THE NEW PUBLIC RECORDS LAW

Technical Requirements and Practical Implications

KP Law Government Information and Access Group
Gregg J. Corbo, Esq., Lauren F. Goldberg, Esq., Michele E. Randazzo, Esq.,
and Brian W. Riley, Esq.

KP LAW
The Leader in Public Sector Law
Attorneys at Law
© 2016 KP Law, P.C. | All rights reserved.
Disclaimer:

- This information is provided as a service by KP LAW, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship between the presenter(s) and the recipient. You are advised not to take, or to refrain from taking, any action based on this information without consulting your legal counsel about the specific issue(s).
Why are we here today?

• Chapter 121 of the Acts of 2016, signed into law on June 3, 2016, makes far-ranging changes to the law
• The portions of the law applicable to public records practices become effective on January 1, 2017
• The law further requires that the Supervisor of Records promulgate applicable regulations no later than January 1, 2017; proposed regulations have been issued
• Significant adjustments will need to be made to public records practices
HEIGHTENED INTEREST IN OPEN GOVERNMENT – WHAT IT MEANS ON THE LOCAL LEVEL

- Appeals being filed with more frequency with the Supervisor of Records over technical noncompliance
- Appeals being filed more frequently in court, often with OML and COI counts
- Intense scrutiny locally and nationally over public records practices and other “sunshine law” requirements
- Frequent requests for thousands of electronically maintained documents, particularly e-mail
- Anticipation of new law taking effect
NEW PRL - OVERVIEW OF SIGNIFICANT ISSUES

- Creation of Records Access Officers and duties thereof
- Timelines and obligations for responses to requests
- Assessment of fees
- Appeals (requestor, Attorney General, court)
- Attorneys Fees and punitive damages
- Revisions and clarifications to particular exemptions
SUMMARY OF TOPICS

• Review existing PRL, including exemptions
• Summarize technical requirements of the new PRL
  • Records Access Officer
  • New time frames
  • Responses - various options and format
  • Petitions to Supervisor – by requestor, by municipality

• Implementation Issues
  • Keeping track of records requests
  • Electronic documents preference
  • Posting electronic documents
Current PRL: a combination of statutes and regulations

- G.L. c. 66, §10 (Public Records Requests)
- G.L. c. 4, §7, clause 26 (Exemptions)
- 950 CMR 32.00, et seq. (Public Records Access Regulations)
- Other statutes specifically addressing the public records status of particular records (so-called “Exemption (a) statutes)
Must respond within ten calendar days

When the cost is estimated to exceed $10.00, that response must include an estimate of the costs of responding, and must identify the reasons for withholding or redacting documents

Burden is on custodian to assert application of law, justifying redaction or withholding, with specificity

Response time & cost to comply includes lowest paid person capable of doing the work, regardless of who actually performs the work
Exemption (a) allows withholding of records that are “specifically or by necessary implication exempted from disclosure by statute.”

Examples of “exemption (a)” statutes:
- CORI (e.g., 803 CMR 2.23; 803 CMR 5.14)
- Domestic Violence Reports (G.L. c. 41, §97D)
- Student Records (e.g., 603 CMR 23.07)
- MCAD documents (aside from the initial complaint and investigative determination) (804 CMR 1.04)
- Abatement Applications (G.L. c. 59, §60)
**COMMON PRL EXEMPTIONS**

- **Exemption (c)** allows withholding of “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.”

- **Exemption (d)** allows withholding of “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.”
Common PRL Exemptions

- **Exemption (e)** allows 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.”

- **Exemption (f)** allows withholding of “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.”
Common PRL Exemptions

• Exemption (n) allows a records custodian, who reasonably believes that disclosure is “likely to jeopardize public safety” to withhold records relative to infrastructure within the commonwealth, and now includes *cyber security*

• Exemption (o) allows withholding of *personal e-mail* and home address and home telephone number of an employee of a municipality or other governmental entity in the custody of a government agency that maintains records identifying persons as falling within those categories
**COMMON PRL EXEMPTIONS**

- New PRL exempts from disclosure records divulging or tending to divulge names and addresses of those owning, possessing, or licensed to own or possess firearms or ammunition.

