

# HOUSE . . . . . No. 3945

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## The Commonwealth of Massachusetts

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HOUSE OF REPRESENTATIVES, March 12, 2014.

The committee on State Administration and Regulatory Oversight to whom were referred the petition (accompanied by bill, Senate, No. 1480) of James B. Eldridge, Sheila C. Harrington, Jason M. Lewis, Denise Andrews and other members of the General Court for legislation to enhance access to electronic public records, petition (accompanied by bill, Senate, No. 1481) of James B. Eldridge, Jason M. Lewis, James Arciero, William N. Brownsberger and other members of the General Court for legislation to improve access to public records, petition (accompanied by bill, Senate, No. 1519) of Richard T. Moore for legislation to promote the timely release of public records, petition (accompanied by bill, Senate, No. 1520) of Thomas Duggan for legislation relative to public records request, petition (accompanied by bill, House, No. 2783) of Antonio F. D. Cabral and others relative to the enhancement of access to electronic public records, petition (accompanied by bill, House, No. 2784) of Antonio F. D. Cabral and others relative to access to public records in state agencies, petition (accompanied by bill, House, No. 2787) of Antonio F. D. Cabral and Denise Provost relative to access to public records, petition (accompanied by bill, House, No. 2819) of Bradford Hill and Bradley H. Jones, Jr. for legislation to impose a fine for public officials in noncompliance with allowing access to public records, petition (accompanied by bill, House, No. 2846) of Peter V. Kocot and others relative to access to public records, reports recommending that the accompanying bill (House, No. 3945) ought to pass.

For the committee,

PETER V. KOCOT.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Fourteen  
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An Act to improve access to 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. Clause Twenty-sixth of section 7 of chapter 4 of the General Laws, as  
2 appearing in the 2012 Official Edition, is hereby amended in line 139 after the word  
3 “characteristics,” the following words:--

4           “including public record information which may be separately retrieved from an  
5 electronic record,”

6           SECTION 2. Section 3 of chapter 66 of the General Laws, as appearing in the 2012  
7 Official Edition, is hereby amended by striking the first two sentences.

8           SECTION 3. Chapter 66 of the General Laws, as appearing in the 2012 Official Edition,  
9 is hereby amended by inserting after section 3A the following new section:--

10           “Section 3B. When designing or acquiring an electronic recordkeeping system or  
11 database, any person having custody of a public record shall ensure that such system or database  
12 is capable of providing data in a common format such as, but not limited to, the American  
13 Standard Code for Information Interchange or the Uniform Character Set Transformation  
14 Format. When records maintained electronically include both public record information and  
15 exempt information that may be withheld from public inspection, the custodian shall design its  
16 information storage and retrieval methods in a manner that permits the segregation and retrieval  
17 of public record information in order to provide maximum public access. No custodian of a  
18 public record may enter into a contract for the storage of electronic records containing public  
19 record information that impairs or restricts public access to those records.”

20           SECTION 4. Said Chapter 66 is hereby amended by inserting after section 6 the  
21 following new section:--

22           “Section 6A. Every state agency, as defined in chapter 66A, shall designate one or more  
23 employees as records access officers, who shall have the custody of all its public records other  
24 than those records for which a clerk is the statutory custodian. Each agency shall publicize by  
25 posting in a conspicuous location at its offices and in a conspicuous location on its website, if  
26 any, the name, title, business address and business telephone number of the designated records  
27 access officers. The designation of one or more records access officers shall not be construed to  
28 prohibit employees who have in the past been authorized to make records or information  
29 available to the public from continuing to do so.

30           Records access officers shall be responsible for coordinating such agency’s response to  
31 requests for access to records under the provisions of this chapter, shall facilitate the informal  
32 resolution of requests by timely and thorough production of records, and shall ensure that the  
33 agency:

34           (a)     Assists requesters seeking records to identify the records sought;

35           (b)     Indicates, when responding to a request, whether the records are available in  
36 electronic form and the manner in which the records are stored, filed, retrieved or generated, to  
37 assist requesters in describing the records sought;

38           (c)     Contacts requesters when the response to a request would be voluminous so the  
39 agency may, at the option of the requester, assist the requester in focusing the request in order to  
40 facilitate the timely and thorough production of the records sought;

41           (d)     Coordinates with the Supervisor of Public Records and the Records Management  
42 Unit to ensure that public records are preserved in accordance with relevant Massachusetts law,  
43 regulation, and administrative guidance, prepares and maintains reference materials to enhance  
44 access to electronic public records in its custody and enable requestors to make informed  
45 requests. These reference materials shall be updated at least annually and shall include:

46           (i)     a reasonably detailed list of categories of records maintained by the agency,  
47 whether or not open for public inspection;

48           (ii)    a list and description of all major databases maintained by the agency; and

49           (iii)   a record of all public records requests received on or after January 1, 2015 and the  
50 responses to those requests, to the extent that such responses may be preserved in electronic  
51 form.

