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Joint Committee on State Administration and Regulatory Oversight  
Sen. Joan Lovely & Rep. Peter Kocot, Chairs

**SUPPORT: H.2772 & S.1676**

**UPDATING THE PUBLIC RECORDS LAW**

Dear Senator Lovely, Representative Kocot, and members of the committee:

The ACLU of Massachusetts strongly supports H.2772 & S.1676. The time to fix and modernize our public records law is now.

The inadequacy of our public records law is well documented, as is its routine abuse. Agencies are non-responsive. They claim that information isn't public. They say it should not be made public. They charge excessive, unreasonable fees. They provide records in paper form when it would be easier and cheaper to do so electronically. And they are completely unaccountable.

That's why more than 35 organizations have come together under the banner of the Massachusetts Freedom of Information Alliance to urge the legislature to act.<sup>1</sup>

**The problem**

By statute, executive branch and municipal government records are supposed to be available to the public as a matter of right, subject to certain exemptions, such as to protect personal privacy. In practice, however, Massachusetts lags behind much of the country in making such information truly accessible to the public. In national surveys, the Commonwealth consistently receives a failing grade.

Since last session when this committee began to seriously consider how to update the law, public awareness of the seriousness of the problems and the need for action has increased dramatically. Here are just a few reasons<sup>2</sup>:

- Bridgewater State University charged \$62,000 for information related to university officials' handling of reported rapes at a campus day care center.
- It's been 7 months since Greater Boston Legal Services requested information from the Department of Transitional Assistance. Despite paying \$1700 in March, GBLS still has not received any records.

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<sup>1</sup> See attached list of advocates for children and education, the environment, health care, consumer protection, civil rights, open democracy, and journalism.

<sup>2</sup> A longer selection of illustrative stories is attached.

- The state Ethics Commission demanded more than \$14,000, to be paid in advance, to access last year's reports. The reason? To redact them, even though they are filed for the specific purpose of public disclosure.
- A regional taxpayer-funded SWAT unit claims it's not subject to the public records law – because it's incorporated as a private, non-profit organization.

The stories that come to public light tend to originate with the news media or advocacy organizations that have the interest and means to publicize them. But the public records law is not just a tool for organizations; it is also about freedom of information for individuals – for ordinary Massachusetts residents who have a personal stake in the workings of their government.

And for ordinary people, a couple hundred dollars can be as much of a roadblock as a 5-figure fee. The parent concerned about lead levels at her children's school doesn't have staff to follow up on a records request for months of runaround and delay. The low-income resident seeking records about a neighborhood-changing development project isn't in a position to run to court to enforce the law. For many, the barriers inherent in our public records law – high costs and lack of accountability – usually mean the end of the road. Our current public records law fails them.

### **The solution**

Thankfully, there are practical, tested fixes. The proposed legislation is based on proven solutions from other jurisdictions.

Here are the most important elements:

- 1) **Incentivize compliance by providing attorneys' fees to successful plaintiffs** – like 46 other states and the federal Freedom of Information Act (FOIA);
- 2) **Make records access affordable** – charges should reflect the actual cost of producing the records and not be inflated with extra fees for reviewing and withholding information;
- 3) **Waive fees for public interest requests** – just like under FOIA;
- 4) **Provide documents electronically** – by both making records available in their native electronic format and proactively publishing public information online;
- 5) **Assign records access officers at each agency** – having a point person makes it easier for agencies to handle requests knowledgeably and efficiently.

The legislature, in its wisdom, has already said certain government information belongs to the public as a matter of right. This legislation would make that promise real.

It would not expand the scope of the current law, change existing exemptions, or require appropriations to operationalize. It would simply update the law with measures proven to bring down costs, make information public more efficiently, and ensure accountability

### **Accountability**

*Providing for attorneys' fees is the key to ensuring compliance and accountability*

When the Massachusetts public records law was passed in 1973, it was missing a crucial element – a practical way to enforce it. Public records laws are sometimes referred to as “sunshine laws.” The Massachusetts law is like a flashlight without batteries.<sup>3</sup>

Today, agencies in Massachusetts know there are no real consequences to withholding information that the law says should be public. As a result, they frequently behave as though compliance were optional. Whether they deny records outright, delay until requesters give up, or charge unreasonable fees that ordinary residents could never hope to be able to pay, they know they will face no penalty.

