

HOUSE No. 3945

The Commonwealth of Massachusetts

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.

HOUSE No. 3945

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

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

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

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

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

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

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

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

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

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

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