diagnosed with lead poisoning or lead exposure fails to seek treatment for that child.
  16. All records relating to specific incidents where the parent or guardian of a child in the State of Rhode Island diagnosed with lead poisoning or lead exposure failed to seek treatment for that child.
  17. All records relating to your policies or practices applicable in the event health care providers fail to treat or monitor a child diagnosed with lead poisoning or lead exposure in accordance with any rules or regulations concerning lead poisoning prevention or any guidelines or policies of the Rhode Island Health Department Childhood Lead Poisoning Prevention Program.
  18. All records relating to specific incidents where a health care provider failed to treat or monitor a child diagnosed with lead poisoning or lead exposure in accordance with the rules and regulations for lead poisoning prevention or any guidelines or policies of the Rhode Island Health Department Childhood Lead Poisoning Prevention Program.
  19. All other records relating to the medical treatment and monitoring of children in the State of Rhode Island diagnosed with lead poisoning or lead exposure not covered in Request Nos. 11-18 above.
  20. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 11-19 above.
  21. All records relating to your policies or practices regarding the evaluation and inspection of dwelling units, rooming units, structures or parts thereof, buildings, premises or properties in the State of Rhode Island for the presence of deteriorated paint, lead-based paint, lead-contaminated dust, or any actual or potential lead-based paint hazard including, but not limited to copies of all Comprehensive Environmental Lead Inspections, copies of all Limited Environmental Lead Inspections and copies of all Environmental Lead Assessments, or comparable inspection or assessments, however denominated.
  22. All records relating to the evaluation or investigation of any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island for the presence of deteri-

quest was tendered to at least five state agencies and several City

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- orated paint, lead-based paint, lead-contaminated dust, or any actual or potential lead-based paint hazard.
23. All records relating to the detection and/or reporting of deteriorated paint, lead-based paint, lead-contaminated dust, or any actual or potential lead-based paint hazard in any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island.
  24. All records relating to lead-based hazard reduction measures implemented or to be implemented in any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island.
  25. All records relating to complaints or notices submitted to your agency alleging the presence of deteriorated paint, lead-based paint, lead-contaminated dust, or any actual or potential lead-based paint hazard in any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island.
  26. All records relating to complaints or notices filed with your agency seeking the maintenance or repair of deteriorated paint, lead-based paint, friction surfaces, impact surfaces, lead-contaminated dust or any actual or potential lead-based paint hazard in any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island.
  27. All records relating to the actual or alleged violation of any statutes, codes, rules, regulations, ordinances or orders pertaining to maintenance, evaluation, reduction, interim controls, abatement or any other procedure designed to reduce human exposure or likely exposure to lead-based paint hazards in any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island.
  28. All other records relating to the evaluation of any dwelling, dwelling unit, rooming unit, structure or part thereof, building, premises or property in the State of Rhode Island for any actual or potential lead-based hazard not covered in Requests Nos. 21-27 above.
  29. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 21-28 above.
  30. All records relating to your policies and practices regarding the training, certification and/or licensing of any person who performs lead-based hazard evaluations.
  31. All records relating to your policies and practices regarding the training, certification and/or licensing of any person who implements lead-based hazard reduction measures.
  32. All records relating to your policies and practices regarding the monitoring and supervision of the lead-based hazard evaluations performed or lead-based hazard reduction measures implemented by persons to whom licenses, certifications and/or permits were issued by the Rhode Island Department of Health.
  33. All records relating to complaints of negligent or otherwise improper lead-based hazard evaluations or implementation of lead-based hazard reduction measures in the State of Rhode Island.

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34. All records relating to any disciplinary action taken against any person who performs lead-based hazard evaluations and/or implements lead-based hazard reduction measures, including, but not limited to any revocation, suspension, cancellation or denial of any certification or license.
  35. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 30-34 above.
  36. All records relating to your policies or practices regarding the assessment and/or selection of procedures for conducting lead-based hazard evaluations of real property in the State of Rhode Island, including but not limited to the methods for examining, sampling or testing painted, varnished or other finished surfaces, water, interior dust, soil or other materials that may contain lead.
  37. All records relating to your policies and practices regarding the selection of lead-based hazard reduction measures to be implemented in real property in the State of Rhode Island, including but not limited to methods of removing lead-based paint and lead-contaminated dust, containing or encapsulating lead-based paint, replacing lead-painted surfaces or fixtures, and cleaning, repairing and monitoring lead-based paint hazards.
  38. All records documenting the implementation of lead-based hazard reduction measures in real property in the State of Rhode Island.
  39. All records relating to your policies and practices regarding the issuance of permits, licenses or certifications to implement lead-based hazard reduction measures in the State of Rhode Island.
  40. All records relating to agreements between the State of Rhode Island or the City of Providence and/or its subparts and any entity or person regarding the implementation of lead-based hazard reduction measures in real property in the State of Rhode Island.
  41. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 36-40 above.
  42. All records relating to your policies and practices regarding the issuance of orders or notices requiring the reduction or elimination of lead-based paint hazards in the State of Rhode Island.
  43. All records concerning your policies and practices relating to the enforcement of notices or orders requiring the reduction or elimination of lead-based paint hazards, including but not limited to the issuance and/or prosecution of citations of any person for non-compliance with such notices or orders or for violations of applicable reduction measures.
  44. All records relating to any notice or order issued by the State of Rhode Island or City of Providence requiring the reduction or elimination of lead-based paint hazards.
  45. All records relating to the actual enforcement of notices and/or orders requiring the reduction or elimination of lead-based paint hazard in the State of Rhode Island, including but not limited to records relating to the citation and/or prosecution of any person for non-compliance with such notices and/or orders or for violations of applicable reduction measures.

46. All records relating to your policies and practices regarding the assessment of civil or criminal penalties for non-compliance with statutes, rules, regulations or ordinances regarding lead-based hazard evaluation or reduction in the State of Rhode Island.
47. All records of assessments of civil or criminal penalties for non-compliance with statutes, codes, rules, regulations, or ordinances regarding evaluation or reduction in the State of Rhode Island.
48. All other records relating to the enforcement of statutes, codes, rules, regulations, ordinances, notices or orders regarding evaluation or reduction in the State of Rhode Island not covered in Requests Nos. 42-47 above.
49. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 42-48 above.
50. All records relating to communication, cooperation or collaboration between the State of Rhode Island and/or the City of Providence and any community based organization, non-profit organization, or other private and/or public entity, including but not limited to the Childhood Lead Action Project, the HELP Lead Safe Center, and the Greater Elmwood Neighborhood Housing Service, regarding lead-based paint hazard, evaluation or reduction.
51. All records relating to any funding provided by the State of Rhode Island or City of Providence to any community based organization, non-profit organization, or other private and/or public entities, including but not limited to the Childhood Lead Action Project and the HELP Lead Safe Center, for lead-paint evaluation or reduction.
52. All records relating to funding provided by the State of Rhode Island or the City of Providence to any individuals for lead-paint evaluation or reduction.
53. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 50-52 above.
54. All records relating to any funding received by the State of Rhode Island or City of Providence for evaluation or reduction.
55. All records relating to any appropriations or other funds the State of Rhode Island and/or City of Providence made available to itself for evaluation or reduction.
56. All records relating to any funding or appropriations for the Residential Rental Property Lead-Based Paint Hazard Control Pilot Project, if any.
57. All records relating to your policies regarding the retention or destruction of records of the type requested in Requests Nos. 54-56 above.
58. All records relating to past, current, and estimated future expenditures by the State of Rhode Island or City of Providence for evaluation, reduction, screening, and medical treatment and/or ongoing care of children diagnosed with lead poisoning or lead exposure.
59. All records relating to the past, current, and/or estimated future financial cost to the State of Rhode Island or City of Providence of providing subsidies, grants, or any type of financial assistance to persons or entities for evaluation, reduction, screening, and medical treat-

of Providence departments and was so broad that it encompassed *any* record relating to lead paint since 1950.

