

# KROKIDAS & BLUESTEIN

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## ATTORNEYS

### CLIENT ALERT

#### UPDATE TO PUBLIC RECORDS LAW

The Massachusetts legislature recently passed “An Act to Improve Public Records” (the “Updated Public Records Law”), which amended the Massachusetts public records law, M.G.L. c. 66. The Updated Public Records Law, which will become effective January 1, 2017, imposes heightened requirements on public agencies and municipalities regarding their responses to public records requests.

The Updated Public Records Law imposes somewhat more stringent requirements on “public agencies” than “municipalities.” Further guidance might be issued by the Public Records Division of the Secretary of the Commonwealth, including whether public charter schools will be considered to be “municipalities” for purposes of the Updated Public Records Law, like their public school district counterparts. In the meantime, we assume that charter schools will be considered to be public agencies based on their state-chartered status.

The following are highlights of the Updated Public Records Law:

**1. Appointment of Records Access Officer:** The Updated Public Records Law requires each public agency to designate at least one employee as the public agency’s records access officer (“RAO”) to coordinate responses to public records requests. Specifically, an RAO must (i) assist requestors in identifying the records they are seeking; (ii) assist the public agency in preserving public records; (iii) prepare and periodically update guidelines that enable requestors to make informed requests regarding the agency’s records (the “public agency’s guidelines”); and (iv) document the following information for each public records request received:

- The nature of the request and the date of receipt;
- The date of the response;
- The date on which a public record was provided;
- The number of hours required to fulfill the request;
- Fees charged to the requestor;
- Petitions submitted to the Supervisor of Records of the Division of Public Records (the “Supervisor of Records”) seeking approval of charges in excess of the maximum hourly rate (discussed below);
- Appeals of requests;
- The time required to comply with orders of the Supervisor of Records; and
- The final decision of any court proceeding associated with a public records request.

A form for recording this information will be provided by the Office of the Secretary of the Commonwealth. The public agency will be required to submit the foregoing information on all public records requests on an annual basis. Employees of a public agency who were previously authorized to make public records available may continue to do so, even after the public agency designates an RAO.

**2. Electronic Record Keeping System or Database:** A public agency may enter into a contract for the storage of records containing public records information, but the public agency cannot enter into a contract that will prevent or unduly restrict its ability to store or provide public records in accordance with the Updated Public Records Law. When designing or purchasing an electronic record-keeping system or database, a public agency should ensure that the system or database, to the extent feasible, is capable of providing data in a commonly available electronic, machine readable format.

**3. Timing of Response to a Public Records Request:** The public agency must provide a written response to a public records request by first class mail or email no later than ten (10) business days following receipt of a public records request. In its written response, the public agency must do one of the following: (i) provide a copy of, or permission to inspect, the requested public record, (ii) send a written response to the requestor stating that the public agency needs additional time to furnish the requested public record, or (iii) send a written response to the requestor stating that the public agency does not intend to provide access to, or a copy of, the requested public record.

*i. If copies or permission to inspect the requested public record will be provided:*

If the request reasonably describes the requested public record, the public agency is able to provide the requested public record, the requestor pays the reasonable fee permitted by law (unless waived by the public agency), and the requested public record otherwise does not qualify for a public records exemption, the public agency must grant permission to inspect, or provide a copy of, the requested public record.

*ii. If the public agency needs additional time to produce the requested public record:*

If the request is sufficiently large or difficult and will unduly burden the public agency's other responsibilities, the public agency may send an initial response to the requestor indicating that additional time is needed to furnish the requested public record (of up to fifteen (15) business days following receipt of the request) with an explanation as to why additional time is needed. If the public agency needs greater than fifteen (15) business days to furnish the public record requested, it must obtain permission from the Supervisor of Records. The written response must suggest a reasonable modification to the scope of the request, or offer to assist the requestor in modifying the scope of the request, if the modification will enable the public agency to produce the requested public record more efficiently and affordably.

