

A Guide to the Massachusetts Public Records Law



Published by
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Division of Public Records

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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 a specifically stated exemption.

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 access Division of Public Records publications and other information at 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 and title.

William Francis Galvin
Secretary of the Commonwealth

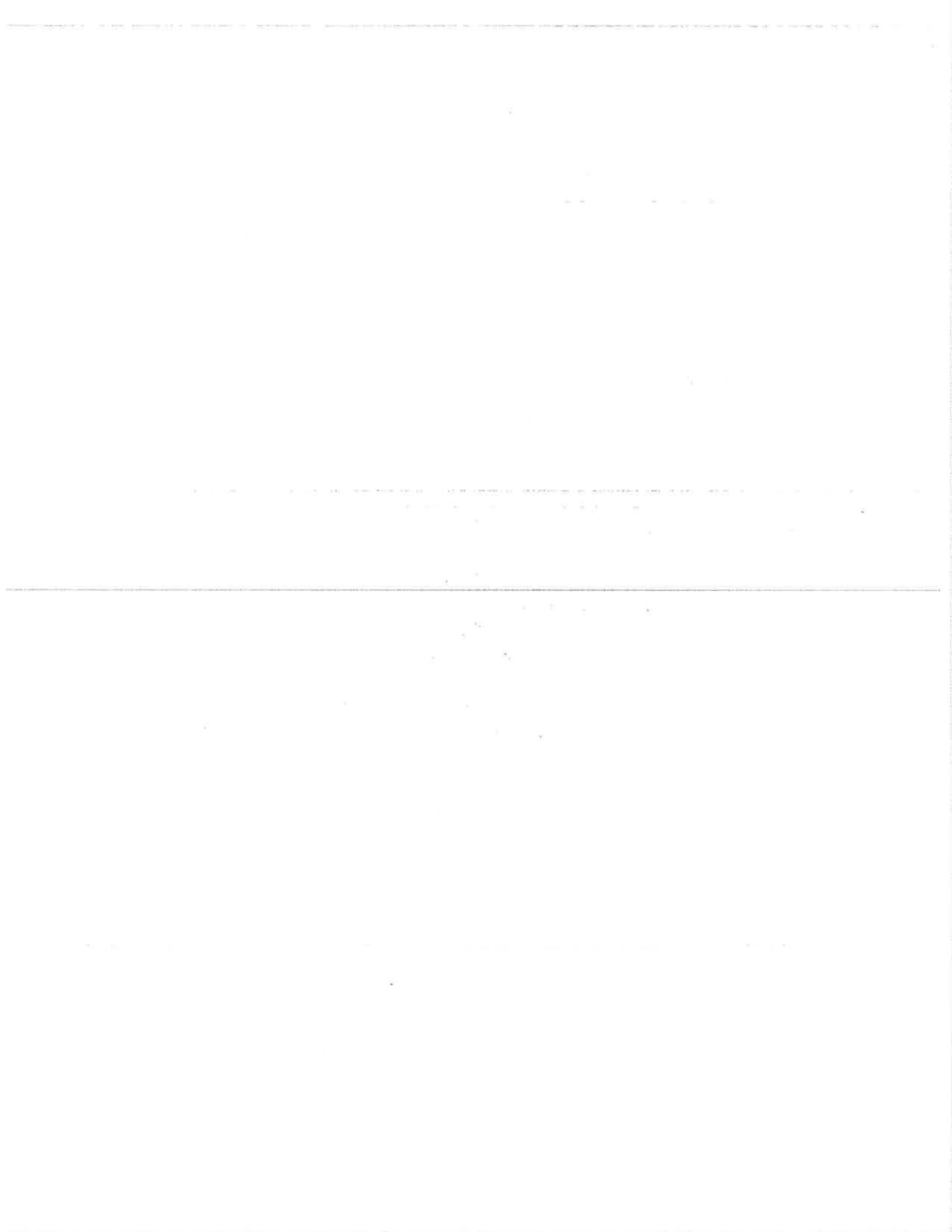


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Frequently Asked Questions

What is the difference between the federal Freedom of Information Act and the Massachusetts Public Records Law?

The federal Freedom of Information Act 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.

Who can help me with questions regarding the Public Records Law?

The Division of Public Records (Division) has always provided an “attorney of the day” to assist any person seeking information regarding the Public Records Law.

The hours of operation for the Division are Monday-Friday, with the exception of holidays, from 8:45 a.m. to 5:00 p.m. The telephone number for the Division is (617) 727-2832, and the email address is pre@sec.state.ma.us.

What is a “public record”

Every record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part.

Specific statutory exemptions have been created by the legislature. There are non-statutory exemptions as well called common law exemptions. Non-statutory exemptions include the common law attorney client privilege and the work product privilege. These exemptions permit the agency or municipality to withhold a record from the public. A records access officer (RAO) must prove with specificity why it should be allowed to withhold any public record.

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

How do I find the records I seek?

A person seeking access to government records must obtain them from the government office that created or received the records.

Does the Division of Public Records have my records?

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.

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To obtain public records a person must directly contact the municipal or state agency office that is the custodian of the sought for records.

