



October 6, 2016

Shawn A. Williams, Supervisor of Public Records
Public Records Division
Office of the Secretary of the Commonwealth

COMMENTS ON PROPOSED CHANGES TO 950 C.M.R. § 32.00

PUBLIC RECORDS ACCESS

Dear Mr. Supervisor,

We write on behalf of the Steering Committee of the Massachusetts Freedom of Information Alliance (MassFOIA) to commend your efforts to implement Chapter 121 of the Acts of 2016, *An Act to Improve Public Records*, and to offer suggestions to clarify and strengthen the proposed regulations.

We recognize that developing a regulatory roadmap for the many different stakeholders in the Commonwealth's freedom of information law is no easy task. We appreciate your commitment to the "presumption of openness," your attention to practical detail, and your over-all fidelity to the statutory framework presented by the General Court.

We hope these comments will help you refine the draft regulations to avoid potential confusion and ensure public access to information about the workings of our government.

In order to make our comments as practical and useful to you as possible, we are attaching suggested edits to the proposed regulations in a redlined format, and we will not attempt to describe and explain all the revisions here. Some specific edits aim to:

- guarantee that records posted online are maintained online for the duration of the records retention schedule;
- articulate the statutory grounds for briefly delaying fulfillment of a public records request, and distinguish such delays from formal petitions to your office for an extension;
- re-affirm the principle that a records access officer, when considering whether to withhold responsive records, may not inquire about the purpose of a request¹;
- ensure the reasonableness of fees for public records; and
- clarify broad language regarding differential treatment for particular types of records.

We would be glad to answer questions you may have about any of the individual suggestions.

¹ Specifically, there is no statutory authority to inquire about the purpose of a request simply because the records may be exempt under G.L. c. 4, §7(26)(n).

With these written comments, however, we want to focus on a few of the most pressing issues:

- 1) The definitions that describe the entities subject to the public records law.
- 2) The very limited circumstances when a governmental entity may deny access to public records based on prior failure to pay.
- 3) The procedure and timeframe for the Supervisor's handling of appeals.

Definitions

With Chapter 121, the legislature has established new distinctions between "agencies" and "municipalities" subject to the public records law. These categories are treated differently with regard to the time they can take to fulfill records requests, the fees they may assess for public records, their reporting requirements, and their obligations to post public records and other information online. Unfortunately, while these distinctions may make good sense as a matter of public policy, the categories of "agency" and "municipality" do not align perfectly with the existing statutory definition of "public records" and its description of those entities subject to the public records law (G. L. c. 4, § 7, clause Twenty-sixth).

Chapter 121 clearly intends for the two terms to describe, efficiently and without overlap, all entities subject to the public records law:

The term "agency" shall mean any entity, other than a municipality, that is identified in clause twenty-sixth of section 7 of chapter 4 as possessing "public records," as defined therein.

However, the statutory description of the entities subject to the law does not use the word "municipality" at all and the word "agency" is used in a much narrower sense than in Chapter 121:

"any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision..."

We appreciate that the proposed regulations attempt to further clarify the meaning of "agency" and "municipality" and make it easier to read Chapter 121 in conjunction with the description of the entities subject to the public records law. However, daylight remains between the proposed regulatory definitions and the language of G. L. c. 4, § 7, clause Twenty-sixth, which could cause confusion for requesters and government actors alike.

In order to make the relationship between the regulations and the statute clearer and easier to understand, we believe it is necessary for the regulations to fully integrate and reflect the language of the statute itself. For this reason, we recommend defining "agency" in a way that tracks the language above: "any agency, executive office, department, board, commission, bureau, division or authority of *the commonwealth*." And we recommend

similarly defining “municipality” as “any agency, executive office, department, board, commission, bureau, division or authority of a *political subdivision* of the commonwealth” (including cities or towns).

With regard to the definition of “municipality,” we are pleased that the proposed regulations specifically include multi-jurisdictional collaborations such as regional school districts or law enforcement consortia. In line with our discussion above, we have suggested revisions to link these ideas to the statutory political subdivision language.

We offer these suggested changes to ensure that the new definitions are fully consistent with the public records statute and fully inclusive.

