

SENATE No. 2120

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

SENATE, January 28, 2016.

The committee on Ways and Means, to whom was referred the House Bill to improve public records (House, No. 3858),-- reports, recommending that the same ought to pass with an amendment striking out all after the enacting clause and inserting in place thereof the text of Senate document numbered 2120; and by striking out the title and inserting in place thereof the following title:- "An Act improving the administration and enforcement of the public records law".

For the committee,
Karen E. Spilka

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1 SECTION 1. Subsection (n) of clause Twenty-sixth of section 7 of chapter 4 of the
2 General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting, in line
3 226, after the word “transportation” the following words:- , cyber-security,.

4 SECTION 2. Said subsection (n) of said clause Twenty-sixth of said section 7 of said
5 chapter 4, as so appearing, is hereby further amended by striking out, in line 229, the words “ (b)
6 of section 10” and inserting in place thereof the following words:- (a) of section 10A.

7 SECTION 3. Said subsection (n) of said clause Twenty sixth of said section 7 of said
8 chapter 4, as so appearing, is hereby further amended by striking out, in line 230, the word
9 “safety” and inserting in place thereof the following words:- safety or cyber-security.

10 SECTION 4. Said section 7 of said chapter 4, as so appearing, is hereby further amended
11 by striking out, in line 269, the word “ten” and inserting in place thereof the following word:-
12 10A.

13 SECTION 5. Chapter 66 of the General Laws, as appearing in the 2014 Official Edition,
14 is hereby amended by inserting after section 1 the following section:-

15 Section 1A. The supervisor of records shall create educational materials or guides and
16 may make available training to an agency or municipality in order to foster awareness and
17 compliance with this chapter. The supervisor of records shall make the materials or guides
18 available at no cost on a website operated by the secretary of the commonwealth. Upon request
19 and to the extent feasible, the supervisor of records shall assist each agency and municipality to
20 develop best practices to facilitate compliance with this chapter and to promote access to public
21 records.

22 SECTION 6. Section 3 of said chapter 66, as so appearing, is hereby amended by
23 inserting after the words “microphotographic process”, in line 12, the following words:- , or by
24 electronic means.

25 SECTION 7. Said chapter 66 is hereby further amended by inserting after section 6 the
26 following section:-

27 Section 6A. (a) Every agency and municipality shall designate 1 or more employees as
28 records access officers. In a municipality, the municipal clerk or any persons the clerk may
29 designate, shall serve as a records access officer, and the local chief executive officer or chief
30 administrative officer, as defined in section 7 of chapter 4, may appoint additional records access
31 officers. For the purposes of this chapter the term “agency” shall mean any entity, other than a
32 municipality, that is identified in clause Twenty-sixth of section 7 of said chapter 4 as possessing
33 public records.

34 (b) A records access officer shall coordinate an agency’s or a municipality’s response to
35 requests for access to public records and shall facilitate the resolution of such requests by the
36 timely and thorough production of public records. Each officer shall further: (i) assist persons

37 seeking public records to identify the records sought; (ii) assist the custodian of records in
38 preserving public records in accordance with all applicable laws, rules, regulations and
39 schedules; and (iii) prepare guidelines or reference materials that enable a person seeking access
40 to public records in the custody of the agency or municipality to make informed requests. The
41 guidelines or reference materials shall be updated periodically and shall include a list of
42 categories of public records maintained by the agency or municipality and a list and description
43 of pertinent databases and record keeping systems maintained by the agency or municipality the
44 contents of which are public records. Each agency that maintains a website shall post such
45 guidelines or reference materials on its website.

46 (c) Each agency and municipality shall post in a conspicuous location at its offices and
47 on its website, if any, the name, title, business address, business telephone number and business
48 email address of each records access officer. The designation of 1 or more records access
49 officers shall not be construed to prohibit other authorized employees from responding to public
50 record requests, making public records or information available to the public, or from otherwise
51 taking actions necessary to comply with this chapter; provided, that such employees shall act in
52 accordance with the law.

