

**COSCAP FALL CONFERENCE**

**LEGAL ISSUES RELATED TO FERPA, THE STUDENT  
RECORDS REGULATIONS AND REVISIONS TO  
THE PUBLIC RECORDS LAW**

**November 4, 2016**

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## I. FERPA AND MASSACHUSETTS STUDENT RECORDS REGULATIONS

### Definitions

- A. Student - Current or former student, not an applicant.
- B. Eligible student - Any student 14 years or older or who has entered the 9<sup>th</sup> grade  
(*FERPA says 18 or attending post-secondary institution, but MA law is more generous.*)
- |                 |             |   |
|-----------------|-------------|---|
| Age categories  | 0-13 years  | - parent                                  |
| for exercise of | 14-17 years | - parent and/or student                   |
| rights:         | 18 years    | - parent and/or student unless            |
|                 |             | student limits parent rights (cannot deny |
|                 |             | right to inspect)                         |
- C. Parent - Mother, father, guardian, person/agency legally authorized to act on behalf of the student  
Includes divorced or separated parents **only** if:
1. The parent is the custodial parent (i.e., physical custody) **OR**
  2. The non-custodial parent has met the requirements of M. G. L. c. 71 § 34H (see below)
- D. Student record - Transcript and temporary record, including all information concerning a student that is organized on the basis of the student's name or in a way that the student can be identified.
- E. Authorized school personnel - Teachers, administrators, counselors, or other professionals employed by the school committee, who are working directly with the student; clerical/administrative personal who need access to records to process information; those working under contract or in some relationship with the school system who are providing services vis a vis a student; the evaluation team.
- F. Third party - Any person, agency or organization other than an eligible student, his/her parent or authorized school personnel.
- G. Directory information – student's name, address, telephone listing, date and place of birth, major field of study, dates of attendance, weight and height of members

of athletic teams, class, participation in officially recognized activities and sports, degrees, honors and awards, and post-high school plans.

H. Personally identifiable information - includes, but is not limited to: the student's name; the address name of the student's parent or other family member; the address of the student or student's family; a personal identifier, such as the student's social security number or student number; a list of personal characteristics that would make the student's identity easily traceable; or other information that would make the student's identity easily traceable.

II. Categories of Records - Please note that there is no such thing as the cumulative file/folder or the permanent record

A. Transcript

Consists of administrative records that constitute the minimum data necessary to reflect the student's educational progress and to operate the educational system (*name, address, phone #, course titles, grades, etc.*).

Any student, regardless of age, shall have the right to receive a copy

Kept for 60 years

B. Temporary record

Consists of all information in the student record which is **not** contained in the transcript, including all information of importance to the educational process (*standardized test results, class rank, extracurricular activities, evaluations, etc.*)

Periodically reviewed by principal to destroy misleading, irrelevant or outdated information (requires written notice to parent/eligible student - see below)

The score of any **group** intelligence test shall be removed from the record at the end of the school year in which it was administered

Destroyed no later than 7 years after student transfers, graduates, or withdraws (requires written notice to parent/eligible student at the time of the transfer, graduation, or withdrawal and in addition to the routine information letter)

C. Personal records

Notes, memory aids and other information in personal files of school employees are not considered part of the student/educational record.

**However**, if such information is released to authorized school personnel it becomes part of the student record

**Please note that when a subpoena is issued to the principal as the keeper of the records for all student records, this does not include personal records of staff members.**

3. Access to Records

- A. Log of access (and those requesting access) must be kept
  - 1. Each entry shall include:
    - name, position and signature of the person releasing the info
    - name, position, and affiliation of the person receiving the info
    - the date of access
    - the parts of the record accessed
    - the purpose of the access
  - 2. The log requirement shall not apply to:
    - authorized school personnel inspecting the record
    - administrative office staff and clerical personnel adding information or accessing the student record
    - school nurses who inspect the student health record
  
- B. Parent and eligible student
  - Access provided as soon as practicable and within 10 calendar days of request
  - Copies provided upon request (reasonable fee may be charged)
  - Right to discuss with qualified school personnel
  - Right to have third party inspect/interpret

**Separate access procedure for non-custodial parents**

**Parent** - Mother, father, guardian, person/agency legally authorized to act on behalf of the student. Includes divorced or separated parents **only** if:

- 1. The parent is the custodial parent (i.e., physical custody) **OR**
- 2. The non-custodial parent has met the requirements of M. G. L. c. 71 § 34H (see below). **A parent may not access the student record if:**

- a. the parent has been denied legal custody or has been ordered to supervised visitation, based on a threat to the safety of the student, and the threat is specifically noted in the order pertaining to custody or supervised visitation, or
- b. the parent has been denied visitation, or
- c. the parent's access to the student or to the custodial parent has been restricted by a temporary or permanent protective order, unless the protective order (or any subsequent order modifying the protective order) specifically allows access to the information contained in the student record, or
- d. there is an order of a probate and family court judge which prohibits the distribution of student records to the parent.

