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EMAILED TO PATRICK.WALSH@MAHOUSE.GOV

September 12, 2018

RE: Written Testimony for Special Legislative Commission on Public Records

Dear Rep. Benson and Sen. Timilty,

I'm writing on behalf of the New England First Amendment Coalition (NEFAC)¹, a Massachusetts-based non-profit organization that advocates for, among other things, the public's right to know about its government.

Since its founding in 2006, NEFAC has helped lead the way for public records reform in the Commonwealth. Its Board of Directors includes many of the most talented media attorneys and journalists in the state, all working diligently to expand public access to every branch of local and state government. NEFAC is a steering member of the Massachusetts Freedom of Information Alliance — along with the ACLU of Massachusetts, Common Cause and the Massachusetts Newspaper Publishers Association — and played an instrumental role in bringing about significant changes to the public records statute in 2016.

Despite improvements made to the statute two years ago, the public's ability to learn about its government and hold its leaders accountable is still inhibited by major omissions in the law: the governor's office, the judiciary and the legislature all continue to be exempt or claim exemption from the statute.

That's too much secrecy.

No matter how strongly the public records statute may be written, it still only covers a small fraction of the documents produced by state government. It's an embarrassment that Massachusetts — whose own constitution explicitly requires government accountability to the people — is the only state in the country where the public lacks a right to records in the Governor's Office, the judiciary *and* the legislature. Accountability simply cannot exist where there is secrecy.

In these comments, I will highlight the danger of secrecy within state offices and share examples of how other states have addressed the public's right to know. But first it's important to emphasize that the benefit of transparency isn't just to root out corruption and expose the misdeeds of public officials. It's also to assure citizens that their system of government is working as intended and that their leaders are honest, competent individuals serving the public's

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interest. Public record laws exist to give citizens the information they need to confirm these assumptions and dispel any suspicion otherwise. With this transparency — and only with this transparency — can there be the trust needed between citizens and the government that serves them.

Legislature

That level of trust would be created between citizens and their legislators if transparency in the Legislature is mandated through the public records statute. Consider the allegations of sexual misconduct that have recently shaken Beacon Hill and resulted in a change of state Senate leadership. The Associated Press filed public record requests earlier this year looking for answers to several questions many in the Commonwealth were asking, such as how many sexual harassment complaints were lodged against legislators over the past decade and whether any financial settlements were reached with accusers.²

Exempted from the state's public records law, the Senate provided no records. Wrote Bob Salsberg of The Associated Press: "The Legislature's longstanding exemption from the state's public records law and frequent use of non-disclosure agreements make fully assessing the scope of the sexual harassment problem on Beacon Hill virtually impossible." Without fully assessing the scope of the problem, Massachusetts residents cannot achieve full accountability. This would change, however, if the Legislature were subject to the state's public records statute and constituents were entitled to the information now being kept secret.

In comparison, residents in other states are enjoying the full accountability, and ultimately protection, that broader public record laws provide. The League of Women Voters in 2015, for example, used Florida's public records law to obtain emails of state legislators showing that these representatives unconstitutionally remapped voting districts to benefit their own political party.³ If this scenario were to play out in Massachusetts, our public records law would be of no help.

Governor

In February 2017, Laura Krantz of The Boston Globe requested records from Gov. Charlie Baker related to calls from his constituents.⁴ The intent behind the request was to learn more about the issues residents were calling the governor about and, presumably, whether the governor was addressing any of those concerns. The documents were denied.

Gov. Baker, like his predecessors, claimed his office was exempt from the public records law and cited *Lambert v. Executive Director of the Judicial Nominating Council*, a case NEFAC board member Peter Caruso, an Andover-based media attorney, said is "hollow" and revolves around one narrow issue unrelated to the documents requested.⁵ Citing *Lambert* is a tactic regularly employed by Gov. Baker to evade transparency, but one also used by former Governors Deval Patrick, Mitt Romney and Paul Cellucci, all who have used the case as an excuse to keep information about their work secret.⁶ Krantz and The Globe appealed the records denial, but Attorney General Maura Healey affirmed the governor's position in November⁷ leaving little recourse for citizens except expensive litigation or new legislation.