Does the Public Records Law apply to court, legislative or federal records?

The Public Records Law does not apply to records held by federal agencies, the legislature or the courts of the Commonwealth. Accordingly, the Supervisor is unable to assist requesters seeking such records.

What is a Records Access Officer?

A Records Access Officer (RAO) is the person responsible for responding to requests for public records. Information on how to contact an RAO is usually available on the website for the applicable municipal or state entity holding the records sought by requesters.

What is a records custodian?

A records custodian means any governmental entity that makes or receives public records.

How do I obtain copies of public records?

To obtain a copy of a record, you must make a request to the RAO for the municipal or state agency that you believe has records you are seeking.

What do I do if my request is denied?

An RAO must respond to your request as determined by the Public Records Law. If the RAO fails to respond or denies a request, a requester may appeal the matter to the Supervisor within ninety days.

Under the Public Records Regulations, all appeals to the Supervisor must include a copy of the original request, any response by the RAO and a statement indicating the reason for the appeal. The requester must also provide a copy of the appeal petition to the RAO.

May I also go to court to seek public records?

A requester may also commence a civil action in superior court to enforce the requirements of the Public Records Law. Where applicable, the superior court may award reasonable attorney's fees and costs in cases where the requestor obtains relief.

My appeal was closed because I did not provide the necessary information. What do I do now?

The Supervisor will close an appeal without a finding if a requester fails to provide a copy of the request or the response. The Supervisor will close an appeal without a finding if the requester fails to provide a copy of the request to the RAO, or fails to provide a copy of the petition for appeal to the RAO.

In such cases, a requester may seek a new appeal, provided the appeal is filed in compliance with the Public Records Regulations.

What are the requirements for an RAO response to a public records request?

An RAO's response must be in writing, and must provide the name of the RAO. The response must include a good faith estimate of any cost of providing the record.

The response must also include a specific exemption to the Public Records Law to justify the denial of access to any record, and an explanation of how that exemption applies to the records. Any denial must include instructions on how to appeal to the Supervisor of Records.

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

A written request is not required but is strongly recommended. An oral request made in person is permitted. An RAO is not permitted to require a written request, but may write an oral request on its own form to assist in prompt response.

To appeal an RAO response to the Supervisor, however, a request must be in writing.

May I appeal a failure to answer a question?

The Public Records Law only applies to records. An RAO is not required by the Public Records Law to answer questions or create a record in response to a request; however, an RAO must provide any records that exist that respond to a question.

What is the cost for copies of public records; what about electronic records?

Absent a specifically identified statute or regulation, an RAO may charge no more than \$0.05 per page for single and double-sided black and white paper copies or computer printouts. There is no longer a separate charge for police or fire reports, or for computer printouts.

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The Public Records Law and its Regulations apply to all Massachusetts government records, regardless of form, and regardless of the location of the records.

Provision of public records in electronic form is preferred where available. An RAO is not permitted to assess a copying fee for electronic records. The \$0.05 fee applies only to paper copies of records.

Is an RAO required to provide a fee estimate?

The Public Records Regulations require that an RAO provide a detailed, written, good faith estimate for the cost of complying with a public record request.

The fee estimate must contain a statement advising the requester that the actual cost of producing the record might vary once the agency or municipality begins preparing the record. An agency or municipality is permitted to require payment of the estimated fee before commencing work.

All agencies and municipalities 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 RAO and should be provided at a minimum cost, if any. Examples include minutes of board meetings, town meeting documents, warrants, street lists and municipal financial documents. Many of these records are required to be placed on the RAO's website.

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

An RAO may charge and recover a fee for the time spent searching, redacting, photocopying and refiling a record. Agencies shall not assess a fee for the first four hours of time spent searching for, compiling, segregating, redacting and reproducing a requested record. Municipalities with a population of over 20,000 shall not assess a fee for the first two hours of time spent searching for, compiling, segregating, redacting and reproducing a requested record. Municipalities with a population of 20,000 and under are permitted to charge for the first two hours of time spent searching for, compiling, segregating, redacting and reproducing a requested record.

The hourly rate may not be greater than the prorated hourly wage of the lowest paid employee who is capable of performing the task. Generally, an RAO is not permitted to charge an hourly rate in excess of \$25.00 per hour to search for records. Municipal RAOs may petition the Supervisor for permission to charge a fee in excess of \$25.00.

The fee estimate must provide the hourly rate and the number of hours required for each portion of the task. An RAO may not recover fees associated with record organization.

Agency and municipal RAOs may petition the Supervisor for permission to assess a fee for time spent segregating and redacting.

If a requestor wishes to review records in the records custodian's office but does not require copies, 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 cannot 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?

The Open Meeting Law, applicable to public bodies such as select boards for towns, is enforced by the Office of the Attorney General, Division of Open Government.¹ Any questions regarding the content of minutes, requirements to keep minutes or any procedural aspects of the Open Meeting Law should be addressed to the Division of Open Government.²

Minutes of open meetings, regardless of form, are public and must be made available in a timely fashion.