Collectively, the state agencies estimated that the search and retrieval of the requested information would require approximately one-and-a-half million documents and consume 2,641 hours, or 377 workdays.<sup>161</sup> When apprised of the state agencies' estimate that search, retrieval, and photocopying costs would exceed \$250,000, and that prepayment was required,<sup>162</sup> the United States Chamber of Commerce declined to pursue nearly all aspects of its APRA request. The Chamber's own actions and statements in this situation, as well as other circumstances, make it clear that its APRA request was intended to intimidate the State into dropping the lead paint lawsuit.<sup>163</sup>

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ment and/or ongoing care of children diagnosed with lead poisoning or lead exposure.

60. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests Nos. 58-59 above.
61. All records relating to the past and present policies or practices of the State of Rhode Island or the City of Providence regarding the use of lead, lead pigment, and/or lead paint in the State of Rhode Island or City of Providence.
62. All records relating to your current policies regarding the retention or destruction of records of the type requested in Requests No. 61 [sic] above.
63. All records relating to the education of the general public, or any specific segments of the public, regarding lead poisoning or lead exposure, evaluation and/or reduction.
64. All records relating to your current policies regarding the retention or destruction of records of the type requested in Request No. 63 above.

*Id.* at 1-8.

161. See Letter from Rhode Island Housing and Mortgage Finance Corporation (May 4, 2001) (on file with author); Letter from the Department of Human Services (Apr. 27, 2001) (on file with author); Letter from the Department of Environmental Management (Apr. 25, 2001) (on file with author); Letter from the Department of Attorney General (Apr. 16, 2001); Letter from the Department of Health (Apr. 13, 2001) (on file with author).

162. See *Smith v. Watch Hill Fire Dist.*, 1999 Op. R.I. Att'y Gen. PR 99-15 (Oct. 19, 1999) (unofficial finding) (noting that the APRA does not prohibit a public agency from requiring pre-payment), available at <http://www.riag.state.ri.us/access/docs/pr99-15.html>.

163. A subsequent Chamber of Commerce press release acknowledged that its Rhode Island APRA request marked only the second time it relied upon a freedom of information law "to give the public all the information necessary to assess whether expensive, risky, and prolonged litigation is the way to solve these kinds of [lead paint] problems." See Press Release, United States Chamber of Commerce, U.S. Chamber Seeks Information About St. Louis Culpability on Lead Paint



A year later, in March 2002, a voluminous APRA request was forwarded to the Department of Attorney General at a time when Attorney General Sheldon Whitehouse was vying for the Democratic gubernatorial nomination.<sup>164</sup> The sixteen-category request<sup>165</sup> required State personnel to forego other government

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(Nov. 14, 2001), at <http://www.uschamber.com/press/releases/2001/november/01-192.html> [hereinafter St. Louis Press Release]. The first time the Chamber of Commerce used a freedom of information law to obtain lead paint related documents occurred when a similarly onerous request was made to the City of Milwaukee – four days before its City Council was scheduled to vote on suing the lead paint manufacturers. See Press Release, United States Chamber of Commerce, United States Chamber of Commerce Seeks Information About Milwaukee's Culpability on Lead Paint (July 21, 2000), at <http://www.uschamber.com/press/releases/2000/july/00-117.html>. When Milwaukee officials failed to fulfill the public records request within six weeks, the Chamber of Commerce sued “to compel compliance.” Press Release, United States Chamber of Commerce, U.S. Chamber Sues Milwaukee for Stonewalling Lead Paint Records Request (Aug. 16, 2000), at <http://www.uschamber.com/press/releases/2000/august/00-123.html>. Subsequently, Milwaukee officials assembled the requested records, including eighty-five boxes from its Department of Health; but, according to a City attorney, Chamber of Commerce representatives “never came and looked at it.” Peter B. Lord, *U.S. Chamber Counterattacks Lead-Paint Suit*, PROVIDENCE J., Mar. 29, 2001, at A1, available at 2001 WL 5382125 (quoting Attorney Linda Burke). Chamber of Commerce representatives have credited their public records request as causing the City of Milwaukee “to back down” from its planned lead paint lawsuit and as causing the City of Milwaukee to hold “off on pressing its suit.” *Id.* (reporting the comments of Chamber of Commerce Spokeswoman Linda Rozett and Chamber of Commerce Legal Institute Reform President James Wootton, respectively). The United States Chamber of Commerce also filed a public records request with the City of St. Louis after that City filed a lawsuit against lead paint manufacturers. See St. Louis Press Release, *supra* note 163.

164. Presumably, the true intention of this APRA request was to advance one candidate's campaign and/or to hinder another candidate's campaign. Notwithstanding the APRA request itself, this situation exemplifies one way the APRA can be applied to advance a private interest to the detriment of the public at large. For example, consider an APRA request made to a political opponent that is so voluminous that it has little chance of being fulfilled within the statutory timeframe. See *infra* note 165. After the agency fails to respond within a timely manner, the inevitable complaint is filed with the Department of Attorney General or the Rhode Island Superior Court, followed shortly by a newspaper headline that a particular candidate is accused of violating the APRA. See *Arruda v. Law Revision Office*, 2001 Op. R.I. Att'y Gen. PR 01-04 (July 10, 2001) (unofficial finding) (APRA complaint filed against House of Representatives Speaker John Harwood in June 2000, five months before November 2000 election, even though complainant obtained records from the Office of Secretary of State in May 2000), available at <http://www.riag.state.ri.us/opinion/docs/advpr01-04.htm>.

165. At the time of the request, Attorney General Sheldon Whitehouse was one of three candidates vying for the Democratic Party nomination for Governor of Rhode Island. The requests stated:

1. Please provide me with copies of all contracts with outside counsel initiated, renewed, amended, or extended by the Attorney General's office from January 5, 1999 [the day Attorney General Sheldon Whitehouse's Administration commenced] to the present.
2. Please provide me with copies of all reimbursement requests and travel advance/payment requests submitted by Sheldon Whitehouse during his term as Attorney General. This request includes copies of the original receipts in addition to the request form or invoice submitted for payment.

Letter to the Attorney General of Rhode Island, Public Records Request #1 (Mar. 20, 2002) (on file with author);

- [3] Copies of all correspondence between the Attorney General's Office and Robert Goldberg, Thomas Hanley, Alan Goldman, Peter McGinn, Patrick Lynch (after leaving the AG's Office), Casby Harrison, Richard Licht, Lynda Barr, Eustace Pliakas, Lynda Izzo, Mary Smith, and Gayle J. Wolf, regarding the state of Rhode Island's enforcement of tobacco [ ] regulations; proposed new federal or state regulations or legislation regarding tobacco; any litigation or proposed litigation involving tobacco companies, including RJ Reynolds, Phillip Morris, and US Smokeless Tobacco/UST.
- [4] Copies of all correspondence between the Attorney General's Office and Joseph Walsh, Casby Harrison, Richard Licht, Lynda Barr, Eustace Pliakas, Lynda Izzo, Mary Smith, and Gayle J. Wolf, regarding the state of Rhode Island's enforcement of insurance regulations; proposed federal or state regulations or legislation regarding insurance; any litigation or proposed litigation involving insurance-related businesses, including Blue Cross-Blue Shield, Care New England, Harvard Pilgrim, Lifespan and United Healthcare.
- [5] Copies of all correspondence between the Attorney General's Office and Peter McGinn, Alan Goldman, Brian Goldman, Gerald Harrington, John Hogan, Joseph Walsh, Casby Harrison, Richard Licht, Lynda Barr, Eustace Pliakas, Lynda Izzo, Mary Smith, and Gayle J. Wolf, regarding the state of Rhode Island's enforcement of liquor, beer and wine regulations; proposed federal or state regulations or legislation regarding liquor, beer and wine; any litigation or proposed litigation involving liquor, beer and wine related businesses; any proposed modifications to the state's drunk driving laws, including recent bills in the state legislature regarding the lowering of the state's legal blood-alcohol limit.
- [6] Any correspondence between the Attorney General's Office and R. Horan of the Horan Law Office, Joseph Walsh, Casby Harrison, Eustace Pliakas, Lynda Izzo, Gayle J. Wolf, Richard Licht, Gerald Harrington, John Hogan, Brian Andrews, or Donald Sweitzer regarding the expansion of gambling facilities, including any proposed or enacted increases in gambling machines or regarding the jurisdiction of the State Lottery Commission.
- [7] Any correspondence between the Attorney General's Office and Robert Goldberg, Gerald Harrington or John Hogan regarding the state's litigation against lead paint manufacturers.

