
**THE NEW PUBLIC RECORDS LAW
TECHNICAL REQUIREMENTS
AND
PRACTICAL IMPLICATIONS**

FALL 2016 INFORMATION SESSIONS

**PREPARED BY THE
KP LAW, P.C. GOVERNMENT INFORMATION
AND ACCESS GROUP**

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THE NEW PUBLIC RECORDS LAW

Technical Requirements and Practical Implications

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AN ACT TO IMPROVE PUBLIC RECORDS

Why are we here today?

- Chapter 121 of the Acts of 2016, signed into law on June 3, 2016, makes far-ranging changes to the law
- The portions of the law applicable to public records practices become **effective on January 1, 2017**
- The law further requires that the Supervisor of Records promulgate applicable regulations no later than January 1, 2017; proposed regulations have been issued
- Significant adjustments will need to be made to public records practices

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HEIGHTENED INTEREST IN OPEN GOVERNMENT – WHAT IT MEANS ON THE LOCAL LEVEL



- Appeals being filed with more frequency with the Supervisor of Records over technical noncompliance
- Appeals being filed more frequently in court, often with OML and COI counts
- Intense scrutiny locally and nationally over public records practices and other "sunshine law" requirements
- Frequent requests for thousands of electronically maintained documents, particularly e-mail
- Anticipation of new law taking effect

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NEW PRL - OVERVIEW OF SIGNIFICANT ISSUES

- Creation of Records Access Officers and duties thereof
- Timelines and obligations for responses to requests
- Assessment of fees
- Appeals (requestor, Attorney General, court)
- Attorneys Fees and punitive damages
- Revisions and clarifications to particular exemptions



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SUMMARY OF TOPICS

- Review existing PRL, including exemptions
- Summarize technical requirements of the new PRL
 - Records Access Officer
 - New time frames
 - Responses - various options and format
 - Petitions to Supervisor – by requestor, by municipality
- Implementation Issues
 - Keeping track of records requests
 - Electronic documents preference
 - Posting electronic documents



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MASSACHUSETTS PUBLIC RECORDS LAW (PRL)

Current PRL: a combination of statutes and regulations

Public Records



- G.L. c. 66, §10 (Public Records Requests)
- G.L. c. 4, §7, clause 26 (Exemptions)
- 950 CMR 32.00, et seq. (Public Records Access Regulations)
- Other statutes specifically addressing the public records status of particular records (so-called "Exemption (a) statutes")

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CURRENT PRL - REVIEW

- Must respond within ten calendar days
- When the cost is estimated to exceed \$10.00, that response must include an estimate of the costs of responding, and must identify the reasons for withholding or redacting documents
- Burden is on custodian to assert application of law, justifying redaction or withholding, with specificity
- Response time & cost to comply includes lowest paid person capable of doing the work, regardless of who actually performs the work

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COMMON PRL EXEMPTIONS

- Exemption (a) allows withholding of records that are "specifically or by necessary implication exempted from disclosure by statute."
- Examples of "exemption (a)" statutes:
 - CORI (e.g., 803 CMR 2.23; 803 CMR 5.14)
 - Domestic Violence Reports (G.L. c. 41, §97D)
 - Student Records (e.g., 603 CMR 23.07)
 - MCAD documents (aside from the initial complaint and investigative determination) (804 CMR 1.04)
 - Abatement Applications (G.L. c. 59, §60)

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COMMON PRL EXEMPTIONS

- Exemption (c) allows withholding of “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.”
- Exemption (d) allows withholding of “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.”

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COMMON PRL EXEMPTIONS

- Exemption (e) allows withholding of “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.”
- Exemption (f) allows withholding of “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.”

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COMMON PRL EXEMPTIONS

- Exemption (n) allows a records custodian, who reasonably believes that disclosure is “likely to jeopardize public safety” to withhold records relative to infrastructure within the commonwealth, and now includes **cyber security**
- Exemption (o) allows withholding of **personal e-mail** and home address and home telephone number of an employee of a municipality or other governmental entity in the custody of a government agency that maintains records identifying persons as falling within those categories

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COMMON PRL EXEMPTIONS

- New PRL exempts from disclosure records divulging or tending to divulge names and addresses of those owning, possessing, or licensed to own or possess firearms or ammunition
- New PRL adds personal e-mail addresses to the list of information that may be withheld for a broad range of law enforcement personnel and victims of adjudicated crimes, domestic violence, or of those who provide or training in family planning services

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RECORDS ACCESS OFFICERS (“RAO”)

- Each municipality must designate one or more RAO
 - Municipal clerk or designee automatically a RAO
 - Chief executive officer may designate additional or different RAOs
- Contact information for RAO must be posted in municipal offices and on website
- Duties include assisting requestors and records custodians, and preparing guidelines to enable requestors to make “informed” requests, including a listing of categories of records
- Guidelines must be posted on website no later than July 1, 2017

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WHO IS THE RAO?

- By default, in a municipality, the RAO is the municipal clerk
- Who is best to serve in that capacity?
 - Does it matter if the municipality is a city or a town?
- Is it a personality “thing” or an office?
- Is it an existing position or a new one?
- Will extra compensation be provided?
- What is the relationship between the RAO and custodians of records?
- What is the relationship between RAOs?
- Is the idea of a Super-RAO a good idea, and what is the function of position?
- What departments should have their own RAO? School? Police? Fire? Ambulance? Why??

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PUBLIC RECORDS REQUESTS



- Made to RAO
 - In person
 - By first class mail
 - By e-mail
- Does not specify whether request can be made orally, although Supervisor of Public Records suggests the same is true in the draft regulations; indicates that the requirements of the law would still apply to a verbal request

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RESPONSES TO PUBLIC RECORDS REQUESTS

- Must respond within **10 BUSINESS** days; failure to do so means that **NO FEE MAY BE ASSESSED**
- If full response, including provision of records, cannot be made within 10 business days, RAO must respond to the requestor, including the following:
 - Confirming receipt
 - Identifying correct custodian/RAO if not correct
 - Outlining what will be withheld, if known
 - Explaining reason for inability to provide the same within the timeframe
 - When a response is expected



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RESPONSES

- Have a total of **25 business days** from date of original request to provide full response
- RAO may, within **20 business days** of receipt of request, petition the Supervisor of Records for additional time, **not to exceed an additional 30 business days** "for good cause shown"

BEST PRACTICE – file request for extension early

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RESPONSES

- For purposes of the law, "good cause" will be analyzed based upon the following:
 - Amount of time required to search for and redact records
 - Office hours & capacity of office
 - Efforts undertaken to respond to request and previous requests
 - Number of requests, including if part of a series of contemporaneous requests that are frivolous, intended to intimidate or harass

The Supervisor will also consider the public interest in expeditious disclosure when deciding whether to grant more time to respond

BEST PRACTICE – file request for extension early

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RESPONSES

- Supervisor must provide response to petition within five business days of receipt
- Supervisor may provide longer response period if determination is made that request is intended to harass or otherwise is not in the public interest OR may "relieve" the municipality/agency of obligation to respond
- Response SHALL be provided electronically if possible and available in that format, unless not desired by requestor

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FEES

- A reasonable fee may be assessed for production of records other than those "freely available"
- Fees shall not exceed actual cost for reproducing the record:
 - Actual cost of storage device
 - \$.05/page for black and white copies and printouts, one or two sided

THE \$.05 PER PAGE COPYING FEE IS ALREADY IN EFFECT



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FEES

- Municipalities ≤ 20,000 people
 - May assess a fee for the first two hours of employee time, only if more than two hours is required
- Burden is on the municipality to show that there are less than 20,000 residents
- Municipalities > 20,000
 - May not assess a fee for employee time for the first two hours required to respond to a public records request

Potentially significant limits upon charges for segregation and redaction time??



