STATE OF RHODE ISLAND

OFFICE OF GOVERNOR DANIEL J. MCKEE

May 22, 2025

Honorable Matthew L. LaMountain
Chair, Senate Committee on Judiciary
Room 313, Rhode Island State House
Providence, Rhode Island 02903

Re: *2025 – S 909 An Act Relating to Public Records – Access to Public Records*

Dear Chair LaMountain:

The Administration writes in opposition to S 909, An Act Relating to Public Records – Access to Public Records (Act). The Act would amend the Access to Public Records Act (APRA) in significant respects, some of which would intrude on the privacy of the State's citizens, undermine criminal investigations, and lead to burdensome and overbroad requests, imposing financial burden on public bodies which will ultimately be passed on to taxpayers. I discuss the Administration's specific concerns in greater detail below.

Requiring Disclosure of Names of Preferred License Plate Holders Violates Federal Law and the Privacy of the State's Drivers

The Act would require the disclosure of the names of drivers with "Preferred Plates," to the extent permitted by the federal Driver's Privacy Protection Act (DPPA). The federal DPPA ***completely prohibits*** the disclosure of this information and imposes civil and criminal penalties against state entities and individuals who violate its mandates. A 2024 decision of the Rhode Island Superior Court specifically affirmed the DPPA's privacy protections as to the names of "Preferred Plate" holders. *LMG Holdings Rhode Island, Inc. v. Office of the Governor,* PC-2023-04394 (Sup. Ct. Jan. 31, 2024).[1] As the DPPA recognizes, the disclosure of this information constitutes a serious invasion of drivers' privacy.[2]

[1] And a decision from the Rhode Island Supreme Court on this issue is currently pending.

[2] *See, The Drivers Privacy Protection Act (DPPA) and the Privacy of Your State Motor Vehicle Record,* https://epic.org/dppa/ (last visited May 12, 2025) (discussing death and injuries resulting from the disclosure of drivers' personal information collected by government).

Requiring Disclosure of Government-Issued Subpoenas May Interfere with Criminal Investigations

The Act's proposed amendment to R.I. Gen. Laws § 38-2-2(4)(Y) would require the disclosure of a subpoena issued by a government entity to a public body or official regarding official business, absent a court order to the contrary. Currently, a government-issued subpoena to a public body or official may be exempt from public disclosure if it falls within one of the exemptions delineated in § 38-2-2(4), such as the exemptions for certain law enforcement records,[3] public body investigatory records,[4] or records required to remain confidential by federal or state law.[5] The Act would prevent public bodies from asserting such exemptions and would instead mandate disclosure of a government-issued subpoena in most cases.

Public bodies and officials are often asked to respond to state and federal subpoenas and to keep these subpoenas confidential. Federal grand jury subpoenas, for example, carry the following disclaimer: "any disclosure on your part could seriously impede an ongoing investigation of possible felony violations of federal criminal law." Many of the subpoenas served on governmental entities do not target conduct by the government but rather by third parties. Disclosure of the existence and content of these subpoenas could impede ongoing state and federal criminal investigations, ultimately harming the public.

The Determination of Whether to Reduce or Waive Fees for Requests "in the Public Interest" is Best Left to the Courts

The Act would also amend § 38-2-4(e) to require the public body, the Attorney General, and the Court to reduce or waive fees if the information sought "is in the public interest." Currently, only a court is allowed to waive or reduce fees charged and its authority to do so is discretionary, not mandatory. *See* § 38-2-4(e). Because the question of whether an APRA request is in the public interest presents "a mixed question of law and fact," *see Direct Action for Rts. & Equal v. Gannon*, 819 A.2d 651 (R.I. 2003), courts – as opposed to public bodies – are best equipped to render such decisions. Public bodies should not be in the business of making "public interest" determinations.

Two unfortunate outcomes flow from the requirement that a public body waive fees if it determines a request is in the public interest. First, since every request made by a member of the public could be considered "in the public interest," the provision could result in a fee waiver for every request. The ability to impose fees for the search, retrieval, and redaction of documents serves an important function in the APRA process. For one,

[3] R.I. Gen. Laws § 38-2-2(4)(D).

[4] § 38-2-2(4)(P).

[5] § 38-2-2(4)(S).

levying fees encourages requestors to carefully tailor their requests to precisely the records they seek. Fees also serve to deter abusive requests that are unreasonably broad, unduly burdensome, or intended to disrupt the public body's business.[6] Second, the "public interest" determination could cut against individual requesters with their own private interests in records. For example, a request to see a site assessment for a particular abutting property might not qualify as a request in the public interest. Thus, people with interests not shared by the public at large would be forced to pay for records while entities with broader interests would not.

