

The New Massachusetts Public Records Law What It Means to You and Your Newsroom

February 2, 2017 | 7 p.m. to 9 p.m. | J.J. Foley's Cafe in Boston

Presented By

**The Society of Professional Journalists New England
New England First Amendment Coalition**



Featuring

PETER J. CARUSO, SR.
New England First Amendment Coalition

MICHAEL MORISY
MuckRock

MAYA SHAFFER
The Bay State Examiner

TODD WALLACK
The Boston Globe

GAVI WOLFE
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About SPJ New England and NEFAC

New England

MISSION

- ▶ To promote the flow of information.
- ▶ To encourage diversity in journalism.
- ▶ To maintain constant vigilance in protection of the First Amendment guarantees of freedom of speech and of the press.
- ▶ To inspire successive generations of talented individuals to become dedicated journalists.
- ▶ To stimulate high standards and ethical behavior in the practice of journalism.
- ▶ To be the pre-eminent, broad-based membership organization for journalists.
- ▶ To foster excellence among journalists.
- ▶ To encourage a climate in which journalism can be practiced freely.



New England First Amendment Coalition

www.nefirstamendment.org

MISSION

The goal of the New England First Amendment Coalition is to defend, promote and expand public access to government and the work it does. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition aspires to advance and protect the five freedoms of the First Amendment, and the principle of the public's right to know, in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance understanding of the First Amendment across the nation and freedom of speech and press issues around the world.

NEFAI 2017

The New England First Amendment Institute is an annual intensive training course for working journalists on freedom of information laws and investigative reporting techniques. By bringing together highly acclaimed media lawyers and award-winning journalists, we offer our 25 fellows a rich and collegial training program to help them better practice watchdog journalism. Applications for this exclusive program will be available in early spring. Visit www.tinyurl.com/nefacsubscribe to stay informed.

HOW TO JOIN

- 1 Visit spj.org.
- 2 Bring your cursor to the "Join SPJ" tab on the top left hand side of the homepage.
- 3 Click on one of the "Three Ways to Join" options on the menu that will appear.
- 4 Fill out the application and be sure to pay both membership and local chapter dues.

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HOW TO SUPPORT

With the New England First Amendment Coalition, you are in a unique position to help keep government accountable and journalism thriving. With the support of individuals like you, NEFAC is making strides. Every donation, no matter the size, counts when it comes to helping NEFAC fight for the First Amendment in the six-state region. We need your help sustaining the effort. Thank you for your support.

- 1 Send a check payable to "New England First Amendment Coalition" to NEFAC, 111 Milk Street, Westborough, MA 01581.
- 2 Donate online by visiting nefirstamendment.org and clicking the "DONATE" box in the upper right corner.

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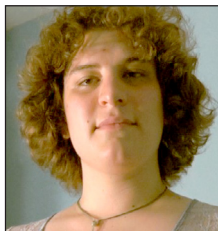
PETER J. CARUSO, SR.
New England
First Amendment Coalition

Peter J. Caruso, Sr., has represented the media in some of the most high-profile court cases in Massachusetts history since 1977. Caruso has represented print professionals in a vast spectrum of media litigation, including defamation, media and the Internet law, newspaper access, advertising acceptance, news reporting, copyright and publications law. A Massachusetts Bar Fellow and a member of the American Bar Association and its Forum on Communications Law, Caruso has argued cases before the Massachusetts Supreme Judicial Court, the Massachusetts Appeals Court, and the U.S. Court of Appeals. Caruso has also represented media organizations throughout New England, including the New England Newspaper Association and the New England Press Association, and was media counsel in the Willie Horton, Pam Smart, and Alan Eagleson cases. Caruso has been inducted into the New England Newspaper Hall of Fame.



MICHAEL MORISY
MuckRock

Michael Morisy is the founder of non-profit investigative news site and FOIA tool MuckRock. Since 2010, MuckRock has helped thousands file public records and FOIA requests at all levels of government. This has helped expose waste and unlawful surveillance and bring about reforms at all levels of government.



MAYA SHAFFER
The Bay State Examiner

Maya Shaffer is an independent investigative reporter from Massachusetts whose work is focused on issues of governmental transparency and accountability. She's written for Photography Is Not A Crime, co-authored Dig-Boston's "Broken Records" column last year and continues to work with the Boston Institute for Nonprofit Journalism. Maya cofounded The Bay State Examiner and will be launching a new outlet in 2017.