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FEES

- “Employee time” is defined as “necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed”
- The hourly rate is capped at \$25.00
- A municipal RAO may petition the Supervisor for a higher hourly rate, or to charge for segregation and redaction time
- The Supervisor must provide a determination within five business days of receipt of the petition
 - Supervisor considers whether response cannot be prudently completed without review and redaction, and the public interest in inexpensive access to records, the ability of the requestor to pay
 - The fee must still be reasonable, and cannot be intended to limit, deter or prevent access

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FEES

- Police records now subject to same fee schedule as other public records (amending G.L. c. 66, §10)
- As with the current version of the law, the RAO may not ask the requestor the purpose of the request
- However, the RAO can indicate to a requestor elements that would allow a more expedient handling of a request, although it will not toll the time periods to respond
- RAO can also request information to determine whether the request is being made to further a better understanding of government or for news, as compared to a “commercial purpose”, defined to mean:
 - Sale or resale of a portion of the record
 - Use of the record to advance strategic business interests

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APPEALS

- Requestor –
 - Requestor may appeal response of RAO to Supervisor
 - Supervisor must issue decision within 10 business days of receipt of appeal
 - If requestor is dissatisfied, may appeal to Superior Court
 - Alternatively, the requestor may bypass the Supervisor and go directly to Superior Court
- Attorney General –
 - Supervisor may refer to Attorney General to compel compliance with order
 - Attorney General must identify a single point of contact for the Supervisor

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APPEALS

- Superior Court has all remedies at law or in equity
 - De novo review
 - May perform an in camera review of records without waiving attorney client privilege or work product privilege
 - **Presumption that records are public**
 - Municipality/agency must demonstrate by a preponderance of the evidence that record or portion thereof may be withheld

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ATTORNEYS FEES

- Presumption in favor of award of attorneys fees and costs IF requestor obtains relief through a judicial order, consent decree, or the provision of the requested documents after the filing of a complaint
- UNLESS municipality establishes:
 - Supervisor found in favor of municipality
 - Municipality relied upon an appellate level court decision with substantially similar facts
 - Municipality relied upon published opinion of the Attorney General
 - Request was designed to harass, intimidate, or was not in the public interest and made for commercial purposes unrelated to disseminating information to the public about actual or alleged government activity

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PUNITIVE DAMAGES & WAIVER

- Punitive Damages - Superior Court may award punitive damages between \$1,000 and \$5,000 if requestor has obtained judgment in Superior Court and demonstrates municipality failed to act in good faith
- Fee Waiver - If award of attorneys fees and costs is made, Superior Court shall order the municipality to waive any fees in connection with provision of records; even if no award of attorneys fees is made, the court may still require waiver of fees

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ELECTRONIC RECORDS PREFERENCE

- Preference for electronic record production
- Electronic records posting policy
- Technological infrastructure
- Staff time and ability
- **Posting of certain records required, if "feasible":**
 - final opinions, decisions, orders, or votes from proceedings;
 - annual reports;
 - notices of regulations proposed "under chapter 30A";
 - notices of hearings;
 - winning bids for public contracts;
 - awards of federal, state and municipal government grants;
 - minutes of open meetings;
 - budgets; and
 - any public record information of significant interest that is deemed appropriate to post



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OTHER ISSUES

- Custodians may contract for "cloud based" or off-site storage
- Must still have access to cloud based or off-site records upon request, and still deemed to have custody
- Electronic record storage systems to be acquired must, to the extent feasible, provide data in commonly available electronic, machine readable format, provide for storage and retrieval that allow for electronic segregation and redaction

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MAIN DIFFERENCES FOR AGENCIES

- Agencies have shorter time frames for responding to requests (**15** total business days, and may only obtain an additional **20** business days to respond from the Supervisor)
- Agencies may not charge for the first **4** hours of work
- Agencies may not petition the Supervisor for an hourly rate in excess of \$25/hour
- Agencies are **required** to post certain categories of records on official websites
- Agency RAO guidelines are due January 1, 2017

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MAIN DIFFERENCES FOR AGENCIES

Agency RAOs **must** maintain a public records log, recording certain information:

- the nature of the request and the date on which the request was received;
- the date on which a response is provided to the requestor;
- the date on which a public record is provided to the requestor;
- the number of hours required to fulfill the request;
- fees charged to the person making the request, if any;
- petitions filed with supervisor of records to charge for segregation/redaction time;
- requests appealed to the supervisor of records;
- the time required to comply with supervisor of records' orders on requests appealed to the supervisor; and
- the final adjudication of any court proceedings under G.L. c. 66, §10A(d)

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MAIN DIFFERENCES FOR AGENCIES

- There is no statutorily defined "default" RAO in an agency
- Under the proposed regulations, agencies have certain reporting requirements:
 - The RAO, once designated, must report his/her designation to the state Division of Public Records, and must also report the designation of any secondary RAO(s)
 - An agency RAO shall report to the Division of Public Records, by December 31, an annual accounting for the calendar year thus ending, of the information contained in the public records log

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Contact the KP Law Government Information and Access Group with questions about the Public Records and Open Meeting Laws.



The New Public Records Law - Municipalities

On June 3, 2016, the Legislature enacted, “An Act to Improve Public Records”, Chapter 121 of the Acts of 2016 (<https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121>). Chapter 121 makes significant changes to the Public Records Law, and as a result, public entities throughout the state will need to adjust their public records practices. Importantly, however, the new requirements will not take effect until January 1, 2017. The outline that follows is therefore for general information purposes only.

Note that different requirements and timelines apply to municipalities as compared to other types of entities. At this time, however, it is not clear whether districts and authorities providing municipal services will be treated as municipalities for purposes of the law. We will provide separate guidance to such entities as may be needed.

(1) Changes to Exemptions

- The new law amends Exemption (n) to allow records to be withheld related to cyber security;
- Exemptions (o) and (p), and other provisions of law relative to the public records status of home addresses and telephone numbers of certain public employees, public safety personnel, victims of adjudicated crimes, and their family members’ names and personal information, have been revised to allow withholding of personal e-mail addresses; and
- The names and addresses of persons who own, possess, or are licensed to carry firearms will not be subject to disclosure, other than in particular situations.

(2) Appointment and Duties of Records Access Officer (“RAO”)

- The RAO is the municipal clerk and any others appointed by the “chief executive officer”;
- The RAO will assist public records requesters, assist records custodians in maintaining records, and prepare guidelines as to the public records request and response process;
- Contact information for each RAO and the guidelines must be posted to the official website;

(3) Responses to Requests

- The time to provide an initial written response has increased from 10 calendar days to 10 business days;
- The new law expressly authorizes requests by hand, first class mail and e-mail; the law does not expressly address in person verbal requests and we are uncertain whether the Supervisor’s regulations will address this issue;
- If a complete response cannot be provided within the initial time frame, the RAO must still respond to confirm receipt, either explaining why a complete response cannot be provided, directing the requester to a different custodian, outlining what will be withheld if known, and estimating the time for response;

- For municipalities, the law establishes an outside date to provide the requested records not to exceed 25 business days from the date of the initial request, although the requester can agree to more;
- The RAO may ask the Supervisor to grant 30 additional business days for “good cause shown”;
- “Good cause shown” will be evaluated based upon a variety of factors including: time needed to search for and redact the record(s); office hours; capacity of the office; number of requests; and whether the request is part of a series that are frivolous, intended to intimidate or harass;
- The law establishes a preference for electronic copies, unless the requester specifically dictates otherwise, and, to the extent feasible, documents must be posted on the municipal website.

(4) Fees

- ***A reasonable fee may be assessed*** for production of records other than those “freely available for public inspection” (such as on a website) ***ONLY if the RAO responds to the request within 10 business days;***
- The fee for copies of records shall not exceed the actual cost for reproducing the record, and shall, unless otherwise provided, be calculated as follows: the actual cost of storage device; for black and white photocopies or computer printouts, no more than \$.05/page, whether single or double-sided (the Supervisor’s Public Records Fee Access Regulations are already reflective of this requirement)
- For responses requiring two hours or less, it appears no fee may be assessed for “employee time”;
- If more than two hours of work will be required to look for, compile, segregate, redact or reproduce the record, the prorated hourly fee of the lowest paid person capable of doing the work, capped at \$25.00/hour, can be charged; provided, however, that, in a municipality of more than 20,000 people, no charge may be made for the first two hours;
- Subject to the cap, “employee time” may include that required by employees or “necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality”;
- The RAO may petition the Supervisor for permission to charge a higher hourly rate, and the Supervisor has five business days to respond; permission may be granted upon a finding that the request is for a commercial purpose OR that the request cannot be prudently completed without the redaction, and the amount of the fee is reasonable and not intended to limit, deter or prevent access; factors to be considered include public interest in access to the record and financial ability of the requester to pay;
- Unlike now, police records are subject to the same fee schedule as other records;
- The RAO may deny additional requests from requesters that have failed to pay for previous requests, provided that the requester is provided with an accounting of outstanding balances;
- As is the case now, the RAO may not require the requester to specify the purposes for the request; however, under the new law, a request for additional information may be made to determine whether the request is made for a commercial purpose (sale or resale of a portion of the record or use of the information to advance strategic business interests, and not for news purposes or to better understand government operations) or to grant a fee waiver.

