

THE NEW PUBLIC RECORDS LAW

Technical Requirements and Practical Implications
UPDATED JANUARY 2017

KP Law Government Information and Access Group

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THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

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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 took effect **January 1, 2017**
- The Supervisor of Records promulgated final regulations for implementation
- Significant adjustments will need to be made to public records practices

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



- Appeals often filed with Supervisor of Records over technical noncompliance
- Court appeals filed more frequently, often together with OML and COI counts
- Intense local and national scrutiny over public records practices and other “sunshine law” requirements
- Frequent requests for thousands of electronically maintained documents, particularly e-mail

HOW DOES THE NEW PRL IMPACT GOVERNMENTAL ENTITIES?

- No major changes to exemptions
- The new law makes several important procedural changes to process for responding to public records requests, the most significant being a short time frame for fully responding to requests
- Other significant changes are financial in nature:
 - Decrease in fees that may be charged to respond to requests
 - Possible award of attorney's costs and fees in favor of a requester, and/or punitive damages awards, in court litigation over the sufficiency a public records response

MASSACHUSETTS PUBLIC RECORDS LAW (PRL)

PRL: A combination of statutes and regulations

Public Records



- G.L. c. 66, §10 (Public Records Requests); now also G.L. c.66, §§10A and 10B
- 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)

COMMON PRL EXEMPTIONS

- Exemption (a) (“statutory exemption”) allows withholding of records that are “specifically or by necessary implication exempted from disclosure by statute.”
- Examples of “exemption (a)” statutes:
 - CORI (e.g., G.L. c. 6, §167)
 - Domestic Violence Reports (G.L. c. 41, §97D)
 - Student Records (e.g., G.L. c. 71, §§34D-34E)
 - MCAD documents (aside from the initial complaint and investigative determination) (G.L. c. 151B, §5)
 - Abatement Applications (G.L. c. 59, §60)

COMMON PRL EXEMPTIONS

- Exemption (c) (“privacy exemption”) 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) (“policy exemption”) 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.”

COMMON PRL EXEMPTIONS

- Exemption (e) (“notebook exemption”) 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) (“investigatory exemption”) 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.”

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 address***, 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

COMMON PRL EXEMPTIONS

G.L. c. 66, §10B – new section incorporating exemptions previously found elsewhere:

- Exemption for records divulging or tending to divulge names and addresses of those owning, possessing, or licensed to own or possess firearms or ammunition
- 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 or domestic violence, or of those who provide, or who provide training in, family planning services

PREVIOUS PRL - REVIEW

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

NEW PRL

- Must respond within ten **business** days
- **Whenever** fees will be assessed, a detailed written estimate of the costs of responding must be provided
- If documents will be withheld or redacted, additional detail must be included in written response
- ***Burden is still on custodian*** to assert application of law, justifying redaction or withholding, with specificity
- ***Fees for time*** required to comply still based upon prorated hourly rate of lowest paid person capable of doing the work, regardless of who actually performs the work, but is now ***capped at \$25.00/hr***, except as otherwise may be authorized by the Supervisor of Public Records

RECORDS ACCESS OFFICERS (“RAO”)

- Municipal clerk or designee automatically the RAO
- However, chief executive officer or appointing authority set forth in a local charter or special act may designate additional or different RAOs
- Contact information for RAO must be posted in municipal offices and on website
- Duties include assisting requesters and records custodians, and preparing guidelines to enable requesters to make “informed” requests, including a listing of categories of records
- Guidelines must be posted on website no later than ***July 1, 2017***

WHO IS THE RAO?

- By default, in a municipality, the RAO is the municipal clerk
- Who will best serve in that capacity?
 - Does it matter if municipality is a city or a town?
- Is it a personality “thing” or dictated by who holds 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 if there is more than one?
- Is it a good idea to appoint a Super-RAO, and what is the function of position?
- What departments should have their own RAO? School? Police? Fire? Ambulance? Why??