Letter to the Attorney General of Rhode Island, Public Records Revised Request #2 (Apr. 2, 2002) (on file with author);

matters and to devote several hundred hours of government time

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- [8] Copies of documents that show annual conviction rates for all criminal charges filed by the Attorney General's Office from 1991 to the present. For each criminal offense tracked by the Attorney General's Office, please show the number of cases filed, the number of cases that ended in a conviction, the number of cases that went to trial and the number of cases that went to trial that ended in a conviction.
- [9] Copies of documents that show the total number of civil environmental and consumer fraud case filed by the Attorney General's Office from 1991 to the present, along with the number of cases that ended in a penalty, the number of cases that went to trial and the number of cases that went to trial that ended in a penalty.
- [10] Copies of documents that show the case numbers and defendant name for all murder charges filed by the Attorney General's Office from January 5, 1999 to the present, and the disposition of each of those cases (including the length of sentence).
- [11] Copies of documents that show the case numbers and defendant name for all criminal cases filed by the Attorney General's Office in Gun Court from January 5, 1999 to the present, along with the disposition of each of those cases (including the length of sentence, amount of fine, etc.).
- [12] Copies of documents that show the case number and defendant name for all other firearm charges filed by the Attorney General's Office from January 5, 1999 to the present, along with the disposition of each of those cases (including the length of sentence, amount of fine, etc.).
- [13] Copies of documents that show the case number and defendant name for all domestic violence cases filed by the Attorney General's Office, including the Domestic Violence/Sexual Assault Unit, from January 5, 1999 to the present, along with the disposition of each of those cases (including the length of sentence, amount of fine, restitution, etc.).

Letter to the Attorney General of Rhode Island, Public Records Request #3 (Mar. 20, 2002) (on file with author);

- [14] Documents that show all positions taken by the Attorney General's Office on state, federal and municipal legislation since January 5, 1999. This includes any legislation drafted with the assistance of the Attorney General's Office, any legislation sponsored by the Attorney General's Office, any legislation otherwise supported, any legislation opposed, and any testimony given by the Attorney General's Office in favor or against legislation.
- [15] Copies of all amicus curiae briefs filed or signed by the Attorney General's Office from January 5, 1999 to the present.

Letter to the Attorney General of Rhode Island, Public Records Request #4 (Mar. 20, 2002) (on file with author).

- [16] Copies of all opinions drafted by the Attorney General's Office from January 5, 1999 to the present.

Letter to the Attorney General of Rhode Island, Public Records Request #5 (Mar. 25, 2002) (on file with author).

to search, retrieve, and photocopy documents, presumably to benefit a political campaign.<sup>166</sup> Other requests are equally onerous.

For example, law firms and other commercial entities tender open-ended or ongoing APRA requests to police departments for all motor-vehicle accident reports, complete with the names, home addresses, and telephone numbers of injured passengers.<sup>167</sup> These requests shed no light on government activities and instead are arguably intended for solicitation of business. In another situation, during a one-month time period, a local water authority received six separate APRA requests from one person, requiring an estimated 132 hours of search and retrieval to locate 10,796 documents.<sup>168</sup>

Undoubtedly, in most cases, these records constituted public records, but were sought to advance a private interest. However, unlike other APRA requests, the issue confronted when a party seeks public records to advance a private interest is the extent to which Rhode Islanders' are willing to allow the APRA to be used for a purpose outside its central purpose and to the public's detriment.<sup>169</sup> As demonstrated by the United States Chamber of Commerce's APRA request, these types of all-encompassing requests

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166. Section 38-2-4(b) of the Rhode Island General Laws permits a public body to charge a maximum of fifteen dollars per hour, with the first hour free, for "a search and retrieval." R.I. GEN. LAWS § 38-2-4(b) (1997). Accordingly, although Department of Attorney General personnel may have spent several hundred hours on this APRA request, because the actual searching and retrieving for public records consisted only of ninety-one hours, the search and retrieval charge was limited to this aspect. See Letter from Michael W. Field, Special Assistant Attorney General, Rhode Island Department of Attorney General (May 9, 2002) (on file with author). This Article also notes that it cannot be independently confirmed that the instant request was propounded "to benefit a political campaign." Nonetheless, the focus of the requested documents, as well as the timing of the APRA request to the Department of Attorney General, certainly could lead one to this conclusion.

167. See, e.g., 1998 Anderson Finding I, *supra* note 144; 1998 Anderson Finding II, *supra* note 144; 1998 Anderson Finding III, *supra* note 144.

168. See Letter to Board of Directors, Kent County Water Authority (Sept. 14, 2001) (on file with author); Letter to Board of Directors, Kent County Water Authority (Aug. 31, 2001) (on file with author); Letter to Attorney Joseph J. McGair (Aug. 26, 2001); Letter to Timothy J. Brown, P.E. General Manager/Chief Engineer, Kent County Water Authority (Aug. 13, 2001) (on file with author); Letter to Timothy J. Brown, P.E. General Manager/Chief Engineer, Kent County Water Authority (Aug. 13, 2001) (on file with author).

169. See Cate et al., *supra* note 10, at 65 ("[T]he FOIA has been extended by requesters, agencies, litigants, and courts far beyond its original purpose. Indeed, the vast majority of requests under the Act seek no information about the activi-

often require agencies to divert resources with little or no corresponding benefit to the public.<sup>170</sup>

### III. LEGISLATIVE INITIATIVES TO ACHIEVE THE ACCESS TO PUBLIC RECORD ACT'S CENTRAL PURPOSE

#### A. *The Balancing Test*

The APRA has long been criticized for not containing a "balancing test" similar to that embodied within the FOIA.<sup>171</sup> Supporters of such a test claim that "[t]he test is a balance . . . between the public's right to know and the individual's right to privacy."<sup>172</sup> The argument continues that "[w]ithout the balancing test, state officials are left with little guidance when it comes to many aspects of state government."<sup>173</sup> These contentions are seriously misdirected.

As presently interpreted, the APRA already encompasses a balancing test.<sup>174</sup> In fact, this balancing procedure was recognized

ties of the government, but rather information about business competitors, opposing parties in litigation, and the activities of other nongovernmental entities.").

170. One of the main reasons why an agency must reprioritize daily governmental business in order to satisfy a public records request is because of the APRA's timeframes. Regardless of how voluminous an APRA request may be, and without consideration to the resources or mission of a public body, the APRA requires that an agency respond to a request within ten business days, which can be extended for "good cause" an additional twenty business days. R.I. GEN. LAWS § 38-2-7(a) (West 2003). After the twenty business day extension, the APRA does not allow an agency to further extend the time to respond under any circumstances. R.I. GEN. LAWS § 38-2-7(b) (West 2003) ("Except that for good cause, this limit may be extended for a period not to exceed thirty (30) business days."). Cf. 5 U.S.C. § 552 (a)(6)(C) (1996) ("If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.").

171. See Bruce Landis, *Open Records Bills 'On Ice for this Year,'* PROVIDENCE J., Apr. 1, 1999, at B1; Christopher Rowland, *Almond Orders Disclosure of Union Records After Firestorm,* PROVIDENCE J., Mar. 20, 1999, at A1; Bruce Landis, *Advocates of Open Government See Progress on Records Law,* PROVIDENCE J., July 19, 1998, at A15 [hereinafter *Progress on Records Law*].