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

Pursuant to the Open Meeting Law, minutes of prior open meetings, regardless of form, must be reviewed and accepted promptly. Copies of the minutes of all open meetings should be readily available. Many public bodies are required to post minutes to meetings on the public body's website. RAOs are strongly encouraged to waive all fees associated with the minutes of open meetings.

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.

¹ G. L. c. 30A, §§ 18-25.

² www.mass.gov/ago/bureaus/government/the-division-of-open-government/.

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

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.

A list of statutes limiting access to public records is found in the back of this book. This list includes student records, criminal offender record information, and other records the access to which is limited by law.

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

With the possible exception of situations where the RAO is anticipating the withholding of records pursuant to Exemption (n) of the Public Records Law, determining whether the records are being requested for a commercial purpose, or determining whether to grant a fee waiver, a records custodian may not ask a requester the reason for the request or the intended use of the requested records.³

How should an RAO respond to an unclear request?

RAOs must help the requester to determine the precise record or records responsive to a request; however, a requester must provide a reasonable description of the requested records. If a request is unclear the RAO is expected to seek clarification from the requester.

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

The Public Records Law only applies to Massachusetts governmental entities. The burden lies with the entity to show that the Public Records Law does not apply.

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

RAOs must use their knowledge of the records to ensure that a request for records is delivered to the appropriate party. A large public records request may include items for which the RAO is not directly responsible, as it may

³ G. L. c. 4, § 7(26)(n); 950 C.M.R. 32.06(2)(h).

include a request for records of another division or department of the RAOs' agency or municipality. An RAO is expected to forward such requests to the appropriate parties in responding to a public records request, and inform the requester he or she has done so.

Overview

The Massachusetts Public Records Law (Public Records Law) and its Regulations provide that each person has a right of access to public information.⁴ This right of access includes the right to inspect, copy or have copies of records provided upon the payment of a reasonable fee.⁵

The Public Records Law 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.⁶

There are strictly and narrowly construed exemptions and common law privileges to the broad definition of “public records.”⁷ 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.

Updated Public Records Law

The Public Records Law and its Regulations were updated with changes effective January 1, 2017. Among other things, the updated law sets limits on fees, provides deadlines for the provision of records, and requires the designation of a “Records Access Officer.” The updated law also distinguishes between “agencies” and “municipalities” and assigns certain duties to each entity.

The Regulations define “agency” as the following:

Any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth that is identified in M.G.L. c. 66, § 6A and c. 4, § 7, clause Twenty-sixth and makes or receives “public records”, as defined in 950 CMR 32.02. Agency includes any person, corporation, association, partnership or other legal entity which receives or expends public

⁴ G. L. c. 66, § 10(a).

⁵ *Id.*; 950 C.M.R. 32.

⁶ G. L. c. 4, § 7(26).

⁷ G. L. c. 4, § 7(26); *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).

funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in M.G.L. c. 32, § 1.⁸

The Regulations define “municipality” as the following:

Cities and towns, local housing, redevelopment or similar authorities. A consortium, consolidation or combination of entities within a single political subdivision of the commonwealth or among multiple political subdivisions of the commonwealth shall be deemed a municipality.⁹

A “Records Access Officer” (RAO) is an employee of a governmental records custodian. An RAO is the employee designated within a governmental entity to perform certain duties, including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, and preparing guidelines that enable requesters to make informed requests regarding the availability of such public records electronically or otherwise.¹⁰

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 in person, by mail, facsimile or email.¹¹ An RAO must provide information on her custodian’s website with respect to requests for public records.

A requester must provide the RAO with a reasonable description of the desired information.¹²

The Response

The RAO must respond to requests without unreasonable delay and within ten business days.¹³ The RAO may offer to provide records; provide a fee estimate, where applicable; or deny access to records in a manner consistent with G. L. c. 66, § 10(a-b).¹⁴

A denial must detail the specific basis for withholding the requested materials.¹⁵ The denial must include a citation to one of the statutory or

⁸ 950 C.M.R. 32.02

⁹ *Id.*

¹⁰ *Id.*

¹¹ 950 CMR 32.06(1)(c).

¹² 950 CMR 32.06(1)(b).

¹³ G. L. c. 66, § 10(a-b); 950 CMR 32.06(2)(a).

¹⁴ *Id.*

¹⁵ G. L. c. 66, § 10(a-b).

common law exemptions upon which the RAO relies, and must explain why the exemption applies.¹⁶

A denial must also advise the requester of the right to seek redress through the administrative process provided by the Supervisor of Records (Supervisor) as well as the judicial remedy available in superior court.¹⁷

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.¹⁸ Consequently, there is no obligation to create a record for a requester or to honor prospective requests. It should be noted, however, that the Regulations do not prohibit an RAO from responding to such requests.

Information contained in a database is presumed to exist at the time of the request. Provision of an extract of requested data does not constitute creation of a public record. An RAO may not deny a request for data contained in such a database on the theory that extraction results in creating a new record. To do so would deny access to information that does exist at the time of the request, though not in a form easily accessible by the requester.

