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HOUSE . . . . . No. 3665

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:

SECTION 1. Clause twenty-sixth of section 7 of chapter 4 of the General Laws is hereby amended after the word "characteristics," by adding the following:- "…including public record information which may be separately retrieved from an electronic record,"

SECTION 2. Chapter 66 of the General Laws is hereby amended by inserting after section 3A the following new section:-"Section 3B. When designing or acquiring an electronic recordkeeping system or database, any person having custody of a public record shall ensure that such system or database is capable of providing data in a common format such as, but not limited to, the American Standard Code for Information Interchange or the Uniform Character Set Transformation Format. When records maintained electronically include both public record information and exempt information that may be withheld from public inspection, the custodian shall design its information storage and retrieval methods in a manner that permits the segregation and retrieval of public record information and redacting of exempt information in order to provide maximum public access. No custodian of a public record may enter into a

contract for the storage of electronic records containing public record information that impairs or restricts public access to those records."

SECTION 3. Said Chapter 66 is hereby amended by inserting after section 6 the following new section:- "Section 6A. Every state agency, as defined in chapter 66A, shall designate one or more employees as records access officers. In a city or town, the city or town clerk, or their designee(s), and any such designees of individual municipal agencies or other entities that the chief executive of the municipality may select, shall serve as the records access officer(s). Each agency, city or town shall publicize by posting in a conspicuous location at its offices and in a conspicuous location on its website, if any, the name, title, business address, business telephone number, and email address of the designated records access officers. The designation of one or more records access officers shall not be construed to prohibit employees who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall be responsible for coordinating such agency's or governmental body's response to requests for access to records under the provisions of this chapter, shall facilitate the informal resolution of requests by timely and thorough production of records, and shall ensure that the agency: (a) assists requesters seeking records to identify the records sought; (b) indicates, when responding to a request, whether the records are available in electronic form and the manner in which the records are stored, filed, retrieved or generated, to assist requesters in describing the records sought; (c) contacts requesters when the response to a request would be voluminous so the agency may, at the option of the requester, assist the requester to modify the scope of the request or the timeframe for compliance; (d) coordinates with the Supervisor of Public Records and the Records Management Unit to ensure that public records are preserved in accordance with relevant Massachusetts law, regulation, and

administrative guidance; and (e) prepares and maintains reference materials to enhance access to electronic public records in its custody and enable requestors to make informed requests. These reference materials shall be updated at least annually and shall include: (i) a reasonably detailed list of categories of records maintained by the agency, whether or not open for public inspection; (ii) a list and description of all major databases maintained by the agency; and (iii) a record of all public records requests received on or after October 1, 2016 and the responses to those requests, to the extent that such responses may be preserved in electronic form. Each state agency that maintains a website shall post these reference materials on its website."

SECTION 4. Section 10 of chapter 66 of the General Laws is hereby amended by striking subsections (a) and (b) and inserting the following:--"(a) Every person having custody of any public record, as defined in clause twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any portion of a record which is an independent public record, including public record information which may be separately retrieved from an electronic record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee not to exceed the actual cost of reproducing the record. In determining the actual cost of reproducing a record, the custodian of the record may include only: (i) the actual cost of any storage devices or materials provided to the requester in complying with such request; (ii) an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record, provided that no fee shall be charged unless at least two hours of employee time is needed to prepare a copy of the record requested, and (iii) when the custodian`s information technology capabilities are inadequate to prepare a copy of the record, the custodian may charge the requestor the actual cost of engaging an outside service to prepare a

copy, provided that no fee shall be charged in excess of the hourly salary attributed to the lowest paid state employee who has the necessary skill required to prepare such a copy. In no case shall fees for black and white photocopies or computer printouts exceed 5 cents per letter size page or smaller or 7 cents per legal size page. A page shall be defined as one side of a sheet of paper. Each person having custody of a record shall inform the requester of the estimated cost of preparing a copy of the record if more than two hours of an employee`s time is needed, or if an outside professional service would be retained to prepare a copy of the record. No fee shall be charged to locate, review or segregate requested records except in exceptional circumstances as defined in subsection (j) of this section. Records shall be furnished without any charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government and is not primarily in the commercial interest of the requester. (b) A custodian of a public record shall, within fifteen days following receipt of a request for inspection or copy of a public record, comply with such request except in exceptional circumstances as defined in subsection (j) of this section. Such request may be delivered in hand to the office of the custodian, mailed via first class mail, or sent by email. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records to compel the custodian to respond or for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person’s request. If the custodian refuses or fails to comply with any such order, the supervisor of records shall notify the attorney general or the appropriate district attorney thereof who shall take whatever measures necessary to insure compliance with the provisions of this section, including enforcement of the penalties prescribed under section 15.

The administrative remedy provided by this section shall in no way limit the 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 and costs 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."

SECTION 5. Section 10 of Chapter 66 of the General Laws is hereby further amended in paragraph three in subsection(d) by inserting after the word "number", the words "…personal email address…".

SECTION 6. 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; (vii) applications and awards of federal, state, and municipal government grants; (viii) minutes of open meetings; (ix) agency budgets; and (x) 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, 2016, 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, 2016. (h) in exceptional circumstances, a custodian of public records may, after

making a good faith attempt to work with the requestor to modify the scope of the request or the timeframe for compliance, petition the supervisor of records for one or both of the following: (1) additional time to comply with a request under subsection (b) of this section, not to exceed 30 days from the receipt of the request from the custodian; (2) authorization to charge a special service fee as a condition to complying with a request under subsection (b) of this section, not to exceed the actual time spent locating, reviewing and segregating the requested records, assessed at the current state minimum wage. (i) A custodian of public records may submit a petition under subsection (h) any time within fifteen days following receipt of a request. The custodian shall deliver written copies of the petition to the supervisor and the requestor. The petition shall specify the reasons that the request is being treated as exceptional, the amount of any additional time requested and an itemized estimate of any service fee requested. The supervisor may grant or deny any such petition in whole or in part. (j) For the purposes of this section, “exceptional circumstances” shall mean one or both of the following: (1) The custodian has received more than 15 requests from the same person in the previous 30 days, excluding requests in the public interest under subsection (a) of this section; (2) The custodian reasonably estimates that the response to the request will exceed 500 pages and that the time required to locate, compile and copy the records will exceed 20 hours."

SECTION 7. Said section 15 of chapter 66 is hereby amended by striking the last sentence and replacing it with the following:--"A court shall impose upon any public entity, when an officer or employee thereof refuses or neglects to perform any duty imposed by this chapter, a civil fine of $20 a day for the first 30 days of such refusal or neglect, and $50 a day for every subsequent day. If a custodian of a public record refuses or fails to comply with a request or order from the supervisor of records made under section 10 of this chapter, the fine shall be

assessed starting fifteen days after the custodian received the request or order. For other statutory violations, the fine shall be assessed starting after the public officer has had a reasonable opportunity to perform his duties. A court may reduce or waive this fine if it finds that the public officer has made a good faith attempt to comply with the duties imposed by this chapter. In determining whether to reduce or waive a fine, the court shall consider (1) the duration and nature of the violation; (2) any past violations by the same public entity; and (3) the degree to which the violation impedes access to public records."