172. Landis, *Progress on Records Law*, *supra* note 171, at A15.

173. Rowland, *supra* note 171, at A5.

174. See *supra* note 57 and accompanying text. Some may contend that the decision in *Providence Journal Co. v. Convention Center Authority*, 774 A.2d 44 (R.I. 2001), overruled the balancing test articulated in *Kane* and reaffirmed in *DARE*. This argument is premised upon the Rhode Island Supreme Court's observation that it "has previously held that applicability of APRA to records held by a public body is not determined by a balancing test. Simply put, the records are

in *Providence Journal Co. v. Kane*, where *The Providence Journal* was denied records pertaining to individual state employees.<sup>175</sup> A superior court trial justice ruled that the requested documents “relat[ed] to identifiable individuals” and, therefore, were exempt from public disclosure.<sup>176</sup> The Providence Journal Company appealed the trial justice’s decision, and in its brief to the Rhode Island Supreme Court, argued that based upon the APRA’s stated purpose “the Legislature clearly recognized the need to balance the legitimate, competing interest of disclosure and privacy.”<sup>177</sup> In other words, despite the applicability of the identifiable records exemption, the newspaper urged the supreme court to remand the matter to the superior court in order to balance the competing interests and to find “some or all of the [r]ecords . . . subject to disclosure.”<sup>178</sup>

The supreme court rejected The Providence Journal Company’s argument that the trial justice erred in *Kane* by not performing the balancing test, but expressly recognized its argument

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subject to public disclosure unless they fall within one of the enumerated exceptions contained in APRA.” *Id.* at 46. Any argument that the balancing test was overruled in *Convention Center Authority* is misguided. The *Convention Center Authority* court did not apply the balancing test analysis itself, and accordingly, never reached this issue. Instead, the supreme court concluded that the balancing test-type analysis performed by the motion justice was in error. *See id.* at 45-46 (noting that “the hearing justice[’s finding] . . . that the release of the requested records would hurt the Authority’s competitive advantage and conflict with its statutory mission to operate as profitably as possible” has “no bearing on whether records held by a public body are subject to disclosure under APRA”). Specifically, the supreme court observed the motion justice’s determination that the requested documents were exempt from disclosure because they contained “information that people presume will be kept confidential when they are engaging in the negotiating process.” *Id.* at 44. This determination by the motion justice, rather than determining whether the affected documents fell within the ambit of any enumerated exemptions, conflicts with *Kane* and *DARE* wherein the supreme court opined that “[a]ny balancing of interests arises *only after* a record has first been determined to be a public record.” *Id.* at 46 (emphasis added) (quoting *Providence Journal Co. v. Kane*, 577 A.2d 661, 663 (R.I. 1990)). Accordingly, the supreme court’s admonition relates to the motion justice’s decision to proceed directly to the balancing test, rather than first determine the applicability of the enumerated exemptions.

175. *See Providence Journal Co. v. Kane*, 577 A.2d 661, 663 (R.I. 1990).

176. *Id.* at 662.

177. Appellant’s Brief at 4-5, *Providence Journal Co. v. Kane*, 577 A.2d 661 (R.I. 1990) (No. 89-317A).

178. *Id.* at 19.

that the APRA does contain a balancing test.<sup>179</sup> Specifically, the supreme court stated:

There is no public interest to be weighed in disclosure of non-public records. Consequently, the trial court's "failure to balance interest" does not in any way constitute an error of law. *Any balancing of interests arises only after a record has first been determined to be a public record.*<sup>180</sup>

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179. *Kane*, 577 A.2d at 663.

180. *Id.* (emphasis added). It may seem inconsistent that a pro-disclosure law like the APRA requires a balancing test for records that do not fall within an exemption in order to determine if the document should be exempt due to a privacy interest, but does not require a balancing test for records that do fall within an exemption in order to assess whether the document should be disclosed due to the public's interest. However, a subjective balancing test should not be permitted to nullify a legislative determination that documents falling within an enumerated exemption are not public records, or stated another way, "[t]here is no public interest to be weighed in disclosure of nonpublic records." *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218 (R.I. 1998) (quoting *Providence Journal Co. v. Kane*, 577 A.2d 661, 663 (R.I. 1990)); see also *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989) ("Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction."). Furthermore, the present balancing test recognizes that it is impossible for the General Assembly to legislate every permutation of any document maintained by a governmental entity. For example, the Rhode Island General Laws do not address whether the identity of an adult victim of sexual assault can be publicly released. Nonetheless, after balancing the public interest in disclosure versus the privacy interest of the adult victim, there is almost universal agreement that disclosing the identity of an adult sexual assault victim would unduly infringe upon the victim's privacy interests without advancing the public interest. Without a balancing test to consider this type of factual permutation, as well as a myriad of other issues not expressly addressed within the General Laws, the APRA would require disclosing the adult victim's identity. In February 2003, it was reported that legislation would be introduced during the 2003 legislative session to make clear that "any record not specifically exempt' from disclosure, should be made available upon request." Katherine Gregg, *Irons Bucks Murphy, Favors Release of Employee Records*, PROVIDENCE J., Feb. 5, 2003 at A5, available at 2003 WL 7054065. If such legislation was enacted, it would almost certainly overrule the supreme court's balancing test articulated in *Kane* and *DARE*, and would place an affirmative duty upon the General Assembly to exempt expressly documents from public disclosure. For example, consider just one type of document, a police record. Should the proposed amendment pass, the General Assembly would place itself in a position of determining what information might possibly be contained within a police report and assess whether such information should be a public record. Home addresses; home telephone numbers; the identities of witnesses, including juveniles; the names of crime victims, including adult victims of sexual assault; and mug shots represent only the beginning of the issues that must be considered with respect to police records. The same type of

The court reaffirmed the balancing test in *DARE*.<sup>181</sup>

Accordingly, pursuant to *Kane* and *DARE*, if a requested record falls within one of the twenty-three enumerated exemptions, that document is exempt from public disclosure and no balancing test is performed.<sup>182</sup> If a requested record does not fall within the enumerated exemptions, the document is presumed a public record, but a balancing test is performed to determine whether the individual's privacy interest outweighs the public's interest in disclosure.<sup>183</sup> If an individual's privacy interest outweighs the public's disclosure interest, the document (or portions thereof) are exempt from public disclosure.<sup>184</sup>

The "balancing test" amendment arguments are faulty on other grounds. Notwithstanding the supreme court's recognition that a balancing test must be performed on otherwise public records, the APRA already contains two provisions that require a balancing of interests. In particular, section 38-2-2(4)(i)(D) of the Rhode Island General Laws provides that all records maintained by law enforcement agencies for criminal law enforcement must be disclosed, unless the document falls within one of six categories, including where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>185</sup> Another example is section 38-2-2(4)(i)(F), which exempts "[s]cientific and technological secrets and the security plans of military and law enforcement agencies, the disclosure of which would endanger the public welfare and security."<sup>186</sup>

When supporters suggest that the APRA contain a balancing test similar to the FOIA, presumably these arguments refer to

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speculative analysis must also be conducted concerning all other types of documents government may possess.

181. *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d at 225 ("We also reject *DARE*'s contention that if any document falls within the APRA's enumerated exceptions . . . the terms of the APRA[] require the administrative agency to demonstrate that the relevant privacy interests outweigh the public's right to access the records. In *Kane* we rejected a similar argument, stating that "[t]here is no public interest to be weighed in disclosure of nonpublic records . . . . Any balancing of interests arises only after a record has been determined to be a public record." (quoting *Kane*, 577 A.2d at 663)).

182. See *supra* note 56 and accompanying text. *Direct Action for Rights & Equal.*, 713 A.2d at 225; *Kane*, 577 A.2d at 663.

