September 12, 2018

Special Legislative Commission Regarding Public Records
Rep. Jennifer Benson & Sen. Walter Timilty, Chairs

**Joint Testimony of ACLU of Massachusetts,
Common Cause Massachusetts, MASSPIRG,
and Massachusetts Newspaper Publishers Association**

Transparency in government is the cornerstone of a strong democracy. Government transparency checks corruption, promotes fiscal responsibility and efficiency, and allows for greater, more meaningful participation in our democratic system. Our organizations have each worked to promote transparency in government for decades. As leaders of the Massachusetts Freedom of Information Alliance (MassFOIA), we collaborated to advocate for the legislation to update the public records law which included this Special Legislative Commission, and we offer this testimony together.

The Special Legislative Commission regarding Public Records is charged with examining two separate and equally important issues: (1) "the accessibility of information concerning the legislative process"; and (2) "the expansion of the definition of public records."[1] Below, we have outlined detailed recommendations in response to each of the specific provisions of the Commission's authorizing language.

However, given the extensive nature of our full comments, we want to highlight three priority recommendations.

PRIORITY RECOMMENDATIONS

1. **Scheduling hearings** – Committees should set a preliminary hearing calendar, divided by subject matter, early in the session. They should then publicize detailed hearing agendas (time, location, list of bills) two weeks in

[1] Chapter 121 of the Acts of 2016: "There shall be established pursuant to section 2A of chapter 4 of the General Laws a special legislative commission to examine the accessibility of information concerning the legislative process of the general court and the expansion of the definition of public records."

advance. When setting hearing agendas, committees should seek to avoid hearings longer than four hours. Finally, committees should maintain subscription email lists to provide affirmative notice of hearings to interested members of the public.

2. **Publication of committee materials** – Committees should publish committee votes, testimony, and for bills given a favorable report, summaries of the legislation and any amendments.

3. **Public Records Law** – Public records law principles should apply to certain kinds of Legislative records, most non-adjudicatory records of the judiciary, and the Governor's office.

The rationale for each of these recommendations is laid out more fully below.

RECOMMENDATIONS

I. Recommendations Regarding Accessibility of the Legislative Process[2]

(i) Scheduling and notice of public hearings and legislative sessions

Scheduling and notice of public hearings

We recommend that the legislature increase the accessibility of the legislative process to the general public by making improvements to the process by which legislative committees provide notice of public hearings.

[2] "The special legislative commission shall examine the procedures and practices of the general court and its committees with regard to legislative process including, but not limited to:

(i) scheduling and notice of public hearings and legislative sessions;
(ii) management of legislative calendars;
(iii) scope and substance of committee hearings, including the number of bills heard at each hearing;
(iv) publication and availability of records concerning committee proceedings, including public hearing agendas, public testimony and committee votes;
(v) rules and scheduling requirements for committee reports;
(vi) content of committee reports, such as summary, explanatory and analytical materials;
(vii) contemporaneous and permanent online access to open sessions of the house of representatives and senate;
(viii) publication of records concerning house of representatives and senate sessions including, but not limited to, roll call votes; and publication of proposed amendments to legislation and votes."

Specifically, we recommend amending legislative rules to require committee chairs to set a preliminary hearing calendar, divided by subject matter, by April 1 in the first year of the legislative session. Many committees do this already, and it provides predictability for both legislators and the public.

This need not be overly burdensome; even without identifying particular bills to be heard on specific dates, a subject matter schedule would enable members of the public to anticipate and plan for meaningful participation in the hearing process.

With regard to full detailed hearing notices, the current 48 hours advance notice for committee hearings is too short. It impedes meaningful public participation and comment because of the impracticality for many people of hastily rearranging one's work, school, or personal schedule to attend a hearing. For this reason, we recommend adopting a general requirement that legislative committees publish public hearing agendas, with specific bills to be heard, two weeks in advance of the hearing date. The rule should allow for some limited exceptions. For instance, a shorter time frame might be needed to timely schedule hearings on late-filed bills, reschedule a previously noticed hearing due to exigent circumstances, and address other special circumstances.

