

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

MASSACHUSETTS

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE
OPEN RECORDS AND MEETINGS LAWS IN
MASSACHUSETTS

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Previously Titled
Tapping Officials' Secrets

Published by The Reporters Committee for Freedom of the Press
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Production of the sixth edition of this compendium was possible
due to the generous financial contributions of:
The Stanton Foundation

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ISBN: 1-58078-220-5

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

The public records and open meetings laws of Massachusetts are among the weakest in any of the 50 states. While it may be true that open government traditions in Massachusetts date back to colonial times, this “birthplace of democracy” today is led by a Legislature that operates largely in secret and a Governor who claims he is not subject to the state’s public records law. A 2008 nationwide study of public access to official records in the 50 states gave Massachusetts a failing grade of F. (Better Government Association and National Freedom of Information Coalition, *Results and Criteria of BGA/NFOIC Survey*.) With respect to the Commonwealth’s courts and court records, where the public’s rights of access are the product of evolving judicial decisions supplemented by court rules, recent decades have seen a modest expansion of rights. When it comes to state, county, and municipal agencies, however, the public’s rights of access are more or less frozen in a motley collection of innumerable statutes, the most significant of which are the Public Records Law (codified at Chapter 66 of the Massachusetts General Laws (G.L. c. 66)) and the Open Meeting Law (G.L. c. 30A).

Not only are those two statutes located in different parts of the General Laws, they have also evolved independently of each other. The Public Records Law, which is enforced by the Office of the Secretary of the Commonwealth, reached essentially its present form in the mid-1970’s. The Open Meeting Law was revised in 2010, at which time responsibility for its enforcement – previously shared by the Attorney General (for state agencies) and each county’s District Attorney (for county and municipal agencies) – was consolidated at the Attorney General level.

There is considerable case law applying both the Public Records Law and the Open Meeting Law as they apply to state and local agencies. The court decisions tend to be brief and pragmatic; they are almost universally the product of statutory construction, rather than any separate body of judicially originated open government law. (In Massachusetts, legislative committee reports are uncommon and legislative debates are not reported. It is therefore unusual to find any meaningful record of legislative history to shed light on how a statute is to be construed.)

When challenged, both statutes are to be construed against a background presumption of openness (G.L. c. 66, §10C (public records); 90 Code of Massachusetts Regulations (CMR) 32.08(4) (open meetings)). But neither statute sets out substantial penalties against agencies that do not comply, with the result that there can sometimes be a substantial gap between what the law commands and what the government agencies do as a matter of practice. That gap is widest, of course, in those areas where members of the public and the media have not been vigilant in holding the government bodies to account.

With respect to other access issues, the record is mixed. There continue to be occasional cases of reflexive court closures or routine impoundment of documents (particularly in the probate and family courts). Nevertheless, the Supreme Judicial Court has been receptive to hearing emergency challenges of lower court access orders. Even when no third party has protested, judges in the Massachusetts federal district court and First Circuit Court of Appeals have expressed a conscious determination not to rubber-stamp litigants’ joint motions to seal court filings or settlement agreements.

The Commonwealth lags behind other states in the extent to which public documents are made affirmatively available online. Federal court filings can generally be downloaded from public web sites; the equivalent state Superior Court sites generally provide online access to court dockets but not to individual filings. The Supreme Judicial Court offers live and archived webcasts of oral arguments, and one trial court is experimenting with routine live-streaming of its proceedings; but the efforts of one federal district court judge to allow webcasting of a trial involving music downloading were unceremoniously rebuffed by the Court of Appeals. Despite the availability of online legislative records, it takes a Kremlinologist to reliably follow a bill’s progress through the State House. Gov. Patrick’s lackluster record on governmental transparency – including his office’s insistence that it can unilaterally exempt itself from the Public Records Law – has proved disappointing to many governmental watchdogs.

PUBLIC RECORDS LAW

History and Scope. Statutory provisions relating to public records go back more than 150 years, but early efforts were “limited and ‘disappointingly vague.’” *Suffolk Constr. Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 453 n.14, 870 N.E.2d 33, 40 n.14 (2007), quoting A.J. Cella, *Administrative Law and Practice* § 1161, at 488 (1986). See, for example, St. 1851 c. 161, § 4, which provided that “[a]ll county, city or town records and files shall be open to public inspection.”

The statewide office of Commissioner of Public Records has existed since the 1890’s. St. 1892 c. 333, § 1. A definition of “public record” first appeared in 1897 but was essentially limited to “any written or printed book or paper or any map or plan of [a governmental entity] in or on which any record or entry has been or is to be made in pursuance of any requirement of law, or any written or printed book . . . which any officer or employee of the Commonwealth or of any county, city or town is required by law to receive.” St. 1897 c. 439, § 1. In other words, the public had a right only to those records that the government was legally required to keep.

A major change occurred in 1973, when the Legislature extended the definition of public records to include all records held by governmental bodies, whatever the reason for their creation, unless one of nine fairly narrow statutory exemptions applied. St. 1973 c. 1050. The number of exemptions has doubled since then, but the basic structure of the law has otherwise remained the same. The statute applies to all levels of governmental bodies (state, county, and local), but it does not cover records of the legislative or, generally, the judicial branches. In recent years, the Governor’s Office has argued that the law does not even apply to the Governor, although the statute provides little support for that position.

Structure. What is generally called the “Public Records Law” is found primarily in two chapters of the General Laws. The first is the definition of “public records,” which appears in G.L. c. 4, § 7, cl. 26. The procedures for obtaining access to such records are set forth principally in G.L. c. 66, § 10(b). These latter provisions are supplemented by administrative regulations located at 950 CMR 32.01, *et seq.* (Copies of the statutory and administrative provisions are appended to this outline.) Enforcement of the law falls, in the first instance, to the Division of Public Records of the Secretary of the Commonwealth, but direct appeal may also be made to the state courts. Alan N. Cote served as Supervisor of Public Records for 10 years until his untimely death, from cancer, in May 2011. Since then, and pending the Governor’s appointment of a successor, the office has been led by Chief Legal Counsel Laurie Flynn.

Frequently overlooked, however, are the scores upon scores of statutory provisions scattered throughout the General Laws declaring that certain particular categories of documents must be kept confidential, or are or are not to be deemed public records. Such exceptions and special rules are particularly common in the health and welfare areas, and their interplay with the provisions of the Public Records Law is sometimes far from self-evident. The result is that while the Pub-

lic Records Law provides a reliable gauge of the *procedure* to be followed when seeking public records, it is merely a starting point when it comes to determining exactly what records are indeed “public,” to what extent, and under what circumstances.

Over the decades, the public records statutes have been the subject of considerable judicial gloss. The cases repeat the fundamental presumption that records maintained in public offices are public. In the event of a dispute, the burden is on the custodian “to prove with specificity the exemption which applies.” G.L. c. 66, § 10(c). *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61, 354 N.E.2d 872, 876 (1976).

Interest Groups. A number of Massachusetts organizations have advocated to strengthen the Public Records Law. These include the Massachusetts Newspaper Publishers Association, New England Newspaper and Press Association, New England First Amendment Coalition, the Boston University Center for Investigative Reporting, the Civil Liberties Union of Massachusetts, and local chapters of the Society for Professional Journalists, Investigative Reporters and Editors, Massachusetts Public Interest Research Group, and Common Cause. *CommonWealth* magazine has been particularly outspoken in reporting on the deficiencies of the state’s public records provisions.

Advocates for limiting the scope of open government provisions and access to public records fall into three general categories. They are:

1. *Certain public officials at both the local and state levels.* The level of compliance with the Public Records Law varies considerably from community to community. It is not unusual that municipal leaders will refuse to disclose certain public records despite warnings by their legal counsel that they are required to make the disclosure. See, e.g., “Selectmen are Keeping their Mail Private,” *Boston Globe*, Nov. 6, 2010 (reporting that Town of Winchendon adopted policy that all mail to selectmen shall be confidential, despite town counsel’s warning that the policy violates the Public Records Law). The level of police department cooperation in some communities is of particular concern. The Supervisor of Public Records in the Office of the Secretary of the Commonwealth has generally been cooperative with the press and other advocates of open government, and has developed a considerable body of written administrative opinions on particular disputes and custodians of records.

2. *Specific interest groups.* These are generally groups that want one particular type of record removed from the public view. They are often successful. To cite a few examples, such groups succeeded in having the general definition of “public records” amended to exclude the names and addresses of persons holding any kind of firearms license, as well as the home addresses and telephone numbers of virtually every public employee in the state and many of their family members. G.L. c. 4, § 7 cl. 26(j), 26(o), 26(p). Likewise, amendments to other statutes now require that: “[a]ll reports of rape and sexual assault . . . shall not be public records and shall be maintained by the police departments in a manner which will assure their confidentiality” (G.L. c. 41, § 97D); that no test for AIDS be made or disclosed without the patient’s written consent (G.L. c. 111, § 70F); that public library records which reveal the identity and intellectual pursuits of persons using the library are not public (G.L. c. 78, § 7); and that the home addresses and telephone numbers of judges, prosecutors, law enforcement officials and crime victims are deleted from all public records (G.L. c. 66, § 10).

3. *General privacy advocates.* In Massachusetts, as in most other states, interest in limiting governmental intrusions into individual privacy has increased in proportion to the ease of widespread distribution of data over the internet. Privacy concerns led to passage of the Fair Information Practices Act (G.L. c. 66A), modeled in considerable part on the Federal Privacy Act, and the Criminal Offender Record Information Act (G.L. c. 6, § 167-178B), which regulates the collection of criminal records and restricts their dissemination. There has also been considerable litigation over the scope of the privacy exemption to the Public Records Law and its interrelation with the general privacy statutes. G.L. c. 214, § 1B. See, e.g., *Pottle v. School Committee of Braintree*, 395 Mass. 861, 482 N.E.2d 813 (1985) (privacy of municipal school

employees not invaded by disclosure of home addresses) (later overruled by statute, G.L. c. 4, § 7, cl. 26(o)).

OPEN MEETING LAW

History. The first Massachusetts Open Meeting Law was enacted in 1958, largely at the insistence of the press and what is now the Massachusetts Newspaper Publishers Association. It was rewritten into substantially its present form in 1975, St. 1975, c. 303, then underwent a significant revision, effective 2010, when the state’s new Ethics Reform Act revamped the open meeting procedures without fundamentally affecting the underlying transparency rules. St. 2009, c. 28.

Summary. The statute applies to meetings of multi-member “public bodies” at the state, county, and municipal levels. This being Massachusetts, however, it excludes committees of the state Legislature and bodies appointed to advise the governor or other “constitutional officer.” Bodies within the judicial branch are also outside of the statute’s purview. Where it applies, the statute mandates notice and posting of meeting times; limits public officials’ deliberation of governmental matters outside of a public session; and mandates not only that minutes be kept, but that, in many cases, they be instantly available to the public upon request. Parties claiming violation of the law may seek administrative enforcement by the Attorney General’s Office, or may file an action in court; additionally, public bodies may appeal an adverse AG ruling to the courts. If a public body is found to have intentionally violated the statute, it may be assessed a civil penalty of not more than \$1,000 for each such intentional violation.

Compared to the Public Records Law in Massachusetts, which contains only a portion of the state’s statutory provisions regarding access to records, the Open Meeting Law is far simpler to administer, because it largely occupies the field. While there are a few other statutes permitting closure of meetings of particular kinds of committees for specific purposes, the state’s open meeting provisions are largely contained within the Open Meeting Law itself. There are also “only” 10 enumerated purposes for which a meeting may lawfully be closed to the public, as opposed to the 18 exceptions (and counting!) within the Public Records Law.

2010 Changes. The most significant of the 2010 changes was to centralize enforcement of the law by transferring enforcement obligations from the state’s 11 district attorneys and consolidating it in the Attorney General’s Office. G.L. c. 30A, § 25. The move was intended to remove inconsistencies in enforcement from one county to the next, as well as to provide more education and outreach to government officials statewide. “Open Meeting Law Guide” (Office of Att’y Gen’l, July 1, 2010), at i. One fortunate consequence has been that the provisions of the Open Meeting Law now appear in a single statute, G.L. c. 30A, § 19(a), instead of being distributed throughout the Commonwealth’s general laws, once for state governmental bodies (G.L. c. 30A, §§ 11A to 11A½), a second time for counties (G.L. c. 34, §§ 9F to 9G), and a third time for municipalities (G.L. c. 39, §§ 23A-C, 24). In and of itself, that change is more optical than substantive, because the three separate laws had been virtually identical, and most of the case law involved disputes at the municipal level.

The AG’s new “Division of Open Government” was created at that time in order to provide training, respond to inquiries, investigate complaints, and to make findings and take remedial action to address violations. *Id.* at 1. In its first 12 months, the division (we’ll eschew the obvious acronym) investigated 116 complaints, resolved 51 cases (34 with formal determinations, another 17 informally), conducted or participated in 47 trainings, and reportedly fielded more than 2,000 inquiries. (It also blew through two directors in the first year, and is now on its third, Amy Nable.) See R. Ambrogi, “AG Releases Figures on First Year of Open Meeting Law,” www.medialaw.legaline.com (June 29, 2011). It also has a robust website that posts all formal determinations.

Education and Training. According to the Attorney General’s Office, the revisions to the law in 2010 has brought a heightened empha-

sis on training of local officials. Within two weeks of qualification for office, all members of public bodies must certify in writing: (1) that they have received the state's packet of Open Meeting Law Materials (consisting of a copy of the statute, the Attorney General's regulations under the statute, and certain educational materials prepared by the Attorney General's office that explain the law's requirements), and (2) that they understand the requirements of the statute and the consequences of violating it. Beyond its precatory function, the certificate does not appear to create any independent obligations; it is to be filed and maintained in the records of the appointing authority or administrator of the body or agency in question. G.L. c. 30A, § 20(g).

Purposes. While the law has no formal legislative history or preamble, the state's highest court has described its purpose as "eliminate[ing] much of the secrecy surrounding the deliberations and decisions on which public policy is based." *Ghiglione v. School Committee of Southbridge*, 376 Mass. 70, 72, 378 N.E.2d 984, 987 (1978). Interestingly, the Attorney General's Office today uses less fervid prose, even suggesting that openness necessarily reduces the government's smooth functioning. According to the AG, the laws purposes are "to ensure transparency in the deliberations on which public policy is based" and "to balance the public's interest in witnessing the deliberations of public officials with the government's need to manage its operations efficiently." "Open Meeting Law Guide" (Att'y Gen'l's Office, July 1, 2010).

Interest Groups. As might be expected, this law has its opponents. They have sought in recent years to amend the statute, to seek broad judicial construction of exemptions for executive (closed) session and simply to evade it.

Privacy-interest proponents have been less active with respect to open meetings than with public records. Rather, opposition has centered in the following areas:

1. *Officials, usually at a local level, who do not believe in the principles of open government.* The most common techniques used to avoid or evade the statute are informal meetings to pre-decide issues, using executive sessions to discuss issues not within the statutory exceptions, and taking a very broad reading of the proper purposes for executive sessions.

2. *Collective bargaining.* Local officials and public employees organizations have been largely successful in having both collective bargaining and discussions of collective bargaining strategy limited to closed sessions. See G.L. c. 39, § 23B(3).

3. *Personnel decisions and appointments.* Disciplinary proceedings against public employees are normally conducted in executive session unless the employee objects. See G.L. c. 39, § 23B(l), (2). The appointment process has been more of a battleground. A screening committee is subject to the Open Meeting Law only if it is appointed by a governmental body (such as a school committee, as opposed to a school superintendent). Even where the Open Meeting Law applies, the screening committee may operate in private only up to the point of conducting a preliminary screening of candidates to recommend to the appointing authority, and even then only if the committee has found that "an open meeting will have a detrimental effect in obtaining qualified applicants." (G.L. c. 39, § 23B(8); *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465, 471-2, 541 N.E.2d 984, 987-8 (1989); *Connelly v. School Committee of Hanover*, 409 Mass. 232, 237 n.7, 565 N.E. 2d 449, 451 n.7 (1991).) The present position of most municipalities is that only "finalists" need to be publicly identified and interviewed.

Others have sought to strengthen the law, seeking unsuccessfully to enact provisions that would provide attorney fees for successful challengers of the law, would make knowing and intentional violations a misdemeanor, and would fine any public official who attends an illegal executive session.

Open Records

I. STATUTE -- BASIC APPLICATION

A. Who can request records?

1. Status of requestor.

"Any person" can request a public record. G.L. c. 66, § 10(a). While not defined in the statute, this term appears to include non-residents and aliens. The custodian may not inquire about a requester's status or motivation. 950 CMR 32.05(5); Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at p. 7. The Supervisor of Public Records has ruled that the law "does not distinguish between requesters," and on that grounds he denied a citizen's request for recordings of calls she herself made to local police. See C. Herman, "Sifting through records appeals," *CommonWealth* (Jan. 13, 2011). Nor does entitlement to information depend on the level of a requester's need. *Torres v. Attorney Gen.*, 391 Mass. 1, 10, 460 N.E.2d 1032 (1984). Nonetheless, the Supervisor of Public Records has said that in applying the investigation exemption (exemption (f)), the determination of what are exempt "identifying details" may depend upon the requester's familiarity with the incident in question. Guide, at 16 (not citing any supporting case law). Such a consideration would seem to be easily subject to manipulation by having a different person make the request, but a similar situation exists with respect to the Homeland Security exemption (exemption (n)).

2. Purpose of request.

The right to receive records is not limited by the requestor's purpose or reason for wanting the records. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64, 354 N.E.2d 872, 877 (1976); *Direct-Mail Svce., Inc.*, 296 Mass. 353, 356, 5 N.E.2d 545, 546 (1937); *Logan v. Commissioner of Dep't of Ind'l Accidents*, 68 Mass. App. Ct. 533, 534 n.3, 863 N.E.2d 559, 561 n.3; *Antell v. Attorney Gen'l*, 52 Mass. App. Ct. 244, 245 n.1, 752 N.E.2d 823, 824 n.1 (2001); *Cunningham v. Health Officer of Chelsea*, 7 Mass. App. Ct. 861, 862, 385 N.E.2d 1011, 1012-13 (1979). Commercial purposes are perfectly proper, as are requests made in order to assist the requester in suing the government entity. Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at 4. A custodian may not question the reason for a request, see 950 CMR 32.05(5), with the "possible exception of situations where the records custodian is anticipating the withholding of records pursuant to Exemption (n)," the Homelands Security/public safety exception. See SPR Bulletin No. 04-03 (April 1, 2003) (when evaluating a request under exemption (n), custodian may not inquire as to requester's "identity or motive," but may "engage[e] the requestor in conversation," and may consider additional information volunteered by requester following an initial denial); Guide to Mass. Pub. Recs. Law, at 4, 7.

3. Use of records.

The law makes no restrictions on subsequent use of the information provided. In 2010 the Massachusetts Department of Transitional Assistance warned a records requester that if he publicized information about how much the government had reimbursed stores for food stamps – data that the agency had turned over to the requester – he could face federal fines of up to \$1,000, plus up to a year in jail. The requester did not buckle, and the agency took no further action. See M. Morisy, "Transparency Missing from Government," *CommonWealth*, Summer 2011 (July 6, 2011).

B. Whose records are and are not subject to the act?

The act covers records "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 [Legislature] to serve a public purpose." G.L. c. 4, § 7, cl. 26. At state level, this basically means executive branch records – except that the

Governor claims to be exempted, as discussed below. At the county and municipal level, it basically means all records, subject to exceptions, are open. The burden lies with the entity to show that the Public Records Law does not apply to it. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 5. See also 950 CMR 32.03, definition of “Governmental Entity.”

Despite the breadth of agencies to which the Public Records Law applies, nevertheless the statute is strictly construed “to preclude the public disclosure of documents held by entities other than those specifically delineated in the statute.” *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 750, 840 N.E.2d 518, 522 (2006). Records of federal agencies, the state Legislature, and the federal and state courts are not subject to the act.

1. Executive branch.

a. Records of the executives themselves.

The Supreme Judicial Court has assumed without discussion that the Public Records Law applies to chief executives of a governmental unit, such as a mayor or district attorney. See, e.g., *Attorney General v. Assistant Commissioner of Real Property Dep’t of Boston*, 380 Mass. 623, 404 N.E.2d 1254 (1980) (applying statute to documents held by mayor’s office); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 1254 (1980) (district attorney’s office).

Nevertheless, Gov. Deval Patrick has asserted, with some success, that as governor he is exempt from the Public Records law, and therefore that he can choose whether and when to follow its mandates. Perhaps it is not surprising that the Supervisor of Public Records, an employee of the governor’s Secretary of the Commonwealth, has agreed, declaring in response to one persistent reporter, “Governor’s records are not public records subject to disclosure under the Public Records Law.” Letter Ruling SPR11/069 to Colman M. Herman (April 28, 2011). (In an apparent act of *noblesse oblige*, the Governor’s Office “responds to requests for records on a case-by-case basis to provide records as it deems appropriate. As Governor’s records are exempt from disclosure under the law an explanation of redactions is not required.” *Id.*; see also L. Carroll, “Alice’s Adventures in Wonderland,” quoting H. Dumpty (“When I use a word, it means just what I choose it to mean – neither more nor less.”).)

The dubious claim for a blanket gubernatorial exemption arises out of *Lambert v. Executive Director of Judicial Nominating Council*, 425 Mass. 406, 681 N.E.2d 285, 288 (1997), in which the Supreme Judicial Court ruled that a completed questionnaire from an applicant for judicial appointment, which was submitted to the governor through the Judicial Nominating Council (JNC), was not a public record. That ruling, however, appears to rest on three arguments, two of which are particular to the facts of that case. First, the governor established the JNC by executive order to help him select judges, magistrates, and clerks of court. Its “sole purpose is to assist the Governor” and it has “no public function.” As a result, JNC records “are essentially the Governor’s records on judicial appointments.” *Lambert*, 425 Mass. at 408-09, 681 N.E.2d at 287-88. Second, the legislature has not “explicitly” listed the Governor as being subject to the Public Records Law. *Id.*, 425 Mass. at 409, 681 N.E.2d at 287. (The Court fails to mention the law’s explicit applicability to “any officer or employee of any ... executive office ... of the commonwealth,” G.L. c. 4, § 7, cl. (26)). Third, the appointment of judges is a constitutional duty assigned to the governor alone. He has “broad discretion to select the means he will use in executing a constitutional duty” without interference from the legislature, *Opinion of the Justices*, 368 Mass. 866, 874, 334 N.E.2d 604 (1975), and he, “by his executive order, has determined that he is best able to exercise his constitutional duty if the JNC’s records and deliberations remain confidential.” *Lambert*, 425 Mass. at 408-10, 681 N.E.2d at 287-88.

The doctrines of executive privilege and deliberative process privilege as to production of documents have not been recognized in Massachusetts. See *Babets v. Secretary of Executive Office of Human Services*,

403 Mass. at 230, 526 N.E.2d 1261 (1988) (declining to create a “governmental” or “executive” privilege); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 127 (1995). But see G.L. c. 4, § 7, cl. 26(d), exempting “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency.” This exemption ends where the deliberative process is complete and the policy decided upon. Thereafter, the documents upon which it was based become public. *Babets, supra*, 403 Mass. 237, note 8.

A public official may not simply claim that records were created in his or her personal capacity if their creation was made possible by virtue of the public he or she holds. See *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 823 N.E.2d 375 (2005) (holding that records created by reserve deputy sheriffs appointed by the Sheriff of Barnstable County are public).

b. Records of certain but not all functions.

Records of all executive functions are subject to the Public Records Law, except that – as discussed above – there is some question as to the law’s applicability to the Governor’s office, and in particular to records reflecting the Governor’s performance of his constitutional duties. See *Lambert v. Executive Director of Judicial Nominating Council*, 425 Mass. 406, 681 N.E.2d 285 (1997); Letter Ruling SPR11/069 to Colman M. Herman (April 28, 2011) (declaring governor’s records to be exempt).

2. Legislative bodies.

Records of the Legislature are exempt. G.L. c. 66, § 18; *Westinghouse Broadcasting Co. v. Sergeant-At-Arms of Gen. Court of Mass.*, 375 Mass. 179, 184, 375 N.E.2d 1205 (1978) (telephone billing records of Legislature not “public records” subject to disclosure, because Legislature is not “agency, executive office, department, board, commission, bureau, division or authority of Commonwealth”). “Massachusetts, the birthplace of American democracy, is one of fewer than 20 states with virtually no requirements that legislators discuss government business in public,” the *Boston Globe* noted after the Legislature passed a \$30.6 billion budget that had been negotiated “almost entirely in secret, with six lawmakers meeting for 24 days of talks that were off limits to taxpayers. Debates, agendas, and even the times and locations of the meetings were held in strict confidence. No minutes were kept.” N. Bierman, “Legislators’ Vital Work Veiled from Public’s Eye,” *Boston Globe* (July 8, 2011). The article said “[i]nformation blackouts are treated with an almost religious reverence” by legislators, who declined to discuss their deliberations “out of what they term ‘a respect for the process.’” *Id.*

3. Courts.

The definition of “public records” does not include court records. See G.L. c. 4, § 7, cl. 26; 950 CMR 32.03; *Ottaway Newspapers Inc. v. Appeals Court*, 372 Mass. 539, 546, 362 N.E.2d 1189 (1977); *Peckham v. Boston Herald, Inc.*, 48 Mass. App. Ct. 282, 286 n.6, 719 N.E.2d 888, 892 n.6 (1999). See also *Kettenbach v. Board of Bar Overseers*, 448 Mass. 1019, 863 N.E.2d 36 (2007) (Board of Bar Overseers and Bar Counsel, as members of the judicial branch of government, are not subject to the public records law and thus not obligated to produce documents relating to a former judge’s status as a member of the bar). When a court document is a public record, access shall be given to all the public, and not be limited to attorneys. Trial Court Admin. Directive No. 2-93, “Public Access to Court Records of Criminal Proceedings” (April 27, 1993).

Whether a document may be sought by subpoena or discovery request is unaffected by the document’s status as a public record. *Town Crier, Inc. v. Chief of Police of Weston*, 361 Mass. 682, 691, 282 N.E.2d 379, 385 (1972); *Sheriff of Bristol Cty. v. Labor Rels. Comm’n*, 62 Mass. App. Ct. 665, 671, 818 N.E.2d 1091, 1095-1096 (2004); see also *Republican Co. v. Appeals Court*, 442 Mass. 218, 223 n.9, 812 N.E.2d 887, 893 n.9 (2004) (Public Records Law exception for investigatory materials is irrelevant to public right of access to materials submitted to court in support of petition for search warrant). Once documents are received by an agency during litigation discovery, however, they will be subject

to disclosure pursuant to the Public Records Law in response to a proper request, unless the documents had been produced subject to a protective order limiting third-party access. *Cf. Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 214, 944 N.E.2d 1019, 1023 (2011) (construing Public Records Law so as not to “invalidate an otherwise providently entered protective order,” in order to avoid raising “serious constitutional questions” about the law’s validity). (Independent of the Public Records Law, the requesting party may also seek permissive intervention in the litigation to challenge an overbroad protective order. *Id.*)

Some specific statutes limit public access to particular court documents, such as adoption records (G.L. c. 210, § 5C); others allow the sealing of criminal records (G.L. c. 276, §§ 100A, 100B, 100C) or prohibit access to the indices of criminal court dockets (G.L. c. 6, § 172). *See generally* Massachusetts District Court Dep’t of the Trial Court, “A Guide to Public Access, Sealing & Expungement of District Court Records” (Admin. Office of the District Court, rev. April 2010). A constitutional separation of powers issue as to legislative authority over court records is probably not fully settled. *See* majority and dissenting opinions in *New Bedford Standard-Times Publishing Co. v. Clerk of Third District Court*, 377 Mass. 404, 387 N.E.2d 110 (1979); *see also First Justice of the Bristol Div. of Juvenile Court Dep’t v. Clerk-Magistrate*, 438 Mass. 387, 780 N.E. 2d 908 (2003).

Despite the lack of statutory support, almost all state court records are open either as the result of tradition or of recent First Amendment litigation. *See Commonwealth v. Doe*, 420 Mass. 142, 648 N.E.2d 1255 (1995) (sealing of court record of criminal defendant should occur only in exceptional cases); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (invalidating Massachusetts statute imposing blanket restriction on access to records of criminal cases ending in finding of not guilty or no probable cause); *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990) (finding constitutional right of access to jury list after completion of criminal trial); *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89 (D. Mass. 1993) (declaring Massachusetts statutory and administrative restrictions on access to court-maintained alphabetical indexes of closed criminal cases unconstitutional); *see also* Trial Court Admin. Directive No. 2-93 (April 27, 1993) (post-*Fenton* rule governing access procedures to criminal records).

Court administrative records, like case records, are not covered by the Public Records Law. Clerk-magistrates presented with a request for access are instructed to seek guidance from legal counsel in the court’s administrative offices. Access is determined on a case-by-case basis, and documents that fit an exception to the Public Records Law will normally be equally unavailable from the administrative departments of the courts. *See* Massachusetts District Court Department of the Trial Court, “A Guide to Public Access, Sealing & Expungement of District Court Records” (Admin. Office of the Trial Court, rev. April 2010), at 30-31. In particular, the following will normally be off limits: personnel matters, documents whose disclosure would be an unwarranted invasion of personal privacy (but not including employee names, job classifications, salaries, and time and attendance calendars), home addresses and related information of employees, victims, and their families; internal policy memoranda; personal notes; bids; and investigatory materials. *Id.* (noting, however, that Public Records Law exceptions “are applied only analogously to judicial branch records,” and that “[t]he absence of a directly-relevant statutory exception is not finally determinative as to whether a particular court administrative record should be made available to the public”).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

As a general rule, nongovernmental bodies are not covered by the general public records statute, and receipt of public funds or benefits does not normally make otherwise private institutions public. *See Bello v. South Shore Hospital*, 384 Mass. 770, 775, 429 N.E.2d 1011 (1981). *See also Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518, 522 (2006) (private university’s

police department not subject to Public Records Act, even though, by statute, certain of its officers have been appointed special State police officers, and others are county deputy sheriffs).

Nevertheless, when a governmental body outsources the provision of certain governmental services to private third parties, “[a]ll records created in fulfillment of the obligations of the contract are government records,” and such records must be made available to the public even when they are in the hands of the third-party vendor. SPR Bulletin No. 3-93, “Requirement to Manage Records Created Under Government Contracts (Dec. 23, 1993). Such records may include “information about vendor qualifications, financial records relating to contracts and payment, reports to the contracting government entity, and information about programs and their constituents,” as well as records “required for contract monitoring, litigation, the prevention of fraud and abuse, and the fulfillment of obligations to citizens served by programs.” *Id.* . “Records resulting from contracted activities are vital to the conduct of government functions” and are “critical to ensuring accountability.” Therefore they fall within the scope of the Public Records Law, regardless of where they are created and stored. Just as such records, when kept in government offices, are “routinely accessible to citizens,” the Supervisor of Public Records has advised that the same standard applies when “such records are created and stored in contractors’ offices.” *Id.* “This change in location does not abrogate the government’s obligation to ensure public accountability and public access to those government records,” the Supervisor has stated. *Id.* (Relying on this principle the Supervisor in 2009 required the Town of Watertown to provide names, addresses, and amounts owed by town’s top 10 parking scofflaws.) Government entities entering into contracts for third-party services must include provisions – at least as broad as those contained in the Public Records Law — “describing the creation, security, accessibility, disposition, and custody” of those records, and no such records may be destroyed without authorization. *Id.*

b. Bodies whose members include governmental officials.

The records of such groups are probably not covered. The basic test is whether or not the board, committee or other group is itself governmentally appointed, and not whether some of its members may otherwise be government officials. *See, e.g., Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518, 522 (2006) (private university’s police department not subject to Public Records Act, even though, by statute, certain of its officers have been appointed special State police officers, and others are county deputy sheriffs).

5. Multi-state or regional bodies.

The statute does cover regional bodies. The status of multistate bodies (rare in Massachusetts) is unclear.

6. Advisory boards and commissions, quasi-governmental entities.

There are some 42 quasi-governmental entities in Massachusetts, ranging in size from six to 6,000 employees, according to the Massachusetts Public Interest Research Group. MassPIRG Education Fund, *Out of the Shadows: Massachusetts Quasi-Public Agencies and the Need for Government Transparency* (Spring 2010). Yet these bodies’ status under the Public Records Law remains murky at best. MassPIRG reports that although most responded to its formal inquiries for information, others, such as the Commonwealth Zoo Corporation, claimed they were not subject to the Public Records Law – and still others, such as the Steamship Authority, ignored the requests altogether. *Id.* at 18-19.

