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A decade after “Access Denied”

The Rhode Island General Assembly and the Open Meetings Act

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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.

- § 42-46-1 Rhode Island General Laws

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Executive Summary

Enacted over 30 years ago, the Open Meetings Act ensures that all Rhode Island citizens are granted free and open access to their government. However, one part of our government does not have to abide by this bedrock of open government; the Rhode Island General Assembly.¹ This report examines the voluntary compliance with the Open Meetings Act by the General Assembly over the past decade.

Since 1999 the Rhode Island Secretary of State has issued an “Access” report documenting the General Assembly’s voluntary compliance with the Open Meetings Act. Over the course of the last decade the, “grade” assigned to the assembly has increased as the total number of violations of the Open Meetings Act has declined. Legislative leaders have seized upon these rising grades as proof of greater transparency in the legislative process.² However, a reexamination of the data reveals that despite the fact that the total numbers of violations are diminishing, there has been a much less dramatic drop-off in violations during the crucial final two weeks of each General Assembly session.

In the last four years, 83% of violations of the Open Meetings Act have taken place in the last two weeks of the legislative session. In 2010, 28 of the 31 violations of the Open Meetings Act, 94%, occurred in the last eight days of the legislative session. These violations involved crucial pieces of legislation with lasting ramifications. They included the Financial Stability Act, which shifted the balance of power between the state and municipalities in economic distress, and the legalization of the sale of dangerous fireworks weeks before the 4th of July holiday without sufficient input from public safety officials.

This report demonstrates that over a decade after the watershed report, “Access Denied: Chaos, Confusion, and Closed Doors” much work remains to be done to ensure that the work of our legislature is completely transparent.

¹ Katherine Gregg, “Does the law apply to the General Assembly” in *It’s your right to know: 12 essays on the importance of access to government meetings and records in Rhode Island* (2002, Access/RI) pg. 24-28, found at http://www.accessri.org/Index/FOI_Essays_Main.HTM

²Katherine Gregg, “UPDATED: Lawmakers get high marks for open meetings law compliance” in *The Providence Journal*, 10:36 February 18, 2011 (<http://politicsblog.projo.com/2011/02/lawmakers-get-h.html>)

Introduction

The Open Meetings Act exists to allow citizens access to the workings of public bodies making decisions on their behalf. In Rhode Island, which for more than two centuries had a constitutionally supreme legislative branch, the General Assembly is the most important (although not the only) public body in the state.³ In 1998 the groundbreaking report by the Rhode Island Secretary of State; “Access Denied: Chaos, Confusion, and Closed Doors” revealed that our General Assembly was not living up to the rules for transparency it required of all other public bodies in Rhode Island.

Since that 1998 report successive Secretaries of State have issued updated Access reports measuring the General Assembly’s compliance with the Open Meetings Act.⁴ These reports demonstrate that the General Assembly’s voluntary compliance with the Open Meetings Act has improved dramatically since the first Access report. However, the number of violations occurring in the crucial final weeks of the legislative session have remained persistently high.

The Open Meetings Act

The Open Meetings Act, first adopted in 1976, resulted from the “sunshine” movement of the 1970s that included the equally important Access to Public Records Act. Applying to “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government” it assures openness and transparency in all branches of state and municipal government.⁵

Violations of the Open Meetings Act can result from a variety of different actions. These include insufficient or no notice of committee meetings, incomplete or vague agendas, lack of public access to the meeting space, or not publicly closing the meeting in accordance to rules for executive sessions.⁶ Those who suspect violations of the Open Meetings Act can file complaints with the office of the Attorney General.⁷

Granted the power to file suit against any entity that is reported to have violated the act, the Attorney General’s office responds to all complaints with their own investigation. If necessary they are granted the statutory authority to sue the public body for recompense. In 2010, the office of Attorney General responded to 22 alleged violations of the Open Meetings Act, filing one suit in the case of Kilmartin v.

³ In 2004 the citizens of Rhode Island amended their constitution to create a system of Separation of Powers, making the state the last to do so in the United States.

