

Office of Attorney General

Peter F. Neronha, Attorney General



ACCESS TO PUBLIC RECORDS ACT

OPEN MEETINGS ACT

ACCESS TO PUBLIC RECORDS ACT



Who is Subject to the APRA?

- APRA applies to “... [any] agency of Rhode Island state or local government ... or any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.”

R.I.G.L. § 38-2-2(1)

- The Commission is a public body subject to the APRA's requirements.



Is it an APRA Request?



Provide Documents
Not Narratives/Summaries



2 Key Steps When Responding to an APRA Request

1. Does your Office maintain responsive records?

2. If your Office does maintain responsive records, are those records public in whole or in part (i.e., redacted)?

- Documents maintained by your Office are presumed to be public unless they fit within one of the 27 APRA exemptions.

Is the Requested Record Maintained by the Commission?

- “all records maintained or kept on file by any public body *** shall be public records and every person or entity shall have the right to inspect and/or copy those records.”
- Public records include “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.”

R.I.G.L. §§ 38-2-2(4), 38-2-3(a)



Examples of Records *Potentially* Maintained by the Commission

- Emails to, from, cc, bcc you
- Word documents, including drafts
- Handwritten notes
- Outlook calendar entries
- Voicemails, audio recordings, videos
- Documents in case files
- CMS Notes or comments
- Personal emails or documents on your work computer
- Emails or documents related to work that you keep on your personal cell phone or computer
- Microsoft Teams "chats"

Searching for Responsive Records:

- Conduct a **reasonable search**.
 - Consider if you have responsive records.
 - Search emails, electronic folders, hard copy folders, storage, and anywhere else records may be.
 - Consider who else may have relevant records.
- You could be asked to provide an affidavit describing search efforts and affirming no additional records exist.

"Any and all Media"

“Any person or entity requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them”



R.I.G.L. § 38-2-3(g)



Prepayment Considerations

- APRA permits requesting fees for retrieval from storage and prepayment of \$15/hr for search and retrieval in certain circumstances. *R.I.G.L. § 38-2-4.*
- Must provide accurate time estimate for search.
- A court may require you to explain basis for estimate.
- Keep a log tracking time spent responding to APRA request.

Scenarios

1. Request asks for “list” – no “list” already maintained

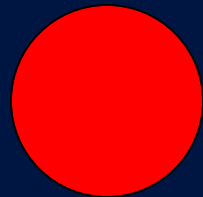


2. Employee’s private email

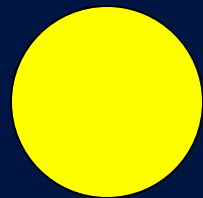


The Exemptions: R.I.G.L. § 38-2-2(4)

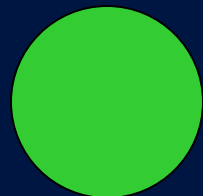
27 Exemptions



Confidential



Exempt



Public



Exemption (A)(I)(a)

- Relates to a **client/attorney** relationship.
 - This has been interpreted as broader than the attorney-client privilege.
- Relates to a **doctor/patient** relationship, including all medical information relating to an individual in any files.

Exemption (B)



Trade secrets and commercial or financial information obtained from a person, firm, or corporation which is of a privileged or confidential nature.

Providence Journal Co. v. Convention Center Authority,
774 A.2d 40 (R.I. 2001)



Exemption (D)

- Records maintained by law enforcement agencies . . . where disclosure could reasonably be expected to:
 - (a): interfere with ongoing criminal investigations;
 - (b): would deprive a person of a right to a fair trial
 - (c): constitute an unwarranted invasion of personal privacy;
 - (d): disclose a confidential source;
 - (e): disclose techniques, procedures, guidelines for law enforcement or prosecutions;
 - (f): endanger the life or physical safety of anyone.

Records relating to the management and the direction of a law enforcement agency and records or reports reflecting the initial arrest of an adult are public records



R.I.G.L. § 38-2-2(4)(D)

Thomson v. Town of Johnston, PR 17-09



Exemption (E)

“Any records which would not be available by law or rule of court to any opposing party in litigation.”