TODD WALLACK
The Boston Globe

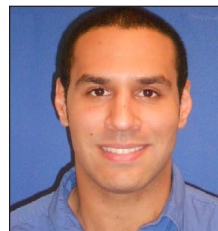
Todd Wallack is a data and investigative reporter for the Boston Globe's Spotlight team. He won national awards last year from the Scripps Howard Foundation and the Society of Professional Journalists for his work on public records. He has also been a finalist for the Pulitzer Prize and Goldsmith Awards. Prior to joining the Globe in 2007, he worked for the San Francisco Chronicle, Boston Herald, Dayton (Ohio) Daily News and other publications. He has a bachelor's and master's degree in journalism from Northwestern University.



GAVI WOLFE
American Civil Liberties
Union of Massachusetts

Gavi Wolfe is legislative director at the American Civil Liberties Union of Massachusetts. Wolfe lobbies at the Massachusetts State House on a range of issues related to individual rights and liberties. He is particularly concerned about the trend of increased government intrusion into private aspects of our lives at the same time that government activity is kept more and more secret. He works to reverse that trend by advocating for both privacy rights in the digital age as well as government transparency. Wolfe is a graduate of Boston College Law School.

MODERATOR



JORDAN FRIAS
Society of Professional
Journalists New England

Jordan Frias is a contributor at Spare Change News and an editorial assistant in the news department of the Boston Herald. He is a graduate of Northeastern University's School of Journalism and was previously employed by GateHouse Media and the now defunct Boston Courant newspaper.

Massachusetts Has a New Public Records Law — Now What?

By Robert A. Bertsche and Jeffrey Pyle

This New Year's Day, journalists in Massachusetts can look forward to more than just a hangover: They'll have a new public records law to try out.

Like a night of epic carousing, the “Act to Improve Public Records,” which goes into effect January 1, has upsides and downsides. It establishes a presumption (not a requirement) that successful records requesters will be awarded their attorneys' fees if they prevail in a lawsuit. It even carries the threat of punitive damages if a custodian withholds records in bad faith. The law also puts some limits on the fees that agencies and municipalities can charge. On the other hand, it extends the time that public entities can take to provide public records: Municipalities can now take more than a month in some cases. The law also leaves some room for custodians to charge exorbitant hourly rates for their employees or outside counsel to search for and redact records.

Until we can demonstrate the need for new legislation to give the public records law even sharper teeth, journalists will need to use the tools provided in the new law. Here, then, are a few tips on how to take advantage of some of these new provisions — and how to avoid some traps for the unwary. (If you have others, feel free to share them in the comments.)

1. Make your request to the “Records Access Officer.”

Under the new law, every agency and municipality must appoint at least one Records Access Officer (“RAO”) to facilitate access to records. This provision was intended to ensure greater accountability for compliance and prevent the government from giving requesters the runaround. However, some journalists and members of the public enjoy relationships with employees who regularly provide them immediate access to documents without bureaucratic hassle, and they may not want to start directing all their requests to an RAO, who may or may not be as access-friendly.

If you have such a relationship, you can continue to use it; the law says the appointment of an RAO does not “prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so.” However, the law (probably unintentionally) goes on to impose specific obligations only on RAOs, including the obligation to provide records electronically and the power to “waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest.” The drafters of the law likely did not intend to limit such obligations and powers only to RAOs, but submitting your request to someone else may give the public entity an argument that you're not entitled to some of the benefits of the new law. One option is to turn to your established relationships first, but, if you encounter resistance, route the request to the RAO.

2. Designate your preferred electronic format in your request letter.

As noted above, the new law says that RAOs “shall, to the extent



feasible, provide the public record in the requestor's preferred format or, in the absence of a preferred format, in a searchable, machine readable format.” This is a good provision, especially for data-driven journalists. It is probably always “feasible” to export a government database into Excel so the data can be organized, filtered, and sorted in a useful way. This provision should end the common practice whereby agencies try to stymie analysis by printing out large spreadsheets and providing them in paper form, or by converting them to pdfs.

