

# **A Guide to the Massachusetts Public Records Law**



Published by  
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The founding fathers of our nation strove to develop an open government formed on the principles of democracy and public participation. An informed citizen is better equipped to participate in that process. Laws mandating the disclosure of public records have existed in the Commonwealth of Massachusetts since 1851. The federal Freedom of Information Act was signed into law in 1966 by President Lyndon B. Johnson. In 1974, Congress amended the federal Freedom of Information Act in order to make government records more accessible to the public. The Massachusetts Public Records Law parallels federal law, with some variation. Every government record in Massachusetts is presumed to be public unless it may be withheld under one of eighteen exemptions.

As Secretary of the Commonwealth and chief public information officer for the Commonwealth, I am pleased to publish this guide explaining the Public Records Law. The full text of the law is provided, as well as a brief description of each of the exemptions to the law. Also included is a section of frequently asked questions about a requester's right to access public records, as well as a government records custodian's duty to respond to those requests. Any additional questions regarding the Public Records Law should be directed to the Division of Public Records at (617) 727-2832 during regular business hours. You may also access Division of Public Records publications and other information at <http://www.sec.state.ma.us/pre/preidx.htm>.

A handwritten signature in cursive script that reads "William Francis Galvin". The signature is written in dark ink and is positioned above the printed name.

William Francis Galvin  
Secretary of the Commonwealth



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## Frequently Asked Questions

### *What is the difference between the federal Freedom of Information Act (FOIA) and the Massachusetts Public Records Law?*

The federal FOIA is a statute that applies to federal records. The Massachusetts Public Records Law applies to records created by or in the custody of a state or local agency, board or other government entity.

### *What records are public?*

Every document, paper, record, map, photograph, etc., as defined by law, that is made or received by a government entity or employee is presumed to be a public record.

Specific statutory exemptions to this rule have been created by the Legislature. These exemptions, which are discretionary to the records custodian, allow the records custodian to withhold a record from the general public.

The exemptions to the Public Records Law are described in this guide. If a records custodian claims an exemption and withholds a record, the records custodian has the burden of showing how the exemption applies to the record and why it should be withheld.

### *How do I obtain copies of public records? What do I do if my request is denied?*

The Division of Public Records (Division) is not a warehouse for government records. The only records kept in the Division are those that are essential to the business operations of the Division. The Division, and specifically, the Supervisor of Records (Supervisor), is empowered to determine the public status of government records. The Supervisor does not have jurisdiction over records held by federal agencies, the Legislature or the courts of the Commonwealth.

To obtain a copy of a record, you must make a request to the state or local records custodian of the record. For example, if you wish to obtain a copy of the minutes of an open meeting, you should direct your request to the records custodian of that board. Similarly, a request for a copy of a police daily log should be made to the police department that created the log.

A records custodian must respond to your request within ten calendar days. If the records custodian fails to respond within the allotted time or denies the request, you may appeal the matter to the Supervisor within ninety (90) days of the date of your original request. The appeal must include a copy of your original request and any response by the records custodian. Appeals will be

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opened on a case-by-case basis at the discretion of the Supervisor. In most cases, the Supervisor will provide an opinion on the appropriateness of the records custodian's response and a determination as to whether the requested record is public.

### ***How must a records custodian respond to my request?***

A records custodian's response must be in writing and must include a good faith estimate of the cost of providing the record or a denial of access to the record by claiming a specific exemption to the public records law.

### ***Must my request be in writing and do I need to use a specific form?***

A written request is not required but it is recommended. An oral request, made in person (not by telephone), is valid under the Public Records Law. To appeal the records custodian's response, however, a request must be in writing.

There is no specific form that must be used to request records, nor is there any language which must be included in such a request. A records custodian may provide a specific form for your use, but cannot demand that the form be used.

### ***I asked a local official a question about his office, but he did not answer. May I appeal his refusal under the Public Records Law?***

No. The Public Records Law only applies to records that are in existence and created or maintained in the usual course of business. A records custodian is not required to answer questions or to create a record in response to a request, but may do so at his or her discretion.

### ***How much may a records custodian charge for copies of public records?***

Unless specifically addressed by statute, a custodian may charge twenty cents (\$0.20) per page for photocopies, twenty-five cents (\$0.25) per page for microfilm copies and fifty cents (\$0.50) per page for computer printouts. Examples of statutes establishing special fees for specific public records include: G. L. c. 66, § 10(a) (copies of police records) and G. L. c. 262, § 38 (copies of records at the Registry of Deeds).

A records custodian may charge the actual cost of reproducing a copy of a record that is not susceptible to ordinary means of reproduction, such as large computer records or over-sized plans.

### ***Is a records custodian required to provide an estimate for copies of public records?***

The Public Records Access Regulations require that a records custodian provide a detailed, written, good faith estimate for the cost of complying with



a public record request when the cost of compliance is expected to exceed ten (\$10.00) dollars.

The estimate should contain a statement advising the requester that the actual cost of producing the record might vary once the custodian begins preparing the record. A records custodian may require payment of the estimated fee before commencing work.

In the interest of open government, all records custodians are strongly urged to waive the fees associated with access to public records, but are not required to do so under the law.

Public records that are of great interest to a large number of people must be readily available within the office of the records custodian and should be provided at a minimum cost, if any. These records include minutes of local board meetings, town meeting documents, warrants, street lists, municipal financial documents, etc.

***May the records custodian charge a fee for search and segregation of records?***

A records custodian may charge and recover a fee for the time he or she spends searching, redacting, photocopying and refiling a record. The per hour charge for this process may not be greater than the prorated hourly wage of the lowest paid employee who is capable of performing the task. Since a records custodian must maintain all records in an orderly fashion, a records custodian may not recover fees associated with record organization.

If a requestor wishes to review records in the records custodian's office but does not require copies of the records, a records custodian may charge and recover a fee for his or her time spent searching for and redacting the records. Access to records viewed in this manner should not be denied and only minor fees associated with securing the record should be charged.

***When must minutes of an open meeting be made available to the public?***

Minutes of open meetings, regardless of form, are public and must be made available at the close of the meeting.

There is no requirement that the minutes be transcribed or approved before they are made public. A records custodian should clearly mark all such minutes "unofficial."

Minutes of prior open meetings, regardless of form, should be reviewed and accepted promptly. Copies of the minutes of all open meetings should be readily available. Records custodians are strongly encouraged to waive all fees associated with the minutes of open meetings.

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Minutes of executive session meetings must be reviewed and released regularly and promptly. Executive session minutes must be released to the public as soon as the stated purpose for the executive session protection has ceased.

For cities, towns and municipal boards, the Open Meeting Law is enforced by the local District Attorney. For state agencies, the Open Meeting Law is enforced by the Office of the Attorney General. Any questions regarding the content of minutes, requirements to keep minutes or any procedural aspects of the Open Meeting Law should be addressed to either the local District Attorney or the Office of the Attorney General.

#### ***Does the Public Records Law apply to computer records?***

Yes. The Public Records Law applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.

#### ***Does a requester have greater access to public records if he is the subject of a record?***

No. Under the Public Records Law, every requester is treated equally; therefore, even a person who is the subject of the record is not granted any greater access right than any other person.

Some statutes and regulations allow requesters to obtain records in a manner that does not require a request under the Public Records Law. It should be noted that once a record is deemed public it may be obtained by anyone upon request.

#### ***Is a requester required to disclose the intended use of the public record requested?***

With the possible exception of situations where the records custodian is anticipating the withholding of records pursuant to Exemption (n), a records custodian may not ask a requester the reason for the request or the intended use of the requested records.

#### ***How should a records custodian respond to an unclear request for public records? What if the request is overly broad?***

A records custodian is required to use his or her superior knowledge of his or her records to determine the precise record or records that is responsive to the request. However, a requester must provide a reasonable description of the requested records.

***What if the records custodian claims that it is not subject to the Public Records Law?***

The Public Records Law only applies to governmental entities. The Massachusetts Supreme Judicial Court provides a standard to determine whether an entity is public or private. The burden lies with the entity to show that the Public Records Law does not apply.

***Are records custodians required to forward a request for records not in their possession?***

Generally, yes. Records custodians should use their superior knowledge to ensure that the request is delivered to the appropriate party. A large public records request may include items for which the custodian is not responsible. It is in the public interest for the custodian to forward such requests to the appropriate parties in responding to a public records request.

***Where can I go for more information?***

Records custodians and requesters seeking more information may telephone the Division and speak with the Attorney of the Day. The Attorney of the Day is a staff member of the Division, reporting to the Supervisor, and is available to answer “general questions” concerning the Public Records Law between the hours of 9:00 a.m. and 4:00 p.m. Oral and written legal advisories are not generally provided by the Division. The phone number for the Division is (617) 727-2832.

## Overview

The Massachusetts Public Records Law provides that every person has a right of access to public information.<sup>1</sup> This right of access includes the right to inspect, copy or have copies of records provided upon the payment of a reasonable fee.<sup>2</sup>

The Massachusetts General Laws broadly define “public records” to include “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 Massachusetts governmental entity.<sup>3</sup> A “custodian” is defined as “the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.”<sup>4</sup> There are eighteen strictly and narrowly construed exemptions to this broad definition of “public records.”<sup>5</sup> This guide will briefly review the application of these exemptions as well as explore some of the other issues that arise when a request is made for access to government records.