See Lambert v. Executive Director of the Judicial Nominating Council, 425 Mass. 406, 409, 681 N.E.2d 285 (1997) (records of judicial nominating council not “public records” subject to disclosure, because council is a creature of the Governor, who is not explicitly an “agency, executive office, department, board, commission, bureau, division or authority of Commonwealth pursuant to Public Records Law); *Globe*

Newspaper Co. v. Massachusetts Bay Transp. Authority Retirement Board, 416 Mass. 1007, 622 N.E.2d 265 (1993) (public agency retirement board created through collective bargaining agreement not a “board” of the Commonwealth and not subject to Public Records Law); *Wallerstein v. Board of Bar Examiners*, 414 Mass. 1008, 610 N.E.2d 891 (1993) (Board of Bar Examiners not required to disclose applicant’s score on bar exam). See also *Kettenbach v. Board of Bar Overseers*, 448 Mass. 1019, 863 N.E.2d 36 (2007) (Board of Bar Overseers and Bar Counsel, as members of the judicial branch of government, are not subject to the public records law and not obligated to produce documents relating to a former judge’s status as a member of the bar).

7. Others.

A private university’s police department is required (not by the Public Records Law but by G.L. c. 41, § 98F) to “make, keep and maintain a daily log ... recording ... all responses to valid complaints received, crimes reported, the names [and] addresses of persons arrested and the charges against such persons arrested,” and those logs shall be deemed public records. *Id.*, 445 Mass. at 754, 840 N.E.2d at 525 (2006). That obligation adheres even though such a private police department is not a governmental entity under the law. *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518, 522 (2006).

C. What records are and are not subject to the act?

“The primary purpose of G.L. c. 66, § 10, is to give the public broad access to government documents. ... To that end, disclosure is favored by a ‘presumption that the record sought is public.’” *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518, 522 (2006), quoting G.L. c. 66, § 10(c).

1. What kind of records are covered?

All records in the agency’s custody when the request is received, whether or not required to be kept. G.L. c. 4, § 7, cl. 26; 950 CMR 32.03; see also 32 Op. Att’y Gen. 157, 165 (May 18, 1977) (custodian not obliged to create a record in response to request for information). “Public records are broadly defined and include all documentary materials made or receive by an officer or employee of any corporation or public entity of the Commonwealth,” unless exempted. *Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co.*, 414 Mass. 609, 614, 609 N.E.2d 460, 463 (1993).

“A custodian may withhold exempt information within a record but must disclose any public portions. ... Segregation may be accomplished by blocking out exempt information on a copy of the record, or through electronic segregation prior to disclosure.” Supervisor of Public Records (SPR) Bulletin No. 4-96, *Fees for Access and Copying of Computer Records* (June 7, 1996).

Occasionally the argument will be made that documents possessed by a government agency were created in a private, individual capacity, and therefore are not public records. Where the documents in question relate to the business of the agency, however, the argument is likely to be an uphill battle at best. See, e.g., *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587 (2005) (requiring sheriff to provide list of reserve deputies he appointed, despite his assertion that the reserves had no substantial public function).

2. What physical form of records are covered?

Statute and regulations cover “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics.” G.L. c. 4, § 7, cl. 26; 950 CMR 32.03. This language clearly includes photographs, tapes, and computerized records, as well as traditional books, papers, and maps. All e-mail created or received by an employee of a government unit is a public record. SPR Bulletin No. 1-99 (Feb. 16, 1999; revised and reissued May 21, 2003). Also included are “all government records generated, received or maintained

electronically, including computer records, electronic mail, video and audiotapes.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4.

3. Are certain records available for inspection but not copying?

No such limitation. See G.L. c. 66, § 10(a); 950 CMR 32.05(6).

D. Fee provisions or practices.

1. Levels or limitations on fees.

The custodian may charge a reasonable fee to recover the costs of complying with a public records request. G.L. c. 66, § 10(a); 950 CMR 32.06. No minimum fee may be imposed. SPR Bulletin No. 4-96 (June 7, 1996). “Citizens should not be required to pay a premium for access to public records, since the ability to inspect the records of government is fundamental in our democracy.” SPR98/018 (Letter to Town of Billerica, April 21, 1998), citing *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 436 (1983); *Attorney General v. Assistant Comm’r of Real Property Dep’t of Boston*, 380 Mass. 623, 625 (1980). A custodian may not deny a public records request on the grounds that the requester had not paid the fee for prior, fulfilled requests. See G. Arbuckle, “State Orders Rockland Town Administrator to Respond to Public Records Request,” Enterpriseneews.com (Oct. 19, 2009).

Except where otherwise provided by statute, fees are not more than 20 cents per page for photocopies of paper records; not more than 25 cents per page for records contained on microfilm or microfiche; and not more than 50 cents per page, plus the “actual cost incurred from the use of the computer time,” for computer printouts. 950 CMR 32.06(1). “The only such ‘actual costs’ which may be recovered are: the cost of the energy consumed during use, the materials used, and the prorated salary of the computer operator.” SPR Bulletin 4-96, *Fees for Access and Copying of Electronic Public Records* (June 7, 1996).

In some instances, statutes prescribe fees for specific types of records. See, e.g., G.L. c. 66, § 10(a) (pertaining to motor vehicle accident reports, fire insurance reports, and other records of police or fire departments); G.L. c. 262, § 38 (copies of Registry of Deeds records). The records custodian may charge the actual cost of reproduction for a copy of a record “not susceptible to ordinary means of reproduction, such as large computer records or over-sized plans.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 2; 950 CMR 32.06(1)(f).

2. Particular fee specifications or provisions.

a. Search.

For non-computerized records, a pro-rated hourly fee may be added for search and segregation time (defined below). The fee must be based on the hourly rate of the lowest-paid public employee capable of performing the search and segregation (normally the lowest-paid employee in the agency). 950 CMR 32.06(1)(c); see also I.D.2(d), below. For a search of computerized records, the actual cost incurred from the use of computer time may be charged. 950 CMR 32.06(1)(e). “Search time” means the time needed to locate, pull from the files, copy, and reshelve or refile a public record. 950 CMR 32.03. “Segregation time” means the time taken “to delete or expurgate data which is exempt,” from the data which is not exempt; the regulations describe “segregation time” as pertaining only to production of paper records. *Id.*

As to both search and segregation, the fee may not include time expended to create the original records (unless the custodian is voluntarily creating a record in response to the request, in which case a reasonable one-time fee may be assessed, see III.B, below) or to organize files; a records custodian has an independent, affirmative obligation to maintain records in an orderly fashion. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. The Supervisor of Public Records has enforced that rule, prohibiting one town from imposing a search fee when the search could have been conducted by

the requester himself, but for the fact that the requested records are kept in a storage bin without any filing system. SPR98/018 (Letter to Town of Billerica, April 21, 1998) (“If you deem it necessary that a staff person be in attendance during [the requester’s] search, that is your choice. However, you may not pass that cost on to the requester ... You cannot charge the requester for your own poor filing system.”).

b. Duplication.

Custodian is not required to produce more than one copy. 950 CMR 32.05(6). Otherwise, except where provided otherwise by statute, fees are not more than 20 cents per page for photocopies of paper records, 950 CMR 32.06(1); not more than 50 cents per page for computer printouts, 950 CMR 32.06(1)(d); and not more than 25 cents per page for microfilm or microfiche, 950 CMR 32.06(1)(b). For non-print audio or audio-visual records, there are no specific fee provisions. However, regulations do provide that, for copies of public records not susceptible to ordinary means of reproduction, such as photographs or computer tapes, actual cost of reproduction may be charged. 950 CMR 32.06(1)(f). Additionally, the records custodian may charge for the time spent in reproduction of the responsive record, based on the pro-rated hourly rate of the lowest-paid employee within that department. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at p. 8.

c. Other.

In calculating the hourly fee to be charged for search and segregation time, not only must the agency use the hourly rate of the lowest-paid public employee capable of performing the search or segregation, 950 CMR 32.06(1)(c), but the Secretary of State has said that employee, presumptively, will be the lowest-paid employee in the agency. “[E]xcept where exceptional circumstances are present, it is expected that the lowest hourly rate [of any agency employee] will be used to calculate search and segregation time.” Where the lowest-paid employee lacks the necessary knowledge or experience to segregate exempt from non-exempt information, the necessary guidance should be provided to that employee. Only “[i]n very complex or difficult cases” may a higher rate be used, that being the hourly rate of the lowest paid employee “who has the necessary knowledge or experience.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at p. 8. Indeed, in some cases, it may be that the requester is capable of conducting the search herself, in which case no search fee may be charged. SPR98/018 (Letter to Town of Billerica, April 21, 1998).

If a requester does not request a copy of the materials, but rather wants only to review them in the office of the record custodian, then the custodian may still charge a fee for search and redaction time. According to Secretary of State guidelines, “Access to records viewed in this manner should not be denied and only minor fees associated with securing the record should be charged.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3.

3. Provisions for fee waivers.

Regulations “encourage” the custodian, unless otherwise required by law, to waive fees “where disclosure would benefit the public interest.” 950 CMR 32.06(5). The Secretary of State’s public guidelines go even further; they say that “[i]n the interest of open government, all records custodians are strongly urged” to waive fees generally, and that public records “that are of great interest to a large number of people must be readily available ... and should be provided at a minimum cost, if any.” Such records include meeting minutes (as to which fee waiver is “strongly encouraged”), town meeting documents, warrants, street lists, and municipal financial documents. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. Nonetheless, it is not within the Supervisor of Public Records’ enumerated powers to require such a waiver. See G.L. c. 66, § 10(b); Supervisor of Public Records decision SPR04/117 (June 29, 2004).

4. Requirements or prohibitions regarding advance payment.

If the fee is likely to exceed \$10, the records custodian must provide a detailed, written, good faith estimate of the expected fee, including a statement that the actual cost may vary. 950 CMR 32.06(2); SPR Bulletin No. 4-96 (June 7, 1996); Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. A custodian may not deny a public records request on the grounds that the requester had not paid the fee for prior, fulfilled requests. See G. Arbuckle, “State Orders Rockland Town Administrator to Respond to Public Records Request,” *Enterpriseneews.com* (Oct. 19, 2009). But the custodian may, and often does, require payment of the fee before complying with a public records request. SPR Bulletin 4-96 (June 7, 1996); see also 950 CMR 32.05(6).

5. Have agencies imposed prohibitive fees to discourage requesters?

Despite the clarity of the regulations limiting photocopy fees to 20 cents per page, it took an enterprising reporter’s appeal to the Supervisor of Public Records to get the Boston city clerk to end her long-standing practice of charging 50 cents per page. The clerk reportedly told the Secretary of State’s office that she did not realize that state regulations trump city ordinances. C. Herman, “Boston Writer Fights City Hall and Wins,” *New England First Amendment Center* (Oct. 23, 2010).

There have been increasing instances of agencies imposing prohibitively high fees for search, segregation, and reproduction of public records. One blogger with a particularly broad request was told that it would cost him more than \$200,000 to obtain records about his city’s parking tickets and responses to citizen complaints. The *Boston Globe* was told it would have to pay \$30,000 to obtain emails of six city officials. An investigative reporter was given a \$6,600 estimate for the cost of finding, reviewing, and photocopying the emails of several senior officials of a large state agency. See M. Rezendes, “High costs can make open records seem closed,” *The Boston Globe*, Sept. 24, 2009. A frequent stratagem has been an agency’s attempt to charge the requester for the attorney fees incurred by the agency in order to have documents reviewed by legal counsel before they are produced. Additionally, many agencies appear unaware of the Public Records Law’s presumption that search and segregation fees should not exceed the pro-rated hourly fee of the lowest-paid employee in the custodian’s department.

E. Who enforces the act?

The Supervisor of Public Records may order a custodian to comply with a person’s request or to reduce its fee, but the Supervisor has no enforcement power. If the custodian refuses to comply, all the Supervisor can do is issue a public opinion and notify the Attorney General or appropriate District Attorney. G.L. c. 66, § 10(b), 950 CMR 32.09. Alternatively, if the requester chooses to take the time and expense of going to court, and if the requester prevails, then the Superior Court or Supreme Judicial Court can order compliance. G.L. c. 66, § 10(b). But the prevailing plaintiff will not be able to recover attorney fees or sanctions.

1. Attorney General’s role.

The Supervisor of Public Records may notify the Attorney General of a case of noncompliance. G.L. c. 66, § 10(b), 950 CMR 32.09. However, the Attorney General has no obligation to act. Rather, the office decides on a case-by-case basis whether to take action and, if it does, what measures it deems necessary to ensure compliance. The Attorney General does not have authority to request oversight of a public records request.

2. Availability of an ombudsman.

The Supervisor of Public Records, an administrative official in the Division of Public Records, which in turn is located within the office

of the Secretary of the Commonwealth, is empowered to rule on the public status of government records held by entities subject to the act. That division generally has an attorney assigned each day to respond to inquiries from the public. To speak to the “Attorney of the Day,” call (617) 828-2832 between 9:00 a.m. and 4:00 p.m. on business days. The office generally declines to provide advisory opinions.

3. Commission or agency enforcement.

Division of Public Records and Supervisor of Public Records.

F. Are there sanctions for noncompliance?

There are no sanctions in the law.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

A record in public control is presumed to be public and within the Public Records Act. G.L. c. 66, § 10(c); 950 C.M.R. 32.08(4); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-83, 764 N.E.2d 847, 852 (2002). Statutory exemptions are to be strictly and narrowly construed. *Attorney General v. Assistant Comm’r of the Real Property Dep’t of Boston*, 380 Mass. 623, 625 (1980); *Attorney General v. Board of Assessors of Woburn*, 375 Mass. 430, 432 (1978). The Secretary of the Commonwealth has stated that the custodian has the burden of showing not only that an exemption applies, but also why the record should be withheld. Guide to Mass. Pub. Rec. Law (rev. March 2009), at p. 1; see also G.L. c. 66, § 10(c) *District Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian must offer specific proof that the documents sought are of a type to which an exemption applies). If an exemption permits withholding of part of a requested government document, still the non-exempt part of the document must be produced once the exempt portions are redacted out – even if the exempt and non-exempt portions are “intertwined.” *Id.* at 8; G.L. c. 66, § 10(a); SPR Bulletin No. 4-96, “Fees for Access and Copying of Electronic Records” (June 7, 1996) (“custodian may withhold exempt information within a record but must disclose any public portions”; “[s]egregation may be accomplished by blocking out exempt information on a copy of the record, or through electronic segregation prior to disclosure”); *Reinstein v. Police Comm’r of Boston*, 378 Mass. 281, 289-90 (1979) (exemptions are not blanket in nature). “After a redaction takes place, [the custodian] must explain in writing to the requester what information was redacted and the specific reasons why the record was sanitized. The remaining portions of the record must then be released.” SPR Bulletin 3-03, Public Record Requests and C.O.R.I. (Nov. 21, 2003) (noting that witness and victim’s names and addresses may be selectively redacted from police records).

1. Character of exemptions.

a. General or specific?

Theoretically specific, although most exemptions have some play in their joints; whether an exemption applies will frequently depend on the outcome of a balancing test or judgment call. For example, the privacy exemption (c) requires a weighing of the privacy and public interests; the investigatory exemption (f) applies only when disclosure would prejudice effective law enforcement; the Homeland Security exemption (n) depends on the custodian’s reasonable judgment of the likely jeopardy to public safety; etc. “Given the statutory presumption in favor of disclosure, exemptions must be strictly construed.” *Attorney Gen’l v. Assistant Comm’r of Real Property Dep’t*, 380 Mass. 623, 625, 404 N.E.2d 1254, 1256 (1980); *Attorney Gen’l v. Assessors of Woburn*, — Mass. —, 378 N.E.2d 45 (1978).

b. Mandatory or discretionary?

A 2009 publication from the Secretary of the Commonwealth describes all exemptions generally as being “discretionary to the records custodian” (Guide to Mass. Pub. Records Law (Sec’y of Comm., revised March 2009), “Frequently Asked Questions” at p. 1), and the Supreme Judicial Court has assumed the same. See *Globe Newspaper*

Co. v. Boston Ret. Bd., 388 Mass. 427, 442 n. 24 (1983). Certainly that would seem correct with respect to documents that are exempted under the public records law but not subject to a separate confidentiality statute. See, e.g., *Westinghouse Broad. Co. v. Sergeant-at-Arms of General Court*, 375 Mass. 179, 185 n.9, 375 N.E.2d 1205 (1978). *Town Crier Inc. v. Chief of Police of Weston*, 361 Mass. 682, 691-692, 282 N.E.2d 379 (1972). Where there is a separate confidentiality statute, that statute’s mandate of non-disclosure will likely control. See, e.g., “personal data” on government employees and others maintained by government agencies (G.L. c. 66A); reports of rape or sexual assault (G.L. c. 41, § 97D); hospital records on individual patients (G.L. c. 111, § 70).

There has been some suggestion that, at least with respect to the personnel exemption, the statute should be viewed as prohibiting disclosure altogether, even in the absence of other statutory authority. See *Wakefield Teachers Ass’n*, 431 Mass. at 802-03 (declaring that personnel files are “absolutely exempt from disclosure,” whereas the *Boston Retirement Board* case used the formulation, “absolutely exempt from mandatory disclosure”). So far, however, that argument has gained no traction. See, e.g., *Geier v. Town of Barre*, No. 070171C, 2009 WL 323370 (Mass. Super. Jan. 9, 2009) (declining to read *Wakefield Teachers Ass’n.* as implicitly recognizing a private right of action for municipal employee to recover damages for a town’s discretionary disclosure of her personnel files). See also *Pottle v. School Comm. of Braintree*, 395 Mass. 861, 862 n. 3; (1985); *General Chem. v. Dept. of Env’tl. Quality*, 19 Mass.App.Ct. 287, 291 n. 3 (1985).

c. Patterned after federal Freedom of Information Act?

The Massachusetts Public Records Law is patterned after the federal Freedom of Information Act “in a general way.” *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 433 n.11, 446 N.E.2d 1051, 1055, n.11. (holding that, due to differences in the punctuation of the Massachusetts and federal statutes, municipal employee medical files, unlike their federal analogs, are absolutely exempt from disclosure). See also *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 156, 385 N.E.2d 505, 508 (1979) (holding that balancing process required under the state privacy exemption (exemption (c)) parallels the privacy exemption under FOIA); see also *Attorney Gen. v. Assistant Comm’r of Real Property Dep’t*, 380 Mass. 623, 625-26 n.2, 404 N.E. 2d 1254, 1256 n.2 (1980).

One important difference is the omission of the federal exemption for litigation strategy and privileged materials contained in the Massachusetts law; another is the narrower exemption under Massachusetts law for personnel rules and policies. The differences between the state statute and the previously enacted federal statutes permit an inference that the Massachusetts law rejects, narrows, or expands the legal principles embodied in FOIA. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 432-33 (1983).

2. Discussion of each exemption.

The general statute defining “public records” (G.L. c. 4, § 7, cl. 26) contains limited exemptions for those parts of books, papers, photographs, tapes, electronic information and other documents that fall within the categories listed below. The full wording of the statutory exemption is quoted; the “titles” for each of the exemptions have been added by this outline’s author, for the reader’s convenience.

(a) **Statutory exemptions:** “specifically or by necessary implication exempted from disclosure by statute.” See *Attorney General v. Collector of Lynn*, 377 Mass. 151, 154 (1979) (records of municipal tax delinquents not exempt from disclosure); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 545-46 (1977) (confidential bank examination report exempt from disclosure). The exemption contemplates two kinds of statutes. The first kind, statutes that specifically exempt records from disclosure, are those that say a record shall be kept confidential, shall not be a public record, or shall not be subject to the Public Records Law. See, for example, G.L. c. 41, § 97D (reports of rape or sexual assault “shall not be public reports”). The second

kind, statutes that provide an exemption by necessary implication, are those that expressly limit dissemination of records to a defined group of individuals or entities. See, for example, G.L. c. 6, § 172 (“Criminal offender record information . . . shall only be disseminated to: criminal justice agencies. . .”). A list of some of the statutory exemptions that exist under Massachusetts law is provided below at II.B.

(b) **Personnel rules and practices (if necessary):** “related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary government functions requires such withholding.” A custodian relying on exemption (b) must show both that records relate solely to the entity’s internal personnel practices, but also that proper performance of necessary government functions would be inhibited by disclosure. Like the cognate federal exemption, exemption (b) is designed to relieve agencies of the burden of maintaining, assembling, and disseminating records “in which the public cannot reasonably be expected to have a legitimate interest.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), p. 10. The state exemption is narrower than the federal one, by virtue of the addition of the “proper performance” clause. *Id.*

(c) **Privacy (sometimes), personnel (often), and medical:** “personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” The privacy standard contained in exemption (c) is “more favorable to nondisclosure” than the Massachusetts privacy statute, G.L. c. 214, § 1B, which provides a right only against “unreasonable, substantial or serious interference with . . . privacy.” *Pottle v. Sch. Comm. of Braintree*, 395 Mass. 861, 866, 482 N.E.2d 813, 817 (1985). It is a complicated exemption, best understood through a process of linguistic dissection.

Under the first clause of exemption (c), “[a]s a general rule, medical information will always be of a sufficiently personal nature to warrant exemption.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), p. 11. See *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 438, 446 N.E.2d 1051 (1983) (“medical . . . files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual”); see also *Logan v. Commissioner of Dep’t of Industrial Accidents*, 68 Mass. App. Ct. 533, 535-36, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007). Even redacted medical records (shorn of names and other data) will be withheld where there is a “grave risk” that individuals familiar with the patient (such as co-workers) could identify the patient and his medical condition. *Id.* (“indirect identification”); see also *Globe Newspaper Co.*, 388 Mass. at 438; *Wakefield Teachers Assn. v. School Comm. of Wakefield*, 431 Mass. 792, 795, 731 N.E.2d 63 (2000).

Whether certain records constitute personnel files or information is a case-specific question, depending on “the nature or character of the documents, as opposed to the documents’ label.” *Id.* Personnel information useful in making individual employment decisions – employment applications, performance evaluations, disciplinary records, documentation regarding promotion, demotion, or termination – will generally be exempt. But internal affairs records – including officers’ reports, witness interview summaries, and the internal affairs report itself – are not exempt because they relate to the workings of a process designed to ensure public confidence in the government.

As to the second half of exemption (c) (the clause following the semicolon), that half of the exemption only comes into play if disclosure of the materials is an invasion of privacy, which under Massachusetts law means that it would disclose “intimate details” of “a highly personal nature,” see G.L. c. 214, § 1B. If such an invasion of privacy is at issue, then the analysis proceeds to whether the privacy invasion may be “unwarranted.” Like the federal privacy exemption, this part of exemption (c) “requires a balancing between the seriousness of any invasion of privacy and the public right to know.”

Despite the Public Records Law’s presumption favoring openness, the “balancing” under the state privacy exemption is weighted toward

non-disclosure (perhaps in deference to the exemption’s application whenever the invasion of privacy “may” be unwarranted). Thus, a record that invades privacy is deemed public only if “the public interest in obtaining information *substantially outweighs* the seriousness of any invasion of privacy.” *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 156, 385 N.E.2d 505, 508 (1979) (emphasis added); see also *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 375 N.E.2d 299 (1978); *Peckham v. Boston Herald, Inc.*, 48 Mass. App. Ct. 282, 286 n.6, 719 N.E.2d 888, 892 n.6 (1999).

The analysis relies to some extent on the contours of the Massachusetts privacy law, G.L. c. 214, § 1B. Compare *Attorney General v. Assistant Comm’r of Real Property Dep’t*, 380 Mass. 623, 404 N.E.2d 1254 (1980) (privacy exemption covers mental health condition, legitimacy of children, medical condition, welfare payments, alcohol consumption, HIV status, family fights) with *Doe v. Registrar of Motor Vehicles*, No. 85-3449, 1993 WL 496590 (Mass. Super. June 8, 1993) (age and height are not “intimate details of a highly personal nature”). But courts have cautioned that whether a privacy interest is implicated in a particular case “requires a somewhat more nuanced examination” in light of the context of the disclosure. *Georgiou v. Commissioner of Department of Industrial Accidents*, 67 Mass. App. Ct. 428, 434 (2006), quoted in *Globe Newspaper Co. v. Executive Office of Admin. and Finance*, No. 011-1184 (Suffolk Super. Ct. April 25, 2011). The factors considered include “whether disclosure would ‘result in personal embarrassment to an individual of normal sensibilities,’ . . . ; whether the materials sought contain ‘intimate details’ of a ‘highly personal’ nature,’ . . . ; and whether ‘the same information is available from other sources.’” *Globe Newspaper Co. v. Police Comm’r of Boston*, 419 Mass. 852, 858, 648 N.E.2d 419, 425 (1995) (internal citations omitted).

Thus, for example, the Superior Court denied an accident victim’s request for the names of certain individuals whose testimony would be integral to his recovering insurance benefits, on the grounds that the individuals had come forward on a promise of anonymity. *Pintado v. Nat’l Carpentry Contractors, Inc.*, No. 073898, 2009 WL 4282102 (Mass. Super. Nov. 6, 2009). “Generally, names and address of adults are not considered to be intimate details of a highly personal nature,” the Superior Court noted. But because “the expectations of the data subject are relevant,” such information “might be protected against disclosure as an unwarranted invasion of privacy in one context and not another.” *Id.* The balancing of a privacy interest against the public interest in disclosure must be done on a case-by-case basis. *Torres v. Attorney Gen.*, 391 Mass. 1, 9 (1984); *Georgiou*, 67 Mass.App.Ct. at 433.

When it comes to records that relate to a public employee’s performance of official duties, however, the privacy interest will be particularly muted. See, e.g., *George W. Prescott Publishing Co. v. Register of Probate*, 395 Mass. 274, 79 N.E.2d 658 (1985) (newspaper successfully sought access to divorce records, including financial statements, of county treasurer). Under specific circumstances, courts have deemed that individual privacy interests were trumped by the public’s right to know “whether the burden of public expenses is equitably distributed,” “whether public servants are carrying out their duties in an efficient and law-abiding manner,” *Attorney Gen. v. Collector of Lynn*, 374 Mass. at 158, 385 N.E.2d at 509; the “expenditure of public monies by public officials,” *Attorney General v. Assistant Comm’r of Real Property Dep’t*, 380 Mass. 623, 626, 404 N.E.2d 1243, 1256 (1980); and “what its public servants are paid,” *Hastings, supra*, 374 Mass. at 818, 375 N.E.2d at 304.

(d) **Deliberative process (sometimes):** “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.” Where it applies, this exemption “protects such documents from disclosure only while policy is ‘being developed,’ that is, while the deliberative process is ongoing and incomplete.” *Babets v. Secretary of the Exec. Office of Human Services*, 403 Mass. 230, 237 n.8, 526 N.E.2d 1261, 1265 n.8 (1988).

(e) **Employee's personal notebooks:** "notebooks and other materials prepared by an employee of the Commonwealth which are personal to him and not maintained as part of the files of the governmental unit." This category does not include materials that are created by virtue of an individual's public office. See, e.g., *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 594, 823 N.E.2d 375, 381-82 (2005).

(f) **Secret investigatory materials (sometimes):** "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." Often misused, this provision "does not ... create a blanket exemption for all records that investigative officials create or maintain." "Guide to the Massachusetts Public Records Law" (Sec'y of State, rev. March 2009) at 15, citing *District Attorney for the Norfolk District v. Flatley*, 419 Mass. 507, 512 (1995), and *WBZ-TV v. District Attorney for the Suffolk District*, 408 Mass. 595, 603 (1990). Rather, it applies to three kinds of materials. First, it covers "information relating to an ongoing investigation that could potentially alert suspects to the activities of investigative officials" (applicable only so long as the investigation is ongoing). "Guide," at 15. Second, it covers information that would reveal "confidential investigative techniques" the disclosure of which would prejudice future law enforcement efforts (applicable indefinitely). *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 62 (1976). Third, and finally, it requires redaction of information, such as details in witness statements, "which if released create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness" (applicable indefinitely). *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 438 (1983) (defining "identifying details" and "grave risk of indirect identification"). In each case, the custodian must demonstrate that there would be a prejudice to investigative efforts. The exemption may be employed "to allow for the redaction of the names and addresses of witnesses and victims or to remove information on the record which if released, will so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." SPR Bulletin 3-03, Public Record Requests and C.O.R.I. (Nov. 21, 2003) (noting, however, that Supervisor of Public Records "will not uphold any claim of an exemption if it is not substantiated by clear evidence").

(g) **Trade secrets voluntarily divulged on promise of confidentiality:** "trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit." All six criteria must be met: (1) trade secrets, commercial information, or financial information; (2) provided voluntarily to a government entity; (3) for use in developing government policy; (4) upon an assurance of confidentiality; (5) not as required by law; and (6) not as a condition of a governmental benefit. It does not apply to information provided in connection with a contract bid or pursuant to a filing requirement. Guide to Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at 16.

(h) **Bids and contract proposals (for a short time):** "proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person." The exemption, designed to protect the integrity of the government bidding process, is time-limited. Proposals may be withheld only until the time for receiving proposals has expired. Bids may be withheld until they are publicly opened and read. (In other words, the agency may not continue withholding such information until a contract is finalized.) The second clause of the exemption is similar to exemption (d), in that it allows withholding of communications regarding the evaluation of the bids or propos-

als while the decision process is ongoing. These evaluative materials must be disclosed once a decision is reached. See Guide to Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at 17-18.

(i) **Real property appraisals (for a short time):** "appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired." Once any one of those three conditions has occurred, the appraisals must be disclosed. The law defines an "appraisal" as any written analysis, opinion, or conclusion prepared by a real estate appraiser relating to the nature, quality, value or utility of specified interest in, or aspects of, identified real estate." G.L. c. 112, § 173. The analysis is parcel-specific; details about one parcel may not be withheld pending final agreement on all parcels involved in a project. See *Coleman v. Boston Redevelopment Authority*, 61 Mass. App. Ct. 239 (2004).

(j) **Firearms license data:** "the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to Chapter one hundred and forty [140] or any firearms identification cards issued pursuant to said Chapter one hundred and forty [140] and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said Chapter one hundred and forty [140] and the names and addresses on said licenses or cards." This exemption permits withholding of identifying details, but not the entirety, of any firearm application or identification card. (Other statutory exemptions may permit further redactions, for example, of the holder's social security number (exemption (c)) or CORI information (exemption (a)). Notably, the Public Records Law contains an independent provision expressly *prohibiting* the release, by the state or any licensing authority, of information "divulging or tending to divulge" names and addresses of individuals who own, possess, or are licensed to carry firearms. G.L. c. 66, § 10(d). See also G.L. c. 140, §§ 1210131P (discussing sale of firearms). Thus, a request for firearm records of a specific individual would be denied in its entirety, as there is no other way to shield the individual's identity.

(k) [Subparagraph (k) of G.L. c. 4, § 7, cl. 26 has been repealed. See St. 1988, c. 180, § 1. However, the same act added an essentially similar provision to the public library laws providing that "[t]hat part of the records of a public library which reveals the identity and intellectual pursuits of a person using such library shall not be a public record." G.L. c. 78, § 7, as amended by St. 1988, c. 180, § 2. That statutory exemption is incorporated into the Public Records Law by virtue of exemption (a).]

(l) **Reusable tests and score sheets:** "questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument." Under this exemption, a school may deny a parent's request for a copy of a midterm exam, if the school establishes that the test questions will be re-used for future examinations. The same would hold for testing materials used for the state-wide Massachusetts Comprehensive Assessment System (MCAS) testing regimen. Guide to the Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at p. 21. The exemption is meant to protect competitively scored, standardized tests and examinations, and does not apply to guidelines used by government agencies to effect policy. *Massachusetts Corr. Legal Services v. Comm'r of Correction*, 76 Mass. App. Ct. 1128, 925 N.E.2d 573 (Mass. App. Ct. 2010) (requiring disclosure of unredacted "Risk Factor Tool" used by jails to determine double-bunking of inmates).

(m) **Certain hospital contracts:** "contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six [c. 176] I, a non-profit hospital service corporation or medical service corporation organized

pursuant to chapter one hundred and seventy-six [c. 176] A and chapter one hundred and seventy-six [c. 176] B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five [c. 175] or any legal entity that is self insured and provides health care benefits to its employees.” Withholding is permitted only if all four criteria are met: (1) a contract; (2) for hospital or related health care services; (3) one party being a government-operated medical facility; and (4) the other party being an entity as described in the exemption.

(n) **Public Safety/Homeland Security:** “records including, but not limited to, blue prints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons, buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.” This post-9/11 exemption was enacted even though the Legislature was advised that it requires a records custodian to make a “value judgment” regarding the requester – something that is “specifically antithetic to the ... presumptions that all records are public records and all requesters shall be treated uniformly.” Guide to the Massachusetts Public Records Law (Sec’y of State, rev. March 2009), at 22-23. The custodian may communicate with the requester and ask for sufficient information to reach a “reasonable judgment” about the risk to public safety by disclosure, although the requester need not respond. *Id.* Under this exemption, it is entirely possible, and permissible, that a custodian might properly provide requested blueprints to one requester, and deny the same blueprints to another.