Finally, though we are all familiar with the SJC’s decision in *Lambert*, we do not agree with an interpretation of that decision that would extend its reach to the Governor’s office in its entirety, so we recommend limiting the description of the entities *not* subject to the public records law to the legislature and judiciary.

Denial for Failure to Pay

The public records law allows governmental entities to assess a reasonable fee to fulfill a public records request, and requires the requester to pay the estimated cost up front, before receiving the requested records. Under Chapter 121, “the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records.”

We fear that this provision could be misunderstood. The regulations must ensure that this provision cannot be invoked if the records access officer waived the fee for a prior request, forfeited the fee by not timely responding to the request, was prohibited from assessing a fee after being required to pay a requester’s litigation costs, or the requester simply did not agree to pay the fee estimate in the first place. Rather, the regulations must permit a custodian to deny access to public records only when all the following conditions are met: a requester agreed to pay a fee estimate; the governmental entity did all the work required to produce the records; and the requester failed to pay the agreed-upon price. We have offered simple language to accomplish these objectives.

Appeals Process

Under the new Chapter 66, Section 10A, a requester can challenge a records access officer’s response to a public records request by bringing an appeal to the Supervisor of Public Records, who has 10 days to make a determination. According to the statute, “[t]he supervisor of records shall issue a written determination regarding any petition submitted in accordance with this section not later than 10 business days following receipt of the petition by the supervisor of records.” This straightforward language does not contemplate a docketing process whereby the timeframe for issuing a determination is delayed until such time as an appeal number is issued. Nor does it allow the Supervisor to decline to hear certain petitions at all.

In light of this unambiguous statutory language, we have suggested changes to ensure that the timeframe for the Supervisor to issue determinations is tied to receipt of the appeal, regardless of when an appeal number is issued. Our proposed revisions also eliminate the

language granting the Supervisor discretion as to whether to open an appeal and, similarly, reframe the proposed grounds for not opening an appeal as grounds for denying an appeal instead. While these grounds for denial do not appear in the statute itself, we recognize that they are longstanding features of the current regulations. Though more could be said about these grounds for denial, we offer just one specific edit — to clarify that an appeal may not be denied simply because the public records sought are the subject of any kind of dispute between any set of parties, but only if they are the subject of a formal dispute *between the requester and the governmental entity from which the requester seeks the records*.

Conclusion

We appreciate the thoughtfulness and care with which these regulations have been developed. We hope that our comments and proposed revisions assist your office in its efforts to provide clear guidance to both public records requesters and records access officers, and to fulfill the promise of the recent legislative reforms by concretely improving access to public records. We would welcome the opportunity to be a resource as you finalize these regulations, and would encourage you to direct any specific inquiries to Gavi Wolfe at gwolfe@aclum.org. Thank you.

Gavi Wolfe
ACLU of Massachusetts

Pam Wilmot
Common Cause Massachusetts

Robert Ambrogi
MA Newspaper Publishers Association

Justin Silverman
New England First Amendment Coalition

32.01: Authority

32.02: Title, Scope and Purpose

32.03: Definitions

32.04: General Provisions

32.05: Records Access Officers

32.06: Additional Records Access Officer Responsibilities

32.07: Rights of Access

32.08: Copies of records; fees

32.09: Appeals

32.10: Enforcement of Orders

32.11: Advisory Opinions

32.01: Authority

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

32.02: Title, Scope and Purpose

- (1) 950 CMR 32.00 shall be referred to as the Public Records Access Regulations.
- (2) 950 CMR 32.00 describes the practices and procedures of the Division of Public Records relative to the requirements of governmental entities or political subdivisions of the Commonwealth with respect to disclosure of public records, reporting requirements for certain records access officers and ensuring that disputes regarding access to particular records are resolved expeditiously and fairly. 950 CMR 32.00 shall not limit the availability of other remedies provided by law.
- (3) The Division of Public Records is under the supervision of the Supervisor of Public Records. The Supervisor may amend and rescind such rules, forms and orders as are contemplated by the provisions of the Massachusetts General Laws and as are necessary to carry out their purposes.
- (4) From time to time, the Supervisor of Public Records may authorize exceptions to 950 CMR 32.00 with respect to any specific requirement provided that such exceptions to 950 CMR 32.00 are in conformity with the provisions of the Massachusetts General Laws.

