

# KROKIDAS & BLUESTEIN

## ATTORNEYS

### WEBINAR FOLLOW-UP QUESTIONS UPDATED PUBLIC RECORDS LAW

Thank you for participating in the webinar entitled “The Updated Public Records Law: How Charter Schools Should Prepare”, hosted by the Massachusetts Charter Public School Association on November 30, 2016. The updated public records law which was the subject of the webinar took effect on January 1, 2017. This client alert provides answers to the questions that were posed during and after the webinar.

A copy of the slide presentation used during the webinar is available [[here](#)].

The updated public records law imposes slightly different requirements on “agencies” and “municipalities.” As discussed during the webinar, there is no official guidance regarding whether charter schools are to be treated as agencies or municipalities. We have assumed for purposes of the webinar and this Alert that charter schools should be treated as agencies. Accordingly, the webinar and this Alert focus on the requirements imposed on agencies under the updated public records law.

The final regulations under the updated public records law were released after the webinar. This Alert will highlight some of the differences between the proposed regulations and the final regulations.

#### Records Access Officer

##### *Designation of Records Access Officers*

The updated public records law does not require a specific individual to serve as a charter school’s records access officer. However, charter schools should consider which school employee will be able to respond to public records requests most efficiently. Additionally, although the updated public records law does not require the adoption or approval of policies and procedures with regard to the updated law, a school that adopts policies and procedures regarding public records compliance may be better prepared to respond to public records requests than one that does not.

##### *Report to Secretary of the Commonwealth*

Each charter school must submit electronically the identity of each primary and secondary records access officer, if applicable, and update this information whenever changes are made.

The records access officer will also be responsible for reporting to the Secretary of the Commonwealth on an annual basis information regarding written requests for public records.

This information must be submitted to the Commonwealth within ten business days after the last day of the calendar year. A template for reporting this information is expected to be released in early 2017.

Absent further guidance, charter schools should submit this information by email to the Supervisor of Records at [pre@sec.state.ma.us](mailto:pre@sec.state.ma.us).

## Public Records Requests

### *Format of Public Records Request*

The final regulations state that public records requests may be made orally, in person, or in writing, which suggests that a charter school will not be able to require a public records request to be made in writing.<sup>1</sup> However, the final regulations provide that charter schools, as well as all other agencies, have discretion as to whether to accept public record requests by telephone.<sup>2</sup>

### *Redaction*

Public records must be produced when requested, unless an exemption under the updated public records law applies. The updated public records law only allows charging the requesting party for time spent redacting information if redaction is required by law. Thus, a charter school may charge for redaction of information, such as social security numbers, which is required to be kept confidential by the Massachusetts data privacy statute.

It is not clear if a charter school may charge for redaction of other types of information, such as home addresses and birth dates of school employees, without approval from the Supervisor of Records. There is a reasonable argument that a charter school may charge for this type of redaction since the Massachusetts privacy statute under Massachusetts General Laws Chapter 214, Section 1B states that an individual has a right against unreasonable, substantial, or serious interference with his or her privacy. However, as there is no definitive guidance on this question, it may be appropriate to request an advisory opinion from the Secretary of the Commonwealth's office if this situation arises.

### *Requests Made for Commercial Purposes*

Generally, a charter school's obligations in responding to public records requests made for commercial purposes do not differ from those imposed when the charter school is responding to public records requests made for other purposes. However, if a request is made for a commercial purpose, the school may be eligible in certain circumstances specified in the regulations to petition the Supervisor of Records to charge for time spent redacting, even if the redaction is not required by law.<sup>3</sup>

## Public Records Requests Made During School Vacations

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<sup>1</sup> 950 CMR § 32.07 (1)(a)

<sup>2</sup> 950 CMR § 32.07 (1)(a)

<sup>3</sup> M.G.L. c. 66 § 10(d)(iv)

The updated public records law requires a charter school to provide an initial response to a public records request within 10 business days -- not 10 school days (days during which the school is open) -- of the request.<sup>4</sup> Thus, charter schools should ensure that the duties of the records access officer are performed during business days occurring during school vacations.

However, a school might have the option of requesting the Supervisor of Records for an extension if a public records request is made during an extended school vacation, particularly during the winter break.<sup>5</sup> If the request requires extensive search and segregation time and/or redaction to produce the requested public records, a school might be eligible to request an extension from the Supervisor of Records on the basis that the public records request is unduly burdensome due to the absence of staff during the vacation period.

The final regulations specify that the Supervisor of Records may grant an extension of up to 20 business days from the date that the Supervisor of Records grants the extension. Note that a school must still provide an initial response to a public records request within 10 business days, regardless of whether the school requests and receives an extension. Moreover, given that the Supervisor of Records may take up to 5 business days to respond to a request for an extension, the request for extension must be made as early as possible, and no later than the 10th business day following receipt of the request, since absent the extension, the school will be obligated to produce the records on the 15th business day.

## Website

### *Required Records*

Each charter school will be required to post on its website the following records that are made or received on or after January 1, 2017:

- The contact information of each records access officer;
- The guidelines created and maintained by the records access officer to enable requestors to make informed public records requests, to include a list of categories of public records which is periodically updated and maintained by the charter school;
- Annual reports;
- Winning bids of public contracts;
- Awards of government grants;
- Minutes of open meetings; and
- Budgets.<sup>6</sup>

### *Winning Bids*

It is reasonable to argue that only the winning bids of public contracts, as opposed to both winning bids and awarded contracts, will be required to be posted on a charter school's website.

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<sup>4</sup> M.G.L. c. 66 § 10(a)

<sup>5</sup> M.G.L. c. 66 § 10(c)

<sup>6</sup> M.G.L. c. 66 § 19(b)

However, the awarded contract may be subject to a public records request and therefore may need to be produced if requested.

### Questions Regarding the Updated Law

The final regulations provide that an advisory opinion from the Supervisor of Records may be requested, but the Supervisor of Records will have discretion as to whether to respond to such a request. However, the final regulations also provide that a staff member of the Supervisor's office will be on call during regular business hours to offer informal information to any person.

### Record Retention

In connection with this discussion, we are taking this opportunity to remind charter school clients that they must retain records for the period specified in the Massachusetts Records Retention Schedule, which can be located at <http://retweb.sec.state.ma.us/retweb/default.asp>.

### Correction

A previous Alert from this office regarding the updated public records law misstated that agencies can seek permission from the Supervisor of Records to charge a rate that exceeds \$25/hour under certain circumstances. Only municipalities are eligible to petition the Supervisor of Records to charge a higher hourly rate.

If you have any additional questions or if you would like assistance in any public records request, please contact Attorney Elka Sachs at [esachs@kb-law.com](mailto:esachs@kb-law.com).