LEGAL ALERT

To: All School Committee Members and Superintendents
From: Stephen J. Finnegan Esq., MASC General Counsel
Re: **PERTINENT AMENDMENTS TO PUBLIC RECORDS LAW EFFECTIVE JANUARY 1, 2017**
Date: December 12, 2016

This alert is intended to remind you that the new Public Records Law becomes effective January 1, 2017. Below you will find a brief summary of the changes to the Public Records Law prepared by the Massachusetts Secretary of State.

One matter that I want to highlight for you is the requirement for municipalities to designate one or more Records Access Officer(s) (RAO). The contact information for the RAOs must be conspicuously posted on the municipality's website, not later than January 1, 2017. I am informed that the Public Record regulations will not be finalized until mid-December. There is some confusion surrounding the RAO in regional school districts. This is not a particular problem for city and town school committees, in part, because the municipality is required to appoint 1 or more RAOs, which may include a designee from the school district. The term municipality is defined in existing law as a city or town see G.L. c. 4, S. 7, nineteenth. The final regulations may address the regional school district issues more definitively. However, if clarification is not forthcoming, I recommend that the current custodian of records in a regional school district (generally the superintendent) post by January 1, 2017 their contact information prominently on the district's website, if available, and include their email address and reference that public record requests to the district must be sent to the them. If the final regulations address the regional school district matter we will send an email notification to those on our list.

In the case of *Chadwick v. Duxbury* SJC-12054, decided on October 4, 2016 the SJC declined to create a union member-union privilege in a civil action.

The case of *Goodwin v. Lee Public Schools* SJC-11977 decided on August 23, 2016 involved the dismissal of the student under the Felony Suspension Statute (G.L.c. 71, S.37h1/2). The Court held that the Felony Statute required that the student be charged with a felony, which did not happen in this case and, therefore found that the suspension was unlawful. The student also sought compensation under G.L.c. 76, S. 16 which allows monetary damages in these circumstances. This case is not remarkable except for the Court's error in interpreting C. 71, S.84 that "no student shall be suspended for conduct which is not connected with any school sponsored activity" as a general law. It is a local option statute pursuant to G.L. c. 71, S. 86.

SUBSTANCE ABUSE POLICY
Chapter 71,Section 96.States as follows: Each public school shall have a policy, regarding substance use prevention and the education of its students about the dangers of substance abuse. The school shall notify the parents or guardians of all students attending the school of the policy and shall post the policy on the school's website. The policy, and any standards and rules enforcing the policy, shall be prescribed by the school committee in conjunction with the superintendent or the board of trustees of a charter school.

Each school district and charter school shall file its substance use prevention and abuse education policies with the department of elementary and secondary education in a manner and form prescribed by the department. Added by: St. 2016, c. 52. S. 15, effective March 14, 2016.

MUNICIPAL MODERNIZATION ACT
(a) Joint Powers Agreements (20)
This section allows governmental entities to enter into a joint power agreement. In a city, these can be entered into with another governmental unit for the joint exercise of any of their common powers and duties within a designated region, except for veterans services,,, by the council with the approval of the mayor, and in a town, by the board of selectmen. **MASC worked with the legislative leadership to ensure that these agreements will not be used to require school districts to regionally or to expand superintendency unions, charters, collaboratives or virtual schools. Furthermore, any agreement involving schools must receive school committee approval. See subsection (h) below.**

(h) A regional school district, superintendency union, educational collaborative, character school or commonwealth virtual school may only be formed as provided in the applicable provisions of the General Laws, and no joint

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powers agreement made pursuant to this section may, in substance, create such a district, union, collaborative, charter school or virtual school, irrespective of how the entity created pursuant to a joint powers agreement may be characterized or named. A joint powers agreement relating to public schools may only be entered into by the school committee, or other governing board, as applicable.

(b) Approval of Bills/Warrants (57-58)
These sections allow multi-member boards, committee, commissions heading departments, including boards of selectmen, to designate one of its members to review and approve bills or payment of warrants with a report provided at the next meeting. Currently a board or committee heading a department may delegate authority to approve payrolls to a member and a regional school committee may designate a subcommittee to approve bills and payrolls with a report to the next meeting of the full committee. Absent a charter or special act, boards and committees must approve bills or payment warrants by majority vote at a meeting subject to the Open Meeting Law.