## The Request

There are no strict rules that govern the manner in which requests for public information should be made. Requests may be made in person or in writing. Written requests may be made by mail, facsimile or email.<sup>6</sup> A requester must provide the records custodian with a reasonable description of the desired information.<sup>7</sup> A records custodian is expected to use his or her superior knowledge of the records in his or her custody to assist the requester in obtaining the desired information.<sup>8</sup>

## The Response

The records custodian must respond to requests as soon as practicable, without unreasonable delay and within ten calendar days.<sup>9</sup> The response must be either an offer to provide the requested materials or a written denial. A denial must detail the specific basis for withholding the requested materials.<sup>10</sup> The denial must include a citation to one of the statutory exemptions upon which

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<sup>1</sup> G. L. c. 66, § 10(a).

<sup>2</sup> Id.

<sup>3</sup> G. L. c. 4, § 7(26).

<sup>4</sup> 950 CMR 32.03.

<sup>5</sup> G. L. c. 4, § 7(26)(a-s); see also Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980) (the statutory exemptions are to be strictly and narrowly construed).

<sup>6</sup> G. L. c. 66, § 10(b); 950 CMR 32.05(3).

<sup>7</sup> 950 CMR 32.05(4).

<sup>8</sup> 950 CMR 32.05(4).

<sup>9</sup> G. L. c. 66, § 10(a-b); 950 CMR 32.05(2).

<sup>10</sup> 950 CMR 32.08(1).

the records custodian relies, and must explain why the exemption applies.<sup>11</sup> A denial must also advise the requester of his right to seek redress through the administrative process provided by the Supervisor.<sup>12</sup> Appeals are opened at the discretion of the Supervisor.<sup>13</sup>

The mandatory disclosure provision of the Public Records Law only applies to information that is in the custody of the governmental entity at the time the request is received.<sup>14</sup> Consequently, there is no obligation to create a record for a requester or to honor prospective requests. It should be noted, however, that the Public Records Access Regulations (Regulations) do not prohibit a records custodian from responding to such requests. The records custodian has discretion to produce a record in the manner in which it was requested, and may charge a reasonable fee for creation of such a record. In creating a new record, the records custodian may charge a fee for the creation of this record on a one-time basis. Any costs due to subsequent requests for this record can be assessed only for production of copies.

With the exception of situations in which a records custodian is withholding records pursuant to Exemption (n), inquiries into a requester's status or motivation for seeking information are expressly prohibited.<sup>15</sup> Consequently, all requests for public records, even if made for a commercial purpose or to assist the requester in a lawsuit against the holder of the records, must be honored in accordance with the Public Records Law.

## Fees

A records custodian may charge a reasonable fee to recover the costs of complying with a public records request.<sup>16</sup> A records custodian is encouraged, but not required, to waive fees where disclosure is in the public interest.<sup>17</sup> Please be advised that the Supervisor does not have the authority to order a waiver of fees. Records custodians assessing a fee must do so in accordance with any applicable statutory provisions, the Regulations or an enabling provision.<sup>18</sup>

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> 950 CMR 32.08(2).

<sup>14</sup> G. L. c. 4, § 7(26) (defining "public records" as materials which have already been "made or received" by a public entity); see also 32 Op. Att'y Gen. 157, 165 (May 18, 1977) (custodian is not obliged to create a record in response to a request for information).

<sup>15</sup> See G. L. c. 66, § 10(a) (public records are to be provided to "any person"); see also 950 CMR 32.05(5) (custodian prohibited from inquiring into a requester's status or motivation); but see G. L. c. 4, § 7(26)(n) (a records custodian may ask the requester to voluntarily provide additional information in order to reach a "reasonable judgment" regarding disclosure of responsive records).

<sup>16</sup> G. L. c. 66, § 10(a); see also 950 CMR 32.06.

<sup>17</sup> 950 CMR 32.06(5).

<sup>18</sup> See e.g., G. L. c. 66, § 10(a) (fees for police records); see also 950 CMR 32.06.

### ***Fees for Search and Segregation Time***

The Regulations provide that a records custodian may charge a pro-rated fee for search and segregation of records based on the hourly rate of the lowest paid employee capable of performing the task.<sup>19</sup> “Search time” means the time used to locate a requested record, pull it from the files, copy it and return it to the files.<sup>20</sup> “Segregation time” means the time used to delete exempt data from a requested public record.<sup>21</sup>

The Supervisor will presume that the lowest paid employee in an agency is capable of search and segregation of records, and, except where exceptional circumstances are present, it is expected that the lowest hourly rate will be used to calculate search and segregation time. In some circumstances, the lowest paid office employee may not have the knowledge or experience required to segregate the exempt information from the non-exempt information contained in a requested record. Guidance on the application of the relevant exemptions may usually be provided to the lowest paid employee. In very complex or difficult cases, however, the hourly rate of the lowest paid employee who has the necessary knowledge or experience may be used to determine the fee for search and segregation time.

### ***Fee for Copies***

In addition to the search and segregation fees, records custodians may charge twenty cents (\$0.20) per page for photocopies of public records.<sup>22</sup> Records custodians may charge a fee of fifty cents (\$0.50) per page for computer printout copies of public records.<sup>23</sup> When the request is for materials that are not susceptible to ordinary means of reproduction, such as photographs or computer tapes and diskettes, the actual cost of reproduction may be assessed to the requester.<sup>24</sup> There are also specific statutes that establish fees for copies of public records.<sup>25</sup> The records custodian may assess a reasonable fee, using the hourly rate of the lowest paid employee within that department, for the time spent in reproduction of the responsive record.

## **Exemptions to the Public Records Law**

The statutory definition of “public records” contains exemptions providing the basis for withholding records completely or in part.<sup>26</sup> The exemptions are

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<sup>19</sup> 950 CMR 32.06(1)(c).

<sup>20</sup> 950 CMR 32.03.

<sup>21</sup> *Id.*

<sup>22</sup> 950 CMR 32.06(1)(a).

<sup>23</sup> 950 CMR 32.06(1)(d).

<sup>24</sup> 950 CMR 32.06(1)(f); *see also* SPR Bulletin 4-96, June 7, 1996 (Fees for Access and Copying of Electronic Public Records).

<sup>25</sup> *See e.g.*, G. L. c. 66, § 10(a) (fees for police records); G. L. c. 262, § 38 (copies of records at the Registry of Deeds).

<sup>26</sup> G. L. c. 4, § 7(26)(a-s).

strictly and narrowly construed.<sup>27</sup> Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted.<sup>28</sup> A review of the appropriate applications of the exemptions follows.

### Exemption (a) – The Statutory Exemption

Exemption (a) applies to those records that are:

*specifically or by necessary implication exempted from disclosure by statute.*<sup>29</sup>

A government entity may use the statutory exemption as a basis for withholding requested materials where the exempting statute expressly states or necessarily implies that the public's right to inspect records under the Public Records Law is restricted.<sup>30</sup>

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."<sup>31</sup>

The second category under the exemption includes records deemed exempt under statute by necessary implication.<sup>32</sup> Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities.<sup>33</sup> A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

***For example:*** I want a copy of an arrest report. May this report be withheld by the records custodian pursuant to Exemption (a) as Criminal Offender Record Information (C.O.R.I.)? It depends. A record that is recorded as a result of the initiation of criminal proceedings or other consequent proceeding may be withheld under the C.O.R.I. statute. For more information on C.O.R.I. and the Public Records Law, please see SPR Bulletin NO. 3-03 November 21, 2003.<sup>34</sup>

<sup>27</sup> Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980).

<sup>28</sup> G. L. c. 66, § 10(a); Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are not blanket in nature).

<sup>29</sup> G. L. c. 4, § 7(26)(a).

<sup>30</sup> Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

<sup>31</sup> See, e.g., G. L. c. 41, § 97D (all reports of rape or sexual assault "shall not be public reports").

<sup>32</sup> G. L. c. 4, § 7(26)(a).

<sup>33</sup> See, e.g., G. L. c. 6, § 172 ("Criminal offender record information ... shall only be disseminated to: criminal justice agencies....").

<sup>34</sup> <http://www.sec.state.ma.us/arc/arcrmu/rmubul/bul303.htm>.

Please reference the Appendix of this Guide for other examples of statutes that specifically exempt records from disclosure.

### **Exemption (b)**

Exemption (b) applies to those records that are:

*related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding.*<sup>35</sup>

There are no authoritative Massachusetts decisions interpreting Exemption (b). The general purpose of the cognate federal exemption, however, is to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public cannot reasonably be expected to have a legitimate interest.<sup>36</sup>

The language of the federal provision is duplicated in the first clause of Exemption (b). The addition of the qualifying second clause of Exemption (b) evidences a legislative intent to create an exemption that is narrower in scope than the previously enacted, parallel federal exemption.<sup>37</sup>

For Exemption (b) to apply in Massachusetts, a records custodian must demonstrate not only that the records relate solely to the internal personnel practices of the government entity, but also that proper performance of necessary government functions will be inhibited by disclosure.

**For example:** Are all Department of Correction security policies and procedures public? No. One of the Department's primary functions is to maintain secure penal institutions. Information regarding the procedures used by correctional officers during law enforcement efforts relates solely to the internal workings of the Department. Moreover, disclosure of this information could prove detrimental to the Department's law enforcement efforts, as knowledge of the Department's security response procedures could enable an inmate to circumvent such procedures. Accordingly, Exemption (b) will allow the Department to withhold portions of the requested policies.

### **Exemption (c) – The Privacy Exemption**

Exemption (c), the privacy exemption, is the most frequently invoked exemption. The language of the exemption limits its application to:

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<sup>35</sup> G. L. c. 4, § 7(26)(b).

<sup>36</sup> Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976).

<sup>37</sup> See Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 432-33 (1983) (where the language of a parallel state statute differs in material respects from a previously enacted federal statute, a rejection or expansion of the legal principles embodied in the federal statute may be inferred).