All requests for public records must be honored in accordance with the Public Records Law. With the exception of situations in which an RAO is determining whether the records are being requested for a commercial purpose, whether to grant a fee waiver, or the applicability of Exemption (n), an RAO may not ask a requester the reason for the request or the intended use of the requested records. Inquiries by an RAO into a requester's status or motivation for seeking information are prohibited.¹⁹

Fees

An RAO may charge a reasonable fee to recover the costs of complying with a public records request.²⁰ An RAO is encouraged, but not required, to waive fees where disclosure is in the public interest.²¹

¹⁶ Id.

¹⁷ 950 CMR 32.06(3)(c).

¹⁸ 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).

¹⁹ See G. L. c. 66, § 10(a) (public records are to be provided to "any person"); 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); 950 CMR 32.06(2)(h).

²⁰ G. L. c. 66, § 10(a); see also 950 CMR 32.07.

²¹ 950 CMR 32.07(2)(k).

The Supervisor does not have the authority to order a waiver of reasonable fees. An RAO assessing a fee must do so in accordance with any applicable statutory provisions, the Regulations or an enabling provision.²²

The updated Public Records Law and its Regulations provide for the following with respect to fees to access public records:

Fees for segregating and redacting

An agency or municipality shall not assess a fee for time spent segregating and redacting a requested record unless such segregation or redaction is required by law or approved by the Supervisor of Records through a petition discussed below.²³

“Segregation time” means the time used to review records to determine what portions are subject to redaction or withholding under M.G.L. c. 4, § 7, clause Twenty-sixth or other legally applicable privileges. Segregation time shall not include time expended to review record for accuracy and correct errors.²⁴

“Redact” means to delete, or otherwise expurgate that part of a public record that is exempt from disclosure under M.G.L. c. 4, § 7, clause Twenty-sixth or other legally applicable privileges from non-exempt material.²⁵

Fees for Copies

In addition to the search and segregation fees, records custodians may charge \$0.05 for either single and double-sided black and white paper copies or printouts.²⁶ When the request is for materials that are not susceptible to ordinary means of reproduction, such as photographs or computer tapes, the actual cost of reproduction may be assessed to the requester.²⁷ There are also specific statutes that establish fees for copies of public records.²⁸

Agencies

Agencies may not assess a fee for the first four hours of time spent searching for, compiling, segregating, redacting and reproducing a requested record. Agencies may not assess a fee of more than \$25 per hour for the cost to comply with a request for public records.²⁹

²² See e.g., G. L. c. 66, § 10(a); see also 950 CMR 32.07.

²³ G.L. c. 66, § 10(d); 950 CMR 32.07(2)(d).

²⁴ 950 CMR 32.02.

²⁵ *Id.*

²⁶ 950 CMR 32.07(2)(e).

²⁷ 950 CMR 32.07(2)(h).

²⁸ See e.g., G. L. c. 262, § 38 (copies of records at the Registry of Deeds).

²⁹ 950 CMR 32.07(2)(l).

Municipalities

Municipalities with a population of over 20,000 may not assess a fee for the first two hours of time spent searching for, compiling, segregating, redacting and reproducing a requested record. Municipalities with a population of 20,000 and under may assess a fee, including the first two hours, for time spent searching for, compiling, segregating, redacting and reproducing a requested record.³⁰

Population data shall be determined by the decennial US. Census and it shall be the burden of the RAO to provide population data information when responding to a request.³¹

A municipal records access officer may not assess a fee of more than \$25 per hour for the cost to comply with a request for public records unless approved by the Supervisor through a petition discussed below.³²

RAO Petitions

Under the updated Public Records Law and Regulations, RAOs may request an extension from the Supervisor of Records if more time is needed to provide records. Such a request for extension must occur within 20 business days of receipt of request or within 10 business days after receipt of a determination by the Supervisor of Records that the requested record constitutes a public record. The Supervisor may grant an extension of 20 business days to an agency and 30 business days to a municipality, or longer depending on the circumstances.³³

RAOs may also petition the Supervisor of Records to charge for time spent segregating or redacting records. Only a municipal RAO may petition the Supervisor for permission to charge fees in excess of the maximum hourly rate of \$25 per hour for time required to comply with a request.³⁴

Filing a petition does not affect the requirement that an RAO shall provide an initial response to a requester within ten business days after receipt of a request for public records.³⁵

³⁰ 950 CMR 32.07(2)(m).

³¹ *Id.*

³² *Id.*

³³ 950 CMR 32.06(4)(e).

³⁴ 950 CMR 32.06(4)(h).

³⁵ 950 CMR 32.06(4)(b).

Agency RAO reporting requirement

Agency RAOs are required to report to the Secretary certain information pertaining to requests for public records. This information includes, among other things, the nature of the request, the date of the request and response, the amount of fees assessed, and information regarding the use of administrative and judicial remedies.³⁶

Agency RAOs must report this information by using an online form provided on the Secretary's website. This website will serve as the form prescribed by the Secretary to accomplish this task as required by G.L. c. 66 § 6A(e). Agency RAOs may complete the online form using the following link: www.sec.state.ma.us/AgencyRAOWeb/RAOAccounts/Welcome.aspx.