For this reason, the most important thing Massachusetts can do to fix our public records law is to adopt the solution that works in 46 other states and under the federal FOIA law. As an incentive for agencies to follow the law, we must authorize courts to award legal fees when people are unlawfully denied access to public records.<sup>4</sup>

Consider this story. When *Forbes* magazine sought information from the Public Employee Retirement Administration Commission, PERAC’s lawyer accidentally sent an email to *Forbes* that was clearly meant for another PERAC executive, saying:

*“[T]his one is more difficult to duck. We can charge them, which might dissuade them, and/or tell them that our info is incomplete, not sure if either will work. Let me know your thoughts.”*

Shortly thereafter, PERAC implemented its dissuasion plan: it demanded an upfront payment of \$10,000 and indicated that additional charges were virtually guaranteed.<sup>5</sup>

*Forbes* viewed this situation clearly: “In effect, [PERAC is] saying that if taxpayers really want to know this information then, ‘Sue us.’ They are betting that most organizations lack the will or the wallet to enforce transparency. But taxpayers shouldn’t have to file lawsuits to find out how their money is being spent.”

Sadly, many users of the Massachusetts public records law recognize in this shameful story their own experience with recalcitrant agencies. They believe that a culture of secrecy at some government offices has overtaken the law’s presumption of openness. That cynicism festers and does great damage to our democracy.

Knowing they might have to pay legal fees makes agencies think twice about hiding the ball. In this way, legal fees function as a front-end incentive far more than as a back-end penalty.

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<sup>3</sup> This is not to say that no enforcement mechanisms exist at all. Under current Massachusetts law, there are actually two enforcement mechanisms – both wholly inadequate and impractical. First, if an agency fails to comply with a request, a requester can appeal to the Supervisor of Public Records within the Secretary of State’s office. However, such appeals can take months and the best result one may hope for is a letter to the agency reminding them of their obligations. Without referral to and prosecution by the Attorney General, such appeals are toothless, and enforcement actions are all but unheard of today. Even if such enforcement were more common, it would still be insufficient; authorizing attorneys’ fees is the most effective incentive and the most efficient enforcement mechanism. Alternatively, a requester may bring a case in court, but agencies know that most requesters lack the desire or money to sue. For ordinary Massachusetts residents, and even for relatively well-resourced legal or news-gathering organizations, the cost of going to court – even for a slam dunk case – usually makes litigation an unrealistic option.

<sup>4</sup> For a summary of fee provisions, see the attached state-by-state chart.

<sup>5</sup> <http://www.forbes.com/sites/adamandrzejewski/2014/12/15/what-is-massachusetts-trying-to-hide>

They prompt agencies to take public records requests seriously and to comply with the law. As a result, far fewer cases need to be resolved in court, and agencies save themselves the cost and trouble of unnecessary litigation.

All major civil rights laws authorize courts to award legal fees to successful plaintiffs. Without legal fees, civil rights laws would be hollow, because people who face discrimination would not have the means to sue. The same is true for public records laws.

Lacking a fee provision, Massachusetts is a major outlier – way out with only 3 other states: Alabama, South Dakota, and Wyoming. Half of all states require courts to award legal fees when agencies violate the law, and this legislation would wisely bring Massachusetts in line with those jurisdictions.

The standard for awarding fees under the proposed legislation closely tracks the language of the federal Freedom of Information Act.<sup>6</sup> Courts are familiar with the standard and can look to federal law for guidance in applying it.

### **Affordability**

Access to public information shouldn't be cost-prohibitive to ordinary, middle-class Massachusetts residents. This legislation would reduce costs in a variety of ways.

#### *Set fees that reflect actual materials costs*

Complying with the public records law should not be a for-profit enterprise. Yet, under current law, agencies can charge copying and printing fees that would make a commercial copy service blush. 50 cents per printed page and 20 cents per photocopy?<sup>7</sup> A full dollar a page for some records? Instead of these princely sums, the proposed legislation would set ordinary printing and copy fees at 5 or 7 cents, depending on the size of the page. These fees match the public records law passed in New Jersey and signed by Governor Christie in 2010.<sup>8</sup>

#### *Charge for the work of producing documents for bigger jobs*

Some public records requests can take substantial staff time to fulfill. In cases where producing records requires 2 or more hours of work, the agency should be allowed to charge the hourly rate of the lowest paid person who can do the work.