PUBLIC RECORDS REQUESTS



- Made to RAO
 - In person
 - By first class mail
 - By e-mail
 - By facsimile
- Oral requests (i.e., in person or by telephone) may not be appealed to the Supervisor of Public Records, although the final regulations indicate that such requests are “valid” public records requests, and thus still may be subject to court appeals

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 requester in writing, including:
 - 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



****A full list of required elements for response on next page****

RESPONSES TO PUBLIC RECORDS REQUESTS

(required elements of written response)

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 requester of possible/actual petition to Supervisor for extension of time and include request for requester'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, if fees will be charged; if municipality has 20,000 residents or less, population data to justify charging fees for all time incurred; and
9. Statement informing requester of the right of administrative appeal to the Supervisor of Records under 950 CMR 32.08(1), and the right to seek judicial review of any unfavorable decision by commencing a civil action in the superior court pursuant to G.L. c.66, §10A(c).

RESPONSES

- Have a total of **25 business days** from receipt 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”

Risk of filing for extension early?

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

Risk of filing for extension early?

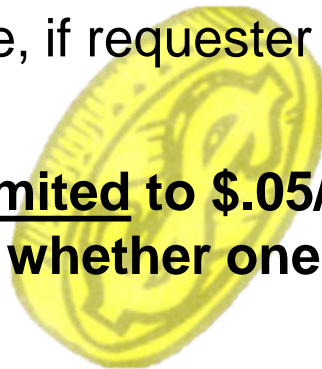
RESPONSES

- 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 requester

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
 - Actual cost of duplicating documents not susceptible to ordinary means of duplication
 - Actual cost of postage, if requester asks for records to be mailed

Photocopy fees are limited to \$.05/page for black and white copies and printouts, whether one or two sided



FEES

- **Municipalities \leq 20,000 people**
 - ***May assess a fee for employee time***
 - 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??

FEES

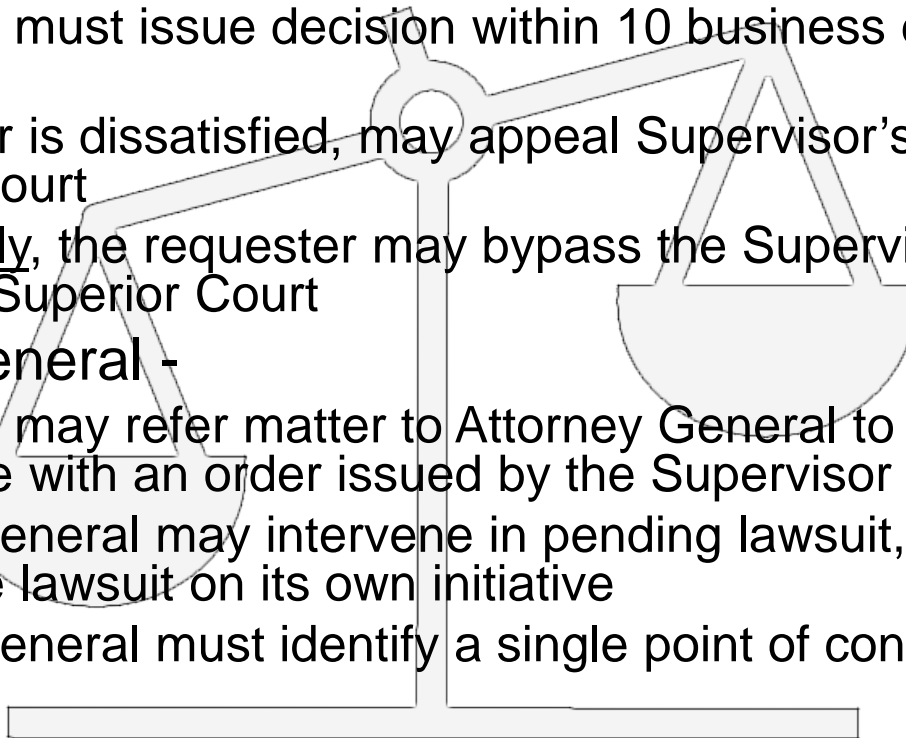
- “Employee time” is defined as “necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed”
- The hourly rate is capped at \$25.00
- A municipal RAO may petition the Supervisor for a higher hourly rate, or to charge for segregation and redaction time
- 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 requester to pay
 - The fee must still be reasonable, and cannot be intended to limit, deter or prevent access

