


Public Records Law


Town of Norton
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Introduction

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- What is referred to as the Public Records Law is a combination of the following:
 - G.L. c.66, §10 (Public Records Requests)
 - G.L. c.4, §7, clause 26 (the exemptions)
 - 950 CMR 32.00, et seq. (the Public Records Access Regulations)
 - Other statutes specifically addressing the public records status of the records to which they relate




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Presumption

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- There is a presumption that all records of a municipality are public records in their entirety, subject to mandatory disclosure upon request, unless falling within one of the strictly and narrowly construed exemptions to the Public Records Law
- The law applies to any kind of "document" made or received by a public officer or employee, including papers, maps, recordings or computer data.




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Introduction, cont.

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- In other words, it is the nature of the information that makes something a public record, not the form that the record takes.
- Carrying the presumption forward, if some but not all of the information can be withheld, the remaining information must be disclosed.
- The burden is on the custodian to justify the application of an exemption.




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Public Records Requests

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- Any person may request a copy of a public record from a record custodian.
- The request may be in person and/or in writing.
- A person may make a request for records over the phone, but such a request does not trigger the requirements of the Public Records Law.
- A custodian may not require a person to put their request in writing.




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Requests, cont.

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- A "custodian" is the person with regular access to and control over a record.
- There can be more than one record custodian.
- A custodian cannot ask a requester what the reason is for their request (although this answer is slightly different with respect to exemption (n)).



[Requests, cont.]

- A records custodian is supposed to use his or her superior knowledge of the records (of municipal government) to assist the requester.
- If a requester addresses the request to the incorrect custodian, the request should be forwarded to the correct custodian.
- If a requester doesn't word their request "just right" the custodian must use their superior knowledge to assist the requester to access the information sought.



[Responses]

- A custodian has 10 calendar days from receipt of the request to provide a response.
- If the final day of the 10-day period falls on a holiday, the period is extended to the next business day
- A response is not necessarily, by may be, provision of the requested records.



[Responses]

- A custodian may:
 - Make the records available for inspection if that is what is requested;
 - Produce copies of the requested records;
 - Provide an estimate of up-front search, segregation and copying costs (and, if the response is estimated to cost more than \$10.00, then an estimate must be provided);
 - Deny the request or a portion thereof in writing; and/or
 - Some combination of the above.



[Responses]

- The requester dictates the format in which responsive records will be provided to the extent that the records exist in that format
- If the records exist in the requested format, the requester is entitled to the same, provided that any applicable fee has been paid
- Fees for access to records are addressed in G.L. c.66, §10 and the Public Records Access Regulations



[Fees]

- A custodian may charge for the time necessary to locate and copy records, and/or to redact records at the pro-rated hourly rate of the lowest paid person capable of doing the work.
- A custodian may charge:
 - \$.50 per page for computer printouts
 - \$.20 per page for photocopies
 - Actual cost for a record not susceptible to ordinary means of copying, such as blueprints.



[Denial]

- If a custodian denies a public records request or portion thereof, the burden is on the custodian to explain in writing the application of the exemption.
- This is not simply a recitation of the exemption, but a description of the way the law applies to the facts at hand.



[Enforcement]

- A denial of access to public records, or provision of an estimate that a requester is dissatisfied with, may be appealed to the Supervisor of Public Records within 90 days.
- The Supervisor may issue an order requiring compliance with the law, or determine that the custodian complied with the law.
- If the custodian does not comply with an order of the Supervisor, the matter may be referred to the Attorney General for enforcement.
- There are times when the Supervisor of Public Records and the Attorney General disagree as to the application of the law.



[Enforcement]

- A requester may also appeal a denial of access to records directly to the Superior Court, as the Superior Court has concurrent jurisdiction.
- It is becoming more common to see a public records, open meeting or conflict of interest count added to an appeal of a land use decision.



[Exemptions]

- There are 18 exemptions to the Public Records Law found in G.L. c.4, §7, clause 26th, although several of them are asserted more frequently than others.
- The exemptions are a reflection of policy determinations made by the General Court, and often involve:
 - A balancing of the public's right to know with individual privacy
 - A balancing of the public's right to know with the municipality's ability to operate as a corporate citizen



[Exemption (a)]

- Known as the statutory exemption, and provides that a record may be withheld if a statute "specifically or by necessary implication" exempts it from disclosure.
- The exemption applies when a statute specifically provides that a record is not a public record or when it limits disclosure to specific parties. Examples are CORI, abatement applications, Open Meeting Law.



[Exemption (c)]

- Known as the "privacy exemption" and has two separate and distinct clauses.
- The first clause applies to medical or personnel records and provides that such records are absolutely exempt from disclosure.



[Exemption (c)]

- In Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000), the Supreme Judicial Court held that personnel records are records that would be helpful in making determinations regarding hiring and firing, including resumes and job applications.
- Query how this decision and the recent amendments to the Open Meeting Law relate.



[Exemption (c)]

- The second clause applies to records that are "personal in nature" and refer to a specific individual. This clause requires a balancing of the public's right to know with the privacy rights of the individual at issue.
- This clause protects records containing intimate details highly personal in nature such as parental status, marital status, substance abuse, government assistance, family disputes and reputation.



[Exemption (d)]

- Known as the policy or deliberative process exemption, the exemption applies to "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".
- The exemption is applicable to documents created prior to a officer, employee or board taking final action or making a final decision.
- Exemption (d) allows withholding of certain litigation or pre-litigation materials.
- Exemption (d) may also allow withholding of communication between governmental entities to the extent that they are developing policy together.



[Exemption (f)]

- Known as the investigatory exemption, this exemption applies to "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."
- In addition, this exemption protects from disclosure the names and identifying details of voluntary witnesses and complainants.



[Exemption (n)]

- This exemption allows a records custodian who believes that disclosure is "likely to jeopardize public safety" to withhold records including, but not limited to, "blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons, buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth."



[Exemption (n)]

- Although a records custodian is generally prohibited from inquiring as to the identity and motivation of a requester, it is within the discretion of the records custodian to deny access to such records if the custodian believes that disclosure may jeopardize public safety.
- Thus, a custodian may inform a requester that if the requester wishes to volunteer additional information about the request or motivation therefor, the custodian may be able to evaluate the request differently.
- In no case, however, may a custodian require the provision of additional information.



[Exemption (o)]

- This exemption allows a municipality to withhold 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".
- It is arguable that this exemption allows, but does not require, withholding of the home addresses and telephone numbers of all municipal employees, including elected and appointed officials, in records identifying the employees as such.
- Query how this statute interacts with other statutes requiring disclosure of certain address information, such as the street list, voter list, zoning appeals, etc.



[Records Retention]

- Municipal records must be retained for seven years, or according to the applicable "records disposal schedule" adopted by the Supervisor of Public Records. G.L. c.66, §8.
- Most records may not be disposed of without the prior permission of the Supervisor of Public Records.



[Records Retention]

- The Supervisor of Public Records recently issued a new Municipal Records Disposal Manual that includes all of the applicable disposal schedules and is available at the Secretary of the Commonwealth's Municipal Archives Division page, or at the following link:
http://www.sec.state.ma.us/arc/arcpdf/MA_Municipal_Records_Retention_Manual.pdf



[Records Retention]

- Examples of permanent records include: Town Meeting warrants, meeting minutes, and reports of town officers. G.L. c.66, §8.
- Meeting minutes must be maintained in written form.
- Although an audiotape may be utilized to assist in preparing written minutes, such a format is not appropriate for permanent storage of the record given that it may deteriorate.
- Audiotapes of minutes, may be erased, taped over or destroyed once written minutes of the hearing have been approved.



[Records Retention]

- There are both criminal and civil penalties for the unlawful destruction of public records.



[Topical Issues]

- E-mail, document creation, unlisted telephone numbers, grandfather clause, the Open Meeting Law, and attorney-client privilege, are all issues that have public records implications.



[E-mail]

- E-mail is a public record to the same extent that all other records held by a municipality are public records, unless material in the e-mail is exempt from disclosure.
- As with any other record, e-mail should be retained pursuant to the appropriate records disposal schedule.



[E-mail]

- If e-mail may properly be deleted, be sure that deletion is actually accomplished - deletion alone may not expunge it from system (see SPR Bulletin 1-99)
- As with any record, if an e-mail exists and is requested, it must be produced unless falling within one of the applicable exemptions to the Public Records Law.



[E-mail]

- For purposes of the Public Records Law, if the e-mail relates to public business it does not matter where the record was created or where it was received.
- As a result, if a municipal official or employee receives or creates an e-mail on their home computer that relates to municipal business, that e-mail is a public record subject to disclosure upon request.