32.03: Definitions

For the purposes of 950 CMR 32.00 unless the context otherwise requires, the following terms shall have the meanings indicated:

Advisory Opinion means an opinion issued by the Supervisor of Public Records intended to provide guidance on issues related to public records access and retention.

Agency means any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth. ~~governmental entity, other than a municipality, that is identified in G. L. c. 66, § 6A and G. L. c. 4, § 7, clause Twenty sixth as possessing and makes or receives “public records,” as defined therein.~~ It includes any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth ~~or any political subdivision as defined in section 1 of chapter 32.~~

Business Day means Monday through Friday. Business day does not include Saturdays, Sundays, legal holidays, or other weekdays where a custodian’s office is closed unexpectedly.

Commercial Purpose means the sale or resale of any portion of the public record or the use of information from the public record to advance the requester’s strategic business interests in a manner that the requester can reasonably expect to make a profit including in addition to the foregoing, obtaining names and addresses from the public record for the purpose of solicitation. It does not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic, or public research or education.

Custodian means any governmental entity, ~~including municipal government entities~~ that makes or receives public records.

Division means Division of Public Records, Office of the Secretary of the Commonwealth of Massachusetts.

Governmental Entity means any agency or municipality as defined herein. ~~It does not include the legislature or the judiciary. authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency entity within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth, including municipalities government entities. It does not include the legislature, or the judiciary, or the Governor.~~

Municipality means any agency, executive office, department, board, commission, bureau, division or authority of any political subdivision of the commonwealth, including but not limited to 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. ~~city, town, or other local or regional political subdivision of the commonwealth municipal government entity, other than an agency, that is identified in G. L. c. 66, § 6A and G.~~

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH

~~L. c. 4, § 7, clause Twenty sixth as possessing and makes or receives “public records,” as defined therein. A local housing, redevelopment or similar authority, regional district or other consortium, consolidation or combination of municipal governmental entities shall be deemed a municipality.~~

It includes

any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of ~~the commonwealth or~~ any political subdivision as defined in section 1 of chapter 32.

Public Records means all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7, clause Twenty-sixth.

Records Access Officer means a governmental officer or employee or a designee within an agency or municipality designated by an agency or municipality to perform duties described in 950 CMR 32 including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, assisting the custodian in preserving and managing public records, and preparing guidelines that enable requestors to make informed requests.

Requester means any person or entity seeking to inspect or obtain copies of public records.

Redact means to delete, or otherwise expurgate that part of a public record that is exempt from disclosure under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege from non-exempt material.

Search Time means the time needed to locate, pull from the files, copy and reshelve or refile a public record. However, it shall not include the time expended to create the original record.

Secretary means the Secretary of the Commonwealth of Massachusetts.

Segregation Time means the time used to review records to determine what portions are subject to redaction or withholding under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

Supervisor means Supervisor of Public Records or Supervisor of Records.

Withhold means to hold back from disclosure a record under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

32.04: General Provisions

- (1) **Division Mailing Address and Electronic Mail Address.** All communications shall be addressed or delivered to:

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719

Boston, Massachusetts 02108

or

pre@sec.state.ma.us

Electronic communication is strongly encouraged and is the preferred method of correspondence.

- (2) **Division Business Hours.** The regular hours of the Division are from 8:45 a.m. to 5:00 p.m. each business day.
- (3) **Computation of Time.**
 - (a) **Electronic Correspondence.** The computation of any time referred to in 950 CMR 32.00 for electronic correspondence shall begin with the first business day following the date of transmission.
 - (b) **Mail or In Person Delivered Correspondence.** The computation of time referred to in 950 CMR 32.00 for mail or in person delivered correspondence shall begin with the first business day following receipt of such document.
 - (c) When the last day of the period so computed is a day on which the offices of the Division are closed, the period shall run until the end of the next business day.
- (4) **Presumptions.** In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.

32.05: Records Access Officers

- (1) Each agency and municipality shall designate one or more employees as records access officer(s).
- (2) In a municipality, the municipal clerk, or the clerk's designees, or any designee of a municipality that the chief executive officer of the municipality may appoint, shall serve as records access officers.
- (3) The designation of a records access officer shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any such employee shall be deemed to be a records access officer and subject to the obligations herein.
- (4) Each agency and municipality shall post in a conspicuous location at its offices and on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer.

