To: Mayors, Selectmen, Town Managers, Town Administrators, Municipal Counsel, Agency Counsel

From: Massachusetts Municipal Lawyers Association, Inc.

Re: Senate Bill 2120, An Act to Amend the Public Records Law

Date: February 2, 2016

As you no doubt have heard, the Senate has released its version of proposed legislation to significantly modify the public records law. The Senate bill, S 2120, follows a bill (H. 3858) voted by the House in November.

While both the House and Senate versions propose changes that in many instances are an improvement to the existing law (which has not been appreciably updated in decades), there are some proposals that municipal counsel very seriously believe will have adverse consequence to public entities. Some of these adverse consequences arise from ambiguities in the law; others arise from provisions that do not present a balanced and fair approach for the requestor and the public entity.

The Senate is scheduled to debate its bill this Thursday, February 4th. It is important that you be aware of provisions of the bill which adversely impact municipalities and reach out to your local Senators and Representatives. Assuming that the Senate version of the bill is enacted by that body without amendment, a conference committee consisting of members of the Senate and House will be convened to reconcile the differences in the two bills. It is therefore critical that both your Senators and your Representatives know of the concerns of local government. We urge you to contact them immediately, as time is short.

This memo first identifies key areas where we believe there will be an adverse consequence to municipalities. Next, it will identify other areas where we believe there is ambiguity that should be addressed.

Like the House bill, the Senate bill would require that all cities and towns designate one or more employees as so-called records access officers ("RAO") by July 1, 2016 – the RAO shall at least be the city or town clerk or their designee, in addition to others designated as RAOs.

Key Concerns

Response – Timeline

- The Senate bill requires that public records be furnished by the RAO within 15 calendar days of the date of receipt of the request.

    a. If the request is burdensome or there are multiple requests from the same person which cause the RAO to miss the 15-day deadline, the RAO has 10 calendar days from the date of receipt of the request to provide the

requester with a statement detailing reasons why the deadline cannot be met. If those burdens exist, the RAO has up to 30 calendar days from the date of the receipt of the request to produce the documents.

b. As a practical matter, the RAO may not know if he or she is unable to provide the documents within the 10-day period. To help address this, the notice period should coincide with the 15 day production period.

- S. 2120 provides no protection to a municipality from the frequent and harassing requestor. Considerable staff time is wasted in responding to overly broad and frequent requests. The municipality should not have to respond to someone abusing the system.

- Payment for the records is an issue. If payment for the records is received on the 14th day of the response period, municipalities are still required to respond within 15 days of the request, i.e., by the day after payment is received. The municipality should have sufficient time after payment to respond to requests in a complete manner.

Response – Extension of Time

- The Supervisor of Public Records at the Secretary of State's Office (SPR) may grant a **single** extension of not more than 30 additional calendar days in cases where the difficulty of a single request or the receipt of multiple requests from the same requestor unduly burdens the municipality's other responsibilities.

    a. It is unclear when the 30-calendar day extension starts – from the date the SPR grants the extension, the date of receipt of the request by the municipality, or from the end of the initial 15-calendar day response period. **Cities and towns must be prepared to hire temporary staff in cases where numerous multiple requests from different requestors are received, or the municipality faces depletion of resources due to other factors – for examples the need to respond to a grand jury subpoena.**

- S. 2120 provides no limit on the quantity of documents that may be requested. A request could include entire databases. There is no requirement that a requestor narrow his request, and there is only limited relief to the municipality if there is no such modification.

    a. For many requests, the amount of time necessary for segregation and redaction may be extensive. **The Senate Bill provides no discretion either to the SPR or a Court to further extend time.** Rules of discovery in court always allow discretion to extend time for compliance. There must be leeway for municipalities to extend deadlines on occasion.

- The SPR ought to have the authority to grant relief in the nature of a protective order to allow municipalities to deny or modify such requests altogether.

- During requests for extensions of time to respond, the response time should be tolled until an order is issued by the SPR.

- Under the Senate bill's language, there is no mention of a right of the municipality to appeal the denial of a request to extend the time to respond, while the requestor is expressly allowed to appeal the grant of an extension to court. Such appeal rights should be reciprocal.

Fees and Charges

- **The cost of the first two hours of search time in most cases may not be recovered from the requestor, nor may the municipality charge more than $25 per hour to comply regardless of the cost.** Cities and towns must be prepared to pay for the actual cost of gathering and review of documents, which will include legal costs for review of potentially privileged or exempt documents, and may include hiring outside contractors with special skills, such as computer forensics.

    a. Under the House bill, the municipality can recover its actual cost in responding to a request.