53 (d) Public records shall be provided to a requestor by electronic means unless otherwise
54 requested or unless the record is not available in electronic form. The records access officer
55 shall, to the extent feasible, provide the public record in the requestor's preferred format and in a
56 searchable, machine readable format. The records access officer shall not be required to create a
57 new public record in order to comply with a request. If the public record requested is available
58 on a public website pursuant to subsection (b) of section 19, section 14C of chapter 7, or any
59 other appropriately indexed and searchable public website, the records access officer may furnish

60 the public record by providing reasonable assistance in locating the requested record on the
61 public website.

62 (e) Each records access officer of an agency shall document each request for public
63 records submitted to the records access officer. The records access officer shall document (i) the
64 nature of the request and the date on which the request was received; (ii) the date on which a
65 response is provided to the requestor; (iii) the date on which a public record is provided to the
66 requestor; (iv) the number of hours required to fulfill the request; (v) fees charged to the person
67 making the request, if any; (vi) petitions submitted under clause (iv) of subsection (d) of section
68 10; (vii) requests appealed under section 10A; (viii) the time required to comply with supervisor
69 of records orders under said section 10A; and (ix) the final adjudication of any court proceedings
70 under subsection (d) of said section 10A. Nothing in this subsection shall require a records
71 access officer to disclose information otherwise protected from public access. The secretary of
72 the commonwealth shall prescribe a form for recording such information and shall annually
73 collect the information from the records access officers, post the information on a website
74 maintained by the secretary and report the same to the clerks of the house of representatives and
75 senate.

76 (f) The supervisor of records shall document requests for public records appealed to the
77 supervisor of records by the requestor. The supervisor of records shall document: (i) the date the
78 request was submitted to the records access officer; (ii) the date the records access officer
79 responded; (iii) the amount of fees charged to the requestor, if any; (iv) petitions under clause
80 (iv) of subsection (d) of section 10; (v) the time required to comply with supervisor of records
81 orders under said section 10A; and (vi) the final adjudication of any court proceedings under
82 subsection (d) of said section 10A. Nothing in this subsection shall require the supervisor to

83 disclose information otherwise protected from public access. The secretary of the
84 commonwealth shall prescribe a form for recording such information and shall post the
85 information on a website maintained by the secretary.

86 SECTION 8. Said chapter 66 is hereby further amended by striking out section 10 and
87 inserting in place thereof the following 3 sections:-

88 Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee,
89 shall, at reasonable times and without unreasonable delay, permit inspection or furnish a copy of
90 any public record, as defined in clause Twenty-sixth of section 7 of chapter 4, or any segregable
91 portion of a public record, not later than 15 calendar days following the receipt of the request if:
92 (i) the request reasonably describes the public record sought; (ii) the public record is within the
93 possession, custody or control of the agency or municipality that the records access officer
94 serves; and (iii) the records access officer receives payment of a reasonable fee as set forth in
95 subsection (d).

96 (b) If the magnitude or difficulty of the request, or the receipt of multiple requests from
97 the same requestor, unduly burdens the other responsibilities of the agency or municipality such
98 that the agency or municipality is unable to permit inspection or furnish a copy of a requested
99 public record within 15 calendar days, the records access officer shall, not later than 10 calendar
100 days following the initial receipt of a request for public records, issue a written response to the
101 person who submitted the request. The written response shall be made via first class or
102 electronic mail and shall include the following:

103 (i) confirmation of the receipt of the request;

104 (ii) identification of any known public records or categories of public records that the
105 agency or municipality intends to produce and any, known records, categories of records, or any
106 portion of a record, that the agency or municipality intends to withhold accompanied by specific
107 reasons for such withholding, including the specific exemption or exemptions upon which the
108 withholding is based; provided, that nothing in the written response shall limit an agency's or
109 municipality's ability to redact or withhold information in accordance with state or federal law;

110 (iii) identification of any public record sought that does not exist or is not within the
111 possession, custody or control of the agency or municipality that the records access officer serves
112 and, if known, identification of the agency or municipality who may be in possession, custody or
113 control of the public record sought;

114 (iv) a detailed statement describing why the magnitude or difficulty of the request unduly
115 burdens the other responsibilities of the agency or municipality and therefore requires additional
116 time to produce the public record sought;