Scheduling and notice of legislative sessions

Advance notice for open sessions of the House and Senate is similarly necessary for meaningful public participation. To that end, we recommend the formal adoption of a rule requiring at least 48 hours' notice for both House and Senate sessions. This time frame is consistent with the notice requirement for public meetings by state and municipal agencies under the open meeting law.[3]

If longer notice can be provided, that would be preferable, as would a regular schedule. Longer notice would benefit not only the public, but members as well.

(ii) <u>Management of legislative calendars</u>

Our most significant concern with legislative calendars is the question of public notice, addressed above.

(iii) <u>Scope and substance of committee hearings, including the number of bills heard at each hearing</u>

[3] G.L. chapter 30A, section 20.

As this commission considers the scope and substance of committee hearings, we encourage you to focus on how to ensure that committees allow adequate time for all members of the public who wish to comment on pending legislation to do so. Unfortunately, we know from experience that when many controversial issues are heard at a single hearing, members of the public are too often denied an opportunity to be heard because their schedules do not allow them to stay indefinitely. We have all attended marathon hearings that begin early in the day and run late into the night; by the end, the chairs are calling strings of names of people who signed up to testify at the start of the hearing but could not stay to the end. Indeed, even committee members are often unable to stay for the duration.

This is not inevitable. Frequently, it is the result of an overstuffed agenda.

It may be tempting to try to address this problem formalistically, by setting hard-and-fast rules limiting hearings to bills on a single subject or limiting the number of bills that may be heard at a hearing. However, each of these approaches would likely lead to unintended consequences. Sometimes no one shows up to testify at a hearing where the agenda includes a large number of bills; listing fewer bills would simply mean holding more hearings where no one shows up.

On the other hand, committee chairs sometimes schedule hearings with long agendas, perhaps with the goal of hearing all their assigned legislation, but these attempts at efficiency come at the expense of meaningful public participation.

We believe a more productive approach would be to set a framework for committee chairs to use when setting hearing agendas that balances the need to structure the committee's work efficiently and to avoid denying members of the public their opportunity to testify. Specifically, we recommend that committees avoid hearing agendas that could reasonably be anticipated to last more than four hours. In some cases, this may mean devoting a hearing to a single piece of contentious legislation.

While we believe it is generally a disservice to the public to set a hearing agenda that could reasonably be anticipated to result in a hearing longer than four hours, an appropriate exception would be when the burden on the general public of limiting a hearing would outweigh the benefit, such as when limiting the hearing agenda would require the committee to hold more than one hearing on substantially the same subject matter.

Committee chairs know their committees best. They know the issues pending before them, and usually have a pretty good handle on which ones are the subject of significant public attention. We believe that with appropriate guidance they can

more effectively tailor hearing agendas to enable, rather than impede, full public participation.[4]

(iv) Publication and availability of records concerning committee proceedings, including public hearing agendas, public testimony and committee votes

Hearing Agendas
We appreciate that committee hearing agendas are published online for anyone to view, if they visit the committee's webpage. However, a static website is only viewed by people who actively seek it out. Even professional advocates can easily miss the announcement of a hearing if they do not regularly check the site.

A better way to ensure that the public receives information about upcoming hearings is for committee staff to email interested parties. Again, many committees already do this. We recommend that all committees develop email lists to which members of the public can subscribe to receive hearing announcements and other important committee notices.

We applaud this special commission for both assembling a general interest email notice distribution list, and additionally using a Twitter account to proactively provide notice of and notes from its hearings. We would be pleased to see other committees follow that lead.

Testimony
We recommend that each committee publish a list of all public testimony on each piece of legislation identifying the name and affiliation of the person who testified, and whether the testimony was for or against the bill. All written testimony should be posted in a timely manner on the committee's webpage. This is common practice in many other states.

Committee Votes
We recommend that committee votes on each bill be made public – both the vote count and how each member voted. This would include votes conducted in person and via polls or emails. This is common practice in many other states.

