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COMMENTS ON PROPOSED DEPARTMENT OF PUBLIC SAFETY REGULATIONS GOVERNING ACCESS TO PUBLIC RECORDS
December 16, 2010

The ACLU wishes to express its deep concerns about these proposed regulations. Rather than promoting access to public records, this proposal would, if enacted, mark a significant step backward for the public's right to know, most particularly in the context of arrest report information. Because we believe the proposed restrictions contained in this proposal go far beyond what is authorized by the Access to Public Records Act (APRA), we urge that the regulations be withdrawn at this time.

Although APRA contains exemptions for certain types of law enforcement records, there is one document about which the law leaves no dispute as to its public availability: arrest reports. APRA explicitly provides that "records or reports reflecting the initial arrest of an adult … *shall be public*." Our organization and others have all too often found law enforcement agencies in the state routinely ignoring that clear mandate. Through these regulations, the Department now wishes to enshrine that non-compliance into formal policy.

Under the Department's proposal, only five specific facts about an arrest would be made public: the arrestee's name, address, age, location of arrest, and name of arresting officer. Among the many pieces of information missing from this short list are such fundamental things as the charge(s) brought against the individual, and the date and time of the arrest.

Just as remarkable is the Department's list of what is explicitly *barred* from disclosure, including the arrestee's race, not to mention such innocuous and basic identifying information as the person's eye and hair color.

Most disturbing of all is that the regulation would allow the heart of an arrest report – its narrative – to be significantly redacted. Specifically, the regulations authorize the Department to redact any narrative information it deems to "fall within any public record exemption." Of course, the whole point of the statute's explicit reference to arrest reports being public is to make clear the information is not subject to exemption, and certainly not to the other exemptions contained within the "law enforcement exemption" provision itself, R.IG.L. §38-2-2(4)(i)(D). After all, if arrest reports were to be treated like any other record and subject to all of APRA's exemptions, there would have been no need for the General Assembly to explicitly specify arrest reports as public records in the first place.

Yet under the proposal, DPS could unilaterally redact any information in an arrest report that it felt might, for example, "deprive a person of a right to a fair trial," "constitute an unwarranted invasion of personal privacy," or interfere with an "investigation." Broadly construed, just about anything in an arrest report could theoretically fit within any or all of those exemptions. In short, the provision in Section V(1)(B)(6) of these regulations eviscerates APRA's explicit guarantee of public access to arrest reports.

Leaving aside the fact that these provisions are directly contrary to the statutory language itself, we would oppose this proposal on policy grounds as well. We feel compelled to note that the agency's history regarding public record access is less than stellar. For the last three years, the Rhode Island State Police (RISP) has been the main opponent of legislation designed to strengthen APRA and, in fact, the agency convinced Governor Carcieri to veto such legislation in 2008. During the past year, the agency publicly criticized the ACLU for making use of the open records law to seek information about State Police compliance with its obligations under federal law to provide appropriate language interpreter services. Although the agency labeled our request for that information as onerous and burdensome, it yielded, by the agency's own count, the release of only 112 pages of documents. Further, that response, as the Department is aware, led our organization to file a complaint with the U.S. Department of Justice. Rather than being an "onerous" request, this is precisely how APRA was designed to operate – to provide the public access to critical information about the workings of public agencies.

It is also worth specifically noting one prominent incident two years ago when RISP redacted, allegedly for privacy reasons, an entire paragraph in the report of a person's arrest for disorderly conduct. In defending the person on the criminal charge, the ACLU obtained an unredacted copy of the report, and learned that the deleted section had merely referred to the arrestee being advised of his Miranda rights and yelling "Free speech!" to a television reporter photographing the arrest. We have never received an explanation as to how State Police officials responsible for compliance with APRA could have conceivably considered this information off-limits to the public. This is a perfect example of why APRA was amended to make explicit that arrest reports are public information. With all this history, the ACLU and other open government advocates have legitimate reason to be wary as to how the DPS would implement this proposed regulation.

The importance of public access to arrest records cannot be overstated. Scrutiny of arrest reports is one of the most fundamental ways to oversee the activities of law enforcement, and to make sure that proper procedures are being followed and arrests are taking place in a lawful manner. If a person is locked up in jail, the public should be able to find out how this came about. Indeed, civilian oversight of police arrests is one of the basic principles that distinguish democratic from totalitarian societies. For all these reasons, we urge removal of these limitations on public access to arrest reports.

Although the proposal's provisions regarding arrest reports are the most crucial, we would also like to briefly point out concerns with a few other sections of these regulations.

● We are troubled by a provision in the rules stating that the agency's "complaint/incident report log" will not be public. Section V(2)(A). In police departments across the state, the log is the primary means by which the public, usually through reporters

from the media, is able to obtain virtually contemporaneous information about police activity in a community. The log has been routinely considered a quintessential public document. By suggesting that it contains non-public information that must be reviewed, and even reviewed by Legal Counsel, the public's right to know about police activity in a timely manner would be significantly stymied.

● The regulations state that "portions of the Statewide Uniform Accident Report" prepared by police "may be a public record while other portions may not." Section V(B)(2)(1). However, no guidance is provided as to what information in the report would not be deemed public, or why.

● The regulations suggest that a person will not necessarily have access to his or her own complaint/incident report. Indeed, even where there are "no law enforcement concerns" about releasing information to the complainant, the regulations state that information "could" – not "must" – be released to the complainant. Sections V(2)(C)(3)(a), V(2)(C)(4). We do not believe that the Department should be denying individual complainants access to the incident reports that have directly emanated from them.

Finally, we would request the addition of one specific provision. Although the sample "public records request form" contained in the appendix specifies that, in requesting documents, a person's name and contact information are optional, we have received reports that persons requesting records from State Police headquarters have been required to provide their driver's license or other identifying information as a condition of obtaining public documents. One can easily imagine numerous scenarios where such a requirement could chill a person from requesting documents. Demanding identification from a requester, when there is clearly no need to do so, can only deter some people from exercising their rights under the open records law. As the proposed form seems to recognize, APRA provides no legal authority for such demands, and we would therefore request that this be explicitly stated in the regulations themselves to avoid any confusion.

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. §42-35-3(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. Thank you.

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