*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.*<sup>38</sup>

The privacy exemption is made up of two separate clauses, the first of which exempts personnel and medical files. As a general rule, medical information will always be of a sufficiently personal nature to warrant exemption.<sup>39</sup>

The Massachusetts Supreme Judicial Court determined that exempting personnel information from disclosure serves to protect the government's ability to function effectively as an employer.<sup>40</sup> The release of certain personnel information could disrupt the government's capability to conduct sensitive and careful investigations regarding employees.<sup>41</sup> While statutorily exempting personnel information from the expansive definition of public records, the Legislature did not explicitly define personnel information.<sup>42</sup> However, judicial decisions acknowledge that the term is neither rigid, nor exact, and that the determination is case-specific.<sup>43</sup> The custodian's classification of materials as "personnel information" is not conclusive.<sup>44</sup> Instead, the nature or character of the documents, as opposed to the documents' label, is crucial to the analysis.<sup>45</sup>

Historically, this office has broadly interpreted the personnel exemption; however, based on more recent judicial decisions, a more narrow interpretation is necessary. The nature of some materials and the context in which they arise take them beyond what the Legislature contemplated when exempting personnel information.<sup>46</sup>

Generally, personnel information which is useful in making employment decisions regarding an employee is sufficiently personal to be exempt pursuant to the first clause.<sup>47</sup> Such information may include employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information.<sup>48</sup>

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<sup>38</sup> G. L. c. 4, § 7(26)(c).

<sup>39</sup> Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 442 (1983); see also Globe Newspaper Company v. Chief Medical Examiner, 404 Mass. 132 (1989) (autopsy reports constitute exempt medical information).

<sup>40</sup> Wakefield Teacher's Association v. School Committee of Wakefield, 431 Mass. 792, 802 (2000).

<sup>41</sup> Id.

<sup>42</sup> G. L. c. 4, § 7(26)(c).

<sup>43</sup> Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 58 Mass App Ct 1, 5 (2003).

<sup>44</sup> Wakefield Teacher's Association, 431 Mass. at 798.

<sup>45</sup> See Worcester Telegram & Gazette Corp., 436 Mass. at 386.

<sup>46</sup> See Worcester Telegram & Gazette Corp., 58 Mass. App. Ct. at 9.

<sup>47</sup> Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000); see also Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983) (evaluative materials are of a particularly personal and volatile nature).

<sup>48</sup> Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000); see also Brogan v. School Committee of Westport, 401 Mass. 306, 308 (1987);

However, recent court decisions have distinguished “personnel records” from “internal affairs” records. The Appeals Court of Massachusetts held that materials in a police internal affairs investigation are different in kind from the ordinary evaluations, performance assessments and disciplinary determinations encompassed in the public records exemption for personnel file or information.<sup>49</sup> The Appeals Court held that officers’ reports, witness interview summaries, and the internal affairs report itself do not fall within the personnel information exemption, as these documents relate to the workings and determinations of the internal affairs process whose quintessential purpose is to inspire public confidence.<sup>50</sup>

Public employees have a diminished expectation of privacy in matters relating to their public employment.<sup>51</sup> Consequently, the public will have greater access to information that relates to an individual’s public employment than to the same individual’s private activities.<sup>52</sup> For example, an individual’s public employment salary is a public record, but the source or amount of private income generally is not public information.<sup>53</sup>

The second clause of the privacy exemption applies to requests for records that implicate privacy interests. Its application is limited to “intimate details of a highly personal nature.”<sup>54</sup> Examples of “intimate details of a highly personal nature” include marital status, paternity, substance abuse, government assistance, family disputes and reputation.<sup>55</sup> Portions of records containing such information are exempt unless there is a paramount public interest in disclosure.<sup>56</sup> Therefore, when applying the second clause of the exemption to requested records it is necessary to perform a *two-step analysis*: first, determine whether the information constitutes an “intimate detail of a highly personal nature”; and second, determine whether the public interest in disclosure outweighs the privacy interest associated with disclosure of the highly personal information.<sup>57</sup> Consequently, the application of the second clause of the exemption can only be determined on a case-by-case basis.

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Pottle v. School Committee of Braintree, 395 Mass. 861, 866 (1985); George W. Prescott Publishing Company v. Register of Probate for Norfolk County, 395 Mass. 274, 278 (1985).

<sup>49</sup> Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 799 (2000).

<sup>50</sup> Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 8-9 (2003).

<sup>51</sup> Brogan v. School Committee of Westport, 401 Mass. 306, 308 (1987).

<sup>52</sup> Hastings & Sons Pub. Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978).

<sup>53</sup> Attorney General v. Collector of Lynn, 377 Mass. 151, 156 (1979).

<sup>54</sup> Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980).

<sup>55</sup> Id. at 626 n. 2.

<sup>56</sup> Collector of Lynn, 377 Mass. at 156.

<sup>57</sup> See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 7-8 (2003).

**For example:** Can a public employee's employment application and work evaluation be disclosed? Generally, no. Disclosure of these records may implicate an employee's privacy interests. Under the first clause of Exemption (c), certain personnel records may be withheld. Therefore, the records custodian may properly withhold certain employment applications and work evaluations under Exemption (c).

**For example:** Does this exemption allow all resumes of public officials to be withheld from disclosure? No. Some of the information contained in a resume may be exempt from disclosure because it relates to a specifically identifiable individual and is the type of information that is useful in making employment decisions. Exemption (c) does not, however, automatically render all resumes exempt in their entirety. The statutory exemptions are narrowly construed and are not blanket in nature. The Public Records Law requires a case-by-case analysis of the applicability of its exemptions. Specifically, any relevant degrees and certifications listed on an employee's resume may be subject to disclosure upon request. Public employees have a diminished expectation of privacy in matters relating to their public employment and the public has a legitimate interest in knowing whether public employees possess the qualifications necessary to perform their jobs.

**For example:** Are settlement agreements exempt under the Public Records Law? No. The public interest in the financial information of a public employee outweighs the privacy interest where the financial compensation in question is drawn on an account held by a government entity and comprised of taxpayer funds. Additionally, the disclosure of the settlement amount would assist the public in monitoring government operations. Therefore, exemptions to the Public Records Law will not operate to allow for the withholding of settlement agreements as a whole. However, portions of the agreements, and related responsive records, may be redacted pursuant to exemptions to the Public Records Law.

**For example:** Are the names and addresses of customers of a municipally owned utility public? Yes. Only the second clause of Exemption (c) is relevant in this case. The analysis is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. The second clause only applies to "intimate details of a highly personal nature." First, the names and addresses of residents of Massachusetts over seventeen (17) years of age are not intimate details of a highly personal nature, because they are available in other venues, such as street lists. Second, the fact that the information may be derived elsewhere reduces the expectation of privacy. Names and addresses of individuals are generally available through telephone directories. Since neither the names nor the addresses of the customers are intimate details of a highly personal nature, the balancing test between individual's privacy interests and the public interest in disclosure does not apply. The records cannot be withheld under Exemption (c).

## Exemption (d) – The Deliberative Process Exemption

Exemption (d) provides a limited executive privilege for policy development. It applies to:

*inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this sub-clause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.*<sup>58</sup>

The exemption is intended to avoid release of materials that could taint the deliberative process if prematurely disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process.<sup>59</sup> Purely factual matters used in the development of government policy are always subject to disclosure.<sup>60</sup> Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials.<sup>61</sup> Therefore, only those portions of materials that possess a deliberative or policymaking character and relate to an ongoing deliberative process are exempt from mandatory disclosure.

**For example:** Is a town's appraisal report, which was prepared for the purpose of litigation before the Appellate Tax Board, a public record? No. The report may be characterized as a proposal that presents recommendations as to a certain course of action or position to be taken by the town. As long as the town is still negotiating a settlement, the deliberative process has not been concluded and the report may be withheld under Exemption (d).

## Exemption (e)

Exemption (e) allows the 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.*<sup>62</sup>

The application of Exemption (e) is limited to records that are work-related but can be characterized as personal to an employee. Materials covered by the exemption include personal reflections on work-related activities and notes created by an employee to assist him in preparing reports for other employees or for the files of the governmental entity. The exemption may not be used to

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<sup>58</sup> G. L. c. 4, § 7(26)(d).

<sup>59</sup> Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n.8 (1988).

<sup>60</sup> See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (construing cognate federal provision).

<sup>61</sup> Moore-McCormack Lines, Inc. v. I.T.O. Corporation of Baltimore, 508 F.2d 945, 948 (1974) (construing cognate federal provision).

<sup>62</sup> G. L. c. 4, § 7(26)(e).

withhold any materials that are shared with other employees or are being maintained as part of the files of a governmental unit.<sup>63</sup>

**For example:** A requester sought all documents from a government entity related to a particular issue. The responsive records included personal notes of the government entity's employee. Are these notes public? No. The notes are not public if they were personal in nature, kept by the employee merely to assist him in preparing reports, were not shared with anyone in the department and were not maintained as part of the department's files.

**For example:** Are handwritten shorthand notes taken by the secretary of a board of selectman at a public/open meeting a public record? Yes. The notes are not personal in nature simply because they contain the secretary's subjective impressions of the board meeting. The notes cannot be considered merely a reference to assist the secretary in fulfilling his duties, but rather the notes comprise a government file itself. Where longhand notes of open meetings have been taken by secretaries, it has been held that the notes are public at the time that they are created. In a sense, the notes are minutes even though not yet approved. Accordingly, Exemption (e) does not provide a basis for withholding the shorthand notes.

