

Town of Sudbury

1

Public Records Law

Considerations and Best Practices for Responding to Public Records Requests

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THE LEADER IN PUBLIC SECTOR LAW

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2

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Overview – What is the Public Records Law?

3

- ▶ The Public Records Law is a series of statutes and implementing regulations
 - ▶ G.L. c. 4, § 7(26)
 - ▶ G.L. c. 66, §§ 10- 10B.
 - ▶ A related law is G.L. c. 66A.
 - ▶ Public Records Access Regulations, 950 CMR 32.00, et seq.

- ▶ There are many other statutes and regulations that are implicated when considering whether a public record is subject to mandatory disclosure under the Public Records Law

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Overview – What is a Public Record?

4

- ▶ Definition of public record: “[A]ll books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee...” G.L. c. 4, § 7(26)

- ▶ The Public Records Law analyzes the content of a record, not the form
 - ▶ Includes e-mails discussing public business, even if on personal e-mail account
 - ▶ Volunteers and the records they make and receive are not “exempt”
 - ▶ Could include text messages
 - ▶ Could include handwritten notes of an employee, memos, video recordings, etc.
 - ▶ Social media

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Overview – What is a Public Record?

5

- ▶ Social Media is a public record!
- ▶ Town must retain and archive all social media pages and posts
 - ▶ Current guidance recommends taking periodic “screenshots” of Town social media accounts in order to meet records retention obligations
- ▶ Do not post information that is not a public record
- ▶ Try not to use “DMs” to communicate; harder to archive and all posts should be public



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Records Access Officers (RAO)

6

- ▶ Each public entity must designate one or more RAO(s)
 - ▶ Town Clerk, Assistant Town Manager, and Information Officer
 - ▶ Contact information for RAO must be clearly posted on Town website
- ▶ RAO duties include:
 - ▶ Coordinating responses to public records requests;
 - ▶ Assisting records requestors and records custodians; and,
 - ▶ Preparing guidelines to enable requestors to make “informed” requests
 - ▶ Guidelines must be posted on website: <https://sudbury.ma.us/publicrecords/>

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7

Public Records Requests

- ▶ Requests may be made in person or in writing, whether through the Town's portal, by mail or email, requesting form at Town Hall, or by fax
- ▶ RAO must respond to request within 10 business days (not calendar days)
 - ▶ Saturdays, Sundays, legal holidays, and "unexpected closures" do not count
 - ▶ Failure to respond within 10 business days = no fee may be assessed
- ▶ If the response does not enclose all the requested records, a detailed written must be provided
- ▶ As alternative to obtaining copies, requester shall be permitted (to the extent feasible and at reasonable times) to view records or use a personal device to copy records

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8

Public Records Requests – Required Elements of Response

- ▶ 1. Confirm receipt and date of request;
- ▶ 2. Identify requested records or categories of records not within custody of RAO; identify agency, municipality, or custodian with custody, if known;
- ▶ 3. Identify records that RAO intends to withhold and/or redact, detailing with specificity the reasons for withholding and the applicable exemptions;
- ▶ 4. Identify records produced (or that will be produced) and, if necessary, a detailed statement describing why response time in excess of 10 business days is required;
- ▶ 5. Identify anticipated timeframe for production (cannot exceed 25 business days after receipt of request without extension) and provide detailed explanation of how request unduly burdens other responsibilities, including, magnitude or difficulty of request, size of office, office hours;



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Public Records Requests – Required Elements of Response

9

- ▶ 6. If more than 25 days response time is anticipated, notify requester of petition to Supervisor for extension of time and include request for requester’s voluntary assent to additional time (to be confirmed in writing);
- ▶ 7. Suggest a modification of request if appropriate to reduce response time and cost;
- ▶ 8. Itemized good faith estimate of fees, if fees will be charged;
 - ▶ Sudbury has fewer than 20,000 residents as of last census, so Town can charge for all time
- ▶ 9. Statement informing requester of appeal rights
 - ▶ Administrative appeal to Supervisor of Records under 950 CMR 32.08(1), and
 - ▶ Right to seek judicial review in Superior Court pursuant to G.L. c. 66, § 10A(c)



