AMERICAN CIVIL LIBERTIES UNION of RHODE ISLAND

128 DORRANCE STREET, SUITE 400
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org | info@riaclu.org

COMMENTS ON PROPOSED REVISIONS TO THE DEPARTMENT OF ADMINISTRATION'S RULES AND REGULATIONS GOVERNING ACCESS TO PUBLIC RECORDS
November 16, 2017

This testimony is submitted on behalf of ACCESS/Rhode Island, a coalition of non-profit organizations and First Amendment advocates in Rhode Island dedicated to ensuring government at all levels be accessible to the public. We appreciate the opportunity to submit testimony on these proposed regulations revising the Department's regulations governing compliance with the Access to Public Records Act. Our comments follow below:

1. Section 3.2(B) and (C) – Purposes and Policy. The Access to Public Records Act specifies that its purpose is to "facilitate access to public records." R.I.G.L. §38-2-1. While it is also designed to protect against "unwarranted invasion[s] of personal privacy," the primary goal of openness should not be diluted. However, we believe subsections (B) and (C) inadvertently do so by overemphasizing the role of privacy in determining access to records. While particular provisions of the statute require a balancing of interests in determining the availability of certain information, there remains a presumption of openness. See, e.g., *In re New England Gas Company*, 842 A.2d 545, 548 (R.I. 2004) ("[W]e reemphasize the strong public policy expressed in the APRA in favor of public disclosure.") That needs to be emphasized, and it is something that this section of the Rules fails to capture. It is "unwarranted" invasions of privacy that portions of APRA are designed to protect, not privacy in general. In order to better reflect the spirit of APRA, we believe Sections 3.2(B) and (C) should more clearly emphasize the presumption of access to government records that the statute envisions.

2. Section 3.3(C) – Definitions. This provision defines the term "readily available" – for the purposes of determining what documents do not need to be requested in writing by the public – as records "published in a formal manner for the public by the Department *on a regular basis…"* (emphasis added) We urge that the italicized language be stricken. It unduly restricts the information that should be made easily available to the public. If DOA has published a document for the public, then it should be readily available to the public, regardless of whether the document is published "regularly."

3. Section 3.4(D) – Procedure for Requesting Public Records. This section provides that if a person submits an APRA request but neither uses the Department's "transparency portal" nor mails or faxes it to the specific person designated in the regulations, then the request "shall not be subject to APRA time requirements." We are concerned about this attempt to circumvent the clear time deadlines contained in the Act for complying with open records requests. We

acknowledge that, for purposes of efficiency, it may make sense for the Department to specify where requests should be sent to, but that should not serve as an excuse to delay responses to people who are unfamiliar with such details, perhaps because they do not have easy access to the internet and these online regulations. If a person mails a request to the Director of the Department rather than to the "Public Records Officer, Division of Legal Services" at the same address, it is difficult for us to understand why that should alleviate the agency's obligation to respond in a timely manner – as long as the request is clearly identifiable as an APRA request. Instead, it should be the Department's responsibility to promptly forward such a request to the appropriate person. This is not a burdensome obligation.

Even assuming that APRA authorized agencies to take extra time to respond to requests sent to a "non-designated" person, there is no reason to completely exempt the agency from the statutory time frames. At most, the Department should be given an extra 48 hours to take into account the need to transfer the request. For these reasons, we urge that this section be revised.

4. Section 3.4(E)(1) – Procedure for Requesting Public Records. This section provides that records "which are not exempt from disclosure" will be provided to requesters. But this is not an accurate rendering of the law. Under APRA, public bodies have the discretionary right to release records even if they are exempt from disclosure. See, e.g., *Rhode Island Federation of Teachers, AFT, AFL-CIO v. Sundlun,* 595 A.2d 799, 803 (R.I. 1991). Because this section otherwise suggests that the agency will limit itself to never releasing records that might otherwise be exempt, we urge that it be revised.

5. Section 3.4(E)(2) – Procedure for Requesting Public Records. This section addresses the "good cause" provision in the statute for extending the time to respond to a request. However, we believe this section should be amended in two ways. First, it states that responses to requesters will indicate that the Department is "invoking the twenty (20) business day extension." But the extension authorized by APRA, under designated circumstances, is not for twenty days, but for *up to* twenty days. An agency has no right to automatically take the full extra twenty days to respond to a request or to indicate that it is doing so. Instead, any response should indicate the amount of extra time the Department estimates it needs to respond to respond to the request.

6. Section 3.6(B) – Costs. This section provides that "the Department *shall charge* a fee" for copying and retrieving records, and "*will* also charge" a $15 per hour search and retrieval fee. However, such charges are not mandatory under the law, and many agencies often routinely waive or reduce fees in responding to requests. We urge that this language be amended to allow for the discretionary waiver or reduction of fees in the public interest, as the statute also authorizes courts to do.

7. APRA contains a variety of specific rights for requesters, such as allowing them to choose the format in which to receive records, their right to obtain segregable portions of otherwise exempt records, etc. See, e.g., §38-2-3(b) and (g)-(k). These are important provisions, and we believe that they deserve to be included in agency regulations. We recognize that one goal of the regulatory format being promoted by the state Office of Regulatory Reform is not to unnecessarily repeat statutory language in regulations. But a number of provisions of these rules do so, and we believe it would be helpful if some of these basic rights were also described in them. Members of the public should not, in our opinion, be required to read the regulations in conjunction with the statute in order to confirm certain basic rights they have under the law.

We appreciate your attention to our views, and trust that you will give them your careful consideration. If the suggestions we have made are not adopted, we request that, pursuant to R.I.G.L. §42-35-2.6, you provide us with a statement of the reasons for not accepting these arguments.

Responses to this testimony can be sent to Steven Brown at the ACLU of Rhode Island at the address above and will be shared with all of the signatories. Thank you.

Submitted on behalf of ACCESS/RI by:

Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island

Jane Koster, President
League of Women Voters of Rhode Island

Linda Lotridge Levin, President
ACCESS/RI

John Marion, Executive Director
Common Cause Rhode Island

John Pantalone, Department Chair
Journalism Harrington School of Communication and Media University of Rhode Island

Justin Silverman, Executive Director
New England First Amendment Coalition