(5) Appeals

- By Requester to Supervisor or Superior Court – Appeals may be made to the Supervisor who shall issue a written decision within 10 business days of receipt of the petition; a requester aggrieved by a decision of the Supervisor may obtain judicial review in Superior Court OR the requester can go directly to court
- By Attorney General – The Attorney General, at the request of the Supervisor, may seek to compel disclosure of records; the Attorney General may also act on its own initiative or intervene in case filed by requester;
- All records are presumed to be public, and burden is on municipality to show, by a preponderance of the evidence, that the record or portion thereof may be withheld;

(6) Attorneys' Fees

- **Presumption in favor of an award of costs and attorneys' fees** – The new law requires an award to be made in any case in which the requester “obtains relief through a judicial order, consent decree, or the provision of the requested documents after the filing of a complaint”;
 - **To combat the presumption**, the municipality must establish that (1) the Supervisor found in favor of the municipality, (2) the municipality relied upon an appellate level decision or a published opinion of the Attorney General based upon similar facts, or (3) request was designed to harass or intimidate or was not in the public interest and made for commercial purposes unrelated to provision of information to the public; thus, if an exemption is asserted, and the court orders any portion of the records to be released OR any portion of the records are released after the filing of litigation, a presumption exists that the plaintiff will be awarded attorneys' fees and costs;
- **Waiver of Fees** - If attorneys' fees and costs are awarded, the Superior Court shall order the municipality to waive fees assessed for copies of the records; if no such award is made, the court may still require the municipality to waive such fees;
- **Punitive Damages** – The Superior Court may award punitive damages of no less than \$1,000 and no more than \$5,000 if the requester has obtained judgment in Superior Court and has demonstrated that the municipality failed to act in good faith.

Summary. This eUpdate identifies certain significant changes to the Public Records Law for your immediate information. It will be important to plan for these changes in the law, including appointment of RAOs. In addition to provision of additional written guidance, this fall we will hold approximately a dozen client training sessions throughout the state. The dates and locations for such training sessions will be announced shortly.

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THE NEW PUBLIC RECORDS LAW: TOP TEN PRACTICAL AND POLICY ISSUES

The new Public Records Law will take effect on January 1, 2017. What will it take to be ready? Here is a list of the top ten practical and policy issues you need to consider now in preparation for implementing the new law.

1. Who should serve as the **Records Access Officer** (“RAO”)? Is the default appropriate in a particular municipality? For an agency, what makes sense? Should this decision be based upon personality, position, and/or other considerations?
2. Will there be **more than one RAO**, and how will that decision be made? What are the implications for having more than one RAO? What factors are important in making that decision— familiarity with the type and scope of records held by a particular custodian, governance issues, content of records, confidentiality of records?
3. If you chose to have more than one RAO, will one be a “**Super-RAO**”, in charge of all other RAOs? Does this depend on whether a municipality has a charter, a representative form of government or otherwise? Does it depend on the size of the municipality? In an agency, what factors might suggest appointment of one Super-RAO – relative allocation of resources, by function, by size?
4. Who is the **appointing authority** for the RAO? Does that impact the relationship between the RAO and records custodians? If not, how will that relationship be regulated? How will you know what steps to take to address this, and what are the stakes if custodians are not “cooperative”?
5. Will the RAO **coordinate all responses** to requests for public records? If so, will this be a full-time or part-time job? Will a new person be hired or will the responsibilities be added to existing responsibilities? Are there bargaining implications if the position appointed as an RAO is covered by a collective bargaining agreement? What are the implications under the law for making salary changes to reflect additional responsibilities?

6. What is the **electronic records keeping/website posting policy** currently? What are the organization's current abilities and possible capabilities with respect thereto, including but not limited to staffing, IT resources and infrastructure, and financial resources? What are the implications for failing to invest in these capabilities, both technological and otherwise, now?

7. Under what conditions will **exemptions** be asserted to withhold or redact records? What are the implications, from various perspectives, for withholding or redacting records - the amount of time required to respond fully consistent with law, the financial burdens, and overall risk - as compared to the risk of simply disclosing a record in its entirety? How does this look from an overall organizational perspective, from a departmental perspective?

8. How will a realistic set of **internal guidelines** be developed for addressing public records issues, and what will that look like? Will it be a "public records policy" for all departments, for some departments? Will the "policy" address the respective roles of records custodians and the RAO(s), with respect to both requests and responses, and take into account the work that must be done within the first 10 business days following receipt of a request? Who will be responsible for, and have authority to, adopt this policy?

9. Who will develop public records request tracking **forms, checklists and standardized response letters**? Will using standardized materials ensure that requests and responses are easier to track?

10. Will typical "**over the counter**" requests and responses thereto be addressed, monitored, tracked? What will be the appropriate mechanisms to do so?

If you have any questions regarding the Public Records Law, contact Attorney Lauren Goldberg at 617.556.0007 or lgoldberg@k-plaw.com. Please visit our website at www.k-plaw.com for information concerning topical issues of importance to municipalities and other public sector entities.

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NEW PUBLIC RECORDS LAW RESPONDING TO A PUBLIC RECORDS REQUEST: MUNICIPAL TIMELINE

Counting begins the business day* after receipt of request

<p>10 BUSINESS DAYS RESPONSE DUE</p> <p><i>NOTE: Failure to respond within 10 business days forfeits right to assess fees.</i></p>	<p>Last day to:</p> <ol style="list-style-type: none"> 1. Produce records; or 2. Deny request in writing, citing with specificity application of exemptions; or 3. Provide detailed written response stating exemptions, and/or need for additional time. <p>SEE OTHER SIDE FOR REQUIRED ELEMENTS OF WRITTEN DENIAL OR RESPONSE</p>
<p>20 BUSINESS DAYS</p> <p><i>NOTE: Consider filing petition in connection with response within 10 business days or well in advance of deadline.</i></p>	<p>Last day to petition State Supervisor of Records for:</p> <ol style="list-style-type: none"> 1. Extension of time; 2. Charge for “employee time” at rate more than \$25.00/hr.; 3. Charge for time spent segregating or redacting 4. Relief from frivolous or harassing requests <p>Supervisor’s decision due within 5 days of receipt of petition.</p> <p>SEE OTHER SIDE FOR PETITION CRITERIA</p>
<p>25 BUSINESS DAYS</p>	<p>Last day to produce records absent Supervisor approved extension (unless requestor agrees to more time).</p>
<p>55 BUSINESS DAYS</p>	<p>Last day to produce records if Supervisor approves maximum extension.</p>

**The term “business day” excludes weekends, legal holidays and unexpected closure of custodian’s office.*

Initial Written Response/Denial to Requestor - Required Elements (Within 10 Business Days)

1. Confirm receipt and date of request;
2. Identify requested records or categories of records not within possession or custody of RAO; identify agency, municipality, RAO or custodian with custody, if known;
3. Identify records that RAO intends to withhold and/or redact, *detailing with specificity* reasons therefor and asserting applicable exemptions;
4. Identify records produced or intended to be produced and, if necessary, a detailed statement describing why response time in excess of 10 business days is required;
5. Identify anticipated timeframe for production – cannot exceed 25 business days after receipt of request without extension – and provide detailed explanation of how request unduly burdens other responsibilities, including, magnitude or difficulty of request, size of office, office hours;
6. If more than 25 days response time is anticipated, notify requestor of possible/actual petition to Supervisor for extension of time and include request for requestor’s voluntary assent to additional time;
7. Suggest a modification of request if appropriate to reduce estimated response time and cost;
8. Itemized good faith estimate of fees; and
9. Statement of requestor’s right to appeal to Supervisor pursuant to G.L. c.66, §10A(a) and/or to Superior Court pursuant to G.L. c.66, §10A(c).

Criteria for Petitions to State Supervisor of Records

Petitions for Extension of Time for “Good Cause” should address:

1. Scope and extent of search for and segregation of records;
2. Scope of redaction necessary to prevent unlawful disclosure;
3. Capacity and normal business hours of RAO or department;
4. Efforts to fulfill current and previous requests;
5. Whether request, individually or as part of series, from the same requestor, is frivolous or intended to harass or intimidate municipality; and
6. Whether public interest is served by expeditious disclosure.

Petitions related to Fees should assert, in good faith:

1. Request is for a commercial purpose; **or**
2. The request could not prudently be completed without redaction, segregation or fee in excess of \$25 per hour; the fee is reasonable and not designed to limit, deter or prevent access to requested public records; balancing the public interest in disclosure and the requestor’s ability to pay.

**The term “business day” excludes weekends, legal holidays and unexpected closure of custodian’s office.*

**CHAPTER 121
OF THE ACTS
OF 2016**

**Acts****2016****Chapter 121 AN ACT TO IMPROVE PUBLIC RECORDS.**

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. Section 7 of chapter 4 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the word "transportation", in line 226, the following words:- , cyber security.

SECTION 2. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in line 229, the words "subsection (b)" and inserting in place thereof the following words:- subsection (c).

SECTION 3. Said section 7 of said chapter 4, as so appearing, is hereby further amended by inserting after the word "safety", in line 230, the following words:- or cyber security.

SECTION 4. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in lines 231 and 242, the words "and home" and inserting in place thereof the following words:-, personal email address and home.

SECTION 5. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in line 269, the word "ten" and inserting in place thereof the following word:- 10A.

SECTION 6. Chapter 10 of the General Laws is hereby amended by inserting after section 35CCC the following section:-

Section 35DDD. There shall be established and set up on the books of the commonwealth a Public Records Assistance Fund, which shall be administered by the Massachusetts office of information technology. The fund shall be credited with:

(i) all punitive damages assessed pursuant to paragraph (4) of subsection (d) of section 10A of chapter 66;

(ii) any appropriations, bond proceeds or other monies authorized or transferred by the general court and specifically designated to be credited to the fund;

(iii) gifts, grants and other private contributions designated to be credited to the fund;

(iv) all other amounts credited or transferred to the fund from any other fund or source;

and

(v) interest or investment earnings on any such monies. Amounts credited to the fund may be expended by the chief information officer, without further appropriation, to provide grants to municipalities to support the information technology capabilities of municipalities to foster best practices for increasing access to public records and facilitating compliance with

said chapter 66.