## Exemption (f) - The Investigatory Exemption

Exemption (f), the investigatory exemption, provides custodians a basis for withholding:

*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.*<sup>64</sup>

The exemption allows investigative officials to withhold materials that could compromise investigative efforts if disclosed. Exemption (f) does not, however, create a blanket exemption for all records that investigative officials create or maintain.<sup>65</sup> A records custodian must demonstrate a prejudice to investigative efforts in order to withhold requested materials. Accordingly, a records custodian may withhold any information relating to an ongoing investigation that could potentially alert suspects to the activities of investigative officials. Similarly, records custodians may withhold confidential investigative techniques indefinitely since their disclosure would prejudice future law enforcement efforts.<sup>66</sup>

<sup>63</sup> G. L. c. 4, § 7(26)(e).

<sup>64</sup> G. L. c. 4, § 7(26)(f).

<sup>65</sup> District Attorney for the Norfolk District v. Flatley, 419 Mass. 507, 512 (1995); WBZ-TV4 v. District Attorney for the Suffolk District, 408 Mass. 595, 603 (1990).

<sup>66</sup> Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976); see also United States Department of Justice v. Landano, 113 S. Ct. 2014, 2020 (1993) (discussion of confidential sources of information under the federal Freedom of Information Act.).

The Legislature also designed the exemption to allow investigative officials to provide an assurance of confidentiality to private citizens so that they will speak openly about matters under investigation.<sup>67</sup> Accordingly, any details in witness statements, which if released create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness are indefinitely exempt.<sup>68</sup>

**For example:** If a requested incident report contains witness statements, can a police department use Exemption (f) to withhold the requested report in its entirety? No. Generally, a police incident report may be released to a requester after the records custodian has redacted the exempt portions from the record, such as, medical information (Exemption (c)) and witness statements (Exemption (f)). If, however, the requester is familiar with the individuals who were involved in the incident(s) noted in the report, then the department may withhold the entire record because it would not be possible for the records custodian to redact the report in a manner as to avoid indirect identification of the voluntary witness and complainant.

## Exemption (g)

Exemption (g) applies to:

*trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit.*<sup>69</sup>

To properly claim Exemption (g), a custodian must meet all six criteria contained in the exemption: (1) trade secrets or commercial or financial information; (2) voluntarily provided to a government entity; (3) for use in developing government policy; (4) upon an assurance of confidentiality; (5) information not submitted by law; and (6) information not submitted as a condition of receiving a governmental benefit. Consequently, this exemption does not apply to information that companies provide to the government in connection with a contract bid or in compliance with a filing requirement.<sup>70</sup>

**For example:** Is a Memorandum submitted as an exhibit in a hearing before the Securities Division of the Secretary of the Commonwealth Office a public record? Yes. In this case, the entity did not satisfy all six criteria of Exemption (g). The first criterion was met as the Memorandum contained commercial information. All of the remaining criteria, however, were not met because the Memorandum was not voluntarily submitted, was not provided

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<sup>67</sup> Bougas, 371 Mass at 62.

<sup>68</sup> Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 438 (1983) (explanation of “identifying details” and “grave risk of indirect identification”).

<sup>69</sup> G. L. c. 4, § 7(26)(g).

<sup>70</sup> Id.

for use in developing government policy, and was not submitted upon a promise of confidentiality. The Memorandum does not satisfy all of the requisite criteria, thus, Exemption (g) does not apply.

### Exemption (h)

Exemption (h) serves to protect the integrity of the bidding processes used by the government to procure goods and services by allowing a records custodian to withhold the proposals of early bidders from other interested parties.<sup>71</sup> Competitive bidding ensures full publicity of the contract and encourages the guarding of the public welfare.<sup>72</sup> Although the competitive bidding process does not have the advantages of more flexible purchasing policies, the Legislature has mandated the process to foster honesty and accountability in government.<sup>73</sup> Specifically, Exemption (h) allows records custodians to withhold from disclosure:

*proposals and bids to enter into any contract or agreement until the time for the opening bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or toward a contract to, a particular person.*<sup>74</sup>

The exemption addresses two types of records held by an awarding authority (records custodian), each with its own time frame. Proposals may be withheld until the time for the receipt of proposals has expired. Bids may be withheld until such time as the bids are publicly opened and read by the awarding authority. This allows the proposals of early bidders to be kept in confidence so that subsequent bidders do not gain an unfair advantage, thus, keeping all on equal footing. The limitation on the duration of the exemption provides the public with an opportunity to review the rejected proposals to ensure that taxpayer dollars are wisely spent.

The second clause of the exemption is similar to Exemption (d) in its application.<sup>75</sup> It allows government officials to withhold any inter-agency or intra-agency communications regarding the evaluations of the bids or proposals until the records custodian renders a decision to enter into negotiations with the successful bidder or awards the contract. Exemption (h) allows government officials to review bids and proposals in an insulated environment, but also provides for public review of all evaluative materials

<sup>71</sup> Datatrol Inc. v. State Purchasing Agent, 379 Mass. 679, 691 (1980) (the purposes of competitive bidding go beyond economy and efficient administration to the prevention of favoritism in the awarding of government contracts).

<sup>72</sup> Datatrol Inc. v. State Purchasing Agent, 379 Mass. 679, 699 (1980).

<sup>73</sup> Id. at 701.

<sup>74</sup> G. L. c. 4, § 7(26)(h).

<sup>75</sup> G. L. c. 4, § 7(26)(d); See also discussion of the application of Exemption (d) in the Massachusetts Guide to the Public Records Law.

once a decision is reached. Clearly, enactment of Exemption (h) indicates the determination of the Legislature to protect the integrity of the bidding process.

***For example:*** May the records custodian withhold proposal and bid documents until the records custodian has finalized a contract with the construction company or developer? No. Exemption (h) addresses two types of records, each with its own time frame for disclosure. Proposals and bids are exempt from disclosure only until the time for the opening bids or until the time for receipt of proposals has expired. Once that occurs, the proposals and bids no longer fall under the protection of Exemption (h) and can no longer be withheld.

***For example:*** May the records custodian withhold any records concerning the evaluations of the bidders and the awarding process, and at what point do the records become public? The second clause of Exemption (h) allows the records custodian to withhold any inter-agency or intra-agency communications that are made in the process of reviewing the bids and proposals, prior to entering into negotiations with or to award the contract to a particular person.

The records custodian may withhold the records pursuant to Exemption (h) only until the contract has been awarded. Once a contract has been finalized, the records custodian can no longer withhold the records of the bidding process.

## **Exemption (i)**

The purpose of Exemption (i) is to provide governmental entities engaged in the acquisition of real property, either through a purchase or an eminent domain proceeding, the same degree of confidentiality that is afforded to private parties. The exemption ensures that the government will not be at a bargaining disadvantage by allowing the other party to use the Public Records Law to gain access to an appraisal prior to completion of negotiations or litigation. Exemption (i) allows the custodian to withhold from disclosure:

*appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired.*<sup>76</sup>

Application of Exemption (i) is limited to situations in which a governmental entity is concerned that disclosure of the subject appraisal will compromise its ability to effectively negotiate a fair purchase or sale price for the property. The Legislature has defined “appraisal” as any written analysis, opinion, or conclusion prepared by a real estate appraiser relating to the nature, quality, value or utility of specified interests in, or aspects of, identified real estate.<sup>77</sup>

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<sup>76</sup> G. L. c. 4, § 7(26)(i).

<sup>77</sup> G. L. c. 112, § 173 (definition of appraisal).



The language of the statute is clear that the three provisions are alternative rather than requisite conditions. Therefore, once one of the three alternatives has occurred, Exemption (i) will no longer serve as a means to withhold the subject appraisal.

***For example:*** May a records custodian (housing authority) continue to withhold the requested appraisals pursuant to Exemption (i), where the records custodian has entered into a final agreement with the property owner and the property owner has agreed to forgo all possible eminent domain claims against the housing authority? No. Once one of the three provisions of the exemption has occurred, Exemption (i) cannot be used to withhold the subject appraisal. In this case, the parties reached a final agreement regarding the property, therefore, the exemption no longer applied and the records custodian could not continue to withhold the appraisals.

***For example:*** Where a requester seeks appraisal documents on a parcel for which a negotiated final settlement has been reached, may the records custodian withhold the appraisals on all the parcels of land being acquired for the project until it reaches final agreement on all the parcels and the litigation on the parcels is finalized? No. Exemption (i) is parcel specific and the records custodian is only allowed to retain an appraisal until an agreement has been reached, any litigation relative to the appraisal has been terminated, or the time within which to commence such litigation has expired. In this situation, the appraisal sought by the requester pertained to a parcel that had already been acquired, and the records custodian was ordered to produce the appraisal documents for that specific parcel.<sup>78</sup>

## **Exemption (j)**

Exemption (j) allows records custodians of firearm records to withhold from disclosure:

*the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefore, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards.*<sup>79</sup>

The purpose of Exemption (j) is to prevent individuals with devious motives from ascertaining the identities of those who possess firearms. The scope of

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<sup>78</sup> Coleman v. Boston Redevelopment Authority, 61 Mass. App. Ct. 239 (2004).

<sup>79</sup> G. L. c. 4, § 7(26)(j).

the exemption is limited to restricting the public disclosure of the name and address of the individual.<sup>80</sup>

Clearly, on its face the exemption does not permit the records custodian to withhold the firearm application or identification card in its entirety. Exemption (j) allows the identifying data, in particular, the name and address of the licensee to be deleted from the record prior to disclosure. It is exceptional that there are both an exemption prohibiting the release of the identity and a separate statute mandating confidentiality of records.<sup>81</sup> This lends credibility to the supposition that the Legislature was especially concerned about release of this type of information.

***For example:*** What if the records custodian receives a request for firearm records of a specifically named individual, such as, “I request all gun permits issued to John Smith”? Here, the records custodian should withhold the entire record, because even if the name and address are redacted, the requester knows with certainty that this particular record pertains to John Smith. It is impossible for the records custodian to protect Mr. Smith’s identity.

