A Guide to the Massachusetts Public Records Law

Published by
William Francis Galvin
Secretary of the Commonwealth
Public Records Division

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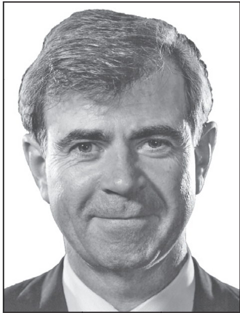

The founding fathers of our nation strove to develop an open government formed on the principles of democracy and public participation. An informed citizen is better prepared to take part in that process. For this reason, the Commonwealth of Massachusetts has had a law mandating the disclosure of public records since 1851. Early versions of this law basically provided a list of government records which were to be publicly available. In 1973, and in response to the Watergate scandal, Congress passed the federal Freedom of Information Act, in order to make government records more accessible to the general public. The Massachusetts Legislature then revised the Public Records Law to parallel that federal law, by adopting certain provisions, and rejecting others. Every government record is now presumed to be public unless it is subject to an exemption.

As Secretary of the Commonwealth and chief public information officer for the Commonwealth, I am pleased to publish this booklet explaining the Public Records Law. The full text of the law is provided, as well as a brief description of each of the exemptions to the law. I have also included a section of commonly asked questions about a requester's rights to access public records, as well as a government custodian's duty to respond to those requests. Any additional questions regarding the Public Records Law should be directed to the Public Records Division at: (617) 727-2832 during regular business hours. You may also access various Public Records Division publications through the Internet at: www.sec.state.ma.us/pre.

William Francis Galvin

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Secretary of the Commonwealth

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Published by
William Francis Galvin
Secretary of the Commonwealth
Public Records Division
One Ashburton Place, Room 1719
Boston, MA 02108
Telephone: (617) 727-2832
Fax: (617) 727-5914
Website: www.sec.state.ma.us/pre

Commonly Asked Questions

Do I contact the Division of Public Records to obtain copies of public records?

The Division of Public Records (Division) is not a warehouse for all government records. The only records that are kept in the Division are those that are essential to the business operations of the Division. The Division of Public Records and specifically, the Supervisor of Public Records (Supervisor), is empowered to determine the public records status of government records. However, the Supervisor does not have jurisdiction over records held by federal agencies, the Legislature or the courts of the Commonwealth.

To obtain copies of records, you must first make a request to the state or local agency, board, or other government entity that has the records you are interested in. For example, if you are interested in obtaining a copy of the minutes of an open meeting of a local board, you should direct your request to that board. Similarly, a request for a copy of the police log would be directed to the appropriate police department.

A custodian has ten (10) calendar days to respond to your request. A failure to respond within the allotted time period, or a denial in writing from the custodian, allows a requester to appeal to the Supervisor of Public Records. In order to appeal to the Supervisor, you must send a copy of your request letter, with copies of any correspondence provided by the custodian within ninety (90) days. An administrative appeal will then be opened. If the Supervisor determines that the records are public, he or she may order the custodian to provide the records, if necessary.

I received a response to my request within ten days, but it only said that the custodian was in the process of gathering the records. How long must I wait to receive the records I am looking for?

The custodian's written response, made within ten days of the request, must be either an offer to provide the requested materials or a written denial. A denial must detail the specific legal basis for withholding the requested materials. Requesters are free to file an appeal with the Public Records Division if they do not receive the records within the ten (10) day period, or if they dispute the custodian's written denial.

Can you tell me which records held by my local town hall should be made available upon request?

Every record made or received by a government entity is presumed to be a public record, unless it is subject to an exemption. The exemptions to the Public Records Law are described in this booklet. The custodian has the burden of claiming an exemption and showing why it applies. In other words, if you request certain records from a local official, there is a presumption that the record is public. The local official should either give you a copy of the requested record, or provide you with an explanation of why it is not public. You may appeal a decision that the record is not public in the manner described above.

Do I have to put my request for public records in writing?

No. An oral request, made in person (not by telephone) is valid under the Public Records Law. However, in order to appeal the custodian's failure to provide copies or access to records, your original request must be in writing. For this reason, it is advisable to put your request in writing. A written request that is clear and concise also helps the custodian to respond to your request in a timely and efficient manner.

There isn't a specific form that must be used to request records, nor is there any language which must be included in your request. A request for access to, or copies of, government records sent to a record custodian should be treated as a public records request.

I asked a local official a question about his office, but he didn't answer. Can I appeal his refusal under the Public Records Law?

No. The Public Records Law only applies to records that are in existence and in the custody of a government official. This means that an official is not required to answer questions, nor is he required to create a record in response to a request. However, if you request documents from that official and he does not respond, you may appeal that denial in the manner described above.

How much may a custodian charge for copies of public records?

Unless specifically addressed by statute, a custodian may charge twenty cents ($0.20) a page for photocopies, twenty-five cents ($0.25) a page for microfilm copies and fifty cents ($0.50) a page for computer printouts. The actual cost incurred by the custodian may be charged for records "not susceptible to ordinary means of reproduction," such as computer records, or over-sized documents.

A custodian may also charge for the time it takes to search for the records, remove any exempt data, photocopy the record and refile it. The charge for this process must be the prorated hourly wage of the lowest paid employee capable of performing the task. A custodian may waive the fees whenever he or she chooses, but is not mandated to do so. A custodian should also provide a written, good faith estimate for the cost of complying with a request where the total cost is expected to exceed ten dollars ($10.00). The estimate should provide a breakdown of the expected expenses.

Examples of statutes that establish fees for specific public records include: G. L. c. 66, § 10(a) (copies of police records), and G. L. c. 262, § 38 (copies of records at the Registry of Deeds).

I did not receive an estimate for the cost of responding to my request; does that mean I get the records for free?

No. Regulations require that a custodian provide a written, good faith estimate for the cost of complying with a public records request when the cost of compliance is expected to exceed ten dollars ($10.00). The purpose of this requirement is two fold. First, it lets the requester know how much money is involved in responding to the request. In cases where the cost is more money than expected, a requester

may want to limit his request. Second, an estimate helps the custodian by making it clear how much work is involved in compliance. A custodian may require prepayment of this fee prior to beginning the process of compiling the records. There are no sanctions in the law, however, for a failure to provide an estimate.

I do not wish to receive copies of records, only review them in the custodian's office. May the custodian still charge me a fee?

Yes. While there will be no fee for copying, the custodian may charge the search and segregation time fees as described above.

The custodian told me that I must pay for the records before I receive them. Can they do this?

Yes. A custodian may insist on pre-payment of the statutory fees before they begin the process of compiling the requested records.

Do minutes of open meetings of local boards or commissions have to be approved before they can be made available to the public?

No. Minutes of open meetings become public upon creation. There is no requirement that these minutes be approved before they are made available to the public. A board or commission is advised to mark copies of minutes not yet approved as "draft" minutes, however, it cannot withhold those minutes from disclosure. If the minutes are not transcribed at the time a request is made, there is no requirement under the Public Records Law that the board transcribe those minutes in response to a request. However, the audio tape of the meeting or any notes taken by the recording secretary (including shorthand notes) are public records.