⁴ Reports can be found at: <http://sos.ri.gov/publicinfo/opengovernment/accessreports/>

⁵ Rhode Island General Laws § 42-46-2 “Definitions” number (3) “Public Bodies”

⁶ Rhode Island General Laws §42-46-3, §42-46-4, §42-46-5, §42-46-6, §42-46-7, 42-46-8

⁷ Rhode Island General Laws § 42-46-8 “Remedies available to aggrieved persons or entities”

Albion Fire District.⁸ In that case, Attorney General Peter Kilmartin sued the Albion Fire District for \$5,000 over an overly vague agenda.⁹ However, the Attorney General lacks the authority to take such actions against the General Assembly.

In the last several decades, a succession of Attorneys General, including Dennis Roberts, Arlene Violet, and James O'Neil, have opined that while the term "public bodies" in the Open Meetings Act applies to the General Assembly, no punishment can be levied against the legislature.¹⁰ Best summarized by Attorney General Sheldon Whitehouse in a letter to the legislative leadership, immunity from prosecution for violations of the Open Meeting Act rests on the "speech in debate" protection afforded the General Assembly in Article VI, Section 5 of the Rhode Island Constitution.¹¹ The General Assembly is a body subject to the Open Meetings Act, but immune from prosecution for any violations.

Rhode Island's Struggle with Open Government.

Upon being elected Rhode Island Secretary of State in 1994, James Langevin identified a lack of transparency in the General Assembly as one of his primary issues. In 1998 Langevin, in partnership with Brown University researchers, published the report "Access Denied" which summarized the closed nature of legislative actions.¹² The findings were remarkable, "A total of 52% of the meetings held in the 1997 session were shown to have had some type of violation of the letter or spirit of the Open Meetings Law."¹³ Equally worrisome, the report found that "Substantive action was taken on 236 bills with no notice to the public whatsoever, including items as important as the state budget and the sale of major non-profit hospitals to for-profit companies."¹⁴

From 1999 until present successive Secretaries of State have released annual updates listing by General Assembly committee compliance with the Open Meetings Act.¹⁵ Given the legislature's immunity from prosecution, these reports serve as the only check on abuse of the Open Meetings Act by the General Assembly.

⁸ Open Government Summit Booklet, "Access to Public Records Act & Open Government Act" released by the Department of the Attorney General, Peter F. Kilmartin (January 13, 2011)

⁹ State of Rhode Island Superior Court, C.A. No.: 11 "Atty. Gen. Peter Kilmartin (in his official capacity) vs. Albion Fire District" issued 2/07/2011

¹⁰ Gregg, Does the law apply, pp. 24-28.

¹¹ Letter from Atty. Gen. Sheldon Whitehouse to Hon. John B. Harwood, Speaker of the House of Representatives, and Hon. Paul Kelly, Majority Leader of the Rhode Island Senate (February 3, 1999)

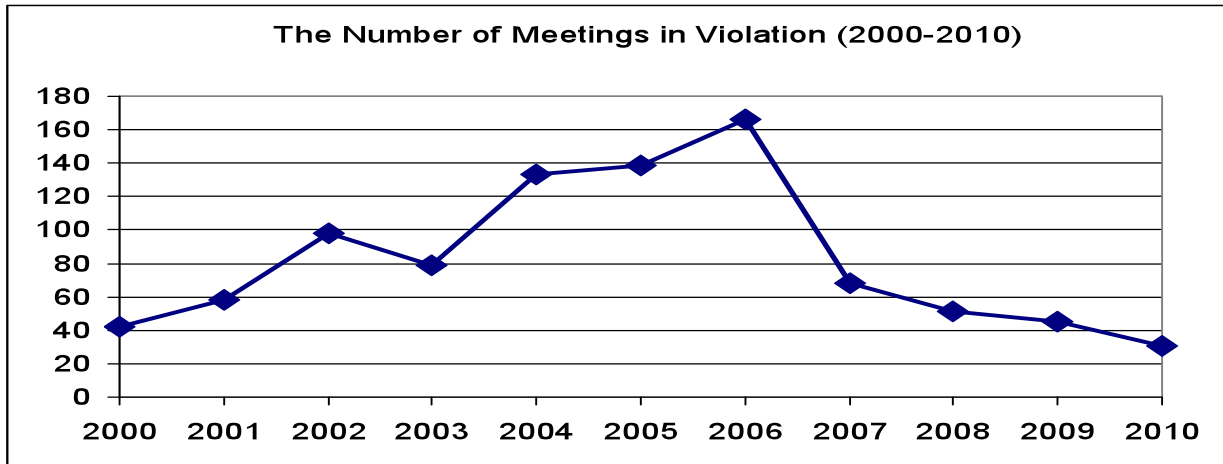
¹² U.S. Congressman Jim Langevin Official Website, Biography (<http://langevin.house.gov/about/biography.shtml>)

