

Frequently Asked Questions

What is the difference between the federal Freedom of Information Act and the Massachusetts Public Records Law?

The federal Freedom of Information Act is a statute that applies to federal records. The Massachusetts Public Records Law applies to records created by or in the custody of a state or local agency, board or other government entity.

What records are public?

Every record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part.

Specific statutory exemptions have been created by the legislature. These exemptions, which are discretionary to the records custodian, allow the records custodian to withhold a record from the general public.

The exemptions to the Public Records Law are described in this guide. If a records custodian claims an exemption and withholds a record, the records custodian has the burden of showing how the exemption applies to the record and why it should be withheld.

Is the Public Records Division a warehouse for government records?

The Division of Public Records (Division) is not a warehouse for government records. The only records kept in the Division are those that are essential to the business operations of the Division.

The Division, and specifically, the Supervisor of Records (Supervisor), is empowered to determine the public status of government records. The Supervisor does not have jurisdiction over records held by federal agencies, the legislature or the courts of the Commonwealth.

How do I obtain copies of public records?

To obtain a copy of a record, you must make a request to the state or local records custodian of the record. For example, if you wish to obtain a copy of the minutes of an open meeting, you should direct your request to the records custodian of that board. Similarly, a request for a copy of a police daily log should be made to the police department that created the log.

What do I do if my request is denied?

A records custodian must respond to your request within ten calendar days. If the records custodian fails to respond or denies the request, you may appeal

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the matter to the Supervisor within ninety days. The appeal must include a copy of your original request and any response by the records custodian.

Appeals will be opened on a case-by-case basis at the discretion of the Supervisor. In most cases, the Supervisor will provide an opinion on the appropriateness of the records custodian's response and a determination as to whether the requested record is public.

How must a records custodian respond to my request for records?

A records custodian's response must be in writing. The response must include a good faith estimate of any cost of providing the record. The response must also include a specific exemption to the Public Records Law to justify the denial of access to any record.

Must my request be in writing and do I need to use a specific form?

A written request is not required but is recommended. An oral request made in person (not by telephone) is permitted. To appeal the records custodian's response to the Supervisor, however, a request must be in writing.

There is no specific form that must be used to request records, nor is there any language that must be included in such a request. A records custodian may provide a form, but cannot demand that the form be used.

I asked a government employee a question, but did not receive an answer. May I appeal under the Public Records Law?

The Public Records Law only applies to government records. A records custodian is not required by the Public Records Law to answer questions or create a record in response to a request, but may do so at his or her discretion.

How much may a records custodian charge for copies of public records?

Unless specifically addressed by statute, a custodian may charge \$0.20 per page for photocopies, \$0.25 per page for microfilm copies and \$0.50 per page for computer printouts.

Examples of statutes establishing special fees for specific public records include G. L. c. 66, § 10(a) (copies of police records) and G. L. c. 262, § 38 (copies of records at the Registry of Deeds).

A records custodian may charge the actual cost of reproducing a copy of a record that is not susceptible to ordinary means of reproduction, such as large computer records or over-sized plans.

Is a records custodian required to provide a fee estimate?

The Public Records Access Regulations require that a records custodian provide a detailed, written, good faith estimate for the cost of complying with a public record request when the cost is expected to exceed \$10.00.

The estimate should contain a statement advising the requester that the actual cost of producing the record might vary once the custodian begins preparing the record. A records custodian is permitted to require payment of the estimated fee before commencing work.

In the interest of open government, all records custodians are strongly urged to waive the fees associated with access to public records, but are not required to do so under the law.

Public records that are of great interest to a large number of people must be readily available within the office of the records custodian and should be provided at a minimum cost, if any. Examples include minutes of board meetings, town meeting documents, warrants, street lists and municipal financial documents.

May the records custodian charge a fee for search and segregation of records?

A records custodian may charge and recover a fee for the time he or she spends searching, redacting, photocopying and refiling a record. The hourly rate may not be greater than the prorated hourly wage of the lowest paid employee who is capable of performing the task. A records custodian may not recover fees associated with record organization.

If a requestor wishes to review records in the records custodian's office but does not require copies, a records custodian may charge and recover a fee for his or her time spent searching for and redacting the records. Access to records viewed in this manner should not be denied and only minor fees associated with securing the record should be charged.

When must minutes of an open meeting be made available to the public?

Minutes of open meetings, regardless of form, are public and must be made available in a timely fashion.

There is no requirement that the minutes be transcribed or approved before they are made public. A records custodian should clearly mark all such minutes "unofficial."