Public bodies take transparency seriously. But they must also be mindful of the costs associated with burdensome APRA requests, which take employees away from other duties and cost the taxpayers. Authorizing a reasonable cost for *all* APRA requests is fair and achieves a reasonable balance between transparency and taxpayer burden.

Prohibiting Charges in the Case of a "Denial" is Vague and Will Create Unnecessary Burden and Confusion

The Act also seeks to amend § 38-2-4(b) to prohibit charges "for the denial of a request for records." Pursuant to § 38-2-7(a), a requestor may be denied "the right to inspect or copy records, in whole or in part." Requests are often denied "in part," meaning that one or more documents will be withheld or redacted pursuant to permissible exemptions. Therefore, as currently drafted, the Act would prohibit public bodies from charging a reasonable fee for the labor-intensive, yet necessary, function of review and redaction, even when such redactions are entirely justified. Relatedly, it is unclear how a public records officer could ever accurately estimate the chargeable unredacted portions of document and the unchangeable redacted portions of documents.

The System for Requesting Public Records is Simple and Predictable for Both the Public Body and Requester; the Proposed Amendment Will Not Result in Greater Public Access

Two provisions of the Act address a requester's failure to follow a public body's APRA procedures. The first, amending § 38-2-3(f), provides that a requester's failure to follow the public body's written procedure for obtaining public records shall not, by itself, serve as the basis not to respond. The second, amending § 38-2-3(g), allows requesters to bypass the public body's records officer altogether by delivering the request to any person

[6] The Administration acknowledges the Act's attempt to contend with "vexatious requests," however, that section as proposed addresses only multiple requests and not a single burdensome request. It therefore fails to ameliorate the Administration's concerns over the Act's unnecessary changes to the existing statutory fee structure – a structure that is administrable and fairly accounts for governmental resource limitations. In any event, the new "vexatious requests" section ultimately offers an unworkable solution, forcing public bodies to initiate an adversarial action against a member of the public while also expending resources to fulfill the request during the pendency of the litigation.

in the public body. The recipient is then required to forward the request to the public records officer, and an additional five days is added to the response deadline.

APRA requires public bodies to establish written access procedures and post them on their websites. These procedures must include the identification of a designated public records officer, and how and where to make a public records request. *See* § 38-2-3(e). These procedures are not complicated. Public records officers monitor their inboxes and have backup coverage if they are sick, on vacation, or otherwise out of the office. They know that they are under a statutory time deadline, and they act accordingly. The same may not be true of other employees of the public body who have different responsibilities, are not on notice of any APRA obligation, and may not have the appropriate backup.

The system for requesting public records works. Requiring public bodies to respond to requests that come outside that system introduces a level of chaos that hurts both the public body and people seeking public records.

Increasing Fines for APRA Violations is Counterproductive

The Act's proposed amendment to §38-2-9(d) increases the civil fine for a knowing and willful violation of the APRA from $2,000 to $4,000 and the fine for a reckless violation from $1,000 to $2,000. State taxpayers will bear the burden of fines levied against state public bodies because those fines would be directed to certain municipalities. To the extent the fines are instead levied against an individual public records officer, the fines may discourage public servants from serving the important role of public records officer.

Awarding Compensatory and Punitive Damages for APRA Violations Makes Little Sense

The Act allows for the award of compensatory and punitive damages for violations of the APRA. Compensatory damages are intended to make whole an injured person for losses suffered, yet it is difficult to imagine what losses, either pecuniary or nonpecuniary, would be suffered from a public body withholding documents in response to an APRA request. Punitive damages are intended to punish the purposed wrongdoer and deter future wrongful conduct, but neither punishment nor deterrence is furthered by awarding punitive damages against the State. The Rhode Island Supreme Court has declared punitive damages "an extraordinary sanction . . . disfavored in the law," only to be awarded with "great caution and within narrow limits." *Palmisano v. Toth,* 624 A.2d 314, 318 (R.I.1993). A violation of the APRA is unlikely to ever warrant such a severe remedy.

The Administration appreciates the opportunity to express its concerns with the Act.

Sincerely,

Claire Richards

Claire Richards
Executive Counsel

cc: Honorable Members of the Senate Committee on Judiciary
Honorable Louis P. DiPalma
Steven T. Hayes, Esq.