¹³ Seth Andrew, "Opening the doors: General Assembly audits and the open meetings law" in *It's your right to know: 12 essays on the importance of access to government meetings and records in Rhode Island* (2002, Access/RI) pg. 21.

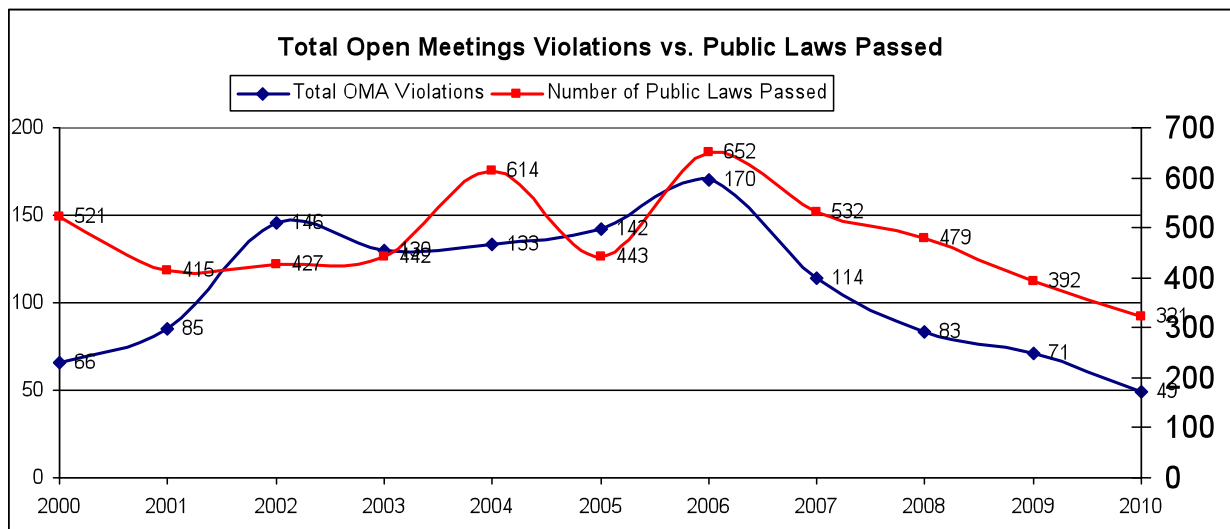
¹⁴ Ibid.

¹⁵ Reports can be found at: <http://sos.ri.gov/publicinfo/opengovernment/accessreports/>

Beginning in 2000, the number of violations climbed steadily higher until 2006. In that year, the number of both total violations and meetings in violation peaked at 166 meetings and 170 violations, with a percentage of over 35% of all committee meetings in violation of the law.¹⁶ Since then, the overall numbers have steadily declined.



Graph (A): The number of committee meetings in violation as found in the Secretary of State Government Access Reports (<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>) Violations can indicate insufficient or no notice of meeting, incomplete or overly vague agendas, and lack of public access.



Graph (D): The total number of Open Meetings Violations as found by the Secretary of State Government Access Reports (<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>) juxtaposed with the number of bills passed during that legislative session.

