RHODE ISLAND AFFILIATE,
AMERICAN CIVIL LIBERTIES UNION

128 DORRANCE STREET, SUITE 220
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org

COMMENTS ON PROPOSED EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES REGULATIONS GOVERNING ACCESS TO PUBLIC RECORDS March 29, 2011

The ACLU appreciates the opportunity to testify on these proposed regulations addressing the very significant topic of access to public records. We have a number of concerns, comments and suggestions about this proposal, and they follow below:

1. We request amendment of Section 4.2 to read, in relevant part, as follows: "All requests for records shall be in writing unless readily available, or available under the Administrative Procedures Act, or prepared for the public." The added phrase tracks the language contained in R.I.G.L. §38-2-3(c). If any of the EOHHS agencies have prepared a report that is designed for public consumption, for example, APRA specifies that no written request for such a document should be necessary. Our amendment would make that clear.

2. We request the deletion of the following sentence in Section 4.2: "The Departments will make every reasonable effort to honor the request; however, it shall not in any way interfere with the ordinary course of business of the Departments." We are extremely troubled by this sentence, which contains a disturbing inference that the Departments do not have any real obligation to comply with APRA. However, APRA is a state law binding on state agencies, designed to promote an important public right. The agencies have **a legal obligation** to provide records to the public upon request, in accordance with the procedures set out by APRA. It is thus not up to the Departments to merely "make every reasonable effort" to comply with those requests – **they must comply**.

Similarly, the regulation's statement that providing access to records must not "interfere with the ordinary course of business of the Departments" suggests that the Departments do not consider compliance with APRA requests to be part of their "ordinary course of business." But, of course, it is. The provisions of APRA are not some mere inconvenience or annoyance imposed on state agencies; they are an integral part of an agency's duties to do its work with transparency and openness.

3. We are concerned that Section 4.6, dealing with "payment in advance," could inappropriately delay access to public documents. We do not believe that a person should be required, in all instances, to pay in advance before receiving delivery of requested records by mail. If the cost of the records involved is minimal, this requirement could unnecessarily add days to a person's access to records.

We also object to the regulation's authorization for Departments to require, without any stated standards, payment to be made before a search or retrieval for the records has even been made. While agencies are supposed to "provide an estimate of the costs of a request for documents prior to providing copies," R.I.G.L. §38-2-4(c), nothing in the statute authorizes Departments to actually delay conducting a search for records until payment of an estimated amount has been made. Once again, this could significantly delay a person's access to public records. We can understand if an agency wishes to make sure that a requester is aware of, and preliminarily approves, the potential costs involved in a request for a massive amount of records that may take many hours to fulfill. But there is no basis for demanding payment up front of an estimated cost. We doubt that the vendors the Departments regularly deal with for Department-related business impose such a requirement. Nor do we assume that the Departments pay in advance providers, contractors or other entities entitled to payment or reimbursement from the Department. Members of the public seeking access to records should not be treated any differently.

4. We believe these regulations should include various provisions to better inform requesters of their rights under APRA. For instance, the regulations should specify that:

- The Departments cannot require, as a condition of fulfilling a public records request, that a person or entity provide a reason for the request or provide personally identifiable information about him/herself.

- The Departments will, except where it would be unduly burdensome, provide copies of the public records electronically, by fax, or by mail in accordance with the requesting person or entity's choice.

- A written request for public records need not be made on a form or in a specified format if the request is otherwise readily identifiable as a request for public records.

5. Since many violations of APRA seem to occur because public employees are unaware of the requirements of the statute, we would urge that these regulations specify that any individuals at the Departments who have responsibility for APRA compliance will be trained in the specifics of the statute.

6. Finally, we question the inclusion in these regulations of Sections 4.8, 4.9 and 4.10. Rather than focusing specifically on the subject of these regulations – the Access to Public Records Act – these sections appear to more directly address Departmental procedures involving contested proceedings under the Administrative Procedures Act (APA). Issues related to evidence at such proceedings, a party's obligations to turn over exculpatory materials, and the availability to parties of an APA hearing's record of proceedings are important issues, but they are out of place in a regulation like this. No person reviewing the public notice of these regulations would have any idea that they were also addressing EOHHS procedures in APA proceedings. We would therefore urge their deletion. Instead, these should be dealt with in separate regulations governing Department procedures in APA hearings.

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The Executive Office of Health and Human Services is the overseer of five major state agencies. Its rules and regulations governing access to public records will therefore have a significant impact on the public's right to know. We believe this proposal is both too minimalist and too dismissive of the important rights at stake. It is minimalist in failing to address key issues that could better promote public access to the agencies' records. (See our comments in #4 and #5 above.) The dismissive view of APRA contained in Section 4.2 (referenced in comment #2 above) is emphasized by other provisions that unduly burden access (referenced in comments #1 and #3 above). EOHHS regulations relating to APRA should serve as a model for other state agencies, encouraging public access to records to the maximum extent feasible. Because, as written, these regulations do not do so, we respectfully request revisions along the lines of those contained in this testimony.

Unrelated to the substance of the regulations, we wish to conclude by raising a concern about the way this public hearing was scheduled. On March 18, 2011, pursuant to R.I.G.L. §42-35-3(a)(2), our office wrote EOHHS to formally request a public hearing on these proposed regulations. We assume it is that request that has led to today's public hearing. However, EOHHS never notified our office that this hearing had been scheduled. Instead, we only learned of it from a third party late last week, when we were forwarded an announcement that was apparently emailed to those on an EOHHS listserv. We find it troubling, to say the least, that EOHHS would not bother to notify the agency that sought a public hearing about the scheduling of that hearing. We certainly hope this will be rectified so that in the future requesting organizations are promptly and formally notified when hearings get scheduled.

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.

Submitted by: Steven Brown, Executive Director
Carolyn Mannis, RI ACLU volunteer attorney