183. LYNCH, *supra* note 54.

184. See *supra* note 59.

185. R.I. GEN. LAWS § 38-2-2(4)(i)(D)(c) (West 2003).

186. R.I. GEN. LAWS § 38-2-2(4)(i)(F) (West 2003) (emphasis added).



amending the identifiable records exemption to contain language similar to 5 U.S.C. § 552(b)(6), which allows federal agencies to exempt from public disclosure “personnel and medical files and similar files *the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.*”<sup>187</sup> The trouble with

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187. 5 U.S.C § 552(b)(6) (1996) (emphasis added). Cf. R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003) (exempting “[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee”). Balancing test amendments to section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws have been proposed in nearly every legislative year since at least 1998. See H. 6956, 2002 Gen. Assem., Jan. Sess. (R.I. 2002) (amending R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) to exempt all records “protected by a client/attorney or doctor/patient relationship, and records reflecting personal or medical or psychological facts, personal finances, welfare, employment security, student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body *where the disclosure would constitute a clearly unwarranted invasion of privacy*” (emphasis added)); H. 5819, 2002 Gen. Assem., Jan. Sess. (R.I. 2002) (employs identical language to H. 6956, 2002 Gen. Assem., Jan. Sess. (R.I. 2002)); H. 5944, 2001 Gen. Assem., Jan. Sess. (R.I. 2001) (“The intent of this section is to recognize that there exists a general presumption that a record is public unless there is a specific statutory exemption or privilege applicable to that record. In determining whether all or any portion of a record is a ‘public’ record, the fact finder must balance the need for public accountability with the need to protect both public safety and individual rights to privacy.”); H. 5819, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(iv)(A)(I) (R.I. 1999) (employs identical language to H. 6956, 2002 Gen. Assem., Jan. Sess. (R.I. 2002)); H. 5950, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(iv)(A)(I) (R.I. 1999) (creating exemption for “[r]ecords relating to an individual in any files including information relating to personal finances, welfare, employment security, student performance, or information in personnel files maintained to hire, evaluate, promote, or discipline any employee of a public body *where the disclosure would constitute an ‘unwarranted invasion of personal privacy’*” (emphasis added)); S. 0336, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(i)(A)(I) (R.I. 1999) (exempting applicable records only where “the disclosure would constitute an ‘unwarranted invasion of personal privacy’”); S. 2652, 1998 Gen. Assem., Jan. Sess. § 38-2-2(4)(iv)(A)(I) (R.I. 1998) (exempting applicable records only “where the subject’s personal right to privacy outweighs the public interest in access to those records or the records are otherwise exempted from disclosure by statute”); S. 2393, 1998 Gen. Assem., Jan. Sess. § 38-2-2(4)(iv)(A)(I) (R.I. 1998) (exempting applicable records only “where the subject’s personal right to privacy outweighs the public interest in access to those records or the records are otherwise exempted from disclosure by statute”); H. 7888, 1998 Gen. Assem., Jan. Sess. § 38-2-2(4)(iv)(A)(I) (R.I. 1998) (exempting applicable records only “where the subject’s personal right to privacy outweighs the public interest in access to those records or the records are otherwise exempted from disclosure by statute”); H. 6022, 1997 Gen. Assem., Jan. Sess. § 38-2-2(d)(1) (R.I. 1997) (exempting applicable records only “where the subject’s personal right to privacy *clearly* outweighs the public interest in access to those records or the records are otherwise exempted from disclosure by statute” (emphasis added)); S. 0395, 1997 Gen. Assem., Jan. Sess. § 38-2-2(d)(1) (R.I. 1997) (exempting applicable records only “where the subject’s per-

amending the identifiable records exemption to include a balancing test similar to section 552(b)(6) is that the state and federal laws are not compatible.<sup>188</sup>

The class of documents exempted pursuant to section 552(b)(6) is narrow and carefully defined to include only "personnel and medical files and similar files."<sup>189</sup> As a result, the balancing test applies only to this narrow class of documents. In comparison, section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws defines a much broader class of documents, exempting "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee."<sup>190</sup> Accordingly, any balancing test must apply literally to any document maintained by the government that is identifiable to an "applicant for benefits, client, patient, student, or employee."<sup>191</sup> The non-exclusive text of the identifiable records exemption provides some insight concerning the reach of a balancing test, which includes records relating to medical treatment, welfare, employment security, students, all personal or medical information, psychological facts, personal finances, attorneys/clients, and doctors/patients.<sup>192</sup>

Furthermore, those advocating some sort of balancing test must be forewarned that an undefined subjective test will have ramifications.<sup>193</sup> It is easy to envision a scenario where a requesting party performs a balancing test to conclude that the public's

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sonal right to privacy outweighs the public interest in access to those records or the records are otherwise exempted from disclosure by statute").

188. Compare R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (1997 & Supp. 2002) (exempting "[a]ll records which are identifiable to an individual applicant for benefits, client, patient, student, or employee"), with 5 U.S.C. § 552(b)(6) (1996) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

189. 5 U.S.C. § 552(b)(6).

190. R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I).

191. *Id.*

192. *See id.*

193. *See generally* H. 5950, 1999 Gen. Assem., Jan. Sess. § 38-2-2(7) (R.I. 1999) (defining "unwarranted invasion of personal privacy" to include disclosing employment, medical, credit histories, or personal references of applicants for employment; revealing medical or personal records of a client or patient in a health care or human service provider; selling or releasing names and addresses for commercial or fundraising purposes; disclosing information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of an agency; and disclosing medical information of a person with a disability that is either required to be provided or the result of a person with a disability filing a discrimination complaint).

interest in disclosure outweighs an employee's privacy interest, while on the other side of the equation, the governmental entity performs the same test only to arrive at a contrary result. The differing conclusions will undoubtedly lead to an influx of complaints and litigation alleging wrongful denial.

Understandably, judges have expressed concern when faced with the prospect of *ad hoc* balancing tests.<sup>194</sup> In one case involving the balancing of interests, a United States Circuit Court of Appeals for the District of Columbia concurring opinion noted that "the judiciary is ill-equipped to make value-laden judgment calls such as assessing the extent of the 'public interest.'"<sup>195</sup> On certiorari, the United States Supreme Court acknowledged the majority's concern about "assigning federal judges the task of striking a proper case-by-case, or *ad hoc* [ ] balance," and observed that its own cases "provide support for the proposition that categorical decisions may be appropriate . . . when a case fits into a genus in which the balance characteristically tips in one direction."<sup>196</sup>

Rather than amending the APRA to include a far-reaching balancing test that even proponents acknowledge will lead to unforeseen results,<sup>197</sup> the APRA should identify those records, consistent with the APRA's central purpose, that the General Assembly wishes to make public. The framework for such a proposal already exists within section 38-2-2(4)(i)(A)(I) where fourteen categories of

194. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527 (1996) (Thomas, J., concurring) (noting the "inherently nondeterminative nature of a case-by-case balancing 'test' unaccompanied by any categorical rules, and the consequent likelihood that individual judicial preferences will govern application of the test"); *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (noting that in the area of the First Amendment "fairly precise rules are better than more discretionary and more subjective balancing tests"); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) ("[T]he use of . . . traditional legal categories is preferable to the sort of *ad hoc* balancing [tests]."); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) ("For my sins, I will probably write some . . . opinions that use [balancing tests], [a]ll I urge is that th[e]se modes of analysis be avoided where possible.").

195. *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 744 (D.C. Cir. 1987) (Starr, J., concurring in the judgment and concurring in part), *rev'd*, 489 U.S. 749 (1989).

196. *Reporters Comm.*, 489 U.S. at 776.

197. See Landis, *Progress on Records Law*, *supra* note 171, at A15 ("[S]upporters could not explain how the balancing test would work in Rhode Island.").

employee records are deemed public.<sup>198</sup> This list could easily be amended to include additional employee-related documents.

