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LEGAL ADVISORY:

**CHANGES TO MASSACHUSETTS PUBLIC RECORDS LAW
AND REGULATIONS**

I. INTRODUCTION

The Commonwealth's amended public records law¹ went into effect on January 1, 2017. Guidance from the Secretary of State's Office was updated in January, following that Office's issuance of amended public records regulations on December 16, 2016, effective January 1, 2017. The amendments most often favor requestors. As such, public entities are subject to increased compliance requirements and a more limited ability to assess fees as a pre-condition to producing responsive documents.

¹ "An Act to Improve Public Records," signed into law by Governor Charlie Baker as Chapter 121 of the Acts of 2016 on June 3, 2016, has amended state public records law M.G.L. c. 66, along with the M.G.L. c. 4, § 7(26) definition of "public records," discussed infra, effective January 1, 2017. Amended regulations were issued by the Secretary of State's office on December 16, 2016, in the form of an updated 950 CMR 32.00 et seq.

The law distinguishes between a “municipality”² versus an “agency”³ that is subject to a public records request. This advisory primarily focuses on the law’s treatment of municipalities. This distinction is significant, as requirements, deadlines and allowable fees can differ for municipalities versus agencies under the public records law. The requirements, deadlines and allowable fees discussed herein are those that are applicable to municipalities under the amended public records law and its regulations.

II. WHAT REMAINS SUBSTANTIALLY THE SAME UNDER THE NEW LAW?

As was the case under the state’s former public records law, the amended law presumes that any requested record is a public record subject to disclosure. The burden remains on public entities to prove, by a preponderance of the evidence, that a requested record, or a portion of it, is exempt from disclosure. What constitutes a public record⁴

² 950 CMR 32.02 defines the term “Municipality” as “Cities and towns, local housing, redevelopment or similar authorities. A consortium, consolidation or combination of entities within a single political subdivision of the commonwealth or among multiple political subdivisions of the commonwealth shall be deemed a municipality.”

³ 950 CMR 32.02 defines the term “Agency” as “Any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth that is identified in M.G.L. c. 66, § 6A and c. 4, § 7, clause Twenty-sixth and makes or receives “public records”, as defined in 950 CMR 32.02. Agency includes any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in M.G.L. c. 32, § 1.

⁴ M.G.L. c. 4, § 7(26) continues to define “public records” as “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32,” unless such materials or data fall within the exemptions itemized in M.G.L. c. 4, § 7(26)(a)-(u) (no subsection (26)(k) exists).

subject to disclosure and what constitutes an exempt record⁵ remains the same under the amended M.G.L. c. 4, § 7(26), other than the additions of “cyber security” related records

⁵ M.G.L. c. 4, § 7(26)(a)-(u) exemptions include “materials or data

- (a) specifically or by necessary implication exempted from disclosure by statute;
- (b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;
- (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;
- (d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;
- (e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;
- (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;
- (g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;
- (h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;
- (i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;
- (j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;
<[There is no subclause (k).]>
- (l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;
- (m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self-insured and provides health care benefits to its employees.
- (n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, **cyber security** or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under **subsection (c)** of section 10 of chapter 66, is likely to jeopardize public safety **or cyber security**.

under § 7(26)(n) and “personal email address” of specified judicial, state and agency employees and their family members under § 7 (26)(o) and (p). See footnote no. 5.

Personnel and medical records remain exempt from disclosure under M.G.L. c. 4, § 7(26)(c). A second class of records that relate to a specifically named individual, the disclosure of which would publicize “intimate details” of a “highly personal” nature, or the disclosure of which may constitute an “unwanted invasion of personal privacy,” are also exempt under § 7(26)(c). See footnote no. 5. Employee records must be produced as public records in response to a request seeking information regularly kept in a staff directory, a payroll database or similar, such as employee names, job classifications, salary information, absences, etc.⁶

(o) the home address, **personal email address** and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, **personal email address** and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.”