¹⁶ Graph (A)

End of Session Violations

Article VI, Section 7 of the Rhode Island Constitution allows each chamber to adopt its own rules of proceeding. The House and Senate Rules are adopted every two years, and govern the manner in which these bodies operate. In the 2009-2010 House and Senate Rules, both chambers included rules requiring committee agendas to be posted 48 hours in advance of a hearing as well as other language following the Open Meetings Act.¹⁷

Both legislative chambers allow suspension of their rules by a 2/3rds vote of the body. As is common practice, in the final two weeks of the 2010 legislative session, both chambers suspended a limited number of their rules.¹⁸ It is during the period when the rules are suspended that the bulk of the violations of the Open Meetings Act occur.

Despite the fact that overall violations have declined over the last four years, the end of the legislative session presents a recurring problem, and one that has worsened throughout the decade.¹⁹ The 2010 session, which ended June 10th, had 31 total meetings in violation. However, of that total, 29 of them occurred in the last two weeks of the session, meaning that in only eight days (June 2-10), 29 meetings occurred in violation of the Open Meetings Act.

Month / Year Breakdown of General Assembly Meetings in Violation of Open Meetings Act												
Month	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Totals
Jan.	0	1	3	5	6	7	7	0	0	0	0	29
Feb.	1	0	5	1	5	6	5	0	0	0	0	23
Mar.	7	8	15	9	21	14	29	2	0	0	0	105
Apr.	6	12	22	12	27	20	18	4	1	0	1	123
May	3	4	44	6	10	17	30	1	0	0	1	116
June	25	32	5	29	63	69	77	61	50	38	29	478
July	0	0	1	17	0	6	0	0	0	0	0	24
Other	0	1	3	0	1	0	0	0	0	7	0	12
Totals	42	58	98	79	133	139	166	68	51	45	31	910

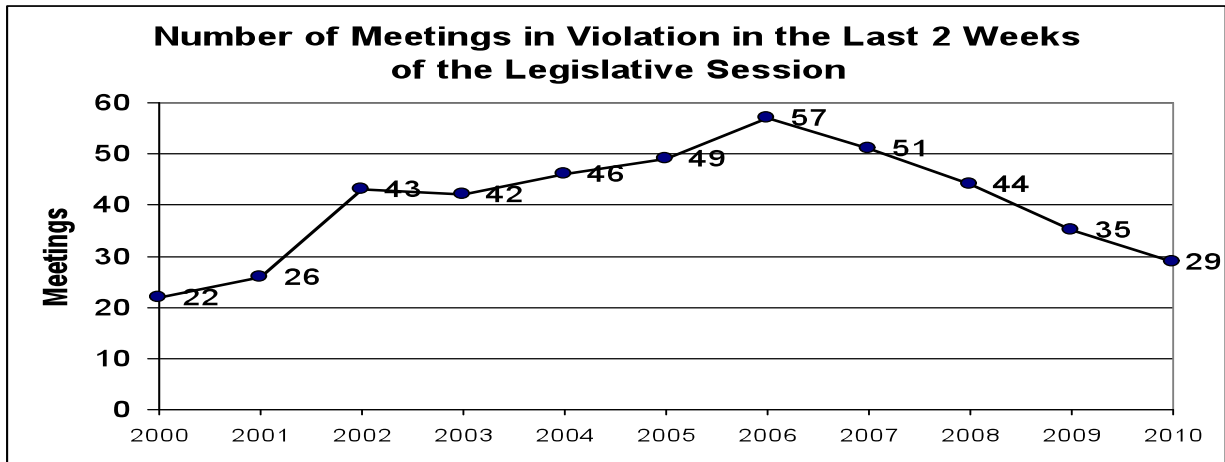
Table (A): The number of committee meetings in violation as found in the Secretary of State Government Access Reports (<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>). Violations include insufficient or no notice of meeting, incomplete or overly vague agendas, and lack of public access.

