AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

**ACLU OF RI POSITION: OPPOSE**

**TESTIMONY IN OPPOSITION TO 21-H 5860,**
**RELATING TO COURTS AND CIVIL PROCEDURE – CAUSES OF ACTION**
**March 24, 2021**

While there are many important and laudable goals sought to be achieved by this legislation, and the ACLU of RI is fully supportive of the expansion of categories protected by the legislation to include national ancestry, color, sexual orientation, gender, gender identity or expression, and disability, we do not support passage of H 5860 as written. We urge that it be amended to address the concerns we raise below.

We wish to begin with our concerns about Section 3 of the bill, which would create an entirely new sweeping power for the "Office of Civil Rights Advocate" of the Attorney General in conducting non-criminal investigations, outside of the grand jury process. The bill would authorize that office to summon any person who may have information about *potential* unlawful activities, and compel that person to disclose whatever he or she knows, by production of documents, creation of a "report," testimony or the like. The person could face a $10,000 fine and possible contempt of court sanctions for failing to comply.

The notion of a roving commission or the establishment of an "investigating magistrate" who can summon citizens to account "[w]hen it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in, any act or practice declared to be unlawful by this chapter," or merely "to ascertain" whether a person "is about to engage in" such activity, is

antithetical to notions of privacy, freedom of speech, and limited police powers. The Attorney General has adequate tools at his disposal to initiate and conduct investigations and to issue subpoenas, which are subject to judicial review where there is an allegation that the Attorney General has overstepped established standards governing criminal process and civil administrative enforcement process.

In a statement the Attorney General issued last year in support of this legislation,[1] he claimed a need for these additional powers in order to conduct investigations of law enforcement personnel. But the actual language of the proposed amendment is much broader than that, and applies to anyone, including the organizers and participants in protests against police abuse.

To give concrete examples of its reach from local headlines this past year, this provision could give the Attorney General broad powers to interrogate individuals who were "believed to have information" about the disturbance that took place in downtown Providence after the death of George Floyd. If the vandalism of the Christopher Columbus statue on Federal Hill last June was deemed to be targeted at Italian-Americans, the Attorney General would have wide-ranging authority to question individuals, including members of organizations involved in protests relating to the topic, whom the Civil Rights Advocate believed might have relevant information to offer.

The legislature and the public cannot rest on the assurances of the Department of Attorney General that the Department will not exercise these new powers in ways expressly permitted by the bill that go far beyond the narrow purpose described as the reason for the new language. Regardless of intent, this section represents a chilling overreach by the Department of Attorney General, empowering it to compel speech from all private persons, not just the target of a civil

[1] https://www.ri.gov/press/view/38604

investigation, about a wide array of activities.[2] The ACLU of RI opposes its adoption as violative of constitutional rights of freedom of expression and privacy, and for covering much greater territory than a focus on addressing police misconduct.

While the bill allows the Attorney General to bring a civil action to address "pattern-or-practice" misconduct, potentially denoting the existence of a systemic practice or formal policy infecting an entire institution, such as a police department, it much more broadly allows for the investigation of "*any* act or practice" by any individual. (Emphasis added.)

We would note that the current statute, in § 42-9.3-1, already authorizes the Office of Civil Rights Advocate "to perform his or her duties as the attorney general may direct, including, but not limited to, training and education, *reviewing complaints and conducting investigations, and bringing civil actions under this chapter*." (Emphasis added.) The statute, in § 42-9.3-2, also already empowers the Civil Rights Advocate (CRA) to institute civil actions in the name of the State to enforce its terms, and in any such action, the CRA can utilize existing discovery standards—which are subject to court review and supervision-- to perform these functions. The proposed section has no such standards, leaving it entirely up to the CRA, who can summon anyone and require them to account to him or her.

The ACLU of RI supports the Attorney General in his efforts to investigate law enforcement agencies and to hold agencies accountable for acts, patterns, or practices which deprive individuals of their civil rights. But this proposed language is too broad and goes well beyond what is necessary to accomplish that goal. The public is entitled to have narrowly drawn, reviewable standards in place to protect it from overreach. It should not be adopted.

[2] In a change from last year's bill, H-5860 does not include a provision specifying that the Civil Rights Advocate's powers could not be used for the purpose of compelling potentially self-incriminating testimony or evidence from individuals.

The ACLU would be happy to work with the Attorney General on legislation specifically focusing on the problems of police misconduct that this section was apparently designed to address.

Returning to Sections 1 and 2 of this legislation, those provisions amend statutes that are currently in effect. When each of these provisions was enacted, the ACLU supported them in principle but raised concerns about their scope, and particularly their potential impact on First Amendment rights. In seeking to further expand the reach of these two statutes, H-5860 exacerbates those concerns. We therefore urge amendments to these sections to make clear that they do not have that effect.

The ACLU of RI has been clear in its support of statutory provisions protecting individuals at work, in public accommodations, and elsewhere from discrimination based upon their race, religion, gender, sexual orientation, etc. But this statute, if read broadly, could serve as a vehicle to impose liability and injunctive relief for an individual's statement of personal or religious belief or expression not accompanied by any threats or acts of violence, stalking, or similar offenses.

Section 9-1-35 currently prohibits more than actions, and its language could be interpreted to prohibit speech protected by the First Amendment, where the speech is considered offensive and upsetting to the individual and therefore could "reasonably be construed" by a jury as "intended to harass," even where an individual is expressing his or her personal or religion-based belief in opposition to, for example, a subject like same-sex marriage.

In further expanding the statute's reach, we therefore believe the legislation should either eliminate the phrase "reasonably be construed" or add the words "by the accused" immediately thereafter. We also believe that the statute should clarify that the term "an act or acts" does not

include a verbal or print statement or expression not accompanied by physical action or threats (in the statements or anything associated with them) against the individual.

Similarly, Section 2 would amend RIGL §42-9.3-2 to add comparable language ("or by any act or acts which would reasonably be construed as intended to harass or threaten any person") to the statute authorizing the Attorney General to bring a civil action to protect individuals from deprivation of their civil rights. Because the statute *already* covers intentional interference or threats to "intentionally interfere, by physical force or violence against a person, by damage or destruction of property or by trespass on property," it is clear that the proposed additional language would substantially expand the scope of prohibited acts or statements to encompass "acts" that encompass speech that is not intended to harm or threaten an individual.

In short, the ACLU of RI believes that the current language is sufficiently robust that the substantial expansion proposed here should not be made.

We thank you for considering our views, and we would welcome the opportunity to work on amendments that would accomplish the goal of protecting the civil rights of Rhode Islanders from unlawful acts based on their status without infringing on other important protected rights.

**Submitted by:**
**Lynette Labinger**
**ACLU of Rhode Island Cooperating Attorney**