⁶ This is particularly true when a request is directed at an entire category of employees rather than targeting an individual. See Wakefield Teachers Ass’n v. School Committee of Wakefield, 431 Mass. 792, 799-803 (2000); citing Brogan v. School Comm. of Westport, 401 Mass. 306 (1987); Pottle v. School

III. SIGNIFICANT PROVISIONS OF NEW LAW IMPACTING MUNICIPALITIES

A. MANDATORY RECORDS ACCESS OFFICERS

The amended public records law and its regulations require each municipality and state agency to appoint and publicly identify at least one designated “Records Access Officer” (“RAO”), who shall be responsible for compliance with state public records laws. Public records requests should be directed to RAOs, who are charged with cataloging all requests, responding to all requests and producing requested public records in accordance with M.G.L. c. 66 and 950 CMR 32.00 et seq. The RAO for a municipality shall be the municipal clerk. We are of the opinion that each school district should also appoint its own RAO, generally the Superintendent of Schools. As discussed below in more detail relative to the amended law’s new posting and website requirements, each RAO must be clearly identified in a conspicuous posting at a public entity’s offices as well as on its website.

B. RESPONSE TIMEFRAME AND OTHER REQUIREMENTS

1. Initial Request and Response

An RAO must furnish requested records no later than ten (10) business days⁷ from the date of a request “reasonably describing” a “public record” within the “possession, custody or control” of the public entity along with payment of a “reasonable

Comm. of Braintree, 395 Mass. 861 (1985); *Globe Newspaper Co. v. Boston Ret. Bd.*, 388 Mass. 427 (1983); *Connolly v. Bromery*, 15 Mass.App.Ct. 661 (1983); *Hastings & Sons Publ. Co. v. City Treasurer of Lynn*, 374 Mass. 812 (1978). Student records are governed at the state level by relevant sections of M.G.L. c. 71 and 603 CMR 23.00 et seq., and by FERPA (20 U.S.C. sec. 1232g) and its regulations (34 CFR Part 99).

⁷ Timeframes were calculated in calendar days, rather than business days, under the former public records law.

fee” assessed within the law’s parameters. If unable or unwilling to furnish the records within ten (10) business days, the RAO must send a written response to the requestor within ten (10) business days from the initial receipt of the request confirming receipt, identifying the relevant records and providing a reasonable timeframe for producing the records and/or the reason(s) for withholding any records. The provided timeframe shall not exceed twenty-five (25) business days following the request to a municipality, unless voluntarily agreed to by the requestor.

2. RAO May Request Modifications / Notice of Fees

If needed, the RAO’s response should suggest a reasonable modification of scope and/or offer to assist the requestor in reasonably modifying the scope of the request. The RAO must provide a good faith estimate of fees (discussed infra) and a notification of the requestor’s right to appeal, as well as documenting the nature, date of request and date of response for each public record request, along with a record of the time, costs/fees, petitions, appeals and adjudications relating to each request.

3. Unduly Burdensome, Harassing Requests / Referral to Supervisor of Public Records

If a public entity is unduly burdened by the number of requests made by the same requestor or the magnitude or difficulty of a request, the RAO may seek an extension of time for compliance from the Supervisor of Public Records within 20 (twenty) business days of receipt of the initial request or within ten (10) business days of a receipt of a determination made by the Supervisor of Public Records that the requested record does constitute a public record. The Supervisor of Public Records may, upon consideration of specified factors, grant a single extension of no more than thirty (30) business days to a municipality. The Supervisor of Public Records may grant a longer extension or relieve

the RAO from the obligation to respond if a request is “part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass,” and “not intended for the broad dissemination of information to the public about actual or alleged government activity.”

C. “REASONABLE” FEES THAT MAY BE CHARGED TO REQUESTORS

1. Allowable Copy / Print Charges Reduced

An RAO may assess a reasonable fee, not to exceed the actual cost of reproduction, for the production of a public record not “freely obtainable for public inspection.” Costs for standard black and white paper copies or printouts are limited to a maximum of five (5) cents per single or double sided page.⁸ If an RAO does not respond within the required ten (10) business days, no fees may apply. No additional charges are permitted for redaction or segregation except as may be required or allowed by law (see discussion of allowable segregation fees below), or approved by the Supervisor of Public Records.

An RAO may waive or reduce fees upon a showing that disclosure is in the public interest and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full reasonable fee. An RAO may refuse to provide requested records if the same requestor has not paid for previously produced records.

