

## 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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