- New PRL adds personal e-mail addresses to the list of information that may be withheld for a broad range of law enforcement personnel and victims of adjudicated crimes, domestic violence, or of those who provide or training in family planning services.
Each municipality must designate one or more RAO
- Municipal clerk or designee automatically a RAO
- Chief executive officer may designate additional or different RAOs

Contact information for RAO must be posted in municipal offices and on website

Duties include assisting requestors and records custodians, and preparing guidelines to enable requestors to make “informed” requests, including a listing of categories of records

Guidelines must be posted on website no later than July 1, 2017
Who is the RAO?

- By default, in a municipality, the RAO is the municipal clerk
- Who is best to serve in that capacity?
  - Does it matter if the municipality is a city or a town?
- Is it a personality “thing” or an office?
- Is it an existing position or a new one?
- Will extra compensation be provided?
- What is the relationship between the RAO and custodians of records?
- What is the relationship between RAOs?
- Is the idea of a Super-RAO a good idea, and what is the function of position?
PUBLIC RECORDS REQUESTS

• Made to RAO
  • In person
  • By first class mail
  • By e-mail

• Does not specify whether request can be made orally, although Supervisor of Public Records suggests the same is true in the draft regulations; indicates that the requirements of the law would still apply to a verbal request
RESPONSES TO PUBLIC RECORDS REQUESTS

• Must respond within 10 BUSINESS days; failure to do so means that NO FEE MAY BE ASSESSED

• If full response, including provision of records, cannot be made within 10 business days, RAO must respond to the requestor, including the following:
  • Confirming receipt
  • Identifying correct custodian/RAO if not correct
  • Outlining what will be withheld, if known
  • Explaining reason for inability to provide the same within the timeframe
  • When a response is expected
RESPONSES (CONT.)

- Have a total of 25 business days from date of original request to provide full response
- RAO may, within 20 business days of receipt of request, petition the Supervisor of Records for additional time, not to exceed an additional 30 business days “for good cause shown”

BEST PRACTICE – file request for extension early
For purposes of the law, “good cause” will be analyzed based upon the following:

- Amount of time required to search for and redact records
- Office hours & capacity of office
- Efforts undertaken to respond to request and previous requests
- Number of requests, including if part of a series of contemporaneous requests that are frivolous, intended to intimidate or harass

The Supervisor will also consider the public interest in expeditious disclosure when deciding whether to grant more time to respond

**BEST PRACTICE – file request for extension early**
RESPONSES

• Supervisor must provide response to petition within five business days of receipt
• Supervisor may provide longer response period if determination is made that request is intended to harass or otherwise is not in the public interest OR may “relieve” the municipality/agency of obligation to respond
• Response SHALL be provided electronically if possible and available in that format, unless not desired by requestor
A reasonable fee may be assessed for production of records other than those “freely available”

Fees shall not exceed actual cost for reproducing the record:

- Actual cost of storage device
- $.05/page for black and white copies and printouts, one or two sided

THE $.05 PER PAGE COPYING FEE IS ALREADY IN EFFECT
Municipalities ≤ 20,000 people
  - May assess a fee for the first two hours of employee time, only if more than two hours is required
  - Burden is on the municipality to show that there are less than 20,000 residents

Municipalities > 20,000
  - May not assess a fee for employee time for the first two hours required to respond to a public records request

Potentially significant limits upon charges for segregation and redaction time??
“Employee time” is defined as “necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed”

• The hourly rate is capped at $25.00

• A municipal RAO may petition the Supervisor for a higher hourly rate, or to charge for segregation and redaction time

• The Supervisor must provide a determination within five business days of receipt of the petition

  • Supervisor considers whether response cannot be prudently completed without review and redaction, and the public interest in inexpensive access to records, the ability of the requestor to pay

  • The fee must still be reasonable, and cannot be intended to limit, deter or prevent access
Police records now subject to same fee schedule as other public records (amending G.L. c. 66, §10)