52           Each state agency that maintains a website shall post these reference materials on its  
53 website.”

54           SECTION 5. Section 10 of said chapter 66 is hereby amended by striking subsections (a)  
55 and (b) and inserting the following:--

56           “(a) Every person having custody of any public record, as defined in clause Twenty-sixth  
57 of section seven of chapter four, shall, at reasonable times and without unreasonable delay,  
58 permit it, or any segregable portion of a record which is an independent public record, including  
59 public record information which may be separately retrieved from an electronic record, to be  
60 inspected and examined by any person, under his supervision, and shall furnish one copy thereof  
61 upon payment of a reasonable fee not to exceed the actual cost of reproducing the record. In  
62 determining the actual cost of reproducing a record, the custodian of the record may include  
63 only: (i) the actual cost of any storage devices or materials provided to the requester in  
64 complying with such request; (ii) an amount equal to the hourly salary attributed to the lowest  
65 paid employee who has the necessary skill required to prepare a copy of the requested record,  
66 provided that no fee shall be charged unless at least two hours of employee time is needed to  
67 prepare a copy of the record requested, and (iii) when the custodian’s information technology  
68 capabilities are inadequate to prepare a copy of the record, the custodian may charge the  
69 requestor the actual cost of engaging an outside service to prepare a copy, provided that no fee  
70 shall be charged in excess of the hourly salary attributed to the lowest paid state employee who  
71 has the necessary skill required to prepare such a copy. In no case shall fees for black and white  
72 photocopies or computer printouts exceed 5 cents per letter size page or smaller or 7 cents per  
73 legal size page. A page shall be defined as one side of a sheet of paper.

74           Each person having custody of a record shall inform the requester of the estimated cost of  
75 preparing a copy of the record if more than two hours of an employee’s time is needed, or if an  
76 outside professional service would be retained to prepare a copy of the record. No fee shall be  
77 charged for review of the content of requested records to determine the extent to which exempt  
78 and public information must be segregated.

79           The custodian may waive part or all of the fee if release of the public record requested is  
80 in the public interest because it is likely to contribute significantly to public understanding of  
81 operations or activities of the government and is not primarily in the commercial interest of the  
82 requester.

83           (b) A custodian of a public record shall, within fifteen days following receipt of a request  
84 for inspection or copy of a public record, comply with such request. Such request may be  
85 delivered in hand to the office of the custodian or mailed via first class mail. If the custodian  
86 refuses or fails to comply with such a request, the person making the request may petition the  
87 supervisor of records for a determination whether the record requested is public. Upon the  
88 determination by the supervisor of records that the record is public, he shall order the custodian  
89 of the public record to comply with the person’s request. If the custodian refuses or fails to  
90 comply with any such order, the supervisor of records shall notify the attorney general or the  
91 appropriate district attorney thereof who shall take whatever measures necessary to insure  
92 compliance with the provisions of this section, including enforcement of the penalties prescribed  
93 under section 15. The administrative remedy provided by this section shall in no way limit the  
94 availability of the administrative remedies provided by the commissioner of administration and

95 finance with respect to any officer or employee of any agency, executive office, department or  
96 board; nor shall the administrative remedy provided by this section in any way limit the  
97 availability of judicial remedies otherwise available to any person requesting a public record. If a  
98 custodian of a public record refuses or fails to comply with the request of any person for  
99 inspection or copy of a public record or with an administrative order under this section, the  
100 supreme judicial or superior court shall have jurisdiction to order compliance. Proceedings  
101 arising under this section shall take precedence on the docket over other civil cases and shall be  
102 expedited. In any such proceeding, the court shall award reasonable attorney's fees to the party  
103 seeking public records if that party has substantially prevailed. A judgment or settlement in  
104 plaintiff's favor shall not be a prerequisite to obtaining an award of attorney's fees or costs if the  
105 court determines that defendant's case lacked grounding in fact or in existing law or a good faith  
106 argument for extension, modification or reversal of existing law."

107 SECTION 6. Said section 10 of chapter 66 is hereby further amended by inserting at the  
108 end thereof the following paragraphs:--

109 "(e) If a public record or public record information is available in electronic form, the  
110 custodian shall, at the option of the requester, provide it in that form. In making a record  
111 available to a requestor, the custodian shall provide the record in any format requested if the  
112 record is readily reproducible in that format. If a request does not specify the format for  
113 producing electronically stored information, the custodian shall provide the record information in  
114 a common format that is reasonably usable. For public records in electronic form, a custodian  
115 may charge the requestor only the actual cost of any storage devices or materials provided to the  
116 requestor. Any programming necessary to retrieve a public record or public record information  
117 and provide the record or record information in the requested format, or to allow the record or  
118 record information to be read or printed, shall not be deemed to be the preparation or creation of  
119 a new record.