Minutes of prior open meetings, regardless of form, should be reviewed and accepted promptly. Copies of the minutes of all open meetings should be

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readily available. Records custodians are strongly encouraged to waive all fees associated with the minutes of open meetings.

Minutes of executive session meetings must be reviewed and released regularly and promptly. Executive session minutes must be released to the public as soon as the stated purpose for the executive session protection has ceased.

The Open Meeting Law is enforced by the Office of the Attorney General, Division of Open Government.¹ Any questions regarding the content of minutes, requirements to keep minutes or any procedural aspects of the Open Meeting Law should be addressed to the Division of Open Government.²

Does the Public Records Law apply to email and other computer records?

The Public Records Law applies to all government records generated, received or maintained electronically, including computer records, electronic mail, video and audiotapes.

Does a requester have greater right of access to records if he is the subject of a record?

Under the Public Records Law, every requester is treated equally; therefore, even a person who is the subject of the record is not granted any greater access right than any other person.

Some statutes and regulations allow requesters to obtain records in a manner that does not require a request under the Public Records Law. It should be noted that once a record is deemed public it may be obtained by anyone upon request.

Is a requester required to disclose the intended use of the public record requested?

With the possible exception of situations where the records custodian is anticipating the withholding of records pursuant to Exemption (n) of the Public Records Law, a records custodian may not ask a requester the reason for the request or the intended use of the requested records.³

¹ G. L. c. 30A, §§ 18-25.

² www.mass.gov/ago/bureau/government/the-division-of-open-government/.

³ G. L. c. 4, § 7(26)(n).

How should a records custodian respond to an unclear request?

Records custodians must use their superior knowledge to determine the precise record or records responsive to a request. However, a requester must provide a reasonable description of the requested records.

What if the records custodian claims that it is not subject to the Public Records Law?

The Public Records Law only applies to governmental entities. The Massachusetts Supreme Judicial Court provides a standard to determine whether an entity is public or private. The burden lies with the entity to show that the Public Records Law does not apply.⁴

Are records custodians required to forward a request for records not in their possession?

Records custodians must use their superior knowledge to ensure that a request for records is delivered to the appropriate party. A large public records request may include items for which the custodian is not responsible. It is in the public interest for the custodian to forward such requests to the appropriate parties in responding to a public records request.

Where can I go for more information?

Records custodians and requesters seeking more information may telephone the Division and speak with the Attorney of the Day. The Attorney of the Day is a staff member of the Division, reporting to the Supervisor, and is available to answer general questions concerning the Public Records Law between the hours of 9:00 a.m. and 5:00 p.m. Oral and written legal advisories are not generally provided by the Division. The phone number for the Division is (617) 727-2832.

⁴ See Massachusetts Bay Transp. Auth. Retirement Bd. v. State Ethics Comm'n, 414 Mass. 582 (1993); see also Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd., 416 Mass. 1007 (1993).

Overview

The Massachusetts Public Records Law provides that every person has a right of access to public information.⁵ This right of access includes the right to inspect, copy or have copies of records provided upon the payment of a reasonable fee.⁶

The Massachusetts General Laws broadly define “public records” to include “all 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” of any Massachusetts governmental entity.⁷ A “custodian” is defined as “the governmental officer or employee who in the normal course of his or her duties has access to or control of public records.”⁸ There are strictly and narrowly construed exemptions to this broad definition of “public records.”⁹ This guide will briefly review the application of these exemptions as well as explore some of the other issues that arise when a request is made for access to government records.

The Request

There are no strict rules that govern the manner in which requests for public information should be made. Requests may be made in person or in writing. Written requests may be made by mail, facsimile or email.¹⁰ A requester must provide the records custodian with a reasonable description of the desired information.¹¹ A records custodian is expected to use his or her superior knowledge of the records in his or her custody to assist the requester in obtaining the desired information.¹²

The Response

The records custodian must respond to requests as soon as practicable, without unreasonable delay and within ten calendar days.¹³ The response must be either an offer to provide the requested materials or a written denial.

⁵ G. L. c. 66, § 10(a).

⁶ *Id.*

⁷ G. L. c. 4, § 7(26).

⁸ 950 CMR 32.03.

⁹ G. L. c. 4, § 7(26); see also *Attorney General v. Assistant Commissioner of the Real Property Department of Boston*, 380 Mass. 623, 625 (1980) (the statutory exemptions are to be strictly and narrowly construed).

¹⁰ G. L. c. 66, § 10(b); 950 CMR 32.05(3).

¹¹ 950 CMR 32.05(4).

¹² 950 CMR 32.05(4).

¹³ G. L. c. 66, § 10(a-b); 950 CMR 32.05(2).