The unexpended balance in the fund at the end of a fiscal year shall not revert to the General Fund but shall remain available for expenditure in subsequent fiscal years. No expenditure made from the fund shall cause the fund to become deficient at any point.

SECTION 7. Chapter 66 of the General Laws is hereby amended by inserting after section 1 the following section:-

Section 1A. The supervisor of records shall:

(i) create educational materials or guides for agencies and municipalities, and may make available training in order to foster awareness and compliance with this chapter; and

(ii) prepare forms, guidelines and reference materials for agencies and municipalities to use and disseminate to individuals seeking access to public records to assist them in making informed public records requests.

The supervisor of records shall make the forms, guidelines and reference materials available at no cost on a website operated by the secretary of the commonwealth. Upon request and to the extent feasible, the supervisor of public records shall assist each agency and municipality in developing best practices to facilitate compliance with this chapter and to promote access to public records.

SECTION 8. Section 3 of chapter 66 of the General Laws, as so appearing, is hereby amended by inserting after the words "process", the second time it appears in line 12, the following words:- , or by electronic means.

SECTION 9. Said chapter 66 is hereby further amended by inserting after section 6 the following section:-

Section 6A. (a) Each agency and municipality shall designate 1 or more employees as records access officers. In a municipality, the municipal clerk, or the clerk's designees, or any designee of a municipality that the chief executive officer of the municipality may appoint, shall serve as records access officers. For the purposes of this chapter the term "agency" shall mean any entity, other than a municipality, that is identified in clause twenty-sixth of section 7 of chapter 4 as possessing "public records," as defined therein.

(b) A records access officer shall coordinate an agency's or a municipality's response to requests for access to public records and shall facilitate the resolution of such requests by the timely and thorough production of public records. Each records access officer shall:

(i) assist persons seeking public records to identify the records sought;

(ii) assist the custodian of records in preserving public records in accordance with all applicable laws, rules, regulations and schedules; and

(iii) prepare guidelines that enable a person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise.

Guidelines shall be updated periodically and shall include a list of categories of public records maintained by the agency or municipality. Each agency and municipality that maintains a website shall post the guidelines on its website.

(c) Each agency and municipality shall post in a conspicuous location at its offices and on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer. The designation of 1 or more records access officers shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any employee responsible for making public records available shall provide the records in accordance with this chapter.

(d) The records access officer shall provide the public records to a requestor by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form. The records access officer shall, to the extent feasible, provide the public record in the requestor's preferred format or, in the absence of a preferred format, in a searchable, machine readable format. The records access officer shall not be required to create a new public record in order to comply with a request, provided that furnishing a segregable portion of a public record shall not be deemed to be creation of a new record. If the public record requested is available on a public website pursuant to subsection (b) of section 19 of this chapter, section 14C of chapter 7 or any other appropriately indexed and searchable public website, the records access officer may furnish the public record by providing reasonable assistance in locating the requested record on the public website. An electronically produced document submitted to an agency or municipality for use in deliberations by a public body shall be provided in an electronic format at the time of submission.

(e) Each records access officer of an agency shall document each request for public records submitted to the records access officer. The records access officer shall document:

- (i) the nature of the request and the date on which the request was received;
- (ii) the date on which a response is provided to the requestor;
- (iii) the date on which a public record is provided to the requestor;
- (iv) the number of hours required to fulfill the request;
- (v) fees charged to the person making the request, if any;
- (vi) petitions submitted under clause (iv) of subsection (d) of section 10;
- (vii) requests appealed under section 10A;
- (viii) the time required to comply with supervisor of records orders under said section

10A; and

(ix) the final adjudication of any court proceedings under subsection (d) of said section 10A.

Nothing in this subsection shall require a records access officer to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall annually collect the information from the records access officers, post the information on a website maintained by the secretary and report the same to the clerks of the house of representatives and senate.

(f) The supervisor of records shall document appeals filed under section 10A, including:

- (i) the date the request was submitted to the records access officer;
- (ii) the date the records access officer responded;
- (iii) the amount of fees charged to the requestor, if any;
- (iv) petitions made pursuant to clause (iv) of subsection (d) of section 10;
- (v) the time required to comply with supervisor of records orders under said section 10A; and
- (vi) the final adjudication of any court proceedings under subsection (d) of said section 10A.

Nothing in this subsection shall require the supervisor to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall post the information on a website maintained by the secretary.

SECTION 10. Said chapter 66 is hereby further amended by striking out section 10, as appearing in the 2014 Official Edition, and inserting in place thereof the following 4 sections:-

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

- (i) the request reasonably describes the public record sought;
- (ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and
- (iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

- (i) confirm receipt of the request;
- (ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;
- (iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;

(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;

(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;

(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;

(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and

(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

- (i) the need to search for, collect, segregate or examine records;
- (ii) the scope of redaction required to prevent unlawful disclosure;
- (iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;
- (iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;
- (v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and
- (vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

(d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:

(i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;

(ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than \$25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access

officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than \$25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of \$25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of \$25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government 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 amount of the reasonable fee;

(vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and

(ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education

(e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).

(f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

Section 10A. (a) If an agency or municipality fails to comply with a requirement of section 10 or issues a response the requestor believes in violation of section 10, the person who submitted the initial request for public records may petition the supervisor of records for a determination as to whether a violation has occurred. In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; provided, however, that where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney-client privilege and the attorney work product privilege. The supervisor of records shall issue a written determination regarding any petition submitted in accordance with this section not later than 10 business days following receipt of the petition by the supervisor of records. Upon a determination by the supervisor of records that a violation has occurred, the supervisor of records shall order timely and appropriate relief. A requestor, aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of records to issue a timely determination, may obtain judicial review only through an action in superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as prescribed in subsection (d).

(b) If an agency or municipality refuses or fails to comply with an order issued by the supervisor of records, the supervisor of records may notify the attorney general who, after consultation with the supervisor of records, may take whatever measures the attorney general considers necessary to ensure compliance. If the attorney general files an action to

compel compliance, the action shall be filed in Suffolk superior court with respect to state agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor of records. In addition to any other duties the attorney general may impose, the designee shall serve as a primary point of contact within the office of the attorney general regarding notice from the supervisor of records that an agency or municipality has refused or failed to comply with an order issued by the supervisor of records.

(c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).

(d) (1) In any action filed by a requestor pursuant to this section:

(i) the superior court shall have jurisdiction to enjoin agency or municipal action;

(ii) the superior court shall determine the propriety of any agency or municipal action de novo and may inspect the contents of any defendant agency or municipality record in camera, provided, however, that the in camera review shall not waive any legally applicable privileges, including without limitation, the attorney-client privilege and the attorney work product privilege;

(iii) the superior court shall, when feasible, expedite the proceeding;

(iv) a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.

(2) The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

(i) the supervisor found that the agency or municipality did not violate this chapter;

(ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;

(iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;

(iv) the request was designed or intended to harass or intimidate; or

(v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged

government activity.

If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial.

(3) If the superior court awards reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it shall order the agency or municipality to waive any fee assessed under subsection (d) of section 10. If the superior court does not award reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it may order the agency or municipality to waive any fee assessed under said subsection (d) of said section 10. Whether the superior court determines to waive any fee assessed under said subsection (d) of said section 10, it shall issue findings specifying the basis for such decision.

(4) If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than \$1,000 nor more than \$5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

(e) Notwithstanding any other provision of this chapter, the attorney general may, at any time, file a complaint in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located, to ensure compliance with this chapter and may further intervene as of right in any action filed in accordance with this section. In any action filed or in which the attorney general has intervened under this subsection, paragraphs (1) and (4) of subsection (d) shall apply and any public records the court orders produced shall be provided without a fee.

Section 10B. The commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined in section 121 of chapter 140, shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said section 121 of said chapter 140, and names and addresses of persons licensed to carry or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in section 167 of chapter 6 and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The home address, personal email address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of children and families, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel, shall not be public records in the custody of the employers of such personnel or the public employee retirement administration

commission or any retirement board established under chapter 32 and shall not be disclosed, but such information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180 or to criminal justice agencies as defined in said section 167 of said chapter 6. The name, home address, telephone number and personal email address of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed. The home address, telephone number, personal email address or place of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name, home address, telephone number, personal email address or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

SECTION 11. Section 12 of said chapter 66, as so appearing, is hereby amended by striking out, in line 4, the words "provided for them" and inserting in place thereof the following words:- or buildings, vaults or file rooms that comply with standards of the National Fire Protection Association, or by electronic means with off-site secure storage, or in accordance with standards promulgated by the records conservation board.