To get the benefit of this provision, it's a good idea to identify your “preferred format” in your request letter, especially if you're seeking big files. If custodians ignore your request to use your preferred format, consider appealing to the Supervisor of Records.

3. Carefully check the timing and contents of the response.

One of the major defects of the old public records law was that records custodians could simply ignore requests beyond the required 10-day response period and suffer no consequences. Under the new law, a failure to respond within 10 “business days” will prevent an agency or municipality from assessing a fee for any records ultimately provided — no matter how many hours it takes staff to comply with the request.

In addition, subsection (b) of the statute expands the information the records custodian must provide in a response to a request if it does not provide the records within 10 business days. Specifically, the RAO must:

- identify the categories of documents the entity intends to produce or withhold;
- if more time is needed, provide a “detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records”; and
- provide an “itemized, good faith estimate” of fees to be charged.

Importantly, the law provides that no fees may be charged unless the RAO responds to the initial request “under subsection (b)” within 10 business days, and that subsection requires that the response “shall” include all required information. Thus, if a records custodian issues a 10-business-day response but does not include

the required information, no fee may be charged. Requesters should check responses carefully to see whether all information is provided, and should use any failures to argue that any fee should be eliminated.

For requests to state agencies (as opposed to municipalities), the response time is actually shorter than 10 business days. Under a July 2015 directive by Gov. Baker, agencies are supposed to determine by the fifth business day after a request whether “the agency believes it will take longer than 10 days and/or cost in excess of \$10 to produce responsive documents.” If so, “the RAO should contact the requester by that fifth day to confirm that the agency fully understands the request and optimal search terms, and to see if the requester wants to adjust the request in any way, maybe by narrowing its scope.” Gov. Baker’s directive has not been superseded by the new public records law, so agencies are subject to both 5-day and 10-day turnarounds.

4. Consider whether to skip an appeal to the Supervisor of Records.

One of the greatest achievements of the new public records law is the ability to recoup attorneys’ fees and costs if a requester successfully sues for access. As the advocacy group Common Cause and many others have pointed out, attorneys’ fee provisions impose financial consequences for wrongful denials, giving the government an incentive to take the law seriously.

Early versions of the legislation proposed mandatory fee-shifting, but the Legislature ultimately enacted a “presumption” for fee-shifting that can be overcome only in certain circumstances, including where the Supervisor of Records finds that the agency or municipality did not violate the law. In other words, if a requester is denied records and loses an appeal to the Supervisor, but then sues in court and wins, there is no presumption of attorneys’ fees — the court can simply award or deny them in its discretion. Absent such an unfavorable ruling from the Supervisor, the presumption is lost only if there’s an Attorney General or appellate court opinion on “similar facts” denying access, or if the request is for either strictly commercial or “harassment” purposes.

In the few cases where requesters have sued after losing a Supervisor appeal, they have had good success (because the Supervisor has often been wrong). Thus, requesters who are denied access should carefully consider whether they’re likely to increase or decrease their leverage by appealing to the Supervisor. If the Supervisor has ruled against access in a similar case, requesters may want to skip the appeal and keep the threat of attorneys’ fees alive. Thankfully, Supervisor decisions are now available online, though they are not yet full-text searchable. Using that database, you can see if an appeal is likely to be a benefit or hindrance to your case.

5. Beef up those appeal letters.

The new law states that when an appeal is filed, the Supervisor of Records “shall issue a written determination . . . not later than 10 business days following receipt of the petition.” This provision is intended to require prompt resolution by the Supervisor and a prompt response by the government to any petition if it’s going to have its point of view considered. The standard is clearly achievable: In theory, an agency or municipality should have carefully

determined why the records are not subject to disclosure before issuing a denial letter, and the Supervisor’s office is supposed to know what the law requires.

The Supervisor, however, has tried to extend his time frames by issuing draft regulations redefining what it means to “receive” an appeal. Under the draft regulations, once an appeal is “reviewed and approved, the Supervisor shall issue an appeal number associated with each appeal submitted by a requester”; the appeal “will be considered received by the Supervisor once an appeal number is assigned”; and a decision will issue “not later than ten business days following the date an appeal number is assigned.”

