

PUBLIC RECORDS LAW: CHALLENGES FOR COMPLIANCE IN THE ELECTRONIC AGE

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Records Management in the Electronic Age

- ❖ Throughout the country, more and more focus on transparency in government
- ❖ Public records issues in the news at every level – local, state and federal governments
- ❖ Use of e-mail and computers in business, including in the public sector, is now the norm
- ❖ Technology itself continues to evolve
- ❖ These developments have a significant impact on public sector records custodians



The Public Records Law

- ◎ Several laws and regulations apply:
 - 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 the records to which they relate (Open Meeting Law, library circulation records, etc.)



Presumptions

- ◎ First: All records of a municipality are public records in their entirety;
- ◎ Second: Records are subject to mandatory disclosure upon request;
- ◎ Third: Records may be withheld in whole or in part only if they fall within one of the strictly and narrowly construed exemptions to the Public Records Law; and
- ◎ Fourth: The law applies to any kind of record - it's the content of the record, not the format that matters.

Custodian of Public Records

- ◎ A “custodian” of a record is the person with regular access to and control over a record.
- ◎ There can be more than one record custodian.
 - Trend – broad based request for records generally – who is custodian?
 - Trend – requests to Clerk as “keeper of the records” – implications?

Public Records Requests

- ◎ A request may be made in person or in writing – e-mail, fax, pen and paper
- ◎ A custodian may not require a person to put their request in writing – drawbacks and benefits.
- ◎ A custodian may not ask a requester what the reason is for their request (compare exemption (n)).



Requests, cont.

- ◎ Custodian has 10 calendar days from receipt of request to provide a response – Supervisor of Public Records encourages response as soon as possible
- ◎ If final day of the 10-day period falls on Sunday or holiday, deadline is extended to the next business day
- ◎ Must use “superior knowledge” of records to assist requester, including forwarding request to appropriate custodian



Responses

A custodian must:

1. Make the records available for inspection (if that is what is requested);
2. Produce copies of the requested records;
3. Provide an estimate of up-front search, segregation and copying costs if estimated at more than \$10.00
4. Deny the request or a portion thereof in writing; and/or
5. Some combination of the above.



Responses

- ⊙ Requester dictates format in which responsive records will be provided to extent records exist in that format
- ⊙ If a particular report may be generated simply by running the same, the record “exists” for purposes of the law and must be provided; although not required to write or buy a program for such purposes
 - Trend – requester seeks data from electronic records in a format that is able to be manipulated – if data can be produced like that, it likely must be
- ⊙ If records exist in requested format, requester is entitled to copy of the same (provided that applicable fee has been paid)



Responses

- ⊙ A records custodian must use “superior knowledge” of the records (of municipal government) to assist the requester.
- ⊙ If a requester addresses the request to the incorrect custodian, the request must be forwarded to the correct custodian.
- ⊙ If a requester doesn't word their request “just right” the custodian must use their superior knowledge to assist the requester to access the information sought.
 - Trend – request is for large volume of electronic or paper data regarding a particular subject: who is custodian; who should provide response?

Responses

TIPS: Form of responses – consider whether you have:

- ❖ conveyed that there has been an initial search and responsive records initially reviewed
- ❖ substantiated the methodology used to prepare estimate;
- ❖ if citing possible exemptions to provide requester with information about why search/segregation time will be required, clarified that exemptions “might” be applicable, but further that a formal letter asserting the same will follow after actual search is undertaken
- ❖ notified requester that they can revise/limit their request and you will revise your estimate accordingly;
- ❖ **notified requester of right to appeal within 90 days**
- ❖ if responsive records are voluminous, proposed a schedule to provide the same or to discuss further reasonable expectations for delivery



Fees

- ◎ A custodian may charge for the time necessary to locate and copy records, and/or to redact records
- ◎ Fee is assessed at pro-rated hourly rate of the lowest paid person capable of doing the work
 - Trend –request is for broad range of documents in several departments, how should the estimate be calculated?
- ◎ A custodian may charge:
 - \$.50 per page for computer printouts
 - \$.20 per page for photocopies
 - Actual cost for a record not susceptible to ordinary means of copying, such as blueprints.
 - Trend – when request is for electronic copies, how should costs be calculated?



