

# A look at Massachusetts updated public records legislation

In September, the Massachusetts Supervisor of Public Records released its proposed update to public records regulations that would be used to carry out the long-awaited public records reform that goes into effect January 1, 2017. Here's what's worth keeping an eye on.

The first thing to note is that these are \*draft\* regulations. If you see something you don't like, it's not etched in stone — yet.

If you'd like to compare the proposed regulations with the current ones, the latter are available on the Supervisor of Public Records website, and you can just flip to page 49 (numbered as page 43).

It's also worth reading some of the other commentary on the draft regulations. Andrew Quemere and Maya Shaffer have been doggedly following the process in their biweekly column Broken Records, and they have two really good commentaries about the regulations that I'll reference later: Appeals Nonsense and Refer Madness.

## **Timing is everything**

One of the elements that disappointed a lot of public records advocates is the timeframe under which agencies have to respond has been extended, to 15 business days for state agencies and 25 business days for municipalities.

These are unusually long time requirements for state public records laws (at the federal level, agencies have 20 business days), but in practice still faster than many agencies responded to requests.

It seems that the new regulations will make those deadlines a little longer, due to how timing is handled in several places in the regulations.

For example, under **\*\*Computation of Time\*\***, the regulations make clear that that timer does not begin until the day after a request is received:

> (a) Electronic Correspondence. The computation of any time referred to in 950 CMR 32.00 for electronic correspondence shall begin with the first business day following the date of transmission.

> (b) Mail or In Person Delivered Correspondence. The computation of time referred to in 950 CMR 32.00 for mail or in person delivered correspondence shall begin with the first business day following receipt of such document.

But John Hawkinson noted that updated regulations later go on to state that:

> a written request for records will be deemed received on the first business day following electronic transmission or physical receipt by the records access officer; an oral request will be deemed received on the day it was made.

So if you email a request to a municipality on a Wednesday morning, the 25-day timer does not start until Thursday. If you mail it on Wednesday morning, and it gets there Thursday, the timer does not start until Monday.

We can understand the desire to not have the clock start counting down on the date received if it comes in after hours or if the agency hasn't had a chance to review it. But if the tables were turned (say, someone was paying a parking ticket or returning a late book to the library), it's hard to imagine timing issues handled so generously.

This may be a relatively minor issue, but timing issues come up perpetually in public records: More than once, I've received a letter from an agency demanding a response by a deadline that had already passed by the time I actually received the letter, and in one instance the deadline had passed before the letter was even mailed.

Proper regulations around timing can be tricky, particularly when someone is out of the office or if there's a lot going on, which is often the case for municipalities. But designated records officers should help avoid some of the confusion, and clearer, consistent rules around timing of requests could help reduce frustration on both sides of the process.

### **Request logs**

Request logs will go a long way towards help bring some standard processes to records requests in Massachusetts, and it looks like what needs to be tracked is clearly spelled out by the Supervisor of Public Records, which is great.

We would love to see the addition of cited exemptions used in these request logs, since right now that information is essentially impossible to get (although we are working on a project to address that challenge).

It's also good that exemptions to this tracking are spelled out: Common, informal requests for information shouldn't be mired down with record keeping that takes more time than the

processing of the request. I hope that the information is made public in a way that allows easy analysis.

Beyond the regulations, I hope the Supervisor of Public Records will share some digital log templates that agencies are encouraged to use, both to help reduce the burden on agencies as well as to help encourage consistent reporting of this information.

### **Enforcement**

Critics of Massachusetts public records laws have rightfully been frustrated by the lack of enforcement. For enforcement of a Supervisor of Public Records ruling, that office must refer it to the Attorney General, who may then decide to enforce the law.

Those referrals were virtually non-existent for a long time, and while we see the increasing use of referrals over the past year as a good sign, there's still a long way to go. Going from none over the course of five years to a handful over the course of the past year still means that the chance of a successful appeal being referred for enforcement is almost negligible, meaning that litigation is often the only viable option, and it's an expensive, slow one.

