

HOUSE No. 3858

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, November 18, 2015.

The committee on Ways and Means, to whom was referred the Bill to improve public records (House, No. 3665), reports recommending that the same ought to pass with an amendment substituting therefor the accompanying bill (House, No. 3858).

For the committee,

BRIAN S. DEMPSEY.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act to improve public records.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Subsection (n) of clause Twenty-sixth of section 7 of chapter 4 of the
2 General Laws, as appearing in the 2014 Official Edition, is hereby amended by striking out, in
3 line 229, the words “subsection (b)” and inserting in place thereof the following words:-
4 subsection (c).

5 SECTION 2. Said section 7 of said chapter 4, as so appearing, is hereby further amended
6 by striking out, in line 269, the word “ten” and inserting in place thereof the following word:-
7 10A.

8 SECTION 3. Section 3 of chapter 66 of the General Laws, as so appearing, is hereby
9 amended by inserting after the words “microphotographic process”, in line 12, the following
10 words:- , or by electronic means.

11 SECTION 4. Said chapter 66 is hereby further amended by inserting after section 6 the
12 following section:-

13 Section 6A. (a) Each agency shall designate 1 or more employees as records access
14 officers. In a municipality, the municipal clerk, or the clerk's designees, or any designee of a
15 municipality that the chief executive officer of the municipality may appoint, shall serve as
16 records access officers. For the purposes of this chapter the term "agency" shall mean any entity,
17 other than a municipality, that is identified in clause Twenty-sixth of section 7 of chapter 4 as
18 possessing "public records," as defined therein.

19 (b) A records access officer shall coordinate an agency's or a municipality's response to
20 requests for access to public records and shall facilitate the resolution of such requests by the
21 timely and thorough production of public records. Each officer shall: (i) assist persons seeking
22 public records to identify the records sought; (ii) assist the custodian of records in preserving
23 public records in accordance with all applicable laws, rules, regulations and schedules; and (iii)
24 prepare guidelines that enable a person seeking access to public records in the custody of the
25 agency or municipality to make informed requests regarding the availability of such public
26 records electronically or otherwise. Guidelines shall be updated periodically and shall include a
27 list of categories of public records maintained by the agency or municipality. Each agency that
28 maintains a website shall post such guidelines on its website.

29 (c) Each agency and municipality shall post in a conspicuous location at its offices and
30 on its website, if any, the name, title, business address, business telephone number, and business
31 email address of each records access officer. The designation of 1 or more records access
32 officers shall not be construed to prohibit employees who have been previously authorized to
33 make public records or information available to the public from continuing to do so; provided
34 that such employees provide public records in accordance with this chapter.

35 (d) If a public record is originally available in electronic form, the records access officer
36 shall, at the option of the requester, provide it in that electronic form. In making a public record
37 available, the records access officer may provide the public record in any commonly available
38 electronic format if the public record is readily reproducible in that format. If a request for
39 public records does not specify the format for producing electronically stored information, the
40 records access officer shall provide the public record in a commonly available electronic format.

41 (e) Each records access officer shall document completed requests for public records and
42 record the nature of the request, the time required to fulfill the request and any fees charged to
43 the person making the request. The secretary of the commonwealth shall prescribe a form for
44 recording such information and shall annually collect the information from the records access
45 officers and report the same to the clerks of the house and senate on or before March 1.

46 SECTION 5. Said chapter 66 is hereby further amended by striking out section 10 and
47 inserting in place thereof the following 3 sections:-

48 Section 10. (a) A records access officer appointed pursuant to section 6A shall, upon
49 request, permit inspection or furnish a copy of any public record, as defined in clause Twenty-
50 sixth of section 7 of chapter 4, or any segregable portion thereof, not later than 10 business days
51 following the receipt of the request; provided, that the request reasonably describes the public
52 record sought; the public record is within the possession, custody or control of the agency or
53 municipality that the records access officer serves; and the records access officer receives
54 payment of a reasonable fee as set forth in subsection (e). A request for public records may be
55 delivered to the records access officer in hand or via first class mail at the record access officer's

56 business address, or via electronic mail to the address posted by the agency or municipality that
57 the records access officer serves.