SECTION 12. Section 13 of said chapter 66, as so appearing, is hereby amended by inserting after the word "person", in line 2, the following word:- unlawfully.

SECTION 13. Said chapter 66 is hereby further amended by striking out section 17, as so appearing, and inserting in place thereof the following section:-

Section 17. Except as otherwise provided by law, all public records shall be kept in the custody of the person having the custody of similar records in the county or municipality to which the records originally belonged; provided, however, that the custodian of public records may enter into a contract for the storage of records containing public record information, but no contract for the storage of public records shall be entered into if the contract prevents or unduly restricts a records access officer or custodian of records from providing or storing the records in accordance with this chapter. Records not directly in the custodian's possession shall be considered in the custody of the custodian if subject to a contract for the storage of public records that is permitted by this section. If the custodian does not have custody of public records, the custodian shall demand delivery from any person unlawfully having possession of the records, and the records shall immediately be delivered by such person to the custodian. A person who refuses or neglects to perform any duty required by this section shall be punished by fine of not more than \$20.

SECTION 14. Said chapter 66 is hereby further amended by adding the following 3 sections:-

Section 19. (a) When designing or acquiring an electronic record keeping system or database, records access officers shall, consistent with section 17 of chapter 110G, consult

with their chief executive officer, chief administrative officer or the Massachusetts office of information technology pursuant to chapter 7D to ensure, to the extent feasible, that the system or database is capable of providing data in a commonly available electronic, machine readable format. Such database designs or acquisitions shall allow for, to the extent feasible, information storage and retrieval methods that permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access. No agency or municipality shall enter into a contract for the storage of electronic records containing public records if the contract prevents or unduly restricts the records access officer from providing the public records in accordance with this chapter.

(b) Every agency shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided that any agency may withhold any record or portion thereof in accordance with state or federal law:

- (i) final opinions, decisions, orders, or votes from agency proceedings;
- (ii) annual reports;
- (iii) notices of regulations proposed under chapter 30A;
- (iv) notices of hearings;
- (v) winning bids for public contracts;
- (vi) awards of federal, state and municipal government grants;
- (vii) minutes of open meetings;
- (viii) agency budgets; and
- (ix) any public record information of significant interest that the agency deems

appropriate to post.

Section 20. For requests of payroll, financial and other data residing in the centralized state accounting and payroll systems, or associated data warehouses, the comptroller shall make available guidelines on how agencies using these systems may access and disclose public records to ensure that data that is exempted or prohibited from disclosure is not wrongfully disclosed and the security of the system is maintained.

Section 21. A document made or received by the Massachusetts Bay Transportation Authority Retirement Board or any other legal entity, public or private, which receives funds from the Massachusetts Bay Transportation Authority for the payment or administration of pensions for employees of the Massachusetts Bay Transportation Authority shall be considered a public record under this chapter and under clause twenty-sixth of section 7 of chapter 4 and subject to all applicable exemptions; provided, however, that subsection (6) of section 23 of chapter 32 shall also apply to these documents.

SECTION 15. Section 3 of chapter 268B of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the word "reports", in line 22, the following words: - ; provided, however, that the commission may make statements and reports filed with the commission available by electronic mail in a read-only format upon the written request of any individual that delivers the request by electronic mail and provides identification acceptable to the commission, including the individual's affiliation, if any.

SECTION 16. A records access officer serving in a municipality pursuant to section 6A of chapter 66 of the General Laws shall, to the extent feasible, post the commonly available public record documents identified in subsection (b) of section 19 of said chapter 66 on a website maintained by the municipality.

SECTION 17. The supervisor of records shall adopt regulations necessary to implement this act. These regulations shall be adopted not later than January 1, 2017.

SECTION 18. Notwithstanding any general or special law to the contrary, sections 9 and 10 of this act shall not apply to public records requests submitted under section 10 of chapter 66 of the General Laws before the effective date of this act and no obligation imposed by sections 9 and 10 of this act shall be enforceable or deemed relevant in an appeal pending before the supervisor of records or a court on the effective date of this act.

SECTION 19. There shall be a working group to review and evaluate the application of subsection (f) of clause twenty-sixth of section 7 of chapter 4 of the General Laws as it relates to law enforcement. The working group shall review determinations of the supervisor of records and judicial decisions regarding the application of said subsection (f) of said clause twenty-sixth of said section 7 of said chapter 4 and issue findings regarding:

(i) the public interest in releasing records made and kept by police departments, including arrest records;

(ii) privacy and confidentiality concerns related to releasing records made and kept by police departments; and

(iii) the interaction of said subsection (f) of said clause twenty-sixth of said section 7 of said chapter 4 and the criminal offender record information system.

The working group shall consist of: the secretary of the commonwealth who shall serve as chair; the secretary of public safety and security, or a designee; the court administrator of the trial court, or a designee; 2 members of the senate, 1 of whom shall be the minority leader, or a designee; 2 members of the house of representatives, 1 of whom shall be the minority leader, or a designee; 1 of whom shall be the secretary of administration and finance, or a designee; a representative of the American Civil Liberties Union of Massachusetts, Inc.; a representative of the Massachusetts Newspaper Publishers Association; a representative of the Massachusetts Town Clerks Association; a representative of the Massachusetts Chiefs of Police Association, Incorporated.; the attorney general or a designee; a representative of the State Police Commissioned Officers Association of Mass., Inc.; a representative of the Massachusetts Coalition of Police, Inc.; and a representative of the Massachusetts Municipal Association, Inc.

The working group shall file a report of its findings and recommendations, along with any drafts of legislation necessary to carry those recommendations into effect, with the clerks of the senate and house of representatives not later than December 30, 2017.

SECTION 20. (a) There shall be established pursuant to section 2A of chapter 4 of the General Laws a special legislative commission to examine the accessibility of information concerning the legislative process of the general court and the expansion of the definition of

public records. Said special legislative commission shall consist of 14 members, 1 of whom shall be the house chair of the joint committee on state administration and regulatory oversight, who shall serve as co-chair; 1 of whom shall be the senate chair of the joint committee on state administration and oversight, who shall serve as co-chair; 1 of whom shall be the chair of the house committee on rules; 1 of whom shall be the chair of the senate committee on rules; 2 of whom shall be members of the house of representatives appointed by the speaker of the house of representatives; 1 of whom shall be a member of the house of representatives appointed by the minority leader of the house; 2 of whom shall be members of the senate appointed by the president of the senate; 1 of whom shall be a member of the senate appointed by the minority leader of the senate; and 2 of whom shall be members of the house of representatives or senate appointed jointly by the speaker of the house of representatives and the president of the senate.

(b) The special legislative commission shall examine the procedures and practices of the general court and its committees with regard to legislative process including, but not limited to:

- (i) scheduling and notice of public hearings and legislative sessions;
- (ii) management of legislative calendars;
- (iii) scope and substance of committee hearings, including the number of bills heard at each hearing;
- (iv) publication and availability of records concerning committee proceedings, including public hearing agendas, public testimony and committee votes;
- (v) rules and scheduling requirements for committee reports;
- (vi) content of committee reports, such as summary, explanatory and analytical materials;
- (vii) contemporaneous and permanent online access to open sessions of the house of representatives and senate;
- (viii) publication of records concerning house of representatives and senate sessions including, but not limited to, roll call votes; and
- (ix) publication of proposed amendments to legislation and votes.

(c) The special legislative commission shall also examine the constitutionality and practicality of subjecting the general court, the executive office of the governor and the judicial branch to the public records law. In conducting its examination the special legislative commission shall examine, without limitation, the applicability and impact of Article XXI of the Declaration of Rights, Article XXX of the Declaration of Rights, Article 7 of Section 2 of Chapter 1 of Part the Second of the Constitution of the Commonwealth and Article 10 of Section 3 of Chapter 1 of Part the Second of the Constitution of the Commonwealth.

(d) In undertaking its examination, the special legislative commission shall examine the procedures used by legislatures in other states and those used by the United States Congress for making information concerning the legislative process available to the public.

(e) Counsel to the House and Senate appointed pursuant to section 51 of chapter 3 of

the General Laws shall serve as counsel to the special legislative commission.

(f) The special legislative commission may:

(i) consult with nongovernmental organizations and academic institutions that have expertise that may benefit the commission, including, but not limited to, Common Cause, the American Civil Liberties Union of Massachusetts, Inc., the Massachusetts Newspaper Publishers Association, the Massachusetts Town Clerks Association, consumer interest organizations and the Massachusetts Taxpayers Foundation, Inc.;

(ii) consult with the attorney general;

(iii) consult with the secretary of administration and finance; and

(iv) solicit input from journalistic associations, public policy research institutions, other government institutions with expertise in public access to public proceedings and other entities with an interest in the legislative process and the issue of public records.

