

Conclusions & Recommendations

Summary of Findings

This audit of the implementation of open records legislation in Rhode Island's cities and towns has produced some telling, and at times disappointing, results. Overall, 83.5 percent of the ten indexes were provided. That result would be impressive if it was difficult or impossible to comply 100 percent of the time. But the law demands 100 percent compliance, the citizens are entitled to 100 percent compliance, and the results in eight jurisdictions indicate that this standard is achievable. The most disappointing results, then, are from the seven jurisdictions in which only 60 or 70 percent of the requests were fulfilled. In short, this report indicates that the public's right to know is often respected, but it is also violated in a disturbing number of cases.

This study also identified distinct trends among the three departments under investigation at the local level: city/town clerks, the school department, and the police department. The city/town clerks performed best, fulfilling all of document requests used to measure overall compliance. City/town clerks were also more courteous and less inquisitive than either the school department or the police. The school departments followed closely behind the city/town clerks by fulfilling 94.1 percent of the documents requested. The best school departments were Bristol/Warren and Coventry as they each provided all of the requested records, received high marks for courtesy, and high-quality minutes and budgets.

The police were by far the worst division of local government. They fulfilled only 35 percent of all the requests used to measure compliance. Additionally, no police department released information regarding the most recent police brutality complaints even though these records, in redacted form, are clearly subject to disclosure under *The Rake* case. Police departments were also by far the most inquisitive subdivision of government. In all but three jurisdictions, researchers were

asked either for their identification or to provide a reason for their request to the police. The police also received the lowest marks for courtesy, and at times their behavior bordered on intimidation and harassment.

This study also examined several issues concerning the minutes of school committees and city/town councils. The statutory requirements upon which this evaluation is based may not be as well known as other obligations of the Open Records or Open Meetings Laws. Thus, noncompliance does not necessarily indicate reluctance on the part of a city or school officer to include important information, but rather a lack of knowledge of the Open Meetings Law. The issue of quality, which is not strictly included in the Open Meetings or Open Records Law, should also be a point of concern for those who keep minutes since poor quality ultimately translates into poor access.

Unfortunately, only eight (25.8 percent) of the school committees were in full legal compliance and had the highest rating for the quality of minutes. Only four city/town council minutes received this distinction. Problems in legal compliance were mostly (a) city/town minutes not listing a record of votes by member and (b) school committee minutes not recording who was present and absent. In terms of quality, poor layout and organization made many sets of minutes difficult, if not impossible, to use. There is significant room for improvement in how minutes are prepared in many jurisdictions.

Reasons for Noncompliance

What explains noncompliance with the Open Records Law? The answer appears to depend primarily on the specific department and the item requested. The city/town clerks performed better than the school and police departments, and, within departments, certain items, like school contracts and arrest reports, were more difficult to obtain than others were. But that observation does not explain why certain items are harder to obtain, or why certain departments are better at compliance than others.

This study was not designed to test causal hypothe-

ses. We did not try to interview those who denied access; in the case of numerous police departments, that would have been impossible because the researcher was essentially thrown out of the office. We formulated several possible explanations for noncompliance, however, in the course of surveying the 39 cities and towns. Those explanations are elaborated below, followed by some suggestions for improvement.

1. Ignorance of the Law

In collecting the data for this study, it became clear that some clerks and other municipal officials were not familiar with the law. They simply did not understand their obligations. With the exception of the police, a significant portion of the violations appeared to be from clerks who were unaware of the legal requirements, rather than being intentionally secretive, uncooperative or malicious.

For example, while the city and town clerks provided all of the requested index-items, there were nevertheless unnecessary delays, significant overcharges, and unfounded denials to requests for the most recently available city council minutes. These problems were even more obvious in the non-index-items. There were huge variations in the accessibility of the voting records. Some jurisdictions provided them only on disk, some only in hard copy, and some not at all. The price, in both electronic and hard-copy forms, varied greatly from jurisdiction to jurisdiction.

Similar problems regarding “transaction costs” revealed themselves at the school and police departments, and it is reasonable to suggest that steps should be taken to eliminate these obstacles to access by insisting that our public servants be aware of their obligations.

2. Police Secrecy

The most troubling finding — and hence the most significant policy puzzle in this study — involves the culture of police secrecy. The police departments are the least compliant of the three departments. In some sense, the police are quite open in their disdain for the law. This may not be surprising since the last attempt to enforce the law was three years ago when the

Attorney General sent a letter to all police departments outlining their minimal legal obligations.