¹⁷ H.5529 Sub A, Introduced by Representative Eileen Naughton, February 24, 2009, pg. 19 **and** S. 792 Sub A, Introduced by Senator Christopher Maselli, March 17, 2009, pg. 24

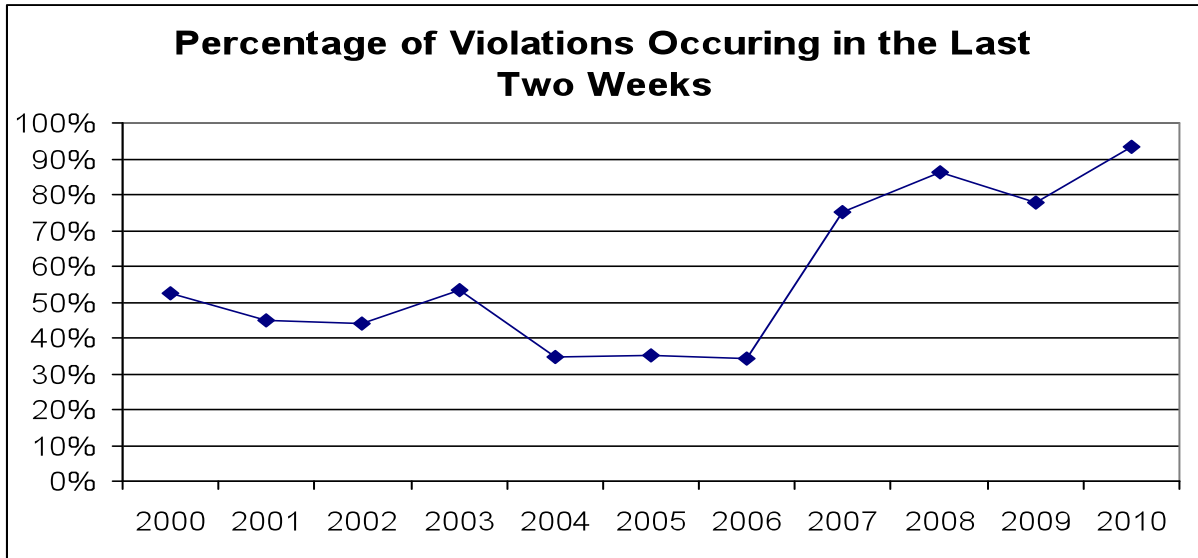
¹⁸ On June 2, 2010 the Senate suspended 9 rules, including 48 posting of committee agendas. On June 8, 2010 the House suspended one rule that included 48 hour posting of committee agendas. See Journal of the Senate, June 2nd, & 3rd, & 4th & 8th, 2010, p. 13 and Journal of the House of Representatives, June 8th & 9th, p. 28.

¹⁹ Access 2000, Access 2010 (<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>)

In 2000, of the 42 total meetings in violation to the Open Meetings Act, just over 52% of them occurred in the last two weeks of the session. In the 2010 legislative session, almost 94% of the 31 total meetings in violation were during the last eight days of the legislative session. Graphs (B) and (C), illustrate that instead of being solved, the practice of violating the Open Meetings Act is taking a form where violations are rampant for the last two weeks of the session in order to pass copious amounts of legislation.



Graph (B): The number of meetings in violation during the last weeks of the legislative session as found in Access Reports 2000-2010 (<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>) Violations include insufficient or no notice of meeting, incomplete or overly vague agendas, and lack of public access.



Graph (C): The percentage of committee meetings in violation during the last two weeks of the legislative session.

(<http://sos.ri.gov/publicinfo/opengovernment/accessreports/>) Violations include insufficient or no notice of meeting, incomplete or overly vague agendas, and lack of public access

In 2000, the number of violations per month indicates that infractions were a regular occurrence throughout the session, and then during June, as the number of meetings increased, the number of violations followed suit. This increased steadily through 2006, where the frequency and number of violations in March, April, and May indicate the same thing, a complete disregard for openness and transparency that in June, corresponding with the increase in meetings, increased with the workload. From 2000 to 2006, the percentage of meetings in violation occurring during the last two weeks of the session broke 50% only twice.