117 (v) an itemized estimate of any fees that may be charged to produce the records;

118 (vi) a reasonable time in which the agency or municipality shall produce the public
119 records sought but this time shall not exceed 30 calendar days following the initial receipt of the
120 request for public records unless the agency or municipality and the requestor agree, in writing,
121 to establish a time beyond 30 calendar days of the initial receipt of the request;

122 (vii) a proposed reasonable modification of the scope of the request or an invitation to
123 assist the person making the request for public records to modify the scope of the request in
124 order to produce records sought more efficiently and affordably; and

125 (viii) a statement informing the requestor of the right of appeal to the supervisor of
126 records under subsection (a) and to superior court under subsection (c) of section 10A.

127 (c) If the magnitude or difficulty of a request , or the receipt of multiple requests from
128 the same requestor, unduly burdens the other responsibilities of the agency or municipality such
129 that an agency or municipality is unable to complete the request within the time provided in
130 clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20
131 calendar days after initial receipt of the request, or within 5 calendar days after receipt of a
132 determination by the supervisor of public records that the requested record constitutes a public
133 record, petition the supervisor of records for an extension of the time for the agency or
134 municipality to furnish copies of the requested record, or any portion of the requested record,
135 that the agency or municipality has within its possession, custody or control and intends to
136 furnish. The records access officer shall, upon submitting the petition to the supervisor of
137 records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the
138 supervisor of records may grant a single extension not to exceed 30 calendar days. In
139 determining whether the agency or municipality has proven good cause, the supervisor of records
140 shall consider, but shall not be limited to considering: (i) the need to search for, collect, segregate
141 or examine records; (ii) the scope of redaction required to prevent unlawful disclosure; (iii) the
142 capacity of the agency or municipality to produce the request without the extension; (iv) efforts
143 undertaken by the agency or municipality in fulfilling the current request and previous requests;
144 (v) whether the request, either individually or as part of a series of requests from the same
145 requestor, is frivolous or intended to harass or intimidate the agency or municipality; and (vi) the
146 public interest served by expeditious disclosure. If the supervisor of records determines that the
147 request is part of a series of contemporaneous requests that are frivolous or designed to

148 intimidate or harass, and the requests are not intended for the broad dissemination of information
149 to the public about actual or alleged government activity, the supervisor of records may grant an
150 extension beyond 30 calendar days. The supervisor of records shall issue a written decision
151 regarding a petition submitted by a records access officer under this subsection within 7 calendar
152 days following receipt of the petition and shall provide the decision to the agency or municipality
153 and the requestor and shall inform the requestor of the right to appeal an unfavorable decision to
154 the superior court.

155 (d) A records access officer may charge a reasonable fee for a public record. The
156 reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly
157 provided for otherwise, the fee shall be determined in accordance with the following provisions:

158 (i) the actual cost of any storage device or material provided to a person in response to a
159 request for public records under subsection (a) may be included as part of the fee; but the charge
160 for standard black and white paper copies or printouts of records shall not exceed 5 cents per
161 page, for both single and double-sided black and white copies or printouts;

162 (ii) if an agency is required to devote more than 4 hours of employee time to search for,
163 compile, segregate, redact or reproduce the record or records requested, the records access
164 officer may also include as part of the fee an hourly rate equal to or less than the hourly rate
165 attributed to the lowest paid employee who has the necessary skill required to search for,
166 compile, segregate, redact or reproduce the record or records requested, but the fee shall not be
167 more than \$25 per hour and an agency shall not charge for the first 4 hours of work performed.
168 An agency shall not charge for time spent segregating or redacting unless such segregation or
169 redaction is required by law or approved by the supervisor of records under clause (iv);

170 (iii) if a municipality is required to devote more than 2 hours of employee time to search
171 for, compile, segregate, redact or reproduce the record or records requested, the records access
172 officer may also include as part of the fee an hourly rate equal to or less than the hourly rate
173 attributed to the lowest paid employee who has the necessary skill required to search for,
174 compile, segregate, redact or reproduce the record or records requested, but the municipality
175 shall not charge more than \$25 per hour unless such rate is approved by the supervisor of records
176 under clause (iv); provided, however, that a municipality shall not charge for the first 2 hours of
177 work performed or time spent segregating or redacting unless such segregation or redaction is
178 required by law or approved by the supervisor of records under clause (iv);