58 (b) If an agency or municipality is unable to permit inspection or furnish a copy of a
59 requested public record within the timeframe established in subsection (a), the records access
60 officer shall, not later than 10 business days following the initial receipt of a request for public
61 records, issue a written response to the person who submitted the request. The written response
62 may be made via first class or electronic mail and shall include the following information:

63 (i) confirmation of the receipt of the request;

64 (ii) identification of any known public records or categories of public records that the
65 agency or municipality intends to produce and any, known records, categories of records, or any
66 portion of a record, that the agency or municipality intends to withhold accompanied by specific
67 reasons for such withholding; provided, that nothing in the written response shall limit an
68 agency's or municipality's ability to redact or withhold information in accordance with state or
69 federal law;

70 (iii) identification of any public record sought that does not exist or is not within the
71 possession, custody, or control of the agency or municipality that the records access officer
72 serves;

73 (iv) a statement as to why the agency or municipality requires additional time to produce
74 all other public records sought;

75 (v) a reasonable timeframe in which the agency or municipality shall produce all other
76 public records sought; provided, that, for an agency, the timeframe provided shall not exceed 60

77 days following the initial receipt of the request for public records; and, for a municipality, the
78 timeframe provided shall not exceed 75 days following the initial receipt of the request for public
79 records; provided further, that an agency or municipality may, by agreement of the requester,
80 establish a date beyond the timeframes set forth herein;

81 (vi) an estimate of any fees that may be charged to produce the records; and

82 (vii) an invitation to the person making the request for public records to contact the
83 records access officer to discuss a reasonable modification of the scope of the request.

84 If an agency or municipality fails to issue any written response to the person who
85 submitted the request for public records within 10 business days following the initial receipt of
86 the request, the person who submitted the request for public records may petition the supervisor
87 of records who shall order the records access officer to issue a response in accordance with this
88 subsection no later than 5 business days from the issuance of the order by the supervisor.

89 (c) Whenever an agency or municipality issues a response that the agency or
90 municipality intends to withhold a record, or any portion thereof, the person who submitted the
91 initial request for public records under subsection (a) may, not later than 30 days following
92 receipt of such a response, petition the supervisor of records for a determination as to whether
93 the requested document constitutes a public record, as defined in clause Twenty-sixth of section
94 7 of chapter 4. In assessing the propriety of a withholding, the supervisor of records shall be
95 permitted to inspect any record or copy thereof in camera when the agency or municipality
96 claims that the record, or any portion thereof, is being withheld in accordance with the
97 exemptions set forth in clause Twenty-sixth of section 7 of chapter 4; provided, that the agency
98 or municipality may withhold from inspection a record, or any portion thereof, that is privileged

99 or being withheld pursuant to an explicit state or federal statutory prohibition. Whenever an
100 agency or municipality fails to respond to any portion of a request for public records pursuant to
101 subsection (b), the person who submitted the initial request for public records may, not later than
102 90 days following the initial submission of the request for public records, petition the supervisor
103 of records for a determination whether the agency or municipality has failed to comply with
104 subsection (b). The supervisor of records shall issue a decision regarding any petition submitted
105 in accordance with this subsection not later than 10 business days following receipt of the
106 petition. Upon a determination that a requested record, or any portion thereof, constitutes a
107 public record, the supervisor of records shall order the records access officer to furnish the public
108 record, or any portion thereof, as soon as practicable, and in any event no later than 60 days from
109 the issuance of the order. The administrative remedy provided by this subsection shall not in any
110 way limit the availability of judicial remedies set forth in this chapter. If the agency or
111 municipality refuses or fails to comply with any order issued by the supervisor of records in
112 accordance with this section, the supervisor of records may notify the attorney general, who,
113 after consultation with the supervisor, shall take whatever measures the attorney general deems
114 necessary to ensure compliance with the provisions of this section. The attorney general shall
115 designate an individual within the office of the attorney general to serve as a primary point of
116 contact for the supervisor including, but not limited to, a primary point of contact for any notice
117 from the supervisor to the attorney general pursuant to this section.