This provision is clearly inconsistent with both the letter and the intent of the legislation: The Supervisor has no power by regulation to help himself to an indefinite extension of a statutory deadline. Andrew Quemere and Maya Shaffer of DigBoston pointed out this problem in comments to the Supervisor’s office. Stay tuned to see whether the provision remains in the final rules.

Regardless of how the extension controversy is resolved, a 10-business-day turnaround time means a requester probably only has one shot to argue that a denial was improper — and that’s in the appeal letter. Under the old law, a requester might have had an opportunity to respond to reasons for denial by the public body before a Supervisor’s decision issued. But with a time frame of 10 business days running from the receipt of the appeal, there may not be such an opportunity.

Accordingly, it’s now a good idea to put all your arguments for access, along with appropriate citations to case law and prior decisions by the Supervisor, in your initial appeal letter. You have 90 days from a denial to file your appeal, so take the time to make it count.

Robert A. Bertsche and Jeffrey Pyle are attorneys at the Boston law firm Prince Lobel Tye, LLP. Bertsche is also a member of the New England First Amendment Coalition’s Board of Directors.

Photo courtesy David Rosen.

An Act to Improve Public Records

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. Section 7 of chapter 4 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the word “transportation”, in line 226, the following words:- , cyber security.

SECTION 2. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in line 229, the words “subsection (b)” and inserting in place thereof the following words:- subsection (c).

SECTION 3. Said section 7 of said chapter 4, as so appearing, is hereby further amended by inserting after the word “safety”, in line 230, the following words:- or cyber security.

SECTION 4. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in lines 231 and 242, the words “and home” and inserting in place thereof the following words:-, personal email address and home.

SECTION 5. Said section 7 of said chapter 4, as so appearing, is hereby further amended by striking out, in line 269, the word “ten” and inserting in place thereof the following word:- 10A.

SECTION 6. Chapter 10 of the General Laws is hereby amended by inserting after section 35CCC the following section:-

Section 35DDD. There shall be established and set up on the books of the commonwealth a Public Records Assistance Fund, which shall be administered by the Massachusetts office of information technology. The fund shall be credited with:

- (i) all punitive damages assessed pursuant to paragraph (4) of subsection (d) of section 10A of chapter 66;
- (ii) any appropriations, bond proceeds or other monies authorized or transferred by the general court and specifically designated to be credited to the fund;
- (iii) gifts, grants and other private contributions designated to be credited to the fund;
- (iv) all other amounts credited or transferred to the fund from any other fund or source; and
- (v) interest or investment earnings on any such monies. Amounts credited to the fund may be expended by the chief information officer, without further appropriation, to provide grants to municipalities to support the information technology capabilities of municipalities to foster best practices for increasing access to public records and facilitating compliance with said chapter 66.

The unexpended balance in the fund at the end of a fiscal year shall not revert to the General Fund but shall remain available for expenditure in subsequent fiscal years. No expenditure made from the fund shall cause the fund to become deficient at any point.

SECTION 7. Chapter 66 of the General Laws is hereby amended by inserting after section 1 the following section:-

Section 1A. The supervisor of records shall:

- (i) create educational materials or guides for agencies and municipalities, and may make available training in order to foster awareness and compliance with this chapter; and
- (ii) prepare forms, guidelines and reference materials for agencies and municipalities to use and disseminate to individuals seeking access to public records to assist them in making informed public records requests.

The supervisor of records shall make the forms, guidelines and reference materials available at no cost on a website operated by the secretary of the commonwealth. Upon request and to the extent feasible, the supervisor of public records shall assist each agency and municipality in developing best practices to facilitate compliance with this chapter and to promote access to public records.

SECTION 8. Section 3 of chapter 66 of the General Laws, as so appearing, is hereby amended by inserting after the words “process”, the second time it appears in line 12, the following words:- , or by electronic means.

SECTION 9. Said chapter 66 is hereby further amended by inserting after section 6 the following section:-

Section 6A. (a) Each agency and municipality shall designate 1 or more employees as records access officers. 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. For the purposes of this chapter 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.

(b) A records access officer shall coordinate an agency’s or a municipality’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. Each records access officer shall:

- (i) assist persons seeking public records to identify the records sought;
- (ii) assist the custodian of records in preserving public records in accordance with all applicable laws, rules, regulations and schedules; and
- (iii) prepare guidelines that enable a 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.

