

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

RHODE ISLAND AFFILIATE
OF THE AMERICAN CIVIL LIBERTIES
UNION, INC.

VS.

DAVID GIFFORD, in his capacity as
Director of the Rhode Island
Department of Health

COMPLAINT

1. Plaintiff, the Rhode Island affiliate of the American Civil Liberties Union, Inc. (hereinafter referred to as “ACLU”) is a duly organized Rhode Island non-profit corporation.
2. Defendant, Dr. David Gifford, is being sued in his official capacity as Director of the Rhode Island Department of Health (hereinafter referred to as “DOH”)
3. The instant action is brought in accordance with the Administrative Procedures Act, RIGL §42-35-1, et seq., and the Uniform Declaratory Judgment Act, §9-30-1, et seq.
4. The Rhode Island Health Information Exchange Act of 2008 (hereinafter referred to as “HIE”) was enacted by the General Assembly effective March 1, 2009. RIGL §5-37.7-1, et al.
5. The purpose of this groundbreaking law was “to establish safeguards and confidentiality protections for the HIE in order to improve the quality, safety and value of health care, keep confidential health information secure and confidential and use the HIE to progress toward meeting public health goals.” RIGL §5-37.7-2. (emphasis added)
6. Pursuant to the HIE statutory requirements, the state DOH created by RIGL §42-18-1, et al, was mandated to promulgate rules and regulations to implement and enforce it.

7. The DOH's promulgation of the HIE required regulations are governed by the Administrative Procedures Act, RIGL §42-35-1, et al, (hereinafter referred to as the "APA".)
8. Under the definition section of the APA, "(8) 'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency." RIGL §42-35-1(8). (emphasis added)
9. In May of 2009, in compliance with the APA "vetting process", pursuant to its HIE's statutory mandate, the Defendant, DOH, held public hearings on its proposed rules and regulations.
10. On May 12, 2009, the Plaintiff, through its Executive Director, Steven Brown, submitted a detailed and specific written explanation of its concerns/questions with the DOH's proposed rules (See attached Exhibit A)
11. Particularly, it was the Plaintiff, ACLU's position that the proposed rules failed to comply with the HIE's statutory mandates by not addressing provisions in the statute that require adoption of regulations on certain specific issues to further promote the confidentiality, security, due process and informed consent due the affected patients.
12. In its May 12, 2009 submission, the Plaintiff requested, pursuant to RIGL §42-35-3(a)(2) that the Defendant, DOH, provide it with a statement of the principal reasons for and against adoption of the rules and to incorporate their reasons for not adopting their suggestions. (See Exhibit A)
13. The Plaintiff's May 12, 2009 submission (Exhibit A) to the Defendant, DOH, contained the following request: "If the suggestions we have made are not adopted, we request that, pursuant to R.I.G.L. §42-35-3(a)(2), you provide us with a statement of the principal reasons for and against adoption of these rules, incorporating therein your reasons for overruling the suggestions urged by us."

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14. Despite the Plaintiff's clearly authorized request, after the adoption of the proposed rules, the Defendant failed to respond to the Plaintiff, resulting in the attached October 14, 2009 reminder letter to the Defendant. (See Exhibit B)
15. On October 22, 2009, the Defendant, through its Chief of Health Information Technology, Amy Zimmerman, responded to the Plaintiff's October 12, 2009 reminder letter. (See Exhibit C)
16. The Defendant's October 22, 2009 letter (Exhibit C) violated RIGL §42-35-3(a)(2) because it did not contain "concise statement of the reasons" why the Defendant failed to specifically address the Plaintiff's identified concerns, issues or proposals it had made when adopting the final rules.
17. Since the Defendant's October 22, 2009 response failed to comply with RIGL §42-35-3(a)(2), the Plaintiff sent another written request to the Defendant's legal counsel, Bruce McIntyre. (See Exhibit D)
18. On January 27, 2010, the Defendant, through counsel, again attempted to respond to the Plaintiff's §42-35-3(a)(2) request, through the attached letter. (See Exhibit E)
19. The thrust of the Defendant's response was that it was not required to promulgate rules and regulations to address each and every issue identified by the HIE and the Plaintiff.
20. Instead of the numerous rules suggested by the Plaintiff, the Defendant's position was that due to the "difficulties and problems" which are the implementation of this innovative and ground breaking law, it could adopt policies, not rules, to address concerns that are identified by the implementation of the HIE and its regulations.
21. The Defendant cannot fulfill its statutory obligation under HIE and the APA, through the adoption of policies of general application that do not undergo required Administrative Procedures Act "public vetting" process.
22. The Defendant's use of "policies" to supplement its HIE promulgated rules and regulations violated the APA statutory framework, since all department policies

that have general application and which implement, interpret or prescribe law are statutorily defined as rules subject to the “public vetting” process (42-35-1(8))

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment as follows:

- A. That the Rules and Regulations promulgated by the Defendant, pursuant to RIGL §5-37.7-1, et al, be declared incomplete and not compliant with HIE requirements.
- B. Declare that the Defendant’s October 22, 2009 and January 27, 2010 letters are not responsive and that they be ordered to comply with the requests, pursuant to RIGL §42-35-3(a)(2)
- C. Declare that the Defendant’s adoption of “policies”, rather than rules and regulations to implement its obligations under HIE be null and void and unenforceable.
- D. Defendant be ordered to promulgate regulations that completely fulfill its statutory obligation under HIE.
- E. Plaintiff be awarded costs of prosecution of this complaint.
- F. Plaintiff be awarded attorney’s fees pursuant to RIGL §42-92-3.
- G. Plaintiff be awarded such other relief that this Court deems just under the circumstances.

ACLU,
By its attorney,

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Dated: