

**Municipal Law Alert
June 2016**

OVERVIEW OF AMENDMENTS TO PUBLIC RECORDS LAW

Below is a summary of the pertinent changes to the Public Records Law, which will become effective January 1, 2017:

Records Access Officers

- The legislation requires each municipality and government agency subject to the Public Records Law to designate at least one Records Access Officer – this is a newly created position that did not exist under the old law. For a municipality, this may be the city/town clerk, the clerk’s designee(s), or an appointee of the chief executive officer of the municipality. The Records Access Officer is separate from the records custodian.
- The Records Access Officer is responsible for coordinating responses to public records requests and facilitating the resolution of requests. A Records Access Officer must: assist requestors; assist records custodians to preserve public records; and establish guidelines to assist requestors in making informed requests about the availability of records.
 - These guidelines must be periodically updated and include a list of the categories of records that the municipality or agency maintain, and be posted on the website of the municipality or agency.
 - Municipalities have until July 1, 2017 to post such guidelines or reference materials on their website.
- The Records Access Officer’s contact information must be conspicuously posted at the office and on the agency/municipal website, including name, business address, business telephone number, and business email address.

Responding to Requests

- Making a request: A request shall be made to the Records Access Officer as follows: hand delivery; first class mail; or email. Upon receipt, the Records Access Officer responds to a public records request.



Municipal Alert June 2016

- Procedures for responding:
 - Within 10 business days after receiving a request:
 - The Records Access Officer or his/her designee may allow inspection or provide a copy of the public record (or the non-exempt portion of it), if: (1) the requested record is reasonably described; (2) the requested record is in the possession, custody or control of the agency or municipality; and (3) a reasonable fee is paid.

OR

- The agency or municipality may indicate that: (1) it does not intend to allow inspection or provide a copy of the public record, such as if an exemption applies; or (2) that it cannot comply within the 10 business day deadline because of an undue burden on the other duties of the agency or municipality due to: (a) the magnitude or difficulty of the request; or (b) the requestor has made multiple requests. In this case, the response must occur by first class mail or email and contain the following:
 - A confirmation of the request;
 - A description of the records or categories of records outside the possession, custody or control of the agency or municipality and, if known, the identity of the agency or municipality that has possession, custody or control of the records;
 - A description of what is being withheld and the specific reasons for withholding, including the exemption(s) for withholding;
 - A description of the records or categories of records (or portions) that will be produced, along with a detailed statement explaining why the magnitude or difficulty of the request burdens the other duties of the agency or municipality and additional time is necessary;
 - A reasonable timeframe to produce the records, which is up to 25 business days from the initial request (for a municipality) or up to 15 business days from the initial request (for an agency), although the requestor can voluntarily consent to a larger deadline for receiving the records;
 - A reasonable modification of the scope or the request or an offer to help the requestor provide a response on a more proficient and less costly basis;
 - The itemized, good faith estimate of the charges for responding to the request; and



Municipal Alert June 2016

- A statement of the right to appeal to the Supervisor of Public Records and the right to seek judicial review through a civil action in the Superior Court.
- Request for additional time to respond: Where the 25 business day (for a municipality) or the 15 business day (for an agency) time period is insufficient, the Records Access Officer may petition the Supervisor of Public Records for additional time to respond.
 - This petition must be filed within 20 business days from receipt of the original request or 10 business days from receiving a decision by the Supervisor of Public Records that a record is a public record.
 - The Supervisor of Public Records may grant a single extension of up to 30 business days (for a municipality) or 20 business days (for an agency).
 - In deciding whether to grant an extension, the following factors are considered:
 - The need to search for, retrieve, redact and/or examine records;
 - The amount of redaction entailed;
 - The ability or the normal business hours of the municipality or agency to comply without an extension;
 - The actions taken to respond to the pending request and prior requests;
 - If the request, on its own or in conjunction with other requests by the same requestor, is frivolous or for purposes of harassment or intimidation; and
 - The public interest in a prompt disclosure.
 - A longer extension may be provided or no response may be required if the request is among multiple contemporaneous requests that are frivolous or it is for purposes of intimidation or harassment, and it does not involve broadly distributing information about actual or alleged government activity.
- The requester cannot be required to state the reasons for a request, except: (1) to determine if the request is for a commercial purpose; or (2) to evaluate a fee waiver request.



Municipal Alert June 2016

Fees

- Reasonable fees can be charged, unless the records are freely available for public inspection. The reasonable fees are capped at the actual cost of production.
- Fees can only be charged if the Records Access Officer responds to the request within 10 business days of initial receipt of the request.
- The Records Access Officer can deny a request if the requestor did not pay the costs for public records produced in response to an earlier request – the itemized outstanding balance from prior requests must be stated, along with the reasons for denial.
- Upon a proper showing, the Records Access Officer can waive or reduce the fee: if the request serves the public interest and is not primarily for commercial purposes; or if the requestor does not have the financial ability to pay the full fee.
- The records can be produced on a storage device or material, charged at the actual cost of the device.
- Copies are limited to 5 cents per page, for black and white copies or print outs, either single or double-sided.
- Employee time includes the time for employees and other vendors, such as outside attorneys, technology consultants, payroll consultants, and other vendors. Employee time may be charged as follows:
 - Agencies: If employee time to respond exceeds 4 hours (*i.e.*, search, retrieval, segregation, redaction and production), the hourly rate of the lowest paid employee that can perform the task may be added to the estimate, subject to the following: (1) the rate is capped at \$25 per hour; (2) the first 4 hours are at no charge; and (3) segregation or redaction is only charged if required by law or the Supervisor of Public Records allows the charge.
 - Municipalities: If employee time to respond exceeds 2 hours (*i.e.*, search, retrieval, segregation, redaction and production), the hourly rate of the lowest paid employee that can perform the task may be added to the estimate, subject to the following: (1) the rate is capped at \$25 per hour unless the Supervisor of Public Records allows a greater hourly rate to be charged; (2) the first 2 hours are at no charge, if the



Municipal Alert June 2016

municipality's population exceeds 20,000 persons; and (3) segregation or redaction is only charged if required by law or the Supervisor of Public Records allows the charge.

- Petition by agency or municipality: An agency or a municipality may petition the Supervisor of Public Records in order to charge for segregating or redacting content; a municipality may also petition to charge more than \$25 per hour. The petition may be granted if the request is for commercial reasons or contains an actual and good faith response to the request and is necessary and reasonable. An adverse decision may be judicially reviewed in Superior Court.

Electronic Records

- Records must be produced electronically – unless the record is not kept electronically or the requestor is unable to receive or access electronic records.
- To the extent feasible, records must be provided in the format desired by the requestor. If the requestor has not stated a desired format, then the record is to be provided “in a searchable, machine readable format.”
- A Records Access Officer can respond to a request through providing “reasonable assistance” in identifying the record if it is located on a public website.
- Agencies must provide certain electronic records on a searchable website (subject to redacting exempt content). These records include: final opinions, decisions, orders or votes from proceedings; annual reports; notices of proposed regulations; notices of hearings; successful bids for public contracts; awards of federal, state and municipal government grants; open meeting minutes; agency budgets; and other information determined to be appropriate to post on the website.
- To the extent feasible, a municipal Records Access Officer must post the following commonly available electronic records on the municipal website (subject to redacting exempt content): final opinions, decisions, orders or votes from proceedings; annual reports; notices of proposed regulations; notices of hearings; successful bids for public contracts; awards of federal, state and municipal government grants; open meeting minutes; agency budgets; and other information determined to be appropriate to post on the website.



Municipal Alert June 2016

Record Keeping for Public Records Requests

- The Records Access Officer must keep track of information relating to requests: nature of the request; dates when the request was received, when a response occurred, and when the public record is produced; number of hours to complete request; charges; time to respond to an order by the Supervisor of Public Records; petitions to the Supervisor of Public Records for permission to charge for segregation/redaction time or to charge more than \$25 per hour; appeals to the Supervisor of Public Records; final determinations from the judicial review of public records matters.
- The Secretary of the Commonwealth shall collect the foregoing information annually, publish it on its website, and report it to the Clerks of the House of Representatives and Senate.

Remedies

- A requestor can petition the Supervisor of Public Records for a decision when the agency or a municipality does not comply with, or provides a response in violation of, the Public Records Law. A requestor can seek judicial review of the decision by the Supervisor of Public Records.
 - The Supervisor of Public Records can request enforcement by the Attorney General if an agency or municipality declines or fails to comply with an order, which may include an action to compel compliance in Superior Court.
- A requestor can directly commence a civil action in Superior Court. The Attorney General may intervene in a civil action filed by a requestor.
- If a civil action is commenced in Superior Court:
 - An injunction may be issued.
 - Reasonable attorney's fees and costs may be awarded to the requestor. Such attorney fees and costs are generally awarded if there is a judicial order of relief, a consent decree, or the records are produced after the civil action is commenced – unless a statutory exemption applies and the Superior Court makes written findings. There is a presumption that attorney's fees and costs are to be awarded.



Municipal Alert June 2016

- The Superior Court must make written findings stating the reasons if attorney’s fees and costs are not awarded; the grounds for not awarding attorney’s fees and costs are as follows: (1) there is no violation of the Public Records Law; (2) there is reasonable reliance by the agency or municipality upon a published opinion from a Massachusetts appellate court or the Attorney General involving “substantially similar facts”; (3) the request was for the purpose of harassment or intimidation; or (4) the request did not serve the public interest and was for a solely commercial purpose (and not to provide information to the public about actual or alleged governmental activity).
- The Superior Court must order a waiver of any fees for producing records if it awards attorney’s fees and costs to the requestor. The Superior Court may order a waiver of fees in other circumstances, provided it issues findings stating its reasoning.
- The Superior Court may order punitive damages (between \$1,000 and \$5,000) if it determines that the agency or municipality did not act in good faith by withholding or failing to timely comply with a public records request or by requested an unreasonable fee.

Storage of Public Records

- Records custodians may execute contracts to store records, either physical or through an electronic record keeping system or database. These contracts cannot prevent or unduly limit the ability of a Records Access Officer or a records custodian from providing or storing records as required by the Public Records Law.
- An electronic system or database must, to the extent feasible, provide data in a commonly available electronic, machine readable format and permit information storage and recall procedures to enable the segregation and location of public records and redaction in order to provide maximum public access.



**Municipal Alert
June 2016**

Statutory Exemptions from Disclosure

- The legislation broadens the scope of Exemptions (o) and (p) to also include the personal email address of most government employees and family members of state employees.

For a discussion of these and other legal issues, please visit our website at www.mhtl.com. To receive legal updates via e-mail, contact information@mhtl.com.

If you have any questions about this issue, please contact Brandon H. Moss, Esq. or the attorney responsible for your account, or call (617) 479-5000. The firm conducts trainings and advises clients on the Massachusetts Public Records Law and other areas of municipal governance.

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