Guidelines shall be updated periodically and shall include a list of categories of public records maintained by the agency or municipality. Each agency and municipality that maintains a website shall post the guidelines on its website.

(c) 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. The designation of 1 or more records access officers 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 employee responsible for making public records available shall provide the records in accordance with this chapter.

(d) The records access officer shall provide the public records to a requestor by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form. The records access officer shall, to the extent feasible, provide the public record in the requestor’s preferred format or, in the absence of a preferred format, in a searchable, machine readable format. The records access officer shall not be required to create a new public record in order to comply with a request, provided that furnishing a segregable portion of a public record shall not be deemed to be creation of a new record. If the public record requested is available on a public website pursuant to subsection (b) of section 19 of this chapter, section 14C of chapter 7 or any other appropriately indexed and searchable public website, the records access officer may furnish the public record by providing reasonable assistance in locating the requested record on the public website. An electronically produced document submitted to an agency or municipality for use in deliberations by a public body shall be provided in an electronic format at the time of submission.

(e) Each records access officer of an agency shall document each request for public records submitted to the records access officer. The records access officer shall document:

- (i) the nature of the request and the date on which the request was received;
- (ii) the date on which a response is provided to the requestor;
- (iii) the date on which a public record is provided to the requestor;
- (iv) the number of hours required to fulfill the request;
- (v) fees charged to the person making the request, if any;
- (vi) petitions submitted under clause (iv) of subsection (d) of section 10;
- (vii) requests appealed under section 10A;
- (viii) the time required to comply with supervisor of records orders under said section 10A; and
- (ix) the final adjudication of any court proceedings under subsection (d) of said section 10A.

Nothing in this subsection shall require a records access officer to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall annually collect the information from the records access officers, post the information on a website

maintained by the secretary and report the same to the clerks of the house of representatives and senate.

(f) The supervisor of records shall document appeals filed under section 10A, including:

- (i) the date the request was submitted to the records access officer;
- (ii) the date the records access officer responded;
- (iii) the amount of fees charged to the requestor, if any;
- (iv) petitions made pursuant to clause (iv) of subsection (d) of section 10;
- (v) the time required to comply with supervisor of records orders under said section 10A; and
- (vi) the final adjudication of any court proceedings under subsection (d) of said section 10A.

Nothing in this subsection shall require the supervisor to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall post the information on a website maintained by the secretary.

SECTION 10. Said chapter 66 is hereby further amended by striking out section 10, as appearing in the 2014 Official Edition, and inserting in place thereof the following 4 sections:-

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

- (i) the request reasonably describes the public record sought;
- (ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and
- (iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

- (i) confirm receipt of the request;
 - (ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;
 - (iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
 - (iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;
 - (v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;
 - (vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;
 - (vii) 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;
 - (viii) include an itemized, good faith estimate of any fees that may be charged to produce the records;
- and

(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

- (i) the need to search for, collect, segregate or examine records;
- (ii) the scope of redaction required to prevent unlawful disclosure;
- (iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;
- (iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;
- (v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and
- (vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

(d) 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. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:

- (i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;
- (ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than \$25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);
- (iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than \$25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B)

shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of \$25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of \$25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;

(vi) 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;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and

(ix) as used in this section “commercial purpose” shall mean 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, and shall 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

(e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).

(f) As used in this section, “employee time” means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

Section 10A. (a) If an agency or municipality fails to comply with a requirement of section 10 or issues a response the requestor believes in violation of section 10, the person who submitted the initial request for public records may petition the supervisor of records for a determination as to whether a violation has occurred. In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; provided, however, that where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide 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. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney-client

privilege and the attorney work product privilege. The 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. Upon a determination by the supervisor of records that a violation has occurred, the supervisor of records shall order timely and appropriate relief. A requestor, aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of records to issue a timely determination, may obtain judicial review only through an action in superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as prescribed in subsection (d).

(b) If an agency or municipality refuses or fails to comply with an order issued by the supervisor of records, the supervisor of records may notify the attorney general who, after consultation with the supervisor of records, may take whatever measures the attorney general considers necessary to ensure compliance. If the attorney general files an action to compel compliance, the action shall be filed in Suffolk superior court with respect to state agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor of records. In addition to any other duties the attorney general may impose, the designee shall serve as a primary point of contact within the office of the attorney general regarding notice from the supervisor of records that an agency or municipality has refused or failed to comply with an order issued by the supervisor of records.