- (5) A records access officer shall:
- (a) coordinate the custodian's response to requests for access to public records and shall facilitate the resolution of such requests by the timely and thorough production of public records;
 - (b) assist persons seeking public records to identify the records sought;
 - (c) assist the custodian in preserving public records in accordance with all applicable laws, rules, regulations and retention schedules as issued by the Supervisor;
 - (d) provide public records to a requester in electronic format unless electronic format is not available or the requester does not have the ability to receive or access the records in electronic format and if feasible, in the requesters preferred format. In the absence of a preferred format, the records shall be provided in a searchable machine-readable form;
 - (e) furnish the public records by providing reasonable assistance in locating the records on an appropriately indexed and searchable public website;
 - (f) prepare guidelines to be posted on the website of the agency or municipality that enable the person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise. The guidelines shall include a list of categories of public records maintained by the agency or municipality and such list shall be updated periodically;
 - (g) a municipal records access officer shall, to the extent feasible, post commonly available public record documents on a website maintained by the municipality for ~~the duration of the retention period a period to be determined by each municipality. The retention period of records posted online shall be~~ determined by the Municipal Records Retention Manual.

32.06: Additional Records Access Officer Responsibilities

- (1) **Agency Records Access Officers.** The requirements of 950 CMR 32.06(1) shall apply only to agency records access officers:
- (a) agency designation of primary and secondary records access officers; reporting requirements:
 - 1. each agency shall designate one primary records access officer responsible for reporting information to the Secretary pursuant to G. L. c. 66, §6A(e) and 950 CMR 32.06(1)(c).

2. a primary records access officer shall submit a notification of such designation to the Division electronically in a manner determined by the Division.
3. the primary records access officer may designate secondary record access officers to facilitate reporting such information.
4. the primary records access officer shall electronically notify the Secretary of the designation of secondary records access officers electronically in a manner determined by the Division.
5. the agency shall maintain and update information regarding primary and secondary records access officers electronically, including changes in personnel identified as primary and secondary records access officers, in a manner determined by the Division.

(b) agency records access officers shall electronically report to the Secretary the information described in 950 CMR 32.06(1)(c)(1-9) in a manner determined by the Secretary.

(c) an agency records access officer shall report to the Secretary with respect to requests and responses to requests for each calendar year ending December 31:

1. the nature of each request and the date on which each request was received;
2. the date on which a response ~~is was~~ provided to the requestor;
3. whether the request was denied or any records were withheld or redacted and, if so, under what exemptions;
3. the date on which a public records request was is-completely fulfilled-provided to the requestor;
4. the number of hours required to fulfill the request;
5. fees charged to the requester, if any;
6. records access officer petitions to the Supervisor submitted under G. L. c. 66, §10(d)(iv) and 950 CMR 32.07(4)(g) and the Supervisor's determinations;
7. requests appealed to the Supervisor under G. L. c. 66, §10A and 950 CMR 32.09(1) and their dispositions;
8. the time required to comply with the Supervisor's orders under G. L. c.

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH
66, §10A; and

9. the final adjudication of any associated court proceedings under G. L. c. 66, §10A(d).

- (d) the Supervisor may make exceptions to the reporting requirement in 950 CMR 32.06(1)(c) for particular classes of records for which a statute authorizes public access on a routine fee-for-service basis, including certain:

~~related to requests for certain types of records shall be determined at the discretion of the Supervisor and may include:~~

1. certified copies of records;
2. registry of deeds records;
3. incorporation records;
4. vital records.

- (e) all information must be provided in accordance with 950 CMR 32.06(1) by 5:00 p.m. on the last business day of the calendar year. The Supervisor shall post such information on a searchable website.

- (f) an agency records access officer shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided in a manner consistent with state and federal law:

1. final opinions, decisions, orders, or votes from agency proceedings;
2. annual reports;
3. notices of regulations proposed under G. L. c. 30A;
4. notices of hearings;
5. winning bids for public contracts;
6. awards of federal, state and municipal government grants;
7. minutes of open meetings;
8. agency budgets; and
9. any public record information of significant interest that the agency deems appropriate to post, such determination to be made by each agency on a case-by-case basis.