(o) **Home address information of public employees:** “the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.” Similar language is repeated in the body of the Public Records Law, *see* G.L. c. 66, § 10(d). Note that this exemption does not apply to the employees’ names, only to their home addresses and telephone numbers.

(p) **Names and home address information of public employees’ family members:** “the name, home address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).” Similar language is repeated in the body of the Public Records Law, *see* G.L. c. 66, § 10(d). Note that this exemption extends to the names of the employees’ family members, and not merely to their home addresses and telephone numbers.

(q) **Adoption information:** “adoption contact information and indices therefore [sic] of the adoption contact registry established by section 31 of chapter 46.”

(r) **Child advocate information:** “information and records acquired under chapter 18C by the office of the child advocate.”

(s) **Energy supplier’s confidential information (sometimes):** “trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities con-

ducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure of a private entity so licensed.”

B. Other statutory exclusions.

A specific exclusion contained in another statute will override the general public records law. *See* G.L. c. 4, § 7, cl. 26(a). The following is a *partial* list of specific statutory references relating to records access. The reader is urged to consult the applicable statute to determine the scope and conditions of the exclusions, if any.

1. *Abatement applications.* Books recording abatements that have been granted are open to public inspection; applications for abatement or exemption are not. G.L. c. 59, § 60.

2. *Address Confidentiality Program, participant applications and supporting documents.* G.L. c. 9A, § 6.

3. *Adoption records.* Closed unless judge orders otherwise. G.L. c. 210, § 5C.

4. *Air pollution control (trade secrets).* Other than emission data, upon request, records are not public when they relate to secret processes, methods of manufacture, or trade secrets. G.L. c. 111, § 142B.

5. *Alcohol treatment records.* G.L. c. 111B, § 11.

6. *Bank examination records.* Available only to the commissioner of banks. G.L. c. 167, § 2.

7. *Birth reports.* G.L. c. 46, § 4A; G.L. c. 46, § 2A (out-of-wedlock birth records unavailable except by court order).

8. *Blind persons, Commission for the Blind Register.* Records regarding aid to the blind are not public. G.L. c. 6, § 149.

9. *Business schools (private), financial statements.* Financial statements used for evaluating renewal applications are not public records. G.L. c. 75D, § 3.

10. *Capital facility construction project records.* Not available to the public. G.L. c. 30, § 39R.

11. *Census records.* The requirement for a decennial state census has been repealed. *See* St. 1992, c. 403, § 2. However, much of the same information is obtainable from the street lists prepared annually by city and town clerks. These list all known inhabitants 17 years of age or older of a given city or town and identify voters. G.L. c. 51, §§ 6-7. This list is also normally available electronically.

12. *Central Registry of Voters.* G.L. c. 51, § 47C. Office of the Secretary of the Commonwealth is obligated to provide all persons, including statewide committees, with access, upon request, to voter information contained in the central registry under public records law and also to provide statewide committees with access to voters’ names and addresses under the central registry statute. *Op.Atty.Gen.*, Oct. 11, 2001.

13. *Conflict of interest, request for an opinion.* G.L. c. 268A, § 22.

14. *Collective bargaining records.* Not covered in exceptions to Public Records Law but are normally not available from government employer until an agreement is reached. This result flows from the collective bargaining strategy and negotiation exception in the Open Meeting Law. *See* G.L. c. 39, § 23B(3).

15. *Confidential communications to sexual assault and domestic violence counselors.* Privilege includes any written records of such communications. G.L. c. 233, § 20J.

16. *Consumer protection investigations.* Information produced in a consumer protection investigation is not to be disclosed. However, the

attorney general may disclose such information in a court pleading. G.L. c. 93A, § 6(6).

17. *Criminal Offender Record Information*. G.L. c. 6, § 167.

18. *Delinquency, sealing by commissioner of probation*. G.L. c. 276, § 100B.

19. *Department of Social Services, central registry*. Information related to individual children is confidential. G.L. c. 119, § 51F.

20. *Department of Youth Services*. Records of the commitment of a delinquent child or youthful offender are not open to public inspection, but remain open to the child, his/her parents or guardian, and his/her attorney. G.L. c. 120, § 21.

21. *Disease and medical treatment records*. In addition to the general patient record confidentiality statute and the fact that most Massachusetts hospitals are private institutions, there are further specific provisions for the confidentiality of various particular medical records. Examples include births of children with congenital deformity or birth defects (G.L. c. 111, § 67E), alcoholism treatment (G.L. c. 111B, § 11), treatment of Reyes syndrome (G.L. c. 111, § 110B), registry of malignant diseases (G.L. c. 111, § 111B), infectious disease reports (G.L. c. 111D, § 6), venereal disease treatment (G.L. c. 111, § 119), drug dependency treatment (G.L. c. 111E, § 18(a)), mentally ill persons (G.L. c. 123, § 36), records of tests for genetically linked diseases (G.L. c. 76, § 15B), and records of tests for AIDS (G.L. c. 111, § 70F). Restrictions may not apply to records not identifying individuals. See, e.g., c. 111, § 191 (lead paint poisoning).

22. *Drug addiction treatment records*. G.L. c. 111E, § 18.

23. *Employment agencies*. Information related to employment agency licensing violations is confidential. G.L. c. 140 § 46R.

24. *Employment security data*. Information secured for employment matters pursuant to G.L. c. 151A is confidential and absolutely privileged except in certain court proceedings. Selected information may be available to certain parties, such as the employer, the claimant, the IRS, and the state police. G.L. c. 151A § 46.

25. *Environmental impact reports*. Largely open. All state agencies, departments, commissions, etc. are required to review and to evaluate the impact on the natural environment of all works, projects or activities conducted by them or by those to whom they issue permits. G.L. c. 30, § 61. All such environmental impact reports are public documents. G.L. c. 30, § 62C.

26. *Executive sessions, minutes*. G.L. c. 30A, § 11A; G.L. c. 34, § 9F; G.L. c. 39, § 23B.

27. *Fetal death reports*. Generally confidential. Reports may be released for statistical or research purposes as long as the report does not contain the names of the parents. G.L. c. 111, § 202.

28. *Firearms Bureau records*. Bureau is not permitted to release names of persons who own, possess, or are licensed to own or possess firearms. G.L. c. 66, § 10(d).

29. *Gas and electric affiliated company records*. G.L. c. 164, § 85.

30. *Genetically linked diseases, testing records*. G.L. c. 76, § 15B.

31. *Hazardous substances reports*. Information provided to state or local agencies or instrumentalities by manufacturers and employers is not a public record. G.L. c. 11F, § 21.

32. *Hazardous waste facilities*. Under the Massachusetts Hazardous Waste Management Act, records are confidential if they would divulge a trade secret. G.L. c. 21C, § 12.

33. *Hazardous waste management records*. Waste disposal site records are confidential when they contain trade secrets, except that they may be reported as aggregate statistics for the environmental impact report. G.L. c. 21D, § 6.

34. *Health care services inventory, Department of Public Health*. A list of health care resources is maintained by the Commonwealth and is considered a public record. Some items considered confidential or privileged are exempted. G.L. c. 111, § 25A.

35. *Historical and archaeological sites and specimen inventory*. Not public records. Exception includes discovery and existence of information about Native American burial sites. G.L. c. 9, § 26A(1).

36. *Home addresses and telephone numbers of public safety personnel, victims of adjudicated crimes, and persons providing family planning services*. In addition to the enumerated exceptions in this outline, the body of the Public Records Law contains an additional exemption prohibiting government entities from disclosing “[t]he home address and telephone number 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 and home address and telephone number, or place of employment or education of a family member of any of the foregoing.” Note that, under the language, the names of family members are exempted, but the names of victims are not. G.L. c. 66, § 10(d).

37. *Hospital medical peer review committee*. Reports and records are confidential, G.L. c. 111, § 204, but subject to subpoena by appropriate regulatory authorities. *Commonwealth v. Choate-Symmes Health Services Inc.*, 406 Mass. 27, 545 N.E.2d 1167 (1989).

38. *Hospital records*. Individual patient records are exempt. G.L. c. 111, § 70. Most Massachusetts hospitals are private.

39. *Hospitals, reports of staff privilege revocation*. Confidential. G.L. c. 111, § 53B.

40. *Housing code violations*. Now largely open. Complaints, inspection reports, and correspondence pertaining to housing violations are public records. G.L. c. 111, § 127B; *Cunningham v. Health Officer of Chelsea*, 7 Mass. App. Ct. 861, 385 N.E.2d 1011 (1979).

41. *Inspector General investigations*. Records from the office are not considered public records. G.L. c. 12A, § 13.

42. *Judicial conduct investigations*. All proceedings of the Judicial Conduct Commission “shall be confidential until there has been a determination of sufficient cause and formal charges have been filed with the Supreme Judicial Court.” G.L. c. 211C, § 6(1).

43. *Juvenile delinquency court records*. G.L. c. 119, § 60A.

44. *Lawyer disciplinary records*. Normally confidential unless public reprimand, suspension, or disbarment results. Supreme Judicial Rule 4:01, §§ 4, 20.

45. *Legal opinions of corporate counsel, city solicitor, or town counsel*. Opinions rendered are public records and are filed with the city or town clerk. G.L. c. 268A, § 22.

46. *Legislature*. The Public Records Act does not apply to the Legislature. G.L. c. 66, § 18.

47. *Library circulation records*. G.L. c. 78, § 7.

48. *Malignant disease reports*. G.L. c. 111, § 111B.

49. *Massachusetts Commission Against Discrimination investigatory files (including position statement)*. G.L. c. 151B, § 5.

50. *Massachusetts Technology Development Corporation, corporate records*. Materials consisting of trade secrets or commercial or financial information regarding the operation of any business conducted by an applicant are exempt. However, if the corporation purchases a qualified security from an applicant, the commercial and financial information, excluding trade secrets, will constitute a public record after the sale of the corporation’s qualified security. G.L. c. 40G, § 10.

51. *Medical disciplinary records*. Records of complaints against and investigation of physicians by the Board of Registration in Medicine

are kept confidential until “after the board has disposed of the matter under investigation by issuing an order to show cause, by dismissing a complaint or by taking other final action.” G.L. c. 112, § 5. Access is available to records from the last 10 years of physician malpractice pay-outs and settlements, and certain disciplinary records, as well as physician profile information including education, awards, hospital affiliations, and insurance plans. Physician profile information may be obtained at <http://profiles.massmedboard.org/Profiles/MA-Physician-Profile-Find-Doctor.asp> or by calling the Massachusetts Board of Registration in Medicine at 617-654-9830.

52. *Mental health facilities records.* G.L. c. 123, § 36.
53. *Motor vehicle insurance merit rating plans.* G.L. c. 6, § 183.
54. *Native American burial site records.* G.L. c. 9, § 26A(5).
55. *Natural heritage programs database.* G.L. c. 66, § 17D.
56. *Patient abuse at intermediate care facilities for mentally retarded citizens, and convalescent, nursing, or rest homes.* Reports of abuse by health care workers are exempt. Upon written request, a copy may be obtained by the patient or resident or counsel, the reporting person or agency, the appropriate professional board of registration, or a social worker assigned to the case. G.L. c. 111, § 72I.
57. *Patient records confidentiality; medical and mental health facilities.* G.L. c. 111, § 70E.
58. *Protective Services records, aged persons.* G.L. c. 19A, § 23.
59. *Psychotherapist-patient privilege.* Includes written communications and records and notes on oral communications. G.L. c. 233, § 20B. Disclosure may be appropriate to protect safety of client or others; also, in legal proceedings at which mental health is a defense, in a case involving custody, or in a case against therapist for malpractice.
60. *Public assistance record, aged persons, dependent children, handicapped persons.* Deemed public records, but only open to inspection by public officials for purposes connected to administration of public assistance. Identifying information only is also open to the state police. G.L. c. 66, § 17A.
61. *Public assistance, Wage Reporting System information.* G.L. c. 62E, § 8.
62. *Rape reports.* Reports of rape and sexual assault are exempt. G.L. c. 41, § 97D.
63. *Security breach reports* created pursuant to G.L. c. 93H are subject to the Public Records Law and its exemptions. See SPR Bulletin 1-08, “Security Breach Protections” (undated, 2008).
64. *Sex offender registry information.* G.L. c. 6, §178I.
65. *Social worker-client privilege.* Includes records of communications and services of licensed or state social worker. G.L. c. 112, § 135A. Disclosure may be appropriate to protect safety of client or others.
66. *Special needs children, evaluations.* The written record and clinical history from the evaluation provided by the school committee and independent evaluation are confidential. G.L. c. 71B, § 3.
67. *Street lists, children ages 3-17, court order granting protection.* G.L., c. 51, § 4(a), (d).
68. *Student records.* Open to inspection by parent or guardian. G.L. c. 71, §§ 34D, 34E.
69. *Tax returns.* Public officials are prohibited from disclosing any state tax information other than the name and address of the person filing the return, except in tax collection or evasion proceedings. G.L. c. 62C, § 21. However, local property tax records are public. G.L. c. 59, § 43.

70. *Vocational rehabilitation records.* G.L. c. 6, § 84.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

1. *Attorney-client privilege.* The Public Records Law does not abrogate the attorney-client privilege. Confidential communications between public officers and employees and governmental entities, on the one hand, and their legal counsel, on the other, “are protected under the rules of the normal attorney-client privilege” when they are “undertaken for the purpose of obtaining legal advice or assistance.” *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 870 N.E.2d 33 (2007). Because the privilege is “a matter of common law of fundamental and longstanding importance to the administration of justice,” attorney-client privileged documents may be withheld in response to a public records request, even in the absence of an applicable statutory exemption. *Id.* (declaring that if Legislature desired for privilege to be trumped by the public records law, “it would have made that intention unmistakably clear”). A different result, the Court said, would be to “employ the conventions of statutory construction in a mechanistic way that upends common law and fundamentally makes no sense.” *Id.* at 458.

Nonetheless, for the government to invoke the attorney-client privilege, it must do more than simply assert it; the government has the burden of proving the existence of the privilege, and must produce “detailed indices” justifying its claim that the privilege applies to the withheld documents. *Id.*, 449 Mass. at 450 n.9, 460, 870 N.E.2d at 38 n.9, 45-46. Whether the Supervisor of Public Records has authority to rule on the applicability of the privilege to public records requests has been the subject of dispute between the Secretary of State’s office, which interprets the statute, and the Attorney General’s Office, which enforces it in court. See, e.g., C. Herman and B. Mohl, *CommonWealth*, Winter 2011 (Jan. 18 2011).

2. *Attorney work product.* The result is different, however, as to the work product privilege; “materials privileged as work product pursuant to Mass. R. Civ. P. 26(b)(3) ... are not protected from disclosure under the public records statute unless those materials fall within the scope of an express statutory exemption.” *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 801, 711 N.E.2d 589, 592 (1999). The differing treatment of the attorney-client and work product privileges results from the different scope of the two protections. *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 456, 870 N.E.2d 33, 43 (2007) (noting that attorney-client privilege “has deep roots in the common law and is firmly established as a critical component of the rule of law in our democratic society,” while the work product doctrine is a “tool of judicial administration, ... not having an intrinsic value in itself outside the litigation arena”). The differing treatment is also due to the fact that, as to work product, the Legislature had expressly rejected a proposed exemption (k) that would have applied to litigation strategy-related materials, and instead adopted an exemption (exemption (d)) that is narrower than the cognate exemption in the federal Freedom of Information Act.

3. *Documents received in litigation, pursuant to a protective order.* A public agency that is party to litigation may receive documents through the discovery process, and such documents are subject to disclosure under the Public Records Law unless an exemption applies. However, if such documents are obtained or received by the agency only subject to a court-approved and “providently entered” protective order, then they are exempt from disclosure under the Public Records Law regardless of whether the law, standing alone, would have required disclosure. See *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 214, 944 N.E.2d 1019, 1023 (2011) (construing Public Records Law so as not to “invalidate an otherwise providently entered protective order,” in order to avoid raising “serious constitutional questions” about the law’s validity).

4. *Governmental privilege rejected.* The Supreme Judicial Court has declined to recognize any governmental privilege broader than what is contained in the deliberative process exemption (d). See *Babets v.*

Secretary of Exec. Office of Human Services, 403 Mass. 230, 239 n.8, 526 N.E.,2d 1261, 1266 n.8 (1988).

D. Are segregable portions of records containing exempt material available?

If segregable, non-exempt portions of partially exempt records should be produced. Redaction is often physically done by blocking out allegedly exempt portions. G.L. c. 66, § 10(a); 950 CMR 32.03; *Reinstein v. Police Comm'r of Boston*, 378 Mass. 281, 287-290, 391 N.E.2d 881 (1979); *Globe Newspaper Co. v. Police Comm'r of Boston*, 419 Mass. 852, 648 N.E.2d 419 (1995). However, where the necessary redactions would be particularly extensive or burdensome, or might still allow for "indirect identification" of the redacted information, courts may decline production altogether. See, e.g., *Globe Newspaper Co. v. Chief Med. Examiner*, 404 Mass. 132, 134 n. 2, 533 N.E.2d 1356 (1989) (declining a redaction order where "it would be both burdensome and unnecessary to force the [public record holder] to redact the reports in order to extract the nuggets of nonconfidential information" requested); *Logan v. Comm'r of Dept. of Indus. Accidents*, 68 Mass. App. Ct. 533, 536-37, 863 N.E.2d 559, 563 (Mass. App. Ct. 2007) (suggesting that a showing of both burden and non-necessity may be required).

E. Homeland Security Measures.

A 2002 amendment to G.L. c. 4, § 7, cl. 26 added subparagraph (n), which exempts:

[R]ecords, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

This exemption was enacted in response to the events of September 11, 2001 and was designed to increase security and prevent future attacks against persons and public places. It was intended to apply only to public buildings, public transportation, and public areas only. The exemption requires a custodian to balance the public right to know against public safety, and in doing so to take into consideration "all apparent facts and circumstances available." The custodian must use "reasonable judgment" in granting or denying a request, and must "articulate with specificity" both the factors underlying that judgment and the basis for the belief that the records were "likely to be used" to endanger public safety. The custodian may not require a requester to provide additional information about him or herself or his or her motives, but the custodian may inform the requester that he or she will reevaluate a denied request if further information is voluntarily provided. Supervisor of Public Records (SPR) Bulletin, No. 04-03 (Apr. 1, 2003). The exemption was enacted even though the Legislature was advised that by requiring the custodian to make a "value judgment" about the requester, it is "specifically antithetic to the ... presumptions that all records are public records and all requesters shall be treated uniformly." Guide to the Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at 22-23. Under this exemption, it is entirely possible, and permissible, that a custodian might properly provide requested blueprints to one requester, and deny the same blueprints to another. *Id.*

III. STATE LAW ON ELECTRONIC RECORDS

The Massachusetts Public Records Law "clearly applies to government records generated, received, or maintained electronically." SPR Bulletin No. 4-96 (June 7, 1996). A records custodian must furnish "copies of non-exempt portions of computerized information at the cost of reproduction, unless otherwise provided by law." Guide to Massachusetts Public Records, Law (Sec'y of State, rev. March 2009), at 27.

There is no statutory public entitlement to online access to Massachusetts government records, although many records are currently

available online. Nor is there any general statute requiring or authorizing the keeping of records electronically, although the practice is clearly recognized in specific statutes. See e.g., G.L. c. 66A, § 1 (defines and anticipates use of "automated personal data system"); c. 90, § 30A (limits access to computer terminals under control of Registrar of Motor Vehicles). See also 950 CMR 32.06(b) (sets fees for copies of city and town "street list," computer tapes and mailing labels).

Many state and municipal records are now automated, and in some instances municipal officials feed information directly into state-owned computers (e.g., street lists, voter lists, juror lists). Whether a particular record or type of record is available in tape, computer disc or other automated form is usually most easily discovered by direct inquiry of the custodian. Questions relating to the maintenance and disposal of government records (including electronic records) should be directed to the Records Management Unit of the Massachusetts State Archives.

A. Can the requester choose a format for receiving records?

Yes, and the custodian must comply if the custodian "is able to provide information in a compatible format or medium." SPR Bulletin 3-96, "Application of the Public Records Law to Electronic Records Access" (June 6, 1996) at ¶ 6. However, because a custodian need not provide information "in a format or medium which is compatible to every requester," the custodian is not required to comply if the time or reprogramming necessary to accommodate a request in a specific format "is tantamount to creating a document, rather than segregating an existing record." *Id.*; SPR Bulletin 4-96 (June 7, 1996). The custodian is only obliged to provide access to existing files, in their existing format, except where segregation is necessary. Guide to Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at 27. "The requester is then responsible for converting the data into the desired format." SPR Bulletin 3-96, at ¶ 6.

B. Can the requester obtain a customized search of computer databases to fit particular needs?

The custodian has no obligation to create a record in response to a request, if such a record does not currently exist. 950 CMR 32.05(4); see also SPR Bulletin 3-96, "Application of the Public Records Law to Electronic Records Access" (June 6, 1996) ("Writing a program to manipulate data or combine data from various sources so that the end product is truly a new record is not required, but ... is permissible."). In such a case, however, the custodian "should advise the requester of other available documents or files that could be responsive to the request." Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at 27.

If the custodian chooses to create a new record in response to a request, the custodian may charge a reasonable one-time fee for the necessary programming to create the record, in addition to reproduction fees. Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at ¶¶ 5, 7. See also SPR Bulletin 4-96, *Fees for Access and Copying of Electronic Public Records* (June 7, 1996) ("Since the newly created record is not within the statutory definition of 'public records,' the Regulations do not apply and the custodian may assess any reasonable fee for such reprogramming to create a document."); see also 32 Op. Att'y Gen. 157, 165 (May 18, 1977). Once a program is written, however, it becomes part of the agency's files. The agency may recover only once for the costs of creating such a program; for future requests derived from the same database, only the reproduction (and, if applicable, segregation) costs may be charged. SPR Bulletin 4-96 at ¶ 7; SPR Bulletin 3-96, "Application of the Public Records Law to Electronic Records Access" (June 6, 1996), at ¶ 2.

C. Does the existence of information in electronic format affect its openness?

Sometimes. An electronic database may well contain both public and non-public information, such that, arguably at least, the segregation of the two may take additional time. See *Doe v. Registrar of Motor Vehicles*, The Appeals Court has bemoaned that "there is a negative

public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny,” largely because data processing technology allows “the aggregation of pieces of personal information to large central data banks.” *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 421-22, 425, 528 N.E.2d 880 (1988). While one might be tempted to deride such dicta as a relic of the pre-electronic era, in fact the public is still sometimes barred from using existing online databases. For example, a Massachusetts statute limits access to computer terminals of the registrar of motor vehicles to government employees, law enforcement agencies, “insurance companies and their authorized agents and service carriers, . . . and the trial courts or computer manufacturers or data processing consultants under contract with the commonwealth.” G.L. c. 90, § 30A. Because state tax information is exempt from the public records law, only the commissioner of revenue may authorize “public access to terminals or other data processing equipment for the purpose of copying, reading, collecting, printing, analyzing or manipulating any data or other information . . . or to authorize the release of the original or copies of tapes, cards, disc files or other methods of electronic storage.” G.L. c. 59, § 52C. Wannabe hackers beware: It is a crime to obtain or attempt to obtain “any commercial computer service by false representation, false statement, unauthorized charging the account of another, by installing or tampering with any facilities or equipment or by any other means.” G.L. c. 266, § 33A. The statutory definition of “commercial computer service” arguably is broad enough to include government computer programs that are available only for a fee.

Another anachronistic sign: At least as of 2003, state government agencies were required to print out paper copies of emails and, where feasible, file them in accordance with the entity’s paper filing system procedures. SPR Bulletin 1-99, “Electronic mail” (revised and reissued, May 21, 2003) at ¶¶ 5, 6.

All state executive agencies, as well as all authorities created by the Legislature, must have a written information security program regarding records containing “personal information” (for security breach purposes). SPR Bulletin 1-08, “Security Breach Protections” (undated, 2008) at ¶ 1. Because the policy should include provisions regarding document retention and destruction, as well as identification and retrieval of documents, it may prove useful to a records requester.

Many municipalities contract with private companies to computerize and maintain their municipal records. Even if contained in a privately created database, however, the data remain public records. A municipality “cannot contract away its public records duties.” SPR Bulletin 3-96, “Application of the Public Records Law to Electronic Records Access” (June 6, 1996).

D. How is e-mail treated?

Electronic mail is a public record subject to the requirements of the Public Records Law. Government agencies have a duty to “effectively manage and control” e-mail as part of the office’s record-holding. SPR Bulletin 1-99, “Electronic Mail” (revised and reissued, May 21, 2003). This duty includes establishing a written policy for storing e-mail and retaining e-mails for the prescribed period of time based on content. E-mail should be printed and stored in paper form, but certain types of e-mail may be stored electronically.

A common issue with e-mail records relates to deletion of e-mail. Even if a custodian claims that an e-mail message was deleted, backup copies are often retained, and these records remain subject to discovery regardless of the intent to delete the message. E-mail is considered analogous to paper documents. The Supervisor of Public Records, however, has noted that there are differences between the two. Namely, the contextual data that accompanies an e-mail (the mailing address, date/time stamp, routing instructions, transmission and receipt information) is considered an integral part of the record and must be retained in any printed or stored version. SPR Bulletin 1-99 (2003).

1. Does e-mail constitute a record?

Yes, the Public Records Law “applies to all government records

generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4.; *see also* SPR Bulletin 1-99 (revised and reissued, May 21, 2003) at ¶ 3. The envelope information (mailing address, date and time stamp, routing instructions, and transmission and receipt information) “constitutes an integral part of the record,” and presumably must be disclosed under the Public Records Law along with the contents of the email. *See* SPR Bulletin 1-99, at ¶ 5.

3. Private matter on government e-mail or government hardware

“Email systems in use in government offices are government property installed and maintained for the conduct of government business”; agencies “may and should” exercise control over it and have the right to monitor and read employee email. SPR Bulletin 1-99, at ¶ 7.

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

Yes. “Public record” is “broadly defined to include all documentary materials or data created or received by any officer or employee of any governmental unit, *regardless of physical form or characteristics*.” SPR Bulletin 1-99, “Electronic mail” (revised and reissued May 21, 2003), at ¶ 2 (emphasis added). Moreover the Public Records Law “applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4. The Supervisor of Public Records has defined email as “any message created on an electronic mail system,” which in turn is defined as “a service that provides facilities for creating messages, transmitting them through a network and displaying them on a recipient’s computer terminal.” SPR Bulletin 1-99 (2003). Both the general and specific language appear to encompass text messages and instant messages.

F. How are social media postings and messages treated?

Presumably they may be public records if created or received by any officer or employee of any governmental unit. “Public record” is “broadly defined to include all documentary materials or data created or received by any officer or employee of any governmental unit, *regardless of physical form or characteristics*.” SPR Bulletin 1-99, “Electronic mail” (revised and reissued May 21, 2003), at ¶ 2 (emphasis added). Moreover the Public Records Law “applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4. The Supervisor of Public Records has defined email as “any message created on an electronic mail system,” which in turn is defined as “a service that provides facilities for creating messages, transmitting them through a network and displaying them on a recipient’s computer terminal.” SPR Bulletin 1-99 (2003). Both the general and specific language might be construed to encompass social media postings.

G. How are online discussion board posts treated?

Presumably they, too, may be public records if created or received by any officer or employee of any governmental unit. “Public record” is “broadly defined to include all documentary materials or data created or received by any officer or employee of any governmental unit, *regardless of physical form or characteristics*.” SPR Bulletin 1-99, “Electronic mail” (revised and reissued May 21, 2003), at ¶ 2 (emphasis added). Moreover the Public Records Law “applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4. The Supervisor of Public Records has defined email as “any message created on an electronic mail system,” which in turn is defined as “a service that provides facilities for creating messages, transmitting them

through a network and displaying them on a recipient's computer terminal." SPR Bulletin 1-99 (2003). Both the general and specific language might be construed to encompass online discussion board posts.

H. Computer software

1. Is software public?

No. "A custodian is not obligated to provide copies of a computer program," because such a program is merely "a tool used in the processing of data rather than a 'record,' and therefore is not subject to mandatory disclosure." SPR Bulletin 3-96, "Application of the Public Records Law to Electronic Records Access," June 6, 1996.

2. Is software and/or file metadata public?

State government offices are required to preserve the metadata associated with any email message, even if the email is printed out, "to ensure the capture and preservation of a complete record." SPR Bulletin 1-99 (2003), at ¶ 7.

I. How are fees for electronic records assessed?

Except where otherwise provided by statute, fees are not more than 50 cents per page for computer printouts, plus the "actual cost incurred from the use of the computer time." 950 CMR 32.06(1). However, "[t]he only such 'actual costs' which may be recovered are: the cost of the energy consumed during use, the materials used, and the prorated salary of the computer operator." SPR Bulletin 4-96, *Fees for Access and Copying of Electronic Public Records* (June 7, 1996). The custodian is required to develop a program for segregating responsive electronic data from exempt data, and, again, only actual costs may be charged. SPR Bulletin 4-96, at 2. In any event, the fee may not include costs expended to develop the database, input data, create the original records (unless the custodian is voluntarily creating a record in response to the request, *see III.B, above*) or organize files; because a records custodian has an independent, affirmative obligation to maintain records in an orderly fashion, those costs cannot be passed along to a requester. SPR Bulletin 4-96 (June 7, 1996); Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at 3.

In some instances, statutes prescribe fees for specific types of records. *See, e.g.*, G.L. c. 66, § 10(a) (pertaining to motor vehicle accident reports, fire insurance reports, and other records of police or fire departments); G.L. c. 262, § 38 (copies of Registry of Deeds records). The records custodian may charge the actual cost of reproduction (as defined below) for a copy of a record "not susceptible to ordinary means of reproduction, such as large computer records...." Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. March 2009), at 2; 950 CMR 32.06(1)(f).

J. Money-making schemes.

1. Revenues.

No information available.

2. Geographic Information Systems.

Information in GIS databases, often submitted by private surveyors and engineers who claim intellectual property rights in the nonfactual portions thereof, is not exempt from disclosure under the Public Records Law. However, the requester may still be bound by intellectual property constraints on the use of the records provided. Guide to Mass. Pub. Recs. Law (Sec'y of State, rev. 3/2009), at 27-28. Records are provided at actual cost. 950 CMR 32.06(f). See <http://www.mass.gov/mgis/massgis.htm>.

Where available, reuse may be restricted. For example, the terms and conditions for the use of digital data provided by MassGIS include the following: "Data provided under this Agreement are intended for the use of the receiving agency, organization or individual. They are not intended to be redistributed or resold to other agencies, organizations or individuals. . . . All maps or other documents produced using data or data products supplied through this agreement should contain

a data source credit, prominently displayed, such as 'source data supplied by the Massachusetts Executive Office of Environmental Affairs, MassGIS.'"

K. On-line dissemination.

Requests for on-line access to records or for a subscription service to certain information do not fall under the Public Records Law, because they are requests for documents not yet created. A custodian may set the fee for such access. SPR Bulletin 4-96, at ¶ 6.