Why are the police so secretive? The explanations for denying requests that the police gave us during this study are telling and provide useful clues for understanding this puzzle. Not only do police deny access to records that are public by law, but the way and the reason that police deny access is troubling. In many cases, police officers seem to think providing access to records would interfere with ongoing investigations or violate the privacy of the people involved. There is a well-established, almost paramilitary attitude that the police know what was best, and the police are in control. While some police records are rightfully confidential, this is no reason to deny access and be abrasive and secretive about all records. It is also possible that the police fear, as too many public officials in other settings do, that releasing records might somehow embarrass or incriminate them. How to overcome this kind of intransigence is a policy challenge.

3. School Secrecy

Although not as reluctant and as secretive as the police, secretaries and front-desk workers at school district offices appeared more reluctant than the city and town clerks to provide access to public records. Perhaps this is due, in part, to the culture of the institution. School districts, unlike city and town halls, have a significant number of records regarding student affairs, which, in many cases, are confidential. This may explain why secretaries are more cautious as to what records they give out. For example, clerks at school departments were often more inclined to consult a superior about whether they should release the public information. Additionally, school department clerks, in comparison to the clerks at city/town halls, may not be faced with the same frequency of requests for public documents. Perhaps this lack of regularity or experience in dealing with the public contributes to the reluctance and/or confusion of some school clerks. In any event, school clerks have the same obligations under the law as other public servants, so these circumstances do nothing to excuse

them from their non-compliance. They do suggest the need for better training.

4. Abuse of Discretion

Another disturbing revelation of this research is that some local clerks seem to have adopted their own ad hoc policies in violation of the Open Records Law. For example, the New Shoreham tax assessor stated that it was not her policy to release a list of tax delinquent properties until the day of the sale, even though other jurisdictions complied with this request. Similarly, the researcher was denied the school contract in Johnston on the stated grounds that the document would be too confusing for the researcher to understand. In instances like these, the clerk is acting as a gatekeeper rather than a person assigned to facilitate public access. The Open Records Law does not leave such decisions to the discretion of local clerks and there is an obvious need to standardize implementation.

Recommendations

1. Training and Continuing Education

Some of the compliance problems encountered in this study were undoubtedly due to ignorance of the law. For example, some clerks are apparently unaware that the Open Meetings Law specifies when unapproved minutes must be released. Similarly, many school department clerks seem unaware that the Open Records Law mandates release of documents such as the policy manual and the school contract. It is harder to attribute violations by the police to ignorance since police departments have been advised by the Attorney General and, of course, their stated mission is to enforce the law. Nevertheless, compliance would clearly improve if those responding to requests from the public received better training.

The institutional framework for improving education for city and town clerks exists in the form of the Rhode Island Town and City Clerks Association. Most cities and towns in Rhode Island hold membership in the Association, but some do not. The Association

holds quarterly meetings and it sponsors a summer program at Salve Regina University through which clerks can receive accreditation. The regular meetings offer an excellent opportunity for continuing education and the courses taught at Salve Regina seems to offer an ideal opportunity for detailed instruction in the Open Meetings and Open Records Laws.

The Rhode Island Association of School Committees provides a similar opportunity for school board members and school department clerks. All but four or five of Rhode Island's school committees are currently members, and this association offers in-service training and workshops ranging from issues of contract negotiations to the Open Meetings Law. These seminars are offered after each general election and are aimed primarily at newly elected school committee members, but these seminars are open to committee clerks as well. This study indicates that there is room for improvement. These efforts obviously are not reaching enough of the front-line clerks.

The Rhode Island Police Academy is the institution in place for training police officers. Along with instructing cadets, the academy also offers in-service training each year for current police officers. Representatives from the Attorney General's office have participated in programs designed to offer information to officers and cadets on various law enforcement procedures. The academy offers classes on the use of force, instruction regarding firearms, and a constitutional law course as part of its curriculum, but there are currently no courses or programs specifically designed to instruct officers on their responsibilities under the Open Records Law. Beyond the Academy, there is an obvious need for continuing education, and possibly even some kind of monitoring, since the police seem to disinclined to obey these laws.

2. Monitoring

Government programs do not implement themselves. Rather, they require monitoring if the government is to assure that the desired goals are being met. Recognizing the importance of such monitoring, the American Library Association has interpreted the

right to use a library to require that libraries:

“systematically monitor their programs of service for potential barriers to access and strive to eliminate such barriers when they occur” (Economic Barriers to Information Access, *An Interpretation of the Library Bill of Rights*; ALA).