120 (f) Every state agency, as defined by Chapter 66A, that has the ability to provide public  
121 internet access, at no charge, to a public record in its custody, shall make reasonable efforts to do  
122 so. A custodian state agency shall be required to provide public internet access, at no charge, to  
123 the following types of public records in searchable format: (i) final opinions, decisions, orders, or  
124 votes from agency proceedings; (ii) annual reports; (iii) reports to the General Court; (iv) notices  
125 of regulations proposed under chapter 30A; (v) notices of hearings; (vi) winning bids for public  
126 contracts; and (vii) any public record information of significant interest to the general public  
127 including, but not limited to, public record information which has been the subject of multiple  
128 public records requests or which could reasonably be anticipated to be the subject of multiple  
129 public records requests in the future.

130 (g) The secretary of each executive office shall, on or before October 1, 2015, promulgate  
131 rules and regulations to carry out the purposes of this act which shall be applicable to all  
132 agencies, departments, boards, commissions, authorities, and instrumentalities within each of

133 said executive offices subject to the approval of the secretary of administration and finance, in  
134 consultation with the chief information officer of the commonwealth. Any agency not within any  
135 such executive office shall be subject to the regulations of the secretary of administration and  
136 finance. The attorney general, the state secretary, the state treasurer and the state auditor shall  
137 adopt applicable regulations for their respective departments on or before October 1, 2015.”

138 SECTION 7. Said section 15 of chapter 66 is hereby amended by striking the last  
139 sentence and replacing it with the following:--

140 “Any public officer who refuses or neglects to perform any duty required of him by this  
141 chapter, including failure to comply with an order from the supervisor of records made pursuant  
142 to paragraph (b) of section 10, shall for each day of such neglect or refusal be punished by a fine  
143 of not more than \$100.”

144 SECTION 8. There shall be a special commission to study the availability to the general  
145 public of information concerning the legislative operations of the general court, to consist of: the  
146 chairs of the joint committee on state administration and regulatory oversight, who shall serve as  
147 co-chairs; 3 additional members of the house of representatives, 1 of whom shall be appointed by  
148 the minority leader and 2 members to be selected by the speaker of the house; 3 additional  
149 members of the senate, 1 of whom shall be appointed by the minority leader and 2 members to  
150 be selected by the senate president, and two additional members appointed by the speaker of the  
151 house and the senate president jointly, who shall have experience in the use of technology to  
152 increase public access to information about government. The commission shall examine the  
153 procedures and practices of the Senate and the House of Representatives and their committees  
154 with regard to matters including, but not limited to: scheduling and notice of hearings and  
155 legislative sessions; management of the agenda, scope and substance of committee hearings,  
156 including the number of bills heard at each hearing; publication and availability of records  
157 concerning committee proceedings, including public hearing agendas, public testimony, and  
158 committee votes; rules and scheduling requirements for committee reports; content of committee  
159 reports, such as summary, explanatory, and analytical materials; contemporaneous and  
160 permanent online access to open sessions of the house and senate; publication of records  
161 concerning house and senate sessions, including but not limited to roll call votes; publication of  
162 proposed amendments to legislation and votes thereon; and the practicability of applying the  
163 provisions of the public records and open meetings laws to the General Court either by statute or  
164 by rule. In addition, the commission shall examine best practices in other states and in the  
165 United States Congress for open government and for making information concerning the  
166 legislative process available to the general public. As necessary, the commission shall: (i) partner  
167 with nongovernmental organizations and academic institutions that have expertise that can  
168 benefit the commission, including, but not limited to Common Cause, the ACLU, the  
169 Massachusetts Newspaper Publishers Association and the Massachusetts Taxpayers Foundation;  
170 (ii) solicit input from journalistic associations, public policy research institutions, other  
171 government institutions with expertise in public access to public proceedings, and other entities

172 with an interest in the legislative process; and (iii) create advisory subgroups that include  
173 representatives of similar entities. The commission shall convene its first official meeting within  
174 45 days of the passage of this legislation. The commission shall issue a report on or before  
175 October 1, 2015, which shall include recommendations for legislation or changes to legislative  
176 rules to: enhance the availability of information to the general public concerning the operations  
177 of the general court; improve the use of information technology for public access to information  
178 about the general court; promote substantive reporting by committees; ensure a permanent,  
179 accessible, and substantive record of public legislative proceedings, including house and senate  
180 sessions and public committee hearings; and apply to the General Court either by statute or by  
181 rule any provisions of the public records and open meetings laws the commission deems  
182 practicable. Said report shall be a public document, filed with the joint committee on rules, the  
183 joint committee on ways and means, and the offices of the house and senate clerks, and shall be  
184 posted online.