Among the agencies providing records online are the following:

Courts

Massachusetts Trial Courts Information Center. <http://www.ma-trialcourts.org/tcic/welcome.jsp> Massachusetts appellate courts. <http://www.ma-appellatecourts.org/search.php>

Business Data

Corporations. <http://corp.sec.state.ma.us/corp/corptest/corptestinput.asp> Corporate finance statements. <http://corp.sec.state.ma.us/uccfiling/uccSearch/Default.aspx>

Licensing and registration

Board of Bar Overseers (attorney discipline records). <http://mass-bbo.org/bblookup.php> Board of Reg. in Medicine (MD profiles). <http://profiles.massmedboard.org/MA-Physician-Profile-Find-Doctor.asp> Division of Prof'l Licensure (licensed professionals). <http://license.reg.state.ma.us/public/licque.asp?color=red> Municipal inspection departments, such as: Boston restaurant inspections: <http://www.cityofboston.gov/isd/health/mfc/court.asp> Cambridge restaurant inspections: <http://www2.cambridgema.gov/inspectional/searchinspections.cfm>

Political Data

Massachusetts Office of Campaign and Political Finance (campaign finance data). <http://www.efs.cpf.state.ma.us/Registryoflobbyists>. <http://www.sec.state.ma.us/LobbyistWeb/Common/Signin.aspx> Massachusetts Budget and Policy Center (state budget data). <http://browser.massbudget.org/Default.aspx> Massachusetts Legislature (bill tracker). <http://www.malegislature.gov/Bills/Search>

Property records

Massachusetts Registry of Deeds. <http://masslandrecords.com/malr/index.htm> Municipal property assessments, such as: Boston: <http://www.cityofboston.gov/assessing/search/> Cambridge: <http://www2.cambridgema.gov/fiscalaffairs/PropertySearch.cfm>

Public safety

Department of Correction (criminal offender custody and case status). <https://www.vinelink.com/vinelink/siteInfoAction.do?siteId=20000> MBTA Transit Police arrest log. <http://www.mbta.com/transitpolice/crimestats/arrestlog/> Sex Offender Registry Board. <http://sorb.chs.state.ma.us/> Municipal crime logs, such as: Boston: <http://www.bpdnews.com/> Brookline: <http://blog.brooklinepolice.com/>

Other government functions

Massachusetts Abandoned Property Division. <http://www2.cambridgema.gov/fiscalaffairs/PropertySearch.cfm> Massachusetts Officer of Geographic Information Systems (online database). http://maps.massgis.state.ma.us/map_ol/oliver.php Boston Neighborhood Services. <http://www.cityofboston.gov/myneighborhood/>

Many of these databases, as well as many useful privately created resources, are collected on a useful, comprehensive site called "Government Center: Boston.com's Guide to Public Records, Databases, and Useful Information," available at http://www.boston.com/news/specials/government_center/. Also useful is www.publicrecordcenter.com.

com . A reasonably comprehensive collection of public notices, including government notices, can be found at MyPublicRecords.com.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

A. Autopsy reports.

Autopsy reports are medical records exempt from disclosure pursuant to exemption (c). *LeBlanc v. Commonwealth*, 457 Mass. 94, 96-97, 927 N.E.2d 1017, 1019 (2010); *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132, 135-36, 533 N.E.2d 1356 (1989); *Boston Firefighters Union, IAFF, Local 718 v. WHDH TV, Channel 7*, No. A.C.2007-J-455 (Mass. App. Ct. Oct. 5, 2007) (Single justice; vacating prior restraint against media disclosure of autopsy report despite non-public record status under Public Records Law). By statute, the office of the chief medical examiner may not even choose to provide reports unless surviving spouse or next of kin makes the request in a written affidavit and, if the case is one of unnatural or suspicious death and the district attorney is directing and controlling the investigation of the death, the district attorney provides written permission.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

Regulated trades and professions, typically licensed and monitored by governmental boards of registration, hold a curious place in the public-records pantheon. All are subject to the Massachusetts Fair Information Practices Act (“FIPA”), G.L. c. 66A, which regulates the government’s use of personal information relating to identifiable individuals. Each also tends to be subject to its own statutory scheme declaring some of the licensing information to be confidential. But all of those provisions are sometimes overridden by the terms of the Public Records Law. See 1976-77 Mass. Op. Atty. Gen. No. 32, 1977 WL 36238 (Mass. Att’y Gen., May 18, 1977).

A 1977 opinion of the Attorney General attempted to wade through the morass, examining public access to records of 16 boards of registration: Architects, c. 112, §§60A-60O; Barbers, c. 112, §§ 87F-87S; Chiropractors, c. 112, §§ 89-97; Dental Examiners, c. 112, §§ 43-53; Dispensing Opticians, c. 112, §§ 73C-73L; Electricians, c. 141, §§ 1 *et seq.*; Embalmers and Funeral Directors, c. 112, §§ 82-87; Medicine, G.L. c. 112, §§ 2-12R; Nursing, c. 112, §§ 74-81C; Nursing Home Administrators, c. 112, §§ 108-117; Optometry, c. 112, §§ 66-73B; Pharmacy, c. 112, §§ 24-42A; Podiatry, c. 112, §§ 13-22; Professional Engineers and Land Surveyors, c. 112, §§ 81D-81T; Real Estate Brokers and Salesmen, c. 112, § 87PP-87DDD; and Veterinary Medicine, c. 112, §§ 54-60; It noted, first, that all of the agencies were subject to FIPA’s mandate that every state agency maintaining a personal data system must prohibit outsiders – other agencies and third parties alike – from access to personal data (personal information concerning identifiable individuals) unless access is authorized by statute or regulation, or the data subject and the agency have both consented to disclosure. Thus, under FIPA, the boards may not disclose names, addresses, registration numbers, or other personal data unless permitted by statute or consent.

Second, the opinion looked to the agencies’ governing statutes. All explicitly required public access to some amount of personal data (varying from one agency to the next) held by the board. For example, the Board of Registration in Medicine must make public the names of registered medical doctors, G.L. c. 112, § 4, while the Board of Registration of Professional Engineers and Land Surveyors must go much further, publicizing each registrant’s name, age, residence, business address, and educational and professional qualifications, G.L. c. 112, § 81H). The affirmative access provisions of each statute will always trump the FIPA restrictions, the Attorney General concluded. Op. Atty. Gen. No. 32.

Third, the Attorney General considered the Public Records Law and its sweeping definition of “public records” that are presumptively available to the public. It ruled, essentially, that the Public Records Law also overrules FIPA’s restrictions to the extent that certain per-

sonal data falls outside the law’s privacy exemption (exemption (c)). Specifically, it determined that, at the very least, the boards must disclose names, addresses, registration numbers, educational and professional training, and experience. Unless otherwise mandated by a governing statute, they need not disclose other personal data, such as age and marital status.

1. Rules for active investigations.

Whether complaints and investigatory files relating to specific licensed professionals must be made public (in whole or in part) depends on an evaluation of the applicability of the privacy exemption (c) and the investigatory exception (f). A 1977 Attorney General ruling suggests that exemption (c) may shield from disclosure any complaint the allegations of which would jeopardize an individual’s reputation. See 1976-77 Mass. Op. Atty. Gen. No. 32, 1977 WL 36238 (Mass. Att’y Gen., May 18, 1977).

2. Rules for closed investigations.

A 1977 Attorney General ruling concluded that the outcome of adjudicated complaints against licensees are public records, which must be disclosed because of the “strong public interest in the professional conduct of individual practitioners.” See 1976-77 Mass. Op. Atty. Gen. No. 32, 1977 WL 36238 (Mass. Att’y Gen., May 18, 1977).

C. Bank records.

Government financial records are normally open. G.L. c. 4, § 7, cl. 26 (records include “financial statements”). Commercial bank records filed with a government agency are normally not open. G.L. c. 4, § 7, cl. 26(a); G.L. c. 167, § 2. See also *Ottaway Newspapers Inc. v. Appeals Court*, 372 Mass. 539, 362 N.E.2d 1189 (1977) (holding that where newspaper wanted court records with information about the potential removal of the bank president and several board members, sealing order could be upheld even if the records were court documents outside the scope of the public records law exemption because the policy of the banking laws supported impoundment.). Banks’ annual reports on their financial condition are public, as are banks’ alternative community reinvestment statements. G.L. c. 167, § 14.

D. Budgets.

Government financial records are normally open. G.L. c. 4, § 7, cl. 26 (records include “financial statements”). Whenever records are sought that involve the expenditure of taxpayer funds, a good case can be made for at least partial disclosure. As one Superior Court judge ruled when enjoining a municipality to produce certain records relating to applications for disability benefits, there is a strong public interest in the prompt disclosure about matters affecting “the budgets of our cities and towns, which are already struggling to fund important public services in these difficult economic times.” *Patriot Ledger v. Masterson*, 09-400, 2009 WL 928796 (Mass. Super. Apr. 2, 2009) (Sanders, J.).

E. Business records, financial data, trade secrets.

“Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality” are not publicly available. G.L. c. 4, § 7, cl. 26(g). Occasional specific statutes apply to the records of a particular body. See, e.g., G.L. c. 164, § 47D (“A municipal lighting plant . . . shall be exempt from the public record requirements . . . in those instances when necessary for protecting trade secrets, confidential, competitively sensitive or other proprietary information. . .”). Other such records are normally open. So, for example, a memorandum submitted as an exhibit in a hearing before the Securities Division of the Secretary of the Commonwealth would be a public record, even though it contained commercial information, because it was not voluntarily submitted, was not provided in connection with government policy-making, and was not submitted confidentially. Guide to Massachusetts Public Records Law (Sec’y of State, rev. March 2009) at 16-17.

F. Contracts, proposals and bids.

Bids and proposals are not available until after bids have been opened or time for receipt of bids has expired. G.L. c. 4, § 7, cl. 26(h). Fiscal statements filed by governmental contractors are normally not available. See G.L. c. 30, § 39R(f). Certain contracts for hospital or related health care services, if between a government-operated medical facility and another entity specifically described in the Public Records Law, may be withheld pursuant to exemption (m). G.L. c. 4, § 26(m).

G. Collective bargaining records.

Not covered in exceptions to Public Records Law but they are normally not available at least until an agreement is reached. This result flows from collective bargaining strategy and negotiation exception in the Open Meeting Law. See G.L. c. 39, § 23B(3).

H. Coroners reports.

As with medical examiners' reports, autopsy reports have been held to be medical records and exempt from disclosure. Judicial inquests are closed. G.L. c. 38, § 8. *Kennedy v. Justice of District Court*, 356 Mass. 367, 252 N.E.2d 201 (1969). Judge's report and transcript become available if District Attorney certifies no prosecution is proposed or if trial of persons named in report as responsible for death is complete. *Kennedy, supra*.

I. Economic development records.

The Supervisor of Public Records has suggested that the state could rely on the privacy exemption to withhold names and addresses of state residents receiving unemployment benefits. (See C. Herman, "Rebate records withheld by state," *CommonWealth*, Feb. 8, 2011.)

J. Election records.

1. Voter registration records.

The records from pre-election voter listings to post-election result certifications are open. This includes all information regarding voter registration. See G.L. c. 51, § 40 (registrars' records shall at suitable times be open to public inspection); § 41 (registrars shall preserve all documents in their custody relative to listing and registration, for two years after the dates thereof, provided that affidavits of registration shall be preserved and shall be deemed to be public records); § 55 (voting lists shall be printed and made available to any person, at a reasonable fee not to exceed the cost of printing the list, upon request).

The Office of the Secretary of the Commonwealth is required by G.L. c. 51, § 47C to maintain a Central Voter Registry. According to the statute, the names and addresses listed therein are not public records, and are only open to statewide committees. The Attorney General has stated, however, that other voter information in the Central Registry (e.g., voter's party enrollment, effective date of registration) is not exempt and should be available to statewide committees and the public. The Office of the Secretary is obligated to provide access to voter information regardless of other means of access. *Opp. Atty. Gen. No. 01/02-1* (Oct. 11, 2001).

If voter or address information is needed, a good source is the street list of all known inhabitants age 17 or older of a given city or town. This list is revised annually and is available from the city or town clerk. G.L. c. 51, §§ 6-7. List is also normally available on computer tape. See 950 CMR 32.06(6).

2. Voting results.

Nomination certificates and certificates of election results are public records (G.L. c. 54, § 117), as are information regarding initiative and referendum petitions (G.L. c. 54, § 54) and campaign finance data (G.L. c. 55, §§ 25-26).

K. Gun permits.

The Public Records Law contains an independent provision expressly *prohibiting* the release, by the state or any licensing authority, of

information "divulging or tending to divulge" names and addresses of individuals who own, possess, or are licensed to carry firearms. G.L. c. 66, § 10(d). See also G.L. c. 140, §§ 1210131P (discussing sale of firearms). Thus, a request for firearm records of a specific individual would be denied in its entirety, as there is no other way to shield the individual's identity. Where there is a request, not specific to a particular individual, for other material relating to firearm applications or identification cards, the custodian may redact identifying details (exemption (j)), social security numbers (exemption (c)) or CORI information (exemption (a)), but normally may not withhold the material entirely.

L. Hospital reports.

Medical files and information are "absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 434, 446 N.E.2d 1051, 1056 (1983). See also SPR Bulletin No. 3-04, "Internal Affairs and Personnel Records" (March 10, 2004) ("Clearly, all medical information, data and records of whatever type and from whatever source may be properly withheld in their entirety."). Hospital patient records, even if kept by a public facility, are also confidential. G.L. c. 111, § 70E(b). Certain contracts for hospital or related health care services, if between a government-operated medical facility and another entity specifically described in the Public Records Law, may be withheld pursuant to exemption (m). G.L. c. 4, § 26(m). A bevy of other statutory provisions mandate confidentiality of particular medical records under certain circumstances. See, e.g., G.L. c. 111, § 110B (treatment or examination of Reyes syndrome); G.L. c. 111, § 111B (registry of malignant diseases); G.L. c. 111, § 202 (report of fetal deaths); G.L. c. 111D, § 6 (report of infectious diseases). However, records relating to municipal health insurance plans and the costs of providing health insurance benefits to employees would be public records. Guide to Massachusetts Public Records Law (Sec'y of State, rev. March 2009), at p. 22. Moreover, the public does have access to physician profiles that include hospital affiliation, certain disciplinary actions, criminal history information, malpractice convictions and settlements, as well as certain personal background information. G.L. c. 112, § 5. Physician profile information may be obtained at <http://profiles.massmedboard.org/MA-Physician-Profile-Find-Doctor.asp> or by calling the Massachusetts Board of Registration in Medicine.

M. Personnel records.

Exempt personnel records include, at a minimum, "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee." *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792, 798, 731 N.E.2d 63, 67 (2000). Not all information contained in the personnel file is exempt, however. Particularly private information such as an employee's name, home address, date of birth, and social security number is the type that the Legislature had in mind when it identified "other materials or data relating to a specifically named individual." *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792, 799, 731 N.E.2d 63, 68 (2000).

"[P]ersonnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 438, 446 N.E.2d 1051 (1983). Nonetheless, Massachusetts courts have been urged to scrutinize skeptically an agency's invocation of the "personnel files" clause of exemption (c). Documents "are not to be insulated from disclosure merely because they have been designated by the defendants as constituting a 'personnel file.' What is critical is the nature or character of the documents, not their label." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 764 N.E.2d 847 (2002). The Supreme Judicial Court has set out three possible procedures to determine whether such records are in fact exempt: (1) creation of

an itemized and indexed document log setting forth justifications for claims of exemption, which can be reviewed by opposing counsel and the judge; (2) inspection of the documents by opposing counsel pursuant to a protective order; or, as a last resort, (3) *in camera* inspection by the judge.

Because a major purpose of the Public Records Law is to enable taxpayers to monitor government activities and employees, the exemption for “personnel records” is a narrow one; not all records relating to an individual’s employment will make the cut. Ordinary evaluations, performance assessments, and disciplinary determinations are exempt personnel records under the statute. But the employee’s name, address, and base and overtime pay are not exempt under the “personnel records” prong, even when contained in a personnel file, because they are merely “payroll records,” and are not records “useful in making employment decisions.” *Brogan v. School Committee of Westport*, 401 Mass. 306, 308 (1987) (holding that employee absentee records are non-exempt “payroll records,” not exempt “personnel records”). Nor is a government agency’s investigation of its own actions and employees.

Materials relating to the conduct of an internal affairs investigation within a police department, such as witness interviews, reports, and conclusions, are not exempted from the Public Records Law. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 787 N.E.2d 602 (2003) (noting that public ability to monitor investigations of police officers is critical for maintaining citizens’ trust and confidence); *accord Leeman v. Cote and City of Haverhill Police Dep’t*, No. 05-5387, 21 Mass. L. Rptr. 411 (Suffolk Super. Ct. Sept. 18, 2006). The disciplinary outcome, however, was exempt, because it directly related to the making of “employment decisions regarding the employee.” *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 5 (2003) (holding that “the bricks and mortar of the investigation and the documenting of its results” are public records, but the “actual order and notice of disciplinary action issued as a personnel matter from the chief to the target of the disciplinary investigation” are not). The Supervisor of Public Records has adopted the distinction. SPR Bulletin No. 3-04, “Police Advisory: Internal Affairs and Personnel Records” (March 10, 2004).

The determination of whether records are “of a personal nature” may sometimes require litigation. *See, e.g., Brogan v. School Committee of Westport*, 401 Mass. 306, 516 N.E.2d 159 (1987) (Public employee attendance and absentee records essentially nonpersonal and available).

1. Salary.

Names, base salaries, and overtime pay of police officers are not “personnel” information, nor are they intimate details of a highly personal nature. Therefore, they do not fall under the privacy exemption, and they must be disclosed. *Hastings & Sons Pub. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 814-15, 375 N.E.2d 299 (1978).

2. Disciplinary records.

A junior high school’s disciplinary report – which led to a teacher’s 4-week suspension for allegedly inappropriate comments written on two female students’ homework papers – was an exempt personnel record, the Supreme Judicial Court determined. *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792, 798, 731 N.E.2d 63 (2000).

An exempt disciplinary report is to be distinguished from an internal affairs investigation, which is a public record that normally must be disclosed. “[A]n internal affairs investigation is a formalized citizen complaint procedure, separate and independent from ordinary employment evaluation and assessment. Unlike other evaluations and assessments, the internal affairs process exists specifically to address complaints of police corruption . . . , misconduct . . . , and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry that is essential to law enforcement.” *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*,

58 Mass. App. Ct. 1, 6-7 (2003), quoted in SPR Bulletin No. 3-04, “Internal Affairs and Personnel Records” (March 10, 2004).

3. Applications.

A blank application form would be a public record. *See Wakefield Teachers Ass’n*, 431 Mass. at 800 (noting that a “generic job description or generic qualification requirement” that does not implicate any individual’s privacy is a public record). An individual employee’s completed application is likely to be exempt. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 435 (1983).

4. Personally identifying information.

Names, home addresses, and job classifications of a group of employees is not exempt; rather, under exemption (c), those facts constitute “other materials or data,” and are not “intimate details” of a “highly personal” nature. *Pottle v. School Committee of Braintree*, 395 Mass. 861, 865 (1985); *Wakefield Teachers Ass’n*, 431 Mass. at 801. *See also Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 823 N.E.2d 375 (2005) (requiring disclosure of names and addresses of county’s reserve deputy sheriffs).

5. Expense reports.

Whether Boston mayor’s office must disclose its employees’ telephone records depends on factors including whether the calls are personal or for business and, if personal, whether they are paid for using public funds. *Attorney General v. Assistant Comm’r of Real Property Dep’t of Boston*, 380 Mass. 623, 627, 404 N.E.2d 1254, 1257 (1980) (vacating trial court’s disclosure order and scheduling a hearing to apply balancing test under privacy exemption (b)). The Supervisor of Public Records has ruled that telephone numbers of calls made or received by city employees which relate to their public business must be disclosed. E. Allegrini, “Public has right to know who Brockton employees are calling,” *PatriotLedger.com* (July 17, 2008).

6. Other.

Student evaluations of their teachers are part of “personnel file” and are exempt from disclosure. *Connolly v. Bromery*, 15 Mass. App. Ct. 661, 662 (1983).

Considerable attention has been paid in recent years to municipal awards of disability benefits to public employees, an area where the individual interest in medical privacy butts up against the public interest in knowing about the expenditure of public funds. On the one hand, the accessibility of pension and disability records will depend on whether they contain medical information that, directly or indirectly, relates to an identifiable individual. When reviewing this issue, courts have been vigilant in protecting medical privacy. *See, e.g., Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 438, 446 N.E.2d 1051 (1983); *see also Logan v. Commissioner of Dep’t of Industrial Accidents*, 68 Mass. App. Ct. 533, 535-36, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007). Even redacted medical records (shorn of names and other data) will be withheld where there is a “grave risk” that individuals familiar with the patient (such as co-workers) could identify the patient and his medical condition. *Id.* (“indirect identification”); *see also Globe Newspaper Co.*, 388 Mass. at 438; *Wakefield Teachers Assn. v. School Comm. of Wakefield*, 431 Mass. 792, 795, 731 N.E.2d 63 (2000). Nevertheless, the result has been different where the requester seeks only the names of doctors who certified disability applications. *Patriot Ledger v. Masterson*, 09-400, 2009 WL 928796 (Mass. Super. Apr. 2, 2009). A carefully tailored records request that does not identify individual claimants may prove successful, particularly because, as one judge ruled, “there is a strong public interest in prompt disclosure of this information. . . . Much of the process by which disability pensions are awarded is shrouded in secrecy. The awards themselves, however, involve taxpayer money and impact the budgets of our cities and towns, which are already struggling to fund important public services in these difficult economic times. Although no individual should have the intimate details of his or her medical history open for public inspection, the public must be also be satisfied that the applicants for disability

are not abusing the benefits extended to them and that the powers conferred on retirement boards to grant or deny such applications are being exercised wisely. If some light can be shed on the process by which those decisions are reached in a way which does not impinge on individual privacy, then that will promote public confidence – or lead to reform if problems are revealed. *Patriot Ledger v. Masterson*, 09-400, 2009 WL 928796 (Mass. Super. Apr. 2, 2009) (Sanders, J.).

N. Police records.

In a blunt memo to state and local police agencies, the Supervisor of Public Records in 2003 set out the law: “Anyone can get any police record at anytime upon request. The record may be redacted to remove bits of information such as witness and victim’s names and addresses. After a redaction takes place, [the custodian] must explain in writing to the requester what information was redacted and the specific reasons why the record was sanitized. The remaining portions of the record must then be released.” SPR Bulletin 3-03, Public Record Requests and C.O.R.I. (Nov. 21, 2003).

“There is little doubt that MOST police records are public records and must be available to anyone upon request,” the Supervisor’s 2003 memorandum continued. “Exemption (f), the ‘investigatory exemption’ of chapter 4, section 7(26) may be employed by the custodian to allow for the redaction of the names and addresses of witnesses and victims or to remove information on the record which if released, will so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” *Id.* The 2003 memo concludes: “The burden of proving the prejudicial effect on law enforcement and the balancing test concerning the public interest lies squarely on the shoulders of the custodian. This office will not uphold any claim of an exemption if it is not substantiated by clear evidence.” *Id.*

The Supervisor had released the memorandum in response to “a troubling trend within the police community” of citing the Criminal Offender Record Information law, G.L. c. 6, § 167, as supposed justification to avoid disclosing public records. *Id.* It provides police departments a checklist, noting that information may *not* be withheld under CORI if any of the following apply: it pertains to a crime for which jail time is possible; concerns “evaluative information,” typically used in connection with bail, sentencing, or probation proceedings; concerns “intelligence information,” such as surveillance reports; does not pertain to an “identifiable individual” who is alive; is limited to aggregated statistical or analytical data; or was not recorded as a result of the initiation of criminal proceedings such as a criminal charge, arrest, pre-trial proceeding, or other judicial proceeding. *Id.* at 1-3.

1. Accident reports.

Local police are required to report, to the state registrar of motor vehicles, every motor vehicle accident involving fatality or serious injury. G.L. c. 90, § 29. They must make monthly reports to the State Commissioner of Public Safety disclosing how many persons of each gender were arrested during the prior month. G.L. c. 124, § 9. They must report any injury or death resulting from the use of a firearm or other weapon to the law enforcement division of the state division of fisheries and game. G.L. c. 131, § 85A. Any accident involving gas or electricity must be reported to the state department of telecommunications and energy. G.L. c. 164, § 95. *Lord v. Registrar of Motor Vehicles*, 347 Mass. 608, 612 (1964) (holding that Registry must disclose accident reports upon request).

2. Police blotter.

By statute, Massachusetts requires all municipal police departments (including deputized college and university police departments) to “make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records available without charge to the public during regular business hours and at all other reasonable times....” G.L. c. 41, § 98F.

Daily police logs constitute public records and do not fall under the CORI exemption from the public records definition. *Commonwealth v. Holt*, Nos. CRIM.A. 95-0026, 95-0021, and 95-0042, 4 Mass. L. Rptr. 539, 1995 WL 670141, *2 (Mass. Super. Ct. Oct. 17, 1995) (“police logs are public records, are non-CORI material, and fall outside CORI’s scope of protection”); *Tomczak v. Town of Barnstable*, 901 F. Supp. 397, 404 (D. Mass. 1995); see also G.L. c. 6, § 172, ¶ 8 (CORI statute, noting that “public records” include “police logs, arrest registers, or other similar records compiled chronologically, provided that no alphabetical arrestee, suspect, or similar index is available to the public, directly or indirectly...”); 803 CMR 2.04(7) (“CORI shall not include public records as defined in M.G.L. c. 4, § 6 [sic] including police daily logs under M.G.L. c. 41, § 98F”). Thus, the daily police logs not only have to be maintained, they must also be produced, without redaction, pursuant to a public records request. Indeed, a Secretary of State publication implies that the request for a “police daily log” would be a routine inquiry under the statute. Guide to Mass. Pub. Rec. Law (Sec’y of State, rev. March 2009), at p. 1.

4. Investigatory records.

a. Rules for active investigations.

The Supreme Judicial Court has stated that there is no blanket exemption to public disclosure for investigatory materials; an exemption must be determined on a case-by-case basis. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 383-84 (2002). Where the exemption applies, it must be narrowly construed so as to allow redaction only “of the names and addresses of witnesses and victims or to remove information on the record which if released, will so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” SPR Bulletin No. 3-03, “Public Record Requests and C.O.R.I.” (Sec’y of State, Nov. 21, 2003), at 4.

See also *Republican Co. v. Appeals Court*, 442 Mass. 218, 223 n.9, 812 N.E.2d 887, 893 n.9 (2004) (Public Records Law exception for investigatory materials is irrelevant to public right of access to materials submitted to court in support of petition for search warrant).

Nevertheless, the same court noted in *Harvard Crimson, Inc. v. President And Fellows Of Harvard Coll.*, 445 Mass. 745, 755, 840 N.E.2d 518, 525 (2006), that under G.L. c. 4, § 7, cl. 26(f), public records do not include “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials[,] the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” Such non-public materials, the court said, could include “accounts of police investigatory efforts including the police officer’s own observations of the incident in question, statements taken from witnesses, additional information obtained from other sources, some confidential, and leads and tips to be pursued,” quoting *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62, 354 N.E.2d 872 (1976). Moreover, the Supreme Judicial Court concluded: “The exemption set forth in G.L. c. 4, § 7, cl. 26(f), applies to both open and closed investigations. See *id.* at 63, 354 N.E.2d 872. Contrast *Matter of a Subpoena Duces Tecum*, 445 Mass. 685, 689-691, 840 N.E.2d 470 (2006).” 445 Mass. at 755.

b. Rules for closed investigations.

In *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976), the Supreme Judicial Court refused to compel disclosure of investigatory materials, including letters from citizens who witnessed the incident subject to investigation. Even though the investigatory reports had been disclosed to a limited group and that the investigation had been concluded, the court found that confidentiality was necessary to enable the police to investigate

The Supervisor of Public Records had made it clear that pre-arrest reports or data, names of informants and witnesses, and surveillance data cannot be withheld based on the C.O.R.I. law. SPR Bulletin No. 3-03 (Sec’y of State, Nov. 21, 2003) (noting that such information might be withheld under another exemption, if applicable).

5. Arrest records.

An “arrest journal, which reveals only arrests,” is a more limited collection of information than “police logs which include a much broader range of items, such as motor vehicle stops which did not result in arrest.” Since daily police logs constitute public records and do not fall under the CORI exemption from the public records definition, *Commonwealth v. Holt*, 4 Mass. L. Rptr. 539 (Mass. Super. 1995), the same is true of arrest records, so long as no alphabetical or similar index is made available, *id.* at n.4. Similarly, pre-arrest reports are public records that do not fall under the CORI exemption. SPR Bulletin 3-03 (Nov. 21, 2003).

Municipal police in Massachusetts must make monthly reports to the State Commissioner of Public Safety disclosing how many persons of each gender were arrested during the prior month. G.L. c. 124, § 9.

6. Compilations of criminal histories.

Massachusetts strictly limits the public dissemination of criminal offender record information. By request to the Criminal History Systems Board along with payment of a fee, a member of the public may obtain a copy of the criminal record of any individual who meets both of the following criteria: (1) was ever given a committed or suspended sentence, or was ever convicted of a felony potentially punishable by incarceration for 5 years or more; and (2) is currently incarcerated, on probation or parole; or was discharged in the past year for a misdemeanor, the past 2 years for a felony, or the last 3 years after violating or being denied parole. 803 Mass. CMR 3.06. One may also obtain one’s own criminal record, for a fee. 803 CMR 6.02. *See generally* Massachusetts District Court Department of the Trial Court, “A Guide to Public Access, Sealing & Expungement of District Court Records” (Admin. Office of the Trial Court, rev. April 2010), at 32-33.

The law was amended in 2010 to reduce the waiting period before an individual may seek to have his or her criminal records sealed. Beginning May 4, 2012, individuals may request that their misdemeanor records be sealed 5 years after the conviction or any period of incarceration, whichever is later; felony records, 10 years after the conviction or any period of incarceration, whichever is later; Level I sex offenders, 15 years after the conviction or any period of incarceration, or after the obligation to register as a sex offender ceases, whichever is later (no sealing is available for Level 2 or 3 sex offenders). Massachusetts does not provide for automatic sealing. Rather, a request for sealing must be made pursuant to G.L. c. 276, §§ 100A, 100C.

7. Victims.

Victim statements, like witness statements, may be released after redaction for medical information and indirect identification of a witness or a victim. Troublingly, the Supervisor of Public Records has opined, without citation, that if a requester “is familiar with the individuals who were involved in the incident(s) . . . , then the department may withhold the entire record because it would not be possible . . . to redact the report in a manner as to avoid indirect identification of the voluntary witness and complainant.” “Guide to Massachusetts Public Records Law” (Sec’y of State, rev. March 2009), at 16.

8. Confessions.

No relevant cases found.

9. Confidential informants.

Witness statements may be withheld (indefinitely) under exemption (f) if their release would create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness. *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 438 (1983) (defining “identifying details” and “grave risk of indirect identification”). Troublingly, the Supervisor of Public Records has opined, without citation, that if a requester “is familiar with the individuals who were involved in the incident(s) . . . , then the department may withhold the entire record because it would not be possible . . . to redact the report in a manner as to avoid indirect identification of the voluntary witness

and complainant.” “Guide to Massachusetts Public Records Law” (Sec’y of State, rev. March 2009), at 16.

10. Police techniques.

Reports of discharge of weapons by police officers must be disclosed. *Reinstein v. Police Comm’r of Boston*, 378 Mass. 281, 284, 293 (1979).

11. Mug shots.

Mug shots taken prior to the initiation of criminal proceedings are public records and do not fall under the CORI exemption from public records. SPR opinion letter, Aug. 27, 2010, as reported in L. Parnass, “State Sides With Northampton, Mass. Newspaper in Mug Shot Flap,” New England First Amendment Center, Sept. 26, 2010.

12. Sex offender records.

The state has an online database listing Level 3 sex offenders, and permitting indexing by community. *See* <http://sorb.chs.state.ma.us/>.

13. Emergency medical services records.

“As a general rule, medical information [about an identifiable individual] will always be of a sufficiently personal nature to warrant exemption” under the privacy exemption. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 11.

O. Prison, parole and probation reports.

Generally not public. The Secretary of State has opined that Department of Correction security policies and procedures would be exempted under exemption (b). Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), p. 10. Additionally, G.L. c. 276, § 100, specifically provides that probation reports and records “shall not be regarded as public records and shall not be open for public inspection.”

P. Public utility records.

Names and addresses of customers of a municipally owned utility would be public. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), p. 13. So are records revealing the names and addresses of all state residents who arranged to receive rebates, through the state’s energy efficiency program, for their purchase of certain energy-saving appliances. The Supervisor of Public Records rejected the state agency’s claim that the names and addresses, along with rebate amounts, were an unwarranted invasion of privacy, adding that any possible privacy right was outweighed by the public interest in how program funds were distributed. (C. Herman, “Rebate records withheld by state,” *CommonWealth*, Feb. 8, 2011.)

Q. Real estate appraisals, negotiations.

1. Appraisals.

ASYA: Under G. L. c. 4, § 7(26)(i), the definition of a public record does not include “appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired”

Coleman v. Boston Redevelopment Authority, 61 Mass. App. Ct. 239 (2004): The exemption for appraisals is “parcel-specific” and, accordingly, is limited to the property which is the subject of the appraisal. The exemption does not apply to properties that are merely related to the same project as the property subject of the appraisal. (at 242). The Massachusetts Appeals Court reasoned that “allowing the Commonwealth to keep its appraisals in a lockbox until the last gasp of the acquisitions in a project . . . would be an impermissible extreme in using a statute.” (at 246)

4. Deeds, liens, foreclosures, title history.

A municipal assessor’s list of tax delinquents is public record. *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 157-58, 385 N.E.2d 505, 509 (1979). So are names of taxpayers, descriptions of their property, and valuations of the property. *Id.*, citing *Hardman v. Collector of Taxes*

of *North Adams*, 317 Mass. 439, 443, 58 N.E.2d 848 (1945). For a fee, anyone can obtain “a certificate itemizing all amounts payable on account of tax liens on a piece of property.” *Attorney Gen. v. Collector of Lynn*, *supra*, citing G.L. c. 60, § 23, 23A.

R. School and university records.

3. Student records.

Although public schools, colleges, and universities are subject to the Public Records Law, “student records” are not public records, and, for the most part, may not be provided to any third party (excepting certain designated authorities) without the student or parent’s “specific, informed consent.” 603 CMR 23.07(4). On this basis, the Supervisor of Public Records denied a newspaper’s appeal seeking the names of students disciplined for a school prank. See J. Kinsella, “State upholds records denial...,” *CapeCodToday.com*, Dec. 31, 2008.