I have been advised by the Department of Revenue that the approval of bills and payroll warrants in a regional school district is still governed by the provisions go G.L. c71, s.16A that states in relevant part as follows: The committee may establish a subcommittee of no less than three members for the purpose of signing payroll warrants and accounts payable warrants to allow for the release of checks; provided, however, that such subcommittee shall make available to the committee at the next meeting a record of such actions of such subcommittee. This provision of law will govern warrant matters absent a charter or special act to the contrary.

William Francis Galvin
Secretary of the Commonwealth of Massachusetts

Updated Public Records Law

On June 3, 2016, Governor Baker signed *An Act to Improve Public Records* into law. Many of the provisions in the new law will take effect on **January 1, 2017**. Please be aware, the current law will remain effective until that time.

Below are a few of the provisions of the new version of the Public Records Law that will become effective next year. It is suggested you consult the complete text of the new law which can be found at:

https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter121

If you have any questions, please contact the Public Records Division at 617-727-2832 or pre@sec.state.ma.us.

New Provisions

Records Access Officers

Agencies and municipalities are required to designate 1 or more Records Access Officer (RAO).
The contact information for the RAO must be posted conspicuously, including on the agency's or municipality's website, if available.
The RAO has a duty to:

- Coordinate the agency's or municipality's response to requests for access to public records;
- Assist individuals seeking public records in identifying the records requested;
- Assist the custodian of records in preserving public records; and
- Prepare guidelines that enable requestors to make informed requests.

Electronic Records

Under the new version of the law, RAOs must provide public records to a requestor in an electronic format *unless* the record is not available in an electronic format or the requestor does not have the ability to receive or access the records in a useable electronic format.

Additionally, as of January 1, 2017, **agency RAOs** will be required to provide on a searchable website electronic copies of commonly requested records, including: final opinions, annual reports, minutes of open meetings and agency budgets. **Municipal RAOs** will also be required to post commonly requested records on their municipal websites, to the extent feasible.

Response Time

Under the current law, a records custodian must respond to a request for records in writing within 10 calendar days.

Beginning January 1, 2017, a RAO must permit inspection or furnish a copy of a requested public record within **10 business days** following receipt of the request. RAOs may petition the Supervisor of Records for an extension if they are unable to grant access to the requested public records in this time period.

Fees

The Supervisor of Records' Public Access Regulations allowing records custodians to charge **5 cents** for black and white paper copies or computer printouts of public records for both single and double-sided sheets was codified and will remain effective with the new law.

Beginning January 1, 2017, if a response to a public records request requires more than 4 hours of employee time, an **agency RAO** may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record. However, the fee shall not exceed $25 an hour.

Beginning January 1, 2017, if a response to a public records request requires more than 2 hours of employee time, a **municipal RAO** may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record. However, the fee shall not exceed $25 an hour, unless approved by the Supervisor of Records. Municipalities with populations of 20,000 people or fewer will be permitted to charge for the first 2 hours of employee time.

Administrative Appeals

As of January 1, 2017, if an agency or municipality fails to comply with a requirement of the new law, the requestor may file an appeal with the Supervisor of Records who will then issue a determination on the public status of the records within **10 business days** of receipt of the request for an appeal.

Attorney Fees

Under the new Public Records Law, if a requestor prevails in a court action against an agency or municipal RAO, the court may award the requestor attorney fees or costs.

Chadwick v. Duxbury SJC-12054

A case decided on October 4, 2016 considered whether a union member-union privilege should be recognized by the SJC. The issue before the Court was whether Duxbury, in defense of a lawsuit alleging discrimination in employment filed by a union member, may demand communications between the union member and her union representatives or between union representatives acting in their official capacity. After a review of the arguments put forth by the parties and Amici the SJC declined to create a union member-union privilege on either statutory grounds or as a common-law privilege. MASC filed an Amicus Brief on behalf of the Duxbury School Committee and was joined by the Massachusetts Municipal Lawyers Association.

Chadwick sought recognition of union member-union privilege that would protect from disclosure to employers communications between public sector employees and their unions when made (1) in confidence; (2) in connection with bargaining or representative services relating to anticipated or ongoing disciplinary or grievance proceedings; (3) between an employee (or the employee's attorney) and union representatives; or (4) by union representatives acting in official representative capacities. Although the Plaintiff was president of her local union for six years, her lawsuit relates to alleged discriminatory actions taken against her personally as an employee, not to matters encompassing union activity. The union argued that various provisions of G. L. c. 150E by implication gave rise to such a privilege, The SJC concluded that the privilege sought by the Plaintiff is not implicit in G. L. c. 150 E, S. S. 10 (a) (1) and (2), because these provisions clearly are not intended to apply to a civil action.