Exemption (E) Encompasses Traditional Litigation Privileges

- Attorney-client privilege
- Work product privilege
- Deliberative process privilege
- Common interest privilege
- Law enforcement privilege

Exemption (K)

“Preliminary drafts, notes, impressions, memoranda, working papers, and work products, including those involving research at state institutions of higher education on commercial, scientific, artistic, technical or scholarly issues, whether in electronic or other format”

Vitkevich v. Rhode Island Department of Transportation, PR 17-42;

Hartley v. Coventry Fire District, PR 17-55

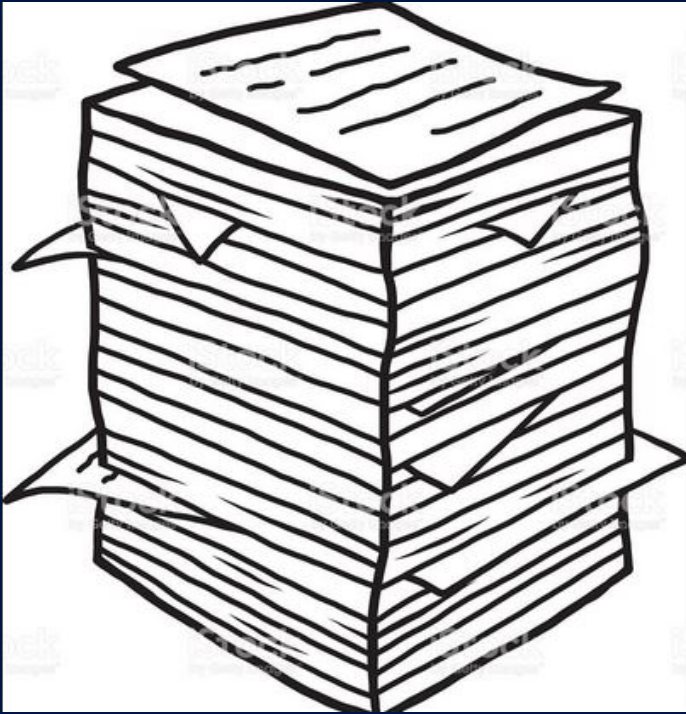


Exemption (M)

“Correspondence of/to elected officials with or relating to those they represent and correspondence of/to elected officials in their official capacity.”



Exemption (P)



All investigatory records of public bodies pertaining to possible violations of statute, rule, or regulation, other than records of final action taken.



Exemption (S)



Records, reports, opinions, information, and statements required to be kept confidential by federal law, regulation, state law, or rule of court.



Exemption (S)



Examples:

R.I. Gen. Laws § 14-1-64: All police records relating to the arrest of a minor

R.I. Gen. Laws § 39-21.1-4, 17: 911 Telephone calls and records

R.I. Gen. Laws § 5-37.3-3: Health Care Information

R.I. Gen. Laws § 12-1-4: BCI Records



Exemption (A)(I)(b)

Individually – identifiable records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to the FOIA.

R.I.G.L. § 38-2-2(4)(A)(I)(b)



Balancing Test

Does the privacy interest of the individual outweigh the public's interest in disclosure?

DARE v. Gannon, 713 A.2d 218, 225 (R.I. 1998);
Harris v. City of Providence, PR 17-16;
Gannon v. City of Pawtucket, PR 17-47



Public Interest

“Official information that sheds light on an agency’s performance of its statutory duties.”



Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)