Denial

- ◎ If custodian denies request or portion thereof, burden is on custodian to explain in writing application of the exemption
- ◎ Requester may also appeal a denial of access to records directly to the Superior Court, as Superior Court has concurrent jurisdiction
- ◎ Frequently public records, open meeting or conflict of interest count added to an appeal of a land use decision.

Enforcement

- ⦿ Denial of access to public records, or provision of an estimate that a requester is dissatisfied with, may be appealed to Supervisor of Public Records within 90 days of denial
- ⦿ Supervisor may issue order requiring compliance with law, or determine that custodian complied with law
- ⦿ If custodian does not comply with order of Supervisor, matter may be referred to Attorney General for enforcement.



Exemptions

- ◎ Multiple exemptions to Public Records Law found in G.L. c.4, §7, clause 26th; several asserted more frequently than others.
- ◎ Exemptions reflect policy determinations made by the General Court, and often involve:
 - A balancing of the public's right to know with individual privacy
 - A balancing of the public's right to know with the municipality's ability to operate as a corporate citizen
- Trend – What are examples of frequently requested documents and why would/should exemptions apply?



Exemption (a)

- ◎ Known as the “statutory exemption”, provides that a record may be withheld if a statute “specifically or by necessary implication” exempts it from disclosure
- ◎ Examples are CORI, abatement applications, Open Meeting Law.
- Trend – Public records requests for executive session minutes and e-mails from board members and staff seem to be increasing.



Exemption (c)

- ⊙ Known as the “privacy exemption”.
- ⊙ First clause - medical or personnel records are absolutely exempt from disclosure
- ⊙ Second clause – a balance between individual privacy and the public “right to know”; applies to records that are “personal” in nature, such as parental status, marital status, substance abuse, government assistance, family disputes and reputation



Exemption (d)

- ◎ “Policy” or “deliberative process” exemption – applicable to inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency
- ◎ Allows withholding of records to include certain litigation or pre-litigation materials and communication between governmental entities to the extent that they are developing policy together, as well as recommendations from consultants on ongoing matters
- ◎ Not applicable to facts underlying policy decisions
- ◎ Not applicable once policy decision is made



Exemption (f)

- ◎ The “investigatory exemption” – two applications:
 - “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”
 - Permanent withholding of names and identifying details of voluntary witnesses and complainants

Exemption (n)

- ⊙ Allows withholding of certain records if the records custodian believes that disclosure is “likely to jeopardize public safety”
- ⊙ Protected records include, but are not limited to, “blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons, buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth.”
- Trend – Building inspectors will often refuse to provide plans of public infrastructure, but have also asserted exemption in response to request for private development plans. Is that what the exemption was intended to protect? This exemption is also used frequently to withhold emergency services response plans.



Records Retention

- ◎ Municipal records must be retained for seven years, unless permanent records or according to applicable “records disposal schedule” adopted by Supervisor of Public Records. G.L. c.66, §8.
- ◎ Most records may not be disposed of without prior permission of Supervisor of Public Records.
- ◎ There are both criminal and civil penalties for the unlawful destruction of public records.



Records Retention

- ◎ The Supervisor of Public Records has issued a comprehensive Municipal Records Disposal Manual that includes all of the applicable disposal schedules and is available at the Secretary of the Commonwealth's Municipal Archives Division page, or at the following link:

http://www.sec.state.ma.us/arc/arcpdf/MA_Municipal_Records_Retention_Manual.pdf

- TIP - There is a separate schedule for each major department, and a "records in common" schedule; department heads should be familiar with the schedule and the retention requirements applicable to the records they use most commonly.



E-mail

- ◎ Public record to the same extent as all other municipal records; public records status based upon the content of the e-mail, rather than the form of the e-mail
 - Envelope information is also part of the record
- ◎ As with any other record, e-mail must be retained pursuant to the appropriate records disposal schedule.
- ◎ Origin of e-mail relating to public business generally irrelevant – i.e., if the e-mail relates to public business, regardless of where it is made or received it remains a public record subject to disclosure upon request and is also subject to records retention requirements

E-mail

- ❖ Likely single biggest challenge currently facing records custodians
- ❖ Open meeting law implications for multiple member bodies
- ❖ Sheer volume
- ❖ “Informal” nature of e-mail leads to “casual” treatment
- ❖ Privacy implications if e-mail is generated on home computer and/or contains non-work related matters
- ❖ Retention issues
- ❖ Public Records Requests - Search terms, search capacity, e-mail management systems, custodians, review of responsive records, and more