The District shall place in the student's record any documents indicating that a non-custodial parent's access to the student's record is limited or restricted pursuant to 603 CMR 23.07(5)(a).

Non-Custodial Parent Access: In the case of a non-custodial parent who is eligible to access the student record, i.e., does not fit any of the four (4) categories under section 2 above, the non-custodial parent must submit a written request for the student record to the school principal. Upon receipt of the request the principal and/or his/her designee shall immediately notify the custodial parent by certified and first class mail, in English and the primary language of the custodial parent, that it will provide the non-custodial parent with access after 21 days, unless the custodial parent provides the principal with documentation that the non-custodial parent is not eligible to obtain access as set forth under 1-4 above.

When the student record is released to the non-custodial parent, the school will delete all electronic and postal address and telephone number information relating to either work or home locations of the custodial parent from student records provided to non-custodial parents. In addition, such records will be marked to indicate that they shall not be used to enroll the student in another school.

C. Access by third parties

No third party access *unless*:

1. Informed written consent of the eligible student or parent is obtained
  - Consent must specify:
  - the records to be released, *and*
  - the reasons for the release, *and*
  - to whom

- A copy of consent must be maintained in the temporary record
- 2. Access falls within one of the following exceptions:
  - To a school district to which a student is transferring
  - Directory information (Notice and an opportunity to opt-out must be given)
  - Upon receipt of a subpoena or court order (Notice must be given)
  - At the request of a probation officer, a justice of court, DSS, or DYS
    - DOE and MDOE
    - BSEA in considering an appeal
  - To appropriate parties in connection with a health or safety emergency
  - Authorized school personnel of a school to which a student transfers = the complete school record (general notice of this procedure required)
  - School, local, and state health personnel = access to health records
  - Pursuant to an ex parte order to obtain records relevant to the investigation or prosecution of a terrorist act

Upon notification by law enforcement that a student, or former student, has been reported missing, a mark shall be placed in the student record. The school shall report any requests concerning this record to the appropriate law enforcement authority

If third party access is granted, conditions about non-disclosure must be listed

#### IV. Amending the Record

- A. Right to add comments, data, and other relevant written material
- B. Right to request in writing a deletion or amendment of information
  1. Right to request a conference with the principal
  2. Principal shall provide a decision in writing within one week of the conference or receipt of the request if no conference was requested, stating reasons for the decision
  3. If the parent or eligible student is unsatisfied with this or any other decision of a principal regarding the Student Records Regulations, they have the right to appeal, in writing, to the superintendent.
  4. The superintendent shall review the issues and render a written decision within two weeks of notification of the appeal.
  5. If the parent or eligible student is unsatisfied with the decision of the superintendent, they shall have the right of appeal to the school

committee. The school committee shall conduct a fair hearing within four weeks and the school officials shall have the burden of proof.

V. Routine Information Letter

- A. Must be sent at least once every school year to students and their parents (in their primary language)
- B. Must include:
  - 1. the standardized testing programs and research studies to be performed during the year and other routine information to be collected from the student
  - 2. the general provisions of 603 CMR 23.00 regarding parent and student rights, and inform them that copies of these regulations are available to them from the school
- C. Can include:
  - 1. Notice of directory information to be released and the ability to object to such a release.
  - 2. Notice of policy of forwarding records to schools in which the student seeks to enroll.