#### *Prohibit extra fees for review and redaction*

Nearly a third of all states either limit or prohibit outright charges for reviewing documents and redacting them to withhold information from disclosure. Massachusetts should join them. We need to change the perverse incentive structure under current law that encourages agencies to withhold information from the public. Today, agencies have every reason to demand huge retainers to pay for hundreds of hours of multi-layer review by legal counsel. Indeed, it has become common practice. Such fees appear calculated to force

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<sup>6</sup> 5 U.S.C. § 552(a)(4)(E)(i) (authorizing fees when the plaintiff “has substantially prevailed”)

<sup>7</sup> 950 CMR 32.06

<sup>8</sup> N.J.S.A. 47:1A-5.b

requesters to give up and go away — and they frequently succeed. If we value freedom of information and government transparency, we cannot tolerate government offices charging fees to withhold information from the public.

People should not have to pay extra to get documents that are blacked out. If information must be withheld, it should be done judiciously and the financial burden should not fall on individual requesters.<sup>9</sup>

#### *Adopt a public interest fee waiver, just like federal FOIA*

Half of all state statutes allow, encourage, or require agencies to waive fees for records requests when dissemination of the information sought is in the public interest. Massachusetts should do that too. The federal Freedom of Information Act requires fee waivers, as do Connecticut, Illinois, and Texas, among others. This legislation would bring Massachusetts in line with those jurisdictions; it directly tracks the federal FOIA law, requiring that fees be waived when disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government” and is “not primarily in the commercial interest of the requester.”

#### **Efficiency**

The public records law can — and must — function more smoothly for government employees and requesters alike. This legislation contains two sensible measures to improve efficiency: by making better use of electronic records and assigning point people at state agencies to manage public records requests.

#### *Increase access to public records in electronic form*

Our public records statute dates back to 1973 and has never since been amended with an eye toward the technological changes of the last forty years. While it makes specific reference to microfiche, it doesn’t contemplate computer files, databases, digital record-keeping and storage of electronic media. The law needs to be updated for the digital age in two ways.

First, when documents are created electronically, they should be given to requesters in electronic form. Today, it is common for agencies to take electronic documents, print them out, and deliver them to requesters in hard copy, which wastes time, paper, and money. Last year, a requester appealed this issue to the Supervisor of Public Records, who directed the agency to provide the requested documents in their native electronic format.<sup>10</sup> This should be standard operating procedure and should be stated clearly in statute to ensure it is widely understood and implemented.

Second, state agencies should publish commonly requested documents online to preempt formal requests. It is easy to anticipate that certain information will be the subjects of

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<sup>9</sup> Note that exemptions under the public records law merely permit agencies to withhold certain information; redaction is not mandatory unless disclosure is prohibited by another federal or state law.

<sup>10</sup> Letter from the Supervisor to the Cape Light Compact, May 2, 1014. (“Where the native form of the records requested is electronic the [agency] must respond to a request that the records be provided in that form.”)

public records requests. Such documents should be posted online as a matter of course, both to promote public access and to save record-keepers and requesters time and money.<sup>11</sup>

These measures require no new investment; state agencies do not need special technology to email documents and post selected information online.

*Assign “records access officers” -- to streamline responses to public records requests*

Frequently, state agencies have no point person to manage records requests, which makes the process more difficult for both parties. Requesters don’t know to whom requests should be directed, and follow-up is frustrating; they feel like they’re getting the runaround. Agencies lack clarity about how requests are supposed to be fulfilled, leading to inefficiencies and breakdowns in the process.

This legislation would adopt a simple fix that works in New York: direct each state agency to assign a point person for records access, making it easier for agencies to handle requests knowledgeably and efficiently.<sup>12</sup> This gives requesters direction, puts them in touch with a person who has experience with the public records law, and facilitates better communication about the scope of requests, reducing frustration for everyone. Agencies will benefit from a more consistent process, and requesters will get relevant information faster. Designating a “records access officer” would not require any new hires, but would ensure that responsibility for managing public records requests does not fall through the cracks.

### **Conclusion**

Our public records law is broken, but H.2772 and S.1676 offer a substantial fix. It is time to update our public records law to ensure that it functions as intended -- efficiently providing information to the public on request without excessive cost.

We would welcome the opportunity to work with the committee to move this critical legislation forward. Thank you.

Carol Rose  
Executive Director

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<sup>11</sup> This bill does not require municipalities to post public records online, presumably out of deference to the limited IT capacity of some smaller towns. However, it would be worth considering whether to apply this requirement to all municipalities that maintain websites or, at a minimum, to larger cities.

<sup>12</sup> As with the requirement to post records online, the bill does not require municipalities to designate records access officers. In smaller communities with limited personnel such a formality could be unnecessary, but the committee might consider whether larger cities would benefit from designating records access officers.