BURNS & LEVINSON LLP

MUNICIPAL LAW
UPDATE

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PUBLIC RECORDS OVERHAUL SIGNED INTO LAW

After a year of intense debate, legislation overhauling the state's public records law for the first time in over 40 years was signed by Gov. Charlie Baker on June 3rd (becoming Chapter 121 of the Acts of 2016, the "Act"). The provisions of the Act take effect on January 1, 2017. The Secretary of State's office is expected to release new regulations later this year.

Among other things, the Act sets new time frames that must be complied with to produce public records, exempts from reimbursement a portion of employee time spent performing records requests, and allows requestors to appeal directly to superior court to compel compliance. It does not change any of the currently applicable exemptions to the definition of a public record.

The Act applies to all agencies and municipalities ("Public Entity" or "Public Entities"). Agencies include any state agency, executive office, board, commission, bureau, division or authority, authority created by the legislature serving a public purpose, and any legal entity that receives or expends public funds for payment of administration of pensions.

All Public Entities would be required to designate a records access officer ("RAO") who is responsible for timely fulfilling records requests, documenting all requests, assisting the requester throughout the process and preparing guidelines that inform persons seeking access to records of the availability of such records electronically or otherwise. Such guidelines must be posted on the Public Entity's website. In the case of municipalities, these must be posted before July 1, 2017.

Record requests must be made in writing by email, first class mail or by hand delivery. Public records must be produced electronically unless the record is not available in such format or the requester does not have the ability to receive or access the records in a usable elctronic form. Agencies will also need to make available on their website searchable electronic copies of several types of records including opinions, decisions, orders, reports and notices.

COMPLIANCE TIMEFRAMES

Ten Business Day Rule

The RAO must permit inspection or provide a copy of a public record within 10 business days from the date the request was made, provided that the RAO receives payment of a reasonable fee, the public record is within the RAO's possession, and the request reasonably describes the record sought.

Situations may arise where the Public Entity does not intend to produce the record, or the request unduly burdens the Public Entity (due to the magnitude of the request or multiple requests) so that it cannot timely comply. In such cases, the Public Entity must inform the requestor in writing no later than 10 business days after the receipt of the request. This response must comply with all of the following:

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ABOUT THE AUTHOR

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Matthew G. Feher represented municipal interests throughout the legislative proceedings which gave rise to the Act in his capacity as Executive Committee Member and Legislative Chairman of the Massachusetts Municipal Lawyers Association.

ABOUT BURNS & LEVINSON

Burns & Levinson is a Boston-based, full service law firm with more than 125 attorneys in Massachusetts, New York and Rhode Island. Core areas of practice are Real Estate, Business Law, Business Litigation, Intellectual Property and Private Client Legal Services.

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(a) Confirm receipt of the request.

(b) Identify the public records or categories thereof that are not within the possession of the Public Entity.

(c) Identify the Public Entity that may be in possession of the record sought, if known.

(d) Identify any records or categories that the Public Entity intends to withhold and provide specific reasons for withholding, including the exemption relied upon.

(e) Identify any public records or categories thereof that the Public Entity intends to produce, and a detailed statement describing why the magnitude or difficulty of the request is unduly burdensome thereby requiring additional time.

(f) Identify a reasonable time frame in which the public record will be produced. This time frame cannot exceed 15 business days in the case of an agency, and cannot exceed 25 business days in the case of a municipality, unless the requestor agrees to extending such time frames voluntarily.

(g) Suggest a reasonable modification of the scope of the request or assist the requestor to modify the scope of the request if doing so would make for greater efficiency and affordability.

(h) Include an itemized, good faith estimate of any fees.

(i) Include a statement informing the requester of the right to seek administrative and judicial appeal of an unfavorable decision.

Petition for Extension

Within 20 business days from the receipt of the request, or within 10 business days from a determination of the Supervisor of Public Records ("Supervisor") that the record sought is a public record, the RAO may petition the Supervisor for an extension of time to furnish the record if the request unduly burdens the Public Entity due to the magnitude or difficulty of the request or if the requester has made multiple requests. The Supervisor may grant a single extension of no more than 20 business days for an agency and 30 business days for a municipality for good cause shown, including the need to segregate or redact records, and whether the request is intended to harass.

In the event that the Supervisor finds that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for broad dissemination of information to the public about governmental activity, the Supervisor may grant an indefinite period of time or relieve the Public Entity from the obligation to satisfy the requests.

In all cases, the Supervisor must make a written determination within 5 business days following receipt of the petition.