(g) The special legislative commission shall issue a report not later than December 30, 2017, that shall include recommendations for legislation or changes to legislative rules to:

(i) enhance the accessibility of information to the public concerning the legislative operations of the general court;

(ii) improve the use of information technology for public access to information about the general court;

(iii) promote substantive reporting by legislative committees; and

(iv) ensure a permanent, accessible, and substantive record of public legislative proceedings, including house and senate sessions and public committee hearings.

The report shall include the constitutional basis for the special legislative commission's recommendations. The report shall also include the special legislative commission's recommendations, if any, on the expansion and reform of the public records statute as it relates to all branches of government. Said report shall be filed with the joint committee on rules, the joint committee on state administration and regulatory oversight, the joint committee on ways and means, and the offices of the house and senate clerks, and shall be posted online.

SECTION 21. Notwithstanding section 16, a municipality that maintains a website shall not be required to post guidelines or reference materials on its website, as required by subsection (b) of section 6A of chapter 66 of the General Laws, before July 1, 2017.

SECTION 22. Sections 1 to 16, inclusive, shall take effect on January 1, 2017.

Approved, June 3, 2016.

PROPOSED REGULATIONS

32.01: Authority

32.02: Title, Scope and Purpose

32.03: Definitions

32.04: General Provisions

32.05: Records Access Officers

32.06: Additional Records Access Officer Responsibilities

32.07: Rights of Access

32.08: Copies of records; fees

32.09: Appeals

32.10: Enforcement of Orders

32.11: Advisory Opinions

32.01: Authority

950 CMR 32.00 is issued by the Supervisor of Public Records under the authority of G. L. c. 66, § 1.

32.02: Title, Scope and Purpose

- (1) 950 CMR 32.00 shall be referred to as the Public Records Access Regulations.
- (2) 950 CMR 32.00 describes the practices and procedures of the Division of Public Records relative to the requirements of governmental entities or political subdivisions of the Commonwealth with respect to disclosure of public records, reporting requirements for certain records access officers and ensuring that disputes regarding access to particular records are resolved expeditiously and fairly. 950 CMR 32.00 shall not limit the availability of other remedies provided by law.
- (3) The Division of Public Records is under the supervision of the Supervisor of Public Records. The Supervisor may amend and rescind such rules, forms and orders as are contemplated by the provisions of the Massachusetts General Laws and as are necessary to carry out their purposes.
- (4) From time to time, the Supervisor of Public Records may authorize exceptions to 950 CMR 32.00 with respect to any specific requirement provided that such exceptions to 950 CMR 32.00 are in conformity with the provisions of the Massachusetts General Laws.

32.03: Definitions

For the purposes of 950 CMR 32.00 unless the context otherwise requires, the following terms shall have the meanings indicated:

Advisory Opinion means an opinion issued by the Supervisor of Public Records intended to provide guidance on issues related to public records access and retention.

Agency means any governmental entity, other than a municipality, that is identified in G. L. c. 66, § 6A and G. L. c. 4, § 7, clause Twenty-sixth and makes or receives “public records,” as defined therein. It 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 section 1 of chapter 32.

Business Day means Monday through Friday. Business day does not include Saturdays, Sundays, legal holidays, or other weekdays where a custodian’s office is closed unexpectedly.

Commercial Purpose means the sale or resale of any portion of the public record or the use of information from the public record to advance the requester’s strategic business interests in a manner that the requester can reasonably expect to make a profit including in addition to the foregoing, obtaining names and addresses from the public record for the purpose of solicitation. It does not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic, or public research or education.

Custodian means any governmental entity, including municipal government entities that makes or receives public records.

Division means Division of Public Records, Office of the Secretary of the Commonwealth of Massachusetts.

Governmental Entity means any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth, including municipal government entities. It does not include the legislature, the judiciary, or the Governor.

Municipality means any municipal government entity, other than an agency, that is identified in G. L. c. 66, § 6A and G. L. c. 4, § 7, clause Twenty-sixth and makes or receives “public records,” as defined therein. A local housing, redevelopment or similar authority, regional district or other consolidation or combination of municipal entities shall be deemed a municipality. It 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 section 1 of chapter 32.

Public Records means 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 unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7, clause Twenty-sixth.

Records Access Officer means a governmental officer or employee or a designee within an agency or municipality designated by an agency or municipality to perform duties described in 950 CMR 32 including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, assisting the custodian in preserving and managing public records, and preparing guidelines that enable requestors to make informed requests.

Requester means any person or entity seeking to inspect or obtain copies of public records.

Redact means to delete, or otherwise expurgate that part of a public record that is exempt from disclosure under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege from non-exempt material.

Search Time means the time needed to locate, pull from the files, copy and reshelve or refile a public record. However, it shall not include the time expended to create the original record.

Secretary means the Secretary of the Commonwealth of Massachusetts.

Segregation Time means the time used to review records to determine what portions are subject to redaction or withholding under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

Supervisor means Supervisor of Public Records or Supervisor of Records.

Withhold means to hold back from disclosure a record under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

32.04: General Provisions

- (1) **Division Mailing Address and Electronic Mail Address.** All communications shall be addressed or delivered to:

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH

Boston, Massachusetts 02108

or

pre@sec.state.ma.us

Electronic communication is strongly encouraged and is the preferred method of correspondence.

- (2) **Division Business Hours.** The regular hours of the Division are from 8:45 a.m. to 5:00 p.m. each business day.
- (3) **Computation of Time.**
 - (a) **Electronic Correspondence.** The computation of any time referred to in 950 CMR 32.00 for electronic correspondence shall begin with the first business day following the date of transmission.
 - (b) **Mail or In Person Delivered Correspondence.** The computation of time referred to in 950 CMR 32.00 for mail or in person delivered correspondence shall begin with the first business day following receipt of such document.
 - (c) When the last day of the period so computed is a day on which the offices of the Division are closed, the period shall run until the end of the next business day.
- (4) **Presumptions.** In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.

32.05: Records Access Officers

- (1) Each agency and municipality shall designate one or more employees as records access officer(s).
- (2) In a municipality, the municipal clerk, or the clerk's designees, or any designee of a municipality that the chief executive officer of the municipality may appoint, shall serve as records access officers.
- (3) The designation of a records access officer shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any such employee shall be deemed to be a records access officer and subject to the obligations herein.
- (4) Each agency and municipality shall post in a conspicuous location at its offices and on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer.

(5) A records access officer shall:

- (a) coordinate the custodian's response to requests for access to public records and shall facilitate the resolution of such requests by the timely and thorough production of public records;
- (b) assist persons seeking public records to identify the records sought;
- (c) assist the custodian in preserving public records in accordance with all applicable laws, rules, regulations and retention schedules as issued by the Supervisor;
- (d) provide public records to a requester in electronic format unless electronic format is not available or the requester does not have the ability to receive or access the records in electronic format and if feasible, in the requesters preferred format. In the absence of a preferred format, the records shall be provided in a searchable machine-readable form;
- (e) furnish the public records by providing reasonable assistance in locating the records on an appropriately indexed and searchable public website;
- (f) prepare guidelines to be posted on the website of the agency or municipality that enable the person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise. The guidelines shall include a list of categories of public records maintained by the agency or municipality and such list shall be updated periodically;
- (g) a municipal records access officer shall, to the extent feasible, post commonly available public record documents on a website maintained by the municipality for a period to be determined by each municipality. The retention period of records posted online shall be determined by the Municipal Records Retention Manual.

32.06: Additional Records Access Officer Responsibilities

- (1) **Agency Records Access Officers.** The requirements of 950 CMR 32.06(1) shall apply only to agency records access officers:
 - (a) agency designation of primary and secondary records access officers; reporting requirements:
 - 1. each agency shall designate one primary records access officer responsible for reporting information to the Secretary pursuant to G. L. c. 66, §6A(e) and 950 CMR 32.06(1)(c).

2. a primary records access officer shall submit a notification of such designation to the Division electronically in a manner determined by the Division.
 3. the primary records access officer may designate secondary record access officers to facilitate reporting such information.
 4. the primary records access officer shall electronically notify the Secretary of the designation of secondary records access officers electronically in a manner determined by the Division.
 5. the agency shall maintain and update information regarding primary and secondary records access officers electronically, including changes in personnel identified as primary and secondary records access officers, in a manner determined by the Division.
- (b) agency records access officers shall electronically report to the Secretary the information described in 950 CMR 32.06(1)(c)(1-9) in a manner determined by the Secretary.
- (c) an agency records access officer shall report to the Secretary with respect to requests and responses to requests for each calendar year ending December 31:
1. the nature of each request and the date on which each request was received;
 2. the date on which a response is provided to the requestor;
 3. the date on which a public record is provided to the requestor;
 4. the number of hours required to fulfill the request;
 5. fees charged to the requester, if any;
 6. records access officer petitions to the Supervisor submitted under G. L. c. 66, §10(d)(iv) and 950 CMR 32.07(4)(g);
 7. requests appealed to the Supervisor under G. L. c. 66, §10A and 950 CMR 32.09(1);
 8. the time required to comply with the Supervisor's orders under G. L. c. 66, §10A; and
 9. the final adjudication of any associated court proceedings under G. L. c. 66, §10A(d).

