

THE UPDATED PUBLIC RECORDS LAW: HOW CHARTER SCHOOLS SHOULD PREPARE

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Background



Public Records Law: Background

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- Last updated in 1973, before electronic record-keeping
- Complaints
 - ▣ Long delays in responding to public records requests
 - ▣ Exorbitant fees
 - ▣ Massachusetts ranked low for government transparency

Public Records Law: Important Dates

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“An Act to Improve Public Records”

- ☐ Signed on June 3, 2016
- ☐ Effective January 1, 2017 - applies only to requests submitted on or after this date
- ☐ Proposed regulations
 - ☐ Public hearing held in October; comment period ended
 - ☐ Final regulations expected by January 1, 2017



About this presentation

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Overview of the updated Public Records Law and how charter schools should prepare for compliance

- ☐ Background
- ☐ Records Access Officer
- ☐ Website Posting Requirements
- ☐ Public Records Requests
- ☐ Petitions by Charter Schools and Requestors



Public Records Law: Basic Terms

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- “Public record” – means any record made or received by a government entity or employee, unless an exemption applies
- “Agency” or “municipality”
 - ▣ No official guidance regarding charter schools
 - ▣ This presentation assumes that charter schools will be treated as agencies

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Records Access Officer



Records Access Officer: Appointment

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- Appointment
 - One or more employees
 - Charter School appoints primary Records Access Officer; primary records access officer may designate secondary Records Access Officer(s) [Proposed Regulations]
- Notice to Public Records Division
- Website notice of each Records Access Officer
 - Name
 - Title
 - Business address
 - Business telephone number
 - Business email address

Records Access Officer: Obligations

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- ☐ Coordinates responses to public records requests
- ☐ Assists public records requestors
- ☐ Prepares guidelines to enable requestors to make informed requests
 - ☐ Must include a list of categories of public records maintained [Proposed Regulations]
- ☐ Posts required records on charter school website

Records Access Officer: Obligations

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- ❑ Documents public records requests
 - ❑ Nature of request
 - ❑ Date request received
 - ❑ Date response provided to requestor
 - ❑ Date requested public record provided to the requestor
 - ❑ Number of hours to fulfill the request
 - ❑ Fees charged to the requestor
 - ❑ Records Access Officer petitions submitted to the Supervisor of Records at the Division of Public Records
 - ❑ Requests appealed to the Supervisor of Records
 - ❑ Time to comply with orders of the Supervisor of Records
 - ❑ Final decision of any court proceeding associated with a public records request

Records Access Officer: Obligations

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- Reports public records requests annually
 - Report filed by 5:00pm on December 31st
 - Report form to be provided by the Secretary of the Commonwealth, expected before January 1, 2017
- Assists in preserving public records

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Website Posting Requirements



Website Posting Requirements

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- On a searchable website, post electronically accessible copies of:
 - Annual reports
 - Winning bids of public contracts
 - Awards of federal, state and municipal government grants
 - Minutes of open meetings
 - Charter school budgets

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Public Records Requests



Public Records Requests: An Overview

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- ☐ What has changed and what remains the same
- ☐ Timeline
- ☐ Content of initial response
- ☐ Format of records delivery
- ☐ Fees

Public Records Requests: What Has NOT Changed

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- General obligations under the public records law:
 - Must **respond** to each public records request
 - Must **provide** requested public record, unless an exemption applies
 - May charge a reasonable **fee**
- Applicable exemptions, such as:
 - Disclosure prohibited under applicable law (e.g., FERPA)
 - Personnel and medical records
 - Unwarranted invasion of personal privacy



Public Records Requests: What HAS Changed

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- ❑ Required timeline
 - ▣ Measured in business days, not calendar days
 - ▣ Greater specificity
- ❑ Contents of response – greater specificity
- ❑ Electronic format – required, unless requestor prefers another format
- ❑ Fees charged by school – much more limited
- ❑ New penalty for failure to meet required timeline
- ❑ Attorneys' fees - may be awarded to requestor which sues



Timeline

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- Deemed Receipt
 - Oral requests - when made
 - Written requests - the first business day following electronic transmission or physical receipt [Proposed Regulations]
- Initial written response and production of records
 - Initial response within ten business days, not ten calendar days
 - New penalties for failure to respond in time



Contents of Initial Response

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- ☐ **Either** provide requested record(s)
- ☐ **Or** provide an itemized good faith fee estimate
- ☐ **Or** provide a denial on one of the following grounds:
 - Option 1: *The school doesn't possess the record?* Explain and identify the agency or municipality that might have the record
 - Option 2: *Does an exemption to the public records law apply?*
 - Identify the specific exemption or common law privilege and how it applies
 - If attorney-client privilege is claimed, include the names of the author and recipients, the date, the substance of the record, and the grounds upon which attorney-client privilege is claimed