(c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).

(d) (1) In any action filed by a requestor pursuant to this section:

- (i) the superior court shall have jurisdiction to enjoin agency or municipal action;
- (ii) the superior court shall determine the propriety of any agency or municipal action de novo and may inspect the contents of any defendant agency or municipality record in camera, provided, however, that the in camera review shall not waive any legally applicable privileges, including without limitation, the attorney-client privilege and the attorney work product privilege;
- (iii) the superior court shall, when feasible, expedite the proceeding;
- (iv) a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.

(2) The superior court may award reasonable attorney fees and costs in any case in which the requestor obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

- (i) the supervisor found that the agency or municipality did not violate this chapter;
- (ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;
- (iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;
- (iv) the request was designed or intended to harass or intimidate; or
- (v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial.

(3) If the superior court awards reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it shall order the agency or municipality to waive any fee assessed under subsection (d) of section 10. If the superior court does not award reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it may order the agency or municipality to waive any fee assessed under said subsection (d) of said section 10. Whether the superior court determines to waive any fee assessed under said subsection (d) of said section 10, it shall issue findings specifying the basis for such decision.

(4) If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested

record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than \$1,000 nor more than \$5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

(e) Notwithstanding any other provision of this chapter, the attorney general may, at any time, file a complaint in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located, to ensure compliance with this chapter and may further intervene as of right in any action filed in accordance with this section. In any action filed or in which the attorney general has intervened under this subsection, paragraphs (1) and (4) of subsection (d) shall apply and any public records the court orders produced shall be provided without a fee.

Section 10B. The commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined in section 121 of chapter 140, shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said section 121 of said chapter 140, and names and addresses of persons licensed to carry or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in section 167 of chapter 6 and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The home address, personal email address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of children and families, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel, shall not be public records in the custody of the employers of such personnel or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed, but such information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180 or to criminal justice agencies as defined in said section 167 of said chapter 6. The name, home address, telephone number and personal email address of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed. The home address, telephone number, personal email address or place of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name, home address, telephone number, personal email address or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

SECTION 11. Section 12 of said chapter 66, as so appearing, is hereby amended by striking out, in line 4, the words “provided for them” and inserting in place thereof the following words:- or buildings, vaults or file rooms that comply with standards of the National Fire Protection Association, or by electronic means with off-site secure storage, or in accordance with standards promulgated by the records conservation board.

SECTION 12. Section 13 of said chapter 66, as so appearing, is hereby amended by inserting after the word “person”, in line 2, the following word:- unlawfully.

SECTION 13. Said chapter 66 is hereby further amended by striking out section 17, as so appearing, and inserting in place thereof the following section:-

Section 17. Except as otherwise provided by law, all public records shall be kept in the custody of the person having the custody of similar records in the county or municipality to which the records originally belonged; provided, however, that the custodian of public records may enter into a contract for the storage of records containing public record information, but no contract for the storage of public records shall be entered into if the contract prevents or unduly restricts a records access officer or custodian of records from providing or storing the records in accordance with this chapter. Records not directly in the custodian’s possession shall be considered in the custody of the custodian if subject to a contract for the storage of public records that is permitted by this section. If the custodian does not have custody of public records, the custodian shall demand

delivery from any person unlawfully having possession of the records, and the records shall immediately be delivered by such person to the custodian. A person who refuses or neglects to perform any duty required by this section shall be punished by fine of not more than \$20.

SECTION 14. Said chapter 66 is hereby further amended by adding the following 3 sections:-

Section 19. (a) When designing or acquiring an electronic record keeping system or database, records access officers shall, consistent with section 17 of chapter 110G, consult with their chief executive officer, chief administrative officer or the Massachusetts office of information technology pursuant to chapter 7D to ensure, to the extent feasible, that the system or database is capable of providing data in a commonly available electronic, machine readable format. Such database designs or acquisitions shall allow for, to the extent feasible, information storage and retrieval methods that permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access. No agency or municipality shall enter into a contract for the storage of electronic records containing public records if the contract prevents or unduly restricts the records access officer from providing the public records in accordance with this chapter.