2. Allowable Search and Segregation Fees Reduced

Municipalities required to spend more than two (2) hours of search/segregation/redaction/compilation/reproduction time in responding to a request

⁸ Prior to the amended law taking effect on January 1, 2017, the limit was twenty (20) cents per page for standard copies and fifty (50) cents per page for computer printouts.

may charge fees for that time, to be calculated at the hourly rate of the lowest paid employee who has the skill to perform the work, not to exceed a maximum rate of twenty-five (\$25.00) dollars per hour. A municipality having a population in excess of twenty thousand (20,000) people may not charge for the first two (2) hours spent on such work. Regulations and guidance issued by the Secretary of State's Office in December and January expressly state that municipalities with populations of 20,000 people or fewer will be permitted to charge for the first 2 hours of employee time.⁹ If the Supervisor of Public Records finds a request to be for a commercial purpose, or that a municipality's fee estimate is a good faith representation of the actual cost of compliance, upon the Supervisor's approval a municipality may charge an increased hourly rate.

D. POSTING/WEBSITE AND ELECTRONIC RECORDS REQUIREMENTS

1. RAO, Access Guidelines and Categories of Public Records Must Be Posted

Each public entity must post conspicuously at its offices and on its website, if any, the name, title, business address, business telephone number and business email address of its RAO. Any entity that maintains a website must post guidelines for accessing public records on its website. These guidelines must be periodically updated and must include a list of categories of public records maintained by the entity.

2. Electronic Records Requirements

An RAO must provide public records to a requestor electronically unless a record is not available in electronic form or the requester "does not have the ability to receive or access" a requested record in a "usable electronic form." Further, an RAO must, "to the

⁹ See 950 CMR 32.07(2)(m)2 and Secretary of State Guidance available at: <https://www.sec.state.ma.us/pre/prenotice.htm> and <https://www.sec.state.ma.us/pre/prepdf/guide.pdf>, p. 4.

extent feasible,” provide a public record in the requestor’s “preferred format,” or, in the absence of a preferred format, in a “searchable, machine readable format.” Providing “reasonable assistance” in locating a requested record on a public website shall be considered furnishing the record. Whenever feasible, public entities must provide commonly available public records online.

E. MAINTENANCE/STORAGE OF RECORDS

Except as may otherwise be provided by law, all public records must be maintained in the custody of a Custodian of Records. A Custodian may enter into a contract for the storage of records, including but not limited to an electronic system or database, only if the contract does not prevent or unduly restrict the Custodian or a RAO from providing or storing records in accordance with the law. Records in storage are considered to remain within the Custodian’s possession for the purposes of the law.

F. ENFORCEMENT: PETITION TO THE SUPERVISOR’S OFFICE / ATTORNEY GENERAL

1. Comply or Go to Court

If a requestor believes that a public entity has refused or failed to comply with the law, the requestor may petition the Supervisor of Public Records for a determination. If the entity refuses or fails to comply with an order issued by the Supervisor of Public Records, the Supervisor can seek enforcement via the Attorney General, who may file an enforcement action in the county where the entity is located. Alternatively, a requestor, or the Attorney General for enforcement of the law, may initiate a civil action for enforcement in the county where the entity is located.

2. Presumptive Award of Fees and Costs for Refusal to Produce Record

An award of fees and costs, including reasonable attorney fees, is presumptive unless (1) the Supervisor of Public Records finds that the public entity did not violate the law, (2) the entity reasonably relied on a published decision of the appellate court or Attorney General based on similar facts, (3) the requestor had the intention to harass or intimidate or (4) the request was not in the public interest or was made for a commercial purpose unrelated to dissemination of information to the public. A court must issue written findings if fees and costs are not awarded.

Upon awarding attorney fees, a court must order waiver of any fee charged by the entity. Punitive damages between one thousand (\$1,000.00) and five thousand (\$5,000.00) dollars, to be deposited in the Public Records Assistance Fund, are permitted only if a court finds that the entity did not act in good faith.

IV. CONCLUSION

The most significant changes stemming from the amended public records law and its regulations generally benefit the requestor, not the public entity. Requestors are generally entitled to timely access to public records at a reduced cost, and have greater access to records in an electronic format. Entities are burdened with increased compliance provisions, particularly relative to electronic records, mandated RAOs and record keeping/posting/website requirements. Awards of costs and attorney fees, with additional punitive damages if warranted, are available to requestors. All public entities should review and become familiar with the full text of the amended M.G.L. c. 66, M.G.L. c. 4, § 7(26) and 950 CMR 32.00 et seq.

This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.