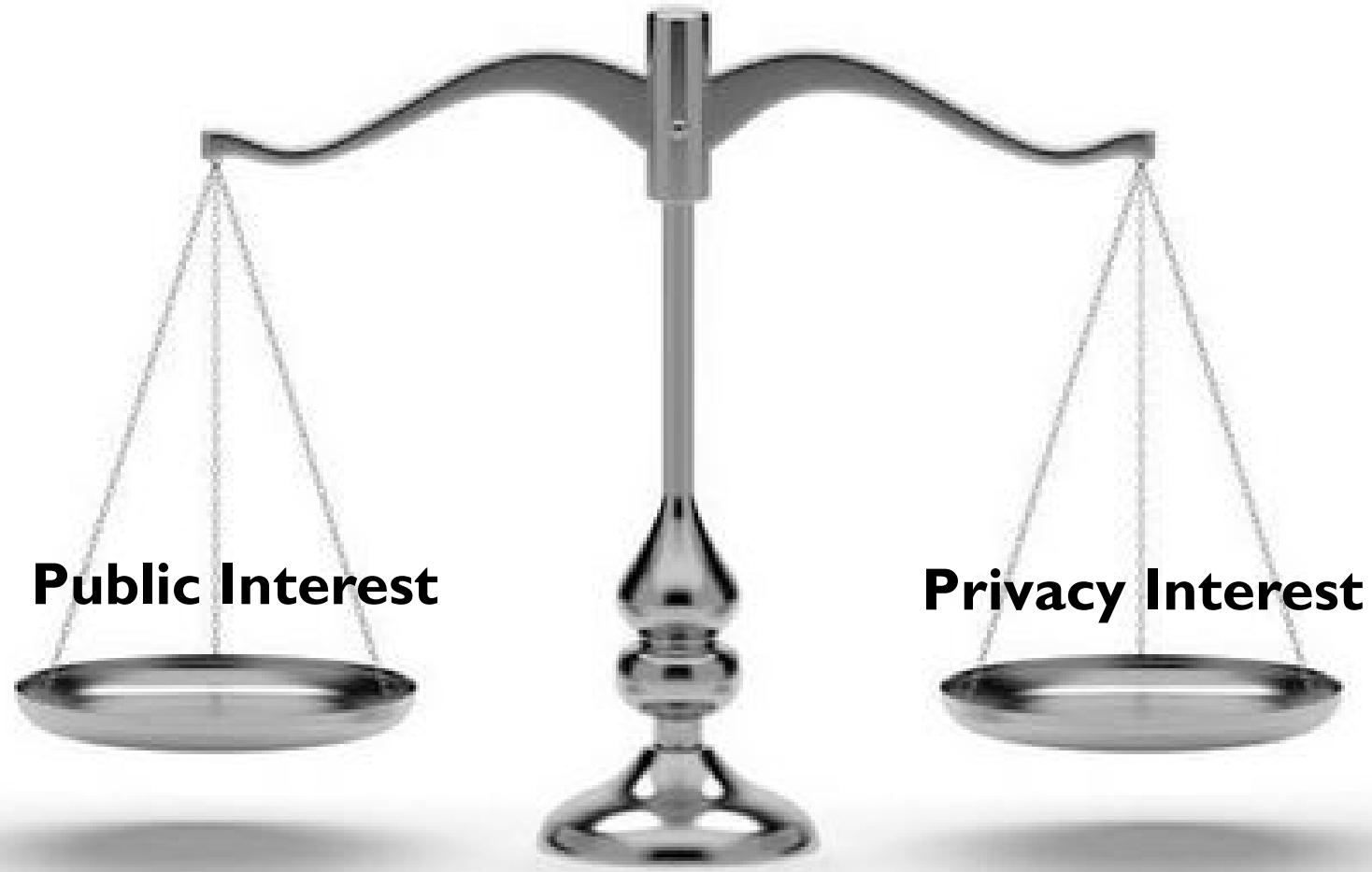


Privacy Interest

“[W]here the subject of the documents ‘is a private citizen,’ ‘the privacy interest . . . is at its apex.’”

National Archives & Records Admin.v. Favish,
541 U.S. 157 (2003)





Public Interest

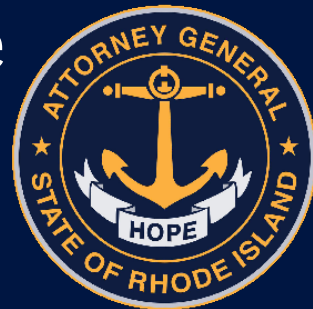
Privacy Interest



Exemption (A)

Public Employee Information

- name
- gross salary
- salary range
- total cost of paid fringe benefits
- gross amount received in overtime
- other remuneration
- job title
- job description
- employment contract
- dates of employment
- positions held with the state, municipality, or public works projects
- work location or project
- business telephone number
- city/town of residence
- date of termination



Any reasonably segregable portion of a public record shall be available.

If entire document is exempt, must state in writing that no reasonable segregable information exists.



R.I.G.L. § 38-2-3(b)

Harris v. City of Providence, PR 18-08



Within 10 Business Days of Receiving a Request a Public Body MUST:

- **DENY:** deny access to records,
- **GRANT:** provide the records, or
- **EXTEND:** extend the time period for an additional twenty (20) business days for “good cause.”

