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Comments on Proposed Ethics Commission Changes to Regulation 1006 - Procedures - Complaints and Investigations

August 21, 2018

Common Cause Rhode Island (herein "CCRI") is pleased to offer testimony to the Rhode Island Ethics Commission (herein "Commission") on these proposed changes to Regulation 1006 - Procedures - Complaints and Investigations (herein "Regulation 1006"). CCRI has a long history of promoting transparency in the Commission's complaint and adjudicatory processes.

Our preferred alternative is that the Commission make no changes to Regulation 1006. We think the existing process whereby the investigatory report is released after the Commission determines there is no probable cause serves the public interest best. It makes the work of the Commission staff public so that they can judge for themselves the Commission's actions. We acknowledge, however, that the recent lawsuit *Fonseca v. Rhode Island Ethics Commission* means that you cannot maintain the status quo without facing further litigation. If changes must be made to Regulation 1006 we believe that the Commission has chosen the best alternative.

In testimony submitted to the Commission at your February 6, 2018 workshop on this topic, we referenced a 50-state comparison of state ethics commission practices regarding investigatory records. As we presented at the time, most jurisdictions withhold investigatory records from the public when there is no finding of probable cause. Only two states--Florida and Oregon--appear to release the investigatory report when their commission does not find probable cause. Many jurisdictions never reveal the presence of a complaint and seal the entire record, including the complaint, if there is not a finding of probable cause. Several jurisdictions, upon not finding probable cause issue an order simply dismissing the complaint.

However, several jurisdictions, including Missouri, Montana and Michigan, go beyond simply dismissing the complaint, as shown in the appendices to our February 6, 2018 testimony. They provide a summary of the complaint and explanation of the rationale of the commission for failing to find probable cause. This is the approach you take in the proposed changes to Regulation 1006 and we believe it is the correct approach under the circumstances.

Common Cause Rhode Island believes that proposed Regulation 1006, Part 3.11(C)(1.) should provide greater detail regarding what is to be included in the "written Decision and Order" beyond what "explaining the basis for such dismissal." That "written Decision and Order" should contain three components; a summary of the facts of the complaint including statements of jurisdiction and applicable law or regulation, a summary of the arguments of the complainant and respondent, and an explanation of the Commission's rationale for not finding probable cause. While the three components may be implicit in the language proposed in the changes to Part 3.11 we believe the rule would benefit from greater detail.

Decisions by the Commission to not find probable cause are of great public interest. The public should be assured that the decision was based on the facts and law, not on politics. CCRI believes the providing sufficient information in these instances is essential to fostering trust in the Commission and its processes. Thank you for the opportunity to present our view on this important topic.

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COMMENTS ON PROPOSED R.I. ETHICS COMMISSION REGULATIONS RELATING TO CONFIDENTIALITY OF INVESTIGATORY REPORTS
August 21, 2018

The ACLU of Rhode Island appreciates the opportunity to comment on the Ethics Commission's proposed amendments to its rules governing "Complaints and Investigations." The proposal would make confidential its investigatory reports, which are currently public even in cases where the Commission finds no probable cause to proceed, and in its place would require the Commission to issue a public written decision explaining its ruling in those instances. As we will explain below, the ACLU opposes the effort to make the investigatory reports confidential, but supports the proposal for written Commission decisions when a finding of no probable cause is made. We have taken this position only after careful deliberation, as we recognize that there are competing civil liberties interests at play: rights to privacy and due process as well as principles of open government.

It is our understanding that the basis for the Commission's proposal is both legal- and policy-based. This rule-making has been generated by a lawsuit that had been filed against the Commission when an investigatory report involving the suing official was made public in a situation where the Commission found no probable cause. The lawsuit alleged that the release of the investigatory report violated a statutory provision dealing with the investigative powers of the Commission that states: "Nothing in this section shall be construed to authorize the commission to make any of its investigatory records public." R.I.G.L. 36-14-12(c)(6). We further understand

that some members of the Commission believe that, as a policy matter, since the investigatory report is essentially designed as a prosecutorial tool, it is unfair in any event to release it, and that a fairer approach in its place is the issuance of a Commission opinion explaining its decision.