However, 2008 through 2010 is different in numerous ways. Only three total violations in those three years occurred in the months of January through May. In the last two weeks of each session, 117 meetings occurred in violation of Open Meetings Act.²⁰ At the most important point in the legislative session, when the bulk of legislation is moving through the process, the number of violations are at their peak.

The practice of regularly violating open meetings laws during the last two weeks of the session is dangerous because of the amount and magnitude of the passed legislation. In 2010, out of the 321 bills that emerged from the General Assembly, 298 were enacted, with or without the Governor's signature, between June 9 and

²⁰ Graph(B): 44 in 2008, 35 in 2009, 29 in 2010

July 1, 2010.²¹ As of April 11, 2011, the General Assembly has passed 8 bills into law, despite the fact that last decade an average of 523.8 were passed each session. The end of session witnesses such a high volume of legislation that it is during this period that it becomes particularly important for the public to be able to track and monitor their government. However, due to what is becoming a regular practice of ignoring these laws during this period, this ability is severely limited, if not altogether compromised.

It is during the passage of controversial and important legislation that openness and accountability become most vital. Over the past years, openness and transparency during most of the year is increasing, as the infrequent violation is more likely the result of a mistake or a routine matter than a deliberate violation. However, during the end of session, the General Assembly deliberately excludes the public, and the exempt status of the legislature prohibits anyone from challenging a piece of legislation that has passed in violation.

Why Is It Important?

"In all actions brought under this chapter, the burden shall be on the public body to demonstrate that the meeting in dispute was properly closed pursuant to, or otherwise exempt from the terms of this chapter." - Rhode Island Open Meetings Act, § 42-46-14

The Open Meetings Law is not a novel idea to increase public participation, or a useless formality to appease the masses. Rather, it is a right of the people of Rhode Island to be able to have access to their government on all levels.²² Despite the fact that the number of violations in the General Assembly has decreased since 2006 and the legislature seems to be coming to terms with the importance of transparency, it is still significant that no means exist to enable the public of Rhode Island to defend this right. The importance of the continuing violations to Open Meetings Act is demonstrated by the amount and type of legislation that is passed in violation.

Looking only at the 2010 session, the House Finance and Judiciary Committees, two of the most important and powerful committees, exemplify the mass passage of legislation under the guise of efficiency. In one day, June 9, 2010, the House Finance Committee violated the Open Meetings Act on five separate occasions, which in the Access Report was recorded as one meeting in violation. Over the span of three meetings, the House Judiciary Committee had eight violations in the handling of 21 pieces of legislation. In addition, on June 9, 2010, these two committees sent a combined 55 pieces of legislation to the floor to be voted upon, many of which had been introduced and passed through committee that same day.

²¹ The Law Revision Office, "The Official 2010 Public Laws List" (<http://www.rilin.state.ri.us/Lawrevision/plshort/pl2010nu.htm>) **and** RI General Assembly Archives, 2010 Bill Status (<http://www.rilin.state.ri.us/BillStatus10/>)

²² Rhode Island General Laws, Open Meetings Act, § 42-46

The following two case studies are examples of legislation that passed without sufficient notice or scrutiny. Additional examples of legislation that passed through these two committees in violation of the Open Meetings Act during the last days of the legislative session can be found in the Appendix.

Case Study #1: The Financial Stability Act

On June 8, 2010, Representative Steven Costantino introduced House Bill 8247, 'The Financial Stability Act', which revised G.L. Chapter 45-9 in response to the financial crisis in Central Falls and the appointment of their judicial receiver through the Superior Court.²³ The new law prohibited municipalities from seeking a judicial receiver, and instead empowered the state government, through the Department of Revenue, to take control of municipalities in severe financial distress through the appointment of a fiscal overseer, a budget and review commission, and a nonjudicial receiver.²⁴ A major piece of legislation, this bill restructured the traditional balance of power between state and local government. However, Rep. Costantino introduced the bill only three days before the end of session on June 10, meaning the only way it could possibly pass was if its hearings and votes violated the Open Meetings Act.