R.I.G.L. § 38-2-7

Wilson v. Town of West Warwick, PR 19-03



PUBLIC RESOURCES

- Open government Page on Attorney General's Website (<http://www.riag.ri.gov/>)
- Findings Issued by Open Government Unit
- APRA Checklist
- Video presentation of Open Government Summit
- APRA Request Procedures
- Inquiries:
 - opengovernment@riag.ri.gov
 - 401-274-4400



OPEN MEETINGS ACT



What is the OMA?

“It is essential to the maintenance of a democratic society that **public business be performed in an open and public manner** and that the **citizens be advised of and aware** of the performance of public officials and the deliberations and decisions that go into the making of public policy.”

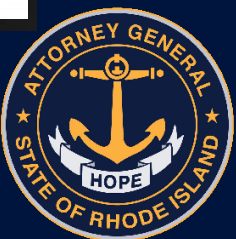
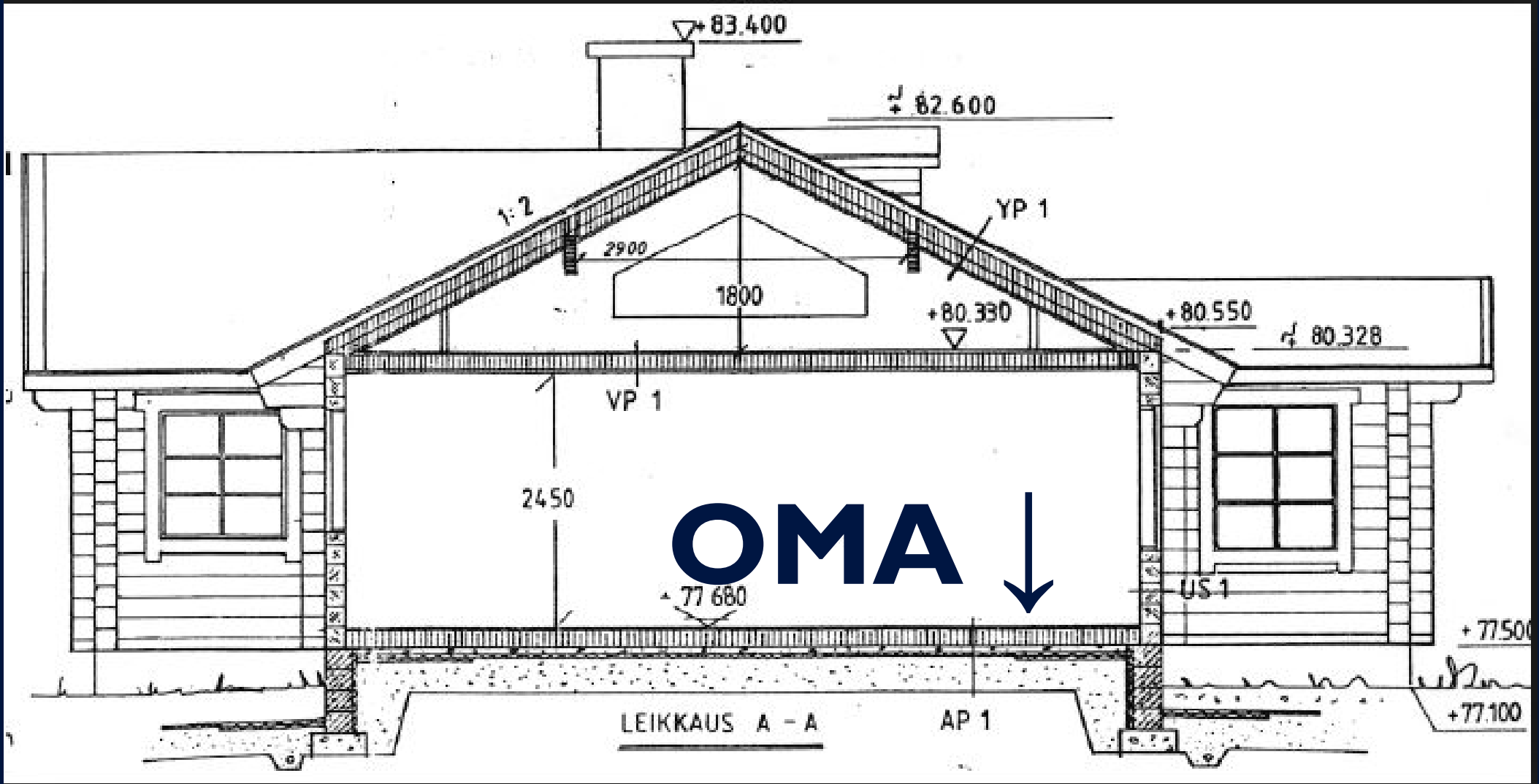
R.I.G.L. § 42-46-1



What does the OMA require?