Any questions regarding the content of minutes, requirements to keep minutes or any procedural aspects of the Open Meeting Law should be addressed to the local District Attorney.

Does the Public Records Law apply to computer records?

Yes. The term "public records" is defined by statute to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any municipality or agency of the Commonwealth, unless falling within a statutory exemption. Therefore, the Public Records Law clearly applies to government records generated, received, or maintained electronically, including computer records, electronic mail, video and audio tapes.

I am the subject of the record; doesn't that give me greater access rights to records about my case?

No. Under the Public Records Law, every requester is treated equally. A person who is the subject of the particular record is not granted any greater access rights to records than any other person.

Do I have to tell the custodian what I plan to do with the records once he provides me with copies?

No. A custodian cannot ask a requester why he or she wants specific records or what he or she plans to do with the records once received.

I am a custodian who has received a request for records but I can't figure out what type of records the requester is looking for. What should I do?

A custodian is required to use his or her superior knowledge of the records to determine which records are responsive to a request. However, a requester should provide a reasonable description of the desired records. You should inform the requester that you are unable to identify responsive records when you receive a request that is too vague. However, a request that is broad or voluminous is valid.

As stated above, the Public Records Law only applies to records that are in existence and in the custody of a government agency. Therefore, a custodian is not required to create records in response to a request. A custodian may create a record in response, but he or she is not required to do so.

I am a custodian who has received a request for records that I don't have, but I do have some of the information the requester is seeking in a different form. What should I do?

A custodian should fulfill a request to the extent possible under the law. If a requester asks for a list of all houses built in 1972, and such list does not exist, the custodian does not have to create such a list. However, if the custodian does have a list of all houses built from 1970 through 1975, the custodian should offer to provide that list instead.

Overview of the Massachusetts Public Records Law

The Massachusetts Public Records Law provides that every person has an absolute right of access to public information.[1] This right of access includes the right to inspect, copy or have copies of records provided upon the payment of a reasonable fee.[2]

The Massachusetts General Laws broadly define "public records" to include all documentary materials or data, regardless of physical form or characteristics, which are made or received by any officer or employee of any Massachusetts governmental entity.[3] As a result, all photographs, papers and electronic storage media including electronic mail of which a governmental employee is the "custodian" constitute "public records."[4] There are, however, fifteen narrowly construed exemptions to this broad definition of "public records."[5] This booklet will briefly review the application of these exemptions as well as explore some of the other issues that arise when a request is made for access to government records.

The Request

There are no strict rules that govern the manner in which requests for public information should be made. Requests may be oral or written and may be made in person, through the mail, by facsimile, or through electronic mail.[6] A requester is not required to specifically identify a particular record: any request which provides the custodian with a reasonable description of the desired information is sufficient.[7] A custodian is expected to use his superior knowledge of the records in his custody to assist the requester in obtaining the desired information.[8]

The Response

All requests must receive a response as soon as practicable, without unreasonable delay and always within ten (10) days.[9] The response must be either an offer to provide the requested materials or a written denial. A denial must detail the specific basis for withholding the requested materials.[10] The denial must include a citation to one of the fifteen statutory exemptions upon which the custodian relies, and must explain why the exemption applies.[11] Finally, a denial must also advise the requester of his right to seek redress through the administrative process provided by the Office of the Supervisor of Public Records.[12]

The mandatory disclosure provision of the Public Records Law only applies to information that is in the custody of the governmental entity at the time the request is received.[13] Consequently, there is no obligation to create a record for a requester or to honor prospective requests. It should be noted, however, that the Regulations do not prohibit a custodian from responding to such requests. The custodian has discretion in whether or not he/she wants to produce a record in the manner in which it was requested, and may charge a reasonable fee for creation of such a record. In creating a new record, the custodian may only charge a fee for the creation of this record on a one-time basis. Any costs recoverable due to subsequent requests for this record can only be assessed for production of copies.

Inquiries into a requester's status or motivation for seeking information are expressly prohibited.[14] Consequently, all requests for public records, even if made for a commercial purpose or to assist the requester in a lawsuit against the holder of the records, must be honored in accordance with the prescriptions of the Public Records Law.

Fees

A custodian is allowed to charge a reasonable fee to recover the costs of complying with a public records request.[15] It should be noted that a custodian is encouraged, but not mandated, to waive fees where disclosure is in the public interest.[16] Please be advised that the Supervisor does not have the authority to order a waiver of fees. If a custodian chooses to assess a fee, he or she must do so in accordance with any applicable statutory provisions, the Public Records Access Regulations (Regulations), or an enabling provision of a state agency.[17]

Search and Segregation Time

The Regulations provide that, for performing a search for requested records or segregating exempt information from non-exempt information that is contained in a requested record, a custodian may charge a pro-rated fee based on the hourly rate of the lowest paid employee who is capable of performing the task.[18] "Search time" is limited to the time needed to locate a requested record, pull it from the files, copy it and return it to the files.[19] "Segregation time" is limited to the time needed to delete exempt items from a requested record.[20]

Charges for Search and Segregation Time

The Supervisor will presume that the lowest paid employee in an agency is capable of performing "search and segregation time." Accordingly, except

where exceptional circumstances are present, it is expected that the hourly rate of the lowest paid office employee will be used to calculate "search and segregation time." In some circumstances, the lowest paid office employee may not have the knowledge or experience required to segregate the exempt information from the non-exempt information contained in a requested record. Usually, guidance on the application of the relevant exemptions can be provided to the lowest paid employee. In very complex or difficult cases, however, the hourly rate of the lowest paid employee who has the necessary knowledge or experience may be used to determine the fee for "segregation time."

Fee for Copies

In addition to the labor fees, a twenty cents ($0.20) per page copying fee may be assessed for a photocopy.[21] When the request is for materials that are not susceptible to ordinary means of reproduction, such as photographs or computer tapes and diskettes, the actual cost of reproduction may be assessed to the requester.[22] The fee for a computer printout, however, is fifty cents ($0.50) per page.[23] The custodian may assess a reasonable fee, using the hourly rate of the lowest paid employee within that department, for the time spent in generating the responsive record. There are also specific statutes which establish fees for copies of public records.[24]

The Exemptions to the Public Records Law (with examples)

The statutory definition of "public records" contains fifteen (15) exemptions that provide bases for withholding records in whole or in part.[25] The exemptions are strictly and narrowly construed, and are discretionary in nature.[26] Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted.[27] A review of the appropriate applications of the exemptions follows.

Exemption (a) – The Statutory Exemption

Exemption (a), also known as the statutory exemption, provides a basis for withholding from disclosure those documents which are:

> *specifically or by necessary implication exempted from disclosure by statute.*[28]

A government entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon

expressly states or necessarily implies that the public's right to inspect records under the Public Records Law is restricted.[29]

Essentially, the exemption creates two categories of exempt records: (1) records that are specifically exempted from disclosure and (2) those that are exempt by necessary implication.[30] Statutes which specifically exempt a record are those which expressly state that a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."[31]

Statutes which exempt records by necessary implication contain language which expressly limits the dissemination of particular records to a defined group of individuals or entities.[32] It should be noted that a statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; it must expressly limit access to the listed individuals or entities.