118 (d) At any time within 45 days following the initial receipt of a request for public records
119 submitted in accordance with subsection (a), within 30 days following the receipt of an order
120 issued by the supervisor of records in accordance with subsection (c), or within any other
121 timeframe agreed upon by the requester and the agency or municipality, a records access officer

122 may petition the supervisor of records for an extension of the time periods allotted in subsection
123 (b) for the agency or municipality to furnish copies of the requested record, or any portion
124 thereof, that the agency or municipality has within its possession, custody, or control, and intends
125 to furnish; provided, that the supervisor may only grant 1 such request for an extension and shall
126 issue a decision regarding such a petition within 5 business days following receipt of the petition.
127 When granting a request for extension, the supervisor of records may extend or modify the
128 timeframes set forth in subsection (b) for the agency or municipality to furnish copies of the
129 records requested upon good cause shown by the agency or municipality; provided that, in
130 determining whether good cause has been shown by the agency, municipality, the supervisor of
131 records shall consider, but shall not be limited to considering, the following: (i) the need to
132 search for and collect the requested record or records from disparate locations; (ii) the need to
133 search for, collect, segregate or examine a voluminous number of records; (iii) the need to redact
134 a significant number of records; (iv) the refusal of a requester to reasonably modify the scope of
135 a request or agree to an alternative time frame for processing a request; (v) the administrative
136 capacity of the agency or municipality to produce the request within the timeframe; and (vi) that
137 the request for public records is designed or intended to harass or intimidate the agency,
138 municipality.

139 (e) Each records access officer shall furnish public records in response to a request for
140 public records and upon payment of a reasonable fee, as determined by the records access officer
141 in accordance with the following provisions:

142 (i) the actual cost of any storage device or material provided to a person in response to a
143 request for public records under subsection (a) may be included as part of the fee; provided, that

144 the charge for black and white paper copies or printouts of records shall not exceed 5 cents per
145 page, for both single and double-sided black and white copies;

146 (ii) in the event that an agency is required to devote more than 4 hours of employee time
147 to search for, compile, segregate, redact or reproduce the record or records requested, the records
148 access officer may also include as part of the fee an hourly rate for each hour any employee
149 devotes to responding to the request; provided, that an agency shall not charge an hourly rate
150 more than \$25 per hour; provided further, that the requester shall not be charged for the first 4
151 hours of work performed;

152 (iii) in the event that a municipality is required to devote more than 2 hours of employee
153 time to search for, compile, segregate, redact or reproduce the record or records requested, the
154 records access officer may also include as part of the fee an hourly rate that is equal to or less
155 than the hourly rate attributed to the lowest paid employee who has the necessary skill required
156 to search for, compile, segregate, redact or reproduce the record or records requested; provided
157 further, that the requester shall not be charged for the first 2 hours of work performed;

158 (iv) in the event that an agency or municipality lacks the qualified staffing or
159 technological capabilities required to search for, compile, segregate, redact or reproduce the
160 records requested, the records access officer may charge the requester the reasonable and actual
161 costs of engaging a vendor to furnish the requested record or records; provided, that prior to
162 contracting with a vendor for such services, the person who submitted the initial request under
163 subsection (a) signs an enforceable written agreement to reimburse the agency or municipality
164 for the reasonable and actual costs of engaging a vendor to furnish the requested record or
165 records, up to a dollar amount specified in the written agreement; provided further, that if the

166 requester refuses to sign a reasonable enforceable written agreement to reimburse the agency or
167 municipality for the reasonable and actual costs of engaging a vendor to furnish the requested
168 record or records, the agency or municipality shall not be required to comply with the request;
169 and

170 (v) the records access officer may waive or reduce the amount of any fee or vendor quote
171 provided for under this subsection upon a showing that disclosure of the requested record or
172 records is in the public interest because it is likely to contribute significantly to public
173 understanding of the operations or activities of the government and is not primarily in the
174 commercial interest of the requester, or upon a showing that the requester lacks the financial
175 ability to pay the full amount of the reasonable fee.