(b) Every agency shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided that any agency may withhold any record or portion thereof in accordance with state or federal law:

- (i) final opinions, decisions, orders, or votes from agency proceedings;
- (ii) annual reports;
- (iii) notices of regulations proposed under chapter 30A;
- (iv) notices of hearings;
- (v) winning bids for public contracts;
- (vi) awards of federal, state and municipal government grants;
- (vii) minutes of open meetings;
- (viii) agency budgets; and
- (ix) any public record information of significant interest that the agency deems appropriate to post.

Section 20. For requests of payroll, financial and other data residing in the centralized state accounting and payroll systems, or associated data warehouses, the comptroller shall make available guidelines on how agencies using these systems may access and disclose public records to ensure that data that is exempted or prohibited from disclosure is not wrongfully disclosed and the security of the system is maintained.

Section 21. A document made or received by the Massachusetts Bay Transportation Authority Retirement Board or any other legal entity, public or private, which receives funds from the Massachusetts Bay Transportation Authority for the payment or administration of pensions for employees of the Massachusetts Bay Transportation Authority shall be considered a public record under this chapter and under clause twenty-sixth of section 7 of chapter 4 and subject to all applicable exemptions; provided, however, that subsection (6) of section 23 of chapter 32 shall also apply to these documents.

SECTION 15. Section 3 of chapter 268B of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the word “reports”, in line 22, the following words:- ; provided, however, that the commission may make statements and reports filed with the commission available by electronic mail in a read-only format upon the written request of any individual that delivers the request by electronic mail and provides identification acceptable to the commission, including the individual’s affiliation, if any.

SECTION 16. A records access officer serving in a municipality pursuant to section 6A of chapter 66 of the General Laws shall, to the extent feasible, post the commonly available public record documents identified in subsection (b) of section 19 of said chapter 66 on a website maintained by the municipality.

SECTION 17. The supervisor of records shall adopt regulations necessary to implement this act. These regulations shall be adopted not later than January 1, 2017.

SECTION 18. Notwithstanding any general or special law to the contrary, sections 9 and 10 of this act shall not apply to public records requests submitted under section 10 of chapter 66 of the General Laws before the effective date of this act and no obligation imposed by sections 9 and 10 of this act shall be enforceable or deemed relevant in an appeal pending before the supervisor of records or a court on the effective date of this act.

SECTION 19. There shall be a working group to review and evaluate the application of subsection (f) of clause twenty-sixth of section 7 of chapter 4 of the General Laws as it relates to law enforcement. The working group shall review determinations of the supervisor of records and judicial decisions regarding the application of said subsection (f) of said clause twenty-sixth of said section 7 of said chapter 4 and issue findings regarding:

- (i) the public interest in releasing records made and kept by police departments, including arrest records;
 - (ii) privacy and confidentiality concerns related to releasing records made and kept by police departments;
- and
- (iii) the interaction of said subsection (f) of said clause twenty-sixth of said section 7 of said chapter 4 and the criminal offender record information system.

The working group shall consist of: the secretary of the commonwealth who shall serve as chair; the secretary of public safety and security, or a designee; the court administrator of the trial court, or a designee; 2 members of the senate, 1 of whom shall be the minority leader, or a designee; 2 members of the house of representatives, 1 of whom shall be the minority leader, or a designee; 1 of whom shall be the secretary of administration and finance, or a designee; a representative of the American Civil Liberties Union of Massachusetts, Inc.; a representative of the Massachusetts Newspaper Publishers Association; a representative of the Massachusetts Town Clerks Association; a representative of the Massachusetts Chiefs of Police Association, Incorporated.; the attorney general or a designee; a representative of the State Police Commissioned Officers Association of Mass., Inc.; a representative of the Massachusetts Coalition of Police, Inc.; and a representative of the Massachusetts Municipal Association, Inc.

The working group shall file a report of its findings and recommendations, along with any drafts of legislation necessary to carry those recommendations into effect, with the clerks of the senate and house of representatives not later than December 30, 2017.