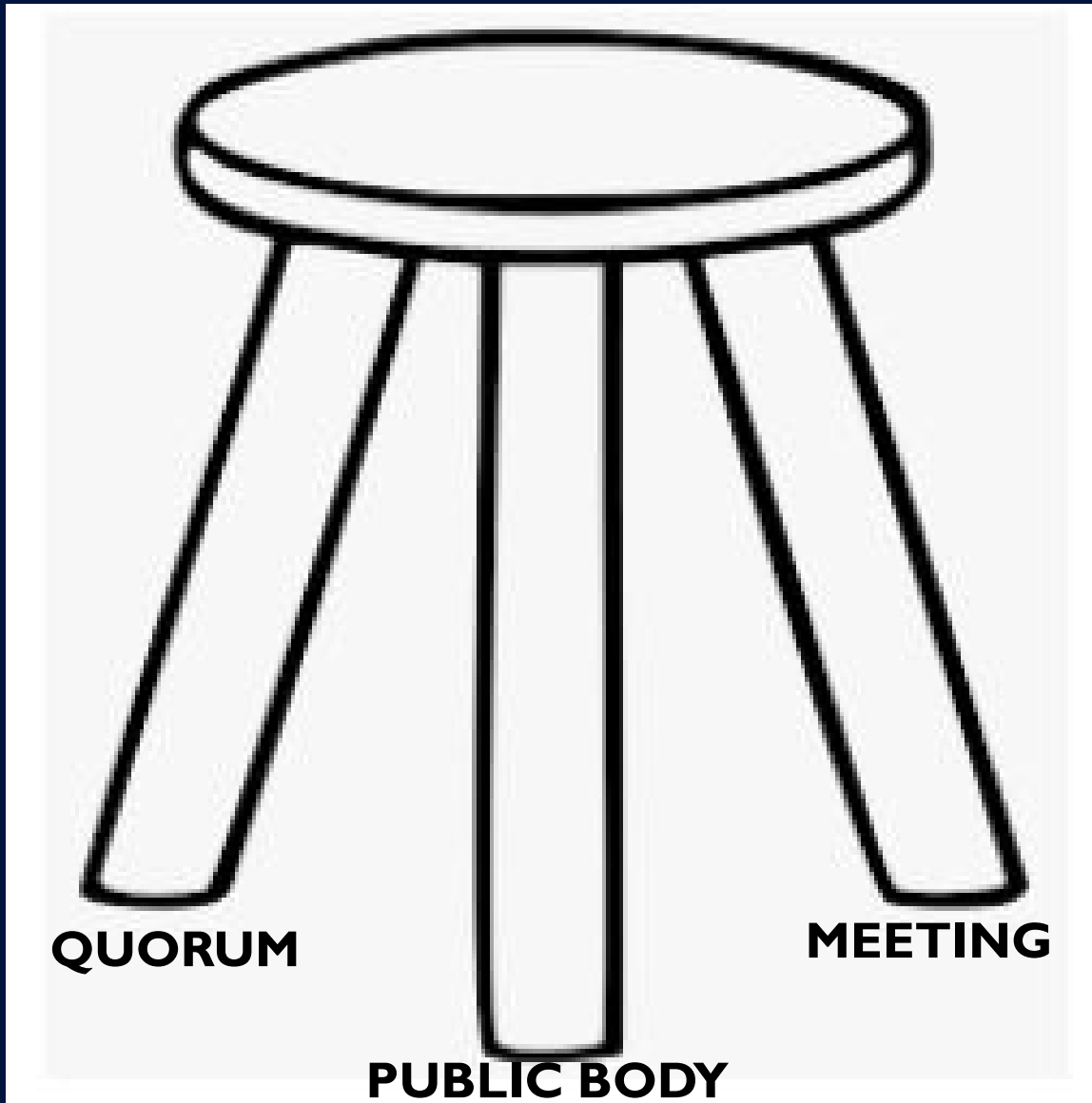
- Open meetings
- Limited circumstances for closed meetings
- Notice
 - Annual
 - Supplemental
- Meeting minutes





Three Threshold Elements that Trigger OMA

- A “quorum” of a “public body” has a “meeting”
- If one (or more) element is missing, the OMA does not apply



What is a Public Body?