179 (iv) the supervisor of records may approve a petition from an agency or municipality to
180 charge for time spent segregating or redacting, or a petition from a municipality to charge in
181 excess of \$25 per hour, if the supervisor of records determines that: (1) the charge represents an
182 actual and good faith representation by the agency or municipality to comply with the request;
183 (2) the charge is necessary such that the request could not have been prudently completed
184 without the redaction, segregation or charge in excess of \$25 per hour; and (3) the charge is not
185 designed to limit, deter or prevent access to requested public records. An agency or
186 municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to
187 the requestor. The supervisor of records shall issue a written determination regarding such a
188 petition within 7 calendar days following receipt of the petition by the supervisor of public
189 records. The supervisor of records shall provide the determination to the agency or municipality
190 and the requestor and shall inform the requestor of the right to appeal an unfavorable decision to
191 the superior court; and

192 (v) the records access officer may waive or reduce the amount of any fee under this
193 subsection upon a showing that disclosure of the requested record or records is in the public
194 interest because it is likely to contribute significantly to public understanding of the operations or
195 activities of the government and is not primarily in the commercial interest of the requester, or
196 upon a showing that the requester lacks the financial ability to pay the full amount of the
197 reasonable fee.

198 A records access officer shall not charge a fee for a public record unless the records access
199 officer furnished the public record in 15 calendar days under subsection (a) or responded to the
200 requestor in 10 calendar days under subsection (b).

201 Section 10A. (a) If an agency or municipality fails to comply with a requirement of
202 section 10 or issues a response the requestor believes in violation of section 10, the person who
203 submitted the initial request for public records may petition the supervisor of records for a
204 determination as to whether a violation has occurred. In assessing whether a violation has
205 occurred, the supervisor of records may inspect any record or copy of a record in camera. The
206 supervisor of records shall issue a written determination regarding any petition submitted in
207 accordance with this section not later than 15 calendar days following receipt of the petition by
208 the supervisor of records. Upon a determination by the supervisor of records that a violation has
209 occurred, the supervisor of records shall order timely and appropriate relief. A requestor,
210 aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of
211 records to issue a timely determination, may obtain judicial review only through an action in
212 superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as
213 prescribed in subsection (d).

214 (b) If an agency or municipality refuses or fails to comply with an order issued by the
215 supervisor of records, the supervisor of records shall notify the attorney general, who, after
216 consultation with the supervisor of records, may take whatever measures the attorney general
217 considers necessary to ensure compliance. If the attorney general files an action to compel
218 compliance, the action shall be filed in Suffolk superior court with respect to state agencies and,
219 with respect to municipalities, in the superior court of the county in which the municipality is
220 located. The attorney general shall designate an individual within the office of the attorney
221 general to serve as a primary point of contact for the supervisor of records. In addition to any
222 other duties the attorney general may impose, the designee shall serve as a primary point of
223 contact within the office of the attorney general regarding notice from the supervisor of records
224 that an agency or municipality refuses or fails to comply with an order issued by the supervisor
225 of records.

226 (c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a
227 civil action to enforce the requirements of this chapter. Any action under this subsection shall be
228 filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the
229 superior court in the county in which the municipality is located. The superior court shall have
230 available all remedies at law or in equity, provided that any damages awarded shall be consistent
231 with subsection (d).

232 (d)(1) In any action filed by a requestor pursuant to this section:

233 (i) the superior court shall have jurisdiction to enjoin agency or municipal action;

234 (ii) the superior court shall determine the propriety of any agency or municipal action de
235 novo and may inspect the contents of any defendant agency or municipality record in camera;

236 (iii) the superior court shall, when feasible, expedite the proceeding;

237 (iv) a presumption shall exist that each record sought is public and the burden shall be on
238 the defendant agency or municipality to prove, by a preponderance of the evidence, that such
239 record or portion of the record may be withheld in accordance with state or federal law.