SECTION 20. (a) There shall be established pursuant to section 2A of chapter 4 of the General Laws a special legislative commission to examine the accessibility of information concerning the legislative process of the general court and the expansion of the definition of public records. Said special legislative commission shall consist of 14 members, 1 of whom shall be the house chair of the joint committee on state administration and regulatory oversight, who shall serve as co-chair; 1 of whom shall be the senate chair of the joint committee on state administration and oversight, who shall serve as co-chair; 1 of whom shall be the chair of the house committee on rules; 1 of whom shall be the chair of the senate committee on rules; 2 of whom shall be members of the house of representatives appointed by the speaker of the house of representatives; 1 of whom shall be a member of the house of representatives appointed by the minority leader of the house; 2 of whom shall be members of the senate appointed by the president of the senate; 1 of whom shall be a member of the senate appointed by the minority leader of the senate; and 2 of whom shall be members of the house of representatives or senate appointed jointly by the speaker of the house of representatives and the president of the senate.

(b) The special legislative commission shall examine the procedures and practices of the general court and its committees with regard to legislative process including, but not limited to:

- (i) scheduling and notice of public hearings and legislative sessions;
- (ii) management of legislative calendars;
- (iii) scope and substance of committee hearings, including the number of bills heard at each hearing;
- (iv) publication and availability of records concerning committee proceedings, including public hearing agendas, public testimony and committee votes;
- (v) rules and scheduling requirements for committee reports;
- (vi) content of committee reports, such as summary, explanatory and analytical materials;
- (vii) contemporaneous and permanent online access to open sessions of the house of representatives and senate;
- (viii) publication of records concerning house of representatives and senate sessions including, but not limited to, roll call votes; and
- (ix) publication of proposed amendments to legislation and votes.

(c) The special legislative commission shall also examine the constitutionality and practicality of subjecting the general court, the executive office of the governor and the judicial branch to the public records law. In conducting its examination the special legislative commission shall examine, without limitation, the applicability and impact of Article XXI of the Declaration of Rights, Article XXX of the Declaration of Rights, Article 7 of

Section 2 of Chapter 1 of Part the Second of the Constitution of the Commonwealth and Article 10 of Section 3 of Chapter 1 of Part the Second of the Constitution of the Commonwealth.

(d) In undertaking its examination, the special legislative commission shall examine the procedures used by legislatures in other states and those used by the United States Congress for making information concerning the legislative process available to the public.

(e) Counsel to the House and Senate appointed pursuant to section 51 of chapter 3 of the General Laws shall serve as counsel to the special legislative commission.

(f) The special legislative commission may:

(i) consult with nongovernmental organizations and academic institutions that have expertise that may benefit the commission, including, but not limited to, Common Cause, the American Civil Liberties Union of Massachusetts, Inc., the Massachusetts Newspaper Publishers Association, the Massachusetts Town Clerks Association, consumer interest organizations and the Massachusetts Taxpayers Foundation, Inc.;

(ii) consult with the attorney general;

(iii) consult with the secretary of administration and finance; and

(iv) solicit input from journalistic associations, public policy research institutions, other government institutions with expertise in public access to public proceedings and other entities with an interest in the legislative process and the issue of public records.

(g) The special legislative commission shall issue a report not later than December 30, 2017, that shall include recommendations for legislation or changes to legislative rules to:

(i) enhance the accessibility of information to the public concerning the legislative operations of the general court;

(ii) improve the use of information technology for public access to information about the general court;

(iii) promote substantive reporting by legislative committees; and

(iv) ensure a permanent, accessible, and substantive record of public legislative proceedings, including house and senate sessions and public committee hearings.

The report shall include the constitutional basis for the special legislative commission's recommendations. The report shall also include the special legislative commission's recommendations, if any, on the expansion and reform of the public records statute as it relates to all branches of government. Said report shall be filed with the joint committee on rules, the joint committee on state administration and regulatory oversight, the joint committee on ways and means, and the offices of the house and senate clerks, and shall be posted online.

SECTION 21. Notwithstanding section 16, a municipality that maintains a website shall not be required to post guidelines or reference materials on its website, as required by subsection (b) of section 6A of chapter 66 of the General Laws, before July 1, 2017.

SECTION 22. Sections 1 to 16, inclusive, shall take effect on January 1, 2017.