

# IMPLEMENTATION OF THE NEW PUBLIC RECORDS LAW: LESSONS AFTER SIX MONTHS

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Franklin Regional  
Council of Governments

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## The New Public Records Law- Recap



- Chapter 121 of the Acts of 2016, signed into law on June 3, 2016, made far-ranging changes to the Public Records Law ("PRL")
- Most provisions of the law applicable to municipalities took effect **January 1, 2017**
- In accordance with the new PRL, the Supervisor of Records adopted revised regulations effective January 1, 2017
- **Municipal RAO Guidelines are due July 1, 2017**
- Significant adjustments were made to public records practices which have been in effect since January 2017

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## New Public Records Law- Refresher



- Must respond within ten **business** days – **not calendar days**
  - Saturdays, Sundays and holidays do not count
  - Day one of response period begins the first business day after the request is received if in writing, or, in the case of an oral request, day one is the day the oral request was made (950 CMR 32.03(3))
  - **Full response required within 25 business days of receipt of request**
- **Whenever** fees will be assessed, a **detailed** written estimate of the costs of responding must be provided
- If documents will be withheld or redacted, additional detail must be included in written response
- **Burden is still on the governmental entity** to assert application of law, justifying redaction or withholding, with specificity
- **Fees for time** required to comply still based upon prorated hourly rate of lowest paid person capable of doing the work, regardless of who actually performs the work, but is now **capped at \$25.00/hr.**, except as otherwise may be authorized by the Supervisor of Public Records

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## The New Public Records Law- Six Months Later

### Where are we today?

- More requests from information “clearinghouses,” some apparently for commercial purposes
- Requesters are still attempting to ascertain consistency in responses across different municipalities and municipal departments
- Supervisor of Records is enforcing the requirement that responses to public records requests must identify, with specificity, the exemption(s) relied upon when withholding or redacting records
- Some requesters still believe that a response needs to be provided within ten calendar days

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## Records Access Officers (“RAO”)

- By now, each municipality should have designated its RAO – if no designation, the “default” RAO is the clerk
- Contact information for RAO must be posted in municipal offices and on website
- Duties include assisting requesters and records custodians, and preparing guidelines to enable requesters to make “informed” requests, including a listing of categories of records
- RAOs should keep accurate log of all requests and responses.
  - A sample log for municipal RAOs is available at [www.k-plaw.com](http://www.k-plaw.com)
  - Requesters can ask for the RAO logs, if they are maintained.

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**Outstanding Implementation Issues**

- Have you designated your RAO(s)?
- Have you publicly posted RAO contact information?
  - Name, title, business address, business phone number, business e-mail address, business facsimile (if you accept public records request by fax)
- Have you decided a protocol for responding to public records requests?
  - Do all departments know and understand the protocol?
  - Are you responding to public records requests in writing?
  - Do your written responses contain a statement of appeal rights?
- Are the RAO Guidelines ready?

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**New Public Records Law Guidelines**

- Public Records Law Guidelines must be posted on your website (if you have one) and publicly posted in municipal offices at "conspicuous" locations, no later than **July 1, 2017**
- An example is available online at: [www.k-plaw.com](http://www.k-plaw.com)
- RAO Guidelines should "enable the person seeking access to public records...to make informed requests regarding the availability of such public records electronically or otherwise. The guidelines shall include a list of categories of public records maintained by the...municipality and such list shall be updated periodically..." G.L. c. 66, § 6A(b)(iii); 950 CMR 32.04(5)(f)

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**New Public Records Law Guidelines**

- Policy decisions regarding Guidelines should be considered, including:
  - Whether one or several RAOs will be designated
  - Will all requests be routed through the RAO(s)?
  - Defining when requests are considered "received"
  - What documents will be available electronically?
  - What documents will be posted on your website?

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### Response Preparation Update



- Records must be sent or an initial written response must be provided, with a fee estimate and/or exemptions cited, within **10 business days**
- **Best Practices**→
  - Response should include the date of the request and the date of the response
  - Even if records are provided and no information is withheld or redacted, the response should include a Statement of Appeal Rights
  - A written response should be provided even if RAO is just directing a requester to online information or e-mailing information for accurate record keeping
  - Requester can grant additional time to respond, but the extension should be confirmed in writing and documented in RAO log.

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### Response Preparation



- Following recent changes to the law, the Supervisor is interpreting Public Records Law exemptions as it did prior to the new law taking effect, but with additional scrutiny
- Care should be taken to ensure there is specific information to justify withholding a record or redacting information under an exemption
- Helpful hints when preparing a response→
  - Review the documents carefully
  - Analyze what information, if any, is exempt
  - Cite to a specific exemption or exemption(s) justifying what information is being withheld and why
  - The Supervisor will generally reject blanket invocation of exemption(s)

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### Petitioning the Supervisor for Additional Time or Fees



- A review of the petitions filed since January 2017 demonstrate that the Supervisor's Office has not been inclined to grant fee petitions or petitions for additional time
  - To date, approximately 25 petitions to charge more than \$25/hour have been filed
  - To date, approximately 30 petitions for additional time have been filed
  - Bottom line is not to rely on additional time or increased fees
- If petitioning, care should be taken to include as much information as possible with your petition
- The Supervisor requires detailed justifications for these petitions.