240 (2) (i) The superior court shall award reasonable attorney fees and other litigation costs
241 reasonably incurred to the requestor in any case in which the requestor has obtained relief
242 through a judicial order or consent decree unless:

243 (A) the supervisor of records under subsection (a) found that the agency or municipal
244 action did not violate this chapter or the agency or municipality reasonably relied on,
245 based on similar facts, a published opinion by the supervisor of records or the
246 attorney general;

247 (B) the agency or municipality reasonably relied upon a published opinion of an
248 appellate court based on similar facts;

249 (C) the request was designed or intended to harass or intimidate; or

250 (D) the request was not in the public interest and made for a private or commercial
251 purpose unrelated to disseminating information to the public about actual or alleged
252 government activity.

253 If the superior court determines that 1 of the conditions exists under subclauses (A) through (D),
254 the superior court may award reasonable attorney fees and other litigation costs reasonably
255 incurred to the requestor.

256 (ii) When a requestor has obtained relief in a superior court case through a voluntary or
257 unilateral change in position by the agency or municipality, if the requestor's claim is not

258 insubstantial, the superior court may award reasonable attorney fees and other litigation costs
259 reasonably incurred to the requestor.

260 (iii) If a requestor has obtained relief under either (i) or (ii) of this clause, and the
261 superior court determines that the assessment of reasonable attorney fees and other litigation
262 costs reasonably incurred is not warranted, the judge shall issue written findings specifying the
263 basis for not awarding reasonable attorney fees and other litigation costs reasonably incurred.

264 (3) If the superior court awards reasonable attorney fees and other litigation costs
265 reasonably incurred to the requestor it shall order the agency or municipality to waive any fee
266 assessed under subsection (d) of section 10. If the superior court does not award reasonable
267 attorney fees and other litigation costs reasonably incurred to the requestor, it may order the
268 agency or municipality to waive any fee assessed under said subsection (d) of said section 10. If
269 the superior court determines not to order any fee assessed under said subsection (d) of said
270 section 10 waived, it shall issue written findings specifying the basis for such denial.

271 (4) If a requestor has obtained judgment in superior court in a case under this section and
272 has demonstrated that the defendant agency or municipality, in withholding or failing to timely
273 furnish the requested record or any portion of the record, or in assessing an unreasonable fee, did
274 not act in good faith, the superior court shall assess punitive damages against the defendant
275 agency or municipality in an amount not less than \$1,000 nor more than \$5,000, to be expended
276 to support the information technology capabilities of a municipality to foster best practices and
277 facilitate compliance with this chapter.

278 (e) Notwithstanding any other provision of this chapter, the attorney general may, at any
279 time, file a complaint in Suffolk superior court with respect to agencies and, with respect to

280 municipalities, in the superior court in the county in which the municipality is located, to ensure
281 compliance with this chapter and may further intervene as of right in any action filed in
282 accordance with this section. In any action filed or in which the attorney general has intervened
283 under this subsection, clauses (1) and (4) of subsection (d) shall apply and any public records the
284 court orders produced shall be provided without a fee.

285 Section 10B. The commissioner of the department of criminal justice information
286 services, the department of criminal justice information services and its agents, servants, and
287 attorneys including the keeper of the records of the firearms records bureau of said department,
288 or any licensing authority, as defined in section 121 of chapter 140, shall not disclose any records
289 divulging or tending to divulge the names and addresses of persons who own or possess firearms,
290 rifles, shotguns, machine guns and ammunition therefor, as defined in said section 121 of said
291 chapter 140, and names and addresses of persons licensed to carry or possess the same to any
292 person, firm, corporation, entity or agency except criminal justice agencies as defined in section
293 167 of chapter 6 and except to the extent such information relates solely to the person making the
294 request and is necessary to the official interests of the entity making the request.