FEES

The Act also makes several change regarding the collection of fees that Public Entities can charge for fulfilling records requests.

A RAO may assess a "reasonable fee" for producing a public record unless the record requested is freely available to the public and such fee cannot exceed the actual cost of producing the record. They may charge the actual cost of a storage device or materials as part of the fee and not more than 5¢ per page for black and white paper copies or printouts. This reduced fee schedule had previously been established pursuant to emergency regulations promulgated by the Secretary of State on February 29, 2016; see 950 CMR 32.06.

The Act exempts the first four hours of agency employee time and the first two hours of municipal employee time, from reimbursement and caps the hourly rate thereafter at $25. In either case, the full amount of employee time is reimbursable if such time is spent redacting or segregating records if required (not permitted) by law and if approved by the Supervisor. In the case of municipalities, the full amount of employee time is reimbursable in cities and towns with a population at or under 20,000. Employee time includes the use of vendors, including outside legal counsel.

An agency or municipality may petition the Supervisor to exceed these limitations or to charge for redaction and segregation time. Such petition may be approved if the Supervisor determines that the request is for a commercial purpose or the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of the $25 per hour cap and the fee is reasonable and not designed to limit, deter or prevent access to the record. Again, the Supervisor must issue a written determination within 5 business days of receiving the petition.

The RAO may deny public records requests from any requestor who has failed to compensate the agency or municipality for previously produced records. Alternatively, the agency or municipality foregoes any fee in the event that the RAO did not respond to the requestor within the 10 business day time frame (discussed above).

ENFORCEMENT

Appeals

The prior law's enforcement provisions were changed substantially by the new Act. Most notably, a requester no longer has to exhaust administrative remedies before seeking judicial review. The Act allows a requestor to appeal directly to superior court to enforce the new law's requirements at any time and notwithstanding a pending Public Entity petition or other administrative consideration. Alternatively, the Act allows a requestor to petition the

Supervisor to determine whether a violation of the law has occurred. There is no statute of limitations applicable to bringing either administrative or judicial appeals.

In the case of administrative review, the Supervisor must render its written determination within 10 business days of receiving the petition and will order timely and appropriate relief. Again, this is required notwithstanding any pending Public Entity petition. If aggrieved by a Supervisor's order or upon failure by the Supervisor to timely issue a determination, a requestor may obtain judicial review in the nature of certiorari. In the event the Public Entity refuses or fails to comply with the Supervisor's order, the Supervisor may notify the Attorney General who may take action they deem appropriate to ensure compliance. At any time, the Attorney General may file a complaint in superior court to enforce the law.

In any judicial action, the courts shall have the authority to enjoin the Public Entity's action, determine the propriety of any Public Entity action de novo, and inspect the public records in camera (unless such records are privileged as in the case of attorney-client privileged communications). Left unchanged from the prior law is the presumption that the record sought is public and the burden on the defendant Public Entity to prove, by a preponderance of the evidence, that such record may be withheld.

Fees and Damages

If the requestor obtains judicial relief, the courts **may** award reasonable attorneys' fees and costs. There shall be a presumption in favor of awarding attorneys' fees and costs unless the Public Entity establishes one or more of the following:

1. The Supervisor found that the agency or municipality did not violate the law.
2. The Public Entity reasonably relied upon a published opinion of an appellate court or the Attorney General based on substantially similar facts.
3. The request was designed or intended to harass or intimidate.
4. The request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

The agency or municipality must waive any fees otherwise due to it for producing a record in the event the court award attorneys' fees and costs. The court may still order the waiver of such fees whether or not attorneys' fees are awarded.

Finally, the court **may** award punitive damages against the defendant agency or municipality in an amount of $1,000 to $5,000 if the requestor obtains judicial relief and has demonstrated that the agency or municipality "did not act in good faith" in withholding or failing to produce the requested record or assessing an unreasonable fee. It is important to note that the imposition of any penalties under the Act are assessed on the Public Entity, not the individual including the RAO.

Conclusion

The Act makes significant changes to the prior law, particularly in the areas of compliance time frames, fees, and enforcement. These changes will need to be carefully understood by all Public Entities. In addition, certain of the Act's new requirements may give rise to unintended consequences. For example, in order to avoid costly and resource-draining litigation, Public Entities may be forced to err on the side of full disclosure to avoid litigation, even if by doing so compromises privacy rights and privileged material.

Public Entities are well advised to consult with their legal counsel to prepare for the Act's new requirements and develop the requisite guidelines and policies.