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Timing for Responses

10

- ▶ Provide all records or the detailed written response within 10 business days
- ▶ If initial written response provided, additional 15 business days to provide the records, for a total of 25 business days from receipt of original request
- ▶ 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”
- ▶ Request is deemed received upon the first business day following receipt, regardless of the form of the request (same rule for oral and written requests)



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Fees

11

- ▶ Copies \$0.05 per page for black and white, two sided
- ▶ May charge actual cost for USB device
- ▶ May charge at hourly rate of lowest paid employee capable of responding
 - ▶ May not exceed \$25.00 per hour (petition process available)
- ▶ Segregation or redaction must be “authorized” by law in order to charge a fee for the time spent redacting
- ▶ RAO “may delay provision of records until all fees related to such requests are paid in full ... in accordance with 950 CMR 32.07.” 950 CMR 32.06.
 - ▶ Supervisor also says work need not begin until all reasonable fees are paid



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Electronic Records Preference

12

- ▶ RAO must post commonly available public documents on the Town website
 - ▶ Annual reports and budgets;
 - ▶ Notices of hearings and minutes of open meetings;
 - ▶ Final opinions, decisions, orders, or votes from proceedings;
 - ▶ Winning bids for public contracts;
 - ▶ Awards of grants;
 - ▶ Any public record information of significant interest that is deemed appropriate to post



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Commonly Used Exemptions

13

- ▶ **Exemption (a)** to the Public Records Law allows withholding or redaction of records that are “specifically or by necessary implication exempted from disclosure by statute.”
 - ▶ You may charge for the time spent redacting or segregating for Exemption (a) statutes
 - ▶ Full list of statutes: <https://www.sec.state.ma.us/pre/prepdf/guide.pdf> (pages 78-80)
- ▶ **Examples:**
 - ▶ Criminal Record Info (CORI): G.L. c. 6, § 167; 803 CMR 2.23; 803 CMR 5.14
 - ▶ Abatement applications: G.L. c. 59, § 60
 - ▶ Affordable Housing Applicant Information: G. L. c. 40T, § 3
 - ▶ Personal information: G.L. c. 93H (SSN, Driver’s License Number, Financial Account Numbers)
 - ▶ HIPAA and medical privacy laws; COVID information about specific individuals

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Commonly Used Exemptions

14

- ▶ **Exemption (c)** - ***NEWLY REVISED*** - allows withholding or redaction 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; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation”
 - ▶ Personal cell phone numbers and emails, if that information is not publicly available
 - ▶ “Intimate details of a highly personal nature, the disclosure of which would constitute an invasion of privacy.”
 - ▶ Examples: Marital status, legitimacy of children, medical conditions, welfare payments, alcohol/drug consumption, mental health issues, family fights, and reputation

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15

Commonly Used Exemptions

- ▶ **Exemption (d)** - Deliberative process documents, including those between government bodies on matters for which policy positions are being developed, including legal advice
- ▶ **Exemption (e)** - Personal notes that are not properly part of any governmental “file” and that have not been shared with other staff/officials



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16

Commonly Used Exemptions

- ▶ **Exemption (f)** - Records of ongoing investigations necessarily compiled out of public view until disclosure will not affect investigation and the records reflecting the names and identifying details of voluntary complainants and witnesses
- ▶ **Exemption (n)** - Records, plans, blueprints, security details, emergency preparedness, etc. that the custodian reasonably believes is “likely to jeopardize public safety” if disclosed, including cyber security concerns
- ▶ **Exemption (o)** - Personal e-mails, home addresses, and home telephone numbers of a public employee and their family members

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PETA Test

17

- ▶ People for the Ethical Treatment of Animals, Inc. v. Dep't of Agriculture, 477 Mass. 280 (2017): Court established a two-part test to determine whether RAO properly withheld records under (n).
 1. Examine record and extent to which it resembles examples listed in statutory exemption (“blueprints, plans, policies, procedures and schematic drawings ... emergency preparedness, threat or vulnerability assessments ..., records relating to the security or safety”)
 2. Determine whether custodian exercised “reasonable judgment” in determining whether disclosure was “likely to jeopardize public safety”