Giving a governor power to withhold basic information from the public is a dangerous proposition, as those in Michigan now realize. Like Massachusetts, Michigan is among the few states where the governor is exempt or claims to be exempt from the public records law.⁸ But that may soon change. After more than 100,000 residents were first exposed to lead water in Flint, Michigan several years ago, the lack of transparency complicated efforts to determine how the crisis occurred and who to hold responsible. Now all major party candidates competing to become Michigan's next governor have publicly supported making the governor's office subject to public record requests.⁹

Meanwhile, the governors who are currently subject to public record laws must provide a level of transparency that often results in more accountability. It was only through a public record statute, for example, that reporters in Virginia five years ago uncovered more than \$177,000 in gifts and loans given to their then-governor in exchange for promoting a dietary supplement company.¹⁰

These examples aren't given to imply that improprieties like those in Virginia or a crisis like that in Michigan currently exist within our own governor's office. But they do highlight what can occur without the transparency a strong public records law provides.

Judiciary

The same holds true for the state's judiciary. A lawsuit last year brought by the Lawyers' Committee for Civil Rights and Economic Justice¹¹ illustrates how the court exemption can be interpreted broadly to deny citizens information clearly in the public interest. The Committee sued the Trial Court System after it was denied records concerning "the demographics, promotion process and hiring practices of the Trial Court Security Department." The request was prompted by concerns that the Court was not hiring qualified minority women for certain security positions. Even though these records pertained to the administrative procedures of the Court — and not the judicial function itself — the Court refused to provide the records requested on the basis of its exemption from the state's public record statute.



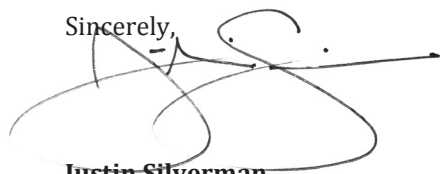
The Lawyer's Committee filed suit arguing that: "Particularly in light of the well-documented history of real and perceived corruption in the Trial Court's hiring and promotion practices, a requirement of transparency is necessary."

The Court ultimately produced the documents on its own and rendered the case moot. But there's no guarantee that it will release similar records in the future, no matter how relevant they are to diversity issues in its employment practices. In comparison, the administrative records of Connecticut courts are explicitly covered by that state's public records law.¹² Expanding the scope of the Massachusetts statute would likewise allow citizens to trust that their court system is being administered fairly without the financial burden of filing a lawsuit to obtain documents showing so.

The members of this special commission have a difficult job, particularly if it determines the Legislature should be open to public record requests. As compelling as the examples provided in this letter may be, it is up to legislators like you to convince your colleagues that the value of transparency is worth the additional scrutiny. I encourage you to provide strong leadership on this issue and to remember that government transparency is neither personal nor partisan. It's about showing Massachusetts residents that those in power today and tomorrow are serving the public interest. It's about changing the culture of the Commonwealth from one of secrecy and suspicion to one of transparency and trust.

Thank you again for the opportunity to submit these comments. Please let me know if I can be of any additional assistance as your commission continues its incredibly important work.

Sincerely,



Justin Silverman
Executive Director

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1. For more information about NEFAC's work in Massachusetts and throughout New England, please visit www.nefac.org.
 2. <http://www.telegram.com/news/20180411/massachusetts-legislatures-records-exemption-shields-data-on-misconduct>
 3. <https://www.lwv.org/newsroom/press-releases/florida-decision-major-victory-against-partisan-gerrymandering>
 4. <https://www.bostonglobe.com/metro/2017/04/19/healey-review-globe-request-for-baker-records/93xZxcbPZVm5C4gN3PFYIL/story.html>
 5. <https://www.bostonglobe.com/opinion/editorials/2017/11/28/the-secrets-governor-charlie-baker/GFTPgrLDAthhBkjdYGsPWL/story.html>
 6. <http://nefac.org/massachusetts-governor-charlie-baker-fast-learner/>
 7. <https://commonwealthmagazine.org/politics/healey-governor-not-subject-public-records-law/>
 8. <http://www.michiganradio.org/post/lawmakers-vote-opening-public-records-governors-office-and-legislature>
 9. <https://www.detroitnews.com/story/news/politics/2018/03/14/open-records-michigan-governor-candidates/32939297/>
 10. https://www.washingtonpost.com/local/va-politics/mansion-spending-records-indicate-improper-billing-by-virginia-governor-and-his-family/2013/06/16/6008bfdc-c240-11e2-8c3b-0b5e9247e8ca_story.html?utm_term=.323c983c3adc and https://www.richmond.com/news/virginia/government-politics/bob-mcdonnell-owes-million-in-legal-fees/article_bcf6873-dd0f-535f-a2a1-927782b02659.html

11. *Lawyer's Committee for Civil Rights and Economic Justice v. Spence, et. al.*, No. SJ-2016-0503

12. Conn. Gen. Stat. c. 14 § 1-201