Nonetheless, if a balancing test is to be included within section 38-2-2(4)(i)(A)(I), the identifiable records exemption must be amended to narrow the class of documents affected.<sup>199</sup> Documents related to the attorney/client relationship, the doctor/patient relationship, medical treatment, personal finances, and students are some examples of records that should not trigger a balancing of interests. To accomplish this bifurcation, section 38-2-2(4)(i)(A)(I) could set forth two exemptions. The first exemption would apply to records identifiable to individual employees, but only if the employee's privacy interests outweighs the public's interest in disclosure.<sup>200</sup> The second exemption would apply to all records identifiable to non-employees and would not contain a balancing test. This bifurcation would recognize situations where the public interest in disclosing certain employee records may outweigh an employee's privacy interests, yet still protect the heightened pri-

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198. See R.I. GEN. LAWS § 38-2-2(4)(i)(A)(I) (West 2003) ("With respect to employees, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and other remuneration in addition to salary, job title, job description, dates of employment, and positions held with the state or municipality, work location, business telephone number, the city or town of residence, and date of termination shall be public.").

199. See ARK. CODE ANN. § 29-19-105(b)(12) (Michie 2002) (exempting "[p]ersonnel records to the extent that disclosure would constitute clearly unwarranted invasion of personal privacy"); CAL. GOV'T CODE § 6254(c) (West 1995) (exempting "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy"); CONN. GEN. STAT. ANN. § 1-210(b)(2) (West 2000) (exempting "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy"); DEL. CODE ANN. tit. 29, § 1002(d)(1) (1997) (exempting "[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy"); IND. CODE ANN. § 5-14-3-4(b)(8) (West 2002) (exempting "[p]ersonnel files of public employees and files of applicants for public employment, except for the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency; information relating to the status of any formal charges against the employee; and information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged").

200. Subjecting employee records to a balancing test does not prohibit the General Assembly from delineating employee records that are categorically exempt from public disclosure. See, e.g., MD. CODE ANN. STATE GOV'T § 10-616(d) (1999) ("A custodian shall deny inspection of a letter of reference.").

vacy interests of other individuals whose information may be contained within government documents.

### B. *Exemptions and Other Procedural Amendments*

Since its enactment in 1979, the APRA has been amended sixteen times.<sup>201</sup> Despite the almost constant attention legislators

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201. See 2000 R.I. Pub. Laws ch. 430 § 1 (adding that records required to be maintained may not be substituted by a "real-time" translation reporter); 1999 R.I. Pub. Laws ch. 130 § 85 (amending section 38-2-2(4)(i)(V) of the Rhode Island General Laws to substitute "TELE - TEXT" devices for "telecommunication" devices); 1999 R.I. Pub. Laws ch. 83 § 85 (amending section 38-2-2(4)(i)(V) of the Rhode Island General Laws to substitute "TELE - TEXT" devices for "telecommunication" devices); 1998 R.I. Pub. Laws ch. 378 § 1 (amending the purpose section; requiring access to electronic records; altering language in four exemptions, among which included mandating that reports reflecting the initial arrest of an adult be public; increasing the first thirty minutes to the first hour of search and retrieval at no charge; allowing attorney's fees, costs, and production of documents at no cost to a prevailing plaintiff; and amending section 38-2-14 of the Rhode Island General Laws to provide that settlement agreements of any legal claims against a governmental entity are public records); 1997 R.I. Pub. Laws ch. 326 § 168 (non-substantive change to section 38-2-3(f) of the Rhode Island General Laws); 1995 R.I. Pub. Laws ch. 112 § 1 (adding section 38-2-2(4)(i)(W) of the Rhode Island General Laws to exempt from disclosure all records received by the Insurance Division of the Department of Business Regulation from other states if such records are accorded confidential treatment in that state); 1991 R.I. Pub. Laws ch. 263 § 1 (providing that a person shall have the right to review the test results of their own examination, increasing the first ten minutes to the first thirty minutes of search and retrieval at no charge, and adding section 38-2-14 of the Rhode Island General Laws to provide that records reflecting the financial settlement of any legal claims against a governmental entity are public records); 1991 R.I. Pub. Laws ch. 208 § 1 (amending section 38-2-2(4)(i)(A)(I) of the Rhode Island General Laws to delineate fourteen categories of employee records deemed public, providing that pension records shall be deemed public, requiring the law enforcement records to fall within one of six categories to be exempt from disclosure, and mandating that records relating to the management and direction of a law enforcement agency shall be public); 1988 R.I. Pub. Laws ch. 87 § 1 (imposing a \$1,000 fine for a willful violation); 1986 R.I. Pub. Laws ch. 345 § 1 (including section 38-2-13 of the Rhode Island General Laws to provide that records initially deemed public records shall continue to be deemed public records whether or not subsequent court action or investigations pertain to the records); 1986 R.I. Pub. Laws ch. 203 § 1 (adding section 38-2-2(4)(i)(V) of the Rhode Island General Laws to exempt printouts from telecommunication devices for the deaf or hearing and speech impaired); 1984 R.I. Pub. Laws ch. 372 § 2 (amending section 38-2-2(4)(i)(J) of the Rhode Island General Laws to exempt executive session minutes sealed pursuant to the Open Meetings Act); 1982 R.I. Pub. Laws ch. 416 § 1 (adding section 38-2-2(4)(i)(U) of the Rhode Island General Laws to exempt library records revealing the identity of a patron); 1981 R.I. Pub. Laws ch. 353 § 1 (expanding the definitions of "public body" and "public record," including definitions of "public business" and "supervisor of the regulatory body," and adding section 38-2-2(4)(i)(T) of the Rhode Island Gen-

have devoted to the APRA, portions of the present statute, as well as failed amendments, sometimes contradict the APRA's central purpose.

One such example involving the privacy of a surviving family member concerned a proposed, albeit failed, amendment that would have done little to reveal the government's decision-making process.<sup>202</sup> In particular, during the 2002 legislative session identical House of Representatives and Senate bills were introduced exempting "[a]utopsy reports and death certificates relating to open criminal investigations reports and certificates relating to closed investigation are open records."<sup>203</sup> Although not a model of clarity, the proposed amendment would certainly have made death certificates relating to closed criminal investigations a public record.<sup>204</sup> More troubling is that since the proposed amendment expressly exempted only "[a]utopsy reports and death certificates relating to open criminal investigations," the amendment could easily be interpreted to require that autopsy reports pertaining to

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eral Laws to exempt from disclosure records of judicial bodies unless in its administrative function); 1981 R.I. Pub. Laws ch. 279 § 2 (providing that a complaint may be filed with the Department of Attorney General and that the Department of Attorney General may initiate injunctive or declaratory proceedings on the complainant's behalf); 1980 R.I. Pub. Laws ch. 269 § 1 (amending section 38-2-2(4)(i)(C) of the Rhode Island General Laws to exempt from disclosure records of juvenile proceedings before the family court and amending section 38-2-2(4)(i)(D) of the Rhode Island General Laws to require disclosure of initial arrest records of "an adult," rather than "a person").

202. Although "the right to privacy dies with the person," Rhode Island law appears to recognize that a right to privacy in the memory of the deceased extends to the surviving family members. *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 814-15 (R.I. 1996) ("[T]he reporter's conversation with the decedent did not, however, rise to the level of an actionable intrusion into the Clift family's seclusion."); see also *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000) ("The personal privacy in [the FOIA] extends to the memory of the deceased held by those tied closely to the deceased by blood or love and, therefore, that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure."); *Katz v. Nat'l Archives & Records Admin.*, 862 F. Supp. 476, 485 (D.D.C. 1994) (release of the photograph of President Kennedy's body held to invade the privacy of members of the Kennedy family), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995); *New York Times Co. v. NASA*, 920 F.2d 1002, 1009-10 (D.C. Cir. 1990), *remanded to* 782 F. Supp. 628 (D.D.C. 1991) (on remand) (release of last taped conversation with Challenger astronauts blocked because it would invade the privacy of their families).