- (g) records access officers shall post records online pursuant to 950 CMR 32.06(1)(f) as soon as practicable and for the duration of the retention period determined by the Statewide Records Retention Manual.

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH

~~1. such posting shall remain online for a period to be determined by each agency;~~

~~2. the retention period of records posted online shall be determined by the
the
Statewide Records Retention Schedule.~~

32.07: Rights of Access

(1) Requests for Public Records.

- (a) requests for public records may be made orally ~~in person~~ or may be written. ~~Telephone requests may be accepted at the discretion of the records access officer.~~
- (b) requests for public records shall include a reasonable description of the requested record to the records access officer so that he or she can identify and locate it promptly.
- (c) written requests may be delivered by a requester to the business address or designated website or email address of a records access officer or governmental entity custodian:
 - 1. by hand;
 - 2. by mail;
 - 3. by electronic mail; or
 - 4. by facsimile.
- (d) a records access officer shall not require a particular form be used by requesters, but may make forms available for requesters.
- (e) a person shall not be required to make a personal inspection of the record prior to receiving a copy of it.
- (f) calculation of time will toll only for requests that are made in accordance with 950 CMR 32.07(1).

(2) Records Access Officer Response to Requests for Records.

- (a) a records access officer shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours and without unreasonable delay.
- (b) a record access officer's superior knowledge of the contents of a governmental entity's files shall be used to assist in promptly complying with the request.
- (c) a record access officer shall facilitate the agency or municipality's reasonable search of all locations likely to contain records responsive to the request.
- (c) a records access officer shall provide a written response to a request for public records no later than the tenth business day following the receipt of a request.

- (d) a records access officer shall not assess a fee for the provision of public records if the records access officer's response is provided more than ten business days after the receipt of the request, subject to the provisions of 950 CMR 32.07(4).
- (e) if a records access officer intends to provide records, access to such records must be provided no later than the tenth business day following the receipt of a request, unless:
 - 1. the magnitude or difficulty of the request, or of multiple requests from the same requester, unduly burdens the governmental entity such that it is unable to provide access within this timeframe and the records access officer identifies a reasonable timeframe pursuant to 950 CMR 32.07(2)(j); or
 - 2. an extension of time is permitted in a manner consistent with 950 CMR 32.07(4).
- (f) a written request for records will be deemed received on the first business day following electronic transmission or physical receipt by the records access officer; an oral request will be deemed received on the day it was made.
- (g) a records access officer may delay provision of records until all fees related to such requests are paid in full by the person seeking access to the requested records in accordance with 950 CMR 32.08.
- (h) a records access officer shall, when appropriate, suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably.
- (i) a records access officer may not require the requester to specify the purpose for a request, but may except:
 - ~~1. when the requested records concern information which may be exempt from disclosure pursuant to G. L. c. 4, § 7(26)(n);~~
 - 21. to determine inquire whether the records are requested for a commercial purpose; or
 - 32. to determine whether to grant in response to a request for a fee waiver, solicit information to determine whether to grant such request.
- (j) if the magnitude or difficulty of the request, or of multiple requests from the same requester, unduly burdens the governmental entity such that it is unable to provide access to the requested records within 10 business days of receipt of the request, a records access officer shall identify a reasonable timeframe in which it shall produce the public records sought in the following manner:
 - 1. **Agencies.** For an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records;

2. **Municipalities.** For a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records.