The public may search the Agency Public Records Request Database website at: www.sec.state.ma.us/RequestSearchWeb/Webpages/Welcome.aspx.

Exemptions to the Public Records Law

The statutory definition of "public records" contains exemptions providing the basis for withholding records completely or in part.³⁷ The exemptions are strictly and narrowly construed.³⁸ Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted.³⁹ A review of the appropriate applications of the exemptions follows.

Exemption (a) – The Statutory Exemption

Exemption (a) applies to records that are:

*specifically or by necessary implication exempted from disclosure by statute*⁴⁰

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.⁴¹

³⁶ G.L. c. 66, § 6A(e).

³⁷ G. L. c. 4, § 7(26).

³⁸ Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980).

³⁹ 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).

⁴⁰ G. L. c. 4, § 7(26)(a).

⁴¹ Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

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.”⁴²

The second category under the exemption includes records deemed exempt under statute by necessary implication.⁴³ Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities.⁴⁴ 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 seek 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.)?

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.⁴⁵ The Department of Criminal Justice Information Services, conferred with the authority to promulgate and interpret statutes and regulations regarding C.O.R.I., interprets the “initiation of criminal proceedings” to be “the point when a criminal investigation is sufficiently complete that the investigating officers take actions toward bringing a specific suspect to court.”⁴⁶

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

Exemption (b)

Exemption (b) applies to 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*⁴⁷

⁴² See, e.g., G. L. c. 41, § 97D (all reports of rape or sexual assault “shall not be public reports”).

⁴³ G. L. c. 4, § 7(26)(a).

⁴⁴ See, e.g., G. L. c. 6, § 172 (“Criminal offender record information ... shall only be disseminated to: criminal justice agencies....”).

⁴⁵ See 803 C.M.R. 7 (C.O.R.I. may be released at the discretion of law enforcement if disclosure aids investigative efforts).

⁴⁶ G. L. c. 6, § 168.

⁴⁷ G. L. c. 4, § 7(26)(b).

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.⁴⁸

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.⁴⁹

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 (DOC) security policies and procedures public?

One of the DOC'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 DOC. Moreover, disclosure of this information could prove detrimental to the DOC's law enforcement efforts, as knowledge of the DOC's security response procedures could enable an inmate to circumvent such procedures. Accordingly, Exemption (b) will allow the DOC 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:

*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*⁵⁰

⁴⁸ Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976).

⁴⁹ 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).

⁵⁰ G. L. c. 4, § 7(26)(c).

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.⁵¹

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.⁵² The release of certain personnel information could disrupt the government's capability to conduct sensitive and careful investigations regarding employees.⁵³

While statutorily exempting personnel information from the expansive definition of public records, the legislature did not explicitly define personnel information.⁵⁴ However, judicial decisions acknowledge that the term is neither rigid, nor exact, and that the determination is case-specific.⁵⁵ The custodian's classification of materials as "personnel information" is not conclusive.⁵⁶ Instead, the nature or character of the documents, as opposed to the documents' label, is crucial to the analysis.⁵⁷

The nature of some materials and the context in which they arise take them beyond what the legislature contemplated when exempting personnel information.⁵⁸

Generally, personnel information that is useful in making employment decisions regarding an employee is sufficiently personal to be exempt pursuant to the first clause.⁵⁹ Such information may include employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information.⁶⁰

⁵¹ 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).

⁵² Wakefield Teacher's Association v. School Committee of Wakefield, 431 Mass. 792, 802 (2000).

⁵³ Id.

⁵⁴ G. L. c. 4, § 7(26)(c).

⁵⁵ Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 58 Mass App Ct 1, 5 (2003).

⁵⁶ Wakefield Teacher's Association, 431 Mass. at 798.

⁵⁷ See Worcester Telegram & Gazette Corp., 436 Mass. at 386.

⁵⁸ See Worcester Telegram & Gazette Corp., 58 Mass. App. Ct. at 9.

⁵⁹ 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).

⁶⁰ 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); 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).

The Appeals Court of Massachusetts distinguished “personnel records” from “internal affairs” records. The Appeals Court 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 files or information.⁶¹ 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.⁶²

Public employees have a diminished expectation of privacy in matters relating to their public employment.⁶³ 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.⁶⁴ 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.⁶⁵

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.”⁶⁶ Examples of “intimate details of a highly personal nature” include marital status, paternity, substance abuse, government assistance, family disputes and reputation.⁶⁷ Portions of records containing such information are exempt unless there is a paramount public interest in disclosure.⁶⁸

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” and second, determine whether the public interest in disclosure outweighs the privacy interest associated with disclosure.⁶⁹ Consequently, the application of the second clause of the exemption must be determined on a case-by-case basis.

For example: Can a public employee’s employment application and work evaluation be disclosed?

⁶¹ Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 799 (2000).

⁶² Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 8-9 (2003).

⁶³ Brogan v. School Committee of Westport, 401 Mass. 306, 308 (1987).

⁶⁴ Hastings & Sons Pub. Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978).

⁶⁵ Attorney General v. Collector of Lynn, 377 Mass. 151, 156 (1979).