For both legal and policy reasons, however, the ACLU supports the Commission's current policy of releasing the investigatory report. On the legal end, we do not believe that the agency's current practice is inconsistent with the cited statutory provision.

If the General Assembly wished to clearly and completely bar release of these investigatory reports, it could explicitly have done so very easily. It did not. Instead, it adopted language stating that "this section" of the law should not "be construed" to authorize the release of investigatory records, clearly leaving intact the possibility that other laws, such as the Access to Public Records Act, could authorize their release (and which APRA gives the Commission the discretion to do).

In addition, the issuance of an "investigatory report" is not the same as the release of "investigatory records," as the latter term, in our view, refers to the underlying documents that are used in the preparation of such a report. Indeed, if one were to interpret the term so broadly, it could be argued that the Commission's "probable cause" finding is an investigatory record, since it marks the beginning, not the end, of the Commission's work in determining whether a violation of the law has occurred.

For these reasons, it is our conclusion that the cited statutory provision does not bar the Commission's release of investigatory reports, as it has been doing for some time.

Since there is no legal impediment to the release of the investigatory report, we have gone on to carefully consider the policy arguments on both sides. As a policy matter, we ultimately believe that the grounds for releasing the investigatory report outweigh any privacy concerns of officials who are the subject of these investigations.

First, the reports at issue relate to the professional conduct of public officials, the type of matters in which the public's right to know is at its zenith. If there is a fear of its one-sided nature as a prosecutorial brief, it is worth emphasizing that prosecutors have an obligation of fairness in fulfilling their duties. If the Commission's prosecutorial arm is routinely making "probable cause" findings based on unfair – and ultimately rejected - one-sided versions of the evidence, there is a public interest in being able to review those reports and hold prosecutors accountable for their overreaching.

In a similar vein, release of the investigatory report is critical in order to allow members of the public to gauge for themselves the fairness of a Commission determination finding no probable cause, and to avoid allegations of political meddling or partisanship. Allowing the Commission to reject recommendations for prosecution by hiding the prosecution's evidence can only breed cynicism about the entire process, even if – as envisioned by the Commission's second proposal – a written explanation for the rejection is provided.

It is also important to emphasize that the Commission's proposal to keep the investigatory report confidential is not limited to situations where no probable cause is found. Rather, the proposed regulation would require the report to be kept confidential under any and all circumstances, even if the Commission supports the report's findings. This would be a big step backward in transparency and accountability. The public's interest in accountability is the same regardless of the Commission's ultimate decision.

While we understand why a vindicated public official might prefer that the investigatory report not be released, it is not as if keeping it confidential shields him or her from public disclosure of the allegations. Since the complainant has a right to publicize the allegations, and the Commission's determination is a matter of public record, the best way to address a public official's

concern about unfairness is by adopting the Commission's second proposal, requiring written decisions when there is a Commission finding of no probable cause. In documenting the reasons why the Commission has rejected the underpinnings of an investigatory report, the public official is not only vindicated, but vindicated in the clear light of day so that any allegations that the official has "rigged the system" are minimized.

As noted above, the ACLU supports the second proposed change requiring the Commission to provide a written decision of its actions. Again, these determinations in Ethics Commission matters are, by their very nature, of extreme public interest where lack of transparency can only create suspicion and doubt. If no probable cause is found by the Commission, a written opinion serves to describe the deficiencies of the initial finding of cause, more fairly vindicates an official who has gone through the process, and better holds prosecutors accountable. In short, this type of transparency in the decision-making process is helpful to the parties, to the public, and to the Commission itself to help avert allegations of political favoritism in its actions.

In sum, the ACLU urges the Commission to reject the proposed changes to Section 3.11(A) and to continue to allow public access to the Investigatory Report presented to the Commission for consideration, whether probable cause is or is not ultimately found. At the same time, the ACLU urges adoption of the proposed changes to Section 3.11(C)(1), which would require the Commission to prepare written decisions in dismissing a complaint.

We appreciate your attention to our views, and trust that you will give them your careful consideration. If our suggestions are not adopted, we request that, pursuant to R.I.G.L. §42-35-2.6, you provide us with a statement of the reasons for not accepting these arguments.

Submitted by: Steven Brown, Executive Director