(v) Rules and scheduling requirements for committee reports

[4] It should be noted that particular committees face greater challenges than others, because they are assigned an abundance of controversial bills that attract considerable public attention. If a single committee is assigned more bills than it can reasonably hear (allowing all members of the public who desire to offer public comment to be able to do so), it may be wise to consider changes to the committee structure to address this problem.

We focused our comments on ways to increase the information committees publish when recommending action on each piece of legislation, as we lay out below.

(vi) Content of committee reports, such as summary, explanatory and analytical materials.

Today, to our knowledge, reports of Massachusetts legislative committees consist solely of the committee's recommendations regarding individual bills, together with the bill language (sometimes, "as amended"). This means that, from the public perspective, committees are black boxes. A bill goes in, the box is briefly opened for a hearing, then it is closed again and the bill emerges later, having been given a favorable or unfavorable report, amended, or "sent to study" with no explanation. This process means that, as a general matter, the public does not know how committee members voted or even the margin by which a bill was advanced or rejected, how a bill was amended (one can compare the versions, but no comparison is provided by the committee), nor is the reasoning behind any amendments.

By contrast, as a matter of course, committees in other states produce reports on individual bills that offer a wide variety of basic information. For example, here is a sample committee report from Nebraska that provides a simple one-line description of the bill, a record of the committee vote, and an explanatory description of an amendment made in committee. California and Illinois provide robust tracking of each bill's substance and its history, including how each bill would alter existing law, every committee and floor vote, and documents tracking every set of amendments made to the bill as it moves through the process.

We recommend that the Joint Rules be amended to require committees to issue reports on each piece of legislation that include all of the following:

1) For every bill – the committee vote, including the individual votes of each member
2) For every bill given a favorable report – a bill summary, either in narrative or section-by-section form
3) For every bill amended by the committee – (a) a clean copy of the amended bill; (b) a redline copy showing committee changes; and (c) a brief explanation of substantive changes.

Committee reports should be published in full online and distributed to the committee's subscription email list, per our recommendation above.

(vii) Contemporaneous and permanent online access to open sessions of the house of representatives and senate

Currently, the House and Senate not only live-stream formal legislative sessions, but archive video recordings online as well. This is a terrific resource to the public.

Some states do the same for committee hearings as well. While there may be less public interest in reviewing footage of a hearing than a formal session in some cases, many committee hearings do attract significant attention and are likely to be of broad interest beyond the small segment of the public that can attend in person. As a best practice, committee chairs should arrange for live-streaming of high interest hearings and make the recordings publicly available online.

Ultimately, we hope the legislature will stream *all* hearings held at the State House as a matter of course, and legislative hearings held outside the State House as technology allows. We would encourage this commission to consider issuing recommendations about a timeline for universal adoption of this practice.

(viii) Publication of records concerning house of representatives and senate sessions including, but not limited to, roll call votes

Information about every roll call vote taken by the Massachusetts legislature currently exists somewhere online, but the actual votes are not consistently accessible. Each bill's webpage should include direct links to PDFs for all recorded roll call votes in both chambers, not references to the Supplement to the legislative journals.

(ix) Publication of proposed amendments to legislation and votes

Every roll call vote on a proposed amendment should be available directly on each bill page (see above).

II. Recommendations Regarding Expansion of the Public Records Law

The Massachusetts Public Records Law is frequently criticized because of its broad carveouts for the legislature, the governor's office, and the judiciary. However, we cannot simply apply the law to each uncovered entity without distinction and without acknowledgement of the unique characteristics of each branch of government. Below, we set forth some recommendations for expanding the application of the public records law, including possible legislative language.

i. Application of Public Records Law to the Governor

Only two states give the governor's office a blanket exemption from the public records law, Michigan and Massachusetts. And last year, Michigan's House of Representatives unanimously passed a bill to repeal that exemption.