For example: G. L. c. 111, § 70 expressly states that hospital records are not public. G. L. c. 6, § 167 states, "Criminal Offender Record Information (CORI)…can only be disseminated to: criminal justice agencies…"

Please reference the last pages of this Guide for further examples of statutes which specifically exempt records from disclosure.

Exemption (b)

Exemption (b) applies to those records that are:

> *related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding*.[33]

There are no authoritative Massachusetts decisions interpreting exemption (b). The general purpose of the cognate federal exemption, however, is merely to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public cannot reasonably be expected to have a legitimate interest.[34] Materials relating to matters such as personnel's use of parking facilities, regulation of lunch hours and statements of policies concerning sick leave are examples of the types of records to which the federal exemption applies.[35]

The language of the federal provision is duplicated in the first clause of

exemption (b). The second clause of exemption (b), however, contains language which requires a more restrictive application. The addition of the qualifying second clause of exemption (b) evidences a legislative intent to create an exemption that is narrower in scope than the previously enacted, parallel federal exemption.[36] The analysis employed by the federal courts requires a two-pronged test. The requested material is exempt if it is predominantly used internally and if disclosure would significantly risk circumvention of agency regulations or statutes.

In Massachusetts, for exemption (b) to apply, a record custodian must not only demonstrate that the records not only relate solely to the internal personnel practices of the government entity, but also that proper performance of necessary government functions will be inhibited by disclosure.

For example: Are Department of Correction records concerning internal investigations, including "Inner Perimeter Security" reports and incident reports public? No. One of the Department's primary functions is to maintain secure penal institutions. Part of that function is the classification of prisoners who may pose a threat to an institution's security. Information regarding the procedures used by correctional officers during law enforcement efforts relates solely to the internal workings of the Department. Moreover, disclosure of this information could prove detrimental to the Department's law enforcement efforts, as knowledge of the Department's Security Threat Group determination procedures could enable an inmate to circumvent such procedures. Accordingly, exemption (b) will allow the Department to withhold the requested reports.

Exemption (c) – The Privacy Exemption

Exemption (c), the privacy exemption, is the most frequently invoked exemption. The language of the exemption limits its application to:

> *personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy*.[37]

The privacy exemption contains two distinct and independent clauses, each requiring its own analysis.[38] The <u>first clause</u> creates a categorical exemption for personnel and medical information which relates to an identifiable individual and is of a "personal nature."[39] As a general rule, medical information will always be of a sufficiently personal nature to warrant exemption.[40] Any personnel information which is useful in making employment decisions regarding an employee is sufficiently personal to be exempt pursuant to the

first clause.[41] Such information includes employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information.[42]

However, recent court decisions have distinguished "personnel records" from "internal affairs" records. The Appeals Court of Massachusetts held that materials in a police internal affairs investigation are different in kind from the ordinary evaluations, performance assessments and disciplinary determinations encompassed in the public records exemption for personnel file or information.[43] The Court held that officers' reports, witness interview summaries, and the internal affairs report itself do not fall within the personnel information exemption, as these documents relate to the workings and determinations of the internal affairs process whose quintessential purpose is to inspire public confidence.[44]

Please note that administrative information typically contained in an employee's personnel file, such as an employee's name, home address, and date of birth, is not personnel information which is sufficiently personal to be exempt.[45] Further, public employees have a diminished expectation of privacy in matters relating to their public employment.[46] Consequently, the public will have greater access to information that relates to an individual's public employment than to the same individual's private activities.[47] For example, an individual's public employment salary is a public record but the source or amount of private income generally is not public information.[48]

The second clause of the privacy exemption applies to requests for records that implicate privacy interests but do not involve personnel and medical records. Its application is limited to "intimate details of a highly personal nature."[49] Examples of "intimate details of a highly personal nature" include marital status, paternity, substance abuse, government assistance, family disputes and reputation.[50] Portions of records containing such information are exempt unless there is a paramount public interest in disclosure.[51] Therefore, when applying the second clause of the exemption to requested records it is necessary to perform a *two-step analysis*: first, determine whether the information constitutes an "intimate detail of a highly personal nature"; and second, determine whether the public interest in disclosure outweighs the privacy interest associated with disclosure of the highly personal information. Consequently, the application of the second clause of the exemption can only be determined on a case-by-case basis.

For example: Can a public employee's resume, employment application,

and work evaluation be disclosed? No. Disclosure of the requested records may implicate the employee's privacy interests. Under the first clause of exemption (c) personnel and medical files or information which is of a personal nature and which relates to a specifically named individual may be withheld. Further, a Massachusetts Supreme Judicial Court (Court) decision held that personnel information which is "useful in making employment decisions regarding an employee" may be withheld pursuant to exemption (c).[52] The Court defined those records which may be withheld as personnel information to include, "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee."[53] Therefore, the custodian may properly withhold the resume, employment application and work evaluation under exemption (c).

For example: Are the names and addresses of customers of a municipally owned utility public? Yes. Only the second clause of exemption (c) is relevant in this case. The analysis is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. The second clause only applies to "intimate details of a highly personal nature." First, the names and addresses of Massachusetts residents over seventeen (17) years of age are not intimate details of a highly personal nature, because they are available in other venues, such as street lists. Second, the fact that the information may be derived elsewhere reduces the expectation of privacy. Names and addresses of individuals are generally available through telephone directories. Since neither the names nor the addresses of the customers are intimate details of a highly personal nature, the balancing test between individual's privacy interests and the public interest in disclosure does not apply. The records cannot be withheld under exemption (c).

Exemption (d)—the Deliberative Process Exemption

Exemption (d), the deliberative process exemption, provides a limited executive privilege for policy development. It applies to:

> *inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this sub-clause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.*[54]

The exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. Therefore, its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process.[55] Purely factual matters used in the development

of government policy are always subject to disclosure.[56] Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials.[57] Therefore, only those portions of materials that possess a deliberative or policymaking character and relate to an ongoing deliberative process are exempt from mandatory disclosure.

For example: Is a town's appraisal report, which was prepared for the purpose of litigation before the Appellate Tax Board, a public record? No. The report may be characterized as a proposal that presents recommendations as to a certain course of action or position to be taken by the town. As long as the town is still negotiating a settlement, the deliberative process has not been concluded and the report may be withheld under exemption (d).

Exemption (e)

Exemption (e) allows the withholding of:

> *notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit*.[58]

The application of exemption (e) is limited to records that are work-related but can be characterized as personal to an employee. Materials that are covered by the exemption include personal reflections on work-related activities and notes created by an employee to assist him in preparing reports for other employees or for the files of the governmental entity. Clearly, however, the exemption may not be used to withhold any materials that are shared with other employees or are being maintained as part of the files of a governmental unit.[59]

For example: A requester sought all documents from a government entity relative to a particular issue. The responsive records included personal notes of the government entity's employee. Are these notes public? No. The notes were personal in nature, kept by the employee merely to assist him in preparing reports, were not shared with anyone in the department, and were not maintained as part of the department's files.

