

**COMMENTS ON PROPOSED DEPARTMENT OF PUBLIC SAFETY REGULATIONS
GOVERNING ACCESS TO PUBLIC RECORDS, 270-RICR-40-00-1
January 2018**

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

1. Section 1.6(E). Amend as follows:

“The Access to Public Records Act allows a public body ten (10) business days to respond to a request for records, which can be extended up to an additional twenty (20) days for good cause, which will be explained in writing by the Department.”

Explanation: APRA's “good cause” provision, allowing public bodies to take more than 10 business days to respond to a request, does not authorize an automatic 20 day extension. Rather, public bodies can take up to 20 extra days to comply with the request. Public bodies should be taking no longer than necessary to respond to a request past the initial 10 day deadline. Because the language of this provision could be read to suggest otherwise, we urge adoption of the clarifying amendment we have proposed.

2. Section 1.6(H). Delete:

~~“The Access to Public Records Act requires public bodies to apply a case-by-case balancing test to non-exempt records to determine whether the privacy interests of individuals outweigh the public's interest in disclosure. That balancing requires a public body to consider both “the public's right to access to public records and the individual's right to dignity and privacy” R.I. Gen. Laws § 38-2-1.”~~

Explanation: This section, citing APRA's preamble, states that: "The Access to Public Records Act requires public bodies apply a case-by-case balancing test to non-exempt records to determine whether the privacy interests of individuals outweigh the public's interest in disclosure."

ACCESS/RI believes this is an inappropriate test for the release of public records. We understand that this is a position that has been articulated by the Attorney General based upon language appearing in *Providence Journal v. Kane*, 577 A.2d 663 (RI. 1990). However, it is ACCESS/RI's position that the use of a "balancing test" to withhold records that are non-exempt from disclosure under APRA is a misreading of the statute and the language in the *Kane* case. This balancing test, we submit, is not authorized by APRA, and indeed is contrary to the architecture and logic of that statute. The privacy interests that APRA is designed to protect are encompassed by the more than two dozen exceptions already contained in the statute, as well as the dozens of others that are scattered throughout the General Laws and federal law.

If none of those myriad exceptions apply, we believe that APRA requires disclosure of the records. In short, government agencies should not be in the position of adding their own privacy test to the privacy considerations that have already been carefully taken into account in the statute, nor do we believe it is authorized by APRA.

Even recognizing the differences of opinion about the meaning of the *Kane* language, nothing in the statute requires application of a case-by-case privacy balancing test. For these reasons, we urge deletion of this sentence.

3. Section 1.8(D). Amend as follows:

"If a court **or the Department** determines the information requested is in the public interest, it may reduce or waive fees for search and retrieval costs."

Explanation: While APRA only references courts in terms of waiving fees in the public interest, nothing prevents the public body itself from doing so. In fact, a number of public bodies regularly waive or reduce fees in recognition of the public interest in making records accessible. These regulations, we believe, should recognize that option so that it can be implemented in appropriate circumstances.

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 Linda Lotridge Levin at **lindalevin@uri.edu** and will be shared with all of the signatories signed below. Thank you.

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