(d) exceptions to the reporting requirement related to requests for certain types of records shall be determined at the discretion of the Supervisor and may include:

1. certified copies of records;
2. registry of deeds records;
3. incorporation records;
4. vital records.

(e) all information must be provided in accordance with 950 CMR 32.06(1) by 5:00 p.m. on the last business day of the calendar year.

(f) an agency records access officer shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided in a manner consistent with state and federal law:

1. final opinions, decisions, orders, or votes from agency proceedings;
2. annual reports;
3. notices of regulations proposed under G. L. c. 30A;
4. notices of hearings;
5. winning bids for public contracts;
6. awards of federal, state and municipal government grants;
7. minutes of open meetings;
8. agency budgets; and
9. any public record information of significant interest that the agency deems appropriate to post, such determination to be made by each agency on a case-by-case basis.

(g) records access officers shall post records online pursuant to 950 CMR 32.06(1)(f) as soon as practicable

1. such posting shall remain online for a period to be determined by each agency;
2. the retention period of records posted online shall be determined by the Statewide Records Retention Schedule.

32.07: Rights of Access

(1) Requests for Public Records.

- (a) requests for public records may be made orally in person or may be written. Telephone requests may be accepted at the discretion of the records access officer.
- (b) requests for public records shall include a reasonable description of the requested record to the records access officer so that he or she can identify and locate it promptly.
- (c) written requests may be delivered by a requester to the business address or designated website or email address of a records access officer or governmental entity custodian:
 - 1. by hand;
 - 2. by mail;
 - 3. by electronic mail; or
 - 4. by facsimile.
- (d) a records access officer shall not require a particular form be used by requesters, but may make forms available for requesters.
- (e) a person shall not be required to make a personal inspection of the record prior to receiving a copy of it.
- (f) calculation of time will toll only for requests that are made in accordance with 950 CMR 32.07(1).

(2) Records Access Officer Response to Requests for Records.

- (a) a records access officer shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours and without unreasonable delay.
- (b) a record access officer's superior knowledge of the contents of a governmental entity's files shall be used to assist in promptly complying with the request.
- (c) a records access officer shall provide a written response to a request for public records no later than the tenth business day following the receipt of a request.

- (d) a records access officer shall not assess a fee for the provision of public records if the records access officer's response is provided more than ten business days after the receipt of the request, subject to the provisions of 950 CMR 32.07(4).
 - (e) if a records access officer intends to provide records, access to such records must be provided no later than the tenth business day following the receipt of a request, unless an extension of time is permitted in a manner consistent with 950 CMR 32.07(4).
 - (f) a written request for records will be deemed received on the first business day following electronic transmission or physical receipt by the records access officer; an oral request will be deemed received on the day it was made.
 - (g) a records access officer may delay provision of records until all fees related to such requests are paid in full by the person seeking access to the requested records in accordance with 950 CMR 32.08.
 - (h) a records access officer shall, when appropriate, suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably.
 - (i) a records access officer may not require the requester to specify the purpose for a request except:
 - 1. when the requested records concern information which may be exempt from disclosure pursuant to G. L. c. 4, § 7(26)(n);
 - 2. to determine whether the records are requested for a commercial purpose; or
 - 3. to determine whether to grant a request for a fee waiver.
 - (j) A records access officer shall identify a reasonable timeframe in which it shall produce the public records sought in the following manner:
 - 1. **Agencies.** For an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records;
 - 2. **Municipalities.** For a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records.
- (3) **Denial by Records Access Officer.**

- (a) the records access officer shall use superior knowledge of the records to determine whether any responsive records may be provided due to the status of a requester, or a representative of the requester.
 - (b) a records access officer shall provide written notice by first class mail or electronic mail to a requester of any denial of access to records.
 - (c) a records access officer shall provide such written notice of denial of access within ten business days of its receipt of a request for public records.
 - (d) such written notice of denial shall include:
 - 1. the date of the request;
 - 2. identification of any records sought that are not within the possession, custody, or control of the records access officer;
 - 3. identification of any known records access officer that may be in possession, custody or control of the public record sought;
 - 4. identification of any records, categories of records or portions of records that the records access officer intends to withhold;
 - 5. identification of any specific exemption to the Public Records Law or common law privilege that applies to the withhold record or records;
 - 6. identification of the applicability of each cited exemption or privilege to each portion of the withheld record or records;
 - 7. identification of any portions of responsive records that the records access intends to produce; and
 - 8. a statement informing the requestor of the right of administrative appeal to the Supervisor under 950 CMR 32.09(1) and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.
 - (e) where a record has been withheld based on a claim of the attorney-client privilege the records access officer shall provide in its written denial a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.
- (4) **Petition for modification or waiver by a records access officer to the Supervisor.**
- (a) all petitions for modification or waiver from a records access officer to the Supervisor shall be in writing and delivered to the Supervisor in accordance with

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950 CMR 32.04(1). A copy of the petition shall be provided by the records access officer to the requester. The Supervisor shall issue a written determination with findings regarding any such petition within five business days following receipt of a records access officer petition.

- (b) petitions filed under this section do not affect the requirement that a records access officer shall provide an initial response to a requester within ten business days after receipt of a request for public records, pursuant to 950 CMR 32.07(2)(c) and 950 CMR 32.07(3)(c). Failure to comply with this requirement will result in a waiver of the right to assess fees for public records.
- (c) all such petitions shall be considered public records both in the custody of the records access officer and the Supervisor.
- (d) petitions for modification or waiver may include a request for extension of time to furnish copies of the requested records, to waive statutory limits to fees, or to waive the obligation to provide records in response to a request that was frivolous.
- (e) such petitions must be made by a records access officer within 20 business days after receipt of a request for public records, or within ten business days after the records access officer's receipt of a determination by the Supervisor that a requested record constitutes a public record.
- (f) a petition for extension of time shall include a brief narrative detailing why an extension of time is necessary.
- (g) request for a waiver of statutory limits to fees assessed to segregate and/or redact public records:
 - 1. any records access officer may petition the Supervisor to charge for time spent segregating or redacting records.
 - 2. only a municipal records access officer may petition the Supervisor with respect to the maximum hourly rate of \$25 per hour for time required to comply with a request.
 - 3. records access officers shall not petition the Supervisor seeking a waiver associated with the provisions of 950 CMR 32.08(2)(m)(1), (n)(1).
 - 4. a records access officer shall respond to a request within five business days of receipt of the Supervisor's determination regarding a petition submitted under section 950 CMR 32.07(4)(g).
 - 5. failure by the records access officer to comply with the provisions of this section shall result in a waiver of the right to assess a fee pursuant to 950 CMR 32.07(2)(d).

32.08: Copies of records; fees

(1) Copies of paper and electronic records.

- (a) upon request, a person shall be entitled to receive in hand, by mail, by facsimile or electronically one copy of a public record or any desired portion of a public record.
- (b) as an alternative to obtaining copies of records from a records access officer a person shall be permitted to, to the extent feasible:
 - 1. view and inspect records prior to obtaining copies; or
 - 2. use a personal device such as a camera or portable scanner to copy records.
- (c) the records access officer shall presume that a requester prefers copies provided in machine-readable electronic form unless such form is unavailable.
- (d) the records access officer shall not convert a record from one electronic form to another as a means to deny access to portions of the record such as mathematical formulas in spreadsheet records or metadata contained in email records.
- (e) the records access officer shall ensure, to the extent feasible that:
 - 1. newly acquired or implemented electronic record keeping systems or databases are capable of providing data in a commonly available electronic, machine readable format; and
 - 2. the system allows for information storage and retrieval methods permitting retrieval of public portions of records to provide maximum public access.
- (f) a responsive record in the form of an extract of existing data shall not be considered creation of a new record and shall be considered a record in existence at the time of the request.

(2) Fees.

- (a) a records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection.
- (b) a records access officer may assess a reasonable fee to provide copies of public records.
- (c) a records access officer shall provide a written, good faith estimate of the applicable fees to be incurred prior to complying with a public records request.

- (d) the reasonable fee shall not exceed the actual cost of reproducing the record.
- (e) a fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor.
- (f) the charge for black and white paper copies or printouts of records of any size susceptible to the ordinary means of production shall not exceed 5 cents per page, for both single and double-sided copies.
- (g) a records access officer shall not assess a copying fee for electronic copies or facsimile copies of public records.
- (h) the actual cost of any storage device or material provided to a person in response to a request for public records may be included as part of the fee.
- (i) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed.
- (j) a records access officer shall assess the lowest hourly rate of a person capable of compiling, segregating, redacting and reproducing a requested record, subject to the requirements of 950 CMR 32.08.
- (k) a records access officer may assess the actual cost of postage to mail copies of public records, provided:
 - 1. the requester specifically requests that records be mailed or is unable to receive copies in person; and
 - 2. the records access officer shall charge the lowest cost available for such mailings, at the discretion of the requester.
- (l) **Waiver of fees.** Records access officers may waive or reduce the amount of any assessed fee upon a showing that:
 - 1. disclosure of a requested record is in the public interest;
 - 2. the request for records is not primarily in the commercial interest of the requestor; or
 - 3. the requestor lacks the financial ability to pay the full amount of the reasonable fee.
- (m) **Agency records access officers.**
 - 1. an agency records access officer shall not assess a fee for the first four hours of time spent compiling, segregating, redacting and reproducing a requested record.