⁶⁶ Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980).

⁶⁷ Id. at 626 n. 2.

⁶⁸ Collector of Lynn, 377 Mass. at 156.

⁶⁹ Id.

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).

Candidates for state employment must provide prospective employers with written disclosure of any relative who is also a state employee. The content of this disclosure is considered public under the Public Records Law.⁷⁰

For example: Does Exemption (c) permit resumes of public officials to be withheld from disclosure?

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 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. Relevant degrees and certifications 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?

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 specifically-cited exemptions to the Public Records Law.

For example: Are the names and addresses of customers of a municipally owned utility public?

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 of Exemption (c) applies to "intimate details of a highly personal nature." Names and addresses of residents of Massachusetts over seventeen years of age are not intimate details of a highly personal nature, because they are available in other venues, such as street lists. Since neither the names nor the

⁷⁰ See G. L. c. 268A, § 6B.

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.

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 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*⁷¹

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.⁷² 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.⁷³ Only portions of records 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, prepared for the purpose of litigation before the Appellate Tax Board, a public record?

Such a report may contain recommendations to 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*⁷⁴

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

⁷¹ G. L. c. 4, § 7(26)(d).

⁷² *Babets v. Sec'y of the Exec. Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988).

⁷³ *Moore-McCormack Lines, Inc. v. I.T.O. Corporation of Baltimore*, 508 F.2d 945, 948 (1974) (construing cognate federal provision).

⁷⁴ G. L. c. 4, § 7(26)(e).

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 withhold any materials that are shared with other employees or are being maintained as part of the files of a governmental unit.⁷⁵

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?

Notes are not public if they are personal in nature, kept by the employee merely to assist him in preparing reports, are not shared with anyone in the department and are not maintained as part of the department's files.

For example: Are handwritten shorthand notes taken by the secretary of a public body a public record?

Such notes are not personal in nature simply because they contain the secretary's subjective impressions of a board meeting. The notes cannot be considered merely a reference to assist the secretary in fulfilling duties, but rather the notes comprise a government file itself.

Where 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 of such 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*⁷⁶

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.⁷⁷ 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

⁷⁵ G. L. c. 4, § 7(26)(e).

⁷⁶ G. L. c. 4, § 7(26)(f).

⁷⁷ 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).

investigation that could potentially alert suspects to the activities of investigative officials.

Records custodians may withhold confidential investigative techniques indefinitely since their disclosure would prejudice future law enforcement efforts.⁷⁸

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.⁷⁹ 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.⁸⁰

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?

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 and witness statements. A records custodian may be permitted to withhold an entire report if the identity of witnesses is known to the requester. Such a record could not possibly be redacted in a manner to avoid identification of such witnesses.

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*⁸¹

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

⁷⁸ Bogas 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.).

⁷⁹ Bogas, 371 Mass. at 62.

⁸⁰ Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983) (explanation of “identifying details” and “grave risk of indirect identification”).

⁸¹ G. L. c. 4, § 7(26)(g).

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.⁸²

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?

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 for use in developing government policy, and was not submitted upon a promise of confidentiality.

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.⁸³ The exemption allows government officials to review bids and proposals in an insulated environment, but also provides for public review of all evaluative materials once a decision is reached.

Competitive bidding ensures full publicity of the contract and encourages the guarding of the public welfare.⁸⁴ 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.⁸⁵ Specifically, Exemption (h) applies to:

*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*⁸⁶

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

⁸² *Id.*

⁸³ *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).

⁸⁴ *Id.* at 699.

⁸⁵ *Id.* at 701.

⁸⁶ G. L. c. 4, § 7(26)(h).

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.⁸⁷ 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.

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?

The *first clause* of Exemption (h) allows the records custodian to withhold proposals and bids from disclosure 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 decision has been made to enter into negotiations the records custodian can no longer withhold the records.

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) applies to:

appraisals of real property acquired or to be acquired until (1) a final

⁸⁷ 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.

*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*⁸⁸

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 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.⁸⁹

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 housing authority (records custodian) withhold 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?

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?

Exemption (i) is parcel specific and the records custodian is may only withhold an appraisal until an agreement has been reached, 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.⁹⁰

⁸⁸ G. L. c. 4, § 7(26)(i).

⁸⁹ G. L. c. 112, § 173 (definition of appraisal).

⁹⁰ Coleman v. Boston Redevelopment Authority, 61 Mass. App. Ct. 239 (2004).

Exemption (j)

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

*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 therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards*⁹¹

The purpose of Exemption (j) is to prevent individuals with devious motives from ascertaining the identities of those who possess firearms. The scope of the exemption is limited to restricting the public disclosure of the name and address of the individual.⁹²

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.⁹³ 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?

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.⁹⁴ For instance, C.O.R.I. must be redacted

⁹¹ G. L. c. 4, § 7(26)(j).

⁹² G. L. c. 4, § 7(26)(j).

⁹³ G. L. c. 140, §§ 121-131P. (discussing sale of firearms).