[E-mail]

- To avoid the risk of improperly deleting e-mails relative to municipal business that reside on a home computer, it may be helpful to have a policy relative to the same.
- Such policy may, for example, include a requirement that all municipal employee or official e-mail created outside of Town Hall be copied to a Town Hall employee or may mandate that municipal officials and employees working outside of Town Hall print their e-mails and deliver them on a weekly basis to Town Hall.



[E-mail]

- To the extent that e-mails made or received by a governmental official or employee are public records subject to mandatory disclosure upon request, consideration should be given to the content of such e-mails.
- For example, municipal officials and employees should consider whether to include personal information or banter in an e-mail, as it is possible that such e-mail may ultimately require disclosure. While an exemption to the Public Records Law may be applicable to such personal information, disputes regarding the status of such information can be time consuming and embarrassing.



[Creation of a Document]

- A custodian cannot be compelled to create a document or to answer questions.
- However, if the custodian does choose to create a record, the custodian is not bound by the Public Records Law and regulations promulgated thereunder with regard to the fee.
- In other words, the custodian may charge whatever it likes to create the record, although the fee charged must reflect the cost to the custodian to create the record. See Emerson College v. City of Boston, 391 Mass. 415, (1983).



[Unlisted Telephone Numbers]

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



Grandfather Clause

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



Attorney-client Privilege

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



Attorney-client Privilege

- The Suffolk Construction decision sets out the following test for determining whether a particular communication may be withheld from disclosure on the basis of attorney-client privilege:
 - (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such;
 - (2) the communications were made in confidence; and
 - (3) the privilege as to these communications has not been waived.
- Municipal officials wishing to assert this privilege must therefore be prepared to demonstrate that each of these elements has been met.



Attorney-client Privilege

- There are still many unanswered questions regarding the attorney-client privilege in this context, particularly with regard to the manner in which it will interact with the Public Records Law.
- It is possible, therefore, that excessive invocation of the privilege may create an appearance that a board or official is attempting to circumvent the requirements of the so-called "sunshine laws" that protect the general public's access to the decisions of government.
- In order to avoid litigation over the scope of the privilege, care should be taken to ensure that legitimate and compelling reasons exist to withhold from disclosure documents such as opinions of counsel, where prior to the Suffolk Construction decision, such documents were often considered public records.



Open Meeting Law

- The new Open Meeting Law (OML) contains several provisions that affect the interpretation of the Public Records Law.
- The OML provides that all records used by a board at a meeting are public records. Consistent with past practice, the use must be substantive, rather than a simple reference.



Open Meeting Law

- The OML states that even though documents used at an open session are public in their entirety, materials used by a public body in a performance evaluation of an individual bearing on his professional competence may be withheld as personnel records, provided they were not created by the members of the body for the purposes of the evaluation.



[Open Meeting Law]

- The OML provides further that materials used by a public body in deliberations about employment or appointment of individuals, including applications and supporting materials may be withheld from disclosure as personnel records.
- However, if a resume is used by the public body in deliberations about employment or appointment of individuals, the resume shall not be exempt from disclosure.



[Open Meeting Law]

- The OML now provides that when the purpose for which a valid executive session was held has been served, including strategy with respect to negotiations with non-union personnel, collective bargaining or litigation, or the actual conduct of negotiations or collective bargaining negotiations the minutes, preparatory materials and documents and exhibits of the session shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.



[Open Meeting Law]

- Further, the OML requires that executive session minutes be reviewed at reasonable intervals by the Chair to determine whether they can continue to be withheld.
- Upon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the public body is required to respond to the request within 10 days following receipt of the requests and shall release any such minutes not covered by an exemption
- However, if the Chair has not performed a review as set forth above, the public body shall perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. A public body shall not assess a fee for the time spent in its review.



[Open Meeting Law]

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



[Summary]

- The Public Records Law establishes a presumption that all records are public and available to the public upon request.
- If a custodian wishes to withhold the same, the burden is on the custodian to prove the applicability of the exemption.
- Records must be maintained in accordance with applicable record disposal schedules
- It can prove quite useful to have a generally applicable policy with respect to the process for responding to requests, e-mail use and retention, and records retention generally.



[Resources]

- Secretary of State's Public Records Division:
 - (617) 727-2832; or
 - <http://www.sec.state.ma.us/pre/>

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