

April 5, 2023

The Honorable Evan P. Shanley
Chair, House Committee on State Government and Elections
State House
Providence, RI 02903

**Re: 2023 H-5454-AN ACT RELATING TO PUBLIC RECORDS
- ACCESS TO PUBLIC RECORDS**

Dear Chairperson Shanley:

I am writing on behalf of the Department of Revenue and its six divisions (collectively “DOR”) to express concerns with how certain provisions of House Bill 5454 may adversely affect how the DOR responds to public records requests governed by the Access to Public Records Act, R.I. Gen. Laws § 38-2-1 *et seq.* (“APRA”).

As you know, House Bill 5454 amends numerous provisions of the APRA, including those governing both the procedures public bodies must follow when responding to APRA requests and the substantive definitions of what constitutes a public record. When responding to APRA requests the DOR adheres to all requirements of the APRA and ensures that all APRA responses fulfill the APRA’s dual purposes of facilitating public access to public records and protecting from disclosure information about particular individuals when disclosure would constitute an unwarranted invasion of personal privacy.

The following proposed provisions could have a detrimental effect on the DOR’s future APRA responses:


- Revision of the exemption in § 38-2-2(4)(A)(I)(a) from “[a]ll records relating to a client/attorney relationship” to “[a]ll records protected by the attorney-client privilege” could inadvertently lead to the disclosure of confidential information and have a chilling effect on the relationship between attorneys and the public bodies they represent. The current exemption has been interpreted to encompass documents beyond those that are covered by the attorney-client privilege. Narrowing the scope of this exemption would lead to the disclosure of documents that, while not strictly within the scope of the attorney-privilege, are created based on the foundation of trust and candor inherent in the attorney-client relationship.
- The addition of “except upon a showing of good cause” to the investigatory records exemption in § 38-2-2(4)(P) is both vague in that “good cause” is not defined and contradictory to the requirements of § 38-2-3(j) that a public body shall not require “that a person or entity provide a reason for the request. . . .”
- The additional public records definition added to the exemption in § 38-2-2(4)(Y) that “a subpoena issued by a governmental entity to a public body or a public official regarding official business shall be a public record” is vague in that “official business” is not defined and does not provide for an exemption for information that may be contained in subpoenas that would constitute an unwarranted invasion of personal privacy if disclosed.

- The language added to § 38-2-3(b) which mandates the production of the equivalent of a privilege log when documents or any portion thereof are withheld would be burdensome on public body personnel and strain public body resources, particularly in light of the proposed revisions to the ability of public bodies to assess costs in responding to APRA requests discussed below.
- The requirements of proposed new § 38-2-3(c) that documents discussed, reviewed, considered, or submitted at an open meeting of a public body shall be posted online with the meeting agenda and made available upon request to any member of the public present at the meeting “[n]otwithstanding the provisions of § 38-2-2(4)” does not allow for the redaction of information that may be contained in such documents that would constitute an unwarranted invasion of personal privacy if disclosed.
- The revisions to § 38-2-4(b) that increase the amount of free search and retrieval time afforded to APRA requesters from 1 to 2 hours and prohibit the assessment of charges for the redaction of documents could inadvertently lead to the disclosure of confidential information. Public body personnel must thoroughly review all documents responsive to an APRA request to ensure they do not contain information that is prohibited by law from disclosure and/or would not constitute an unwarranted invasion of personal privacy if disclosed. This review and redaction process is an integral part of fulfilling the purposes of the APRA. Prohibiting public bodies from charging for it, even at a rate that is often far below the hourly rate of the employees conducting it, could lead to personnel conducting a less careful review causing the disclosure of information that should not be disclosed, and which cannot be undisclosed following an inadvertent disclosure.
- The revisions to § 38-2-4(e) that mandate public bodies must reduce or waive search and retrieval fees “if requested and the information requested is in the public interest” creates an exception that swallows the rule. It is hard to envision any APRA requestor not seeking a fee waiver. Waiving all search and retrieval fees, both for the actual search and retrieval and for the review and redaction process, could lead to the inadvertent disclosure issues described above.

Finally, the addition of the phrase “including electronic tax messages” to R.I. Gen. Laws § 39-21.1-17 appears to contain a scrivener’s error. The DOR respectfully suggests that “tax” be changed to “text” to match the assumed intent of the provision.

The DOR seeks to continue responding to APRA requests in a manner that fulfills the APRA’s dual purposes. Addressing the issues raised above will help to achieve that goal. Thank you for your consideration.

Sincerely,



Jane E. Cole
Acting Director

Cc: Honorable Joseph J. Solomon, Jr.
Honorable Members of the House Committee on State Government and Elections
Nicole McCarty, Esq., Chief Legal Counsel