*iii. If access to the requested public record will not be provided:*

In the event that the public agency intends to withhold access to a public record or is otherwise unable to produce the public record requested, the public agency may send a written response to the requestor stating this fact and specifying the reason why it will not release the requested public record.

Any denial (as described in subsections (ii) and (iii) above) must also inform the requestor of the right to appeal an unfavorable decision to the Supervisor of Records and the right to sue in superior court. The Updated Public Records Law also includes additional requirements for the written response in the circumstances described in subsection (ii) and (iii) which are not summarized in this Alert.

**4. Reasonable Fee:** Under the proposed regulations to the Updated Public Records Law, if a public agency seeks to charge a fee for producing the requested public record, the public agency must respond to the requestor in writing with a reasonable fee estimate within ten (10) business days following receipt of the public records request. The public agency is not required to produce the requested public record until the fee is paid. However, certain limitations apply to the fee that may be charged:

- a. The fee cannot exceed the actual cost of providing the requested public record.
- b. The fee for printing standard black and white paper copies cannot exceed 5 cents per page, whether single or double-sided copies.
- c. The public agency cannot charge for the first four hours of work to produce the requested public record. Thereafter, the public agency may charge the lesser of the hourly rate of the lowest paid employee (including attorneys and outside vendors) with the needed skill to produce the requested public record and \$25 per hour.
- d. The fee cannot include time spent segregating or redacting the requested public record, unless segregation or redaction is required by law or approved by the Supervisor of Records.

The public agency must provide to the requestor an itemized estimate of the reasonable fee to be charged to produce the record.

**5. Electronic Format:** If the public record is provided to the requestor, the response must be in a searchable, machine-readable electronic format, unless the record is not available in an electronic format, the requestor does not have the ability to receive or access the record in a usable electronic format, or the requestor has otherwise indicated a preference for an alternate format.

**6. Information Required to be Posted on Public Agency Website:** The Updated Public Records Law requires a public agency to post certain commonly requested information on a public searchable website, including:

- The public agency's guidelines;
- Contact information for the RAO, including his or her name, title, business address, business telephone number, and business email address;
- Votes from public agency proceedings;

- The public agency's annual reports;
- Minutes of the public agency's open meetings;
- The public agency's budgets;
- Winning bids for public contracts; and
- Awards of federal, state, and municipal government grants

7. **Appeals by Requestor:** If the public agency fails to comply with the Updated Public Records Law, the requestor may appeal to the Supervisor of Records, who must issue a determination within ten (10) business days of receipt of the appeal. Alternatively, without first appealing to the Supervisor of Records, a requestor may file a civil action to enforce the Updated Public Records Law.

The attorney general may take action independently or upon petition by the Supervisor of Records to compel the public agency to comply with the Updated Public Records Law.

8. **Penalties:** The Updated Public Records Law imposes strict penalties for failure to comply with its requirements. If a public agency fails to respond to a public records request within ten (10) business days of receipt, no fee can be charged to produce the requested public records. Further, failure to comply with the Updated Public Records Law, including failure to respond to a public records request within ten (10) business days of receipt, may result in an award of attorneys' fees and costs to the requestor, if the requestor files suit.

The Office of the Secretary of the Commonwealth recently released proposed regulations to the Updated Public Records Law, with a comment period that ended on October 6, 2016. Final regulations are expected to be released no later than January 1, 2017.

If you have any questions or if you would like assistance in establishing or reviewing your public records policies and procedures, please contact attorney Elka Sachs ([esachs@kb-law.com](mailto:esachs@kb-law.com)), attorney Judith Kim ([jkim@kb-law.com](mailto:jkim@kb-law.com)), or attorney Gabriel Balzano-Brookes ([gbalzano-brookes@kb-law.com](mailto:gbalzano-brookes@kb-law.com)).

The Massachusetts Charter Public School Association will be hosting a free webinar presented by attorneys Elka Sachs and Judith Kim on Wednesday, November 30, 2016, 12:00 noon to 1:00pm. Registration information may be found at <https://attendeegotowebinar.com/register/74122855138021377>.