2. an agency records access officer shall not assess a fee for time spent compiling, segregating, redacting and reproducing a requested record unless such compilation, segregation or redaction is required by law or approved by the Supervisor.
3. an agency records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records.

(n) Municipal records access officers.

1. a municipal records access officer shall not assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record in a municipality with a population of over 20,000.
2. a municipal records access officer in a municipality with a population of 20,000 persons or fewer may assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record, provided:
 - i. population data shall be determined by the decennial U.S. Census or an annual census if contrary to the decennial U.S. Census; and
 - ii. it shall be the burden of the municipal records access officer to provide population data information in responses in which it seeks to assess such fees.
3. a municipal records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records unless approved by the Supervisor, pursuant to 950 CMR 32.07(4).

(o) Failure to pay fee.

1. a records access officer may provide written notice denying access to public records to a requester who has failed to compensate the records access officer for previously produced public records for which it prepared a fee estimate, provided:
 - i. the prior fee estimate was prepared in compliance with 950 CMR 32.08; and
 - ii. the written notice cites the reasons for denial, including an itemized list of any balances attributed to previously produced records.

32.09: Appeals

(1) Appeal to the Supervisor.

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- (a) this section shall not apply to records in which the requester, or a representative of the requester, has a unique right of access to the record.
- (b) a requester may petition the Supervisor for failure by a records access officer to comply with a requirement of 950 CMR 32.00.
- (c) the Supervisor shall only open appeals associated with requests made in writing. An oral request, while valid as a public record request, shall not be the basis of an appeal under 950 CMR 32.09.
- (d) petitions for appeal of a response by a records access officer must be made within 90 calendar days of a response by a records access officer.
- (e) petitions for appeal of a failure to respond within the timeliness requirements of 950 CMR 32.00 must be made within 90 calendar days of the request.
- (f) all petitions for appeal shall be in writing and shall specifically describe the nature of the requester's objections to the response or failure to timely respond.
- (g) requesters shall provide to the Supervisor complete copies of all correspondence associated with the petition, including:
 - 1. a complete copy of the letter by which the request was made, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses; and
 - 2. a complete copy of all written responses associated with requests subject to the petition for appeal, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses.
- (h) in petitioning the Supervisor, the requester shall provide a copy of such petition to the records access officer associated with such petition.
- (i) if the requester's petition for appeal is related to a previous appeal to the Supervisor, the requester's petition shall refer to the previous appeal number.
- (j) it shall be within the discretion of the Supervisor whether to open an appeal concerning a request for public records. The Supervisor may decline to accept an appeal for, among other reasons if, in the opinion of the Supervisor:
 - 1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation;
 - 2. the request is designed or intended to harass, intimidate, or assist in the commission of a crime;

3. the public records request is made solely for a commercial purpose;
4. the requester has failed to comply with the provisions of this section.

(2) **Dispositions of Appeals.**

- (a) once reviewed and approved the Supervisor shall issue an appeal number associated with each appeal submitted by a requester.
- (b) The appeal will be considered received by the Supervisor once an appeal number is assigned.
- (c) the Supervisor shall issue a written determination regarding any petition submitted in accordance with 950 CMR 32.09(1) not later than ten business days following the date an appeal number is assigned.
- (d) upon a determination by the Supervisor that a violation has occurred, the Supervisor shall order timely and appropriate relief.

(3) **Hearings and conferences.**

- (a) the Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. The decision to hold a hearing shall be solely in the discretion of the Supervisor.
 1. said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.09.
 2. nothing in 950 CMR 32.09 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.
- (b) the Supervisor may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding. The decision to hold a conference shall be solely in the discretion of the Supervisor.

(4) **In Camera Inspections and Submissions of Data.**

- (a) the Supervisor may require an inspection of the requested record(s) in camera during any investigation or any proceeding initiated pursuant to 950 CMR 32.09.
- (b) the Supervisor may require the records access officer to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.09.
- (c) the Supervisor does not maintain custody of documents received from a records access officer submitted for an in camera review. The documents submitted for an

in camera review do not fall within the definition of public records. G. L. c, 4, § 7 (26).

- (d) upon a determination of the public record status of the documents, they are promptly returned to the custodian, and no copies shall be retained by the Supervisor.
- (e) any public record request made to the Division for records being reviewed in camera would necessarily be denied, as the office would not be the custodian of those records.
- (f) attorney-client privileged records voluntarily submitted to Supervisor:
 - 1. a records access officer may permissibly submit documents to the Supervisor for in camera review;
 - 2. such submission shall not waive any legally applicable privileges claimed by the records access officer.

(5) **Custodial Indexing of Records.**

- (a) the Supervisor may require a records access officer or governmental entity custodian to compile an index of the requested records.
- (b) said index shall be a public record and shall meet the following requirements:
 - 1. the index shall be contained in one document, complete in itself;
 - 2. the index shall adequately describe each withheld record or redaction from a released record;
 - 3. the index must state the exemption or exemptions claimed for each withheld record or each redaction of a record; and
 - 4. the descriptions of the withheld material and the exemption or exemptions claimed for the withheld material must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt.
- (c) nothing in 950 CMR 32.09 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

32.10: Enforcement of Orders

A records access officer shall promptly take such steps as may be necessary to comply with an order of the Supervisor. If a records access officer fails to comply with an order issued by the

Supervisor, the Supervisor, upon the Supervisor's initiative, may notify the Attorney General to ensure compliance.

32.11: Advisory Opinions

Advisory opinions will only be issued upon the Supervisor's initiative.



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DIRECTIONS

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Updated Public Records Law

On June 3, 2016, Governor Baker signed *An Act to Improve Public Records* into law. Many of the provisions in the new law will take effect on **January 1, 2017**. Please be aware, the current law will remain effective until that time.

Below are a few of the provisions of the new version of the Public Records Law that will become effective next year. It is suggested you consult the complete text of the new law which can be found at:

<https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121>

If you have any questions, please contact the Public Records Division at 617-727-2832 or pre@sec.state.ma.us.

New Provisions

Records Access Officers

Agencies and municipalities are required to designate 1 or more Records Access Officer (RAO). The contact information for the RAO must be posted conspicuously, including on the agency's or municipality's website, if available.

The RAO has a duty to:

- Coordinate the agency's or municipality's response to requests for access to public records;
- Assist individuals seeking public records in identifying the records requested;
- Assist the custodian of records in preserving public records; and
- Prepare guidelines that enable requestors to make informed requests.

Electronic Records

Under the new version of the law, RAOs must provide public records to a requestor in an electronic format *unless* the record is not available in an electronic format or the requestor does not have the ability to receive or access the records in a useable electronic format.

Additionally, as of January 1, 2017, **agency RAOs** will be required to provide on a searchable website electronic copies of commonly requested records, including: final opinions, annual reports, minutes of open meetings and agency budgets. **Municipal RAOs** will also be required to post commonly requested records on their municipal websites, to the extent feasible.

Response Time

Under the current law, a records custodian must respond to a request for records in writing within 10 calendar days.

Beginning January 1, 2017, a RAO must permit inspection or furnish a copy of a requested public record within **10 business days** following receipt of the request. RAOs may petition the Supervisor of Records for an extension if they are unable to grant access to the requested public records in this time period.

Fees

The Supervisor of Records' Public Access Regulations allowing records custodians to charge **5 cents** for black and white paper copies or computer printouts of public records for both single and double-sided sheets was codified and will remain effective with the new law.

Beginning January 1, 2017, if a response to a public records request requires more than 4 hours of employee time, an **agency RAO** may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record. However, the fee shall not exceed \$25 an hour.

Beginning January 1, 2017, if a response to a public records request requires more than 2 hours of employee time, a **municipal RAO** may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record. However, the fee shall not exceed \$25 an hour, unless approved by the Supervisor of Records. Municipalities with populations of 20,000 people or fewer will be permitted to charge for the first 2 hours of employee time.

Administrative Appeals

As of January 1, 2017, if an agency or municipality fails to comply with a requirement of the new law, the requestor may file an appeal with the Supervisor of Records who will then issue a determination on the public status of the records within **10 business days** of receipt of the request for an appeal.

Attorney Fees

Under the new Public Records Law, if a requestor prevails in a court action against an agency or municipal RAO, the court may award the requestor attorney fees or costs.

William Francis Galvin, Secretary of the Commonwealth of Massachusetts

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