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Commonly Used Exemptions

18

- ▶ Attorney-Client Privilege - May withhold or redact records subject to the attorney-client privilege or the attorney work product doctrine if it meets the test articulated by the court in Suffolk Construction Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 449-450 (2007).
- ▶ Must produce a detailed “privilege log” describing:
 - ▶ Names of author and recipients and the subject matter of withheld information
- ▶ Revised Regulations: Removed the “statutory right of access” exemption when requestor had an alternative means of access to records, such as through discovery process in court cases
 - ▶ Consult with Town Counsel on how to best respond to requests that implicate pending litigation, which will depend on the particulars of the case

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Appeals

19

Forum Options

- ▶ Administrative appeals may be filed with Supervisor of Public Records; if dissatisfied with response, requester may further appeal decision to Superior Court.
- ▶ Attorney General may enforce Supervisor's orders, seek to intervene in a pending suit, or bring her own suit in Superior Court; and/or,
- ▶ Requester may go directly to Superior Court to appeal response



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Appeals

20

Risks

- ▶ Presumption in favor of awarding attorney's fees in court if plaintiff is successful, including if the public entity ultimately provides the requested records upon filing of lawsuit
- ▶ Public record fees also are waived if plaintiff in court is successful, unless the Town is able to demonstrate action consistent with existing precedent or with prior decisions of the Supervisor of Records
- ▶ Court has discretion to waive fees even if plaintiff is unsuccessful



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21

Creating Records – Best Practices

- ▶ Use official Town-issued e-mail addresses for public business;
 - ▶ Or always copy staff with Town e-mail so it is stored on Town’s servers
- ▶ Ensure that when you hit “send” on an e-mail, you are comfortable with that e-mail being forwarded, printed, posted, and tweeted;
- ▶ Use “formal tone” when conducting public business in writing (and otherwise);
- ▶ Avoid asking for or providing personal information in public e-mails, including unpublished telephone numbers, medical information, social security numbers, financial account numbers, and the like;
- ▶ Consider whether formal record is required (“phone calls still work”)

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22

Producing Records – Best Practices

- ▶ RAOs coordinate response by identifying officials, employees, and departments likely to have responsive records;
- ▶ RAOs to keep track of deadlines;
 - ▶ Let staff know deadline to get responsive records to you or to get an estimate of time/cost to fully respond
- ▶ RAOs, with help of IT staff, create list of “search terms” or date ranges to input for e-mail records
- ▶ If large volume of records, segregate records into categories (i.e., attorney emails to send to Town Counsel for review, records to be produced, records to be withheld)

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Common Issues

23

- ▶ What constitutes receipt? - ***NEWLY REVISED***
 - ▶ First business day following receipt, *regardless of form*
- ▶ Some requesters think response needs to be provided within 10 calendar days
- ▶ Simple acknowledgement of receipt of a request within 10 business days is not sufficient; responses often do not contain requisite level of detail
 - ▶ Supervisor of Records is enforcing the requirement that responses must identify, with specificity, the exemption(s) relied upon when withholding or redacting records
- ▶ More requests from information “clearinghouses” sent to all Towns for which Counsel often has a template response; commercial purposes; excessively broad requests



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Resources

24

- ▶ Secretary of the Commonwealth, A Guide to the Public Records Law (2020)
 - ▶ <https://www.sec.state.ma.us/pre/prepdf/guide.pdf>
- ▶ KP Law’s Public Records Law Resources
 - ▶ <http://www.k-plaw.com/resources/public-records-law-resources/>
- ▶ Guide to Municipal Records Retention Schedule
 - ▶ https://www.sec.state.ma.us/arc/arcpdf/Municipal_Retention_Schedule_20200406.pdf
- ▶ With approval of Town Manager, KP Law is also available to help with responses to requests, review records for privileges/exemptions, and prepare privilege logs

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Questions?

25

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