

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DIVISION OF PUBLIC UTILITIES AND CARRIERS**

IN RE: ACCESS TO PUBLIC RECORDS REGULATION

DOCKET NO. D-10-09

ORDER

Whereas: Section 38-2-3(c) of the Rhode Island General Laws provides that each public body “establish procedures regarding access to public records but shall not require written requests for public information available pursuant to R.I.G.L. §42-35-2 or for other documents prepared for or readily available to the public.”

Whereas: In response to the foregoing statutory mandate, the Rhode Island Division of Public Utilities and Carriers (“Division”) prepared an “Access To Public Records Regulation” (“Access Regulation”) which (1) establishes a regulation to implement R.I.G.L. §38-2-1, et seq. and §42-35-2(a) relating to access to public records maintained by the Division; (2) to identify and delineate categories of records exempt from disclosure; and (3) to provide the public and Division personnel with a Regulation that sets forth the rules and procedures applicable to access public records maintained by the Division.¹

Whereas: The Division conducted a duly noticed public hearing to take comments on the proposed adoption of the Access Regulation on Monday, May 3, 2010 at 10:00 a.m. The hearing was conducted in the Division’s first-floor

¹ Division Exhibit 1.

hearing room located at 89 Jefferson Boulevard, Warwick, Rhode Island. The Division received one offer of comment in this rulemaking matter.

On or about April 28, 2010, the Division received comments from the Rhode Island Affiliate of the American Civil Liberties Union (“ACLU”).² The ACLU suggested the following amendments to the proposed Access Regulation:

1. Section 4(1) refers to the sample request form contained in an appendix to the regulations, and approximately notes that requests can, but do not have to, be submitted on that form. Because the form asks for the name of, and various contact information for, the requester, we would urge the addition of a clarifying sentence in this section: “A requester shall not be required to provide identifying information in order to request or obtain public records.”
2. Section 4(4) states that the Department will “use its best efforts to notify” an inquirer of the status of his or her request if it appears it can’t be honored within the statutorily-prescribed ten days. We urge deletion of this first sentence. The Department should be routinely notifying individuals within 10 days if that deadline will not be met. The open records statute sets a 10-day time-frame for complying with requests, and if the Department wishes to make use of the law’s “good cause” 30-day extension, then it should so notify the requester in a timely manner. There is no need for the Department to wait longer than ten days to advise the requester that “good cause” requires an extension.
3. In line with our first suggestion, we would urge that the sample request form, included as Exhibit A, include a notice that the request for the requester’s name and contact information is optional.
4. We have a second concern about the sample request form contained in Exhibit A. Specifically, it asks the requester to indicate whether the requested documents are or are not “sought of [sic] the purpose of pending litigation involving the Department of the State of Rhode Island.” This sentence should be deleted. R.I.G.L. §38-2-3(h)

² Public Comment Exhibit 1.

specifically provides that: “No public records shall be withheld based on the purpose for which the records are sought.” That is, either the documents requested are public records or they are not. If the document sought is a public record, then it should be released, regardless of the requester’s interest or motivation. The open records statute is concerned with access to information, now [sic] how it is used. Since an agency cannot deny access to a document on the basis for which it is sought, the Department should not be seeking that information in the first place.

It is unclear to us where this provision emanates from. We are aware that in 1985, the R.I. Supreme Court ruled that if certain records relating to pending litigation are not required to be disclosed under court rules, then those records relating to pending litigation are not disclosable under APRA. *Hydron Laboratories [sic], Inc. v. Department of the Attorney General*, 492 A.2d 135 (R.I. 1985). However, that ruling does not authorize the type of inquiry contained on the form. Even if it had, that ruling preceded the adoption of the language in §38-2-3(h), which makes abundantly clear that any such inquiries are inappropriate.³

Whereas: The Division has reviewed and considered the ACLU’s proposed amendments to the Division’s Access Regulation and finds as follows:

ACLU Comment “1”

The Division declines to accept this proposed amendment as Section 4.1 clearly states that the form “is suggested, but not required...”

ACLU Comment “2”

The Division declines to accept this proposed amendment due to the fact that deadlines contained in R.I.G.L. §38-2-7(b) remain in effect. The “best efforts” qualifier in Section 4(4) is only applicable in circumstances where the

³ Public Comment Exhibit 1.

individual requesting records decides not to provide a name and/or contact information after making his or her request for records.

ACLU Comment “3”

The Division declines to accept this proposed amendment as Section 4.1 clearly states that the form “is suggested, but not required...”

ACLU Comment “4”

The Division agrees to adopt the ACLU’s proposed amendment to “Exhibit A,” attached to the Regulation, with respect to the form’s request that the individual seeking records indicate whether or not the materials requested are being “sought for the purpose of pending litigation involving the Department of the State of Rhode Island.” The Division finds the ACLU’s rationale for the proposed amendment reasonable. The Division also finds that R.I.G.L. §38-2-2 (4)(A)(II)(E), which permits the Division to exempt from disclosure “any records which would not be available by law or rule of court to an opposing party in litigation,” sufficiently safeguards the integrity of evidentiary findings in judicial proceedings.

Now, therefore, it is

(20049) ORDERED:

1. That predicated upon and modified by the findings contained herein, the Division hereby adopts the “Access To Public Records Regulation” as reflected in “Appendix 1” to this order.
2. That “Appendix 1” is hereby incorporated by reference.

3. That the Division's Rules Coordinator is hereby instructed to file a certified copy of the attached "Access To Public Records Regulation" (Appendix 1) with the Rhode Island Secretary of State as soon as practicable, and also to fully comply with the filing requirements contained in R.I.G.L. §42-35-3.1 and §42-35-4. The Division will endeavor to file the instant "Access To Public Records Regulation" with the Rhode Island Secretary of State on or before July 16, 2010 in order to facilitate a coinciding effective date of August 5, 2010.
4. That the new "Access To Public Records Regulation" shall take effect on August 5, 2010.

Dated and Effective at Warwick, Rhode Island on July 2, 2010.

John Spirito, Jr., Esq.
Hearing Officer

APPROVED: _____
Thomas F. Ahern
Administrator