A denial must detail the specific basis for withholding the requested materials.¹⁴ The denial must include a citation to one of the statutory exemptions upon which the records custodian relies, and must explain why the exemption applies.¹⁵ A denial must also advise the requester of his right to seek redress through the administrative process provided by the Supervisor.¹⁶ Appeals are opened at the discretion of the Supervisor.¹⁷

The mandatory disclosure provision of the Public Records Law only applies to information that is in the custody of the governmental entity at the time the request is received.¹⁸ Consequently, there is no obligation to create a record for a requester or to honor prospective requests. It should be noted, however, that the Public Records Access Regulations (Regulations) do not prohibit a records custodian from responding to such requests.

The records custodian has discretion to produce a record in the manner in which it was requested, and may charge a reasonable fee for creation of such a record. In creating a new record, the records custodian may charge a fee for the creation of this record on a one-time basis. Any costs due to subsequent requests for this record can be assessed only for production of copies.

With the exception of situations in which a records custodian is withholding records pursuant to Exemption (n), inquiries into a requester's status or motivation for seeking information are expressly prohibited.¹⁹ Consequently, all requests for public records, even if made for a commercial purpose or to assist the requester in a lawsuit against the holder of the records, must be honored in accordance with the Public Records Law.

Fees

A records custodian may charge a reasonable fee to recover the costs of complying with a public records request.²⁰ A records custodian is encouraged, but not required, to waive fees where disclosure is in the public interest.²¹ Please be advised that the Supervisor does not have the authority to order a waiver of fees. Records custodians assessing a fee must do so in

¹⁴ 950 CMR 32.08(1).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 950 CMR 32.08(2).

¹⁸ G. L. c. 4, § 7(26) (defining "public records" as materials which have already been "made or received" by a public entity); see also 32 Op. Att'y Gen. 157, 165 (May 18, 1977) (custodian is not obliged to create a record in response to a request for information).

¹⁹ See G. L. c. 66, § 10(a) (public records are to be provided to "any person"); see also 950 CMR 32.05(5) (custodian prohibited from inquiring into a requester's status or motivation); but see G. L. c. 4, § 7(26)(n) (a records custodian may ask the requester to voluntarily provide additional information in order to reach a "reasonable judgment" regarding disclosure of responsive records).

²⁰ G. L. c. 66, § 10(a); see also 950 CMR 32.06.

²¹ 950 CMR 32.06(5).

accordance with any applicable statutory provisions, the Regulations or an enabling provision.²²

Fees for Search and Segregation Time

The Regulations provide that a records custodian may charge a pro-rated fee for search and segregation of records based on the hourly rate of the lowest paid employee capable of performing the task.²³ “Search time” means the time used to locate a requested record, pull it from the files, copy it and return it to the files.²⁴ “Segregation time” means the time used to delete exempt data from a requested public record.²⁵

The Supervisor will presume that the lowest paid employee in an agency is capable of search and segregation of records, and, except where exceptional circumstances are present, it is expected that the lowest hourly rate will be used to calculate search and segregation time. In some circumstances, the lowest paid office employee may not have the knowledge or experience required to segregate the exempt information from the non-exempt information contained in a requested record. Guidance on the application of the relevant exemptions may usually be provided to the lowest paid employee. In very complex or difficult cases, however, the hourly rate of the lowest paid employee who has the necessary knowledge or experience may be used to determine the fee for search and segregation time.

Fee for Copies

In addition to the search and segregation fees, records custodians may charge \$0.20 per page for photocopies of public records.²⁶ Records custodians may charge a fee of \$0.50 per page for computer printout copies of public records.²⁷ When the request is for materials that are not susceptible to ordinary means of reproduction, such as photographs or computer tapes and diskettes, the actual cost of reproduction may be assessed to the requester.²⁸ There are also specific statutes that establish fees for copies of public records.²⁹ The records custodian may assess a reasonable fee, using the hourly rate of the lowest paid employee within that department, for the time spent in reproduction of the responsive record.

²² See e.g., G. L. c. 66, § 10(a) (fees for police records); see also 950 CMR 32.06.

²³ 950 CMR 32.06(1)(c).

²⁴ 950 CMR 32.03.

²⁵ *Id.*

²⁶ 950 CMR 32.06(1)(a).

²⁷ 950 CMR 32.06(1)(d).

²⁸ 950 CMR 32.06(1)(f); see also SPR Bulletin 4-96, June 7, 1996 (Fees for Access and Copying of Electronic Public Records).

²⁹ See e.g., G. L. c. 66, § 10(a) (fees for police records); G. L. c. 262, § 38 (copies of records at the Registry of Deeds).