For example: Are handwritten shorthand notes taken by the Secretary of a Board of Selectman at a public/open meeting a public record? Yes. The notes are not personal in nature simply because they contain the Secretary's subjective impressions of the Board meeting. The notes cannot be considered merely a reference to assist the Secretary in fulfilling his duties, but rather the notes

comprise a government file itself. Where longhand notes of open meetings have been taken by secretaries, it has been held that the notes are public at the time that they are created. In a sense, the notes are minutes even though not approved yet. Accordingly, exemption (e) does not provide a basis for withholding the shorthand notes.

Exemption (f) - The Investigatory Exemption

Exemption (f), the investigatory exemption, provides a basis for withholding:

> *investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.*[60]

The exemption allows investigative officials to withhold materials which could compromise investigative efforts if disclosed. There is no blanket exemption, however, for records created or maintained by investigative officials.[61] Therefore, a custodian must demonstrate a prejudice to investigative efforts in order to withhold requested materials. Accordingly, any information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Also, any confidential investigative techniques may be withheld indefinitely since their disclosure would prejudice future law enforcement efforts.[62]

The exemption is also designed to allow investigative officials to provide an assurance of confidentiality to private citizens so that they will speak openly about matters under investigation.[63] Accordingly, any details in witness statements, which if released create a grave risk of directly or indirectly identifying a private citizen who volunteers as a witness are indefinitely exempt.[64]

For example: Can an incident report kept by a police department be released to a requester when the requester is familiar with the individuals who were involved in the incident(s) noted in the report? No. Usually, a police incident report can be released to a requester after the custodian has redacted the exempt portions from the record, such as, medical information and witness statements. However, in this case, it is not possible to redact the report in a manner as to avoid indirect identification of the voluntary witness and complainant. Therefore, exemption (f) allows withholding of the entire record.

For example: Can records of a current grand jury investigation be released? No. Grand jury investigations are required to remain secret in order to protect the investigatory functions of the grand jury. The rationale for such secrecy is to encourage full and free disclosure of information concerning the commission of a crime, and to allow the utmost freedom of deliberation to the grand jury. Can the grand jury minutes be released if the investigation is closed? No. The minutes may still be withheld from disclosure as they contain witness statements in the form of testimony. The grand jury process is dependent upon people coming forward and testifying freely. Accordingly, both the records of the open and closed investigations by the grand jury may be withheld under exemption (f).

Exemption (g)

Exemption (g) applies to:

> *trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit.*[65]

To properly claim exemption (g), the custodian must meet all six criteria contained in the exemption: (1) trade secrets or commercial or financial information; (2) voluntarily provided to a government entity; (3) for use in developing government policy; (4) upon an assurance of confidentiality; (5) information not submitted by law; and (6) information not submitted as a condition of receiving a governmental benefit. Consequently, where trade secrets or commercial or financial information are provided to the government in connection with a contract bid or in compliance with a filing requirement the exemption will not allow the withholding of the information.[66]

For example: Is a Memorandum submitted as an exhibit in a hearing before the Securities Division of the Secretary of the Commonwealth Office public? Yes. In this case, the entity did not satisfy all six criteria of exemption (g). Only the first criteria was met as the Memorandum contained commercial information. The other criteria were not met as the Memorandum was not voluntarily submitted, nor was it provided for use in developing government policy, or upon a promise of confidentiality, nor was it submitted to the Division pursuant to a statutory requirement or as a condition of receiving a governmental benefit. Therefore, as only one out of the six criteria were met, exemption (g) does not

apply to withhold the Memorandum from disclosure.

Exemption (h)

Exemption (h) is designed to ensure the integrity of processes used by government to procure goods and services by allowing a custodian to withhold the proposals of early bidders from other interested parties.[67] Specifically, it allows custodians to withhold:

> *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 toward a contract to, a particular person.*[68]

The exemption addresses two types of records, each with its own time frame. Proposals and bids are exempt from disclosure until the deadline for their submission passes. This prevents late bidders from gaining an unfair competitive advantage over early bidders. The limitation on the duration of the exemption provides the public with an opportunity to review the rejected proposals to ensure that tax dollars are wisely spent. The second clause of the exemption is similar to exemption (d) in its application.[69] It allows government officials to review bids and proposals in an insulated environment, but also provides for public review of all evaluative materials once a decision is made either to enter into negotiations with the successful bidder or to award the contract.

For example: At what point do bids and evaluations related to a project become public? Exemption (h) applies only until the time that evaluations are completed and a decision to enter into negotiations has been made. Once that occurs, the records are no longer under the protection of exemption (h) and should be disclosed.

Exemption (i)

Exemption (i) recognizes the need for confidentiality for those real estate appraisals relating to parcels which the government seeks to obtain either through a purchase or an eminent domain proceeding. Its application, however, is limited to a defined time period. Specifically, the exemption applies to:

> *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.*[70]

The exemption applies to any estimation of value of property which involves an expert opinion.[71] It allows the government to be in the same position in a land deal as any private party. Obviously, parties to a land deal could be at a bargaining disadvantage if required to disclose their appraisals of the subject parcel. The exemption ensures that the government will not be at a bargaining disadvantage by allowing the other party to use the Public Records Law to gain access to an appraisal prior to completion of negotiations or litigation.

For example: A city housing authority entered into an agreement with a property owner in which the owner agreed to forgo all possible eminent domain claims against the authority. May the housing authority continue to claim that the appraisal of the property cannot be disclosed under exemption (i)? No. If any of the conditions of exemption (i) have been satisfied, then the appraisal should be released. Exemption (i) does not permit the withholding of appraisals until such time as all three of the provisions of the exemption have been satisfied. The language of the statute is clear that the three provisions are alternative rather than requisite conditions. Therefore, once one of the three alternatives has occurred, exemption (i) will no longer allow the withholding of the subject appraisal. As a final agreement has been reached by the parties regarding the property, exemption (i) is no longer applicable and the housing authority must release the appraisal.

Exemption (j)

Exemption (j) allows custodians of firearms records to withhold from disclosure:

> *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 therefore, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards.*[72]

The exemption prevents individuals with devious motives from ascertaining who possesses firearms. It should be noted, however, that the scope of the exemption limits its application to identifying details.[73] Therefore, once identifying details are deleted, the remaining portions of firearms records are subject to mandatory disclosure.

For example: Are records pertaining to gun permit applications public? Generally, yes. However, only portions of the gun permit application may be disclosed, because under exemption (j), names and addresses of any individual contained in, or referred to in the application can be withheld. Prior to disclosure of the record, the names and addresses should be redacted from the record. It should be noted that, the application may also contain information which may be properly withheld under several other exemptions. For instance, criminal offender record information (CORI) must be redacted prior to disclosure of the application under exemption (a), and social security numbers contained in the application may be withheld under exemption (c).

Exemption (k)

Exemption (k), which addressed "that part of the registration or circulation records of every public library which reveals the identity of a borrower" has been repealed by the Legislature.[74]

Although exemption (k) has been repealed, the Legislature retained the substance of the exemption in another section of the General Laws.[75] Consequently, this new statute operates through exemption (a) to provide a basis for denying access to library circulation records.