Contents of Initial Response

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■ Option 3: *Is the request unduly burdensome?*

- Explain in detail why the request is unduly burdensome
- Identify a reasonable timeline, no later than 15 business days following receipt of the request
- Suggest a reasonable modification to permit efficient production

■ Any denial must also include the following:

- The date of the request
- Identification of the records or categories of records that will be produced
- An itemized, good faith estimate of any fees that may be charged
- A statement that the requestor has the right to appeal administratively to the Supervisor of Records, and the right to seek judicial review of an unfavorable decision from the Superior Court



Format of Records Delivery

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- Upon request, a person is entitled
 - ▣ to inspect and/or photograph or scan
 - ▣ to receive: in hand, by mail, by fax, electronically
- Updated law assumes that machine-readable electronic form is preferred, unless unavailable
- New systems, to the extent feasible, shall ensure:
 - ▣ electronic access
 - ▣ maximum public access

Fees

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- ☐ Reasonable fee, which does not exceed actual cost
- ☐ \$.05/ page for copies; electronic/faxed copies are free
- ☐ No charge for redaction, unless
 - ☐ required by law, or
 - ☐ approved by the Supervisor of Records
- ☐ Lowest hourly rate for compiling, redacting and copying, up to \$25/hour
- ☐ No charge for first four hours of labor
- ☐ Actual postage
 - ☐ if requestor asks for record to be mailed, or cannot receive in person
 - ☐ requestor may ask for lowest cost mailing available



Petitions

- ☐ **Petitions by Charter School**
- ☐ **Petitions by Requestor**



Petitions by Charter School to Supervisor of Records

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- Three types of petitions by schools are permitted:
 - To charge for time spent redacting, when redaction is not required by law
 - To extend the deadline up to 20 business days
 - For longer extensions, or waivers



Petitions by Charter School: Basis I

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- Petition to charge for redaction, when not required
 - ▣ Prerequisites
 - Request is for commercial purpose, or
 - Request cannot be prudently completed without redaction, and “the fee represents an actual and good faith representation by the agency or municipality to comply with the request”
 - ▣ **BUT** Supervisor of Records must also consider
 - Public interest in limiting public access
 - Financial ability of the requestor
 - Other relevant extenuating circumstances

Petitions by Charter School: Basis II

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□ Petition to extend deadline up to 20 business days

■ Prerequisites

- Undue burden, and charter school cannot complete request within 15 business days due to:

- Magnitude of request, or
- Receipt of multiple requests from the same requestor

- Good cause, such as

- Search and segregation time
- Scope of redaction required to prevent unlawful disclosure
- Capacity and normal business hours
- Efforts undertaken to fulfill this and other requests, and/or
- Request is frivolous or intended to harass or intimidate

- **BUT** Supervisor of Records must also weigh public interest in expeditious disclosure

Petitions by Charter School: Basis III

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- Longer extension or waiver if request is:
 - Part of a series of contemporaneous requests that is
 - Frivolous or
 - Designed to intimidate or harass, and
 - **NOT** intended for the broad dissemination of information to the public about actual or alleged governmental activity

Petitions by Charter School: Procedure

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- Within 20 business days after request is received:
 - Initial response still required within 10 business days
 - Submit petition in writing to Supervisor of Records
 - If requesting more time, must explain necessity [Proposed Regulations]
 - Provide a copy of the petition to the requestor
 - Written determination from Supervisor of Records within 5 business days

Petitions by Requestor

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- Requestor may petition Supervisor of Records
 - [Proposed Regulations] Within 90 calendar days of
 - Response from the Records Access Officer, or
 - Request, if Records Access Officer failed to respond
- Supervisor of Records
 - Provides written determination within 10 business days
 - May notify the Attorney General to ensure compliance
- Requestor may file suit in superior court (whether or not petition is filed with Supervisor of Records)

Penalties for Noncompliance

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- ❑ Charter school cannot charge fees, if it fails to respond within 10 business days
- ❑ If requestor prevails in superior court
 - Attorneys fees and costs presumed (resulting in automatic fee waiver)
 - Fees may be waived, even if attorneys fees not awarded
- ❑ If Attorney General prevails in superior court – automatic waiver of fees
- ❑ Punitive damages (\$1,000 - \$5,000) if requestor proves in superior court that charter school did not act in good faith



Further Guidance



Further Guidance; Some Open Issues

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□ Further Guidance

- Updated Guide to the Public Records Law
- Advisory Opinions

□ Sample open issues

- Charter Schools: Agencies or municipalities?
- Redaction required by law: Does this include MGL C. 214 s.1B? “A person shall have a right against unreasonable, substantial or serious interference with his privacy.”

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Questions?



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