- (3) **Denial by Records Access Officer.**

- (a) the records access officer shall use superior knowledge of the records to determine whether any responsive records may be withheld under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege. may be provided due to the status of a requester, or a representative of the requester.
 - (b) a records access officer shall provide written notice by first class mail or electronic mail to a requester of any denial of access to records.
 - (c) a records access officer shall provide such written notice of denial of access within ten business days of its receipt of a request for public records.
 - (d) such written notice of denial shall include:
 - 1. the date of the request;
 - 2. identification of any records sought that are not within the possession, custody, or control of the records access officer;
 - 3. identification of any known records access officer that may be in possession, custody or control of the public record sought;
 - 4. identification of any records, categories of records or portions of records that the records access officer intends to withhold;
 - 5. identification of any specific exemption to the Public Records Law or common law privilege that applies to the withhold record or records;
 - 6. identification of the applicability of each cited exemption or privilege to each portion of the withheld record or records;
 - 7. identification of any portions of responsive records that the records access intends to produce; and
 - 8. a statement informing the requestor of the right of administrative appeal to the Supervisor under 950 CMR 32.09(1) and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.
 - (e) where a record has been withheld based on a claim of the attorney-client privilege the records access officer shall provide in its written denial a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.
- (4) **Petition for modification or waiver by a records access officer to the Supervisor.**
- (a) all petitions for modification or waiver from a records access officer to the Supervisor shall be in writing and delivered to the Supervisor in accordance with

950 CMR 32.04(1). A copy of the petition shall be provided by the records access officer to the requester. The Supervisor shall issue a written determination with findings regarding any such petition within five business days following receipt of a records access officer petition.

- (b) petitions filed under this section do not affect the requirement that a records access officer shall provide an initial response to a requester within ten business days after receipt of a request for public records, pursuant to 950 CMR 32.07(2)(c) and 950 CMR 32.07(3)(c). Failure to comply with this requirement will result in a waiver of the right to assess fees for public records.
- (c) all such petitions shall be considered public records both in the custody of the records access officer and the Supervisor. The Supervisor shall post such petitions online within a reasonable amount of time after a determination is issued.
- (d) petitions for modification or waiver may include a request for extension of time to furnish copies of the requested records pursuant to (f), to waive statutory limits to fees pursuant to (g), or to waive the obligation to provide records in response to a request that was frivolous.
- (e) such petitions must be made by a records access officer within 20 business days after receipt of a request for public records, or within ten business days after the records access officer's receipt of a determination by the Supervisor that a requested record constitutes a public record.
- (f) a petition for extension of time shall include a brief narrative detailing why an extension of time is necessary. Upon a showing of good cause, the Supervisor may grant a single extension. For an agency, such extension may not exceed 20 business days. For a municipality, such extension may not exceed 30 business days.
- (g) request for a waiver of statutory limits to fees assessed to segregate and/or redact public records:
 - 1. any records access officer may petition the Supervisor to charge for time spent segregating or redacting records.
 - 2. only a municipal records access officer may petition the Supervisor ~~with respect to~~ for permission to charge fees in excess of the maximum hourly rate of \$25 per hour for time required to comply with a request.
 - 3. records access officers shall not petition the Supervisor seeking a waiver associated with the provisions of 950 CMR 32.08(2)(m)(1), (n)(1).

X. records access officers shall not petition the Supervisor seeking a waiver of the prohibition in 950 CMR 32.07(2)(d) on assessing a fee for the provision of public records if the records access officer's response is provided more than ten business days after the receipt of the request.

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH

4. a records access officer shall ~~respond to~~fulfill a request within five business days of receipt of the Supervisor's determination regarding a petition submitted under section 950 CMR 32.07(4)(g).
5. failure by the records access officer to comply with the provisions of this section shall result in a waiver of the right to assess a fee pursuant to 950 CMR 32.07(2)(d).

32.08: Copies of records; fees

(1) Copies of paper and electronic records.

- (a) upon request, a person shall be entitled to receive in hand, by mail, by facsimile or electronically one copy of a public record or any desired portion of a public record.
- (b) as an alternative to obtaining copies of records from a records access officer a person shall be permitted to, to the extent feasible:
 - 1. view and inspect records prior to obtaining copies; or
 - 2. use a personal device such as a camera or portable scanner to copy records.
- (c) the records access officer shall presume that a requester prefers copies provided in machine-readable electronic form, when-unless such form is ~~un~~available, unless the requester specifies an alternative preference.
- (d) the records access officer shall not convert a record from one electronic form to another as a means to deny access to portions of the record such as mathematical formulas in spreadsheet records or metadata contained in email records.
- (e) the records access officer shall ensure, to the extent feasible that:
 - 1. newly acquired or implemented electronic record keeping systems or databases are capable of providing data in a commonly available electronic, machine readable format; and
 - 2. the system allows for information storage and retrieval methods permitting retrieval of public portions of records to provide maximum public access.
- (f) a responsive record in the form of an extract of existing data shall not be considered creation of a new record and shall be considered a record in existence at the time of the request.