Exemption (l)

Exemption (l) provides a basis for withholding from disclosure:

> *questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument*.[76]

This exemption which was previously restricted to licensing examinations was recently amended. Exemption (l) now ensures that no one who takes an examination can gain an advantage by using the Public Records Law to access the questions and answers of upcoming tests.

For example: Can test questions be withheld from a requester, when he/she seeks all documents related to the issue of discrimination in the Massachusetts Comprehensive Assessment System (MCAS)? Yes. Under exemption (l) the custodian may properly withhold the test questions, because the test questions and related materials are used to administer subsequent examinations. As long as the questions and materials are still in use and will be used for future MCAS testing, exemption (l) applies. The action to withhold the testing materials insures that the integrity of future tests is not jeopardized.

Exemption (m)

Exemption (m) applies to:

> *contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a 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*.[77]

Although the provision of exemption (m) has yet to be interpreted by Massachusetts courts, the language of the exemption is clear.

Exemption (m) contains four criteria that must be met in order for a record to be withheld thereby. First, the record must be a contract. Second, that contract must be for hospital or related health care services. Third, one of the contracting parties must be a government operated medical facility. Finally, the party providing services must be one of the entities described by the exemption. Exemption (m) allows the withholding of a record only if that record satisfies all four criteria.

Exemption (n)

Exemption (n) applies to:

> *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.*[78]

In response to the horrific events of September 11, this exemption is intended to secure the safety of persons and public places by restricting access to records which may have been previously open to public inspection.

The nature of the exemption requires a custodian to make some value judgment regarding the requester in order to decide whether to release the information sought. Therefore, a custodian should review the request promptly and completely in order to gather all of the facts surrounding the request. The custodian is not prevented from engaging the requestor in conversation by asking the requester to voluntarily provide additional information in order to reach a "reasonable judgment" but a custodian may not "require" the requester to provide personal information.[79]

Exemption (o)

Exemption (o) applies to:

> *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.*[80]

Exemption (p)

Exemption (p) applies to:

> *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).*[81]

Attorney-Client Communications/Work Product

Under the provisions of the Massachusetts Public Records Law, there is no exemption allowing a custodian to withhold from disclosure records classified as attorney-client communications or work product. For example, custodians have responded that requested records contained legal strategy and, therefore, were exempt pursuant to the attorney-client privilege. For the reasons set forth below, per se claims of common law privileges to a public records request must fail.

The Supreme Judicial Court has decided that materials privileged as work product are not protected from disclosure under the public records statute unless those materials fall within the scope of one of the statutory exemptions.[82] In reaching its conclusion, the Court noted, "[w]e agree with the observation that the Legislature "**clearly did not intend to exempt documents involved in litigation** from the mandatory disclosure requirements of the public records statute."[83] Through its decision, the Court recognized a long standing position of this office. Namely, common law privileges are not a valid basis for withholding records pursuant to a public records request.[84] It appears, therefore, that the Court envisioned its holding to extend to the attorney-client privilege.

All common law privileges continue to exist in Massachusetts unless abrogated by the Legislature.[85] The Legislature unequivocally decided that all documentary materials or data made or received by a public employee constitute public records, unless one of the strictly and narrowly construed exemptions applies.[86] The statutory definition of "public records" contains no exemption for materials deemed privileged as work product that term is defined within the Massachusetts Rules of Civil Procedure.[87] The Legislature further decided that all public records are subject to mandatory disclosure.[88]

Thus, through enactment of the Public Records Law, the Legislature abrogated that part of the privilege which relates to documentary materials created or received by public employees which do not fall within the parameters of an

exemption.[89] An examination of legislative history supports this conclusion. The Public Records Law is modeled on the Federal Freedom of Information Act (FOIA).[90] At the federal level, materials which are covered by common law privileges or discovery rules are encompassed by an exemption.[91] After enactment of the FOIA, many states other than Massachusetts modeled their freedom of information laws on the federal act and included an exemption for litigation strategy and privileged materials.[92] The Massachusetts Legislature removed the counterpart federal language incorporating common law discovery protections.[93] The difference is important, since we can infer from it the Legislature's intention to reject the standards embodied at the federal level.[94]

It should be noted that the omission is not an oversight on the part of the Legislature. Rather, the Legislature considered, and rejected, a proposed amendment to the definition of public records that would have exempted "records pertaining to any civil litigation in which an agency, department, authority, or political subdivision is involved."[95] When examining the legislative history of the Public Records Law, the SJC found that the rejection of that proposed amendment confirms that the Legislature did not intend implicitly to incorporate a work product exemption.[96] Therefore, the attorney-client and work product privileges cannot be used as a basis to withhold responsive records.

Computer Records

The Public Records Law was drafted at a time when legislators could not have envisioned the impact computers would have on the government's ability to collect, store, compile and disseminate information.[97] The legal principles embodied in the Public Records Law, however, may be readily transposed into legal principles governing access to information maintained in an automated system.

The statutory definition of "public records" does not distinguish between traditional paper records and records stored in the computer medium.[98] Rather, it provides that all information made or received by a public entity, regardless of the manner in which it exists, constitutes "public records." Computer cards, tapes or diskettes are all independent public records that are subject to the same requirements of the Public Records Law as are paper records. Therefore, a custodian is obliged to furnish copies of non-exempt portions of computerized information at the cost of reproduction unless otherwise provided by law.

It should be noted, however, that just as a custodian is not required to create a paper record in response to a request for information, a custodian is not

required to create a computer record in response to a request for information. Conceptually, a computer is like a large filing cabinet. The "files" in the cabinet consist of any compilations of information contained on a tape or a diskette which can be independently retrieved through the use of existing computer programs.

A custodian is only obliged to provide access to the existing "files" of a cabinet. Therefore, a custodian is not required to create a new computer program to provide a requester with computerized information in a desired format. There is, however, an exception to this general rule when the reprogramming is needed to comply with the segregation provision of the law.

For example, suppose a request is made for a computer diskette which references all woman homeowners who also own dogs. The custodian, however, does not have a computer program which allows him to combine his dog license information with the assessor files to select the desired information. Providing the requested information in the desired format requires the creation of a new program. In this situation, the custodian is only obliged to notify the requester that there is no specific record which is responsive to his request. The custodian should also advise the requester of the available formats and let the requester determine which of the existing formats or "files" is best suited for his needs.[99]

It should be noted there is nothing which prevents a custodian from creating a program which will generate requested information in the desired format. In fact, the custodian can benefit from such an arrangement. Since the creation of records, including the honoring of prospective requests are not governed by the Public Records Law, including its maximum fee limitations, the custodian is free to negotiate all terms of the arrangement.[100] Consequently, when a requester is willing to pay for the creation of a program, the custodian is able to add a new program to his library without any expense to the government. Once that program is created, future requests for the same information would fall within the fees set by regulation.