203. See H. 6956, 2002 Gen. Assem., Jan. Sess. § 38-2-2.1(g) (R.I. 2002); S. 2549, 2002 Gen. Assem., Jan. Sess. § 38-2-2.1(g) (R.I. 2002).

204. S. 2549, 2002 Gen. Assem., Jan. Sess. § 38-2-2.1(g) (R.I. 2002).

closed criminal investigations – or, worse yet – autopsy reports and death certificates unrelated to any criminal investigation, constitute public records.

Another proposed amendment that could have disclosed non-governmental records was introduced into the House of Representatives in 1999 and 2000.<sup>205</sup> The 1999 bill proposed to exempt:

The home address or the home telephone number of law enforcement, judicial, prosecutorial, department of children, youth and families services, correctional, or any other public safety or criminal justice system personnel, or victims of adjudicated crimes; health inspector, individuals providing family planning services, or the name, home address, or telephone number of any family member of any of the foregoing.<sup>206</sup>

Although this language exempted a small category of employees' home addresses and home telephone numbers, as well as the home addresses and home telephone numbers of victims of *adjudicated* crimes,<sup>207</sup> the 1999 bill treated differently any other person, including private citizens. With respect to all non-delineated individuals, the 1999 bill mandated that the home address and home telephone number not be disclosed, but only upon demonstrating that "disclosure would create an unreasonable risk of personal har-

205. See H. 7257, 2000 Gen. Assem., Jan. Sess. § 38-2-2.2 (R.I. 2000); H. 5483, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(i)(x) (R.I. 1999).

206. H. 5483, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(i)(x) (R.I. 1999). Notwithstanding this exemption, House Bill 5483 also contained an identical provision that the delineated home addresses and home telephone numbers "shall not [be] disclose[d]." *Id.* Subject to other statutory provisions mandating confidentiality, documents that are exempt from public disclosure pursuant to the APRA *may* be disclosed. See *R.I. Fed'n of Teachers v. Sundlun*, 595 A.2d 799, 803 (R.I. 1990) ("Our statute . . . is directed solely toward requiring disclosure by public agencies and does not provide a reverse remedy to prevent disclosure."). Accordingly, House Bill 5483 contained conflicting language exempting, but permitting, the disclosure of home addresses and home telephone numbers, while also containing language prohibiting the disclosure of home addresses and home telephone numbers.

207. According to the proposed amendment, a crime victim's home address and home telephone number may be excluded from the public purview only *after* the crime has been adjudicated. This, of course, presumes that *prior* to adjudication, the crime victim's home address and home telephone number constitute public records. Notwithstanding the over-arching APRA issue concerning what public interest is advanced by disclosing a crime victim's home address and home telephone number, the exemption for home addresses and home telephone numbers of *adjudicated* crime victims is inconsequential since this information will have already been in the public domain.

assessment or physical danger to the person or property of such individuals or their family members."<sup>208</sup> The 2000 bill was similar.<sup>209</sup>

Considering the APRA's central purpose, one must ponder how the disclosure of a person's death certificate, autopsy report, home address, or home telephone number advances the public's interest in learning about the government's activities. These examples would seem to be so obviously outside the APRA's central purpose that enacting an exemption would be redundant.<sup>210</sup> Yet in recent years, amendments have been introduced that, at best, were directed to ensure confidentiality, but were poorly drafted, or, at worst, were written in a manner to exempt a small portion of records, but require the disclosure of the larger class.<sup>211</sup>

In contrast to proposed amendments that unduly infringe upon a person's privacy, two present exemptions unduly hinder the public's oversight function. For instance, among the broadest exemption in any freedom of information law is section 38-2-2(4)(i)(M) of the Rhode Island General Laws, which exempts from public disclosure all "[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities."<sup>212</sup> Unlike other states with similar, though narrower, exemptions,<sup>213</sup> the plain language

208. H. 5483, 1999 Gen. Assem., Jan. Sess. § 38-2-2(4)(i)(x) (R.I. 1999).

209. H. 7257, 2000 Gen. Assem., Jan. Sess. § 38-2-2.2(1) (R.I. 2000). The only difference between the two proposed bills was that the 2000 bill added an additional category to prohibit the disclosure of the home address and home telephone number of "individuals providing shelter services to victims of domestic violence." *Id.*

210. See *supra* Part I.

211. But see *infra* notes 212-16 and accompanying text.

212. R.I. GEN. LAWS § 38-2-2(4)(i)(M) (1997 & Supp. 2002). A related issue concerns obtaining documents from the General Assembly and the constitutional privileges enjoyed by the General Assembly that makes the APRA unenforceable against that branch of government. For a detailed discussion, see James T. O'Reilly, *Applying Federal Open Government Laws to Congress: An Exploratory Analysis and Proposal*, 31 HARV. J. ON LEGIS. 415 (1994).

213. See ARK. CODE ANN. § 25-19-105(b)(7) (Michie 1987) (exempting "correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General"); CAL. GOV'T CODE § 6254(l) (West 1995) (exempting "[c]orrespondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's legal affairs secretary, provided that public records shall not be transferred to the custody of the Governor's legal affairs secretary to evade the disclosure provisions of this chapter"); COLO. REV. STAT. § 24-72-202(II) (2001) (correspondence of elected officials represent public records unless correspondence is work product, without a demonstrable connection to the exercise required or authorized by law



of section 38-2-2(4)(i)(M) expressly applies to *any* state or local elected officer and encompasses all documents authored or received by that individual.<sup>214</sup> While significant policy arguments exist to facilitate correspondence to and from constituents, and to promote open communication within an agency during the deliberative processes, final decisions and other similar documents affecting the public should most certainly be available for public inspection.

In a similar vein, the exemption codified at section 38-2-2(4)(i)(K) of the Rhode Island General Laws for “memoranda” is broader than the other preliminary documents delineated in this exemption.<sup>215</sup> Specifically, section 38-2-2(4)(i)(K) also exempts from public disclosure preliminary drafts, notes, impressions, working papers, and work products; all documents that embrace the deliberative process and that are incapable of memorializing final action. However, an agency that wishes to conceal public policy or other final action could, in accordance with section 38-2-2(4)(i)(K), simply memorialize this action in a memorandum. Rather than identifying the form of specified documents, an amended section 38-2-2(4)(i)(K) should exempt documents that represent the substance of the deliberation process.<sup>216</sup>

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and does not involve the receipt or expenditure of public funds, a communication to/from a constituent that implies confidentially, or prohibited by law); KAN. STAT. ANN. § 45-221(14) (2000) (exempting “[c]orrespondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual”); KY. REV. STAT. ANN. § 61.878(1)(h) (Michie 1993) (exempting “correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency”); UTAH CODE ANN. § 63-2-304(29) (1997) (exempting “records of the governor’s office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor’s contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public”).

214. See R.I. GEN. LAWS § 38-2-2(4)(i)(M) (1997 & Supp. 2002) (exempting “[c]orrespondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities”).

215. See R.I. GEN. LAWS § 38-2-2(4)(i)(K) (1997 & Supp. 2002).

216. See KY. REV. STAT. ANN. § 61.878(1)(i) (Michie 1993) (exempting “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended”).