Creation of a Document

- ◎ A custodian cannot be compelled to create a document or to answer questions.
- ◎ However, if the custodian does choose to create a record, the custodian is not bound by the Public Records Law and regulations promulgated thereunder with regard to the fee; the setting of the fee is subject to the so-called “Emerson Test” and must be reasonably calculated to compensate the municipality for the cost to create the record, rather than to generate revenue
 - TIP: It is highly unlikely that a street list or bylaw or ordinance compilation would be considered to fall under this category; instead, the fee that could be requested for producing such a document would be based upon the per-page cost and the pro-rated hourly rate of the lowest paid person who would have been capable of making the copies



Grandfather Clause

- ⦿ This clause provides that any records which were public prior to the adoption of the current Public Records Law will remain a public record.
- ⦿ An example of such a provision was a statute that stated that if a document was substantively discussed in an open session, that document became a public record in its entirety (now codified in new Open Meeting Law).
- ⦿ Another example is that a contract for \$50.00 or more is considered a public record in its entirety.



Telephone Numbers

- ◎ Although an owner has a privacy interest in an unlisted telephone number, if the number appears in an otherwise public document the interest will be protected only if the owner has taken “measures” to identify in the record that the number is unlisted.
- ◎ The names, addresses and telephone numbers of police and other public safety officers who live in and work for the same municipality are expressly exempt from disclosure pursuant to the provisions of G.L. c.66, §10.
- ◎ Further, a municipality may withhold the home address and telephone numbers of town employees. See also G.L. c.4, §7(26)(o).



Attorney-client Privilege

- ◎ The Massachusetts Supreme Judicial Court affirmed the ability of governmental bodies to assert the application of the attorney-client privilege to withhold confidential communications between a governmental entity and their legal counsel. See Suffolk Construction. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007).
- ◎ Although the attorney-client privilege is technically not an exemption to the Public Records Law, it will allow withholding of documents in response to a request for the same.
 - TIP: Consideration should be given as to when to assert the application of the privilege as overuse of the privilege may be problematic for various reasons.



Open Meeting Law

- ◎ The revised Open Meeting Law (OML) contains several provisions that affect the interpretation of the Public Records Law.
- ◎ All records used by a board at a meeting are public records. Consistent with past practice, the use must be substantive, rather than a simple reference.
- ◎ A list of the documents used at the meeting must be made part of the minutes; however, the documents themselves must be maintained in an easily accessible location for at least six months



Open Meeting Law

- ◎ Materials used by a public body in an open session performance evaluation of an individual bearing on his professional competence may nevertheless be withheld as personnel records, provided they were not created by the members of the body for the purposes of the evaluation.
- ◎ Thus, the opposite appears to also true – if a public body discusses in substance performance evaluations prepared for the meeting, that document would become part of the record of the meeting
 - There remain questions under the Open Meeting Law as to how best to conduct a performance review, and whether individual evaluations not discussed at such meeting are necessarily public records. At this time, no court has ruled on the issue under the revised Open Meeting Law.



Open Meeting Law

- ◎ Materials used by a public body in deliberations about employment or appointment of individuals, including applications and supporting materials may be withheld from disclosure as personnel records.
- ◎ However, if a resume is used by the public body in deliberations about employment or appointment of individuals, the resume shall not be exempt from disclosure.
 - It appears that the Attorney General's Division of Open Government takes the position that this provision of the Open Meeting Law makes resumes public records in their entirety regardless of whether they were discussed in substance at an open meeting. No court has yet to rule on this issue.