***For example:*** Is the records custodian permitted to withhold identifying information, other than name and address, such as a criminal offender record information (C.O.R.I.) or social security numbers? Yes. The records custodian should review all the exemptions in the Public Records Law to see whether one or more of them are applicable, redact the information and claim the proper exemptions.<sup>82</sup> For instance, C.O.R.I. must be redacted before disclosing the gun application pursuant to Exemption (a), and social security numbers contained in the application may be withheld pursuant to Exemption (c).

### **Exemption (k).** Repealed, 1988 Mass Acts 180, § 2.

Although Exemption (k) was repealed, the Legislature retained the substance of the exemption, incorporating the language into another section of the General Laws. It reads: “...[T]hat part of the records of a public library which reveals the identity and intellectual pursuits of a person using such library shall not be a public record as defined by clause Twenty-sixth of section seven of chapter four.”<sup>83</sup>

G. L. c. 78, § 7 operates through Exemption (a) of the Public Records Law to provide a basis for denying access to library circulation records.<sup>84</sup>

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<sup>80</sup> G. L. c. 4, § 7(26)(j).

<sup>81</sup> G. L. c. 140, §§ 121-131P. (discussing sale of firearms).

<sup>82</sup> G. L. c. 4, § 7(26)(a-s) (exemptions to the Public Records Law).

<sup>83</sup> G. L. c. 78, § 7 (discussing Public Libraries).

<sup>84</sup> G. L. c. 4, § 7(26)(a).

## Exemption (l)

Exemption (l) provides a basis for withholding from disclosure:

*questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument.*<sup>85</sup>

The exemption was previously restricted to licensing examinations; however, in 1996 it was amended in order to protect the integrity of all testing materials.<sup>86</sup> The purpose of Exemption (l) is to prevent individuals from gaining an unfair advantage by using the Public Records Law to access test questions and answers prior to the administration of an examination.

As long as the same materials are used to administer subsequent examinations, the custodian of records may continue to withhold the materials pursuant to Exemption (l). The action to withhold the testing materials ensures that the integrity of future testing is not jeopardized.

**For example:** May a records custodian withhold a copy of a middle school mid-term examination, when the request is made by a parent of one of the school's students? Yes. Where the school has proven that the test questions administered to this student on this mid-term examination will be used for future examinations, the school may properly withhold the testing materials pursuant to Exemption (l).

**For example:** May a records custodian withhold testing materials, when a request is made for all documents related to the issue of discrimination in the Massachusetts Comprehensive Assessment System (MCAS)? Yes. Pursuant to Exemption (l), the records custodian may properly withhold the test questions and answers, and any other testing materials that are currently used or may be used to administer subsequent MCAS examinations.

## Exemption (m)

Exemption (m) applies to:

*contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a non-profit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred*

<sup>85</sup> G. L. c. 4, § 7(26)(l).

<sup>86</sup> 1996 Mass. Acts 204, § 3 (July 30, 1996).

*and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.*<sup>87</sup>

Although Exemption (m) has yet to be interpreted by any Massachusetts court, the language of the exemption is clear. It pertains to contracts for hospital or healthcare services between a government-operated healthcare facility and a health maintenance organization or health insurance corporation.

To properly claim Exemption (m), the records custodian must meet all four criteria contained in the exemption. First, the record must be a contract; second, the contract must be for hospital or related health care services; third, one of the contracting parties must be a government-operated medical facility, and finally, the party providing services must be one of the entities described by the exemption. If the requested record satisfies all of the criteria, the records custodian may withhold the record pursuant to Exemption (m).

***For example:*** May a city or town withhold records pertaining to the health insurance plans and the costs of providing these health insurance benefits to employees of the city or town pursuant to Exemption (m)? No. Exemption (m) specifically applies only to records that are contracts for hospital or related health care services. Additionally, one of the contracting parties must be a government operated medical facility, such as a hospital or clinic, and the party providing the services must be one of the entities described by the exemption. The requested records do not satisfy the criteria of the exemption; therefore, the list of health insurance plans and the costs of providing these as employee benefits may not be withheld pursuant to Exemption (m).

## **Exemption (n)**

Exemption (n) applies to:

*records including, but not limited to, blue prints, 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, the disclosure of which, in the reasonable judgment of the custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.*<sup>88</sup>

In response to the horrific events of September 11th, this exemption is intended to secure the safety of persons and public places by restricting access to records that may have been previously open to public inspection.

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<sup>87</sup> G. L. c. 4, § 7(26)(m).

<sup>88</sup> G. L. c. 4, § 7 (26)(n).

The nature of the exemption requires a records custodian to make some value judgment regarding the requester in order to decide whether to release the information sought. Making such a value judgment is specifically antithetic to the previously expounded presumptions that all records are public records and all requesters shall be treated uniformly. The Legislature was informed in writing of this radical and disparate change in the Public Records Law but chose to retain the language thereby clearly indicating its intent to provide records custodians with the discretion to withhold applicable records. Therefore, a records custodian should review the request promptly and completely in order to gather all of the facts surrounding the request. The records custodian is not prevented from engaging the requestor in conversation by asking the requester to voluntarily provide additional information in order to reach a “reasonable judgment,” but a records custodian may not “require” the requester to provide personal information.<sup>89</sup>

***For example:*** If a records custodian discloses a set of blueprints under Exemption (n) to one requestor, must the same blueprints be made available to all subsequent requestors? No. This exemption is unique in its application in that the disclosure of records to one requestor does not render the records public to all. If a records custodian determines that disclosure of the records to a specific requestor would not compromise public safety, the records custodian may then withhold the same records to later requestors if, in the reasonable judgment of the records custodian, release of the records to those subsequent requestors would jeopardize public safety.

## Exemption (o)

Exemption (o) applies to:

*the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.*<sup>90</sup>

***For example:*** Would the address of a government employee found in payroll records be public? No. Exemption (o) applies to records that contain the home address or telephone number of an employee while identifying the individual as a government employee. Given that payroll records identify an

<sup>89</sup> See SPR Bulletin No. 04-03 (April 1, 2003).

<sup>90</sup> G. L. c. 4, § 7 (26)(o).

individual as being a government employee while providing the employee's home address, and possibly telephone number in the same record, the home address and telephone number would be subject to redaction under this exemption.

### **Exemption (p)**

Exemption (p) applies to:

*the name, home address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).*<sup>91</sup>

Under this exemption, the record must contain an individual's home address and/or telephone number and identify the individual as being the family member of a Commonwealth employee in order for the record to be subject to redaction pursuant to Exemption (p).

### **Exemption (q)**

Exemption (q) allows for the withholding of:

*adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.*<sup>92</sup>

The registry of vital records and statistics maintains a voluntary adoption contact information registry for the purpose of connecting parents listed on the initial birth certificate to any of their children who were adopted by others.<sup>93</sup> The adoption contact registry contains the addresses and other information supplied by parents and adoptees necessary for one to contact the other. Any contact information contained in the adoption contact registry, as well as indices created from this registry, may be withheld under Exemption (q).

### **Exemption (r)**

Exemption (r) applies to:

*information and records acquired under chapter 18C by the office of the child advocate.*<sup>94</sup>

The records created and received by the Office of the Child Advocate pursuant to Chapter 18C may be withheld under this exemption.<sup>95</sup>

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<sup>91</sup> G. L. c. 4, § 7 (26)(p).

<sup>92</sup> G. L. c. 4, § 7 (26)(q).

<sup>93</sup> G. L. c. 46, § 31.

<sup>94</sup> G. L. c. 4, § 7 (26)(r).

<sup>95</sup> G. L. c. 18(c).

## Exemption (s)

This exemption pertains to:

*trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.*<sup>96</sup>

Exemption (s) relates to certain records of public utility providers. This exemption is to take effect in March of 2009.<sup>97</sup>

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<sup>96</sup> G. L. c. 4, § 7 (26)(s).

<sup>97</sup> Chapter 445 of the Acts of 2008.

## Attorney-Client Communications and Attorney Work Product

Historically, this office has not recognized the claim of common law privilege as a means for public entities to withhold records. However, in a recent ruling, the Supreme Judicial Court (Court) held that confidential communications between governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are protected under the normal rules of the attorney-client privilege.<sup>98</sup>

The Legislature conferred to the Supervisor of Records (Supervisor) the authority to render determinations on the public status of records.<sup>99</sup> Additionally, the Court has interpreted the Supervisor's authority to include issuing decisions on whether records are privileged.<sup>100</sup> As a result, the Supervisor has the authority to determine whether records may be withheld as privileged documents. Until further judicial or legislative clarification is provided concerning the claim of attorney-client privilege as a means to withhold records from public disclosure, this office will issue determinations regarding this privilege on a case-by-case basis.

The Suffolk holding did not define work product materials as records exempt from public disclosure.<sup>101</sup> While recognizing that certain confidential communications between public officials and their legal counsel may be withheld from the public, the Court made clear its holding in this case did not extend to work product materials.<sup>102</sup> Accordingly, the Suffolk decision will not alter this office's long-standing determination that work product documents are subject to public release.<sup>103</sup>

## Computer Records

The Legislature did not envision the impact computers would have on the government's ability to collect, store, compile and disseminate information when drafting the Public Records Law.<sup>104</sup> The legal principles embodied in the Public Records Law, however, may be readily transposed into legal principles governing access to information maintained in an automated system.

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<sup>98</sup> Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007).

<sup>99</sup> G. L. c. 66, § 10 (b); See Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 414 Mass. 609, 614-15 (1993).

<sup>100</sup> See Id. at 610 (Supervisor may delineate whether documents are privileged or exempted from the Public Records Law).