Prior to this study, there had never been a systematic statewide audit of this nature in Rhode Island. The Attorney General’s Office has been made aware of the problem through complaints, but no Attorney General has ever undertaken a proactive study of how well the law is implemented. If authority to enforce this law remains with the Attorney General, then the A.G. should monitor implementation in order to identify problems and decide which enforcement actions are most important. If this authority is transferred elsewhere (as recommended below), then the responsibility to monitor follows.

3. Transfer the Attorney General’s Enforcement Powers

The law currently allows aggrieved citizens to file complaints with the Attorney General. The Attorney General then may either file suit on behalf of the complainant, issue an advisory opinion, or choose to take no action. The difficulty with this method of redress is that there may be little incentive for the Attorney General to consistently take action, especially by filing suit, on behalf of citizens who are attempting to obtain public information. Since the Attorney General often depends on other government agencies and officials, especially police departments, to perform the functions the office, the Attorney General may be disinclined to disrupt the relationships with those agencies in order to enforce the Open Records Law.

That is certainly the track record under more than one Attorney General. Actions taken by the Attorney General regarding public information, especially in terms of police records, have tended to be in the form of non-binding advisory opinions, such as the letter to police departments in 1994, that specify the bare minimum that has to be released. The ineffectiveness of this current means of enforcement power is illustrated by this study in that no jurisdiction provided redacted

police brutality complaints, which appear to be open records according to *The Rake* case.

The current practice of routing complaints through the Attorney General’s office should be examined to determine if this best meets the public’s needs. Other states have recognized this possible conflict of interest and removed the Attorney General from the process and, in some cases, set up other institutional mechanisms for complainants. Only thirteen other states make some provisions for the Attorney General to be involved in disputes over public records. Most of these state’s statutes outline the Attorney General’s involvement as being more of an advisor and mediator rather than a proactive advocate. Rather than placing the responsibility of enforcement in the hands of the Attorney General, Connecticut has created an innovative Freedom of Information Commission that investigates complaints regarding public access. Interestingly, the Attorney General proposed moving the enforcement power for the Open Records Law to the Ethics Commission, but the proposal did not include any additional funding for the commission to carry out its increased workload. (See, *Statement in Opposition to 93-S 923, Rhode Island Ethics Commission*) Such a restructuring seems plausible, but the funding is necessary in order for this reform to be successful. Also, the suggestion, in itself, indicates that the Attorney General’s office would feel more comfortable if the powers of enforcement were transferred out of their hands.

4. Provide for Attorneys’ Fees

While some states allow complaints to be filed with the Attorney General, most states, Rhode Island included, also allow citizens to independently seek legal action in order to obtain public information. However, Rhode Island is one of the few states that does not allow citizens who successfully sue to obtain records to receive reimbursement for court costs and attorneys’ fees. Forty-one of the fifty states make some sort of allowance for recovery of court costs, attorney fees, or both. For example, Maine and Massachusetts allow successful plaintiffs to be reimbursed for their court expenses but do not allow for the recovery of attorneys’ fees. Other states, like Connecticut, allow

trial expenses to be granted to a successful plaintiff up to a \$1,000 limit. (Tapping Officials' Secrets: The Door to Open Government in the 50 States and D.C., The Reporters' Commission for Freedom of the Press, 1997) Often, the recovery of court costs and attorneys' fees are left to the discretion of the court, as is the case in states such as Maryland, Delaware, Illinois, and Indiana. Some states go even further since their statutes require that successful plaintiffs be completely reimbursed for their expenses. These states include California, Florida, Iowa, and Missouri. In many of these states, the statute allows for recovery of expenses only if the plaintiff "substantially prevails" or if the agency who denies the request is found to have committed a willful violation of the law.

By giving citizens the opportunity to independently pursue litigation while failing to allow for reimbursement, the state, in effect, makes this avenue of recourse expensive and denies its potential effectiveness. Court costs and attorneys' fees act as another structural impediment to citizens who seek to obtain documents that are, by law, public information. By amending the Open Records Law to provide for attorneys' fees and court costs, the Rhode Island legislature could remove this obstacle to access and create a more effective means for citizens to protect their right to public information.