176 (f) Whenever an agency or municipality assesses a fee or quotes an estimate for the
177 actual costs of engaging a vendor to furnish the requested record or records in accordance with
178 subsection (e), the person who submitted the initial request for public records may, within 30
179 days following notice of the fee or vendor quote amount, or within 30 days following notice of
180 the records access officer's decision on a request for fee or vendor quote waiver or reduction, as
181 set forth in subsection (e), whichever is later, petition the supervisor of records to reduce the
182 amount of any fee or vendor quote assessed by the records access officer in accordance with
183 subsection (e); provided, that the supervisor of records shall reduce any unreasonable fee or
184 vendor quote assessed and shall issue a decision regarding such a petition within 5 business days
185 following receipt of the petition; provided further, that whenever an agency or municipality
186 assesses a fee that is \$25,000 or more, or claims that the reasonable and actual costs of engaging
187 a vendor are \$25,000 or more, the requester may immediately file an action seeking judicial

188 review of the reasonableness of the fee or vendor quote in accordance with subsection (f) of
189 section 10A.

190 Section 10A. (a) Whenever an agency or municipality fails to furnish a copy of any
191 public record or any portion thereof, the furnishing of which is not disputed by the agency or
192 municipality, within the timeframes set forth in section 10, including any extension of the
193 timeframe granted by the supervisor of records in accordance with the provisions of said section
194 10 or any timeframe agreed upon by the requester and the agency or municipality, the person
195 who submitted the initial request under subsection (a) of said section 10 may, within 30 days of
196 the expiration of the relevant timeframe, file a complaint against the agency or municipality in
197 accordance with chapter 231A of the general laws in the superior court of the county where the
198 records are situated, or, for any agency, in the superior court for Suffolk county.

199 (b) Whenever an agency or municipality issues a response in accordance with subsection
200 (b) of section 10 that identifies any requested record, category of record requested or any portion
201 thereof and indicates that the agency or municipality does not intend to produce such record,
202 category of record requested or any portion thereof, the person who submitted the initial request
203 under subsection (a) of said section 10 may, within 30 days of the issuance of the response, file a
204 complaint against the agency or municipality in accordance with chapter 231A in the superior
205 court of the county where the record or any portion thereof is situated, or, for any agency, in the
206 superior court for Suffolk county.

207 (c) Whenever an agency or municipality fails to comply with any order issued by the
208 supervisor of records, the person who submitted the initial request for public records under
209 section 10 may file a complaint against the agency or municipality in accordance with chapter

210 231A in the superior court of the county where the record or any portion thereof is situated, or,
211 for any agency, in the superior court for Suffolk county.

212 (d) In any action filed pursuant to subsection (a), (b) or (c) of this section:

213 (i) the superior court shall have jurisdiction to enjoin the agency or municipality from
214 withholding any public record or any portion thereof and order production of any record or
215 portion thereof improperly withheld;

216 (ii) the superior court shall determine the propriety of any withholding de novo and may
217 inspect the contents of any defendant agency or municipality record in camera to determine
218 whether any such record or any portion thereof may be withheld in accordance with state or
219 federal law;

220 (iii) there shall be a presumption that each record sought is public, and the burden shall
221 be on the defendant agency or municipality to prove, by a preponderance of the evidence, that
222 such record or portion thereof may be withheld in accordance with state or federal law;

223 (iv) whenever a complainant has obtained relief in such a case through a judicial order;
224 enforceable written agreement; consent decree; or a voluntary or unilateral change in position by
225 the agency or municipality, if the complainant's claim is not insubstantial; the superior court may
226 award reasonable attorney fees and other litigation costs reasonably incurred to the complainant,
227 and may order the agency or municipality to waive or reasonably reduce any fee assessed in
228 accordance with subsection (e) of section 10; provided, that if the superior court determines that
229 the assessment of reasonable attorney fees and other litigation costs reasonably incurred is not
230 warranted, the judge shall issue written findings specifying the reasons for such denial; and

231 (v) whenever a complainant has obtained judgment in such a case, and has demonstrated
232 by a preponderance of the evidence that the defendant agency or municipality, in withholding or
233 failing to timely furnish the requested record or any portion thereof, acted maliciously or in bad
234 faith, the superior court may assess punitive damages against the defendant agency or
235 municipality an amount not less than \$1,000 nor more than \$5,000, to be awarded to the
236 complainant.

