

RESPONDING TO PUBLIC RECORDS REQUESTS

Municipal Electric Association of
Massachusetts

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BASIC FACTS ABOUT PUBLIC RECORDS

- A presumption exists that all records of the Town are public unless explicitly exempted under G.L. c.4, §7(26) or other statute. G.L. c.66, §10.
- The Public Records Law applies to any kind of "document" made or received by a public officer or employee (papers, maps, recordings, computer data, etc.). It is the nature of the information, not the form in which it is maintained, which makes it a public record.
- A custodian of public records is the person with routine access to or control over public records (for example, the Building Inspector is the custodian of records in the Building Inspector's office, the Board of Selectmen is the custodian of records in the Board of Selectmen's office, etc.).
- A custodian of public records is not required to create a record in response to a public records request. In other words, if the record does not exist, a custodian may simply deny the request on the basis that, "No such responsive record exists."

BASIC FACTS ABOUT PUBLIC RECORDS

- The Public Records Law does not require a custodian of public records to respond to questions. Thus, if a custodian of public records receives a letter asking various questions, the records custodian is not required to respond to the questions. The Public Records Law simply requires that records custodians provide access to or copies of existing public records, upon request, as described below. Additionally, a records custodian may, under certain circumstances, wish to answer questions, or may be required to pursuant to different statutory authority.
- A custodian of public records is presumed to have superior knowledge of the records in his or her custody. Thus, if a records request is not precise, the Supervisor of Public Records has indicated that custodian of public records should utilize his or her superior knowledge of the records to attempt to provide the requester with records responsive to his or her request.

PUBLIC RECORDS REQUEST

- A public records request may be made in person or in writing (including a fax or e-mail). A custodian of public records is not obligated to respond to requests made by telephone only, but may respond at his or her discretion.
- A custodian of public records may not ask a public records requester why he or she seeks a copy of a particular record. Please note, however, that pursuant to exemption (n) of the Public Records Law, a custodian may refuse to disclose records that he or she believes might jeopardize public safety, and may therefore inform the requester that if the requester wishes to volunteer additional information about the requester or the motive for requesting the records, the custodian may be able to evaluate the request differently. See discussion of exemption (n), below.

THE RESPONSE

- The Public Records Law states that, “a custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request.” [emphasis added]
- Within ten calendar days of receipt of the request, a records custodian “shall” respond to a public records request in one of the following ways, or by combining any of the following methods:
 - (1) providing copies of or access to the requested documents;
 - (2) providing a written denial asserting any applicable exemptions; or,
 - (3) if the custodian estimates that it will cost more than \$10.00 to comply with the request, providing a good faith estimate of the cost to comply.

THE RESPONSE

- Pursuant to the Public Records Access Fee Regulations, 950 CMR 32.00 et seq., a records custodian may recover from the requesting party charges as follows:
- (1) Copying
 - (a) Photocopies; \$.20 per page;
 - (b) Computer printouts: \$.50 per page; and
 - (c) Copies of records not susceptible to ordinary means of reproduction: the actual cost to provide the copy. (For example, if a copy of an oversized blueprint is requested and the Town does not have facilities to make such a copy, a Town employee would need to take the blueprint to a copy center. The fee assessed would include the amount charged for the copy at the copy center, plus the pro-rated hourly rate of the lowest paid person capable of taking the blueprint to be copied.)
- (2) Document search time, i.e., any time necessary to search for and copy responsive records, such fee to be determined at the pro-rated hourly rate of the lowest paid employee capable of performing the search.
- (3) Segregation time, i.e., any time necessary to delete or redact protected information from records otherwise subject to disclosure, such fee to be determined at the pro-rated hourly rate of the lowest paid employee capable of such review.

THE RESPONSE

- If a records custodian estimates that it will cost more than \$10.00 to respond to the request for records, and that certain responsive records may be withheld from disclosure pursuant to the application of an exemption, the provided estimate must also contain a written denial citing the specific exemption relied upon to withhold responsive records.
- A records custodian may wait until the requester's payment of the estimated fee is received by the Town prior to performing the work necessary to comply with the request.
- The analysis a municipal records custodian undergoes upon receipt of a public records request is the same regardless of the identity of the requester, except in limited circumstances, such as where the Town would assert exemption (c), the so-called "privacy exemption."

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (a)** applies to those records which are “specifically or by necessary implication exempted from disclosure by statute.”
- This exemption applies when there is a statute which specifically states that records of a certain type will be exempt from disclosure. For example, executive session minutes are protected from disclosure under G.L. c.39, §23B, and are therefore exempt from disclosure pursuant the provisions of G.L. c.39, §23B as it operates through exemption (a) of the Public Records Law.

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (c)** applies to those records which constitute “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.”
- This exemption is known as the “privacy exemption” and protects two types of records. The first clause of exemption (c) protects personnel and medical files maintained by the employer. The Supreme Judicial Court in Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792, 798 (2000), defined personnel records to include any records which would be helpful in making determinations regarding hiring and firing. The second clause of exemption (c) protects from disclosure records which are “personal in nature” and refer to a specific individual. Accordingly, records containing intimate details highly personal in nature such as parental status, marital status, substance abuse, government assistance, family disputes and reputation may be withheld if the public interest in disclosure does not outweigh the privacy interest associated with disclosure of highly personal information.

Customer List of Municipally-Owned Utility

- Not exempt. From Public Records Division Guide:
- "First, the names and addresses of residents of Massachusetts 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)."

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (d)** applies to “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.”
- This exemption is known as the “policy development” or “deliberative process” exemption. This exemption applies to documents created when a particular board has not yet reached a final decision, or created a final document. Further, if a board requests a study to be done which would contain both facts and recommendations, the recommendations portion of the study will not become a public record until the board has determined its response to the same. This exemption will also withholding of certain litigation or pre-litigation communications and documents.

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (f)** applies to “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.”
- In addition to protecting records which are part of an ongoing investigation, this exemption permanently protects the names of voluntary witnesses and complainants from disclosure.

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (n)** allows a records custodian, who believes that disclosure is “likely to jeopardize public safety” to withhold 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.”
 - **Although a custodian is generally prohibited from inquiring as to the identity and motivation of the requester in making a request, it is within the discretion of the custodian to deny access to covered records if the custodian believes that disclosure may jeopardize public safety. Thus, a custodian may inform a requester that if the requester wishes to volunteer additional information about the requester or the motive for requesting the records, the custodian may be able to evaluate the request differently. In no case, however, may a custodian require a requestor to produce additional information**

FREQUENTLY ASSERTED EXEMPTIONS

- **Exemption (o)** allows a custodian to withhold “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”
- It is arguable that this exemption allows (but does not require) withholding of the home addresses and telephone numbers of all municipal employees, including elected and appointed officials, in records identifying the employees as such. There has only been limited interpretation of this exemption by the Supervisor of Public Records, and the exact application of this exemption remains somewhat unclear. You should also note that G.L. c.66, §10 provides that the home address and telephone number of “law enforcement” personnel is exempt from disclosure pursuant to a public records request.

WHERE TO LOOK FOR ADVICE

- 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>
- Town Counsel/City Solicitor

Any Last Questions?

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