



The public’s right and ability to access government documentation and witness public decision-making is integral to representative government. Laws providing access to public records in Massachusetts have existed since 1851 while the federal Freedom of Information Act (FOIA) was passed 50 years ago. Yet the debate over the appropriate balance between public access and government efficacy continues at federal, state, and local levels. Coinciding with the March 16th birthday of James Madison, author of the Bill of Rights, the American Society of News Editors and others have promoted Sunshine Week for more than a decade—calling on government at every level to make documentation and decision-making more accessible. As the Massachusetts General Court seeks approval of new laws related to public access, what is the appropriate level of public access to government operations and how should such access be administered and enforced?

Public Records versus Open Meetings

The public’s right to government documentation is managed differently than the public’s right to witness official government activity.

In Massachusetts, a citizen’s right to access government documents is governed by Massachusetts General Laws (MGL) Chapter 66, Section 10. A request for public documents may be made verbally or in writing to the local custodian of records of the government entity that made or received the documents — municipal documents are only held locally. Unless the requested records fall under an exemption of the law, the records must be produced within 10 days of the request or, if infeasible, notice of the reason for delay and an anticipated timeline must be provided within that same period. If the requested documents are not received an appeal may be made to the Supervisor of Public Records, an administrative official located within the Office of the Secretary of the Commonwealth. The appeal must be in written form. If a custodian of a public record refuses to comply with a directive from the State, the Supervisor may ask the Attorney General’s Office to make a legal assessment of the dispute and, if necessary, enforce the decision. There are 20 exemptions in the law that allow for the denial of documentation (See Table 1). The law requires that the custodian provide a detailed, written, good faith estimate for any request that will cost over \$10.00, based on allowed costs for printing and reproduction.

Table 1: Exemptions to the Massachusetts Public Records Law	
<i>The law allows exemptions for withholding records completely or in part. The exemptions are strictly and narrowly construed.</i>	
1.	Statutorily exempted
2.	Related solely to internal personnel rules and practices
3.	Privacy exemption for personnel, medical documentation, or data relating specifically to one individual
4.	Limited executive privilege for policy development
5.	Personal notebooks and other materials prepared by staff
6.	Investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials
7.	Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing policy
8.	Bidding materials necessary to protect the integrity of the process
9.	Appraisals of real property acquired or to be acquired until final agreement entered into or litigation has been terminated or expired
10.	Names and addresses on firearms records
11.	Questions, answers, scoring cards, and sheets for tests or assessment instrument that will be used again
12.	Contracts from hospital or healthcare services between government operated facility and HMO or health insurance company
13.	Documents related to security and emergency preparedness
14.	Addresses and phone numbers of employees of judicial branch, or unelected employees of government
15.	Addresses and phone numbers of family members of employees of judicial branch, or unelected employees of government
16.	Adoption contact documentation
17.	Records created and received by the Office of the Child Advocate
18.	Trade secrets or propriety documentation provided by a governmental body serving as an energy supplier
19.	Financial interest statements filed by members of public retirement boards
20.	Trade secrets or propriety documentation of UMass

The records custodian may also charge for the time he or she spends searching, redacting, photocopying, and refileing a record. The hourly rate may not be greater than the prorated hourly wage of the lowest paid employee who is capable of performing the task. Documents include both paper and electronic communications.

The open meeting law is governed by MGL Chapter 30A, Sections 18-25 and is overseen and enforced by the Attorney General’s Office. The law requires that legislative or regulatory board meetings be held openly and with 48-hour public notification of date, time, and location, excluding weekends and holidays. The law outlines the rules that public bodies must follow in the creation and maintenance of records relating to those meetings, including the posting of agendas and the keeping of minutes. The law lists 10 reasons a board or committee may go into executive or closed session (See Table 2). Before members of a public board meet in executive session, however, they must first convene in open session, state the reason for going into executive session, publicly vote to enter executive session, and announce whether open session will reconvene upon the conclusion of executive session. Accurate minutes of executive sessions must be kept and made available to the public when the factors allowing executive session no longer apply. Meetings with individual government officials are not subject to the law and do not constitute open meetings.

Table 2: Exemptions to the Massachusetts Open Meeting Law	
<i>A public Board may go into executive session to discuss the following topics if a public meeting would prove detrimental to negotiations or reveal personal or propriety</i>	
1.	Personal documentation about an employee, including disciplinary actions
2.	Strategy and negotiation with union (collective bargaining) and non-union personnel
3.	Strategy for litigation or collective bargaining
4.	Deployment of security personnel or devices
5.	Investigate charges of criminal conduct or to consider filing a criminal complaint
6.	To discuss the sale, lease, or purchase of real property
7.	To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements
8.	To preliminarily consider or interview applicants for employment or appointment
9.	To meet or confer with a mediator, with respect to litigation or decision of public business
10.	To discuss trade secrets and confidential/sensitive or other propriety documentation provided in the course of activities conducted by a governmental body as an energy provider

If the Attorney General’s Office receives a complaint and upon investigation finds there has been a violation of the law, a civil penalty of not more than \$1,000 can be imposed on the public body for each intentional violation. Members of the board may be required to undergo training on the law and any decisions made during inappropriate executive sessions may be vacated. In 2015, the Attorney General’s Office issued 243 determinations on open meeting complaints.

Questions to Consider

1. Government and the public should seek to categorize the level of detail necessary to understand specific government policies and to ensure that government is operating effectively and appropriately. How can governments review functions and resources and identify public information “hotspots” to ensure the provision of necessary public access?
2. Should municipalities establish central filing systems and identify staff to compile, track, and manage records?
3. How can governments adopt open meeting protocols to create opportunities for real discussion at public meetings between elected and appointed officials and members of the public, so that meetings are deliberative and not simply declarative.
4. How should the legislature, as it establishes new policies, recognize the legitimate tension between government transparency and efficient and effective government operations and ensure that new legislation is not overly restrictive, limiting the public’s access to certain areas or branches of government, and does not cause a negative effect on official communications with constituents or internal government dialogue around policy issues and decisions?

Case Study

In honor of Sunshine Week 2016, the Associated Press sent open records requests to top lawmakers in all 50 states seeking copies of daily schedules and emails from their government accounts for the week of February 1 through 7. The AP received more denials than approvals from lawmakers. Reasons given included that the requests were “overly broad and lack a reasonable specificity for the information sought,” that calendars are “in draft form, contain appointments that may or may not occur, are revised daily, are never corrected, and are not an accurate log,” and that the release of emails would “almost certainly have a detrimental chilling effect on citizen’s constitutional rights and willingness to petition their elected officials.”

Bureau Brief

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