237 (e) Notwithstanding any other provision of this chapter, the attorney general may, at any
238 time, file a complaint in accordance with chapter 231A in the superior court of the county where
239 the record or any portion thereof is situated, or, for any agency, in the superior court for Suffolk
240 county, to ensure compliance with the provisions of this chapter; provided, that in any such
241 proceeding:

242 (i) the superior court shall have jurisdiction to enjoin the agency or municipality from
243 withholding any public record or any portion thereof and order production of any record or
244 portion thereof improperly withheld;

245 (ii) the superior court shall determine the propriety of any withholding de novo and may
246 inspect the contents of any defendant agency or municipality record in camera to determine
247 whether any such record or any portion thereof may be withheld in accordance with state or
248 federal law;

249 (iii) there shall be a presumption that each record sought is public, and the burden shall
250 be on the defendant agency or municipality to prove, by a preponderance of the evidence, that
251 such record or portion thereof may be withheld in accordance with state or federal law;

252 (iv) whenever the attorney general has obtained judgment in such a case, the superior
253 court shall assess against the defendant agency or municipality a civil penalty in an amount not
254 less than \$1,000 nor more than \$5,000 for each violation found; payment of any such civil
255 penalty paid to or received by the attorney general shall be paid into the general fund of the
256 commonwealth.

257 (f) Any person who submitted a request under subsection (a) of section 10 who is
258 aggrieved by an order issued by the supervisor of records related to such request may, within 30
259 days of receipt of any such order, file an action seeking judicial review in the superior court of
260 the county where the record or any portion thereof is situated, or, for any agency, in the superior
261 court for Suffolk county. Any such proceeding shall, insofar as applicable, be governed by the
262 provisions of section 14 of chapter 30A; provided, that any record or portion thereof that is
263 withheld by the agency or municipality shall not be made part of the administrative record filed
264 in answer to the complaint; provided further, that in any such proceeding, the superior court may
265 inspect the contents of any defendant agency or municipality record in camera to determine
266 whether any such record or any portion thereof may be withheld in accordance with state or
267 federal law; provided further, that in any action seeking judicial review of a decision issued by
268 the supervisor of records in accordance with subsection (f) of section 10, the superior court shall
269 review de novo the reasonableness of the fee or vendor quote assessed under subsection (e) of
270 section 10.

271 (g) Any agency or municipality that is aggrieved by an order issued by the supervisor of
272 records in accordance with subsection (d) or subsection (f) of section 10 may, within 30 days of
273 receipt of any such order, file an action seeking judicial review in the superior court of the
274 county where the record or any person thereof is situated, or in the superior court for Suffolk

275 county. Any such proceeding shall, insofar as applicable, be governed by the provisions of
276 section 14 of chapter 30A; provided, that in any such action, the superior court shall review de
277 novo the reasonableness of the fee or vendor quote assessed under subsection (e) of section 10.

278 (h) Any agency or municipality that is aggrieved by an order issued by the supervisor of
279 records in accordance with subsection (c) of section 10 may, within 30 days of receipt of any
280 such order, file an action seeking judicial review in the superior court of the county where the
281 record or any portion thereof is situated, or in the superior court for Suffolk county. Any such
282 proceeding shall, insofar as applicable, be governed by the provisions of section 14 of chapter
283 30A; provided, that in any such proceeding:

284 (i) any record or portion thereof that is withheld by the agency or municipality shall not
285 be made part of the administrative record filed in answer to the complaint;

286 (ii) the superior court shall determine the propriety of any withholding de novo and may
287 inspect the contents of any defendant agency or municipality record in camera to determine
288 whether any such record or any portion thereof may be withheld in accordance with state or
289 federal law;

290 (iii) there shall be a presumption that each record sought is public, and the burden shall
291 be on the defendant agency or municipality to prove, by a preponderance of the evidence, that
292 such record or portion thereof may be withheld in accordance with state or federal law; and

293 (iv) the superior court shall have jurisdiction to enjoin the agency or municipality from
294 withholding any public record or any portion thereof and order production of any record or
295 portion thereof improperly withheld.