Such records may also be statutorily exempted by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g), or under the Public Records Law on privacy grounds (exemption (c)). D. Lapp, “Student Privacy Issues,” *College and University Law Manual* (Mass. Continuing Legal Education, Inc., 2009), § 4.4.2. FERPA guarantees students the right to inspect and review their own education records, 20 U.S.C. § 1232(g)(1)(a); the right to request the institution amend education records that a student believes are inaccurate or that violate the student’s privacy rights; and the right, subject to numerous exceptions, not to have their education records disclosed without their consent. A student’s education records, as well as any “personally identifiable” information contained in those records, normally may not be disclosed without the student’s specific, written consent, 20 U.S.C. § 1232(g)(b); 34 CFR §§ 99.30, 99.31.

Student “directory information,” however, may be (but does not have to be) released after notice to the student or parents. 603 CMR 23.07(4). Such information includes student names, street and email addresses, telephone listings, date of birth, dates of attendance, courses of study, honors received, post-high school plans, and height and weight of sports team members. *Id.*

4. Other.

A private university’s police department is not subject to the Public Records Law, even though, by statute, certain of its officers have been appointed special State police officers, and others are county deputy sheriffs. *Harvard Crimson, Inc. v. President and Fellows of Harvard College*, 445 Mass. 745, 749, 840 N.E.2d 518, 522 (2006). Thus, it is not required to make incident reports available to the public. *Id.* (Bills aimed at changing that result have stalled in the Legislature year after year since that decision.) Nevertheless, such a department is required (not by the Public Records Law but by G.L. c. 41, § 98F) to “make, keep and maintain a daily log ... recording ... all responses to valid complaints received, crimes reported, the names [and] addresses of persons arrested and the charges against such persons arrested,” and those logs shall be deemed public records. *Id.*, 445 Mass. at 754, 840 N.E.2d at 525 (2006). (Compliance, however, is spotty. See K. Brack, “Push to Open Campus Police Reports at Mass. Private Universities,” *Huff Post College* (Dec. 13, 2010).) The FERPA “education records” exemption does not include campus law enforcement records. “Thus, to the extent records are created or maintained by a campus law enforcement unit for law enforcement purposes, FERPA does not apply.” Lapp, *supra*, § 4.4.2 (noting, however, that FERPA’s exemptions will apply if the law enforcement records are maintained by a component of the school other than the law enforcement unit, or for reasons (such as student discipline) other than law enforcement).

Additionally, a campus police chief must provide the State Police with a monthly report about each search or arrest warrant issued by a court in response to the school’s request, *id.*, citing G.L. c. 22C, § 69; 515 CMR 5.07(1)(c) (1996), as well as a monthly report listing all felonies that have occurred within the institution’s jurisdiction, 515 CMR § 5.07(2). “Once in the custody of the department of State police, a department within the Executive Office of Public Safety, see G.L.

c. 6A, §§ 1, 2, 18, those reports would be available for public inspection,” subject to any applicable exemptions in the Public Records Law. *Harvard Crimson*, 445 Mass. at 755 & n.9, 840 N.E.2d at 525 & n.9.

S. Vital statistics.

1. Birth certificates.

Records since 1915 are publicly available from the Registry of Vital Records and Statistics in Boston, except with respect to records of out-of-wedlock births, which are available only to the child, the listed parents, an adjudicated father, and the child’s legal guardian or legal representative. G.L. c. 46, § 2A. No internet access. Records from 1841 to 1915 are available at the State Archives. Earlier records, dating back to 1635, may be available from the clerk’s office in the municipality of occurrence.

Contact information contained in the voluntary adoption contact information registry maintained by the Registry of Vital Records and Statistics may be withheld from disclosure under exemption (q) of the Public Records Law. G.L. c. 4, § 7(26)(q).

2. Marriage & divorce.

Marriage records since 1915 are publicly available from the Registry of Vital Records and Statistics in Boston, except with respect to marriage records of persons born out of wedlock, which are available only to the bride, groom, and the legal representative or parent of either of them. G.L. c. 46, § 2A. No internet access. Marriage records from 1841 to 1915 are available at the State Archives. Earlier marriage records, dating back to 1635, may be available from the clerk’s office in the municipality of occurrence. Divorce records are available from the probate court where the divorce was obtained; an index of divorces from 1952 to present is available at the Boston Registry.

3. Death certificates.

Death records since 1915 are publicly available from the Registry of Vital Records and Statistics in Boston. No internet access. Records from 1841 to 1915 are available at the State Archives. Earlier records, dating back to 1635, may be available from the clerk’s office in the municipality of occurrence.

4. Infectious disease and health epidemics.

“As a general rule, medical information [about an identifiable individual] will always be of a sufficiently personal nature to warrant exemption” under the privacy exemption. *Guide to Mass. Pub. Recs. Law* (Sec’y of State, rev. March 2009), at 11.

V. PROCEDURE FOR OBTAINING RECORDS

A custodian of records may not impose any policy or procedure for obtaining public records “that is adverse to the provisions of the Public Records Law and its Regulations.” SPR Bulletin No. 3, “Public record requests and C.O.R.I.” (Nov. 21, 2003).

A. How to start.

Public records requests may be made in person or in writing; and if in writing, by mail, facsimile or email. G.L. c. 66, § 10(b); 950 CMR 32.05(3).

1. Who receives a request?

Request must be made to custodian of the government entity that has the record desired. Custodian means “the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.” 950 CMR 32.03. “Records custodians should use their superior knowledge” both “to assist the requester in obtaining the desired information” and “to ensure that the request is delivered to the appropriate party,” and therefore custodians should forward requests (or portions of requests) to the appropriate parties for a response. *Guide to the Mass. Pub. Recs. Law* (Sec’y of State, rev.

March 2009), at 5, 6. A custodian may not refer a requester to a service bureau within the agency (such as a data processing division) or to a private entity that has contracted with the government to maintain a database. SPR Bulletin 3-96, “Application of the Public Records Law to Electronic Records Access” (Jun3 6, 1996).

2. Does the law cover oral requests?

Statute is silent on oral requests but a regulation permits an in-person oral request. 950 CMR 32.05(3) (“A custodian shall not require written requests merely to delay production.”). While such a request will suffice for purposes of invoking the Public Records Law’s provisions, nevertheless sound practice is to put all requests in writing unless they are granted and fulfilled on the spot. Request should always be put in writing if a dispute or appeal is expected, because a written request is a mandatory prerequisite to administrative or court appeal. See G.L. c. 66, § 10(b); 950 CMR 32.08(2). According to the Secretary of State’s Office, an oral request may not be made by telephone. Mass. Pub. Recs. Guide (Sec’y of State, rev. March 2009), at p. 2.

a. Arrangements to inspect & copy.

There is no statutory requirement of advance arrangements but they may often be desirable as a practical matter. If a requester does not request a copy of the materials, but rather wants only to review them in the office of the record custodian, the request should be honored “and only minor fees associated with securing the record should be charged.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3.

b. If an oral request is denied:

(1). How does the requester memorialize the refusal?

Because an oral request cannot be the basis of an administrative or court appeal, oral requester would have to make a second, written, request – and await a second, written, denial – before appealing. Presumably the period for appealing would run from denial of the written request, but the ambiguity of the law on this point is another reason to put in writing all requests that are not granted and fulfilled on the spot.

(2). Do subsequent steps need to be in writing?

Yes.

3. Contents of a written request.

No specific form or “magic words” are required for a written request, and the agency cannot demand that any specific form be used. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 2.

a. Description of the records.

“Reasonable description” is required. 950 CMR 32.05(4). Be as specific as possible. However, a records custodian “is required to use his or her superior knowledge of his or her records to determine the precise record or records that is responsive to the request.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4.

b. Need to address fee issues.

If copies are requested, a fee may be required before copies are delivered. See 950 CMR 32.05(6). If cost is more than ten dollars, custodian should give an estimate. 950 CMR 32.06(2). If the fee is known or can be approximated, enclosure of check with request is probably advisable.

c. Plea for quick response.

This can be added but has no formal significance.

d. Can the request be for future records?

The custodian has no obligation to comply with prospective requests, but is not barred from doing so, and some custodians may be willing

to honor a standing order for a repetitive type of record, or a request for online access or a subscription service to certain information. SPR Bulletin 4-96, *Fees for Access and Copying of Electronic Public Records* (June 7, 1996); Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at p. 7 (“Since those records are not yet in existence at the time of the request, they are ... outside the purview of the Regulations and the custodian may set the fee for such access.”); G.L. c. 4, § 7, cl. 26 (defining “public records” as materials already “made or received” by the governmental entity). Note, however, that a request for a future document would not shorten the response period, *Globe Newspaper Co. v. Commissioner of Education*, 439 Mass. 124, 131, 786 N.E.2d 328, 333-34 (2003), and that a standing order probably would not be sufficient for an appeal; to be prudent, the requester would still have to submit a written records request after the government record is created or received by the agency, then appeal from denial of, or non-action on, that request.

e. Other.

The record custodian’s response must be in writing and must include either an offer to provide the requested materials, with “a good faith estimate of the cost of providing the record,” or “a denial of access to the record” that claims a “specific exemption to the public records law” and “details the specific basis for withholding the requested materials.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at pp. 2, 6; 950 CMR 32.08(1). In particular “[t]he denial must include a citation to one of the statutory exemptions upon which the records custodian relies, and must explain why the exemption applies.” *Id.* If no exemption is asserted, then it is to be presumed that the records sought are public. SPR98/018 (Letter to Town of Billerica, April 21, 1998).

B. How long to wait.

1. Statutory, regulatory or court-set time limits for agency response.

Statute requires custodian to respond to request within 10 calendar days after receiving request. G.L. c. 66, § 10(b); *see also* Guide to the Massachusetts Public Records Law (Mass. Sec’y of State, rev’d March 2009), “Frequently Asked Questions” at p. 1 (“calendar days”) and at p. 6 (“as soon as practicable”). If that period ends on a day that the Division of Public Records is closed, then the period extends until the end of the following business day. 950 C.M.R. 32.04(3). Although the Law states that records shall be produced “without unreasonable delay,” and later states that they should be produced “within ten days,” the Supreme Judicial Court has stated that the terms do not clash and that a reply within 10 days is presumptively reasonable. The presumption may be overcome by a requester who can demonstrate a compelling need for earlier disclosure, *Globe Newspaper Co. v. Commissioner of Education*, 439 Mass. 124, 786 N.E.2d 328 (2003), although it is believed that no case has ever deemed a less-than-10-day response time to violate the statute.

2. Informal telephone inquiry as to status.

Not prohibited. To the contrary, a polite follow-up inquiry to ensure that the request was received and is understood is a good idea as a matter of practice. This is particularly so if you are seeking a response before lapse of the 10-day response period. With state budget dollars limited, it is often the case that “the squeaky wheel gets the grease.”

3. Is delay recognized as a denial for appeal purposes?

Ten days’ inaction after receipt of request is treated as denial. G.L. c. 66, § 10(b); 950 CMR 32.08(1).

4. Any other recourse to encourage a response.

No legal recourse is available. Political pressure may be possible.

C. Administrative appeal.

There is an optional administrative appeal to the Supervisor of Public Records in the Office of the Secretary of the Commonwealth. G.L. c. 66, § 10(b); 950 CMR 32.08(2). A requester wishing to appeal the

denial of a request has the choice of either petitioning the Supervisor for a decision, or else immediately initiating a court proceeding. The Supervisor has jurisdiction over appeals for non-compliance with any part of the regulations, including those relating to fees. 950 CMR 32.08(2). Except in cases where it is known that the record holder will litigate in any event, the administrative route is often quicker and less expensive.

1. Time limit.

No appeal is possible until custodian denies the request or fails to comply “with any provision of 950 . 32.00” – presumably meaning, in the typical case, that the 10-day response period has lapsed without a response. G.L. c. 66, § 10(b) (“fails to comply”); 950 32.08(2). An appeal to the Supervisor must be made “within 90 days,” a period that – according to a publication from the Secretary of the Commonwealth – runs from the date of the requester’s “original request.” See 950 32.08(2) and Guide to Mass. Pub. Rec. Law (Sec’y of State, rev. March 2009), “Frequently Asked Questions,” at 1.

2. To whom is an appeal directed?

a. Individual agencies.

Not authorized.

b. A state commission or ombudsman.

Appeal is to Supervisor of Public Records within the Division of Public Records, part of the office of the Secretary of the Commonwealth. The Supervisor has discretion whether or not to accept an appeal. 950 CMR 32.08(2); Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at pp. 2, 7. Among other reasons, the Supervisor may reject an appeal if the request: appears to be an act of harassment, or is made in aid of the commission of a crime; involves a matter that is the subject of active litigation, administrative hearings, or mediation; or is made for purely commercial purposes. 950 CMR 32.08(2). Once the appeal is accepted, Supervisor will normally “provide an opinion on the appropriateness of the records custodian’s response” and will also determine “whether the requested record is public.” *Guide, supra*.

c. State attorney general.

No formal appeal to Attorney General. In any event, should first petition Supervisor of Public Records. If governmental entity fails to comply with Supervisor’s order on appeal, then Supervisor may refer the matter to the Attorney General. When those two agencies have not seen eye to eye on the interpretation of the statute, however – as has frequently been the case – such referral either does not take place or else brings no results. *CommonWealth* magazine reported in 2008 that of 52 public records appeals referred to the Attorney General’s office by the Supervisor of Public Records over a 5-year period, the attorney general ordered full release of documents in 10 cases and partial release in 3 more; reversed the Supervisor’s determination in another 10; and failed altogether to respond to 14. C. Herman, *CommonWealth*, Fall 2008 (Oct. 2, 2008).

3. Fee issues.

The Supervisor of Public Records may make determinations regarding fees.

4. Contents of appeal letter.

It is described in the statute as a “petition.” It must be in writing but can be in letter form. It must attach a copy of the original request to custodian and any written response from custodian. 950 CMR 32.08(2).

a. Description of records or portions of records denied.

A fairly detailed description should have been included in the original request to custodian.

b. Refuting the reasons for denial.

The letter should include a brief statement as to why record is public or, if custodian has given reason for denial, refutation of that reason.

5. Waiting for a response.

The regulations state that the Supervisor shall act and render a written opinion “within a reasonable time,” 950 CMR 32.08(3), and the public records office normally responds reasonably promptly. An appellant would be wise to check on the status of the appeal periodically, because the Supervisor may close an appeal where there has been no communication from the requester for a six-month period. *Id.*

6. Subsequent remedies.

None, other than court action.

D. Court action.

Any party aggrieved by the decision of the Supervisor of Public Records may obtain judicial review of the ruling pursuant to the Massachusetts Administrative Procedure Act, G.L. c. 30A, § 14. See, e.g., *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1 (2003). “In any court proceeding . . . there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.” G.L. c. 66, § 10(C); see also *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 153, 385 N.E.2d 505, 507 (1979).

The Public Records Law does not confer on the public a right to intervene in an ongoing litigation for the purpose of gaining access to records filed or exchanged in that action. *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 217, 944 N.E.2d 1019, 1025 (2011). However, permissive intervention may be available (independent of the Public Records Law) to a third party seeking to challenge the breadth of a protective order entered in court. *Id.*, 459 Mass. at 218, 944 N.E.2d at 1026 (noting that trial judge has “considerable discretion in deciding whether permissive intervention is appropriate”).

1. Who may sue?

Any person whose written request to the records custodian has been denied, or not acted on for ten days, may sue. If instead an administrative appeal is taken and the custodian refuses to comply with an order of the Supervisor of Public Records, then the Supervisor may ask the District Attorney or Attorney General to enforce the order. G.L. c. 66, § 10(b). Historically, the Attorney General has not always honored such requests. The Superior Court and the Supreme Judicial Court are empowered to order compliance with the Supervisor’s ruling. *Id.*

2. Priority.

The statute does not confer priority to public records challenges, although a court has discretion to allow a motion to expedite the case. A more effective strategy, in appropriate cases, may be to move for preliminary injunction at the start of the case. One Superior Court judge has noted that “a motion for a preliminary injunction made in a lawsuit filed pursuant to G.L.c. 66 § 10 is precisely how an issue under the Public Records Statute is best addressed.” *Patriot Ledger v. Masterson*, 09-400, 2009 WL 928796 (Mass. Super. Apr. 2, 2009) (Sanders, J.). There are strong arguments to be made that there is a public interest in affording injunctive relief where appropriate. “[T]he Public Records Statute itself requires that records not exempt from disclosure be produced without unreasonable delay and that, where the custodian of public records fails to comply with a request, the Superior Court has jurisdiction to order compliance. G.L.c. 66 § 10(a) and (b); see also 950 C.M.R. 32.05(2).” *Id.* The issue before the court is frequently a pure question of law. And, often, the argument that can be made that there is “a strong public interest in prompt disclosure of this information which outweighs any conceivable harm to the defendants.” *Id.* (emphasis added) (noting that “[m]uch of the process by which disability pensions are awarded is shrouded in secrecy,”

even though taxpayer money is involved and the awards have a significant impact on “the budgets of our cities and towns, which are already struggling to fund important public services in these difficult economic times”). Nevertheless, because injunctive relief ordering records release would effectively end the case, courts may be resistant to take that path. Indeed, in a thoughtful and nuanced decision, the same judge who decided *Masterson* declined to provide injunctive relief in another case where she was not convinced that the issues before the court were “purely legal.” *Globe Newspaper Co. v. Executive Office of Admin. and Finance*, No. 011-1184 (Suffolk Super. Ct. April 25, 2011) (Sanders, J.).

3. Pro se.

An individual reporter, editor, or citizen may appear *pro se*. However, unless also a lawyer, he or she may not represent others or appear for a corporation. *Varney Enterprises Inc. v. WMF Inc.* 402 Mass. 79, 520 N.E.2d 1312 (1988) (corporation may not appear through corporate officer who is not licensed attorney).

Pro se appearance in court is normally not advisable. The law in this area is becoming fairly complex. In appropriate cases, a public records appellant may be able to obtain *pro bono* counsel by contacting the Reporters Committee, the author of this outline, or other organizations involved in access issues.

In one extreme case, a court denied a records request altogether because it was unduly broad and appeared to be an act of harassment brought by a serial *pro se* plaintiff. *Erickson v. Executive Office of Environmental Affairs*, 2006 WL 3010949 (Mass. Super. Ct. 2006) (Connolly, J.) (denying appeal brought by cat lady, who already had a documented history of making repeated overly broad and harassing requests, and who was seeking documents responsive to a request that was virtually unlimited in scope and time). See also 950 C.M.R. § 32.08(2) (allowing Supervisor of Public Records to decline to take an administrative appeal that is deemed an act of harassment).

4. Issues the court will address:

a. Denial.

The court may address denial. G.L. c. 66, § 10(b).

b. Fees for records.

The court will probably address fees. Reasonableness of fees is basically a matter left to administrative discretion of Supervisor of Public Records. Op. Atty. Gen. Oct. 20, 1977, p.92.

c. Delays.

The court will not address delays since the right to initiate a suit exists immediately after the custodian refuses a request or has taken no action for ten days.

d. Patterns for future access (declaratory judgment).

Authority to make declaratory judgments exists but is always discretionary with court. See G.L. c. 231 A.

5. Pleading format.

Complaint. Massachusetts has in substance adopted the Federal Rules of Civil Procedure.

6. Time limit for filing suit.

None prescribed.

7. What court.

Superior Court. G.L. c. 66 § 10(b). Supreme Judicial Court theoretically has concurrent jurisdiction but will normally remand case to Superior Court.

8. Judicial remedies available.

The statute specifically authorizes the court “to order compliance,” that is, production of the records sought. G.L. c. 66, § 10(b). In addition, court has general equitable powers to fashion appropriate remedies.

9. Litigation expenses.

Court costs are available but are normally nominal. The statute does not provide for awards of attorneys’ fees and they are also not available under a private attorney general theory. See *Pearson v. Board of Health of Chicopee*, 402 Mass. 797, 525 N.E.2d 400 (1988). However, if record custodian’s defenses are insubstantial or frivolous, court has authority to award attorneys’ fees. G.L. c. 231 § 6F. *Pearson, supra*.

a. Attorney fees.

Not available.

b. Court and litigation costs.

Not available.

10. Fines.

Not available. The legislature has periodically declined to amend the statute to provide for fines.

11. Other penalties.

Not available.

12. Settlement, pros and cons.

As in any civil litigation, settlement is always possible if the parties are so minded. Unless the requester is interested in establishing legal precedent with respect to a particular kind or kinds of record, a settlement whereunder the documents sought, or the bulk of them, are produced is normally quicker and cheaper than protracted litigation.

E. Appealing initial court decisions.

1. Appeal routes.

Normal civil appeal to Massachusetts Appeals Court. In some cases, interlocutory appeal to single justice of appeals court may be available. See G.L. c. 231, § 118.

2. Time limits for filing appeals.

30 days from date of Superior Court judgment. M.R. App. P. 4(a).

3. Contact of interested amici.

Amici curiae may file briefs with leave of court but are allowed to argue orally only in extraordinary circumstances. M.R. App. P. 17. Responsible press organizations are routinely granted leave to file briefs as *amici*. Most frequent such *amici* are the Massachusetts Newspaper Publishers Association and the New England Newspaper and Press Association.

The Reporters Committee for Freedom of the Press may also be interested in joining as an *amicus* before the Supreme Judicial Court.

F. Addressing government suits against disclosure.

No known litigation on the subject, although in 2010 the Department of Transitional Assistance warned a records requester that if he publicized information about how much the government had reimbursed stores for food stamps – data that the agency had turned over to the requester – he could face federal fines of up to \$1,000, plus up to a year in jail. (The requester did not buckle, and the agency took no further action.) See M. Morisy, “Transparency Missing from Government,” *CommonWealth*, Summer 2011 (July 6, 2011).

More typically, requests to enjoin disclosure typically take the form of third-party suits against the government agency to preclude release

of the third party's documents that are in the agency's possession. See, e.g., *Wakefield Teachers Ass'n v. School Committee of Worcester*, 431 Mass. 792, 793 & n.4 (2000) (complaint for injunctive relief brought on teacher's behalf by teachers' exclusive bargaining representative). Media entities can typically intervene in such situations. See, e.g., *Bechtel Infrastructure Corp. v. Massachusetts Turnpike Authority*, 16 Mass. L. Rep. 149 (Super. Ct. April 10, 2003) (intervention by Boston Globe).

Open Meetings

I. STATUTE -- BASIC APPLICATION.

A. Who may attend?

"Any person." G.L. c. 39, § 23B. This clearly includes non-residents and non-voters.

B. What governments are subject to the law?

Every "public body," as defined in the Open Meeting Law, is subject to the statute.

1. State.

Subject to the law. All state executive and legislative branch multiple-member boards, commissions, committees, and subcommittees established to serve a public purpose are "public bodies" subject to the law. This specifically includes the governing board or body of any other authority established by the general court (a/k/a the Legislature) to serve a public purpose in the commonwealth or any part thereof. If a body meets these criteria, it is subject to the law no matter how it was created, no matter how it is constituted, and no matter whether its members are elected or appointed. (A "subcommittee" is defined to include "any multiple-member body created to advise or make recommendations to a public body.") G.L. c. 30A, § 18 (definition of "public body").

Excluded from the law. The general court (Legislature) itself is not a "public body," and therefore is excluded from the Open Meeting Law's scope, as are committees or recess commissions of the general court (Legislature). Bodies of the judicial branch are also not "public bodies" covered by the law. Also excluded are any bodies "appointed by a constitutional officer solely for the purpose of advising a constitutional officer." G.L. c. 30A, § 18 (definition of "public body"). Finally, the statute contains an additional provision specifically stipulating that "the board of bank incorporation" and the "policyholders protective board" are not public bodies, and, thus, they too are not subject to the Open Meeting Law. *Id.*

2. County.

All county-level multiple-member boards, commissions, committees, and subcommittees established to serve a public purpose are subject to the law. It does not matter how the body was created or how it is constituted, and it does not matter whether the body's members are elected or appointed. (A "subcommittee" is defined to include "any multiple-member body created to advise or make recommendations to a public body.") G.L. c. 30A, § 18 (definition of "public body").

3. Local or municipal.

All multiple-member boards, commissions, committees, and subcommittees of any city, town, district, or region, if established to serve a public purpose, are subject to the law. This specifically includes the governing board or body of any local "housing, redevelopment or other similar authority." It does not matter how the body was created or how it is constituted, and it does not matter whether the body's members are elected or appointed. (A "subcommittee" is defined to include "any multiple-member body created to advise or make recommendations to a public body.") G.L. c. 30A, § 18 (definition of "public body").

OML applies to "governmental bodies." G.L. c. 39, § 23B. This term is defined to include "every board, commission, committee or subcommittee of any district, city, region or town." G.L. c. 39 § 23A. Decisions here interpreted this definition narrowly. See *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465, 541 N.E.2d 984 (1989) (construes broadly exemption for preliminary screening committees interviewing municipal job applicants); *Connelly v. School Committee of Hanover*, 409 Mass. 232, 565 N.E.2d 449 (1991). (school principal-selection committee appointed by Superintendent of

Schools, rather than by the School Committee, held not to be a committee of the town and was therefore exempt from the OML); *Medlock v. Board of Trustees of University of Massachusetts*, 31 Mass. App. Ct. 495, 580 N.E.2d 387 (1991) (animal care and use committee at state medical school not subject to OML).

By statutory amendment, town meetings are technically exempt from the definition of “government body.” St. 1988, c. 116 § 3, amending G.L. c. 39 § 23A. However, town meetings have traditionally been open for centuries.

C. What bodies are covered by the law?

1. Executive branch agencies.

a. What officials are covered?

The Open Meeting Law applies only to “multiple-member” public bodies. G.L. c. 30A, § 18 (definition of “public body”). It does not apply to individual government officials, such as the governor or a mayor or police chief, nor to members of their staffs. As a consequence, such officials may meet with one another or with their staffs to discuss public business without having to comply with Open Meeting Law requirements. “Open Meeting Law Guide” (Att’y Gen’l, July 1, 2010), at 2.

b. Are certain executive functions covered?

If the mayor, police chief, school superintendent, or other public official is a member of the City Council or School Committee or other multi-member body, that body remains subject to the Open Meeting Law. However, the law would not extend to functions the mayor or other official performs alone.

c. Are only certain agencies subject to the act?

Multi-member agencies that serve a public purpose are subject to the Open Meeting Law unless they are excluded. At the state level, the covered agencies specifically include the governing board or body of any authority established by the Legislature to serve a public purpose in the commonwealth or any part of the commonwealth. At the local level, covered agencies specifically include the governing board of any housing, redevelopment or other similar authority.

Specifically excluded are committees or recess commissions of the Legislature; all bodies of the judicial branch; the Board of Bank Incorporation; the Policyholders Protective Board; and public bodies “appointed by a constitutional officer solely for the purpose of advising a constitutional officer.” G.L. c. 30A, § 18 (definition of “public body”). By excluding public bodies appointed by and advising a “constitutional officer,” the Open Meeting Law appears to be legislatively affirming the result reached by the Supreme Judicial Court in 1992, when it ruled that the governor’s appointed Executive Council, itself created under the state constitution, cannot constitutionally be subject to the Open Meeting Law. *Pineo v. Executive Council*, 412 Mass. 31, 586 N.E.2d 988 (1992).

2. Legislative bodies.

The governing board or body of any authority established by the Legislature to serve a public purpose in the commonwealth (or any part of the commonwealth) must comply with the Open Meeting Law. In all other respects, however, the law does not apply to the state Legislature (formally called the “general court”), nor does it apply to the Legislature’s committees and recess commissions. G.L. c. 30A, § 18 (definition of “public body”). Municipal Town Meetings are not subject to the Open Meeting Law, nor are the warrants prepared for such Town Meetings. G.L. c. 30A, § 18(e) (“meeting’ shall not include .., a session of a town meeting convened under [G.L. c. 39, § 10] which would include the attendance by a quorum of a public body at any such session”); see also *Bratko/Hubbardson Bd. of S’men* (Att’y Gen’l, Aug. 23, 2011) (“The Open Meeting Law does not govern the content of warrant articles or the procedures for annual Town Meetings.”).

3. Courts.

The judicial branch is not covered by the Open Meeting Law. Neither are any committees or other bodies established by the judiciary. G.L. c. 30A, § 18 (definition of “public body”).

That does not mean, however, that the public has no right of access to judicial proceedings; quite the contrary. Massachusetts has a well-established tradition of open judicial proceedings. See, e.g., *Cowley v. Pulsifer*, 137 Mass. 392 (1884); *Ottaway Newspapers Inc. v. Appeals Court*, 372 Mass. 539, 546, 362 N.E.2d 1189, 1194 (1977). In addition, First Amendment principles leave little doubt that almost all criminal and civil proceedings are presumptively open to the public. See, e.g., *Globe Newspaper Co. v. Superior Court for County of Norfolk*, 457 U.S. 596 (1982).

4. Nongovernmental bodies receiving public funds or benefits.

If members are not governmentally elected or appointed, statute probably does not apply. See *District Attorney for Northern Dist. v. Board of Trustees of Leonard Morse Hospital*, 389 Mass. 729, 452 N.E.2d 208 (1983); *Bello v. South Shore Hospital*, 384 Mass. 770, 775, 429 N.E.2d 1011, 1015 (1981).

5. Nongovernmental groups whose members include governmental officials.

These are probably not covered, although issue may turn on membership and powers of particular body. See *District Attorney for Northern Dist. v. Board of Trustees of Leonard Morse Hospital*, 389 Mass. 729, 452 N.E.2d 208 (1983).

6. Multi-state or regional bodies.

Regional bodies are covered. Multi-state bodies do not appear to be covered. See G.L. c. 30A, § 18 (definition of “public body”).

7. Advisory boards and commissions, quasi-governmental entities.

Subcommittees of public bodies, and any “multiple-member body created to advise or make recommendations to a public body,” are covered if they were established “to serve a public purpose.” G.L. c. 30A, § 18 (definition of “public body”). This will be true “regardless of whether their role is decision-making or advisory.” “Open Meeting Law Guide” (Att’y Gen’l, July 1, 2010). It does not matter how they were created, how they are constituted, or whether their members are elected or appointed, so long as they were established to serve a public purpose.

8. Other bodies to which governmental or public functions are delegated.

The answer will probably turn on extent of delegation of government functions and method of selection of members. See *District Attorney for Northern District v. Board of Trustees of Leonard Morse Hospital*, 389 Mass. 729, 452 N.E.2d 208 (1983); *Connelly v. School Committee of Hanover*, 409 Mass. 232, 565 N.E.2d 449 (1991). *Connelly v. School Committee of Hanover*, 409 Mass. 232, 565 N.E. 2d 449 (1991) (school principal selection committee appointed by superintendent of schools exempt from Open Meeting Law);

Municipal Town Meetings also are not covered, nor are the warrants prepared for same. G.L. c. 30A, § 18(e) (“meeting’ shall not include .., (e) a session of a town meeting convened under [G.L. c. 39, § 10] which would include the attendance by a quorum of a public body at any such session”); see also *Bratko/Hubbardson Bd. of S’men* (Att’y Gen’l, Aug. 23, 2011) (“The Open Meeting Law does not govern the content of warrant articles or the procedures for annual Town Meetings.”).

9. Appointed as well as elected bodies.

The statute applies to multi-member bodies regardless of whether their members are appointed or elected, and regardless of how the

body was created. G.L. c. 30A, § 18 (definition of “public body”).

D. What constitutes a meeting subject to the law.

All “meetings” of a “public body,” as those terms are defined in the Open Meeting Law, must be open to the public. The statute defines a “meeting” as “a deliberation by a public body with respect to any matter within the body’s jurisdiction,” but carves out five specific exceptions. A “deliberation” is defined, in turn, as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction. G.L. c. 30A, § 18 (definition of “deliberation”).

The five exceptions to the definition of a meeting are the following:

(i) An onsite inspection of a project or program by members of the public body, provided that the members do not “deliberate” at those gatherings. In other words, they may not communicate (through words, emails, sign language, smoke signals, etc.) with each other on any public business within the body’s jurisdiction. Since it is unlikely the inspection would be taking place if it did not relate to a matter within the board’s jurisdiction, that effectively means that public officials attending an onsite inspection may not chat among themselves about what they are observing.

(ii) A conference, training program, social event, media event, or other public or private gathering attended by a quorum of the public body, provided, again, that the members do not “deliberate.”

(iii) A properly noticed public meeting of some *other* public body, when attended by a quorum of the public body in question, provided that the visiting members communicate not among themselves, but only “by open participation” regarding the matters under consideration by the host body. Again, the visiting members may not themselves deliberate at such meetings.

(iv) A meeting of a “quasi-judicial board or commission,” if the meeting is held for the “sole purpose of making a decision required in an adjudicatory proceeding brought before it.”