Open Meeting Law

- ◎ The OML now provides that when the purpose for which a valid executive session was held has been served preparatory materials and documents and exhibits of the session shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.
- ◎ This is a change from the previously applicable OML, and allows a records custodian to assert an exemption or the Attorney Client Privilege to withhold executive session minutes or portions thereof even after the purpose of an executive session has been served



Open Meeting Law

- ⦿ Executive session minutes must be reviewed at reasonable intervals by the Chair
- ⦿ Such minutes must be provided upon request within 10 days; provided, however, that if the periodic review has not been done, then releasable minutes must be provided not later than the body's next meeting or 30 days, whichever first occurs. No fee may be assessed for this review.
 - Note, however, that if such records also require redaction, it may be appropriate to include a fee from the same under the Public Records Access Regulations



Open Meeting Law

- The Records in Common Disposal Schedule has been revised to address various records implicated by the Open Meeting Law, including:
 - Complaints (6 months and then pursuant to schedule by regular custodian)
 - Correspondence, notices, documents, exhibits and other records of the meeting (6 months with public body and then pursuant to schedule by regular custodian) (90 days for drafts unless complaint filed)
 - Meeting minutes (permanent)
 - Agendas and meeting notices (1 year)
 - Notices to individuals of executive sessions (6 years)
 - OML complaints (3 years)
 - Recordings for public access television (6 months)
 - Recordings for drafting of minutes (until minutes approved)
 - Certifications (6 months from last day of office)
 - Training materials (until superseded)



Public Records Law – The Future

- Increased media focus
- Several bills pending, one of which was believed to be acted upon swiftly, but for various reasons, including strenuous objection of the MMA, was not
- Taken back up by the House
- Also an initiative petition filed by Secretary of the Commonwealth, unlikely to move forward if bill moves forward
- Governor recently issued new guidelines for his administration



Public Records Law – The Future

- ⦿ Governor's guidelines include requirements to:
 - Designate public records access officer (list on website with instructions as to how to make a request)
 - Establish record request tracking system
 - Contact requester within a certain number of days
 - Waive search and retrieval fees more often
 - Provide documents within 10 days if possible, or otherwise in stages
 - Encourage production of electronic records
 - Lower fees for copies to \$. 10 per page
 - Produce electronically searchable documents
 - Post on website frequently requested records



Public Records Law – The Future

- Generalizing, the pending bills include several similar initiatives, focus on H. Bill 3858
- H. Bill 3858
- Personnel:
 - Designation of one or more “records access officer(s)”, per agency/municipality, posting of those persons contact information on the website, and in Town Hall
 - Records access officer(s) would be the individuals ultimately responsible for responding to public records requests; required to handle or address all public records issues, keep track of requests, work with chief executive officer to ensure that all systems allowed electronic search and segregation, and more



Public Records Law – The Future

- Requests/Timeframes for Response:
- Requests delivered by mail, in person or by e-mail
- Initial written response within 10 business days of receipt of the request, by either first class or electronic mail.
- Where an agency/municipality is unable to permit inspection or furnish a copy of the requested record within this 10 business day period, H.3858 identifies specific information that must be contained within the agency's/municipality's initial response:
 - (i) confirmation of receipt;
 - (ii) identification of any known public records or categories of public records to produce or withhold, accompanied by specific reasons for withholding;
 - (iii) identification of any public record sought that does not exist or is not within the possession, custody, or control of the municipality;
 - (iv) a statement as to why the agency or municipality requires additional time to produce all other public records sought;
 - (v) a reasonable timeframe to produce all other public records sought; provided not to exceed 75 days following the initial receipt of the request, or longer time by agreement
 - (vi) an estimate of any fees that may be charged to produce the records; and
 - (vii) an invitation to the person making the request for public records to contact the records access officer to discuss a reasonable modification of the scope of the request.



Public Records Law – The Future

- ⦿ Establishes a petition process for the Supervisor of Records, within certain statutory timeframes, to, within five days of receipt of petition, provide an additional time to respond, for good cause shown, based upon:
 - volume of records sought;
 - need to assemble records from different locations; and
 - scope of the request and the requester's refusal to reasonably The Supervisor would be required to respond to extension request within 5 business days. An agency or municipality would be limited to one extension petition per public records request.



Public Records Law – The Future

○ Fees:

- “Reasonable fee” for complying with a public records request, limited as follows:
 - actual cost of any storage device or material provided in response to a request;
 - for paper copies or printouts shall not exceed 5 cents per page, for both single and double-sided black and white copies;
 - if more than 2 hours of employee time to search for, compile, segregate, redact or reproduce records requested, may also include an hourly rate that is equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill to respond (i.e., requester may not be charged for the first 2 hours of work performed)
 - where municipality lacks the “qualified staffing or technological capabilities” required, municipality will not be required to comply with the request unless the requester signs an “enforceable written agreement” to reimburse the agency/municipality for the reasonable and actual costs of engaging a vendor to furnish the requested record(s), up to a dollar amount specified in the written agreement.
 - Requester may ask for a fee waiver or reduction, based upon “public interest”, contribution to understanding of government, or inability to pay