296 (i) The attorney general may intervene as of right in any action filed in accordance with
297 this section.

298 Section 10B. The commissioner of the department of criminal justice information
299 services, the department of criminal justice information services and its agents, servants, and
300 attorneys including the keeper of the records of the firearms records bureau of said department,
301 or any licensing authority, as defined in section 121 of chapter 140, shall not disclose any records
302 divulging or tending to divulge the names and addresses of persons who own or possess firearms,
303 rifles, shotguns, machine guns and ammunition therefor, as defined in said section 121 of said
304 chapter 140, and names and addresses of persons licensed to carry or possess the same to any
305 person, firm, corporation, entity or agency except criminal justice agencies as defined in section
306 167 of chapter 6 and except to the extent such information relates solely to the person making the
307 request and is necessary to the official interests of the entity making the request.

308 The home address and home telephone number of law enforcement, judicial,
309 prosecutorial, department of youth services, department of children and families, department of
310 correction and any other public safety and criminal justice system personnel, and of unelected
311 general court personnel, shall not be public records in the custody of the employers of such
312 personnel or the public employee retirement administration commission or any retirement board
313 established under chapter 32 and shall not be disclosed, but such information may be disclosed to
314 an employee organization under chapter 150E, a nonprofit organization for retired public
315 employees under chapter 180 or to criminal justice agencies as defined in said section 167 of said
316 chapter 6. The name and home address and telephone number of a family member of any such
317 personnel shall not be public records in the custody of the employers of the foregoing persons or
318 the public employee retirement administration commission or any retirement board established

319 under chapter 32 and shall not be disclosed. The home address and telephone number or place of
320 employment or education of victims of adjudicated crimes, of victims of domestic violence and
321 of persons providing or training in family planning services and the name and home address and
322 telephone number, or place of employment or education of a family member of any of the
323 foregoing shall not be public records in the custody of a government agency which maintains
324 records identifying such persons as falling within such categories and shall not be disclosed.

325 SECTION 6. Said chapter 66 of the General Laws is hereby further amended by adding
326 the following section:-

327 Section 19. (a) When designing or acquiring an electronic recordkeeping system or
328 database, records access officers shall consult with their chief executive officer or the
329 Massachusetts office of information technology pursuant to the provisions of chapter 7D to
330 ensure, where feasible, that the system or database is capable of providing data in a commonly
331 available electronic format. Such database designs shall include, to the extent feasible,
332 information storage and retrieval methods that permit the segregation and retrieval of public
333 record information and redacting of exempt information in order to provide maximum public
334 access.

335 (b) Every agency shall provide on a searchable website electronic copies, accessible in a
336 commonly available electronic format, of the following types of records: (i) final opinions,
337 decisions, orders, or votes from agency proceedings; (ii) annual reports; (iii) reports to the
338 General Court; (iv) notices of regulations proposed under chapter 30A; (v) notices of hearings;
339 (vi) winning bids for public contracts; (vii) awards of federal, state and municipal government
340 grants; (viii) minutes of open meetings; (ix) agency budgets; and (x) any public record

341 information of significant interest that the agency deems appropriate to post; provided, that any
342 agency may withhold any record or portion thereof in accordance with state or federal law.

343 SECTION 7. On or before July 1, 2016, the secretary of the commonwealth shall
344 promulgate rules and regulations necessary to implement the provisions of this act, including, but
345 not limited to, when and how fees shall be reviewed by the secretary upon appeal by a person
346 making a request for public records.

347 SECTION 8. Sections 6 and 7 of this act shall take effect on January 1, 2016.

348 SECTION 9. Section 4 shall take effect on July 1, 2016.

349 SECTION 10. Sections 1, 2, 3 and 5 of this act shall take effect on October 1, 2016.