The day after it was introduced, the House Finance Committee heard and passed H. 8247 Sub A, which was then placed on the House floor calendar. The following day, June 10th, it passed the House and was placed on the Senate floor calendar.²⁵ On June 11, 2010, the Senate voted to pass the bill, transmitted it to the Governor's office, who signed the bill into law that same day.²⁶ In four days, a new and major piece of legislation passed through a committee, both Houses, and was transmitted and signed by the Governor. All of this was done in spite of a law that requires 48-hour notice period for almost all of those steps, exemplifying the manner in which allcitizens who are not political insiders can be kept out of the Rhode Island legislative process, even in instances of major legislation.

Following the passage of the Financial Stability Act, Central Falls Mayor Charles Moreau sued the State of Rhode Island on the premise that the law violated the city of Central Falls' self-governance and his right to due process. On May 29, 2011, the State Supreme Court ruled that since Mayor Moreau, the plaintiff, was not taken out of office, and the receivership was temporary, the law was Constitutional.²⁷

²³ Rhode Island General Assembly Archives, Bill Status, 2010 (<http://www.rilin.state.ri.us/BillStatus10/H8200-8292.pdf>)

²⁴ House Bill 8247 sub A, "Relating to cities and towns -- Financial Stability" introduced by Rep. Steven Costantino (<http://www.rilin.state.ri.us/BillText/BillText10/HouseText10/H8247A.pdf>)

²⁵ Rhode Island General Assembly Archives, House Journals, June 9, 2010 (<http://www.rilin.state.ri.us/journals10/housejournals10/hjournal6-10.pdf>)

²⁶ Rhode Island General Assembly Archives, Senate Journals, June 9, 2010 (<http://www.rilin.state.ri.us/journals10/senatejournals10/sjournal6-09.pdf>)

²⁷ Abby Goodnough, "Rhode Island: Receivership is Upheld" in *The New York Times* published May 29, 2011 appearing in print May 30, 2011

The Supreme Court did not take into account the manner in which the General Assembly had passed this legislation. Legislative disregard of the Open Meetings Act resulted in a bill that passed in violation of the rights of an entire city to aid in the altering of their local structures of government. Affected parties, such as all citizens of the City of Central Falls, should have been given a chance to voice their opinions, or simply the opportunity to read the legislation before it was signed into law. Instead, the resulting legislation led to a year of litigation and controversy.

Case Study #2: The Last Minute Legalization of Fireworks

On May 25, 2010, both the Senate and House introduced bills that would legalize the sale of certain types of fireworks. The House bill, H. 8173 Sub A, was heard by the Judiciary Committee on May 27th, but then held for further study. In order to pass this legislation, it was brought back on June 8th and passed, but then placed on the House Calendar and passed by the House on that same day. On June 10th it was placed on the Senate Calendar, and then passed, transmitted and signed by the Governor on June 11, 2010.²⁸

Less than a month before Independence Day, the legislature pushed through a bill legalizing the sale of certain fireworks. This decision drew responses from multiple law enforcement sources. The president of the state Police Chiefs Association, Central Falls Police Col. Joseph P. Moran III, stated a week after the legislation was signed that he was unaware it even existed, while Warwick Police Col. Stephen M. McCartney was frustrated about how to enforce questionable legislation. “We have had no guidance at all from anybody,” McCartney explained. “Maybe the AG is doing something, but this is not the first time we’ve had this problem where all of a sudden a law pops up out of the legislature and we have to figure out how to enforce it.”²⁹ This problem was never truly solved, as law enforcement officials remained confused about how to enforce the law right up to, and during, the Independence Day celebrations.³⁰

These problems were a direct result of the speed with which the legislation moved through the process. The executive director of the American Pyrotechnics Association, Jill Heckman, called it, “[T]he most poorly written piece of legislation I have ever seen.”³¹ The Attorney General’s office supported this statement. “Because the fireworks bill signed into law is so poorly written and confusing, this may prove to be one of those exceptional cases,” said Beryl Kenyon, the Attorney General’s spokesperson. “The attorney general’s office did not craft the bill, did not sign the