(2) Fees.

- (a) a records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection.
- (b) a records access officer may assess a reasonable fee to provide copies of public records.
- (c) a records access officer shall provide a written, good faith estimate of the applicable fees to be incurred prior to complying with a public records request.

- (d) the reasonable fee shall not exceed the actual cost of reproducing the record.
- (e) a fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or a request for a waiver is approved by the Supervisor pursuant to 950 CMR 32.07(4)(g)(1).
- (f) a records access officer shall maintain a copy of records produced in response to each request for which time is spent segregating or redacting the records, and shall not assess a fee for segregating and redacting the same records in response to subsequent requests.
- (f) the charge for black and white paper copies or printouts of records of any size susceptible to ~~the~~ ordinary means of production shall not exceed 5 cents per page, for both single and double-sided copies.
- (g) a records access officer shall not assess a copying fee for electronic copies or facsimile copies of public records.
- (h) the actual cost of any storage device or material provided to a person in response to a request for public records may be included as part of the fee.
- (i) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed, provided that the records access officer shall charge the lowest cost available for such reproduction, at the discretion of the requester.
- (j) a records access officer shall assess no fee greater than the lowest hourly rate of a person capable of compiling, segregating, redacting and reproducing a requested record, subject to the requirements of 950 CMR 32.08.
- (k) a records access officer may assess the actual cost of postage to mail copies of public records, provided:
 - 1. the requester specifically requests that records be mailed or is unable to receive copies in person; and
 - 2. the records access officer shall charge the lowest cost available for such mailings, at the discretion of the requester.
- (l) **Waiver of fees.** Records access officers may waive or reduce the amount of any assessed fee upon a showing that:
 - 1. disclosure of a requested record is in the public interest;
 - 2. the request for records is not primarily in the commercial interest of the requestor; or
 - 3. the requestor lacks the financial ability to pay the full amount of the

950 CMR 32 OFFICE OF THE SECRETARY OF THE COMMONWEALTH
reasonable fee.

(m) Agency records access officers.

1. an agency records access officer shall not assess a fee for the first four hours of time spent compiling, segregating, redacting and reproducing a requested record.

2. an agency records access officer shall not assess a fee for time spent compiling, segregating, redacting and reproducing a requested record unless such compilation, segregation or redaction is required by law or approved by the Supervisor.
3. an agency records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records.

(n) Municipal records access officers.

1. a municipal records access officer shall not assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record in a municipality with a population of over 20,000.
2. a municipal records access officer in a municipality with a population of 20,000 persons or fewer may assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record, provided:
 - i. population data shall be determined by the decennial U.S. Census or an annual census if contrary to the decennial U.S. Census; and
 - ii. it shall be the burden of the municipal records access officer to provide population data information in responses in which it seeks to assess such fees.
3. a municipal records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records unless approved by the Supervisor, pursuant to 950 CMR 32.07(4).

(o) Failure to pay fee.

1. a records access officer may provide written notice denying access to public records to a requester who has failed to compensate the ~~records-access officer~~ governmental entity for previously produced public records ~~for which it prepared a fee estimate~~, provided:
 - i. ~~the prior~~ fee estimate for the previous request was prepared in compliance with 950 CMR 32.08 and the requester agreed to pay the fee;
 - ii. the prior fee was not waived, prohibited pursuant to 950 CMR 32.07(2)(d), or otherwise prohibited by statute or court judgment; and
 - iii. the written notice cites the reasons for denial, including an itemized list of any balances attributed to previously produced records.

