



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth

MEMORANDUM

To: Conference Committee on the Public Records Bill

From: Michael Maresco, Assistant Secretary/Legislative Director
Rebecca S. Murray, Associate Legal Counsel

Date: March 23, 2016

Re: Public Records Bill

The following is a comparison of differing provisions in the Senate and House versions of the proposed Public Records Bill.

Provisions Mostly in Common

Information on Requests: Both Bills require the Secretary of the Commonwealth (SOC) to collect information from records access officers relating to public records requests. The **Senate** version requires additional information to be collected, such as specific dates requests were made/responses provided and time taken to respond to the Supervisor of Records (SPR)'s order, as well as requires the SOC to post this information on his website.

Preference: Both of these provisions will be challenging to administer given the resources required for the SOC to collect, maintain and disseminate this information regarding every request for public records at the state and local levels. Under the **Senate** version, the SOC would further be mandated to create a website, likely searchable given language of both Bills, containing this request information.

Response by Records Access Officer: Both require a records access officer to respond to a request for records in a specified time period. The **House** requires a response within 10 *business* days of receipt of the request while the **Senate** requires the provision of records within 15 *calendar* days, but if the custodian does not intend to provide responsive records or if due to the difficulty of the request the records cannot be provided within 15 *calendar* days a specific response detailing these reasons must be provided within 10 *calendar* days.

Preference: No strong preference but the **Senate** version could provide more flexibility to records custodians while still requiring accountability if records are not provided in 15 calendar days.

Appeal to SPR: Both versions allow lack of response or withholding of records to be appealed to the SPR.

The **House** requires the requestor to appeal to the SPR within 10 *business* days following initial receipt of request if there has been no response and 30 days following receipt of response from records access custodian that records will be withheld. If there has been no response by the records access officer, the requestor must file the appeal to the SPR within 90 days following the submission of the request. It is unclear if this is 90 business or calendar days. The SPR must then issue a decision within 10 *business* days of receipt of the appeal. The records access officer must comply with the SPR's order within 5 *business* days from issuance of the order.

In line 241, the **Senate's** version allows the requestor to appeal to the SPR any response that does not provide access to the requested public records. The SPR must issue a decision within 15 *calendar* days of receipt of the appeal.

Preference: Both versions could be tightened. With the **House's** version it is uncertain how a requestor would be able to determine 10 *business* days following the records access officer's initial receipt of request if there has been no response. It is also unclear if the requestor has 30 business or calendar days to appeal to the SPR following a response by the records access officer that the records were being withheld.

The **Senate's** version may give the SPR slightly more time to issue an order, however, it is unclear how long the custodian has to comply with the SPR's ruling.

The public interest is best served when the SPR has adequate time to issue a researched and well-reasoned determination. The SPR would require additional resources in order to meet these tight deadlines to issue orders. Additionally, it is unclear if additional time would be granted to the SPR if an *in-camera* review of the records is required.

In-camera Review: While both versions allow the SPR to perform an *in-camera* review of records, the **House's** version is more restrictive as to what the SPR may review. The SPR is not permitted to review privileged materials or records explicitly exempt by state or federal statute.

Preference: The **Senate** version preserves the SPR's current ability to review records *in-camera* in order to accurately render a ruling on the public status of records. Given that the records are provided to the SPR as part of the administrative review proceeding, it is the interpretation of this Office that the custodian does not waive any privilege or violate any prohibition on disclosure set by state or federal law. Many records are broadly withheld under a claim by records custodians of a privilege or specific state or federal statute. Upon review of these records, it is often determined they are public. Without this ability of the SPR to review certain records, the public will have a significantly limited administrative appeal process and will be forced to bring these matters to court.

Attorney General Referral: While both versions involve AG referral provisions, with the **House** version the referral by the SPR to the AG is discretionary while in the **Senate** version the referral to the AG is mandatory.

Preference: The discretion granted by the **House** version is preferred to allow the SPR the necessary flexibility when seeking enforcement of orders.

Extensions: Both versions permit a records access officer to request an extension to respond from the SPR. The **House** version requires the SPR to issue this determination within 5 *business* days of receiving the request while the **Senate** requires the decision to be issued by the SPR within 7 *calendar* days.

In the **House** version, the SPR appears to have discretion to determine the extended time granted and in the **Senate** version the SPR may grant an extension of 30 *calendar* days.

In the **Senate** version, the SPR may grant an extension or relieve the records access officer of the obligation of providing the records if the request is frivolous or harassing and not in the public interest.

In both versions it is unclear what happens if the SPR does not issue a ruling on the extension within the specified time.

Preference: The **Senate** version grants the SPR more flexibility in determining the best course of action to serve the public interest in situations where the request is complex, voluminous, frivolous or intended to intimidate or harass.

Fees: Both Bills set maximum fees for agencies and municipalities to charge when providing requested records.