As with the current version of the law, the RAO may not ask the requestor the purpose of the request

However, the RAO can indicate to a requestor elements that would allow a more expedient handling of a request, although it will not toll the time periods to respond

RAO can also request information to determine whether the request is being made to further a better understanding of government or for news, as compared to a “commercial purpose”, defined to mean:

- Sale or resale of a portion of the record
- Use of the record to advance strategic business interests
Appeals

- Requestor –
  - Requestor may appeal response of RAO to Supervisor.
  - Supervisor must issue decision within 10 business days of receipt of appeal.
  - If requestor is dissatisfied, may appeal to Superior Court.
  - Alternatively, the requestor may bypass the Supervisor and go directly to Superior Court.

- Attorney General –
  - Supervisor may refer to Attorney General to compel compliance with order.
  - Attorney General must identify a single point of contact for the Supervisor.
Superior Court has all remedies at law or in equity

- De novo review

- May perform an in camera review of records without waiving attorney client privilege or work product privilege

**Presumption that records are public**

- Municipality/agency must demonstrate by a preponderance of the evidence that record or portion thereof may be withheld
ATTORNEYS FEES

- Presumption in favor of award of attorneys fees and costs IF requestor obtains relief through a judicial order, consent decree, or the provision of the requested documents after the filing of a complaint
- UNLESS municipality establishes:
  - Supervisor found in favor of municipality
  - Municipality relied upon an appellate level court decision with substantially similar facts
  - Municipality relied upon published opinion of the Attorney General
  - Request was designed to harass, intimidate, or was not in the public interest and made for commercial purposes unrelated to disseminating information to the public about actual or alleged government activity
PUNITIVE DAMAGES & WAIVER

• Punitive Damages - Superior Court may award punitive damages between $1,000 and $5,000 if requestor has obtained judgment in Superior Court and demonstrates municipality failed to act in good faith

• Fee Waiver - If award of attorneys fees and costs is made, Superior Court shall order the municipality to waive any fees in connection with provision of records; even if no award of attorneys fees is made, the court may still require waiver of fees
Electronic Records Preference

- Preference for electronic record production
- Electronic records posting policy
- Technological infrastructure
- Staff time and ability
- **Posting of certain records required, if “feasible”:**
  - 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
OTHER ISSUES

- Custodians may contract for “cloud based” or off-site storage
- Must still have access to cloud based or off-site records upon request, and still deemed to have custody
- Electronic record storage systems to be acquired must, to the extent feasible, provide data in commonly available electronic, machine readable format, provide for storage and retrieval that allow for electronic segregation and redaction
**Main Differences for Agencies**

- Agencies have shorter time frames for responding to requests (**15** total business days, and may only obtain an additional **20** business days to respond from the Supervisor)
- Agencies may not charge for the first **4** hours of work
- Agencies may not petition the Supervisor for an hourly rate in excess of **$25/hour**
- Agencies are **required** to post certain categories of records on official websites
- Agency RAO guidelines are due January 1, 2017
Agency RAOs must maintain a public records log, recording certain information:

- the nature of the request and the date on which the request was received;
- the date on which a response is provided to the requestor;
- the date on which a public record is provided to the requestor;
- the number of hours required to fulfill the request;
- fees charged to the person making the request, if any;
- petitions filed with supervisor of records to charge for segregation/redaction time;
- requests appealed to the supervisor of records;
- the time required to comply with supervisor of records’ orders on requests appealed to the supervisor; and
- the final adjudication of any court proceedings under G.L. c. 66, §10A(d)
There is no statutorily defined “default” RAO in an agency

Under the proposed regulations, agencies have certain reporting requirements:

- The RAO, once designated, must report his/her designation to the state Division of Public Records, and must also report the designation of any secondary RAO(s)

- An agency RAO shall report to the Division of Public Records, by December 31, an annual accounting for the calendar year thus ending, of the information contained in the public records log
Contact the KP Law Government Information and Access Group with questions about the Public Records and Open Meeting Laws.