<sup>101</sup> Suffolk Constr. Co., 449 Mass. at 455-56.

<sup>102</sup> Id.

<sup>103</sup> See General Electric Company v. Department of Environmental Protection, 429 Mass. 798 (1999).



The statutory definition of “public records” does not distinguish between traditional paper records and records stored in the computer medium.<sup>105</sup> Rather, it provides that all information made or received by a public entity, regardless of the manner in which it exists, constitutes “public records.” Computer cards, tapes or diskettes are all independent public records that are subject to the same requirements of the Public Records Law as are paper records. Therefore, a records custodian is obliged to furnish copies of non-exempt portions of computerized information at the cost of reproduction, unless otherwise provided by law.

It should be noted, however, that as with paper records a records custodian is not required to create a computer record in response to a request for information. A records custodian is only obliged to provide access to existing files. A records custodian is not required to create a new computer program to provide a requester with computerized information in a desired format. There is, however, an exception to this general rule when the reprogramming is needed to comply with the segregation provision of the law.

For example: A request is made for a spreadsheet summarizing expenses for various goods purchased by a government entity. The records custodian is not obligated to create a new record if such a record does not currently exist. In this situation, the records custodian is only obliged to notify the requester that there is no record responsive to the request. The records custodian should also advise the requester of other available documents or files that could be responsive to the request.<sup>106</sup> The creation of records, including the honoring of prospective requests, is not governed by the Public Records Law; therefore, the records custodian is free to negotiate all terms of the arrangement.<sup>107</sup> Consequently, if a requester is willing to pay for the work, the records custodian may create a digital record to respond to the request.

## **Geographic Information Systems (GIS)**

A GIS is a computer system designed to store, capture, analyze and display geographically referenced information. Often, the information that comprises Commonwealth or municipal GIS databases is submitted by private surveyors and engineers who exercise intellectual property rights over nonfactual portions of the materials. While there are no Massachusetts court cases interpreting this issue, it is clear that the Legislature did not carve out specific exemptions from the Massachusetts Public Records Law allowing protected intellectual property in the custody of a governmental entity to be withheld

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<sup>105</sup> G. L. c. 4, § 7(26).

<sup>106</sup> See 950 CMR 32.05(4) (a custodian shall use his superior knowledge of his files to assist a requester in obtaining the desired information).

<sup>107</sup> G. L. c. 4, § 7(26) (defining “public records” as materials which have already been “made or received” by a public entity); see also 32 Op. Att’y Gen. 157, 165 (May 18, 1977) (custodian is not obliged to create a record in response to a request for information) (the Public Records Law and Regulations only apply to existing records; consequently, a custodian is free to set any fee for creating a record).

from public dissemination. The Public Records Law does not serve to preempt federal intellectual property law, nor does the Public Records Law exonerate those who violate intellectual property rights validly held by private individuals or governmental entities once the public GIS records have been released. As a precaution, records custodians of GIS records are encouraged to indicate on released GIS records that the information contained in the records may be subject to intellectual property protections.

Given that GIS records are public, the fees a municipal records custodian may assess for access to these records have been statutorily set. GIS records fall under the category of public records that are not susceptible to ordinary means of reproduction, thus, the Public Records Access Regulations provide that the records custodian may assess the actual cost incurred in copying the requested records.<sup>108</sup> Fees assessed for these records cannot serve as a deterrent for access or as a means of generating revenue.

### **The Supervisor of Records**

A requester who is denied access to any requested information may petition the Supervisor of Records (Supervisor) for a review of the request. The Supervisor will then instruct a staff member, usually a staff attorney or a legal intern, to contact the records custodian and requester to ascertain the relevant facts and discuss the applicable law. The findings of the attorney or intern are then reported to the Supervisor to assist in making a decision. The records custodian will receive an administrative order if the Supervisor determines that records are being improperly withheld or the proposed fee is excessive.<sup>109</sup> If the records custodian does not comply with an order issued by the Supervisor, the case may be referred to the Office of the Attorney General or appropriate district attorney for enforcement.<sup>110</sup>

### **Records Management**

As the chief information officer for the Commonwealth, Secretary of the Commonwealth William F. Galvin recognizes the importance of maintaining records properly. With this understanding, the Secretary strongly encourages the creation, adoption and implementation of a formal, written Records Management Program that includes specific standards for both paper and electronic records.

In accordance with regulations promulgated by the Records Conservation Board, each agency of the Commonwealth is required to submit Form RCB-4 on an annual basis. This Form states the name and title of each agency's designated records management officer or Records Liaison Officer (RLO).

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<sup>108</sup> 950 C.M.R. 32.06(f).

<sup>109</sup> G. L. c. 66, § 10(b).

<sup>110</sup> G. L. c. 66, § 10(b); 950 CMR 32.09.

If you need assistance filing out this form, would like additional information or require assistance in creating a proper Records Management Program, please contact the Records Management Unit of the Massachusetts Archives at 617-727-2816 or the Public Records Division at 617-727-2832.

## **Electronic Records Storage**

The Supervisor and the Division are working diligently to develop and implement electronic storage standards. At the time of this writing, however, the Commonwealth has not yet adopted formal standards for the storage, retrieval and maintenance of long-term electronic records. Therefore, no agency or municipality is permitted to store records with a retention period of more than ten (10) years exclusively electronically. All paper originals must be maintained pursuant to the applicable retention period for that document.

Records with a retention period of less than ten (10) years may be stored exclusively electronically once the agency's computer storage system has been approved and the proper Destruction Schedules have been submitted and approved. State agencies must submit forms RCB-1E and RCB-2E to the Records Conservation Board (RCB) (see below discussion). Municipalities must submit a plan to the Supervisor for approval, pursuant to the appropriate retention schedule. If you have any questions regarding electronic records and storage, please do not hesitate to contact the Records Management Unit at 617-727-2816.

## **Records Retention**

It is the responsibility of government employees who create, receive and maintain public records to ensure their safekeeping and availability to the public. The governmental officer or employee who in the normal course of his duties has access to or control of public records is defined as the records custodian.<sup>111</sup> A records custodian's responsibility extends to all records that are within his routine access or control.

A records custodian's obligations include not only responding to public records requests but also ensuring that records will be available for review when requested. Therefore, a records custodian may not dispose of records until the retention period for the specific records series has expired, and disposal of records has been approved by the Supervisor or the RCB.

Retention schedules, as well as information on records management, including permission forms for disposal of records, may be accessed through the Secretary of the Commonwealth's website. Specifically, this information can be found on the homepage of the homepage of the Records Management Unit, <http://www.sec.state.ma.us/arc/arcrmu/rmuidx.htm>.

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<sup>111</sup> 950 CMR 32.03.

The RCB has been empowered “to require all departments of the Commonwealth to report to it what series of records they hold, to set standards for the management and preservation of such records, and to establish schedules for the destruction, in whole, or in part, and transfer to the archives or another appropriate division within the office of the state secretary, in whole, or in part, of records no longer needed for current business.”<sup>112</sup>

The Records Management Unit was created to provide records management services and outreach to all state agencies and municipalities to help them meet state record-keeping standards and requirements. The Records Management Unit can provide agencies with retention schedules for specific records, as well as information on proper disposal and destruction of records.

## **Records Disposal Schedules**

There are records disposal schedules for state agencies and municipal agencies. Schedules describe records created as a result of a particular activity; identify the content of the record; describe how the record is used; and specify the lifecycle of the information.

### ***Municipal Government***

The Records Management Unit has published 28 different records disposal schedules. Schedules are available for the following departments and boards. If your department is not listed below, please see the Administration and Personnel schedule for records held in common by various departments. If you have records not listed on these schedules, please contact the Records Management Unit for suggested retention periods at 617-727-2816.

Accountant/Auditor	Historic District Commission
Administration and Personnel	Licensing Board
Board of Assessors	Planning Board
Board of Appeals	Police Department
Board of Health	Public Library
Building Inspector	Purchasing
City Clerk	Retirement Board
Collector	School Department
Conservation Commission	Sealer of Weights and Measures
Council on Aging	Selectmen
Department of Public Works	Shellfish Constable
Fire Department	Town Clerk
Fire District	Treasurer
Historical Commission	Veterans' Service Agent

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<sup>112</sup> G. L. c. 30, § 42 (defining the composition and duties of the Records Conservation Board).

Municipal Records may not be destroyed without the written permission of the Supervisor. For instructions and sample letter, see the instructions section of each department. The current disposal schedule for each of the above listed offices can be found by accessing the Records Management Division homepage ([www.sec.state.ma.us/arc/arcrmu/rmuidx.htm](http://www.sec.state.ma.us/arc/arcrmu/rmuidx.htm)) and clicking on the link to *Municipal Disposal Schedules and Instructions*.

### **State Government**

State records may not be destroyed without the permission of the RCB. State records custodians must be aware of the retention requirements for their records. The RCB has combined what were once many separate retention schedules into one document. The Statewide Records Retention Schedule may be used by state agencies in filing requests for destruction of records, as well as scanning, transferring and microfilming records. The current Statewide Records Retention Schedule is available on the Records Management Division homepage.

The following is a list of RCB forms (all of which are available for download on the Records Management Division homepage, [www.sec.state.ma.us/arc/arcrmu/rmuidx.htm](http://www.sec.state.ma.us/arc/arcrmu/rmuidx.htm)) via the link to *State Agency Forms*:

#### **RCB-1E**

##### ***Application for Systems Information Management Plan***

Use this form to obtain approval for a retention plan for electronic record keeping systems and databases.

#### **RCB-2E**

##### ***Application for Scanning and Destruction Permission***

Use this form in conjunction with a previously approved RCB-1E form.