- S. 2120 is unclear as to the circumstances under which a municipality may charge for segregating and redacting necessary information. **Municipalities need to recover all actual costs.**

- Costs of staff time for segregation or redaction of records can only be recovered if they are "required by law." This is too vague of a term. Redaction of attorney-client privilege, as well as many statutory exemptions, would not be eligible for cost recovery as these may not be "required" but merely permitted. Even exemption (n) to protect security information is viewed as discretionary by the SPR under current law.

    a. The Legislature has provided exemptions upon its determination that those exemptions are warranted by sound policy reasons, including prejudice to municipalities from disclosure**. Municipalities should not be forced to choose between waiving privileges and exemptions, versus forgoing recovery of costs associated with segregation and redaction**.

- If the municipality does not provide the required responses within the specified time periods, it is precluded from charging for the costs involved to produce the documents. This is not reasonable as there may have been good reasons why the response was not made within the required time periods. The allowed costs of response should not be at risk for failure to meet what may be unreasonable deadlines, especially in force majeure circumstances.

- Under S. 2120, the municipality can petition the SPR to exceed the fee cap if the city or town can demonstrate that the charge is necessary to prudently complete the request and if the charge represents the actual and good faith representation of cost

compliance. If the SPR grants that request, the requestor can appeal it to court; there is no reciprocity for the municipality to appeal an adverse decision.

- **All time periods should be tolled while a matter is under appeal.**

- The requestor can appeal an SPR determination of no violation. **There is no reciprocity stated in the bill for a municipality to appeal an adverse decision.**

- There is no time period or statute of limitations within which the requestor must appeal to court. As in the House bill, there should be a 30-calendar day time period, from the date of receipt of the SPR's order, within which a civil action must be filed, whether by the requester or by the municipality.

Costs, Penalties and Attorney's Fees

- The Superior Court is **required** to award attorney's fees and costs when the requestor has either obtained a judgment in his or her favor or a consent decree has been entered. This is a disincentive to settlement, as the requestor would expect to be awarded attorney's fees and costs.

    a. If the municipality were acting in good faith on advice of counsel, it should be protected from paying fees. This protection would be similar to the protection in the open meeting law, where "it shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel." G.L. c. 30A, § 23(g).

    b. **Reciprocity is necessary.** If fees are to be mandated against municipalities, fees and costs should also be awarded to the municipality against frivolous and harassing requesters.

2. A court may (in its discretion) award attorney's fees and costs to a requestor:

- **even if the city or town acted on advice of counsel, or**
- **even if the SPR found in favor of the municipality, or**
- **even if the municipality relied on an opinion of either an appellate court or the SPR based on similar facts, or**
- **even if the request was not in the public interest and was made for private or commercial purposes.**

a. This discretionary award attorney's fees and costs is not reasonable and would be unduly burdensome to municipalities. **Cities and towns would have to weigh the decision to withhold records carefully, even if there is the possibility of exempt information being disclosed, such as personal information given by a constituent to an elected official**.

- Courts are **required** to award punitive damages if a requestor demonstrates that a municipality "did not act in good faith."

- S. 2120 removes judicial discretion by requiring that the court assess punitive penalties of between $1,000 and $5,000 on the municipality which "did not act in good faith."

- A municipality should be deemed to have acted in good faith if the RAO acted on the advice of legal counsel, or on decisions issued by the SPR, the AG or the courts (whether appellate or trial).

- "Punitive damages" has a particular meaning in the law, especially in civil rights law where punitive damages are not allowed against municipalities. The damages allowed should be deemed to be a penalty, not "punitive damages."

- By comparison, the House bill recognizes the unique set of facts associated with each public records request and therefore preserves judicial discretion as it relates to both the imposition of penalties and attorney's fees.

- Moreover, the House bill used the standard of acting "maliciously or in bad faith," which is a clearer standard than "did not act in good faith."

- **A court is required to order a waiver of any fees or costs for production of the documents if there is a ruling against the municipality.** Courts are where disputes are resolved. It is unreasonable to penalize a municipality because a matter was adjudicated in court.

Other

- Financial and accounting databases of state agencies, including payroll databases, would be subject to State Comptroller guidelines to protect protected private information and data. **No such protection is afforded municipal databases.**

- Aggressive effective dates would immediately impact FY 2017 budgets, many already in final form, requiring designation of records access officers with significant new duties by July 1, 2016 and full implementation of all provisions by October 1, 2016.

    a. Final enactment of a new public records law could be months away. Later effective dates are imperative. SPR has to issue regulations by September 1, 2016. If in fact they are issued on September 1, 2016, governmental entities would only have 30 days to prepare to implement based on the regulations.