Future amendments must also address the post-September 11 realities that disclosing blueprints, water treatment plans, security procedures, and other similar documents can threaten public safety. As presently enacted, the APRA only exempts “[s]cientific and technological secrets and the security plans of military and law enforcement agencies, the disclosure of which would endanger the public welfare and security.”<sup>217</sup> In 2002, a proposed bill, which subsequently failed, attempted to remedy some of these security concerns by exempting “plans, assessments or security measures relating to publicly-owned or operated biological, nuclear, incendiary, chemical or explosive (‘BNICE’) facilities.”<sup>218</sup> An amendment must consider a broader application to protect public safety without unduly hindering the public interest.<sup>219</sup>

Lastly, the APRA should be amended to allow, in rare circumstances, an agency to seek an extension of the maximum thirty business day timeframe within which to respond to a public records request.<sup>220</sup> Absent an amendment, voluminous requests<sup>221</sup> or simply dire circumstances<sup>222</sup> can divert an agency’s limited resources without considering society’s overall best interests. In these situations, a public body could seek leave of court and would have the burden to demonstrate that, even with the exercise of due diligence, exceptional circumstances require a court-approved extension. A court could consider the volume of the re-

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217. R.I. GEN. LAWS § 38-2-2(4)(i)(F) (West 2003).

218. H. 7449, 2002 Gen. Assem., Jan. Sess. § 38-2-2(4)(i)(F)(II) (R.I. 2002).

219. *See, e.g.*, KAN. STAT. ANN. § 45-221(a)(12) (2000) (exempting “[r]ecords of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communication, if disclosure would jeopardize security of the public agency, building or facility”); OR. REV. STAT. § 192.501(18) (West 2003) (exempting “[s]pecific operational plans in connection with an anticipated threat to individual or public safety for deployment and use of personnel and equipment, prepared and used by a law enforcement agency, if public disclosure thereof would endanger the life or physical safety of a citizen or law enforcement officer or jeopardize the law enforcement activity involved”).

220. *See supra* note 170.

221. *See supra* notes 160 and 165.

222. *See, e.g.*, Tracy Breton & Zachary Mider, *The Station Nightclub Disaster – Town Hall Seen Releasing Night Club Records Next Week*, PROVIDENCE J., Mar. 1, 2003, at A7 (estimating seventeen or eighteen APRA requests to the Town of West Warwick after the February 20, 2003 nightclub fire), available at 2003 WL 7057261.

requested records, the agency's due diligence in attempting to comply within the APRA's timeframe, the agency's resources, and other relevant factors. Such an amendment could be modeled after the FOIA.<sup>223</sup>

### CONCLUSION

Promulgated in 1979, and amended on many occasions, the General Assembly has charged the APRA with a difficult task – delineating standards to determine whether a document maintained by any local or state agency is a public record. Although some may describe our freedom of information law as “complex,”<sup>224</sup> the reality is that no statute can anticipate the form and content of every document maintained by all governmental entities.<sup>225</sup>

Since the APRA will undoubtedly continue to govern the public dissemination of government documents in Rhode Island, it is vital to consider the question posed in the introduction: How open should Rhode Island government be?<sup>226</sup> The answer lies in fulfilling the APRA's central purpose that citizens be permitted to access documents concerning government operations and final agency decisions, but that documents unrelated to government activity, fall outside the ambit of the APRA.<sup>227</sup> As interpreted by our judiciary, two guiding principles for considering APRA matters already exist.

The first established principle mandates that “records that do not specifically identify individuals and that represent final actions” must be disclosed.<sup>228</sup> The second principle expressly references the United States Supreme Court's FOIA interpretations and observes:

The FOIA was designed to create a broad right of access to “official information.” Whether disclosure of a private document is warranted must turn on the nature of the requested

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223. Cf. 5 U.S.C. § 552(a)(6)(C)(i) (2000) (“If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.”).

224. See Liz Anderson, *State's Complex Public-Records Law Under Scrutiny*, PROVIDENCE J., Feb. 24, 2003, at B1, available at 2003 WL 7056509.

225. See *supra* note 180.

226. See *supra* note 15 and accompanying text.

227. See *supra* Part I.

228. *Direct Action for Rights & Equal. v. Gannon*, 713 A.2d 218, 224 (R.I. 1998).

document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny rather than on the particular purpose for which the document is being requested. Official information that sheds light on an agency's performance of statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.<sup>229</sup>

As future amendments are contemplated by the General Assembly, these two guiding principles should be heeded. Our legislators must be cognizant of the fact that although the APRA has the noblest of purposes, unintended uses and consequences do occur that dilute the APRA's central purpose and that cast the application of the law awry.<sup>230</sup> With these principles in mind, Rhode

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229. *Providence Journal Co. v. Pine*, C.A. No. 96-6274, 1997 WL 356904, at \*4 (R.I. Super. Ct. June 24, 1998).

230. See *Arruda v. Law Revision Office*, 2001 Op. R.I. Att'y Gen. PR 01-04 (July 10, 2001) (unofficial opinion) (requesting copies of public laws in April 2000 from the Law Revision Office, and on May 11, 2000 receiving copies of public laws from the Office of the Secretary of State; but nonetheless filing a petition for review with the Speaker of the House on May 22, 2000, and a complaint with the Department of Attorney General against the Law Revision Office and the Speaker of the House in June 2000), available at <http://www.riag.state.ri.us/opinion/docs/advpr01-04.htm>; *Blais v. Revens*, 2001 Op. R.I. Att'y Gen. PR 01-01 (May 18, 2001) (unofficial opinion) (after the Department of Attorney General entered its appearance in an APRA case pending in superior court, complainant, who was opposing counsel in the superior court case, filed APRA complaint with the Department of Attorney General concerning the same subject-matter as already pending in the superior court in an attempt to create conflict of interest), available at <http://www.riag.state.ri.us/access/docs/pr01-01.htm>. Cf. *Central Falls City Council v. City of Central Falls*, 2001 Op. R.I. Att'y Gen. PR 01-05 (Aug. 7, 2001) (unofficial opinion) (City Council filing APRA complaint against Mayor), available at <http://www.riag.state.ri.us/meetings/docs/2001/om01-05.htm>, and *Matthews v. Central Falls City Council*, 2001 Op. R.I. Att'y Gen. OM 01-04 (Aug. 7, 2001) (unofficial opinion) (Mayor filing Open Meeting Act complaint against City Council), available at <http://www.riag.state.ri.us/meetings/docs/2001/om01-04.htm>; cf. also *Dietz v. R.I. Bd. of Registration for Prof'l Land Surveyors*, 2000 Op. R.I. Att'y Gen. PR 00-27 (Dec. 15, 2000) (unofficial opinion) (alleging inaccurate transcript and inadequate audio equipment to review audiotape), available at <http://www.riag.state.ri.us/access/2000upr.html>; *Dietz v. R.I. Bd. of Registration for Prof'l Land Surveyors*, 2000 Op. R.I. Att'y Gen. OM 00-29 (Dec. 15, 2000) (unofficial opinion) (open meeting complaint filed alleging illegal closed meeting after Board forwarded application for new license, rather than application for renewal, and affirmed its determination that complainant's license had lapsed), available at <http://www.riag.state.ri.us/meetings/docs/2000/om29-00.html>; *Dietz v. R.I. Bd. of Registration for Prof'l Land*

Island citizens can ensure that the operation and function of their government remains open and accountable.

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Surveyors, 1999 Op. R.I. Att'y Gen. OM 99-25 (Nov. 19, 1999) (unofficial opinion) (open meeting complaint alleging Board failed to file minutes with the Office of Secretary of State), *available at* <http://www.riag.state.ri.us/meetings/docs/1999/om99-25.html>; Dietz v. R.I. Bd. of Registration for Prof'l Land Surveyors, 1999 Op. R.I. Att'y Gen. PR 99-17 (Nov. 19, 1999) (unofficial opinion) (public record complaint alleging improper denial), *available at* <http://www.riag.state.ri.us/access/docs/pr99-17.html>; Dietz v. R.I. Bd. of Registration for Prof'l Land Surveyors, 2000 Op. R.I. Att'y Gen. OM 00-12 (May 12, 2000) (unofficial opinion) (open meeting complaint alleging Board failed to file minutes with the Office of Secretary of State), *available at* <http://www.riag.state.ri.us/meetings/docs/2000/om00-12.html>.