(v) A Town Meeting session under G.L. c. 39, § 10, attended by a quorum of the public body.

G.L. c. 30A, § 18 (definition of “meeting”).

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

Not all communications between or among members of a public body constitute a “meeting” subject to the Open Meeting Law. It is only when those communications rise to the level of a “deliberation” that the statute applies, and a “deliberation” occurs only if the communication is “between or among a quorum of a public body.” G.L. c. 30A, § 18 (“deliberation”). A quorum is normally a simple majority of the members of the public body. G.L. c. 30A, § 18 (“quorum”). In rare cases, a statute, executive order, or other authorizing provision may set a different standard for a quorum, and in such cases, the specially defined quorum applies.

However, if less than a quorum are in fact a subcommittee, the statute applies. *Nigro v. Conservation Commission of Canton*, 17 Mass. App. Ct. 433, 458 N.E.2d 1219 (1984) (statute applies to three-member subcommittee of seven-member commission since subcommittee was making decisions). Nevertheless, a single member of a governmental body who attends a meeting with others who are not members of the same governmental body is not a subcommittee, and therefore the OML does not apply. *Pearson v. Board of Selectmen of Longmeadow*, 49 Mass. App. Ct. 119, 726 N.E.2d 980 (2000).

b. What effect does absence of a quorum have?

If a communication does not involve, either simultaneously or serially, a quorum of the public body, then there has been no “deliberation” and hence no “meeting.” In such a case, the statute does not apply.

2. Nature of business subject to the law.

a. “Information gathering” and “fact-finding” sessions.

Both “information-gathering” and “fact-finding” sessions, if attended by a quorum of a public body and relating to public business within that body’s jurisdiction, appear to be subject to the law. See G.L. c. 30A, § 18 (definition of “deliberation”). (Prior to the 2010 revision of the Open Meeting Law, the status of such bodies was somewhat unclear. See, e.g., *Nigro v. Conservation Commission of Canton*, 17 Mass. App. Ct. 433, 458 N.E.2d 1219 (1984).) An off-premises retreat attended by a quorum of the public body is probably subject to the law if its purpose is to address the body’s long-term vision and plans; but the same might not be true if the retreat were designed solely to resolve interpersonal issues among the group members. The critical question to be answered in such cases is whether the public body is addressing “public business” that falls within the body’s jurisdiction.

The statute does not define “jurisdiction,” nor does it set out a test for determining whether or not certain public business falls within the body’s jurisdiction. The Attorney General, however, has supplied the following test: “[A]s a general rule, any matter of public business on which a quorum of the public body may make a decision or recommendation would be considered a matter within the jurisdiction of the public body.” “Open Meeting Law Guide” (Att’y Gen’l, July 1, 2010), at 3.

An explicit statutory exception exists for “on-site inspection of any project or program.” G.L. c. 39, § 23A, definition of “meeting.”

The law does not apply to “. . . any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section . . .” G.L. c. 39, § 23B.

b. Deliberations toward decisions.

At state level, quasi-judicial bodies sitting on adjudicatory matters may deliberate in private. G.L. c. 30A, § 11A, definition of “governmental body.” Otherwise and subject to general provisions on executive sessions, deliberations must be public including those of county or municipal level quasi-judicial bodies. *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980) (local zoning board of appeals must deliberate in public). Because of special statutes, a school committee may deliberate in private when deciding teacher disciplinary cases. *O’Sullivan v. School Committee of Worcester*, 411 Mass. 123, 579 N.E.2d 160 (1991). Deliberations of governmental bodies are subject to the law whether or not the discussions culminate immediately in an official vote. *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465, 469-70, 541 N.E.2d 984, 986-87 (1989).

3. Electronic meetings.

a. Conference calls and video/Internet conferencing.

Not authorized. Statute defines “meeting” as “corporal convening.” G.L. c.39, § 23A. May in fact occasionally occur in emergencies.

b. E-mail.

An email is a “written communication.” If sent to a quorum of a public body and addressing a matter of “public business within its jurisdiction,” the email constitutes a prohibited deliberation under the law – even if the sender’s email does not ask the recipients to respond.

G.L. c. 30A, § 18; “Open Meeting Law Guide” (Att’y Gen’l, July 1, 2010), at 3. Thus, for example, a city council member violated the Open Meeting Law when he sent an email to a quorum of his fellow council members asking whether they support a special election for a ballot question, because his act could have resulted in the council “making policy decisions outside of a public meeting.” *Burke/Methuen City Council*, OML 2011-35 (Att’y Gen’l, Aug 22, 2011).

An email is not a prohibited “deliberation,” however, if *both* of the following two conditions are met: (1) it serves merely as the vehicle for distributing a “meeting agenda, scheduling information,” other procedural matter, or “reports or documents that may be discussed at a meeting”; *and* (2) “no opinion of a member is expressed” in the email. G.L. c. 30A, § 18 (definition of “deliberation”).

Additionally, an email – like any other written or oral communication — is not a prohibited “deliberation” if the communication is confined to less than a quorum of the public body. G.L. c. 30A, § 18; “Open Meeting Law Guide” (Att’y Gen’l, July 1, 2010), at 3. If, however, there are multiple email communications among the members of the public body, and if those communications, taken as a whole, involve a quorum of members, then a “deliberation” has probably occurred. *Id.*

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

“Any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered.” G.L. c. 39, § 23A. At least one case tends to construe “meeting” narrowly. *Medlock v. Board of Trustees of University of Massachusetts*, 31 Mass. App. Ct. 495, 580 N.E.2d 387 (1991) (animal use and care committees at state medical school held not to consider public policy matters and therefore to be exempt from OML). See also *Globe Newspaper Co. v. Massachusetts Bay Transportation Authority Retirement Board*, 416 Mass. 1007, 622 N.E.2d 265 (1993) (records of public agency retirement board created by collective bargaining agreement are not public records).

b. Notice.

(1). Time limit for giving notice.

Except in an emergency, notice of a meeting must be provided 48 hours in advance of the meeting, *excluding* Saturdays, Sundays, and legal holidays. G.L. c. 30A, § 20(b). The same time limits and posting requirements apparently apply for adjourned or continued sessions. See *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 495 N.E.2d 892, 895 (1986). The notice must be printed in a “legible, easily understandable format,” and it must contain the date, time, and place of the meeting, as well as “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G.L. c. 30A, § 20(b).

(2). To whom notice is given.

The only requirement is posting.

(3). Where posted.

Notice of meetings of local bodies must be filed with the municipal clerk, and also “posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located.” G.L. c. 30A, § 20(c).

Notice of meetings of regional or district bodies must be filed and posted in each city or town within the region or district, in the same manner prescribed for the posting of notices of local bodies. In the case of a regional school district, the secretary of the regional school district committee must file the meeting notice with the clerk of each

city or town within the district, and must also post the notice in the same manner prescribed for the posting of notices of local bodies. *Id.*

Notice of meetings of county bodies must be filed in the office of the county commissioners, and also “publicly posted in a manner conspicuously visible to the public at all hours” in one or more places designated by the county commissioners. *Id.*

Notice of meetings of state bodies must be filed with the Attorney General via website posting “in accordance with procedures established for this purpose.” The AG may require, or permit, other methods of notice if “the attorney general determines such alternative will afford more effective notice to the public.” *Id.*

Because the Open Meeting Law as revised effective 2010 requires that notice of an upcoming meeting must include a list of anticipated topics, public bodies may no longer fulfill the notice requirement by the expedient of posting a printed schedule of future meetings.

(4). Public agenda items required.

The notice must include “a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G.L. c. 30A, § 20(b) (provision added effective 2010). The agenda items must be listed with “sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03. The Attorney General’s Office appears to interpret the requirement as referring to what could be “reasonably anticipated” at the time of the posting of the meeting. See *Dufault/Sudbury Bd of S’men*, OML 2011/36 (Att’y Gen., Aug 31, 2011) (no violation where new, time-sensitive, topic arose on day of meeting).

(5). Other information required in notice.

None other than date, time, and place of meeting.

(6). Penalties and remedies for failure to give adequate notice.

If an unforeseen matter arises that was not reasonably anticipated and therefore not included in the list of topics contained in the previously posted notice of the meeting, then “the best practice would be to postpone discussions on topics not listed on the meeting notice that are more than administrative or procedural discussions,” because “[t]he postponement of substantive discussions until such time as they may be appropriately noticed allows for transparency in a public body’s proceedings...” Nevertheless, discussion on the unanticipated topic are not prohibited outright under such circumstances. See *Dufault/Sudbury Bd of S’men*, OML 2011/36 (Att’y Gen., Aug 31, 2011) (no violation where new, time-sensitive, topic arose on day of meeting).

Normally none other than possible judicial invalidation of actions taken at meeting should litigation be brought challenging lack of notice. See, e.g., G.L. c. 39, § 23B. \$1,000 fine theoretically possible. G.L. c. 39 § 23B.

c. Minutes.

(1). Information required.

Date, time and place of meeting, members present and absent, and record of action taken. G.L. c. 39, § 23B; c. 66, § 5A. There is no requirement that minutes include summaries of discussions or deliberations.

(2). Are minutes public record?

Yes, regardless of form, and they must be made available at the close of the meeting. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. Minutes of prior open meetings, regardless of form, should be reviewed and accepted promptly, and custodians are “strongly encouraged” to waive all fees associated with producing the minutes. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. The records custodian may not withhold minutes on the grounds that they have not yet been transcribed or approved (although

untranscribed or unapproved minutes should be marked “unofficial”). The only exception to this rule is that minutes of executive (closed) sessions may remain secret “as long as publication may defeat the lawful purpose of the executive session.” G.L. c. 39, § 23B.

2. Special or emergency meetings.

a. Definition.

“Emergency” for meeting purposes is defined as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” G.L. c. 39, § 23A. The emergency must be of such a nature that there is not time to wait 48 hours to hold a meeting. There is no provision for “special” meetings.

b. Notice requirements.

No such provisions for emergency meetings.

c. Minutes.

(1). Information required.

Date, time and place of meeting, members present and absent, and record of action taken. G.L. c. 39, § 23B; c. 66, § 5A. There is no requirement that minutes include summaries of discussions or deliberations.

(2). Are minutes a public record?

Yes, regardless of form, and they must be made available at the close of the meeting. Minutes of prior open meetings, regardless of form, should be reviewed and accepted promptly, and custodians are “strongly encouraged” to waive all fees associated with producing the minutes. Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. The records custodian may not withhold minutes on the grounds that they have not yet been transcribed or approved (although untranscribed or unapproved minutes should be marked “unofficial”). Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 3. The only exception to this rule is that minutes of executive (closed) sessions may remain secret “as long as publication may defeat the lawful purpose of the executive session.” G.L. c. 39, § 23B.

3. Closed meetings or executive sessions.

a. Definition.

“Any meeting or part of a meeting of a governmental body which is closed to certain persons for deliberation on certain matters.” G.L. c. 39, § 23A.

b. Notice requirements.

(1). Time limit for giving notice.

The same as for regular meetings — 48 hours, including Saturdays but exclusive of Sundays and legal holidays. See G.L. c. 39, § 23B.

(2). To whom notice is given.

Posting only, although many boards also notify members and some notify the local press.

(3). Where posted.

Same as for regular meetings.

(4). Public agenda items required.

None required.

(5). Other information required in notice.

Same as for regular meetings — date, time and place.

(6). Penalties and remedies for failure to give adequate notice.

The same as for regular meetings, that is, possible judicial invalidation of action taken at meeting and remote possibility of fine.

c. Minutes.

(1). Information required.

The same as for regular meetings plus additional requirement that all votes in executive session shall be recorded roll call votes which shall become a part of the record of the executive session. G.L. c. 39, § 23B.

(2). Are minutes a public record?

Yes, except that the minutes of executive sessions “may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer.” G.L. c. 39, § 23B. Such minutes “must be reviewed and released regularly and promptly,” with release to occur “as soon as the stated purpose for the executive session protection has ceased.” Guide to Mass. Pub. Recs. Law (Sec’y of State, rev. March 2009), at 4.

d. Requirement to meet in public before closing meeting.

The meeting must first be convened as an open meeting and a recorded vote taken to go into executive session. G.L. c. 39, § 23B. The vote must be a majority affirmative vote of board members present. *District Attorney for Northwestern Dist. v. Board of Selectman of Sunderland*, 11 Mass. App. Ct. 663, 418 N.E.2d 642 (1981) (invalidating an executive session because one affirmative vote with two abstentions did not constitute a majority). The presiding officer also must state whether body will reconvene publicly after executive session. G.L. c. 39, § 23B. A board may not enter into executive session at an emergency meeting because the prerequisite of an open meeting has not been met.

e. Requirement to state statutory authority for closing meetings before closure.

The presiding officer must cite in advance the “purpose” of the proposed executive session. G.L. c. 39, § 23B.

f. Tape recording requirements.

None. Even if meeting is gratuitously recorded, there is no public right of access to the tape. *Perryman v. School Committee of Boston*, 17 Mass. App. Ct. 346, 458 N.E.2d 748 (1983).

F. Recording/broadcast of meetings.

1. Sound recordings allowed.

These are allowed, except for executive sessions or where recording would be “active interference with the conduct of the meeting.” G.L. c. 39, § 23B.

2. Photographic recordings allowed.

Videotape recording is now permitted, except during an executive session, provided the equipment is in a fixed location or locations determined by the governmental body and there is no active interference with conduct of the meeting. G.L. c. 39, § 23B as amended by St. 1987, c.159. Still photography is routinely allowed.

G. Are there sanctions for noncompliance?

A 1993 amendment to the law now allows the court to impose a civil fine upon a governmental body “in an amount not greater than one thousand dollars for each meeting held in violation” of the law. G.L. c. 39, § 23B. Although a fine is allowed, it is rarely, if ever, imposed.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The statute provides for specific exemptions. The exceptions are

not to be used as a subterfuge to retreat from open to executive session. *Puglisi v. School Committee of Whitman*, 11 Mass. App. Ct. 142, 414 N.E.2d 613 (1981) (School committee holding public hearing on discipline of school principal went into “sham” executive session to discuss character and reputation of superintendent of school system. In fact, executive session let superintendent get in private “last word” on principal. Principal awarded back pay). See *District Attorney for Northwestern Dist. v. Board of Selectmen of Sunderland*, 11 Mass. App. Ct. 663, 418 N.E.2d 642, 644 (1981). At least in some circumstances, a subsequent open meeting on the same subject may in effect cure an improperly closed meeting. *Pearson v. Board of Selectmen of Longmeadow*, 49 Mass. App. Ct. 119, 726 N.E.2d 980 (2000); *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Board of Lawrence*, 403 Mass. 531, 557-8, 531 N.E.2d 1233, 1249-50 (1988).

b. Mandatory or discretionary closure.

Executive sessions are discretionary with the governmental body, subject to the rights of affected individuals who may request an open meeting. G.L. c. 39, § 23B. Although executive sessions are not mandatory, at least one case has treated a failure to negotiate in executive session as a failure to negotiate in good faith. *Board of Selectmen of Marion v. Labor Relations Commission*, 7 Mass. App. Ct. 360, 388 N.E.2d 302 (1979) (finding that existence of exception for collective bargaining showed that executive session served a purpose, and the refusal to hold closed session damaged the bargaining process and could be seen as a failure to negotiate in good faith).

2. Description of each exemption.

The municipal portion of the Massachusetts Open Meeting Law provides for the following nine purposes for executive sessions (G.L. c. 39, § 23B);

1. To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights: (a) to be present at such executive session during discussions or considerations which involve that individual; (b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session; (c) to speak in his own behalf.

2. To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights: (a) to be present at such executive session during discussions or considerations which involve that individual; (b) to have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation; (c) to speak in his own behalf.

3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with non-union personnel, to conduct collective bargaining sessions or contract negotiations with non-union personnel.

4. To discuss the deployment of security personnel or devices.

5. To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.

6. To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.

7. To comply with the provisions of any general or special law or federal grant-in-aid requirements.

8. To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening.

9. To meet or confer with a mediator, as defined in § 23C of Chapter 233 with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required by this section.

Virtually identical exemptions exist under the state and county parts of the Massachusetts Open Meeting Law except that they do not include numbers 8 and 9. G.L. c. 30A, § 11A 1/2; c. 34, § 9G.

B. Any other statutory requirements for closed or open meetings.

Other statutory provisions exist for specific kinds of meetings. See e.g. G.L. c. 71, § 42 (closing hearings on dismissal of tenured teachers). See also *Kurlander v. School Committee of Williamstown*, 16 Mass. App. Ct. 350, 451 N.E.2d 138 (1983) (tenured teacher unsuccessfully resisted closed hearing); *O’Sullivan v. School Committee of Worcester*, 411 Mass. 123, 579 N.E.2d 160 (1991) (teacher not entitled to be present at school committee’s disciplinary deliberations).

C. Court mandated opening, closing.

Basic court power is to set aside actions taken at improper executive sessions. See G.L. c. 39, § 23B. The Superior Court has on occasion set aside such action and ordered actions taken to be reconsidered in open session. No instance is known where a court ordered a meeting closed; however, one court has suggested that a failure to hold a closed session can constitute bad faith in collective bargaining negotiation. *Board of Selectmen of Marion v. Labor Relations Commission*, 7 Mass. App. Ct. 360, 388 N.E.2d 302 (1979).

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

At state level, quasi-judicial bodies may deliberate in private. G.L. c. 30A, § 11A, definition of “Governmental Body.” At county and municipal levels, deliberations must be public. *Yaro v. Board of Appeals of Newburyport*, 10 Mass. App. Ct. 587, 410 N.E.2d 725 (1980). All fact-finding at any level must be public whether or not hearing officer is appointed.

B. Budget sessions.

Normally open, subject to collective bargaining and land acquisition exemptions.

C. Business and industry relations.

Open unless land acquisition involved.

D. Federal programs.

Open unless federal statute provides otherwise.

E. Financial data of public bodies.

Normally open.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

No specific exemption in general Open Meeting Law or specific case law but court likely to apply general privacy and trade secret principles. As to individual right of privacy, see G.L. c. 214, § 1B, *Attorney General v. School Committee of Northampton*, 375 Mass. 127, 375 N.E.2d 1188 (1978) (candidates for vacant school superintendency have right to keep fact of application private unless and until they reach semi-finalist status). As to trade secrets, see G.L. c. 4, § 7, cl. 26(g). In addition, the statutes relating to specific agencies may authorize closed discussions of trade secrets or financial information received from businesses. See e.g. G.L. c. 40D, § 5 (Mass. Industrial Development Financing Authority).

G. Gifts, trusts and honorary degrees.

Not specifically covered in statute. Normally open. However, most Massachusetts universities are private and not subject to the Open Meeting Law.

H. Grand jury testimony by public employees.

Grand juries fall under judicial branch and are not subject to Open Meeting Law. All grand jury proceedings in Massachusetts are secret. M.R. Crim. P. 5(d). *WBZ-TV4 v. District Attorney for Suffolk Dist.*, 408 Mass. 595, 562 N.E.2d 817 (1990). It is possible that grand jury testimony will become public in course of subsequent criminal proceedings or as a result of other public disclosure. *Globe Newspaper Co. v. Police Comm'r of Boston*, 419 Mass. 852, 648 N.E.2d 419 (1995).

I. Licensing examinations.

Not within scope of Open Meeting Law.

J. Litigation; pending litigation or other attorney-client privileges.

There is a statutory exemption for discussions of “strategy with respect to . . . litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body.” See G.L. c. 39, § 23B(3). The litigation must be actual or imminent. *Doherty v. School Committee of Boston*, 386 Mass. 643, 436 N.E.2d 1223 (1982). *Perryman v. School Comm. of Boston*, 17 Mass. App. Ct. 346, 458 N.E.2d 748, 751-2 (1983). In the absence of actual or imminent litigation, no executive session for consultation with government attorney, even if attorney-client privilege would normally apply. *District Attorney for Plymouth Dist. v. Board of Selectmen of Middleborough*, 395 Mass. 629, 481 N.E.2d 1128 (1985) (executive session to discuss proposed rubbish disposal contract with town counsel held improper).

K. Negotiations and collective bargaining of public employees.

Closed. See G.L. c. 39, § 23B(3).

1. Any sessions regarding collective bargaining.

Statute is not specifically limited to collective bargaining with public employees but normally public employers do not bargain with anyone else.

2. Only those between the public employees and the public body.

The statutory exemption covers both collective bargaining sessions and meetings to “discuss strategy with respect to collective bargaining . . . if an open meeting may have a detrimental effect on the bargain-

ing . . . position of the governmental body.” G.L. c. 39, § 23B(3). Amendments in 1985 and 1988 extend this exemption to cover “strategy sessions in preparation for negotiations with non-union personnel” and “contract negotiations with non-union personnel.” St. 1985, c. 333. St. 1988, c. 291. The collective bargaining exception normally extends to grievance hearings called for under collective bargaining agreements. *Ghiglione v. School Committee of Southbridge*, 376 Mass. 70, 378 N.E.2d 984 (1978); *Bartell v. Wellesley Housing Authority*, 28 Mass. App. Ct. 306, 550 N.E.2d 883 (1990).

L. Parole board meetings, or meetings involving parole board decisions.

Except for individuals serving life sentences, parole hearings are not open to the public. G.L. c. 127, § 133A. 120 300:02(2), 301.01(1).

M. Patients; discussions on individual patients.

Not covered. Most hospitals in Massachusetts are private institutions. In any event, patient privacy is protected by separate statute. G.L. c. 111, § 70E.

N. Personnel matters.**1. Interviews for public employment.**

Screening of applicants by a screening committee or a subcommittee of the appointing body may be and normally is closed. G.L. c. 39, § 23 B(8). *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465, 471-2, 541 N.E.2d 984, 987-8 (1989). Present position of most municipalities is that only “finalists” need be identified or interviewed publicly.

2. Disciplinary matters, performance or ethics of public employees.

Disciplinary hearings are normally closed although the employee may insist they be open. G.L. c. 39, § 23B(2). Non-disciplinary discussion of a public employee’s job performance should be public. G.L. c. 39, § 23B(1). Once disciplinary proceedings are complete, the minutes of any executive sessions involved should be made public. *Foudy v. Amherst-Pelham Reg’l School Committee*, 402 Mass. 179, 521 N.E.2d 391 (1988).

3. Dismissal; considering dismissal of public employees.

Dismissal proceedings are normally closed although the employee may insist they be open. G.L. c. 39, § 23B(2). *Bartell v. Wellesley Housing Authority*, 28 Mass. App. Ct. 306, 550 N.E.2d 883 (1990). As to dismissal of tenured teachers, see G.L. c. 71, § 42. Major lay-offs for budgetary reasons do not fall within exception and should be considered publicly. *Doherty v. School Committee of Boston*, 386 Mass. 643, 436 N.E.2d 1223 (1982).

O. Real estate negotiations.

Normally may be closed. G.L. c. 39, § 23B(6). However, closure may only occur if the purpose of the real property exception is met. *Allen v. Board of Selectmen of Belmont*, 58 Mass. App. Ct. 715, 792 N.E.2d 1000 (2003) (stating that closure was not appropriate where representatives from property involved were present because there was no confidential negotiating position to protect).

P. Security, national and/or state, of buildings, personnel or other.

Discussion of “deployment of security personnel or devices” may be closed. G.L. c. 39, § 23B(4).

Q. Students; discussions on individual students.

Discussions of individual students can probably be held in executive session under general privacy principles. See G.L. c. 214, § 1B. See also strict restrictions on access to student records. G.L. c. 71, § 34D. 603 23.07(4).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

A. When to challenge.

Litigation must be filed within 21 days of the date when the challenged action of the governmental body is made public. G.L. c. 39, § 23B. Normally this means within 21 days of the vote for such action. If vote was in executive session, it means within 21 days of when minutes are made public.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

No specific provision. Can attempt declaratory judgment proceeding and ask for restraining order in Superior Court.

2. When barred from attending.

When barred from attending a public meeting, litigation must be filed within 21 days after the action to be challenged becomes public.

3. To set aside decision.

When barred from attending a public meeting, litigation to set aside decision must be filed within 21 days after the action to be challenged becomes public.

4. For ruling on future meetings.

The statute does not appear to authorize general order that future meetings be open. However, the courts have entered orders that governmental bodies shall hereafter comply with the Open Meeting Law and/or that matters considered in improper executive session be reconsidered in public.

B. How to start.

1. Where to ask for ruling.

a. Administrative forum.

There is no available administrative forum in sense of a quasi-judicial agency.

b. State attorney general.

1. **Submission of a complaint with the public body.** At least 30 days prior to filing a complaint with the attorney general, a written complaint must be filed with the public body. The written complaint must explain the alleged violation of the open meeting law and must allow the public body to remedy the alleged violation. G.L. c. 30A, § 23(b).

Open Meeting Law complaint form is available on the Attorney General's website. 940 CMR 29.05(1). Public bodies are required to provide members of the public with a copy of the complaint form upon request. 940 CMR 29.05(2).

The complaint must be filed within 30 days of the date of the alleged violation, or of the date the alleged violation should reasonably have been discovered. 940 CMR 29.05(3).

2. **Public Body's Response.** Within 14 days of receiving the written complaint, the public body must send a copy of the complaint to the attorney general and must inform the attorney general of any remedial action taken. G.L. c. 30A, § 23(b). The Attorney General may grant additional time to the public body at its discretion.

3. **Submission of complaint with the Attorney General's Office.** If the complainant is not satisfied with the action taken by the public body, the complainant may file a copy of the complaint and supporting materials with the Attorney General's Office. Filing the complaint with the Attorney General's Office more than 90 days after the alleged Open Meeting Law violation may result in the Attorney General's Office declining to investigate the complaint, unless an extension was granted to the public body or the complainant demonstrates good cause for the delay.

4. **Attorney General's Investigation.** The Attorney General's Office will review the complaint and determine whether there is a reasonable cause to believe that the Open Meeting Law has been violated. Whenever the Attorney General has reasonable cause to believe that there has been a violation of the Open Meeting Law, it may then conduct a formal investigation, request additional information from the complainant, compel the production of documents, take oral testimony, or convene a hearing. 940 CMR 29.06. Although regulations say the Attorney General's Office will resolve complaints with a reasonable period of time, generally within 90 days, 940 CMR 29.05(7), the office's form response to complaining parties in summer 2011 said the office was "short staffed" and "may take longer than ... 90 days ... to resolve this matter."

5. **Remedies.** The Attorney General's Office may resolve its investigation with or without a hearing. 940 CMR 29.07. Where it finds that the Open Meetings Law has been unintentionally violated, the Attorney General may resolve the investigation by an information action or by formal order. 940 CMR 29.07(2). Remedial action in such cases may involve directing the public body to comply with the law, attend a training session, or release records. Findings of intentional violation of the Open Meeting Law may result in a civil penalty of up to \$1,000 for each violation, the nullification of any action taken at the relevant meeting, or the reinstatement of an employee. 940 CMR 29.07(3).

Statute authorizes both Attorney General and local District Attorneys to bring enforcement actions, G.L. c. 39, § 23B. The level of activity by the Attorney General and various District Attorneys has varied over the years. Upon complaints by press, most District Attorneys will review facts and, if they think law was violated, will so advise the governmental body. However, Attorney General and District Attorneys have no formal enforcement powers except through courts.

c. Court.

When access is denied, filing an action in Superior Court is appropriate.

2. Applicable time limits.

There is no formal administrative review procedure. As a practical matter, complaint to District Attorney must be within a few days of asserted violation.

3. Contents of request for ruling.

There is no formal administrative review procedure. Most District Attorneys require that requests for action by them on asserted violations be in writing.

4. How long should you wait for a response?

There is no formal administrative review procedure. If the District Attorney fails to act on complaint, the 21-day period in which to file litigation continues to run.

5. Are subsequent or concurrent measures (formal or informal) available?

Court remedy is available at any time within 21-day period.

C. Court review of administrative decision.

1. Who may sue?

Attorney General, local District Attorney or "three or more registered voters." G.L. c. 39, § 23B. In case of county or municipal body, "registered" presumably means registered in the particular county or municipality. A decision of Single Justice of Appeals Court holds that a person who is not a registered voter has no standing to bring enforcement action. The three voter requirement will be strictly enforced. See *Vining Disposal Service Inc. v. Board of Selectmen of Westford*, 416 Mass.

35, 616 N.E.2d 1065 (1993) (public contract bidder alone lacks standing to challenge selectmen's alleged violation of OML).

2. Will the court give priority to the pleading?

Generally available. Normal procedure is to issue order of notice returnable in 10 days and to schedule prompt trial. G.L. c. 39, § 23B.

3. Pro se possibility, advisability.

An individual reporter, editor, or citizen may appear *pro se*. However, unless also a lawyer, he or she may not represent others or appear for a corporation. *Varney Enterprises Inc. v. WMF Inc.*, 402 Mass. 79, 520 N.E.2d 1312 (1988) (corporation may not appear through corporate officer who is not licensed attorney).

Pro se appearance in court is normally not advisable. The law in this area is becoming fairly complex and at least some judges do not particularly care for either *pro se* litigants or the press generally.

4. What issues will the court address?

The court will address any claim of violation of Open Meeting Law. In past, virtually all cases have involved claims of inadequate notice and/or improper executive sessions.

a. Open the meeting.

Pre-meeting litigation is extremely rare but theoretically possible.

b. Invalidate the decision.

The court clearly has discretionary power to invalidate the decision and this has happened on occasion.

c. Order future meetings open.

The courts have entered orders that governmental bodies shall hereafter comply with the Open Meeting Law and/or that matters considered in improper executive session be reconsidered in public, but statute does not appear to authorize a general order that future meetings be open.

5. Pleading format.

Massachusetts has in substance adopted the Federal Rules of Civil Procedure. The initial pleading is the complaint. M.R. Civ. P. 7(a).

6. Time limit for filing suit.

Twenty-one days after date when action complained of "is made public." G.L. c. 39, § 23B.

7. What court.

Superior Court for county in which defendant governmental body acts. G.L. c. 39, § 23B.

8. Judicial remedies available.

Court has specific discretionary power to invalidate any action taken at an improper meeting or executive session and to require that records of meetings be made public. G.L. c. 39, § 23B. Court also has general equitable powers to order future compliance with Law, to order improper executive session re-held in public, to order reconstruction of missing or inadequate records of meetings, and to order preparation of minutes. Courts may also order back pay in certain employment circumstances. *Puglisi v. School Committee of Whitman*, 11 Mass. App. Ct. 142, 414 N.E.2d 613 (1981) (employee discharged in improper executive session was awarded back pay from the date of the session to the date when the committee would make a discharge decision at a meeting in conformity with the OML).

Other remedies may be available as well. The law states that its remedial provisions are not exclusive. G.L. c. 39, § 23B; G.L. c. 66, § 17C.

9. Availability of court costs and attorneys' fees.

Court costs available but nominal. The statute does not provide for awards of attorneys' fees. *Pearson v. Board of Health of Chicopee*, 402 Mass. 797, 525 N.E.2d 400 (1988). However, in egregious cases where governmental body's defenses are insubstantial or frivolous, court has authority to award attorneys' fees. G.L. c. 231, § 6F. *Pearson, supra*.

10. Fines.

A 1993 amendment allows a Court to impose a civil fine "against the government body" of up to \$1,000 "for each meeting held in violation of this section." G.L. c.39, § 23B. Acts 1993, c.455. This amendment applies only to the municipal section of the OML. It has rarely, if ever, been invoked.

11. Other penalties.

None.

D. Appealing initial court decisions.

1. Appeal routes.

Normal civil appeal to Massachusetts Appeals Court. In some cases, interlocutory appeal to Single Justice of Appeals Court may be available. See G.L. c. 231, § 118.

2. Time limits for filing appeals.

Thirty days from date of Superior Court judgment. M.R. App. P. 4(a).

3. Contact of interested amici.

Amici curiae may file briefs with leave of court but are allowed to argue orally only in extraordinary circumstances. M.R. App. P. 17. Responsible press organizations are routinely granted leave to file briefs as *amici*. Most frequent such *amici* include the Massachusetts Newspaper Publishers Association and the New England Press Association.

The Reporters Committee for Freedom of the Press may also be interested in joining as an *amicus* before the Supreme Judicial Court.

V. ASSERTING A RIGHT TO COMMENT.

The law related to municipal meetings states that "[n]o person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent." G.L. c. 39, § 23C. There are no other statutes or case law addressing this issue.

A. Is there a right to participate in public meetings?

The OML provides no general right for a member of the public to address a governmental body.

B. Must a commenter give notice of intentions to comment?

Not addressed.

C. Can a public body limit comment?

Not addressed.

D. How can a participant assert rights to comment?

Not addressed.

E. Are there sanctions for unapproved comment?

Although the law does not include specific sanctions, a person commenting in a municipal governmental meeting without permission may be asked to withdraw from the meeting and may be escorted out by a constable if he or she refuses to leave. G.L. c. 39, § 23C.