## **CHANGES TO THE PUBLIC RECORDS LAW.**

### **I. “An Act to Improve Public Records,” Chapter 121 of the Acts of 2016**

- A. Signed into law June 3, 2016
- B. Most new provisions effective January 1, 2017
- C. Supervisor of Public Records required to issue regulations by effective date; also to make available materials, guides, and training related to requirements of Public Records Law
- D. Full text of Act:  
<https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121>

### **II. Definitions**

- A. The definition of what is or is not a Public Record is mostly unchanged.
  - a. M.G.L., Chapter 4, Section 7, Twenty-Sixth Paragraph: “Public records shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions...”
  - b. Exemptions include:
    - i. Documents exempted from disclosure by other statutes (such as student records);
    - ii. Personnel and medical files or information;
    - iii. Personal notebooks or materials of an employee;
    - iv. Investigatory materials compiled by law enforcement;
    - v. Trade secrets or commercial or financial information voluntarily provided upon a promise of confidentiality;
    - vi. Questions and answers, scoring keys and sheets and other materials used to develop, administer or score a examinations;
    - vii. Records (such as plans and blueprints) related to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the



security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure.

viii. The home address, personal email address, and home telephone number of an employee of the judicial branch, agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof.

c. NEW Chapter 66, Section 10B also exempts: “The home address, telephone number, personal email address or place of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name, home address, telephone number, personal email address or place of employment or education of a family member of any of the foregoing shall not be public records ...”

B. New law defines “Agency” as any entity, other than a municipality, that is identified in Chapter 4, Section 7, clause twenty-sixth as possessing public records.

### III. NEW Requirements

A. **The Records Access Officer (RAO)**. Every government agency and municipality must designate a Records Access Officer (RAO).

a. RAO’s role to coordinate an agency’s or a municipality’s response to requests for access to public records by:

i. assist persons seeking public records to identify the records sought;

ii. assist the custodian of records in preserving public records in accordance with all applicable laws, rules, regulations and schedules; and

iii. prepare guidelines that enable a person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise.

b. RAO’s name, title, business address, business phone, and business email address must be posted in offices and on website.

c. The RAO must document, for each public records request:

i. the nature of the request and the date on which the request was received;

ii. the date on which a response is provided to the requestor;

- iii. the date on which a public record is provided to the requestor;
- iv. the number of hours required to fulfill the request;
- v. fees charged to the person making the request, if any;
- vi. any petition or appeal made concerning the request, the time required to comply with any order resulting from such appeal, and the final adjudication of any court proceeding related to the appeal (if applicable).

- B. **Format of Production.** Public records must be provided to a requestor by electronic means, unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form.
- C. **Timeframe for Response:** Within 10 business days (instead of calendar days) of receipt of request, RAO must permit inspection or provide copy of requested public records.
- i. Provided that the request reasonably describes the public record sought; the public record is within the possession, custody or control of the agency or municipality; and the RAO receives payment of a reasonable fee.
  - ii. No fee may be charged if the agency or municipality fails to respond to the requestor within 10 business days.
- b. If the magnitude, difficulty, or number of requests submitted by same requestor unduly burdens the agency or municipality, it may inform the requestor in writing within the 10 business days. Said writing must:
- i. Confirm receipt of the request;
  - ii. Identify any public records sought that are not within the possession, custody, or control of the agency or municipality;
  - iii. Identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
  - iv. Identify any records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding;
  - v. Identify any public records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore

requires additional time to produce the public records sought;

- vi. Identify a reasonable timeframe in which the agency or municipality shall produce the public records sought (not to exceed 15 business days for an agency or 25 business days for a municipality, unless the requestor agrees to a longer timeframe)
  - vii. Suggest a reasonable modification of the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;
  - viii. Include an itemized, good faith estimate of any fees that may be charged to produce the records; and
  - ix. Include a statement informing the requestor of the right of appeal to the Supervisor of Records
- c. The RAO may also petition the Supervisor of Records for a one-time extension of time (up to 20 additional business days for an agency; 30 additional business days for a municipality), upon showing of good cause.
- i. *“If the Supervisor of Records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the Supervisor of Records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought.”*

**D. Reasonable Fee for Production:**

- a. Fee may be charged only if the RAO responds to requestor (with records or written letter) within 10 business days.
- b. The reasonable fee may include:
  - i. Actual cost of any storage device or material provided
  - ii. Black and white paper copies and/or print-outs, either single or double-sided, shall not exceed five (.05) cents per page
  - iii. For an agency: If an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the records requested, the hourly rate of the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested (not to

exceed \$25 per hour). No such fee shall be assessed for the first 4 hours of work performed.