The Supervisor of Records

A requester who is denied access to any requested information may petition the Supervisor for a review of the request. The Supervisor will then instruct a staff member, usually a lawyer or a legal intern, to contact the custodian and requester to ascertain the relevant facts and discuss the applicable law. The findings of the staff attorney or legal intern are then reported to the

Supervisor to assist him/her in making a decision. The custodian will receive an administrative order if the Supervisor determines that records are being improperly withheld or the proposed fee is excessive.[101] If the custodian does not comply with the Supervisor's order, the case may be referred to the Office of the Attorney General or appropriate district attorney for enforcement in court.[102]

Custodians and requesters may seek an informal opinion from the Supervisor's staff by telephoning the Public Records Division and asking to speak with the Attorney of the Day. The Attorney of the Day is available to answer "general questions" concerning the Public Records Law between the hours of 9:00 a.m. and 4:00 p.m. The phone number is (617) 727-2832.

Records Management

As the chief information officer for the Commonwealth, Secretary of the Commonwealth William F. Galvin recognizes the importance of maintaining the records properly. With this understanding, the Secretary strongly encourages the creation, adoption and implementation of a formal, written Records Management Program which includes specific standards for both paper and electronic records.

In accordance with regulations promulgated by the Records Conservation Board, each agency of the Commonwealth is required to submit Form RCB-4 on an annual basis. This Form states the name and title of each agency's designated records management officer or Records Liaison Officer (RLO).

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

Electronic Records Storage

At the time of this writing, the Commonwealth has not adopted formal standards for the storage, retrieval and maintenance of long-term electronic records. Therefore, no agency or municipality is permitted to store records with a retention period of more than ten (10) years exclusively electronically. All paper originals must be maintained pursuant to the applicable retention period for that document.

Records with a retention period of less than ten (10) years may be stored exclusively electronically once the agency's computer storage system has been

approved by the Supervisor of Records and the proper Destruction Schedules have been submitted and approved.

The Supervisor of Records and the Public Records Division is working diligently to format electronic storage standards. Once these standards are adopted, all agencies and municipalities will be permitted to request approval of their storage systems. Once a system has been reviewed and approved, proper Destruction Schedules may be submitted. If you have any questions regarding electronic records and storage, please do not hesitate to contact the Division or the Records Management Unit.

Records Retention

It is the responsibility of government employees who create, receive and maintain public records to ensure their safekeeping and availability to the public. The governmental officer or employee who in the normal course of his duties has access to or control of public records is defined as the custodian.[103] A custodian's responsibility extends to all records which are within his routine access or control.

A custodian's obligations include not only responding to public records requests but also ensuring that records will be available for review when requested. Therefore, a custodian may not dispose of records randomly. Records may not be disposed of until the retention period for the specific records series has expired. Disposal of records must be approved by the Supervisor of Public Records and/or the Records Conservation Board.

Retention schedules, as well as information on records management, including permission forms for disposal of records, may be accessed through the Commonwealth's website portal at mass.gov. Following is a step by step guide on how to access records retention information electronically:

1. Access the Commonwealth's website portal, mass.gov.
   To find information on Records Retention, you must go to the Secretary of the Commonwealth's homepage.

2. Click on *Other Constitutional Officers,* found on the left hand side of your screen in a box entitled State Government.

3. A list of Constitutional Officers will appear. Click on *Secretary.*
   This will bring you to the homepage of the Secretary of the Commonwealth. Here you will find the Divisions of the Office of the Secretary of the Commonwealth.

The Massachusetts Archives Division has been empowered "to require all departments of the commonwealth to report to it what series of records they hold, to set standards for the management and preservation of such records, and to establish schedules for the destruction, in whole, or in part, and transfer to the archives or another appropriate division within the office of the state secretary, in whole, or in part, of records no longer needed for current business."[104]

The Records Management Unit of the Massachusetts Archives was created to provide records management services and outreach to all state agencies and municipalities to help them meet state record-keeping standards and requirements. The Unit can provide agencies with retention schedules for specific records, as well as information on proper disposal and destruction of records.

4. Therefore, to access information on records retention, click on *Massachusetts Archives*. You are presented with the following three areas - General Information, Related Departments, Special Events - as shown below (please note, information in parentheses is not found on the actual website. The information is presented here to be of help to the user and make searching through the website easier).

Massachusetts Archives

General Information:

Mission (objective of the Massachusetts Archives)

Research Services (services provided at the Archives facility, includes reading room research, duplication of records, and free publications)

Collections (The Massachusetts Archives holds the official records created by Massachusetts state government. Holdings are organized by agency and date from 1629 to the present. Examples include: legislative records, executive records, state secretary records, historical resource files, family history resources, black history resources, military records)

Hours and Directions

Programs (The Archives curates traveling historic exhibit, presents educational programs, and provides tours of the facility or presentations about resources at the facility)

Site and Building

Archives Staff Directory

Researching Your Family's History at the Massachusetts Archives (general information on how to research genealogy and what records are available for researching)

Related Departments:

Records Management Unit
(homepage for the Records Management Unit, provides contact information, records disposal schedules for state and municipal government, technical bulletins, and Supervisor of Public Records bulletins)

Records Conservation Board
(homepage for the Records Conservation Board of the Archives, provides disposal schedules for state government, applications for destruction and transfer of state agency records, authorization form for records liaison officer, etc.)

Massachusetts Historical Records Advisory Board (provides information on current events and forums to the historical records community)

Special Events:

Massachusetts History Day

Massachusetts Archives Week

5. To locate information on retention of records and disposal schedules, click on *Records Management Unit* under Related Departments. This will bring you to the Records Management Unit homepage, as shown below (again, information in parentheses is not found on actual website). (www.state.ma.us/sec/arc/arcrmu/rmuidx.htm)

Records Management Unit

What's New

Statewide Records Retention (schedule 04/04 has been approved replacing all other special, general, and department-wide records schedules with the exception of the Comptroller's Statewide Schedules MMARS (2/99), PMIS (3/99), PCRS (4/99), CAPS (6/99), and Municipal Disposition Schedules.

Services

Contact Information

Technical Assistance and Workshops

Statewide Contracts (information on how to receive workshops and training sessions by RMU staff pertaining to support and guidance on records and record-keeping issues)

Records Retention Schedules

Statewide Records Retention Schedules (a comprehensive retention schedule for all state agencies)

State Agency Transfer or Destruction of Records Procedures (procedure and forms for destruction and transfer of state agency records, and designation of records liaison officer)

State Agency Forms (forms for disposal and destruction of records, transferring records to Archives, and Liaison Officer designation, namely RCB-2, RCB-2T, RCB-4)

Municipal Disposal Schedules and Instructions (retention schedules for city and town departments)

Record-Keeping Systems

Guideline for the Documentation of Record-Keeping Systems

Records Law and Statutes

What is a Record? (article providing definitions of: public records, exempted public records, electronic records, and agencies with oversight authority over creation, disposition and use of records)

Access to Public Records (contact information for the Public Records Division)

Supervisor of Public Records Bulletins

SPR Bulletins Home (bulletins issued by the Supervisor on various topics of interest, such as electronic records, optical media, open meeting minutes, etc.)

Resources

Technical Bulletins Home (bulletins on procedures for maintenance and security of records, includes specifications for safes and vaults, record-keeping environment, and storage equipment)

Microfilm Regulations, 950 CMR 39.00

Records Storage Areas (requirements for the areas/rooms in which public records are stored)

Records Disposal Schedules

There are records disposal schedules for state agencies and municipal agencies. Disposal schedules are management plans for information. Schedules describe records created as a result of a particular activity; identify the content of the record; describe how the record is used; and specify the lifecycle of the information.