295 The home address and telephone number of law enforcement, judicial, prosecutorial,
296 department of youth services, department of children and families, department of correction and
297 any other public safety and criminal justice system personnel, and of unelected general court
298 personnel, shall not be public records in the custody of the employers of such personnel or the
299 public employee retirement administration commission or any retirement board established under
300 chapter 32 and shall not be disclosed, but such information may be disclosed to an employee
301 organization under chapter 150E, a nonprofit organization for retired public employees under
302 chapter 180 or to criminal justice agencies as defined in said section 167 of said chapter 6. The

303 name and home address and telephone number of a family member of any such personnel shall
304 not be public records in the custody of the employers of the foregoing persons or the public
305 employee retirement administration commission or any retirement board established under
306 chapter 32 and shall not be disclosed. The home address and telephone number or place of
307 employment or education of victims of adjudicated crimes, of victims of domestic violence and
308 of persons providing or training in family planning services and the name and home address and
309 telephone number, or place of employment or education of a family member of any of the
310 foregoing shall not be public records in the custody of a government agency which maintains
311 records identifying such persons as falling within such categories and shall not be disclosed.

312 SECTION 9. Said chapter 66 of the General Laws is hereby further amended by adding
313 the following 2 sections:-

314 Section 19. (a) When designing or acquiring an electronic recordkeeping system or
315 database, records access officers shall, consistent with section 17 of chapter 110G, consult with
316 their chief executive officer, chief administrative officer or the Massachusetts office of
317 information technology pursuant to chapter 7D to ensure, to the extent feasible, that the system
318 or database is capable of providing data in a commonly available electronic, machine readable
319 format. Such database designs or acquisitions shall allow for, to the extent feasible, information
320 storage and retrieval methods that permit the segregation and retrieval of public records and
321 redacting of exempt information in order to provide maximum public access. No agency or
322 municipality shall enter into a contract for the storage of electronic records containing public
323 records if the contract prevents or unduly restricts the records access officer from providing the
324 public records in accordance with the requirements of this chapter.

325 (b) Every agency shall provide on a searchable website electronic copies, accessible in a
326 commonly available electronic format, of the following types of public records: (i) final
327 opinions, decisions, orders or votes from agency proceedings; (ii) annual reports; (iii) reports to
328 the general court; (iv) notices of regulations proposed under chapter 30A; (v) notices of hearings;
329 (vi) winning bids for public contracts; (vii) awards of federal, state and municipal government
330 grants; (viii) minutes of open meetings; (ix) agency budgets; and (x) any public record
331 information of significant interest or which could reasonably be anticipated to be the subject of
332 multiple requests that the agency deems appropriate to post; provided, that any agency may
333 withhold any record or portion of a record in accordance with state or federal law.

334 Section 20. For requests of payroll, financial and other data residing in the centralized
335 state accounting and payroll systems, or associated data warehouses, the comptroller shall make
336 available guidelines on how agencies using these systems may access and disclose public records
337 to ensure that data that is exempted or prohibited from disclosure is not wrongfully disclosed and
338 the security of the system is maintained.

339 SECTION 10. Municipal records access officers shall, to the extent feasible, post the
340 guidelines or reference materials required under subsection (b) of section 6A of chapter 66 and
341 the commonly available public record documents identified in subsection (b) of section 19 of
342 said chapter 66 on a website maintained by the municipality.

343 SECTION 11. Notwithstanding any general or special law to the contrary, all damages
344 paid pursuant to clause (4) of subsection (d) of section 10A of chapter 66 shall be directed to
345 item 1599-0026 of the general appropriations act to support municipal improvements to the

346 information technology capabilities of a municipality to foster best practices and facilitate
347 compliance with chapter 66 of the General Laws.

348 SECTION 12. Pursuant to section 1 of chapter 66 of the General Laws, the supervisor of
349 records shall adopt regulations necessary to implement this act. The regulations shall be adopted
350 not later than September 1, 2016.

351 SECTION 13. Notwithstanding any general or special law to the contrary, this act shall
352 not apply to public records requests submitted under section 10 of chapter 66 of the General
353 Laws before the effective date of this act. Nor shall any obligation imposed by this act be
354 enforceable or deemed relevant in any appeal pending before the supervisor of records or any
355 court as of the effective date of this act.

356 SECTION 14. Section 7 shall take effect on July 1, 2016.

357 SECTION 15. Sections 1 to 6, inclusive, and 8 to 11, inclusive, of this act shall take
358 effect on October 1, 2016.