#### **RCB-2**

##### ***Application for Destruction Permission***

#### **RCB-2M**

##### ***Application for Scanning and Destruction Permission***

Use this form for records required to be microfilmed before they are destroyed.

#### **RCB-2T**

##### ***Application for Transfer Permission***

Use this form to request permission to implement the transfer provisions. This form can be used for both transfer to the State Records Center and the Massachusetts Archives.

#### **RCB-4**

##### ***Records Liaison Officer Designation***

Use this form to appoint an authorized agent for Records Conservation Board business.

### ***Maintenance and Storage of Public Records***

Public records must be maintained and kept in a manner that allows by the general public, as they are subject to mandatory disclosure upon request.<sup>113</sup>

The Supervisor is responsible for ensuring that the records of the Commonwealth and municipalities are maintained and stored as required by law.<sup>114</sup> In accordance with this duty, the following procedures have been established to ensure security of and access to public records.

#### **1. Records Custodian**

Each municipal or governmental entity or agency shall have a designated “records custodian.” The town clerk shall serve as records custodian unless a particular board or committee appoints an individual who shall be in charge of maintaining, storing and keeping the public records of such agency or entity by local by-law or ordinance.<sup>115</sup>

#### **2. Original Records Removed from Municipal Offices**

- a. Whenever original public records are removed from municipal offices by a records custodian for use in the regular course of business to a private office or home, they shall be stored in fire-resistant devices and safes provided by the municipality.<sup>116</sup>
- b. If a records custodian cannot ensure fire-resistant storage outside of the municipal building then no original records may be removed. However, the records custodian may create copies of records for use in a private office or home.

#### **3. Original Records Created Outside of Municipal Offices**

- a. Whenever original public records are created outside the municipal offices, they shall be transferred on a regular and frequent basis to secure storage in the municipal building.

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<sup>113</sup> G. L. c. 66, § 10(a); see also Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979).

<sup>114</sup> See G. L. c. 66, § 1 (the Supervisor shall oversee preservation of the records of the Commonwealth, counties, cities, and towns).

<sup>115</sup> G. L. c. 66, § 7.

<sup>116</sup> G. L. c. 66, § 11.

- b. If secure storage is available in the records custodian's private office or home, then copies of the records shall be maintained in the municipal building, with the originals stored in secure storage at the records custodian's private office or home.

#### 4. Availability of Records Custodian

Whenever a records custodian finds it necessary to work, or to keep original public records, in a location other than the municipal building, he shall make himself, and the public records, available during regular posted office hours, at a location convenient to the general public, for inspection and copying of the public records. *Please note that in such situations, copies of the public records must also be maintained in the municipal building, in accordance with paragraph 2(b), above.* In those instances in which the governmental entity does not have regular business hours, a written notice shall be posted in a conspicuous location, listing the name, position, address and telephone number of the person to be contacted to obtain access to public records.<sup>117</sup>

#### 5. Transfer of Public Records upon Termination of Duties as Records Custodian

- a. Whenever a records custodian relinquishes his office or terminates his duties as records custodian, he shall deliver over to his successor all such public records that he is not authorized by law to retain.<sup>118</sup>

These procedures are designed to ensure the safekeeping of public records so that compliance with the Massachusetts Public Records Law by governmental entities is best accomplished.

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<sup>117</sup> 950 CMR 32.05(1).

<sup>118</sup> See G. L. c. 66, § 14.

## Appendix

The following provisions are not the official versions of the Massachusetts General Laws (MGL) or Code of Massachusetts Regulations (CMR). Reasonable efforts have been undertaken to assure the validity of the information provided at the time of publishing, however, do not depend on this information without first consulting an official edition of the MGL or CMR.

### Public Records Law

#### G. L. c. 4, § 7(26)

“Public records” shall mean 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, unless such materials or data fall within the following exemptions in that they are:

- (a) specifically or by necessary implication exempted from disclosure by statute;
- (b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;
- (c) 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;
- (d) 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;
- (e) 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;
- (f) 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;

- (g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;
- (h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;
- (i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;
- (j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefore, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;
- (l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;
- (m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a non-profit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

- (n) records including, but not limited to, blue prints, 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, the disclosure of which, in the reasonable judgment of the custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.
- (o) the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.
- (p) the name, home address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).
- (q) adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.
- (r) information and records acquired under chapter 18C by the office of the child advocate.
- (s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making,

selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

Any person denied access to public records may pursue the remedy provided for in section ten of chapter sixty-six.

## **Public inspection and copies of records**

### **G. L. c. 66, § 10 (2006 ed.)**

- (a) Every person having custody of any public record, as defined in clause twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expenses of such search. The following fees shall apply to any public record in the custody of the state police, the Massachusetts Bay Transportation Authority Police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages, plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven inch sheet of paper.
- (b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the

administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

- (c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.
- (d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of public safety and his agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty 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 therefore as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six 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 and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of social services, 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 a criminal justice agency as defined in section 167 of chapter 6. The name and home address

and telephone number 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 and telephone number 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 and home address and telephone number, 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.

### **1973 Mass Acts c. 1050, § 6**

The provisions of clause twenty-sixth of section seven of chapter four of the General Laws, as amended by section one of this act, shall not be construed to exempt any record which was a public record on the effective date of this act from said clause twenty-sixth.

### **Public Records Access**

**950 C.M.R. 32.00; G. L. c. 66, § 1 (2006 ed.)**

The Supervisor of Records shall adopt regulations pursuant to the provisions of chapter thirty A to implement the provisions of this chapter.

#### Section

32.01: Authority

32.02: Scope and Purpose

32.03: Definitions

32.04: General Provisions

32.05: Rights to Access

32.06: Fees for Copies of Public Records

32.07: Advisory Opinions

32.08: Appeals

32.09: Enforcement of Orders

(950 CMR 32.10 through 32.90: RESERVED)

#### **32.01: Authority**

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

### **32.02: Scope and Purpose**

950 CMR 32.00 shall be construed to ensure the public prompt access to all public records in the custody of state governmental entities and in the custody of governmental entities of political subdivisions of the Commonwealth, and to ensure 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.

### **32.03: Definitions**

As used in 950 CMR 32.00:

Custodian means the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.

Division means the Division of Public Records, Office of the State Secretary.

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. It shall not include the legislature and the judiciary.

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, unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7(26).

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.

Segregation time means the time used to delete or expurgate data which is exempt under G. L. c. 4, § 7(26) from non-exempt material which is contained in a paper public record.

Supervisor means Supervisor of Public Records.

**32.04: General Provisions**

- (1) Office address. All communications shall be addressed or delivered to:

*Supervisor of Records  
Office of the State Secretary  
One Ashburton Place, Room 1719  
Boston, Massachusetts 02108*

- (2) Office hours. The offices of the Division shall be open from 8:45 a.m. to 5:00 p.m. each weekday, Monday-Friday, excluding legal holidays.
- (3) Computation of Time. Computation of any period of time referred to in 950 CMR 32.00 shall begin with the first day following the action which initiates such period of time. 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 following business day.

**32.05: Rights to Access**

- (1) Access to Public Records. A custodian of a public record shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours. In governmental entities which do not have daily business hours, a written notice shall be posted in a conspicuous location listing the name, position, address and telephone number of the person to be contacted to obtain access to public records.
- (2) Promptness of Access. Every governmental entity shall maintain procedures that will allow at reasonable times and without unreasonable delay access to public records in its custody to all persons requesting public records. Each custodian shall comply with a request as soon as practicable and within ten days.
- (3) Requests for Public Records. Requests for public records may be oral or written. Written requests may be submitted in person or by mail. It is recommended that a record requester make a written request where there is substantial doubt as to whether the records requested are public, or if an appeal pursuant to 950 CMR 32.08(2) is contemplated. A custodian shall not require written requests merely to delay production.
- (4) Description of Requested Records. Any person seeking access to a public record or any portion thereof shall provide a reasonable description of the requested record to the custodian so that he or she can identify and locate it promptly. A person shall not be required to make a personal inspection of the record prior to receiving a copy of it. A custodian's superior knowledge of the contents of a governmental

entity's files shall be used to assist in promptly complying with the request.

- (5) **Prohibition of Custodial Requests for Background Information.** Except when the requested records concern information which may be exempt from disclosure pursuant to G. L. c. 4, §7(26)(n), a custodian may not require the disclosure of the reasons for which a requester seeks access to or a copy of a public record. A custodian shall not require proof of the requester's identity prior to complying with requests for copies of public records.
- (6) **Copies.** Upon request, a person at his or her election, shall be entitled to receive in hand or by mail one copy of a public record or any desired portion of a public record upon payment of a reasonable fee as determined by 950 CMR 32.06.

### **32.06: Fees for Copies of Public Records**

- (1) Except where fees for copies of public records are prescribed by statute, a governmental entity shall charge no more than the following fees for copies of public records:
  - (a) for photocopies of a public record no more than twenty cents (\$0.20) per page;
  - (b) for copies of public records maintained on microfilm or microfiche no more than twenty-five cents (\$0.25) per page;
  - (c) for requests for non-computerized public records a prorated fee based on the hourly rate of the lowest paid employee capable of performing the task may be assessed for search time and segregation time expenses, as defined by 950 CMR 32.03. In addition, a per page copying fee under 950 CMR 32.06(1)(a) and 950 CMR 32.06(1)(b) may be assessed;
  - (d) for computer printout copies of public records no more than fifty cents (\$0.50) per page;
  - (e) for a search of computerized records the actual cost incurred from the use of the computer time may be assessed;
  - (f) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed.
- (2) **Estimates.** A custodian shall provide a written, good faith estimate of the applicable copying, search time and segregation time fees to be incurred prior to complying with a public records request where the total costs are estimated to exceed ten dollars (\$10.00).



