

Public Records Law Update

January 2019

Municipalities and public entities throughout the Commonwealth continue to adopt strategies to best implement new requirements imposed by the January 1, 2017 amendments to the Massachusetts Public Records Law (“PRL”). The following key issues that have emerged since the new PRL was enacted.

Level of Specificity Required in Response to Public Records Requests. A presumption exists that all records held by a municipality are public records subject to mandatory disclosure. It is therefore the municipality’s burden to prove the application of an exemption justifying non-disclosure. Recent determinations issued by the state Supervisor of Records (“Supervisor”) reiterate and strongly emphasize that the response prepared by the Records Access Officer (“RAO”) must demonstrate *with specificity* the application of an exemption to the PRL or the attorney-client privilege as the bases for withholding records or portions thereof. Blanket invocation of an exemption or the privilege continues to be generally insufficient to support withholding of a record in its entirety. Instead, the Supervisor typically require that records be produced subject only to limited redaction of the portion or portions clearly exempt from disclosure. For all of these reasons, and because the Supervisor has only a limited timeframe to resolve appeals, it is imperative that the 10-business day response letter prepared by the RAO clearly and specifically detail the application of an exemption or the privilege to each portion of any record that the RAO wishes to withhold.

The case of Healey v. Cruz, Suffolk Superior Court (November 27, 2018), illustrates this point. That case involved public records requests made by the Boston Globe to the offices of all Massachusetts district attorneys and the Attorney General for certain criminal case information maintained in their computer databases. The Globe appealed the non-compliance of three district attorneys, and the Supervisor agreed with the Globe, ordering that the requested records be produced. When the three district attorneys refused to comply with the orders, the matter was referred to the Attorney General, who sought enforcement of the orders. The Superior Court concluded that the district attorneys’ arguments justifying withholding were overly broad and without particular reference to applicable exemptions for each category of information sought. Importantly, the case reiterated that use of a government database to easily generate a report responsive to a records request is required by the PRL, and is not the equivalent of “creation” a new record, which action is not subject to the PRL.

Unique Right of Access. Generally, any request for records constitutes a public records request subject to the law and its implementing regulations, 950 CMR §§ 32.00 *et seq.* However, 950 CMR § 32.06(g) and § 32.08(a) provide that a request for records does not constitute a public records request and trigger the appeal process where the individual has a “unique right of access” by statutory, regulatory, judicial or other applicable means. The Supervisor has declined appeals when the public records in question are the subject of and directly related to a dispute in active litigation.

(See, e.g., SPR 18/1717; SPR 18/932; SPR 18/770; SPR 17/1779). To demonstrate the application of the “unique right of access” provision, in preparing its initial 10-business day response, a RAO must: (1) specifically detail that the particular records sought are the actual subject of a dispute in active litigation, administrative hearing or mediation; (2) cite to the docket and any other particulars relative to such matter; and (3) explain that the requester has a unique right of access to the responsive records through alternative means, such as court discovery processes or under administrative regulations, citing thereto.

Assessment of Fees. The Supervisor has concluded that a requester may not separate a public records request into less than two hour increments to circumvent the fees a public entity may lawfully charge under the PRL. Similarly, the Supervisor has concluded that a public entity is not required to separate a request into two hour increments. (See SPR 18/1726). A custodian may always, however, waive fees at its discretion in a manner consistent with law.

Petitions for Relief. There is no express mechanism in the PRL or its implementing regulations whereby a RAO can seek permission from the Supervisor to simply not respond to a public records request, even if the request is from someone who makes frequent, redundant requests. Nonetheless, RAOs do request such relief from the Supervisor, often in conjunction with a request for more time to respond to burdensome requests. While it is uncommon for the Supervisor to grant such relief, we are aware that the Supervisor has granted such a petition where the municipality demonstrated that the requestor had already obtained the requested documents, and that many of the records sought were created by the requester. In that limited context, the Supervisor concluded that the municipality had established the request was “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” as required by G.L. c.66, §10(c). (See SPR 17/1282).

As the Supervisor’s action in that case is the exception rather than the rule, we continue to advise communities faced with numerous, ongoing, or duplicative records requests from the same requester to take the administrative steps needed to demonstrate the burden of such requests. For example, a RAO may wish to maintain written logs of all public records requests, including: name of the requester; date of the request; specific records requested; person or official to whom the request was directed; date of response; and a summary or copy of the response. This information will be important in any attempt to convince the Supervisor to relieve a RAO from the obligation to provide a response to a particular request or requests, or in the event of a law suit. Additionally, RAOs may wish to provide for the posting of all responses to public records requests and other materials to facilitate quicker and easier responses to requests.

Should you have any questions concerning the Public Records Law, please contact Attorneys Michele Randazzo (mrandazzo@k-plaw.com) and Janelle Austin (jaustin@k-plaw.com) or any of the attorneys in our Government Information and Access Group at 617.556.0007, or visit our Public Records Resources Page at <http://k-plaw.com/resources/public-records-law-resources/>.

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