“department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government”

R.I.G.L. § 42-46-2(c)

Howard v. Portsmouth Senior Center Focus Group, OM 21-22;
Pontarelli v. RI Council on Elem/Second Ed., 151 A.3d 301 (R.I. 2016);
Solas v. Emergency Hiring Council, 774 A.2d 820 (R.I. 2001)



What is a Public Body?

The Rhode Island Cannabis Act:

- The Cannabis Control Commission:

- “**Public body.** The cannabis control commission shall be a public body for the purposes of chapter 46 of title 42 (the ‘open meetings act’).” *R.I.G.L. § 21-28.11-4(i)*

- The Cannabis Advisory Board:

- “The advisory board shall ... (4) Conduct all meetings in compliance with chapter 46 of title 42 (the ‘open meetings act’)”
R.I.G.L. § 21-28.11-6(g)(4)



What is a Quorum?



“unless otherwise defined ...
a simple majority of the
membership”

R.I.G.L. § 42-46-2(d)

GoLocalProv v. Providence City Council, OM 20-15



“Rolling” or “Walking” Quorum

A series of meetings each less than a “quorum,” but that collectively represent a “quorum”

Langer v. Bonnet Shores Fire District, OM 21-04



“Rolling” or “Walking” Quorum

Quorums can be created not only by members of a public body, but through a third person

Finnegan v. Scituate Town Council, OM 20-22



“Listserve” (email distribution lists through which subscribers receive information on a particular topic) do not per se violate the OMA

Keegan/Silva v. Burrillville Town Council, OM 17-07



What is a Meeting?

“The convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power”

R.I.G.L. § 42-46-2(a)

Cook v. Tiverton Town Council, OM 20-23



Virtual/Telephone

- Can a public body use virtual platforms or telephone conferencing to conduct a meeting?
 - § 42-46-5(b)(1): Discussions of a public body via electronic communication, including telephone, are permitted **only** to schedule a meeting

Jones v. Kingston Hill Academy Board of Trustees, OM 20-26



Virtual/Telephone

- A member of a public body may participate by use of electronic communication or telephone if:
 - on **active duty in the armed services**
 - has a **disability** and cannot otherwise participate
- Subject to rules/regulations and waiver process governed by Governor's Commission on Disabilities

R.I.G.L. § 42-46-5(b)(2),(3) & (4)





Executive Session



Executive Session

- Every meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5.

R.I.G.L. § 42-46-3

- Purposes for which may be closed.

R.I.G.L. § 42-46-5(a)(1)-(10)



Convening in and out of Executive Session

- During open session: Motion to convene into executive session, pursuant to R.I. Gen. Laws § [appropriate section here], to [repeat whatever is on the agenda here]
- During closed session, at conclusion of substantive closed session business: Motion to reconvene into open session
- During open session: report out any votes taken; motion to seal the executive session minutes (optional)

R.I.G.L. § 42-46-4(a), (b)



R.I.G.L. § 42-46-5(a)(1)



- **Discussions** of job performance, character, or physical or mental health of affected person or persons
 - advanced written notice
 - advised that the person may require the discussion to be held at an open meeting
 - state in open call and open minutes that notice provided

Driggs v. Tiverton Town Council, OM 20-47

Sullivan v. Coventry School Committee, OM 21-05



R.I.G.L. § 42-46-5(a)(2)



Sessions or work sessions pertaining
to collective bargaining or litigation

Zonfrillo v. Narragansett Town Council, OM 21-20



R.I.G.L. § 42-46-5(a)(4)

Investigative
proceedings
regarding
allegations of civil
or criminal
misconduct



R.I.G.L. § 42-46-5(a)(4)





Two Types of Notice



- **Annual Notice:** at the beginning of each calendar year
- **Supplemental Notice:** a minimum of 48 hours, excluding weekends & state holidays



Supplemental Notice Posting Requirements

- Principal office of public body
- One other prominent location within the governmental unit
- Secretary of State (electronic)

R.I.G.L. § 42-46-6(c)

Langseth v. Buttonwoods Fire District, OM 22-10



Notice Requirements

Annual

- Dates, times and location of regularly scheduled meetings
- Available to public upon request
- Posted with the Secretary of State

Supplemental

- Date, time and location of the meeting
- Date posted
- Statement specifying business to be discussed

R.I.G.L. § 42-46-6(a), (b)



Supplemental Notice Requirements

“Statement specifying business to be discussed” means:

- “whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.”