Statute

Public Records

Public Records Defined

Massachusetts General Laws

Part I. Administration of the Government (Ch. 1-182)

Title I. Jurisdiction and Emblems of the Commonwealth, the General Court, Statutes and Public Documents

Chapter 4. Statutes

Section 7. Definitions of statutory terms; statutory construction

Clause 26th. "Public records"

Twenty-sixth, "Public records" shall mean 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, unless such materials or data fall within the following exemptions in that they are:

- (a) specifically or by necessary implication exempted from disclosure by statute;
- (b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;
- (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;
- (d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;
- (e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;
- (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;
- (g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;
- (h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;
- (i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;
- (j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

[There is no subclause (k).]

(l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a non-profit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

(o) the home address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a non-profit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore [sic] of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

Any person denied access to public records may pursue the remedy provided for in section ten of chapter sixty-six.

1973 Mass Acts c. 1050, § 6

The provisions of clause twenty-sixth of section seven of chapter four of the General Laws, as amended by section one of this act, shall not be construed to exempt any record which was a public record on the effective date of this act from said clause twenty-sixth.

Access to Public Records

Massachusetts General Laws

Part I. Administration of the Government (Ch. 1-182)

Title X. Public Records

Chapter 66. Public Records

Section 1. Supervision of public records; powers and duties

Section 1. The supervisor of public records, in this chapter called the supervisor of records, shall take necessary measures to put the records of the commonwealth, counties, cities or towns in the custody and condition required by law and to secure their preservation. He shall see that the records of churches, parishes or religious societies are kept in the custody and condition contemplated by the various laws relating to churches, parishes or religious societies, and for these purposes he may expend from the amount appropriated for expenses such amount as he considers necessary. The supervisor of records shall adopt regulations pursuant to the provisions of chapter thirty A to implement the provisions of this chapter.

Section 2. Repealed, 1977, 80, Sec. 1

Section 3. "Record", defined; quality of paper and film; microfilm records

Section 3. The word "record" in this chapter shall mean any written or printed book or paper, or any photograph, microphotograph, map or plan. All written or printed public records shall be entered or recorded on paper made of linen rags and new cotton clippings, well sized with animal sizing and well finished or on one hundred per cent bond paper sized with animal glue or gelatin, and preference shall be given to paper of American manufacture marked in water line with the name of the manufacturer. All photographs, microphotographs, maps and plans which are public records shall be made of materials approved by the supervisor of records. Public records may be made by hand-writing, or by typewriting, or in print, or by the photographic process, or by the microphotographic process, or by any combination of the same. When the photographic or microphotographic process is used, the recording officer, in all instances where the photographic print or microphotographic film is illegible or indistinct, may make, in addition to said photographic or microphotographic record, a typewritten copy of the instrument, which copy shall be filed in a book kept for the purpose. In every such instance the recording officer shall cause cross references to be made between said photographic or microphotographic record and said typewritten record. If in the judgment of the recording officer an instrument offered for record is so illegible that a photographic or microphotographic record thereof would not be sufficiently legible, he may, in addition to the making of such record, retain the original in his custody, in which case a photographic or other attested copy thereof shall be given to the person offering the same for record, or to such person as he may designate.

Subject to the provisions of sections one and nine, a recording officer adopting a system which includes the photographic process or the microphotographic process shall thereafter cause all records made by either of said processes to be inspected at least once in every three years, correct any fading or otherwise faulty records and make report of such inspection and correction to the supervisor of records.

Section 4. Regulation of recording materials and devices; mandamus

Section 4. No ink shall be used upon any permanent public record except ink of such a standard as established and approved by the supervisor of records, and no ribbon, pad or other device used for printing by typewriting machines, or stamping pad, or any ink contained in such ribbon, pad, device, stamping pad or carbon paper, shall be used upon any permanent public record, nor shall any photographic machine or device or chemical used in connection therewith be used in making any permanent public record, except such as has been approved by the supervisor of records, who may cancel his approval if he finds that any article so approved is inferior to the standard established by him. The supreme judicial or superior court shall have jurisdiction in mandamus, on petition of the supervisor of records and pursuant to section five of chapter two hundred and forty-nine, to order compliance with the provisions of this section.

Section 5. Municipal records; copies

Section 5. County commissioners, city councils and selectmen may cause copies of records of counties, cities or towns, of town proprietaries, of proprietors of plantations, townships or common lands, relative to land situated in their county, city or town or of easements relating thereto, to be made for their county, city or town, whether such records are within or without the commonwealth, and such records within the commonwealth may be delivered by their custodians to any county, city or town for such copying. City councils and selectmen may also cause copies to be made of the records of births, baptisms, marriages and deaths kept by a church or parish in their city or town.

Section 5A. Records of meetings of boards and commissions; contents

Section 5A. The records, required to be kept by sections eleven A of chapter thirty A, nine F of chapter thirty-four and twenty-three B of chapter thirty-nine, shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other

official actions taken by such boards and commissions; but unless otherwise required by the governor in the case of state boards, commissions and districts, or by the county commissioners in the case of county boards and commissions, or the governing body thereof in the case of a district, or by ordinance or by-law of the city or town, in the case of municipal boards, such records need not include a verbatim record of discussions at such meetings.

Section 6. Records of public proceedings; preparation; custody

Section 6. Every department, board, commission or office of the commonwealth or of a county, city or town, for which no clerk is otherwise provided by law, shall designate some person as clerk, who shall enter all its votes, orders and proceedings in books and shall have the custody of such books, and the department, board, commission or office shall designate an employee or employees to have the custody of its other public records. Every sole officer in charge of a department or office of the commonwealth or of a county, city or town having public records in such department or office shall have the custody thereof.

Section 7. Custody of old and other records

Section 7. Every town clerk shall have the custody of all records of proprietors of towns, townships, plantations or common lands, if the towns, townships, plantations or common lands to which such records relate, or the larger part thereof, are within his town and the proprietors have ceased to be a body politic. The state secretary, clerks of the county commissioners and city or town clerks shall respectively have the custody of all other public records of the commonwealth or of their respective counties, cities or towns, if no other disposition of such records is made by law or ordinance, and shall certify copies thereof.

Section 8. Preservation and destruction of records, books and papers

Section 8. Every original paper belonging to the files of the commonwealth or of any county, city or town, bearing date earlier than the year eighteen hundred and seventy, every book of registry or record, except books which the supervisor of public records determines may be destroyed, every town warrant, every deed to the commonwealth or to any county, city or town, every report of an agent, officer or committee relative to bridges, public ways, sewers or other state, county or municipal interests not required to be recorded in a book and not so recorded, shall be preserved and safely kept; and every other paper belonging to such files shall be kept for seven years after the latest original entry therein or thereon, unless otherwise provided by law or unless such records are included in disposal schedules approved by the records conservation board for state records or by the supervisor of public records for county, city, or town records; and no such paper shall be destroyed without the written approval of the supervisor of records. Notwithstanding the foregoing, the register of deeds in any county may, without such written approval, destroy any papers pertaining to attachments or to the dissolution or discharge thereof in the files of his office following the expiration of twenty years after the latest original entry therein or thereon, unless otherwise specifically provided by law, and he may destroy all original instruments left for record and not called for within five years after the recording thereof.

Section 8A. Destruction of certain records by city and town clerks if microphotographed

Section 8A. Any provision of general or special law to the contrary notwithstanding, the clerk of any city or town, with the written approval of the supervisor of records, may destroy any index of instruments made by any clerk of such city or town under the provision of law now embodied in section fifteen of chapter forty-one or any original record made by any such clerk under any of the provisions of law now embodied in section eleven of chapter two hundred and nine, section three of chapter two hundred and fifty-five, or any similar statute; provided, that such index or record, as the case may be, has been, or shall have been, micro-photographed, and that twenty years has, or shall have, expired after the making of such index or record. The micro-photograph of any index or record so destroyed shall have the same force and effect as the original index or record from which such micro-photograph was made.

Section 8B. Destruction or disposal of records in accordance with chapter 93I

Section 8B. Records or documents required to be destroyed or disposed of in this chapter shall be destroyed or disposed of in the manner set forth in chapter 93I.

Section 9. Preservation and copying of worn, etc., records

Section 9. Every person having custody of any public record books of the commonwealth, or of a county, city or town shall, at its expense, cause them to be properly and substantially bound. He shall have any such books, which

may have been left incomplete, made up and completed from the files and usual memoranda, so far as practicable. He shall cause fair and legible copies to be seasonably made of any books which are worn, mutilated or are becoming illegible, and cause them to be repaired, rebound or renovated. He may cause any such books to be placed in the custody of the supervisor of records, who may have them repaired, renovated or rebound at the expense of the commonwealth, county, city or town to which they belong. Whoever causes such books to be so completed or copied shall attest them, and shall certify, on oath, that they have been made from such files and memoranda or are copies of the original books. Such books shall then have the force of the original records.

Section 10. Public inspection and copies of records; presumption; exemptions

Section 10. (a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the Massachusetts bay transportation authority police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

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 by chapter one hundred and forty 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 chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six 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 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 a criminal justice agency as defined in section 167 of chapter 6. The name and home address and telephone number 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 and telephone number 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 and home address and telephone number, 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. Fireproof vaults and safes

Section 11. Officers in charge of a state department, county commissioners, city councils and selectmen shall, at the expense of the commonwealth, county, city or town, respectively, provide and maintain fireproof rooms, safes or vaults for the safe keeping of the public records of their department, county, city or town, other than the records in the custody of teachers of the public schools, and shall furnish such rooms with fittings of non-combustible materials only.

Section 12. Arrangement of records

Section 12. All such records shall be kept in the rooms where they are ordinarily used, and so arranged that they may be conveniently examined and referred to. When not in use, they shall be kept in the fireproof rooms, vaults or safes provided for them.

Section 13. Custodian to demand records; compelling compliance

Section 13. Whoever is entitled to the custody of public records shall demand the same from any person having possession of them, who shall forthwith deliver the same to him. Upon complaint of any public officer entitled to the custody of a public record, the superior court shall have jurisdiction in equity to compel any person unlawfully having such record in his possession to deliver the same to the complainant.

Section 14. Surrender of records by retiring officer

Section 14. Whoever has custody of any public records shall, upon the expiration of his term of office, employment or authority, deliver over to his successor all such records which he is not authorized by law to retain, and shall make oath that he has so delivered them, according as they are the records of the commonwealth or of a county, city or town, before the state secretary, the clerk of the county commissioners or the city or town clerk, who shall, respectively, make a record of such oath.

Section 15. Penalties

Section 15. Whoever unlawfully keeps in his possession any public record or removes it from the room where it is usually kept, or alters, defaces, mutilates or destroys any public record or violates any provision of this chapter shall be punished by a fine of not less than ten nor more than five hundred dollars, or by imprisonment for not more than one year, or both. Any public officer who refuses or neglects to perform any duty required of him by this chapter shall for each month of such neglect or refusal be punished by a fine of not more than twenty dollars.

Section 16. Surrender of church records; jurisdiction of superior court

Section 16. If a church, parish, religious society, monthly meeting of the people called Friends or Quakers, or any similar body of persons who have associated themselves together for holding religious meetings, shall cease for the term of two years to hold such meetings, the persons having the care of any records or registries of such body, or of any officers thereof, shall deliver all such records, except records essential to the control of any property or trust funds belonging to such body, to the custodian of a depository provided by the state organization of the particular denomination or to the clerk of the city or town where such body is situated and such clerk may certify copies thereof

upon the payment of the fee as provided by clause (25) of section thirty-four of chapter two hundred and sixty-two. If any such body, the records or registries of which, or of any officers of which, have been so delivered, shall resume meetings under its former name or shall be legally incorporated, either alone or with a similar body, the clerk of such city or town or the custodian of said depository shall, upon written demand by a person duly authorized, deliver such records or registries to him if he shall in writing certify that to the best of his knowledge and belief said meetings are to be continued or such incorporation has been legally completed. The superior court shall have jurisdiction in equity to enforce this section.

Section 17. Municipality in which records to be kept; penalty

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, city or town to which they originally belonged, and if not in his custody shall be demanded by him of the person having possession thereof, and shall forthwith be delivered by such person to him. Whoever refuses or neglects to perform any duty required of him by this section shall be punished by a fine of not more than twenty dollars.

Section 17A. Public assistance records; public inspection; destruction

Section 17A. The records of the department of transitional assistance, relative to all public assistance, and the records of the commission for the blind relative to aid to the blind, shall be public records; provided that they shall be open to inspection only by public officials of the commonwealth, which term shall include members of the general court, representatives of the federal government and those responsible for the preparation of annual budgets for such public assistance, the making of recommendations relative to such budgets, or the approval or authorization of payments for such assistance, or for any purposes directly connected with the administration of such public assistance or with the administration of chapter 118G or with the administration of child support enforcement under chapter one hundred and nineteen A, including the use of said records in set-off debt collections under chapter sixty-two D, and including the use of said records by the department of transitional assistance, in concert with related wage reports to ascertain or confirm any fraud, abuse or improper payments to an applicant for or recipient of public assistance; and provided, further, that data from said records may be made available to representatives of the department of education and local school committees solely for the purpose of targeting school attendance areas with the largest concentrations of low income children pursuant to 20 USC 2701 *et seq.* and that such access shall be supervised by the department of transitional assistance and the department of education in accordance with an interagency agreement between said departments that safeguards confidentiality; and provided, further, that information relative to the record of an applicant for public assistance or a recipient thereof may be disclosed to him or his duly authorized agent; provided, however, that nothing in this section shall be construed to prohibit disclosure to or access by the bureau of special investigations to the department's records or files for the purposes of fraud detection and control. The state police, including the state police violent fugitive arrest squad, and local police departments, shall also be provided with identifying and locating information upon request from the department's records or files for the sole purpose of identifying and locating individuals wanted on default or arrest warrants. Only identifying information including, but not limited to, the name, date of birth, all pertinent addresses, telephone number and social security number of such individuals shall be made available to the state police and local police departments pursuant to this section. The commonwealth shall destroy public assistance records ten years after the discontinuance of aid granted under the provisions of chapter sixty-nine, one hundred and seventeen, one hundred and eighteen, one hundred and eighteen A, one hundred and eighteen D and one hundred and nineteen, in such manner as the commissioner or director may prescribe.

Section 17B. Repealed, 1973, 1050, Sec. 4

Section 17C. Failure to maintain public records of meetings; orders to maintain

Section 17C. Upon proof of failure of a governmental body as defined in section eleven A of chapter thirty A, section nine F of chapter thirty-four and section twenty-three A of chapter thirty-nine, or by any member or officer thereof to carry out any of the provisions prescribed by this chapter for maintaining public records, a justice of the supreme judicial or the superior court sitting within and for the county in which such governmental body acts or, in the case of a governmental body of the commonwealth, sitting within and for any county, shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out the provisions of this chapter. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney for the county in which the

governmental body acts. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of any such complaint the burden shall be on the respondent to show by a preponderance of the evidence that the actions complained of in such complaint were in accordance with and authorized by section eleven B of chapter thirty A, by section nine G of chapter thirty-four or by section twenty-three B of chapter thirty-nine. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Any such order may also, when appropriate, require the records of any such meeting of a governmental body to be made a public record unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized by section eleven B of chapter thirty A, by section nine G of chapter thirty-four or by section twenty-three B of chapter thirty-nine. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy.

Section 17D. Massachusetts natural heritage and endangered species program data base; division records; site-specific rare species information

Section 17D. Records of the division of fisheries and wildlife in the department of fish and game known as the Massachusetts natural heritage and endangered species program data base shall not be public records; provided, however, that they shall be open for inspection by agents of the commonwealth and the federal government for the purposes of protecting and preserving species and subspecies of nongame wildlife and indigenous plants. Except as otherwise determined by the administrator of the said data base, site-specific rare species information shall be released only upon the receipt of a statement, in writing, by the recipient that he shall keep such information confidential.

Section 17E. Local filing offices; former Article 9 Uniform Commercial Code records; revised Article 9 records

Section 17E. (a) In this section the following words shall have the following meanings:

- (1) "Former Article 9", Article 9 of chapter 106 as in effect on June 30, 2001.
- (2) "Revised Article 9", Article 9 of said chapter 106 as in effect on or after July 1, 2001.
- (3) "Local filing office", a filing office, other than the office of the state secretary, that is designated as the proper place to file a financing statement under Section 9-401(1) of former Article 9. The term applies only with respect to a record that covers a type of collateral as to which the filing office is designated in that section as the proper place to file.
- (4) "Former Article 9 records":
 - (A) financing statements and other records that have been filed in a local filing office before July 1, 2001, and that are, or upon processing and indexing will be, reflected in the index maintained, as of June 30, 2001, by the local filing office for financing statements and other records filed in the local filing office before July 1, 2001, and
 - (B) the index as of June 30, 2001.

The term shall not include records presented to a local filing office for filing after June 30, 2001, whether or not the records relate to financing statements filed in the local filing office before July 1, 2001.

(5) "Mortgage", "as-extracted collateral", "fixture filing", "goods" and "fixtures" have the meanings set forth in revised Article 9 for those terms.

(b) A local filing office shall not accept for filing a record presented after June 30, 2001, whether or not the record relates to a financing statement filed in the local filing office before July 1, 2001.

(c) Until July 1, 2008, each local filing office shall maintain all former Article 9 records in accordance with former Article 9. A former Article 9

record that is not reflected on the index maintained at June 30, 2001, by the local filing office shall be processed and indexed, and reflected on the index as of June 30, 2001, as soon as practicable but in any event no later than July 30, 2001.

(d) Until at least June 30, 2008, each local filing office shall respond to requests for information with respect to former Article 9 records relating to a debtor and issue certificates, in accordance with former Article 9. The fees charged for responding to requests for information relating to a debtor and issuing certificates with respect to former Article 9 records shall be the fees in effect under former Article 9 on June 30, 2001, unless a different fee is later set by the local filing office, but the different fee shall not exceed \$20 for responding to a request for information relating to a debtor or \$20 for issuing a certificate.

(e) After June 30, 2008, each local filing office may remove and destroy, in accordance with any then applicable record retention law of the commonwealth, all former Article 9 records, including the related index.

(f) This section shall not apply, with respect to financing statements and other records, to a filing office in which mortgages or records of mortgages on real property are required to be filed or recorded, if:

- (1) the collateral is timber to be cut or as-extracted collateral, or
- (2) the record is or relates to a financing statement filed as a fixture filing and the collateral is goods that are or are to become fixtures.

Section 18. Application of chapter

Section 18. This chapter shall not apply to the records of the general court, nor shall declarations, affidavits and other papers filed by claimants in the office of the commissioner of veterans' services, or records kept by him for reference by the officials of his office, be public records.

Police Logs

Massachusetts General Laws

Part I. Administration of the Government (Ch. 1-182)

Title VII. Cities, Towns, and Districts (Ch. 39-49A)

Chapter 41. Officers and Employees of Cities, Towns, and Districts

Section 98F. Daily logs; public records

Each police department and each college or university to which officers have been appointed pursuant to the provisions of section sixty-three of chapter twenty-two C shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records available without charge to the public during regular business hours and at all other reasonable times; provided, however, that any entry in a log which pertains to a handicapped individual who is physically or mentally incapacitated to the degree that said person is confined to a wheelchair or is bedridden or requires the use of a device designed to provide said person with mobility, shall be kept in a separate log and shall not be a public record nor shall such entry be disclosed to the public.

Access to Public Records: Implementing Regulations

Code of Massachusetts Regulations (C.M.R.)

Title 950. Office of the Secretary of the Commonwealth

Section 32. Public Records Access

§ 32.01: Authority

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

32.02: Scope and Purpose

950 CMR 32.00 shall be construed to ensure the public prompt access to all public records in the custody of state governmental entities and in the custody of governmental entities of political subdivisions of the Commonwealth, and to ensure 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.

32.03: Definitions

As used in 950 CMR 32.00:

Custodian means the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.

Division means the Division of Public Records, Office of the State Secretary.

Governmental Entity means any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth. It shall not include the legislature and the judiciary.

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, unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7(26).

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.

Segregation time means the time used to delete or expurgate data which is exempt under G. L. c. 4, § 7(26) from non-exempt material which is contained in a paper public record.

Supervisor means Supervisor of Public Records.

32.04: General Provisions

- (1) *Office address.* All communications shall be addressed or delivered to:

Supervisor of Records
Office of the State Secretary
One Ashburton Place, Room 1719
Boston, Massachusetts 02108

- (2) *Office hours.* The offices of the Division shall be open from 8:45 a.m. to 5:00 p.m. each weekday, Monday-Friday, excluding legal holidays.

- (3) *Computation of Time.* Computation of any period of time referred to in 950 CMR 32.00 shall begin with the first day following the action which initiates such period of time. 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 following business day.

32.05: Rights to Access

- (1) *Access to Public Records.* A custodian of a public record shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours. In governmental entities which do not have daily business hours, a written notice shall be posted in a conspicuous location listing the name, position, address and telephone number of the person to be contacted to obtain access to public records.

- (2) *Promptness of Access.* Every governmental entity shall maintain procedures that will allow at reasonable times and without unreasonable delay access to public records in its custody to all persons requesting public records. Each custodian shall comply with a request as soon as practicable and within ten days.

- (3) *Requests for Public Records.* Requests for public records may be oral or written. Written requests may be submitted in person or by mail. It is recommended that a record requester make a written request where there is substantial doubt as to whether the records requested are public, or if an appeal pursuant to 950 CMR 32.08(2) is contemplated. A custodian shall not require written requests merely to delay production.

- (4) *Description of Requested Records.* Any person seeking access to a public record or any portion thereof shall provide a reasonable description of the requested record to the custodian so that he or she can identify and locate it promptly. A person shall not be required to make a personal inspection of the record prior to receiving a copy of it. A custodian's superior knowledge of the contents of a governmental entity's files shall be used to assist in promptly complying with the request.

(5) *Prohibition of Custodial Requests for Background Information.* Except when the requested records concern information which may be exempt from disclosure pursuant to G. L. c. 4, §7(26)(n), a custodian may not require the disclosure of the reasons for which a requester seeks access to or a copy of a public record. A custodian shall not require proof of the requester's identity prior to complying with requests for copies of public records.

(6) *Copies.* Upon request, a person at his or her election, shall be entitled to receive in hand or by mail one copy of a public record or any desired portion of a public record upon payment of a reasonable fee as determined by 950 CMR 32.06.

32.06: Fees for Copies of Public Records

(1) Except where fees for copies of public records are prescribed by statute, a governmental entity shall charge no more than the following fees for copies of public records:

(a) for photocopies of a public record no more than twenty cents (\$0.20) per page;

(b) for copies of public records maintained on microfilm or microfiche no more than twenty-five cents (\$0.25) per page;

(c) for requests for non-computerized public records a prorated fee based on the hourly rate of the lowest paid employee capable of performing the task may be assessed for search time and segregation time expenses, as defined by 950 CMR 32.03. In addition, a per page copying fee under 950 CMR 32.06(1)(a) and 950 CMR 32.06(1)(b) may be assessed;

(d) for computer printout copies of public records no more than fifty cents (\$0.50) per page;

(e) for a search of computerized records the actual cost incurred from the use of the computer time may be assessed;

(f) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed.

(2) *Estimates.* A custodian shall provide a written, good faith estimate of the applicable copying, search time and segregation time fees to be incurred prior to complying with a public records request where the total costs are estimated to exceed ten dollars (\$10.00).

(3) *Postage.* A custodian may assess the actual cost of postage.

(4) *Inspection of Public Records.* A custodian may not assess a fee for the mere inspection of public records, unless compliance with such request for inspection involves "search time" in which case a fee under 950 CMR 32.06(1)(c) may be assessed.

(5) *Waiver of Fees.* Every custodian, unless otherwise required by law, is encouraged to waive fees where disclosure would benefit the public interest.

(6) *Street Census Computer Tapes and Mailing Labels - Reproduction Fees for City and Town Committee Chairman.*

Where "street list" data collected under G. L. c. 51, §§ 6-7, is compiled on computer tapes:

(a) City or town registrars of voters shall provide, or cause their agents to provide, copies of said computer tapes to the chairman of each city or town committee for a fee of no more than one cent (\$0.01) per name, provided that a minimum fee of no more than ninety dollars (\$90.00) may be assessed. No fee assessed under 950 CMR 32.06(6)(a) shall exceed seven hundred fifty dollars (\$750.00).

(b) City or town registrars of voters shall provide, or cause their agents to provide, sets of mailing labels made from said computer tapes to the chairman of each city or town committee for a fee of no more than two cents (\$0.02) per label, provided that a minimum fee of no more than fifty dollars (\$50.00) may be assessed.

32.08: Appeals

(1) *Denial by Custodian.* Where a custodian's response to a record request made pursuant to 950 CMR 32.05(3) is that any record or portion of it is not public, the custodian, within ten (10) days of the request for access, shall in writing set forth the reasons for such denial. The denial shall specifically include the exemption or exemptions in the definition of public records upon which the denial is based. When Exemption (a) of G. L. c. 4, § 7(26) is relied upon the custodian shall cite the operational statute(s). Failure to make a written response within ten (10) days to any request for access shall be deemed a denial of the request. The custodian shall advise the person denied access of his or her remedies under 950 CMR 32.00 and G. L. c. 66, § 10(b).

(2) *Appeal to the Supervisor.* In the event that a person requesting any record in the custody of a governmental entity is denied access, or in the event that there has not been compliance with any provision of 950 CMR 32.00, the requester may appeal to the Supervisor within ninety (90) days. Such appeal shall be in writing, and shall include a copy of the letter by which the request was made and, if available, a copy of the letter by which the custodian responded. The Supervisor shall accept an appeal only from a person who had made his or her record request in writing. An oral request, while valid as a public record request pursuant to 950 CMR 32.05(3), may not be the basis of an appeal under 950 CMR 32.08.

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 from a requester where the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation. The Supervisor may decline to accept an appeal from a requester if, in the opinion of the Supervisor, the request is designed or intended to harass, intimidate or assist in the commission of a crime. The Supervisor may decline to accept an appeal from a requester if, in the opinion of the Supervisor, the public records request is made solely for a commercial purpose.

Appeals in which there has been no communication from the requester for six (6) months may be closed at the discretion of the Supervisor.

(3) *Disposition of Appeals.* The Supervisor shall, within a reasonable time, investigate the circumstances giving rise to an appeal and render a written decision to the parties stating therein the reason or reasons for such decision.

(4) *Presumption.* In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.

(5) *Hearings.* The Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. Said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.08. Nothing in 950 CMR 32.08 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.

(6) *In-camera Inspections and Submissions of Data.* The Supervisor may require an inspection of the requested record(s) *in-camera* during any investigation or any proceeding initiated pursuant to 950 CMR 32.08. The Supervisor may require the custodian to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.08.

The Supervisor does not maintain custody of documents received from a custodian pursuant to an order by this office to submit records for an *in-camera* review. The documents submitted for an *in-camera* review do not fall within the definition of public records. See G. L. c. 66, §10(a) (2006 ed.). Any public record request made to this office for records being reviewed *in-camera* would necessarily be denied as the office would not be the custodian of those records. See 950 CMR 32.03 (defining "custodian" as the government employee who in the normal course of his duties has access to or control over records). Upon a determination of the public record status of the documents, they are promptly returned to the custodian.

(7) *Custodial Indexing of Records.* The Supervisor may require a custodian to compile an index of the requested records where numerous records or a lengthy record have been requested. Said index shall meet the following requirements:

(a) the index shall be contained in one document, complete in itself;

32.07: Advisory Opinions

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

(b) the index must adequately describe each withheld record or deletion from a released record;

(c) the index must state the exemption or exemptions claimed for each withheld record or each deletion of a record; and,

(d) 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. Nothing in 950 CMR 32.08 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

(8) *Conferences.* At any time during the course of any investigation or any proceeding, to the extent practicable, where time, the nature of the investigation or proceeding and the public interest permit, the Supervisor, order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding.

32.09: Enforcement of Orders

A custodian shall promptly take such steps as may be necessary to put an order of the Supervisor into effect. The Supervisor may notify the Attorney General or appropriate District Attorney of any failure by a custodian to comply with any order of the Supervisor.

REGULATORY AUTHORITY: G. L. c. 66, § 1; 950 CMR 32.00.

Examples of Exemption (a) Statutes

Abatement Applications: G. L. c. 59, § 60.
 Address Confidentiality Program, Participant Applications and Supporting Documents: G. L. c. 9A, § 6.
 Air Pollution Control (Trade Secrets): G. L. c. 111, § 142B.
 Alcohol Treatment Records: G. L. c. 111B, § 11.
 Bank Examination Records: G. L. c. 167, § 2.
 Birth Reports: G. L. c. 46, § 4A.
 Blind Persons, Commission for the Blind Register: G. L. c. 6, § 149.
 Business Schools (Private), Financial Statements: G. L. c. 75D, § 3.
 Capital Facility Construction Project Records: G. L. c. 30, § 39R.
 Central Registry of Voters: G. L. c. 51, § 47C.
 Conflict of Interest, Request for an Opinion: G. L. c. 268A, § 22.
 Consumer Protection Investigation: G. L. c. 93A, § 6(6).
 Councils on Aging, Names, Addresses and Telephone Numbers of Elderly: G. L. c. 40, § 8B.
 Criminal Offender Record Information: G. L. c. 6, § 167.
 Delinquency, Sealing by Commissioner of Probation: G. L. c. 276, § 100B.
 Department of Social Services, Central Registry: G. L. c. 119, § 51F.
 Department of Youth Services Records: G. L. c. 120, § 21.
 Drug Addiction Treatment Records: G. L. c. 111E, § 18.
 Employment Agencies, Data: G. L. c. 140, § 46R.
 Employment Security Data: G. L. c. 151A, § 46.
 Exemption of Legislature from Public Records Law: G. L. c. 66, § 18.
 Evaluations of Special Needs Children: G. L. c. 71B, § 3.
 Executive Sessions: G. L. c. 30A, § 11A; G. L. c. 34, § 9F; G. L. c. 39, § 23B.
 Fetal Death Reports: G. L. c. 111, § 202.
 Firearms Bureau Records: G. L. c. 66, § 10(d).
 Gas and Electric Affiliated Company Records: G. L. c. 164, § 85.
 Genetically Linked Diseases, Testing Records: G. L. c. 76, § 15B.
 Hazardous Substances Reports: G. L. c. 111F, § 21.
 Hazardous Waste Management Records: G. L. c. 21D, § 6.
 Hazardous Waste Facilities: G. L. c. 21C, § 12.
 Historical and Archaeological Sites and Specimen Inventory: G. L. c. 9, § 26A (1).
 Home Addresses and Telephone Numbers of Public Safety Personnel, Victims of Adjudicated Crimes and Persons Providing Family Planning Services: G. L. c. 66, § 10.
 Hospital Records: G. L. c. 111, § 70.

Hospitals, Reports of Staff Privilege Revocation: G. L. c. 111, § 53B.

Impounded Birth Records: G. L. c. 46, § 2A.

Inspector General Investigations, Records: G. L. c. 12A, § 13.

Juvenile Delinquency Case Records: G. L. c. 119, § 60A.

Library Circulation Records: G. L. c. 78, § 7.

Malignant Disease Reports: G. L. c. 111, § 111B.

Massachusetts Commission Against Discrimination Investigatory Files: G. L. c. 151B, § 5.

Massachusetts Technology Development Corporation, Corporate Records: G. L. c. 40G, § 10.

Mental Health Facilities Records: G. L. c. 123, § 36.

Merit Rating Plans, Motor Vehicle Insurance: G. L. c. 6, § 183.

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

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

Patient Abuse Information; Intermediate Care Facilities for Mentally Retarded Citizens, Convalescent, Nursing or Rest Homes: G. L. c. 111, § 72I.

Patient's Rights to Confidentiality of Records; Medical and Mental Health Facilities: G. L. c. 111, § 70E.

Protective Services Records, Aged Persons: G. L. c. 19A, § 23.

Public Assistance Records, Aged Persons, Dependent Children, Handicapped Persons: G. L. c. 66, § 17A.

Public Assistance, Wage Reporting System Information: G. L. c. 62E, § 8.

Rape Reports: G. L. c. 41, § 97D.

Reyes Syndrome Report: G. L. c. 111, § 110B.

Sex Offender Registry, Requests for Registry Information: G. L. c. 6, § 178I.

Street Lists, Children Aged 3-17, Court Order Granting Protection: G. L. c. 51, § 4(a), (d).

Student Records: G. L. c. 71, § 34D, 34E.

Tax Returns: G. L. c. 62C, § 21.

Venereal Disease Records: G. L. c. 111, § 119.

Vocational Rehabilitation Records: G. L. c. 6, § 84.