The SJC noted that Section 10A (1) has been interpreted by the Mass. Labor Relations Commission to protect the confidentiality of communications between a union and its members in labor disputes. See Bristol County Sheriff's Dep't, 31 M.L.C. 6,17 (2004) (employer prohibited from asking union members, during internal affairs investigations, overly broad questions about the means and methods by which the Union was organizing the upcoming picket because such organization clearly falls within the realm of concerted activities protected under[G. L. c. 150E, S. 2]). The Court also cited City of Lawrence& Lawrence Patrolmen's Association, 15 M. L. C. 1162-1166 (1988).

The SJC has the power to create privileges; however, it has been exercised sparingly. The reliance by Chadwick on Peterson v. State, 280 P.3d 559 (Alaska 2012) which recognized a broad union-member privilege, was insufficient to persuade the Court. The SJC noted that Peterson is the only case where a court has judicially recognized such a privilege for civil lawsuits without relying on a state statute specifically protecting same. Also, the Court determined that the creation of such a privilege is better left to the Legislature. Although, the SJC declined to recognize the privilege it was noted that a court has inherent powers to issue protective orders to prevent abuses, oppression, and injustices, and may exercise that power in appropriate circumstances involving communications between a union member and her union.

GOODWIN v. LEE PUBLIC SCHOOLS SJC- 11977 August 23, 2016

The plaintiff was a high school student at the Lee Middle and High School in the town of Lee (town) when she was suspended from school for conduct that purportedly took place not on school grounds, pursuant to a school policy, based on G. L. c. 71, § 37H1/2 (§ 37H1/2), which provided that students who had been charged with felonies would be suspended. The principal ordered the suspension in the mistaken belief that the plaintiff had been charged with a felony, stealing, or being involved in the theft of a firearm. Ultimately, the suspension lasted for the entire final semester of what would have been the plaintiff's senior year, and she was unable to graduate with her class, but eventually obtained her high school diploma. She thereafter commenced this action in the Superior Court against the Lee Public Schools, the Superintendent of the Lee Public Schools, and the town.

The question before the Court was whether the Superior Court Judge erred in allowing the defendants' motion to dismiss based on the failure to exhaust the administrative remedies available under 37 H1/2. The standard for the review of a motion to dismiss requires the court to accept as true the facts alleged in the plaintiff's complaint and favorable inferences that may be drawn from them. The plaintiff was suspended on December 20, 2011 under the school's policy concerning §. 37H1/2. A letter sent to the plaintiff's mother stated that the decision to suspend was based on charges brought against her by the Lee Police, including an alleged connection to weapons theft, a felony. No such charges had been filed. In April, more than three months after imposition of the suspension a complaint issued from the Berkshire County Division of the Juvenile Court Department charging the plaintiff with receipt of stolen property under $250, a misdemeanor to which §. 37H1/2 does not apply. The plaintiff was never charged with a felony. The suspension was lifted on May 2, 2012; however, while she was allowed to return to classes she would not be allowed to attend the graduation, a provision that was rejected by the plaintiff. An agreement was reached between the parties to provide, among other things, that the plaintiff would receive tutoring at the town library, two hours a day through the end of the 2012 school year. The student ultimately was provided by the School District with an online program that resulted in her graduation in the summer 2013.

In December, 2014 a complaint was filed in Superior Court asserting that the student's suspension was unlawful under§. 37H1/2, because she had not been charged with a felony, and she also sought compensation under G.L. c. 76, §. 16, which states, in part, that "if ... the exclusion was unlawful, such pupil may recover from the town ... , in tort. "The school district argued that the student had not exhausted her administrative remedies under §. 37H1/2, and not sought certiorari review.

The SJC found that the plaintiff was not required to exhaust administrative remedies under §. 37H1/2, a statute that did not authorize her suspension. The Court also held that that G. L. c. 76, §. 16 provide a suspended student a parallel and distinct avenue for relief.

The narrow holding reached by the SJC appears to be a reasonable interpretation of the law. However, the court strayed into problematic interpretations of the law in dicta (matters that are not essential to the decision) when they stated "suspension as a result of a pending felony charge is an exception to the general rule under G. L. c. 71, S. 84, that 'no student shall be suspended ... for conduct which is not connected with any school-sponsored activity.' There is no such general rule because S. 84 is not a statute of general application, rather it is a local option statute (G. L. c. 71, S. 86) subject to acceptance by cities and towns..