(1) **Appeal to the Supervisor.**

- ~~(a) this section shall not apply to records in which the requester, or a representative of the requester, has a unique right of access to the record.~~
- (b) a requester may petition the Supervisor for failure by a records access officer to comply with a requirement of 950 CMR 32.00.
- (c) the Supervisor shall only open appeals associated with requests made in writing. An oral request, while valid as a public record request, shall not be the basis of an appeal under 950 CMR 32.09.
- (d) petitions for appeal of a response by a records access officer must be made within 90 calendar days of a response by a records access officer.
- (e) petitions for appeal of a failure to respond within the timeliness requirements of 950 CMR 32.00 must be made within 90 calendar days of the request.
- (f) all petitions for appeal shall be in writing and shall specifically describe the nature of the requester's objections to the response or failure to timely respond.
- (g) requesters shall provide to the Supervisor complete copies of all correspondence associated with the petition, including:
 - 1. a complete copy of the letter by which the request was made, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses; and
 - 2. a complete copy of all written responses associated with requests subject to the petition for appeal, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses.
- (h) in petitioning the Supervisor, the requester shall provide a copy of such petition to the records access officer associated with such petition.
- (i) if the requester's petition for appeal is related to a previous appeal to the Supervisor, the requester's petition shall refer to the previous appeal number.
- ~~(j) it shall be within the discretion of the Supervisor whether to open an appeal concerning a request for public records. The Supervisor may decline to accept an appeal for, among other reasons if, in the opinion of the Supervisor:
 - 1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation between the requester and the governmental entity;
 - 2. the request is designed or intended to harass, intimidate, or assist in the commission of a crime;~~

~~3. the public records request is made solely for a commercial purpose;~~

~~4. the requester has failed to comply with the provisions of this section.~~

(2) **Dispositions of Appeals.**

~~(a) once reviewed and approved the Supervisor shall issue an appeal number associated with each appeal submitted by a requester.~~

~~(b) The appeal will be considered received by the Supervisor once an appeal number is assigned.~~

(ea) the Supervisor shall issue a written determination regarding any petition submitted in accordance with 950 CMR 32.09(1) not later than ten business days following ~~the date an appeal number is assigned~~ receipt of the petition.

(b) the Supervisor may deny an appeal if:

1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation between the requester and the governmental entity;

2. the request is designed or intended to harass, intimidate, or assist in the commission of a crime;

3. the public records request is made solely for a commercial purpose.

(~~d~~) upon a determination by the Supervisor that a violation has occurred, the Supervisor shall order timely and appropriate relief.

(3) **Hearings and conferences.**

(a) the Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. The decision to hold a hearing shall be solely in the discretion of the Supervisor.

1. said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.09.
2. nothing in 950 CMR 32.09 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.

(b) the Supervisor may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding. The decision to hold a conference shall be solely in the discretion of the Supervisor.

(4) **In Camera Inspections and Submissions of Data.**

(a) the Supervisor may require an inspection of the requested record(s) in camera during any investigation or any proceeding initiated pursuant to 950 CMR 32.09.

(b) the Supervisor may require the records access officer to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.09.

(c) the Supervisor does not maintain custody of documents received from a records access officer submitted for an in camera review. The documents submitted for an

in camera review do not fall within the definition of public records. G. L. c, 4, § 7 (26).

- (d) upon a determination of the public record status of the documents, they are promptly returned to the custodian, and no copies shall be retained by the Supervisor.
- (e) any public record request made to the Division for records being reviewed in camera would necessarily be denied, as the office would not be the custodian of those records.
- (f) attorney-client privileged records voluntarily submitted to Supervisor:
 - 1. a records access officer may permissibly submit documents to the Supervisor for in camera review;
 - 2. such submission shall not waive any legally applicable privileges claimed by the records access officer.

(5) Custodial Indexing of Records.

- (a) the Supervisor may require a records access officer or governmental entity custodian to compile an index of the requested records.
- (b) said index shall be a public record and shall meet the following requirements:
 - 1. the index shall be contained in one document, complete in itself;
 - 2. the index shall adequately describe each withheld record or redaction from a released record;
 - 3. the index must state the exemption or exemptions claimed for each withheld record or each redaction of a record; and
 - 4. the descriptions of the withheld material and the exemption or exemptions claimed for the withheld material must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt.
- (c) nothing in 950 CMR 32.09 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

32.10: Enforcement of Orders

A records access officer shall promptly take such steps as may be necessary to comply with an order of the Supervisor. If a records access officer fails to comply with an order issued by the

Supervisor, the Supervisor, upon the Supervisor's initiative, may notify the Attorney General to ensure compliance.

32.11: Advisory Opinions

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