The **House** version allows a municipality to charge the rate of the lowest paid employee capable of performing the task to search for, compile, segregate, redact or reproduce the records for time needed to provide the records beyond the first 2 hours. The **House** also permits an agency or municipality to assess the fees associated with engaging a vendor to furnish records if the custodian lacks the capabilities to do so. Prior to engaging the vendor, the requestor must enter into a contract with the vendor and agree to pay the specified fees. The SPR has 5 *business* days to issue a decision on fees.

In the **Senate** version, an agency may only charge for the time segregating and redacting if approved by the SPR. A municipality may only charge at the maximum rate of \$25/hour if more than 2 hours are required to provide records. A municipality may petition the SPR to charge more than \$25/hour or to charge for the search and segregation of records. The SPR has 7 *calendar* days to issue a decision on fees.

Preference: The **Senate** version allows the SPR to determine situations when it is necessary for additional fees to be assessed. Often, municipalities must employ the assistance of legal counsel in providing an appropriate response to complex requests. Without the ability to recoup more than the \$25/hour maximum fees, municipalities may forgo the advice of counsel, release records without adequate review and risk violation of privacy provisions or other state or federal laws.

Attorney Fees/Court Costs: While they each take a slightly different approach, both versions allow a requestor to file a complaint in court if an agency or municipality does not comply with the SPR's order. If the requestor prevails, under the **House** version the court may award reasonable attorney fees and other litigation costs and may require the records custodian to waive the fees for the provision of records.

In the **Senate** version the court must award attorney fees and costs unless one of the specified conditions exists. If a condition is found to exist, the assessment of fees and costs is discretionary. However, if the court awards fees/costs the records access officer is precluded from charging a fee for the provision of the requested records.

Preference: No strong preference but it would appear the **House** version grants the court more discretion to determine whether the awarding of attorney fees and costs to the requestor is in the best interests of the taxpayers, who will ultimately be required to pay these fees and costs.

Distribution of Fees: Both versions designate the payment of certain assessed costs against records custodians. In the **House** version, when the Attorney General obtains a judgment against a records custodian, the payment of assessed civil penalties must go to the Commonwealth's general fund.

The **Senate** version establishes a Public Records Assistance Fund, administered by MassIT. All punitive damages assessed under the Public Records Law would be paid to this Fund, in addition to any appropriations or gifts transferred to the Fund. The Massachusetts CIO is authorized to make payments from the Fund to support the IT capabilities of municipalities to foster best practices for increasing access to public records.

Preference: The use of penalties and fees in the **Senate** version to assist municipal records custodians in compliance with the Public Records Law will be beneficial given many of them have limited resources to devote to technology relative to public records maintenance and dissemination.

Effective Dates: The majority of the provisions of the **House Bill** become effective October 1, 2016 with others taking effect January 1, 2016. The SPR would be required to promulgate regulations by July 1, 2016.

The **Senate** provisions would also mostly take effect October 1, 2016 with the SPR promulgating regulations by September 1, 2016.

Preference: The later **Senate** date for the SPR to promulgate regulations would be beneficial to allow the SPR the necessary time to create effective regulations.

Senate Only Provisions

Electronic Records Submitted to Public Body: Lines 83-85 would require that any document submitted to a public body for deliberations shall be provided in an electronic format. It is unclear how this provision would be enforced or what accommodations will be made for individuals who are unable to submit electronic records. There is a significant concern that this requirement would cause a chilling effect that individuals would be discouraged from coming before a public body if they are unable to provide electronic documents.

SPR Documents Appeals: In lines 100-109, the SPR would be required to document requests for appeals to the SPR and to post this information on the SOC's website.

No Fees Charged: As indicated in lines 237-239, a records access officer cannot charge a fee for public records unless the officer provided the records or required response within the specified time period. While this provides incentive for records access officers to provide records or a response in the required time period, if a Town, in good faith, responds to a highly complicated response that is estimated to cost \$1000 in 16 calendar days rather than 15 they would be prohibited from recouping any costs associated with the provision of records. It seems to either encourage records access officers to rush through a response or to play it safe and request a time extension even when it actually may be unnecessary.

Municipal Records Online: Lines 423-425 of the **Senate** version would require a municipal records access officer to post commonly available public documents on the municipality's website. Given the limited resources of many of the Commonwealth's municipalities, compliance with this requirement may be a challenge.

Exemption (f) Working Group: The **Senate** version establishes a working group to study and make recommendations regarding the investigatory exemption. There are no issues with this provision.

Records Storage: The **Senate** version contains a provision that removes the Commonwealth's obligation to provide fireproof vaults and safes to records custodians. Custodians would be required to provide their own storage that would be mandated to comply with National Fire Protection Association Standards or standards promulgated by the SPR. This Office provided input that was incorporated into this version of the language-no further issues with this.