Public Records Law – The Future

- Appeal to Supervisor of Public Records when:
 - Fails to provide an initial response within 10 business days
 - Fails to comply with an order from the Supervisor requiring the records access officer to respond to the request within 5 business days
- OR, when the municipality intends to withhold or redact records, within 30 days of receipt of initial response, requesting a determination as to whether the municipality may withhold or redact
 - Supervisor must respond within 10 business days
 - If Supervisor determines record is public, must produce as soon as practicable and no more than 60 days from supervisor's order
- OR, if a fee estimate or vendor quote is issued, within 30 days of either the receipt of the original fee estimation or quote, or of the records access officer's decision on a fee waiver or reduction request, whichever is later.
 - The Supervisor must respond within 5 business days of receipt of the petition.



Public Records Law – The Future

○ Judicial Relief:

- Failure to respond timely or to provide a public record, requester may file a G.L. c.231A declaratory judgment action within 30 days of the expiration of the relevant timeframe.
- Failure to comply with an order issued by the Supervisor, requester may file a G.L. c. 231A action (although H.3858 does not provide an express time period within which this type of appeal must be filed).
- Municipality assesses a fee or provides a vendor quote of \$25,000 or more requester may “immediately” file G.L. c. 30A action in Superior Court, seeking de novo judicial review of the reasonableness of the fee or vendor quote.
- Requesters and municipalities aggrieved by an order of the Supervisor may file a G.L. c. 30A appeal in superior court, within 30 days of receipt of the Supervisor’s decision. In such a Chapter 30A appeal, any record or portion thereof that has been withheld by the agency/ municipality shall not be included in the administrative record, but may be inspected by the court in camera, as it deems necessary.



Public Records Law – The Future

- Attorneys fees and Punitive Damages
 - Available in connection with first two cases
 - If requester “has obtained relief ... through a judicial order; enforceable written agreement; consent decree; or voluntary or unilateral change in position by the agency or municipality”; and the claim is not “unsubstantial”.
 - If the court does not award attorneys fees and costs, the decision must include written findings specifying the reason why
 - Punitive damages of between \$1,000.00-\$5,000.00 may be awarded in the event that the municipality is found to have withheld or failed to timely furnish requested records maliciously or in bad faith, (which is unusual for a declaratory judgment action).
- Attorney General may, at any time, file a declaratory judgment action in superior court “to ensure compliance” with the provisions of G.L. c. 66.
 - A civil penalty of \$1,000.00-\$5,000.00 may be awarded for each violation found.
 - Attorney General may also intervene in any civil action commenced by either a requester or agency/municipality.



Public Records Law – The Future

⦿ Initiative Petition

- Focused in large part on providing additional tools to the office of the Supervisor of Public Records and the Secretary of the Commonwealth to enforce the law
- Requires the Attorney General to designate a public records enforcement officer to file civil suits to enforce orders of Supervisor of Public Records, and to file such suits if directed by the Secretary or Supervisor
- Provides that the order of the Supervisor shall be given deference by the designated enforcement officer
- Limits fees for copies to \$.15 per page for printouts or copies and \$.25 per page for color
- Allows fees for search time only if more than two hours



Summary

- The Public Records Law establishes a presumption that all municipal records are public, regardless of the format in which they are created or maintained, and available to the public upon request.
- If a custodian wishes to withhold the same, the burden is on the custodian to prove the applicability of the exemption.
- Records must be maintained in accordance with applicable record disposal schedules.
- **If H. Bill 3858 becomes law, in some form, there will be significant changes to many aspects of the Public Records Law. It is a good time to look at Public Records Law policies and practices, and to evaluate and formalize them, in anticipation of such changes.**



Resources

- Public Records Division - (617) 727-2832
<http://www.sec.state.ma.us/pre/preidx.htm>
- A Guide to the Public Records Law
<http://www.sec.state.ma.us/pre/prepdf/guide.pdf>
- Supervisor of Public Records Bulletins
<http://www.sec.state.ma.us/arc/arcrmu/rmubul/bulidx.htm>
- General Court Bill search page
<https://malegislature.gov/Bills/Search>



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