5. Electronic Access: Problems and Possibilities

As we move closer to the next millennium, government records are increasingly being stored or created on a computer. The computerization of everything from the "booking" of an arrestee to the list of registered voters has greatly improved the efficiency of local governments and made records more rapidly accessible and searchable. At the same time, this rapid computerization has created questions about how such records are protected under existing open records statutes.

a. Are electronic records as legally accessible as hard-copy documents?

Rhode Island's law, although enacted in 1979, is relatively progressive in that it specifically states that public records should be available regardless of physical form and also provides that printouts of any computer stored data be available R.I.G.L. § 38-2-3(d) and 38-2-3(e). This would imply that all public records created on computers would be open, and that, at the very least, a hard copy should be made available. The issue of the format of the data, electronic or on paper, has been debated around the country and in numerous court cases. The general trend in recent cases is that, unless there are extenuating circumstances, the data should be made available in electronic form (Chris Lopeta "Access to Electronic Access" A Guide to Reporting in the Computer Age, Reporters' Committee for Freedom of the Press, 1994) Some states have amended their laws to clarify this issue. In Connecticut, for example, the state legislature passed an amendment to its open records law requiring that the records must be provided in the form in which they are asked for, if available.

A legal loophole often used by agencies to deny access to electronic database records is a provision in practically all open record acts, include Rhode Islands, stating that agencies are not required to create a new document to meet a public request. Some agencies have argued in court, occasionally successfully, that by having to run a search of a database to only pull out certain records constitutes the creation of a new record.

Clearly, this issue requires legislative clarification.

b. How much should electronic documents cost?

Many people seeking electronic records find that they are allowed to access the records, but only for an unreasonable cost. For example, in the Providence Journal-Bulletin case, the state requested several million dollars for the records. The statute specifies only two costs to be associated with access to public records: a maximum of \$.15 a page for copying of documents,

and a maximum of \$15 an hour for staff time put into assembling the documents. Some states, such as Connecticut, have enacted laws that the cost of access shall not exceed the direct cost of the agency to provide it. Again, whether or not these costs are appropriate for electronic access is an issue that could use legislative clarification.

C. Possibilities

The increase in the use of computers in the compilation and storage of government records has not only increased productivity for the government, but has created a unique opportunity for extremely easy access to records. Computerized access to the records is not only faster than to its paper counterparts, but is generally less expensive, both in terms of materials and staff time. For these reasons, two main recommendations are appropriate since they suggest ways to increase access to electronic public records.

i. Local governments should recognize the efficiency, in terms of administrative costs and time required by the public, associated with electronic access.

When a member of the public asks for documents stored electronically, clerks often locate the records in their digital form and then produce a printout. Not only does this require significant staff involvement, but consumes considerable amounts of paper. It would be far simpler, in most cases, if the public could simply access the electronic versions directly. As long as the contents were organized in a user-friendly fashion, the data could be accessed by the public without the involvement of the staff. Also, as time progresses, electronic access to records is going to become a larger issue. Those towns that make an effort now to create an on-line presence will not only make it easier for their citizens to obtain the information they need, but will save themselves the hassles of trying to catch up in the future.

In terms of the citizenry, electronic access would provide the ultimate in accessibility as anyone, anywhere, at any time could access the records from their home, business or one of the numerous public libraries or internet cafes offering no cost access to the Internet. Placing the records on the Internet would also allow a searching capacity such that the public could electronically find the information they are looking for among many records.

ii. Local governments should learn from the example set by federal and state efforts to make documents accessible via electronic means.

The benefits of placing public records online have already been well exploited by the federal government. Not only are versions of bills before Congress available online, but most federal agencies have placed thousands of regulations, informational pamphlets, and other materials on the Internet.

The State of Rhode Island has recently placed legislative information, including bills, on the Secretary of State's Web site. Although there is still a lot of room for improvement, some localities have made bits and pieces of public information on the Web. Providence, for example, on the mayor's home page, has placed an electronic copy of the city ordinances.

Another interesting example is that of Jamestown where "unofficial" agendas to upcoming meetings and minutes from past Town Council, Planning Council, and Zoning Board meetings are available on the Internet (<http://users.ids.net/~allphin/meetings.htm>). The site is not sponsored by the Town of Jamestown, but rather by a member of its Zoning Board who is working in cooperation with the Town. While unofficial, it does provide a good example of the possibilities for placing public records on the Internet. While not searchable, the site does provide up-to-date information in an easily accessible format.