- 1) “Employee time” includes outside legal counsel, technology and payroll consultants or others.
- iv. For a municipality with population over 20,000: If a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce the records requested, the hourly rate of lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested (not to exceed \$25 per hour). No such fee shall be assessed for the first 2 hours of work.
    - 1) “Employee time” includes outside legal counsel, technology and payroll consultants or others.
  - v. For a municipality with less than 20,000 population: The hourly fee of \$25 or less may be charged for the first 2 hours of work as well.
  - vi. The RAO may also petition the Supervisor of Records to charge in excess of \$25 per hour if the request is for commercial purpose and the fee is an actual and good faith representation.
- c. The RAO may waive or reduce the amount of the reasonable fee.
  - d. The RAO may also deny public records requests from a requestor who has failed to pay for previously produced public records, so long as the RAO provides a written explanation of the denial and an itemized list of any balances owed.

#### **IV. Changes to Appeal Process**

- A. As under prior law, a requestor may petition the Supervisor of Records if s/he believes that the agency or municipality has failed to comply with the law.
  - a. Supervisor of Records must issue a written determination within 10 business days.
  - b. If Supervisor of Records orders relief, and the agency or municipality refuses to comply, Supervisor of Records may notify Attorney General’s Office, who may take steps to ensure compliance.
- B. With or without prior petition to the Supervisor of Records, requestor may bring a civil action in Superior Court to enforce the public records law.
  - a. Superior Court review is *de novo*.

- b. Superior Court must presume that all records sought are public; the agency or municipality will bear the burden of demonstrating by a preponderance of the evidence that the record can be withheld.
- c. Presumption in favor of awarding attorney's fees and costs if the requestor obtains a judicial order, consent decree, or "the provision of requested documents after the filing of a complaint."
  - i. Agency or municipality can overcome presumption awarding attorney fees by demonstrating that: the Supervisor of Records found no violation; the agency/municipality relied on prior opinion from appellate court or Attorney General; the request was intended to intimidate or harass; or the request was not in the public interest but for a commercial purpose.
- d. If the Superior Court finds that the agency or municipality acted in bad faith, it may also award punitive damages, from \$1000 - \$5000, to be deposited in the Public Records Assistance Fund.

## V. Storage of Public Records

- A. Records custodians may contract for off-site storage of public records, so long as access by the RAO and custodian is not unduly restricted by such contracts.
- B. Any electronic record keeping system or database must, to the extent feasible, be capable of providing data in a commonly available electronic, machine readable format and allow for information storage and retrieval methods that permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access.
- C. Every agency shall provide on a searchable website electronic copies of the following types of records:
  - a. final opinions, decisions, orders, or votes from agency proceedings;
  - b. annual reports;
  - c. notices of regulations proposed under chapter 30A;
  - d. notices of hearings;
  - e. winning bids for public contracts;
  - f. awards of federal, state and municipal government grants;
  - g. minutes of open meetings;
  - h. agency budgets; and
  - i. any public record information of significant interest that the agency deems appropriate to post.
  - j. Effective July 1, 2017: The RAO of a municipality shall, to the extent feasible, post the commonly available public record documents listed above on the municipality's website.

**MAJOR CHANGES TO PUBLIC RECORDS LAW,  
EFFECTIVE JANUARY 1, 2017**

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1. Each agency and municipality must designate a **Records Access Officer (RAO)** as point of contact for requestors and who shall document each public records request.
2. Public records must be provided in **electronic format**, whenever possible.
3. Public records must be produced within **10 business days**. If the agency or municipality requires additional time, it must send the requestor a written letter within 10 business days including specific information about the request, the timeline for production, and an estimate of any fees.
4. Agency or municipality may charge a **reasonable fee** for public records, including the actual cost of any storage device provided, five (.05) cents per page for paper copies/print-outs, and in some cases, compensation for employee time spent to reproduce the records (not to exceed \$25 per hour).
5. **Agency or municipality may petition the Supervisor of Records** for additional time to respond, or for a determination that the request is frivolous, designed to intimidate or harass, and not in the public interest.
6. The **requestor may bring a civil action** in Superior Court for failure to comply with public records law. Superior Court review is de novo.
7. Presumption in favor of awarding reasonable **attorney's fees and costs** if the requestor obtains a judicial order, consent decree, or the requested documents are provided after complaint is filed.

Supervisor of Records to issue regulations by January 1, 2017.