FEES

- Police records now subject to same fee schedule as other public records (amending G.L. c. 66, §10)
- As with the prior version of the law, the RAO may not ask the requester the purpose of the request
- However, the RAO can indicate to a requester elements that would allow a more expedient handling of a request, although it will not automatically toll 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

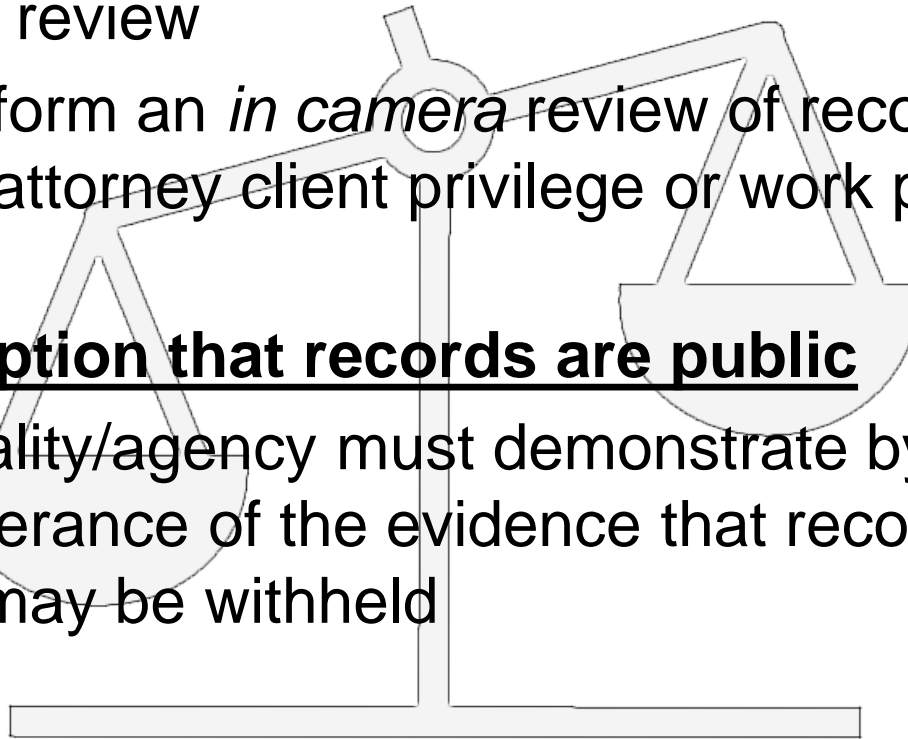
APPEALS

- Requester –
 - As under the prior PRL, requester may appeal response of RAO to Supervisor
 - Supervisor must issue decision within 10 business days of receipt of appeal
 - If requester is dissatisfied, may appeal Supervisor's decision to Superior Court
 - Alternatively, the requester may bypass the Supervisor and go directly to Superior Court
- Attorney General -
 - Supervisor may refer matter to Attorney General to compel compliance with an order issued by the Supervisor
 - Attorney General may intervene in pending lawsuit, or may commence lawsuit on its own initiative
 - Attorney General must identify a single point of contact for the Supervisor



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



ATTORNEYS FEES

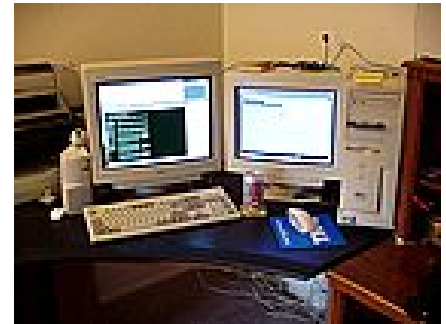
- Presumption in favor of award of attorneys fees and costs **IF** requester obtains relief through a judicial order, consent decree, or municipality provides requested records after the filing of a complaint
- **UNLESS** municipality establishes:
 - Supervisor found in favor of municipality
 - Municipality 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

PUNITIVE DAMAGES & WAIVER

- Punitive Damages - Superior Court may award punitive damages between \$1,000 and \$5,000 if requester 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

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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Feel free to contact the KP Law Government Information and Access Group with questions about the Public Records and Open Meeting Laws.



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