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## Helpful Points



- A reasonable fee may be assessed for production of records other than those "freely available"- which includes online records
- **No fee may be assessed if the initial response is not made within 10 business days**
- Fees shall not exceed actual cost for reproducing the record:
  - Actual cost of storage device
  - Actual cost of duplicating documents not susceptible to ordinary means of duplication, such as plans
    - Best practice: include invoice for large scale copies with estimate
  - Actual cost of postage, if requester asks for records to be mailed

**Photocopy fees are limited to \$.05/page for black and white copies and printouts, whether one or two sided. Make sure that all handouts and online resources are updated with this amount.**

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## Best Practices- Producing Records



- Preference to produce electronic records, if available; this does not mean that documents that do not exist in electronic form must be converted to an electronic form (i.e., pdf)
- Before producing records in either electronic or hard copy form, **always** check→
  - Whether electronic documents contain any confidential information, including: medical information, social security numbers, drivers license numbers and financial account numbers. This information should be redacted
  - Consider converting electronic records to a read-only PDF document.
- Review records to make sure that **no** attorney-client privileged communications are provided

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## Best Practices- Producing Records



- **Posting of certain records to the municipal website required, if "feasible".** Now is a good time to ensure that certain documents are up-to-date online:
  - final opinions, decisions, orders, or votes from proceedings;
  - annual reports;
  - notices of regulations proposed "under chapter 30A";
  - notices of hearings;
  - winning bids for public contracts;
  - awards of federal, state and municipal government grants;
  - minutes of open meetings;
  - budgets; and
  - any public record information of significant interest that is deemed appropriate to post
- How do you monitor the posting of items online by boards, officials, departments?

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## The Public Records Access Regulations

- The Supervisor of Records has updated regulations, what generally track the new PRL
- Interesting aspects of the new regulations:
  - Where the requester is incarcerated, there is a presumption that the requester cannot receive or access records electronically
  - A request for records "in which an individual, or representative of the individual has a unique right of access by statutory, regulatory, judicial or other applicable means, shall not be considered a request for public records," and is not appealable to the Supervisor
  - You may delay provision of records until all fees are paid. BUT WHAT DOES THIS REALLY MEAN? And, what if the fees for prior requests are unpaid?
  - If you withhold or redact records under the attorney-client privilege, you must provide the requester with the following information: a detailed description of the record(s), including the names of the author and recipients, and the subject matter of the withheld information in general terms
  - Can we charge for segregation and redaction time?
  - The Supervisor can order the preparation of a records index

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## Public Records Law & Open Meeting Law Considerations

- Significant overlap between Public Records Law and Open Meeting Law
  - Enforcement Authority for Public Records Law – Supervisor of Public Records
  - Enforcement Authority for Open Meeting Law- Attorney General's Office, Division of Open Government
  - Care should be taken to comply with the separate laws, which often have overlapping considerations
    - Example - Responding to a public records request for regular or executive session meeting minutes

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## Open Meeting Law- Minutes

- Must include:
  - Time, date, place, members present and absent
  - Summary of the discussion on each topic
  - Decisions made and actions taken, including a record of all votes
  - List of documents and other exhibits used at the meeting.
- Summary of discussion must be sufficiently detailed to allow a person not in attendance to determine the essence of the discussion and what documents were used
- The same rules apply to executive session minutes
- Must be approved in a timely manner, best practice is to approve minutes at next meeting
- Public records requests for meeting minutes are subject to same, initial 10 day written response as other requests

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### Open Meeting Law - Minutes

• G.L. c. 30A, §22(g)(2): Upon request by any person to inspect or copy the minutes of an executive session or any portion thereof, the body shall respond to the request within 10 days following receipt and shall release any such minutes not covered by an exemption under subsection (f); provided, however, that if the body has not performed a review pursuant to paragraph (1), the public body shall perform the review and release the non-exempt minutes, or any portion thereof, not later than the body's next meeting or 30 days, whichever first occurs. A public body shall not assess a fee for the time spent in its review.

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### Additional Resources

- Secretary of the Commonwealth – Public Records Division: <http://www.sec.state.ma.us/pre/preidx.htm>
- Secretary's "Guide to the Public Records Law" - <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>
- Municipal Records Retention Schedule - [https://www.sec.state.ma.us/arc/arcpdf/Municipal\\_Retention\\_Schedule\\_20161109.pdf](https://www.sec.state.ma.us/arc/arcpdf/Municipal_Retention_Schedule_20161109.pdf)
- KP Law, P.C. – [www.k-plaw.com](http://www.k-plaw.com), <http://www.k-plaw.com/resources/public-records-law-resources/>

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Feel free to contact the KP Law Government Information and Access Group with questions about the Public Records and Open Meeting Laws.



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