- (3) Postage. A custodian may assess the actual cost of postage.
- (4) Inspection of Public Records. A custodian may not assess a fee for the mere inspection of public records, unless compliance with such request for inspection involves “search time” in which case a fee under 950 CMR 32.06(1)(c) may be assessed.
- (5) Waiver of Fees. Every custodian, unless otherwise required by law, is encouraged to waive fees where disclosure would benefit the public interest.
- (6) Street Census Computer Tapes and Mailing Labels - Reproduction Fees for City and Town Committee Chairman.

Where “street list” data collected under G. L. c. 51, §§ 6-7, is compiled on computer tapes:

- (a) City or town registrars of voters shall provide, or cause their agents to provide, copies of said computer tapes to the chairman of each city or town committee for a fee of no more than one cent (\$0.01) per name, provided that a minimum fee of no more than ninety dollars (\$90.00) may be assessed. No fee assessed under 950 CMR 32.06(6)(a) shall exceed seven hundred fifty dollars (\$750.00).
- (b) City or town registrars of voters shall provide, or cause their agents to provide, sets of mailing labels made from said computer tapes to the chairman of each city or town committee for a fee of no more than two cents (\$0.02) per label, provided that a minimum fee of no more than fifty dollars (\$50.00) may be assessed.

### **32.07: Advisory Opinions**

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

### **32.08: Appeals**

- (1) Denial by Custodian. Where a custodian’s response to a record request made pursuant to 950 CMR 32.05(3) is that any record or portion of it is not public, the custodian, within ten (10) days of the request for access, shall in writing set forth the reasons for such denial. The denial shall specifically include the exemption or exemptions in the definition of public records upon which the denial is based. When Exemption (a) of G. L. c. 4, § 7(26) is relied upon the custodian shall cite the operational statute(s). Failure to make a written response within ten (10) days to any request for access shall be deemed a denial

of the request. The custodian shall advise the person denied access of his or her remedies under 950 CMR 32.00 and G. L. c. 66, § 10(b).

- (2) **Appeal to the Supervisor.** In the event that a person requesting any record in the custody of a governmental entity is denied access, or in the event that there has not been compliance with any provision of 950 CMR 32.00, the requester may appeal to the Supervisor within ninety (90) days. Such appeal shall be in writing, and shall include a copy of the letter by which the request was made and, if available, a copy of the letter by which the custodian responded. The Supervisor shall accept an appeal only from a person who had made his or her record request in writing. An oral request, while valid as a public record request pursuant to 950 CMR 32.05(3), may not be the basis of an appeal under 950 CMR 32.08.

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 from a requester where the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation. The Supervisor may decline to accept an appeal from a requester if, in the opinion of the Supervisor, the request is designed or intended to harass, intimidate or assist in the commission of a crime. The Supervisor may decline to accept an appeal from a requester if, in the opinion of the Supervisor, the public records request is made solely for a commercial purpose.

Appeals in which there has been no communication from the requester for six (6) months may be closed at the discretion of the Supervisor.

- (3) **Disposition of Appeals.** The Supervisor shall, within a reasonable time, investigate the circumstances giving rise to an appeal and render a written decision to the parties stating therein the reason or reasons for such decision.
- (4) **Presumption.** In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.
- (5) **Hearings.** The Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. Said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.08. Nothing in 950 CMR 32.08 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.
- (6) **In-camera Inspections and Submissions of Data.** The Supervisor may require an inspection of the requested record(s) *in-camera* during any investigation or any proceeding initiated pursuant to 950 CMR 32.08. The Supervisor may require the custodian to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.08.

The Supervisor does not maintain custody of documents received from a custodian pursuant to an order by this office to submit records for an *in-*

*camera* review. The documents submitted for an *in-camera* review do not fall within the definition of public records. See G. L. c. 66, §10(a) (2006 ed.). Any public record request made to this office for records being reviewed *in-camera* would necessarily be denied as the office would not be the custodian of those records. See 950 CMR 32.03 (defining “custodian” as the government employee who in the normal course of his duties has access to or control over records). Upon a determination of the public record status of the documents, they are promptly returned to the custodian.

(7) **Custodial Indexing of Records.** The Supervisor may require a custodian to compile an index of the requested records where numerous records or a lengthy record have been requested. Said index shall meet the following requirements:

- (a) the index shall be contained in one document, complete in itself;
- (b) the index must adequately describe each withheld record or deletion from a released record;
- (c) the index must state the exemption or exemptions claimed for each withheld record or each deletion of a record; and,
- (d) 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. Nothing in 950 CMR 32.08 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

(8) **Conferences.** At any time during the course of any investigation or any proceeding, to the extent practicable, where time, the nature of the investigation or proceeding and the public interest permit, the Supervisor, may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding.

### **32.09: Enforcement of Orders**

A custodian shall promptly take such steps as may be necessary to put an order of the Supervisor into effect. The Supervisor may notify the Attorney General or appropriate District Attorney of any failure by a custodian to comply with any order of the Supervisor.

REGULATORY AUTHORITY  
G. L. c. 66, § 1; 950 CMR 32.00.

## **Examples of Exemption (a) Statutes**

Abatement Applications: G. L. c. 59, § 60.

Address Confidentiality Program, Participant Applications and Supporting Documents: G. L. c. 9A, § 6.

Air Pollution Control (Trade Secrets): G. L. c. 111, § 142B.

Alcohol Treatment Records: G. L. c. 111B, § 11.

Bank Examination Records: G. L. c. 167, § 2.

Birth Reports: G. L. c. 46, § 4A.

Blind Persons, Commission for the Blind Register: G. L. c. 6, § 149.

Business Schools (Private), Financial Statements: G. L. c. 75D, § 3.

Capital Facility Construction Project Records: G. L. c. 30, § 39R.

Central Registry of Voters: G. L. c. 51, § 47C.

Conflict of Interest, Request for an Opinion: G. L. c. 268A, § 22.

Consumer Protection Investigation: G. L. c. 93A, § 6(6).

Councils on Aging, Names, Addresses and Telephone Numbers of Elderly: G. L. c. 40, § 8B.

Criminal Offender Record Information: G. L. c. 6, § 167.

Delinquency, Sealing by Commissioner of Probation: G. L. c. 276, § 100B.

Department of Social Services, Central Registry: G. L. c. 119, § 51F.

Department of Youth Services Records: G. L. c. 120, § 21.

Drug Addiction Treatment Records: G. L. c. 111E, § 18.

Employment Agencies, Data: G. L. c. 140, § 46R.

Employment Security Data: G. L. c. 151A, § 46.

Exemption of Legislature from Public Records Law: G. L. c. 66, § 18.

Evaluations of Special Needs Children: G. L. c. 71B, § 3.

Executive Sessions: G. L. c. 30A, § 11A; G. L. c. 34, § 9F; G. L. c. 39, § 23B.

Fetal Death Reports: G. L. c. 111, § 202.

Firearms Bureau Records: G. L. c. 66, § 10(d).

Gas and Electric Affiliated Company Records: G. L. c. 164, § 85.

Genetically Linked Diseases, Testing Records: G. L. c. 76, § 15B.

Hazardous Substances Reports: G. L. c. 111F, § 21.

Hazardous Waste Management Records: G. L. c. 21D, § 6.

Hazardous Waste Facilities: G. L. c. 21C, § 12.

Historical and Archaeological Sites and Specimen Inventory: G. L. c. 9, § 26A (1).

Home Addresses and Telephone Numbers of Public Safety Personnel, Victims of Adjudicated Crimes and Persons Providing Family Planning Services: G. L. c. 66, § 10.

Hospital Records: G. L. c. 111, § 70.

Hospitals, Reports of Staff Privilege Revocation: G. L. c. 111, § 53B.

Impounded Birth Records: G. L. c. 46, § 2A.

Inspector General Investigations, Records: G. L. c. 12A, § 13.

Juvenile Delinquency Case Records: G. L. c. 119, § 60A.

Library Circulation Records: G. L. c. 78, § 7.

Malignant Disease Reports: G. L. c. 111, § 111B.

Massachusetts Commission Against Discrimination Investigatory Files: G. L. c. 151B, § 5.

Massachusetts Technology Development Corporation, Corporate Records: G. L. c. 40G, § 10.

Mental Health Facilities Records: G. L. c. 123, § 36.

Merit Rating Plans, Motor Vehicle Insurance: G. L. c. 6, § 183.

Native American Burial Site Records: G. L. c. 9, § 26A (5).

Natural Heritage Programs, Data Base: G. L. c. 66, § 17D.

Patient Abuse Information; Intermediate Care Facilities for Mentally Retarded Citizens, Convalescent, Nursing or Rest Homes: G. L. c. 111, § 72I.

Patient's Rights to Confidentiality of Records; Medical and Mental Health Facilities: G. L. c. 111, § 70E.

Protective Services Records, Aged Persons: G. L. c. 19A, § 23.

Public Assistance Records, Aged Persons, Dependent Children, Handicapped Persons: G. L. c. 66, § 17A.

Public Assistance, Wage Reporting System Information: G. L. c. 62E, § 8.

Rape Reports: G. L. c. 41, § 97D.

Reyes Syndrome Report: G. L. c. 111, § 110B.

Sex Offender Registry, Requests for Registry Information: G. L. c. 6, § 178I.

Street Lists, Children Aged 3-17, Court Order Granting Protection: G. L. c. 51, § 4(a), (d).

Student Records: G. L. c. 71, § 34D, 34E.

Tax Returns: G. L. c. 62C, § 21.

Venereal Disease Records: G. L. c. 111, § 119.

Vocational Rehabilitation Records: G. L. c. 6, § 84.





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