Municipal Government

The Records Management Unit has published 28 different records disposal schedules for 1600 record series. Schedules are available for the following departments and boards. If your department is not listed below, please see the Administration and Personnel schedule for records held in common by various departments. If you have records not listed on these schedules, please contact the Records Management Unit for suggested retention periods at 617-727-2816 and speak with Terry French.

- Accountant/Auditor
- Administration and Personnel
- Board of Assessors
- Board of Appeals
- Board of Health
- Building Inspector
- City Clerk
- Collector
- Conservation Commission
- Council on Aging
- Department of Public Works
- Fire Department
- Fire District
- Historical Commission
- Historic District Commission
- Licensing Board
- Planning Board
- Police Department
- Public Library
- Purchasing
- Retirement Board
- School Department
- Sealer of Weights and Measures
- Selectmen
- Shellfish Constable
- Town Clerk
- Treasurer
- Veterans' Service Agent

Records may not be destroyed without the written permission of the Supervisor of Public Records. For instructions and sample letter, see the instructions section of each department. A disposal schedule for each of the above listed offices can be found by clicking on *Municipal Disposal Schedules and Instructions* under the heading Records Retention Schedules.

State Government

The basic job of a records retention schedule is to outline how long to keep different types of records. Over the last forty years, the Records Conservation Board has reviewed nearly 1500 records schedules from various state agencies and offices. The task of keeping these special schedules updated, accurate,

and complete represents considerable work for those involved in the process. The schedules are also problematic for other reasons. Records descriptions for the same records can vary between agencies and retention periods are sometimes inconsistent. Many offices only list records destined for the State Records Center and they ignore the rest of their records. Agencies often have difficulty keeping track of their schedules due to staff turnover and changing responsibilities. In any given agency only a handful of staff have access to records retention requirements. Many staff, including management staff, are not fully aware of their record-keeping requirements. The aim of the *Statewide Records Retention Schedules* is to minimize these shortcomings by consolidating the special schedules into a single composite document and to make it available to as many agency personnel as possible.

Destruction of Records

Records may not be destroyed without the approval of the Records Conservation Board. Using the appropriate permission form, the agency should identify records which have been retained as long as required and are now eligible for transfer to the State Records Center or Archives, or that are now eligible for destruction.

The following is a list of Records Conservation Board forms:

RCB-2: Application for Destruction Permission.
Use this form to request permission to implement the destruction provisions of an existing Disposal Schedule.

RCB-2T: Application for Transfer Permission
Use this form to request permission to implement the transfer provisions of an existing Disposal Schedule. This form can be used for both transfer to the State Records Center and the Massachusetts Archives.

RCB-4: Records Liaison Officer Designation
Use this form to appoint an authorized agent for Records Conservation Board business.

Maintenance And Storage Of Public Records

Public records must be maintained and kept in a manner which allows and ensures access to them by the general public, as they are subject to mandatory disclosure upon request.[105]

The Supervisor of Public Records is responsible for insuring that the records of the Commonwealth, counties, cities, and towns are maintained and stored as

required by law.[106] In accordance with this duty, the following procedures have been established to ensure security of and access to public records.

1. Records Custodian:

Each municipal or governmental entity or agency shall have a designated "records custodian." The town clerk shall serve as records custodian unless a particular board or committee appoints an individual who shall be in charge of maintaining, storing and keeping the public records of such agency or entity by local by-law or ordinance.[107]

2. Original Records Removed from Municipal Offices:

   a. Whenever original public records are removed from municipal offices by a records custodian for use in the regular course of business to a private office or home, they shall be stored in fire-resistant devices and safes provided by the municipality.[108]

   b. If a records custodian cannot insure fire-resistant storage outside of the municipal building then no original records may be removed. However, the records custodian may create copies of records for use in a private office or home.

3. Original Records Created Outside of Municipal Offices:

   a. Whenever original public records are created outside the municipal offices, they shall be transferred on a regular and frequent basis to secure storage in the municipal building.

   b. If secure storage is available in the records custodian's private office or home, then copies of the records shall be maintained in the municipal building, with the originals stored in secure storage at the records custodian's private office or home.

4. Availability of Records Custodian:

Whenever a records custodian finds it necessary to work, or to keep original public records, in a location other than the municipal

building, he shall make himself, and the public records, available during regular posted office hours, at a location convenient to the general public, for inspection and copying of the public records. *Please note that in such situations, copies of the public records must also be maintained in the municipal building, in accordance with paragraph 2(b), above.* In those instances in which the governmental entity does not have regular business hours, a written notice shall be posted in a conspicuous location, listing the name, position, address and telephone number of the person to be contacted to obtain access to public records.[109]

5. Transfer of Public Records Upon Termination of Duties as Records Custodian:

    a. Whenever a records custodian relinquishes his office or terminates his duties as records custodian, he shall deliver over to his successor all such public records that he is not authorized by law to retain.[110]

These procedures are designed to ensure the safekeeping of public records so that compliance with the Massachusetts Public Records Law by governmental entities is best accomplished.

Notes

All statutory references are to the 2002 Edition of the Massachusetts General Laws.

1. G. L. c. 66, § 10(a).
2. Id.
3. G. L. c. 4, § 7(26).
4. Id; See 950 CMR 32.03 (defining "custodian" as the government employee who has access to or control of public records).
5. G. L. c. 4, § 7(26)(a-p); see also Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980) (the statutory exemptions are to be strictly and narrowly construed).
6. G. L. c. 66, § 10(b); 950 CMR 32.05(3).
7. 950 CMR 32.05(4).
8. Id.

9. G. L. c. 66, § 10(a-b); 950 CMR 32.05(2).
10. 950 CMR 32.08(1).
11. Id.
12. Id.
13. G. L. c. 4, § 7(26) (defining "public records" as materials which have already been "made or received" by a public entity); see also 32 Op. Att'y Gen.157, 165 (May 18, 1977) (custodian is not obliged to create a record in response to a request for information).
14. See G. L. c. 66, § 10(a) (public records are to be provided to "any person"); see also 950 CMR 32.05(5) (custodian prohibited from inquiring into a requester's status or motivation); but see G. L. c. 4, § 7(26)(n) (a custodian may ask the requester to voluntarily provide additional information in order to reach a "reasonable judgment" regarding disclosure of responsive records).
15. G. L. c. 66, § 10(a); see also 950 CMR 32.06 (fees for copies of public records).
16. 950 CMR 32.06(5).
17. See e.g., G. L. c. 66, § 10(a) (fees for police records); see also 950 CMR 32.06 (fees for copies of public records).
18. 950 CMR 32.06(1)(c).
19. 950 CMR 32.03.
20. Id.
21. 950 CMR 32.06(1)(a).
22. 950 CMR 32.06(1)(f); see also SPR Bulletin 4-96, June 7, 1996 (fees for copying electronic records).
23. 950 CMR 32.06(1)(d).
24. G. L. c. 66, § 10(a) (fees for police records); G. L. c. 262, § 38 (copies of records at the Registry of Deeds).
25. G. L. c. 4, § 7(26)(a-p).
26. Real Property Department of Boston, 380 Mass. at 625.
27. G. L. c. 66, § 10(a); Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979) (none of the statutory exemptions provide a blanket exemption from disclosure).
28. G. L. c. 4, § 7(26)(a).
29. Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).
30. G. L. c. 4, § 7(26)(a).
31. See, e.g., G. L. c. 41, § 97D (all reports of rape or sexual assault "shall be confidential").
32. See, e.g., G. L. c. 6, § 172 ("Criminal offender record information ... shall only be disseminated to: criminal justice agencies....").