The new regulations aren't very promising in this regard: If the Supervisor of Public Records chooses to be aggressive with referrals, it can be, but even then the regulations are very vague on the criteria they will use to pick referrals:

> A records access officer shall promptly take such steps as may be necessary to comply with an order of the Supervisor. If a records access officer fails to comply with an order issued by the Supervisor, the Supervisor, upon the Supervisor's initiative, may notify the Attorney General to ensure compliance.

Some discretion is good, but more details on which factors will come into play could help increase the use of this important mechanism.

### **Fees**

The regulations do a lot to reform the worst part of Massachusetts records fees. The language provides stricter rules and oversight over a variety of fees, such as setting a 5 cent fee for black-and-white copies, and requires approval when municipalities want to charge more than \$25 an hour for requests.

There's still a lot of wiggle room: Agencies have often estimated that requests will take hundreds or thousands of hours of work for what many would consider basic documents, and the "good faith" rule is hard to judge these estimates by.

But we believe that the regulations have a serious flaw by allowing agencies to reject future requests when a fee goes unpaid. If carefully implemented, such as only kicking in when a requester has agreed in writing to pay fees and the request is fulfilled in a timely manner, this stipulation is reasonable.

However, as written, it appears to allow an agency to assess a huge fee without requester agreement, and then to allow the agency to reject future requests until that fee is assessed. Over the years, we've had agencies proactively charge our users thousands of dollars in fees they never agree to pay, and we think as written this regulation opens a dangerous loop hole that will actually encourage, not diminish, the use of fees to block access to government documents. We'd also note that the language around fee waivers has been slightly weakened with the new regulations. It now reads:

> Records access officers may waive or reduce the amount of an assessed fee upon a showing that:

>

- > 1. disclosure of a requested record is in the public interest;
- > 2. the request for records is not primarily in the commercial > interest of the requestor; or
- > 3. the requestor lacks the financial ability to pay the full amount of the reasonable fee.

The previous language:

> Every custodian, unless otherwise required by law, is encouraged to waive fees where disclosure would benefit the public interest.

In practice, going from "encouraged" to "may" probably won't change how anyone handles their requests, but it's yet another signal of the Bay State's lack of enthusiasm for records access.

### **Electronic filing of appeals**

Electronic communications are encouraged and now codified. I don't have exact numbers, but electronic acceptance of appeals is relatively rare, nationally, and while this isn't new, Massachusetts Supervisor of Public Records is to be commended for accepting and encouraging emailed appeals at [pre@sec.state.ma.us](mailto:pre@sec.state.ma.us) and it's good to see that now officially in the regulations (it wasn't before).

The Supervisor's office should also get credit for their electronic appeal room, and I hope that they continue to look for ways to go above and beyond the laws that are in place.

### **Proactive publication**

State agencies now have an obligation to post a variety of public records on their websites:

- \* final opinions, decisions, orders, or votes from agency proceedings; annual reports;
- \* notices of regulations proposed under G. L. c. 30A;
- \* notices of hearings;
- \* winning bids for public contracts;
- \* awards of federal, state and municipal government grants; minutes of open meetings;
- \* agency budgets; and
- \* any public record information of significant interest that the agency deems appropriate to post, such determination to be made by each agency on a case-by-case basis.

It's a great list, and we'd like to see, either in the regulations or in practice, more details on how this new rule will be enforced; details on options for how a citizen can proceed if something is missing; resources for agencies to follow through on these rules with minimal burden.

The new regulations also provide for similar information to be posted by municipalities, for which we have the same suggestions. In 2017, proactive disclosure of commonly cited public records is an obvious step, but I'd like to make sure that we're giving government at all levels tools to help them succeed at these efforts, as well as enforcement mechanisms to help spur on those that would otherwise take their time to comply.

### **Summary**

All in all, these are good regulations that mirror the spirit of the law while providing generally clear guidance on how it should be implemented. The most concerning aspect is the vagueness on using fees to block future requests, a problem that can be easily addressed.

We'd also like to see more details on the proactive disclosure, but perhaps that's best not hard coded in regulations, particularly as technology continues to rapidly change.

#

By: Pat Brown