Open Meetings

Massachusetts General Laws

Part I. Administration of the Government (Ch. 1-182)

Title III. Laws Relating to State Officers

Chapter 30A. State Administrative Procedure

[Note: Chapter 28 of the Acts of 2009, sections 17–20, repealed the existing state Open Meeting Law, G.L. c. 30A, §§ 11A, 11A-1/2, county Open Meeting Law, G.L. c. 34, §9F, 9G, and municipal Open Meeting Law, G.L. c. 39, §§ 23A, 23B, and 23C, and replaced them with a single Open Meeting Law covering all public bodies, G.L. c. 30A, §§ 18-25, enforced by the Attorney General.]

Section 18. Definitions applicable to secs. 18 to 25

Section 18. As used in this section and sections 19 to 25, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

“Deliberation”, an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that “deliberation” shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.

“Emergency”, a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

“Executive session”, any part of a meeting of a public body closed to the public for deliberation of certain matters.

“Intentional violation”, an act or omission by a public body or a member thereof, in knowing by violating the open meeting law.

“Meeting”, a deliberation by a public body with respect to any matter within the body's jurisdiction; provided, however, “meeting” shall not include:

- (a) an on-site inspection of a project or program, so long as the members do not deliberate;
- (b) attendance by a quorum of a public body at a public or private gathering, including a conference or training program or a media, social or other event, so long as the members do not deliberate;
- (c) attendance by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate;
- (d) a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it; or
- (e) a session of a town meeting convened under section 10 of chapter 39 which would include the attendance by a quorum of a public body at any such session.

“Minutes”, the written report of a meeting created by a public body required by subsection (a) of section 23 and section 5A of chapter 66.

“Open meeting law”, sections 18 to 25, inclusive.

“Post notice”, to display conspicuously the written announcement of a meeting either in hard copy or electronic format.

“Preliminary screening”, the initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview.

“Public body”, a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; provided, however, that the governing board of a local housing, redevelopment or other similar authority shall be deemed a local public body; provided, further, that the governing board or body of any other authority established by the general court to serve a public purpose in the commonwealth or any part thereof shall be deemed a state public body; provided, further, that “public body” shall not include the general court or the committees or recess commissions thereof, bodies of the judicial branch or bodies appointed by a constitutional officer solely for the purpose of advising a constitutional officer and shall not include the board of bank incorporation or the policyholders protective board; and provided further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.

“Quorum”, a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision.

Section 19. Division of open government; open meeting law training; open meeting law advisory commission; annual report

Section 19. (a) There shall be in the department of the attorney general a division of open government under the direction of a director of open government. The attorney general shall designate an assistant attorney general as the director of the open government division. The director may appoint and remove, subject to the approval of the attorney general, such expert, clerical and other assistants as the work of the division may require. The division shall perform the duties imposed upon the attorney general by the open meeting law, which may include participating, appearing and intervening in any administrative and judicial proceedings pertaining to the enforcement of the open meeting law. For the purpose of such participation, appearance, intervention and training authorized by this chapter the attorney general may expend such funds as may be appropriated therefor.

(b) The attorney general shall create and distribute educational materials and provide training to public bodies in order to foster awareness and compliance with the open meeting law. Open meeting law training may include, but shall not be limited to, instruction in:

- (1) the general background of the legal requirements for the open meeting law;
- (2) applicability of sections 18 to 25, inclusive, to governmental bodies;

(3) the role of the attorney general in enforcing the open meeting law; and

(4) penalties and other consequences for failure to comply with this chapter.

(c) There shall be an open meeting law advisory commission. The commission shall consist of 5 members, 2 of whom shall be the chairmen of the joint committee on state administration and regulatory oversight; 1 of whom shall be the president of the Massachusetts Municipal Association or his designee; 1 of whom shall be the president of the Massachusetts Newspaper Publishers Association or his designee; and 1 of whom shall be the attorney general or his designee.

The commission shall review issues relative to the open meeting law and shall submit to the attorney general recommendations for changes to the regulations, trainings, and educational initiatives relative to the open meeting law as it deems necessary and appropriate.

(d) The attorney general shall, not later than January 31, file annually with the commission a report providing information on the enforcement of the open meeting law during the preceding calendar year. The report shall include, but not be limited to:

- (1) the number of open meeting law complaints received by the attorney general;
- (2) the number of hearings convened as the result of open meeting law complaints by the attorney general;
- (3) a summary of the determinations of violations made by the attorney general;
- (4) a summary of the orders issued as the result of the determination of an open meeting law violation by the attorney general;
- (5) an accounting of the fines obtained by the attorney general as the result of open meeting law enforcement actions;
- (6) the number of actions filed in superior court seeking relief from an order of the attorney general; and
- (7) any additional information relevant to the administration and enforcement of the open meeting law that the attorney general deems appropriate.

Section 20. Meetings of a public body to be open to the public; notice of meeting; remote participation; recording and transmission of meeting; removal of persons for disruption of proceedings

Section 20. (a) Except as provided in section 21, all meetings of a public body shall be open to the public.

(b) Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.

(c) For meetings of a local public body, notice shall be filed with the municipal clerk and posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located.

For meetings of a regional or district public body, notice shall be filed and posted in each city or town within the region or district in the manner prescribed for local public bodies. For meetings of a regional school district, the secretary of the regional school district committee shall be considered to be its clerk and shall file notice with the clerk of each city or town within such district and shall post the notice in the manner prescribed for local public bodies. For meetings of a county public body, notice shall be filed in the office of the county commissioners and a copy of the notice shall be publicly posted in a manner conspicuously visible to the public at all hours in such place or places as the county commissioners shall designate for the purpose.

For meetings of a state public body, notice shall be filed with the attorney general and a duplicate copy of said notice shall be filed with the regulations division of the state secretary’s office by posting on a website in accordance with procedures established for this purpose.

The attorney general shall have the authority to prescribe or approve alternative methods of notice where the attorney general determines such alternative will afford more effective notice to the public.

(d) The attorney general may by regulation or letter ruling, authorize remote participation by members of a public body not present at the meeting location; provided, however, that the absent members and all persons present at the meeting location are clearly audible to each other; and provided, further, that a quorum of the body, including the chair, are present at the meeting location. Such authorized members may vote and shall not be deemed absent for the purposes of section 23D of chapter 39.

(e) After notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. At the beginning of the meeting the chair shall inform other attendees of any such recordings.

(f) No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.

(g) Within 2 weeks of qualification for office, all persons serving on a public body shall certify, on a form prescribed by the attorney general, the receipt of a copy of the open meeting law, regulations promulgated pursuant to section 25 and a copy of the educational materials prepared by the attorney general explaining the open meeting law and its application pursuant to section 19. Unless otherwise directed or approved by the attorney general, the appointing authority, city or town clerk or the executive director or other appropriate administrator of a state or regional body, or their designees, shall obtain such certification from each person upon entering service and shall retain it subject to the applicable records retention schedule where the body maintains its official records. The certification shall be evidence that the member of a public body has read and understands the requirements of the open meeting law and the consequences of violating it.

Section 21 Meeting of public body in executive session

Section 21. (a) A public body may meet in executive session only for the following purposes:

(1) To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties. A public body shall hold an open session if the individual involved requests that the session be open. If an executive session is held, such individual shall have the following rights:

- i. to be present at such executive session during deliberations which involve that individual;
- ii. to have counsel or a representative of his own choosing present and attending for the purpose of advising the individual and not for the purpose of active participation in the executive session;
- iii. to speak on his own behalf; and
- iv. to cause an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense.

The rights of an individual set forth in this paragraph are in addition to the rights that he may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements and the exercise or non-exercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

(2) To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;

(3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;

(4) To discuss the deployment of security personnel or devices, or strategies with respect thereto;

(5) To investigate charges of criminal misconduct or to consider the filing of criminal complaints;

(6) To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;

(7) To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;

(8) To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;

(9) To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that:

(i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and

(ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session; or

(10) to discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy.

(b) A public body may meet in closed session for 1 or more of the purposes enumerated in subsection (a) provided that:

(1) the body has first convened in an open session pursuant to section 21;

(2) a majority of members of the body have voted to go into executive session and the vote of each member is recorded by roll call and entered into the minutes;

(3) before the executive session, the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called;

(4) the chair shall publicly announce whether the open session will reconvene at the conclusion of the executive session; and

(5) accurate records of the executive session shall be maintained pursuant to section 23.

Section 22 Minutes of meetings

Section 22. (a) A public body shall create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meet-

ing, the decisions made and the actions taken at each meeting, including the record of all votes.

(b) No vote taken at an open session shall be by secret ballot. Any vote taken at an executive session shall be recorded by roll call and entered into the minutes.

(c) Minutes of all open sessions shall be created and approved in a timely manner. The minutes of an open session, if they exist and whether approved or in draft form, shall be made available upon request by any person within 10 days.

(d) Documents and other exhibits, such as photographs, recordings or maps, used by the body at an open or executive session shall, along with the minutes, be part of the official record of the session.

(e) The minutes of any open session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, shall be public records in their entirety and not exempt from disclosure pursuant to any of the exemptions under clause Twenty-sixth of section 7 of chapter 4. Notwithstanding this paragraph, the following materials shall be exempt from disclosure to the public as personnel information: (1) materials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation; and (2) materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any resume submitted by an applicant shall not be exempt.

(f) The minutes of any executive session, the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at the session, may be withheld from disclosure to the public in their entirety under subclause (a) of clause Twenty-sixth of section 7 of chapter 4, as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21.

When the purpose for which a valid executive session was held has been served, the minutes, preparatory materials and documents and exhibits of the session shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.

For purposes of this subsection, if an executive session is held pursuant to clause (2) or (3) of subsections (a) of section 21, then the minutes, preparatory materials and documents and exhibits used at the session may be withheld from disclosure to the public in their entirety, unless and until such time as a litigating, negotiating or bargaining position is no longer jeopardized by such disclosure, at which time they shall be disclosed unless the attorney-client privilege or 1 or more of the exemptions under said clause Twenty-sixth of said section 7 of said chapter 4 apply to withhold these records, or any portion thereof, from disclosure.

(g) (1) The public body, or its chair or designee, shall, at reasonable intervals, review the minutes of executive sessions to determine if the provisions of this subsection warrant continued non-disclosure. Such determination shall be announced at the body's next meeting and such announcement shall be included in the minutes of that meeting.

(2) Upon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body shall respond to the request within 10 days following receipt and shall release any such minutes not covered by an exemption under subsection (f); provided, however, that if the body has not performed a review pursuant to paragraph (1), the public body shall perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. A public body shall not assess a fee for the time spent in its review.

Section 23 *Enforcement of open meeting law; complaints; hearing; civil action*

Section 23. (a) Subject to appropriation, the attorney general shall interpret and enforce the open meeting law.

(b) At least 30 days prior to the filing of a complaint with the attorney general, the complainant shall file a written complaint with the public body, setting forth the circumstances which constitute the alleged violation and giving the body an opportunity to remedy the alleged violation; provided, however, that such complaint shall be filed within 30 days of the

date of the alleged violation. The public body shall, within 14 business days of receipt of a complaint, send a copy of the complaint to the attorney general and notify the attorney general of any remedial action taken. Any remedial action taken by the public body in response to a complaint under this subsection shall not be admissible as evidence against the public body that a violation occurred in any later administrative or judicial proceeding relating to such alleged violation. The attorney general may authorize an extension of time to the public body for the purpose of taking remedial action upon the written request of the public body and a showing of good cause to grant the extension.

(c) Upon the receipt of a complaint by any person, the attorney general shall determine, in a timely manner, whether there has been a violation of the open meeting law. The attorney general may, and before imposing any civil penalty on a public body shall, hold a hearing on any such complaint. Following a determination that a violation has occurred, the attorney general shall determine whether the public body, 1 or more of the members, or both, are responsible and whether the violation was intentional or unintentional. Upon the finding of a violation, the attorney general may issue an order to:

- (1) compel immediate and future compliance with the open meeting law;
- (2) compel attendance at a training session authorized by the attorney general;
- (3) nullify in whole or in part any action taken at the meeting;
- (4) impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation;
- (5) reinstate an employee without loss of compensation, seniority, tenure or other benefits;
- (6) compel that minutes, records or other materials be made public; or
- (7) prescribe other appropriate action.

(d) A public body or any member of a body aggrieved by any order issued pursuant to this section may, notwithstanding any general or special law to the contrary, obtain judicial review of the order only through an action in superior court seeking relief in the nature of certiorari; provided, however, that notwithstanding section 4 of chapter 249, any such action shall be commenced in superior court within 21 days of receipt of the order. Any order issued under this section shall be stayed pending judicial review; provided, however, that if the order nullifies an action of the public body, the body shall not implement such action pending judicial review.

(e) If any public body or member thereof shall fail to comply with the requirements set forth in any order issued by the attorney general, or shall fail to pay any civil penalty imposed within 21 days of the date of issuance of such order or within 30 days following the decision of the superior court if judicial review of such order has been timely sought, the attorney general may file an action to compel compliance. Such action shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets. If such body or member has not timely sought judicial review of the order, such order shall not be open to review in an action to compel compliance.

(f) As an alternative to the procedure in subsection (b), the attorney general or 3 or more registered voters may initiate a civil action to enforce the open meeting law.

Any action under this subsection shall be filed in Suffolk superior court with respect to state public bodies and, with respect to all other public bodies, in the superior court in any county in which the public body acts or meets.

In any action filed pursuant to this subsection, in addition to all other remedies available to the superior court, in law or in equity, the court shall have all of the remedies set forth in subsection (b).

In any action filed under this subsection, the order of notice on the complaint shall be returnable not later than 10 days after the filing and the complaint shall be heard and determined on the return day or on such day as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the

purposes of the open meeting law. In the hearing of any action under this subsection, the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by the open meeting law; provided, however, that no civil penalty may be imposed on an individual absent proof that the action complained of violated the open meeting law.

(g) It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel.

(h) Payment of civil penalties under this section paid to or received by the attorney general shall be paid into the general fund of the commonwealth.

Section 24 Investigation by attorney general of violations of open meeting law

Section 24. (a) Whenever the attorney general has reasonable cause to believe that a person, including any public body and any other state, regional, county, municipal or other governmental official or entity, has violated the open meeting law, the attorney general may conduct an investigation to ascertain whether in fact such person has violated the open meeting law. Upon notification of an investigation, any person, public body or any other state, regional, county, municipal or other governmental official or entity who is the subject of an investigation, shall make all information necessary to conduct such investigation available to the attorney general. In the event that the person, public body or any other state, regional, county, municipal or other governmental official or entity being investigated does not voluntarily provide relevant information to the attorney general within 30 days of receiving notice of the investigation, the attorney general may: (1) take testimony under oath concerning such alleged violation of the open meeting law; (2) examine or cause to be examined any documentary material of whatever nature relevant to such alleged violation of the open meeting law; and (3) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.

(b) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least 10 days prior to the date of such taking of testimony or examination.

(c) Service of any such notice may be made by: (1) delivering a duly-executed copy to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of such person; (2) delivering a duly-executed copy to the principal place of business in the commonwealth of the person to be served; or (3) mailing by registered or certified mail a duly-executed copy addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(d) Each such notice shall: (1) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (2) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (3) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (4) prescribe a return date within which the documentary material is to be produced; and (5) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(e) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(f) Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, how-

ever, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.

(g) At any time prior to the date specified in the notice, or within 21 days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

Section 25 Investigation by attorney general of violations of open meeting law

Section 25. (a) The attorney general shall have the authority to promulgate rules and regulations to carry out enforcement of the open meeting law.

(b) The attorney general shall have the authority to interpret the open meeting law and to issue written letter rulings or advisory opinions according to rules established under this section.

Open Meetings: Implementing Regulations

Code of Massachusetts Regulations (C.M.R.)

Title 940. Office of the Attorney General

Section 29. Open Meeting

§ 29.01: Purpose, Scope and Other General Provisions

(1) *Authority.* The Attorney General promulgates 940 CMR 29.00, relating to the Open Meeting Law, pursuant to M.G.L. c. 30A, § 25(a) and (b).

(2) *Purpose.* The purpose of 940 CMR 29.00 is to interpret, enforce and effectuate the purposes of the Open Meeting Law, M.G.L. c. 30A, §§ 18 through 25.

(3) *Severability.* If any provision of 940 CMR 29.00 or the application of such provision to any person, public body, or circumstances shall be held invalid, the validity of the remainder of 940 CMR 29.00 and the applicability of such provision to other persons, public bodies, or circumstances shall not be affected thereby.

(4) *Mailing.* All complaints, notices (except meeting notices) and other materials that must be sent to another party shall be sent by one of the following means: first class mail, email, hand delivery, or by any other means at least as expeditious as first class mail.

29.02: Definitions

As used in 940 CMR 29.00, the following terms shall, unless the context clearly requires otherwise, have the following meanings:

Commission means the Open Meeting Law Advisory Commission, as defined by M.G.L. c. 30A, § 19(c).

Emergency means a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

Intentional Violation means an act or omission by a public body, or a member of a public body, that knowingly violates M.G.L. c. 30A, §§ 18 through 25. Conduct in violation of

M.G.L. c. 30A, §§ 18 through 25, shall be considered evidence of an intentional violation where the body or member has previously been informed by receipt of a decision from a court of competent jurisdiction or advised by the Attorney General, pursuant to 940 CMR 29.07 or 940 CMR 29.08 that the conduct violates M.G.L. c. 30A, §§ 18 through 25.

Person means all individuals and entities, including governmental officials and employees.

Person does not include public bodies.

Post Notice means to place a written announcement of a meeting on a bulletin board, electronic display, website, cable television channel, newspaper or in a loose-leaf binder in a manner conspicuously visible to the public, including persons with disabilities, at all hours, in accordance with 940 CMR 29.03.

Public Body has the identical meaning as set forth in M.G.L. c. 30A, § 18, that is, a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose; provided, however, that the governing board of a local housing, redevelopment or similar authority shall be deemed a local public body; provided, further, that the governing board or body of any other authority established by the general court to serve a public purpose in the commonwealth or any part thereof shall be deemed a state public body; provided, further, that “public body” shall not include the general court or the committees or recess commissions thereof, bodies of the judicial branch or bodies appointed by a constitutional officer solely for the purpose of advising a constitutional officer and shall not include the board of bank incorporation or the policyholders protective board; and provided, further, that a subcommittee shall include any multiple-member body created to advise or make recommendations to a public body.

Qualification for Office means the election or appointment of a person to a public body and the taking of the oath of office, where required, and shall include qualification for a second or any subsequent term of office. Where no term of office for a member of a public body is specified, the member shall be deemed to be qualified for office on a biannual basis on January 1st of a calendar year beginning on January 1, 2011. Where a member’s term of office began prior to July 1, 2010, and will not expire until after July 1, 2011, the member shall be deemed to have qualified for office on January 1, 2011.

29.03: Notice Posting Requirements

(1) Requirements Applicable to All Public Bodies.

(a) Except in an emergency, public bodies shall file meeting notices sufficiently in advance of a public meeting to permit posting of the notice at least 48 hours in advance of the public meeting, excluding Saturdays, Sundays and legal holidays, in accordance with M.G.L. c. 30A, § 20. In an emergency, the notice shall be posted as soon as reasonably possible prior to such meeting.

(b) Meeting notices shall be printed or displayed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting. The list of topics shall have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting. The date and time that the notice is posted shall be conspicuously recorded thereon or therewith.

(c) Notices posted under an alternative posting method authorized by 940 CMR 29.03(2) through (5) shall include the same content as required by 940 CMR 29.03(1)(b). If such an alternative posting method is adopted, the municipal clerk, in the case of a municipality, or the body, in all other cases, shall file with the Attorney General written notice of adoption of the alternative method, including the website address where applicable, and any change thereto, and the most current notice posting method on file with the Attorney General shall be consistently used.

(2) Requirements Specific to Local Public Bodies.

(a) The municipal clerk, or other person designated by agreement with the municipal clerk, shall post notice of the meeting in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located. Such notice shall be accessible to the public in the municipal clerk’s office. If such notice is not conspicuously visible to the public during hours when the clerk’s office is closed, such notice shall also be made available through an alternative method prescribed or approved by the Attorney General under 940 CMR 29.03(2) (b)4. A description of such alternative method, sufficient to allow members of the public to obtain notice through such method, shall be posted in a manner conspicuously visible to the public at all hours on or adjacent to the main and handicapped accessible entrances to the municipal building in which the clerk’s office is located.

(b) For local public bodies, the Attorney General has determined, pursuant to M.G.L. c. 30A, § 20(c), that the following alternative methods will provide more effective notice to the public:

1. public bodies may post notice of meetings on the municipal website;
2. public bodies may post notice of meetings on cable television, AND, post notice or provide cable television access in an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

3. public bodies may post notice of meetings in a newspaper of general circulation in the municipality, AND, post notice or a copy of the newspaper containing the meeting notice at an alternate municipal building (e.g., police or fire station) where the notice is accessible at all hours;

4. public bodies may place a computer monitor or electronic or physical bulletin board displaying meeting notices on or in a door, window, or near the entrance of the municipal building in which the clerk’s office is located in such a manner as to be visible to the public from outside the building; or

5. public bodies may provide an audio recording of meeting notices, available to the public by telephone at all hours.

(3) Requirements Specific to Regional or District Public Bodies.

(a) Notice shall be filed and posted in each city and town within the region or district in the manner prescribed for local public bodies in that city or town.

(b) As an alternative method of notice, a regional or district public body may post a meeting notice on the regional or district public body’s website. A copy of the notice shall be filed and kept by the chair of the public body or the chair’s designee.

(4) Requirements Specific to Regional School Districts.

(a) The secretary of the regional school district committee shall be considered to be its clerk. The clerk of the regional school district shall file notice with the municipal clerk of each city and town within such district and each such municipal clerk shall post the notice in the manner prescribed for local public bodies in that city or town.

(b) As an alternative method of notice, a regional school district committee may post a meeting notice on the regional school district’s website. A copy of the notice shall be filed and kept by the secretary of the regional school district committee or the secretary’s designee.

(5) Requirements Specific to County Public Bodies.

(a) Notice shall be filed and posted in the office of the county commissioners and a copy of the notice shall be publicly posted in a manner conspicuously visible to the public at all hours in such place or places as the county commissioners shall designate for this purpose.

(b) As an alternative method of notice, a county public body may post a meeting on the county public body’s website. A copy of the notice shall be filed and kept by the chair of the county public body or the chair’s designee.

(6) *Requirements Specific to State Public Bodies.* Notice shall be posted on a website in accordance with procedures established by the Attorney General in consultation with the Information Technology Division of the Executive Office for Administration and Finance for the purpose of providing the public with effective notice. A copy of each notice shall also be sent by first class or electronic mail to the Secretary of State’s Regulations Division. The chair of each state public body shall notify the Attorney General in writing of its Internet notice posting location and any change thereto. The public body shall consistently use the most current notice posting method on file with the Attorney General.

29.04: Certification

(1) For local public bodies, a document including M.G.L. c. 30A, §§ 18 through 25; a document including 940 CMR 29.00; and educational materials prepared by the Attorney General explaining M.G.L. c. 30A, §§ 18 through 25, and its application, shall be delivered by the municipal clerk to each member of a public body, whether elected or appointed, upon taking the oath of office, if required, and in every case before entering into performance of the office. Within two weeks after receipt of such materials, the member shall certify, on the form prescribed by the Attorney General, receipt of such materials. The municipal clerk shall maintain the signed certification for each such person, indicating the date the person received the materials.

(2) For regional, district, county or state public bodies, a document including M.G.L. c. 30A, §§ 18 through 25; a document including 940 CMR 29.00; and educational materials prepared by the Attorney General explaining M.G.L. c. 30A, §§ 18 through 25, and its application, shall be delivered by the appointing authority, executive director or other appropriate administrator or their designees, to each member of a public

body, whether elected or appointed, upon taking the oath of office, if required, and in every case before entering into the performance of the office. Within two weeks after receipt of such materials, the member shall certify, on the form prescribed by the Attorney General, receipt of such materials. The appointing authority, executive director or other appropriate administrator, or their designees, shall maintain the signed certification for each such person, indicating the date the person received the materials.

29.05: Complaints

(1) All complaints shall be in writing, using the form approved by the Attorney General and available on the Attorney General's website. A public body need not, and the Attorney General will not, investigate or address anonymous complaints.

(2) Public bodies, or the municipal clerk in the case of a local public body, should provide any person, on request, with an Open Meeting Complaint Form. If a paper copy is unavailable, then the public body should direct the requesting party to the Attorney General's website, where an electronic copy of the form will be available for downloading and printing.

(3) For local public bodies, the complainant shall file the complaint with the chair of the public body, who shall disseminate copies of the complaint to the members of the public body. The complainant shall also file a copy of the complaint with the municipal clerk, who shall keep such filings in an orderly fashion for public review on request during regular business hours. For all other public bodies, the complainant shall file the complaint with the chair of the relevant public body, or if there is no chair, then with the public body. The complaint shall be filed within 30 days of the alleged violation of M.G.L. c. 30A, §§ 18 through 25, or if the alleged violation of M.G.L. c. 30A, §§ 18 through 25, could not reasonably have been known at the time it occurred, then within 30 days of the date it should reasonably have been discovered.

(4) The public body shall review timely complaints to ascertain the time, date, place and circumstances which constitute the alleged violation. If the public body needs additional information to resolve the complaint, then the chair may request it from the complainant within seven business days of receiving the complaint. The complainant shall respond within ten business days after he or she receives the request. The public body will then have an additional ten business days after receiving the complainant's response to review the complaint and take any remedial action pursuant to 940 CMR 29.05(5).

(5) Within 14 business days after receiving the complaint, unless an extension has been granted by the Attorney General as provided in 940 CMR 29.05(5)(a) and (b), the public body shall review the complaint's allegations; take remedial action, if appropriate; and send to the Attorney General a copy of the complaint and a description of any remedial action taken. The public body shall simultaneously notify the complainant that it has sent such materials to the Attorney General and shall provide the complainant with a copy of the description of any remedial action taken.

(a) Any remedial action taken by the public body in response to a complaint under 940 CMR 29.05(5) shall not be admissible as evidence that a violation occurred in any later administrative or judicial proceeding against the public body relating to the alleged violation.

(b) If the public body requires additional time to resolve the complaint, it may obtain an extension from the Attorney General by submitting a written request within 14 business days after receiving the complaint. The Attorney General will grant an extension if the request demonstrates good cause. Good cause will generally be found if, for example, the public body cannot meet within the 14 business day period to consider proposed remedial action. The Attorney General shall notify the complainant of any extension and the reason for it.

(6) If at least 30 days have passed after the complaint was filed with the public body, and if the complainant is unsatisfied with the public body's resolution of the complaint, the complainant may file a complaint with the Attorney General. When filing a complaint with the Attorney General, the complainant shall include a copy of the original complaint along with any other materials the complainant believes are relevant. The Attorney General may decline to investigate complaints filed with the Attorney General more than 90 days after the alleged violation of M.G.L. c. 30A, §§ 18 through 25, unless an extension was granted to the public body or the complainant demonstrates good cause for the delay.

(7) The Attorney General shall acknowledge receipt of all complaints and will resolve them within a reasonable period of time, generally 90 days. If additional time is necessary to resolve a particular complaint, the Attorney General will notify the complainant and the public body.

(8) If a complaint appears untimely, is not in the proper form, or is missing information, the Attorney General shall return the complaint to the complainant within 14 business days of its receipt, noting its deficiencies. The complainant shall then have 14 business days to correct the deficiencies and resubmit the complaint to the Attorney General. If the deficiencies are not corrected, no further action on the complaint will be taken by the Attorney General.

29.06: Investigation

Whenever the Attorney General has reasonable cause to believe that a violation of M.G.L. c. 30A, §§ 18 through 25, has occurred that has not been adequately remedied, then the

Attorney General may conduct an investigation.

(1) The Attorney General shall notify the public body or person that is the subject of a complaint and an investigation of the existence of the investigation within a reasonable period of time. The Attorney General shall also notify the public body or person of the nature of the alleged violation.

(2) Upon notice of the investigation, the subject of the investigation shall provide the Attorney General with all information relevant to the investigation. The subject may also submit a memorandum or other writing to the Attorney General, addressing the allegations being investigated.

If the subject of the investigation fails to voluntarily provide the necessary or relevant information within 30 days of receiving notice of the investigation, the Attorney General may issue subpoenas to obtain the information in accordance with M.G.L. c. 30A, § 24, to:

(a) Take testimony under oath;

(b) Examine or cause to be examined any documentary material; or

(c) Require attendance during such examination of documentary material by any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material.

Any documentary material or other information produced by any person pursuant to

940 CMR 29.06 shall not, unless otherwise ordered by a court of the Commonwealth for good cause shown, be disclosed without that person's consent by the Attorney General to any person other than the Attorney General's authorized agent or representative. However, the Attorney General may disclose the material in court pleadings or other papers filed in court; or, to the extent necessary, in an administrative hearing or other action taken to conduct or resolve the investigation pursuant to 940 CMR 29.00.

29.07: Resolution

(1) *No Violation.* If the Attorney General determines, after investigation, that M.G.L. c. 30A, §§ 18 through 25, has not been violated, the Attorney General shall terminate the investigation and notify, in writing, the subject of the investigation and any complainant.

(2) *Violation Resolved Without Hearing.* If the Attorney General determines after investigation that M.G.L. c. 30A, §§ 18 through 25, has been violated, the Attorney General may resolve the investigation without a hearing. The Attorney General shall determine whether the relevant public body, one or more of its members, or both, were responsible, and whether the violation was intentional or unintentional. The Attorney General will notify, in writing, any complainant of the investigation's resolution. Upon finding a violation of the M.G.L. c. 30A, §§ 18 through 25, the Attorney General may take one of the following actions:

(a) *Informal Action.* The Attorney General may resolve the investigation with a telephone call, letter or other appropriate form of communication that explains the violation and clarifies the subject's obligations under M.G.L. c. 30A, §§ 18 through 25, providing the subject with a reasonable period of time to comply with any outstanding obligations.

(b) *Formal Order*: The Attorney General may resolve the investigation with a formal order. The order may require:

1. immediate and future compliance with M.G.L. c. 30A, §§ 18 through 25;
2. attendance at a training session authorized by the Attorney General;
3. that minutes, records or other materials be made public; or
4. other appropriate action.

Orders shall be available on the Attorney General's website.

(3) *Violation Resolved After Hearing*. The Attorney General may conduct a hearing where the Attorney General deems appropriate. The hearing shall be conducted pursuant to 801 CMR 1.00, *et seq.*, as modified by any regulations issued by the Attorney General. At the conclusion of the hearing, the Attorney General shall determine whether a violation of M.G.L. c. 30A, §§ 18 through 25, occurred, whether the public body, one or more of its members, or both, were responsible, and whether the violation was intentional or unintentional. The Attorney General will notify, in writing, any complainant of the investigation's resolution. Upon a finding that a violation occurred, the Attorney General may order:

- (a) immediate and future compliance with M.G.L. c. 30A, §§ 18 through 25;
- (b) attendance at a training session authorized by the Attorney General;
- (c) nullification of any action taken at the relevant meeting, in whole or in part;
- (d) imposition of a fine upon the public body of not more than \$1,000 for each intentional violation;
- (e) that an employee be reinstated without loss of compensation, seniority, tenure or other benefits;
- (f) that minutes, records or other materials be made public; or

(g) other appropriate action.

Orders issued following a hearing shall be available on the Attorney General's website.

(4) A public body or any member of a body aggrieved by any order issued by the Attorney General under 940 CMR 29.07 may obtain judicial review of the order through an action in Superior Court seeking relief in the nature of certiorari. Any such action must be commenced in Superior Court within 21 days of receipt of the order.

29.08: *Advisory Opinions*

The Attorney General may issue advisory opinions on request or at his or her own initiative to provide guidance to public bodies and the public on changes to M.G.L. c. 30A, §§ 18 through 25, court decisions interpreting M.G.L. c. 30A, §§ 18 through 25, or other developments concerning M.G.L. c. 30A, §§ 18 through 25.

(1) The Attorney General shall ordinarily make a draft advisory opinion available for comment on the Attorney General's website at least 60 days prior to the planned issuance of the opinion. Notice of the posting shall be provided to the Commission.

(2) Comments on the draft advisory opinion shall be submitted, in writing, to the Attorney

General at least 30 days prior to the planned issuance of the opinion.

(3) Action taken by a public body in good faith compliance with an advisory opinion, provided that the circumstances are not materially different, shall not constitute an intentional violation of M.G.L. c. 30A, §§ 18 through 25.

29.09: *Other Enforcement Actions*

Nothing in 940 CMR 29.06 or 29.07 shall limit the Attorney General's authority to file a civil

action to enforce M.G.L. c. 30A, §§ 18 through 25 pursuant to M.G.L. c. 30A, § 23(f).

REGULATORY AUTHORITY: 940 CMR 29.00: M.G.L. c. 30A, § 25(a) and (b).