²⁸ Rhode Island General Assembly Archives, Bill Status, 2010 (<http://www.rilin.state.ri.us/BillStatus10/H7900-8199.pdf>)

²⁹ Steve Peoples, “Rhode Island’s new fireworks law sparks confusion” in *The Providence Journal* published 12:33AM, June 21, 2010

³⁰ John Hill, “Fireworks in R.I.: What’s legal and what’s not” in *The Providence Journal* published 8:12AM, June 29, 2010

³¹ Peoples, “Rhode Island’s new fireworks law sparks confusion” June 21, 2010

bill, but now it's left to deal with what happens in late night sessions in the legislature."³²

In the last days of the legislative session, legislators voted and passed legislation in disregard of participatory government and public access. The lawsuits and law enforcement issues following the passage of the aforementioned case studies exemplify the repercussions that can result from end of session violations. Without taking into account public opinion, the advice of qualified individuals, or the concerns of those most affected, the eagerness to pass legislation has created an imprudent method of legislating which affects all citizens.

Conclusion

It should not be necessary for the Rhode Island electorate to be required to fight to ensure inclusion in their government. It is the purpose of elected government to comply with the rules set out for them, but in Rhode Island, this is not always the case. Despite the General Assembly's responsibility as representatives of the people of Rhode Island to safeguard and protect their rights, the yearly violations of the Open Meetings Act do the opposite.

Openness and accountability in government is not a strain on the legislative process, or an unnecessary measure taken to appease activists. It is a vital safeguard of democracy. Several years ago, over 35% of committee meetings were in violation of the Open Meetings Act. Last year, this number was down to less than 10%, almost all of which occurred in the last two weeks of the session. While this is an improvement, the regularly scheduled act of violating public access laws at the end of the session serves as a reminder of why they exist in the first place.

The vast improvements made in the last several years illustrate the problems with the exempt status of the General Assembly. Regardless of the improvements made, there is nothing to prevent the legislature from returning to practices that defined years such as 2006. And with the numerous violations occurring at the end of each of the most recent legislative sessions, the deliberative process of the General Assembly is circumvented to the detriment of both good public policy, and the citizens of Rhode Island.

³² Peoples, "Rhode Island's new fireworks law sparks confusion" June 21, 2010

APPENDIX

Additional Examples of Legislation that Passed the House Finance and Judiciary Committees during the last weeks of the 2010 legislative session

- H. 7943: Placed Municipalities and cities responsible instead of Amtrak should any train accident occur that was due to some fault in their transportation system.
 - Scheduled for its first hearing in House Finance on 6/9/10, on the same day, in violation of the Open Meetings Act, it was placed on the floor calendar, passed by the House, the next day it was placed on the Senate calendar, then on 6/11/10 it was passed by the Senate. On 6/14/10 it was transmitted to the Governor, on 6/22/11 it became effective without signature.
- H. 8172 as amended: An act to keep records of people applying for a permit to buy medical marijuana confidential.
 - Introduced on 5/25/10, Judiciary heard it on 6/2/10. Then on June 8th it was heard again in violation of Open Meetings Act, passed, then the same day passed on the floor, in violation. Two days later it was heard, amended, and passed by the Senate, and then the same day, passed in concurrence by the House. In three days, this bill passed through Committee, the House, the Senate, the House in concurrence. On 6/22/10 it became effective without the Governor's signature.
- H. 8185 Sub A as amended: Placed heavy fines, community service, and the suspension of license if 4 tickets in the span of 18 months were issued to the same person.
 - Introduced on 5/27/10, Judiciary heard it on 6/2/10. Then on 6/9/10 it was heard again in violation of Open Meetings Act, passed, the next day passed on the floor. On 6/11/10 it was heard, amended, and passed by the Senate, and then the same day, passed in concurrence by the House. On 6/28/10 it was transmitted to the Governor, on 6/30/10 it was signed and became law. In three days, this bill passed through Committee, the House, the Senate, and the House in concurrence.