Fact-specific inquiry, taking into account:

- Specificity of the agenda item
- Relation between agenda item and topics of discussion
- Whether notice is given of any action (votes, discussion) taken

Ford v. Barrington School Committee, OM 21-21

Pontarelli v. RI Council on Elem/Second Ed., 151 A.3d 301 (R.I. 2016);

Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I.2013)



Executive Session Notice

- No boilerplate language
- Identify number of items to be discussed
- Statement of each item to be discussed

R.I. Gen. Laws § 42-46-4(a)

Straus v. Westerly Town Council, OM 21-10



Executive Session Notice Examples*

1. R.I.G.L. § 42-46-5(a)(1)
(Town Manager performance review)

2. R.I.G.L. § 42-46-5(a)(2)
(Police Union Negotiation)

3. R.I.G.L. § 42-46-5(a)(2)
(potential litigation – land dispute)

4. R.I.G.L. § 42-46-5(a)(2)
(litigation – Plaintiff v. Public Body, PC-2018-1234)

*The necessary notice information will depend on the specific circumstances and must be evaluated on a case-by-case basis.



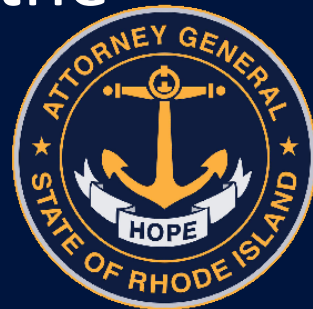
Emergency Meetings

“where the meeting is deemed necessary to address an **unexpected occurrence that requires immediate action to protect the public.**”

R.I.G.L. § 42-46-6(c)

- notice and agenda shall be posted **as soon as is practicable** and shall be electronically filed with the secretary of state
- the public body shall state for the record and minutes **why the matter must be addressed** in less than forty-eight (48) hours and **only** discuss the issue or issues which created the need for an emergency meeting.

Jones v. Kingston Hill Academy Board of Trustees, OM 20-26



PUBLIC COMMENT



- “Nothing contained in [the OMA] requires any public body to hold an open forum session, to entertain or respond to any topic nor does it prohibit any public body from limiting comment on any topic at such an open forum session.”

R.I.G.L. § 42-46-6(d)

- Public participation may be required by other applicable laws or regulations.



Public Comment

Public body may respond
to comments initiated
by a member of the
public during a properly
noticed open forum



R.I.G.L. § 42-46-6(d)

Castelli v. Coventry Town Council, OM 20-32





Minutes: Contents



- the date, time, and place of meeting
- the members who are absent/present
- a record by individual member of any vote(s) taken
- any other relevant information that a member of the public body requests

R.I.G.L. § 42-46-7(a)

Langseth v. Buttonwoods Fire District, OM 19-27



Disclosure of Unofficial Minutes

- All*: “unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier[.]” *R.I. Gen. Laws § 42-46-7(b)(1)*.

*Fire companies see *R.I. Gen. Laws § 42-46-7(b)(2)*.
Wahl, et al. v. Indian Lake Shores Fire District, OM 20-01



Disclosure of Official/Approved Minutes

All public bodies shall keep official and/or approved minutes and file a copy of all open meetings with the Secretary of State within 35 days of a meeting

Exception: Advisory Public Bodies

R.I.G.L. § 42-46-7(d)

Keep Metacomet Green v. East Providence City Council, OM 21-15

Solas v. South Kingstown School Committee Wellness

Subcommittee, et al., OM 22-28



Superior Court Remedies

- Injunctive relief and declare actions null and void
- Civil fine up to **\$5,000** for a willful or knowing violation
- Attorney fees and costs

R.I.G.L. § 42-46-8(d)



PUBLIC RESOURCES

- Open government Page on Attorney General's Website (<http://www.riag.ri.gov/>)
- Findings Issued by Open Government Unit
- APRA Checklist
- Video presentation of Open Government Summit
- APRA Request Procedures
- Inquiries:
 - opengovernment@riag.ri.gov
 - 401-274-4400