33. G. L. c. 4, § 7(26)(b).
34. Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976).
35. Jordan v. Department of Justice, 591 F.2d 753, 763-71 (D.C.Cir. 1978) (construction of cognate federal provision).
36. See Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 432-33 (1983) (where the language of a parallel state statute differs in material respects from a previously enacted federal statute, a rejection or expansion of the legal principles embodied in the federal statute may be inferred).
37. G. L. c. 4, § 7(26)(c).
38. Globe Newspaper Company, 388 Mass. at 432-34.
39. Id.; Brogan v. School Committee of Westport, 401 Mass. 306, 308 (1987).
40. Globe Newspaper Company, 388 Mass. at 442; see also Globe Newspaper Company v. Chief Medical Examiner, 404 Mass. 132 (1989) (autopsy reports constitute exempt medical information).
41. Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000); see also Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983) (evaluative materials are of a particularly personal and volatile nature).
42. Wakefield, 431 Mass. at 798; see also Brogan, 401 Mass. at 308; Pottle v. School Committee of Braintree, 395 Mass. 861, 866 (1985); George W. Prescott Publishing Company v. Register of Probate for Norfolk County, 395 Mass. 274, 278 (1985); Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 436 n.15 (1983); Hastings & Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978).
43. Wakefield, 431 Mass. at 799.
44. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, No. 02-P-1632, 2003 Mass. App. LEXIS 504, at *2 (Mass. App. Ct. May 1, 2003).
45. Worcester Telegram, 2003 Mass. App. LEXIS 504, at *15.
46. Brogan, 401 Mass. at 308.
47. Hastings & Sons Publishing Company, 374 Mass. at 818.
48. Collector of Lynn, 377 Mass. at 156.
49. Real Property Department of Boston, 380 Mass. at 625.
50. Id. at 626 n.2.
51. Collector of Lynn, 377 Mass. at 156.
52. Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000).
53. Wakefield Teachers Association, 431 Mass. at 798.

54. G. L. c. 4, § 7(26)(d).
55. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n.8 (1988).
56. See Environmental Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (construing cognate federal provision).
57. Moore-McCormack Lines, Inc. v. I.T.O. Corporation of Baltimore, 508 F.2d 945, 948 (1974) (construing cognate federal provision).
58. G. L. c. 4, § 7(26)(e).
59. Id.
60. G. L. c. 4, § 7(26)(f).
61. District Attorney for the Norfolk District v. Flatley, 419 Mass. 507, 512 (1995); WBZ-TV4 v. District Attorney for the Suffolk District, 408 Mass. 595, 603 (1990).
62. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976); see also United States Department of Justice v. Landano, 113 S. Ct. 2014, 2020 (1993) (discussion of confidential sources of information under the federal Freedom of Information Act.).
63. Bougas, 371 Mass at 62.
64. Globe Newspaper Company, 388 Mass. at 438 (explanation of "identifying details" and "grave risk of indirect identification").
65. G. L. c. 4, § 7(26)(g).
66. Id.
67. See Datatrol Inc. v. State Purchasing Agent, 379 Mass. 679, 691 (1980) (the purposes of competitive bidding go beyond economy and efficient administration to the prevention of favoritism in the awarding of government contracts).
68. G. L. c. 4, § 7(26)(h).
69. See discussion of the application of exemption (d), supra p. 14.
70. G. L. c. 4, § 7(26)(i).
71. See BLACK'S LAW DICTIONARY 97 (7th ed. 1999) (definition of "appraisal").
72. G. L. c. 4, § 7(26)(j).
73. Id.
74. 1988 Mass Acts 180, § 2.
75. G. L. c. 78, § 7.
76. 1996 Mass. Acts 204, § 3 (July 30, 1996).
77. G. L. c. 4, § 7 (26)(m).
78. G. L. c. 4, § 7 (26)(n).
79. See SPR Bulletin No. 04-03 (April 1, 2003).
80. G. L. c. 4, § 7 (26)(o).
81. G. L. c. 4, § 7 (26)(p).

82. General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 801 (1999).
83. General Electric Company, 429 Mass. at 803, *quoting* A. Cella, Administrative Law and Practice § 1182, at 584 n.10 (emphasis added).
84. Id.
85. Mass. Const. Pt. 2, c. 6, Art. 6.
86. G. L. c. 4, § 7(26); see also Attorney General v. Assistant Commissioner of the Real Property Department, 380 Mass. 623, 625 (1980) (requiring strict and narrow construction of the exemptions); Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 432 (1978).
87. G. L. c. 4, § 7(26); see also General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 801 (1999).
88. G. L. c. 66, § 10(a).
89. See e.g., District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985) (where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied).
90. Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 432-34 (1983).
91. See 5 U.S.C. § 552(b)(5) (exempting materials which cannot be obtained during discovery in civil litigation); H. R. Rep. No. 1497, 89th Cong., 2nd Sess. 10 (1966) (exemption 5 intended to incorporate the government's common law privilege from discovery in litigation); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155 (1975) (federal exemption incorporates work product doctrine and attorney-client privilege); Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (Congress intended that FOIA should not result in an agency's loss of traditional privileges).
92. See e.g., Conn. Gen. Stat. c. 3, §§ 1-19 (Connecticut exemptions).
93. General Electric Company, 429 Mass. at 804.
94. Id. *quoting* Globe Newspaper Company, 388 Mass. at 432-34.
95. See House J. 3149 (1973); 1973 Mass. Acts 1050, § 1.
96. General Electric Company, 429 Mass. at 803.
97. See 1973 Mass. Acts. 1050 (legislation providing for the current statutory definition of "public records").
98. G. L. c. 4, § 7(26).
99. See 950 CMR 32.05(4) (a custodian shall use his superior knowledge of his files to assist a requester in obtaining the desired information).
100. See supra p. 7, note 13 (the Public Records Law and Regulations only apply to existing records; consequently, a custodian is free to set any fee for creating a record.).

101. G. L. c. 66, § 10(b).
102. G. L. c. 66, § 10(b); 950 CMR 32.09.
103. 950 CMR 32.03.
104. G. L. c. 30, § 42.
105. G. L. c. 66, § 10(a); see also Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979).
106. See G. L. c. 66, § 1 (the Supervisor shall oversee preservation of the records of the Commonwealth, counties, cities, and towns).
107. G. L. c. 66, § 7.
108. G. L. c. 66, § 11.
109. 950 CMR 32.05(1).
110. See G. L. c. 66, § 14.