⁹⁴ G. L. c. 4, § 7(26) (exemptions to the Public Records Law).

before disclosing the gun application pursuant to Exemption (a), and social security numbers contained in the application may be withheld pursuant to Exemption (c). Please reference the Appendix of this Guide for other examples of statutes that specifically exempt records from disclosure.

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 four⁹⁵

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.⁹⁶

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 instrument⁹⁷

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?

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).

⁹⁵ G. L. c. 78, § 7 (discussing Public Libraries).

⁹⁶ G. L. c. 4, § 7(26)(a).

⁹⁷ G. L. c. 4, § 7(26)(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)?

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 nonprofit 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*⁹⁸

Although Exemption (m) has yet to be interpreted by any Massachusetts court, the language of the exemption is clear. The exemption 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: (1) the record must be a contract; (2) the contract must be for hospital or related health care services; (3) one of the contracting parties must be a government-operated medical facility; and (4) 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)?

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

⁹⁸ G. L. c. 4, § 7(26)(m).

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, 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 or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.*⁹⁹

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. 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.

A records custodian should review a request for such records promptly and completely to gather all 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.

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?

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

⁹⁹ G. L. c. 4, § 7 (26)(n).

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, personal email 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.*¹⁰⁰

For example: Would the address of a government employee found in payroll records be public?

Exemption (o) applies to records that contain the home address, personal email address or telephone number of an employee while identifying the individual as a government employee. Given that payroll records identify an 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, personal email 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).*¹⁰¹

¹⁰⁰ G. L. c. 4, § 7 (26)(o).

¹⁰¹ G. L. c. 4, § 7 (26)(p).

The record must contain an individual's home address, personal email address or telephone number and identify the individual as being the family member of a Commonwealth employee to be subject to redaction.

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*¹⁰²

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.¹⁰³ 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*¹⁰⁴

The records created and received by the Office of the Child Advocate pursuant to Chapter 18C may be withheld under this exemption.¹⁰⁵

Exemption (s)

Exemption (s) applies 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

¹⁰² G. L. c. 4, § 7 (26)(q).

¹⁰³ G. L. c. 46, § 31.

¹⁰⁴ G. L. c. 4, § 7 (26)(r).

¹⁰⁵ G. L. c. 18(c).

*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*¹⁰⁶

Exemption (s) relates to certain records of public utility providers.

Exemption (t)

Exemption (t) applies to:

*statements filed under section 20C of chapter 32*¹⁰⁷

Members of public retirement boards are required by statute to file a statement of financial interest with the Public Employee Retirement Administration Commission. The statement of financial interest document is exempt from disclosure under Exemption (t).¹⁰⁸

Exemption (u)

Exemption (u) applies to:

*trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns*¹⁰⁹

This exemption applies to certain records in the possession of the University of Massachusetts.

¹⁰⁶ G. L. c. 4, § 7 (26)(s).

¹⁰⁷ G. L. c. 4, § 7 (26)(t).

¹⁰⁸ See G. L. c. 32, § 20C.

¹⁰⁹ G. L. c. 4, § 7 (26)(u).

Attorney-Client Communications and Attorney Work Product

In Suffolk Construction Co., Inc. v. Division of Capital Asset Management (Suffolk), the Massachusetts 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.¹¹⁰

The legislature conferred to the Supervisor of Records (Supervisor) the authority to render determinations on the public status of records.¹¹¹ Additionally, the Court has interpreted the Supervisor's authority to include issuing decisions on whether records are privileged.¹¹² As a result, the Supervisor has the authority to determine whether records may be withheld as privileged documents. This office will issue determinations regarding this privilege on a case-by-case basis.

Computer Records

The statutory definition of "public records" does not distinguish between paper records and electronically stored information (ESI).¹¹³ Rather, the law provides that all information made or received by a public entity, regardless of the manner in which it exists, constitutes "public records." 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.

To the extent feasible, RAOs must provide public records to a requester in electronic format unless the record is not available in electronic form or the requester does not have the ability to receive or access the records in electronic format. If feasible, the records should be provided in the requester's preferred format. In the absence of a preferred format, the records must be provided in a searchable machine-readable form.¹¹⁴

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.

¹¹⁰ Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-50 (2007).

¹¹¹ G. L. c. 66, § 10 (b); See Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 414 Mass. 609, 614-15 (1993).

¹¹² See Id. at 610 (Supervisor may delineate whether documents are privileged or exempted from the Public Records Law).

¹¹³ G. L. c. 4, § 7(26).

¹¹⁴ 950 CMR 32.04(5).

For example: A request is made for a spreadsheet summarizing expenses for various goods purchased by a government entity.

A records custodian is not obligated to create a new record if such a record does not exist at the time of the request. In this situation, the RAO is only obliged to notify the requester that there is no record responsive to the request. The RAO should also advise the requester of other available documents or files that could be responsive to the request.

The creation of records, including the honoring of prospective requests, is not governed by the Public Records Law; therefore, the RAO is free to negotiate all terms of the arrangement.¹¹⁵ 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 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

¹¹⁵ 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).

records.¹¹⁶ 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 attorney or another staff member to contact the RAO and requester as needed to ascertain the relevant facts and applicable law. The findings are then reported to the Supervisor to assist in making a decision. The RAO will receive an administrative order if the Supervisor determines that records are being improperly withheld or the proposed fee is excessive.¹¹⁷ 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 for enforcement.¹¹⁸

¹¹⁶ 950 C.M.R. 32.07(2)(h).

¹¹⁷ G. L. c. 66, § 10A.

¹¹⁸ G. L. c. 66, § 10A; 950 CMR 32.08.

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 (RCB), each agency of the Commonwealth is required to submit Form RCB-4 on an annual basis. Similarly, municipal agencies must submit Form RMU-4. This Form states the name and title of each agency's designated records management officer or Records Liaison Officer. These forms are available on the web at www.sec.state.ma.us/arc/arcrmu/rmuidx.htm.

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

Electronic Records Storage

The Records Conservation Board (RCB) implemented *Electronic Records Management Guidelines* to assist records custodians in maintaining electronic records.¹¹⁹ Records custodians are encouraged to review the *Statewide Records Retention Schedule* or the *Municipal Records Retention Manual* for more information on retention periods for records.

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 Application for Destruction Permission forms have been submitted and approved. State agencies must submit forms *RCB-1E* and *RCB-2E* to the RCB. Municipalities must submit forms *RMU-1E* and *RMU-2E* to the Supervisor for approval. 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.

¹¹⁹ www.sec.state.ma.us/arc/arcpdf/Electronic_Records_Guidelines.pdf.

An RAO's obligations include not only responding to public records requests but also ensuring that records will be available for review when requested. Therefore, an RAO 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 of Records or the Records Conservation Board (RCB).

Retention schedules for state and municipal agencies, 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, at www.sec.state.ma.us/arc/arcrmu/rmuidx.htm.

The RCB is 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."¹²⁰

The Records Management Unit (RMU) 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 RMU can provide agencies with retention schedules for specific records, as well as information on proper disposal and destruction of records.

¹²⁰ G. L. c. 30, § 42.

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 record.

Municipal Government

Municipal agencies must obtain the written permission of the Supervisor of Records prior to destroying records. See the *Municipal Records Retention Manual* for more information and instructions.

The following is a list of forms available on the Records Management Unit homepage www.sec.state.ma.us/arc/arcrmu/rmuidx.htm via the link to *Municipal Agency Forms*:

RMU-1E

Application for Systems Information Management Plan

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

RMU-2E

Application for Scanning and Destruction Permission

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

RMU-2

Application for Destruction Permission

RMU-2M

Application for Scanning and Destruction Permission

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

RMU-4

Records Liaison Officer Designation

Use this form to appoint an authorized agent for Records Management Unit business.

State Government

State agencies must obtain the written permission of the Records Conservation Board (RCB) prior to destroying records. 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 *Statewide Records Retention Schedule* (Schedule). The Schedule may be used by state agencies in filing requests for destruction of records, as well as scanning, transferring and microfilming records.

The following is a list of RCB forms, available on the Records Management Unit homepage, 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 access by the general public, as they are subject to mandatory disclosure upon request.¹²¹

The Supervisor of Records is responsible for ensuring that the records of the Commonwealth and municipalities are maintained and stored as required by law.¹²² In accordance with this duty, the following procedures have been established to ensure security of and access to public records.

1. Records Access Officers (RAOs)

RAOs shall assist the custodian in preserving public records in accordance with all applicable laws, rules, regulations and retention schedules.¹²³

2. Original Records Removed from Municipal Offices

- a. Whenever original public records are removed from municipal offices 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.¹²⁴
- b. If fire-resistant storage outside of the municipal building cannot be ensured, then no original records may be removed. However, the RAO 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.
- b. If secure storage is available in an individual'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.

¹²¹ G. L. c. 66, § 10(a); see also *Reinstein v. Police Comm'r of Boston*, 378 Mass. 281, 289-90 (1979).

¹²² See G. L. c. 66, § 1.

¹²³ G.L. c. 66, §6A(b); 950 C.M.R. 32.04(5).

¹²⁴ G. L. c. 66, § 11.

4. Availability of RAO

Whenever it is necessary to work, or to keep original public records, in a location other than the municipal building, RAOs shall be 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.¹²⁵

5. Transfer of Public Records upon Termination of Duties as Government Employee

- a. Whenever a government employee relinquishes his office or terminates his duties, he shall deliver over to his successor all such public records that he is not authorized by law to retain.¹²⁶

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.

¹²⁵ 950 CMR 32.04(4).

¹²⁶ See G. L. c. 66, § 14.

Examples of Exemption (a) Statutes

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

Address Confidentiality Program: G. L. c. 9A, § 6.

Affordable Housing Applicant Information: G. L. c. 40T, § 3.

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.

Bid Information, Trade Contractor Scores: G. L. c. 149A, § 8(f).

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.

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.

Mortgage Lender and Mortgage Broker Examination Records: G.L. c. 255E, § 8.

Mortgage Loan Originator Examination Records: G.L. c. 255F, § 14(d).

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

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

Open Meeting Law: G. L. c. 30A, §§ 18-25.

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.