In Massachusetts, it is not clear that the legislature ever intended to create an exemption for the governor. The definition of "public records" in G. L. c. 4, § 7(26) is expansive and appears on its face to include the governor in its coverage of "any officer or employee of any agency, *executive office*, department, board, commission, bureau, division or authority of the commonwealth … ." (*Emphasis added.*)

Confusion over the governor's coverage under the law followed the Supreme Judicial Court's decision, *Lambert v. Judicial Nominating Council*, 425 Mass. 406 (1997). Every governor since *Lambert* has invoked it as a blanket exemption from the public records law. But *Lambert* dealt only with a very specific issue: whether the public should have access to questionnaires completed by applicants for judicial appointments and submitted to the Judicial Nominating Council.

As a matter of public policy, there is no reason to give the governor's office a blanket exemption from the law. No question, there are certain documents within the governor's office that should be excluded from public view. But the *existing exemptions* to the public records law – such as those related to policy development and personal privacy – fully cover these situations and protect the governor's office to the same extent as they protect any other state or local official performing an executive function.

For these reasons, we propose that the Public Records Law be amended to make clear that it applies to the governor's office in the same way and to the same extent that it applies to other executive branch entities. To that end, we propose that G.L. Chapter 4, Section 7, Clause Twenty-sixth, be amended as follows:

> "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, **including the governor's office,** 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 in that they are: [. . .]

II. Application of Public Records Law to Judiciary

We propose that the Public Records Law be amended to apply to a limited scope of records within the judiciary. The amendment would provide a public right of access to *administrative* and *financial* records of the judiciary, such as contracts, audits and payrolls, but would not change existing common law or court rules governing access to case records in adjudicatory matters. This is consistent with a policy adopted by the courts earlier this year.

Researchers, advocates, and the general public should be entitled to obtain basic data about the operations of court administrative offices, including the office of probation. Such basic information as records regarding leased property, contracts for services, written employment or operations policies, numbers of probationers, length of probation terms, dispositions of violations, demographic information, etc. Without freedom of information, the public and public officials cannot evaluate how well the system operates and how it can be improved.

To this end, we propose two changes to applicable legislation. First, we would add to Chapter 4, Section 7, a new definition of a "judiciary financial and administrative record":

> "Judiciary financial and administrative record." Any record in any form pertaining to the management, supervision, administration, or finance of the Supreme Judicial Court, the Appeals Court, or the Trial Court, including any court department under the direction of the Trial Court, the Office of the Commissioner of Probation, the Office of Jury Commissioner, or the office of any Court Clerk, but not adjudicatory records relating to specific cases or proceedings in any court or subdivision.

The second change with regard to the judiciary would be to amend Chapter 66, the Public Records Law, to add new section 6B:

> **Section 6B. Records of the Judicial Branch.**
>
> The judicial branch shall provide judiciary financial and administrative records in accordance with this act or any rule or order of court providing equal or greater access to the records. This section shall not restrict the

public's right of access to adjudicatory records in cases and proceedings as established through constitutional law, common law, and court rules.

III. Application of Public Records Law to General Court

We propose that the Public Records Law be amended to cover a limited and specific scope of legislative documents, listed below. These are documents to which the public has a strong interest in having access, and for which providing access would not impinge on the need for members of the legislature to engage in study of and collaboration on issues that come before them. Pennsylvania and many other states have similar lists in their open records laws.

To that end, we propose two changes to the General Laws, or possibly to the Joint Rules instead. First, we would amend Chapter 4, Section 7, to create a new definition of "legislative record":

> "Legislative record." Any of the following relating to the legislature or a standing committee, subcommittee or conference committee of the legislature:
>
> (1) A financial record.
> (2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.
> (3) Fiscal notes.
> (4) A cosponsorship memorandum.
> (5) The journal of a chamber.
> (6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
> (7) The transcript of a public hearing when available.
> (8) Executive nomination calendars.
> (9) The rules of a chamber.
> (10) A record of all recorded votes taken in a legislative session.
> (11) Any administrative staff manuals or written policies.
> (12) An audit report concerning any financial transactions of the legislature.
> (13) Final or annual reports required by law to be submitted to the General Court.
> (14) Legislative budget and finance committee reports.
> (15) Daily legislative session calendars and marked calendars.

(16) A record communicating to an agency the official appointment of a legislative appointee.
(17) A record communicating to the appointing authority the resignation of a legislative appointee.
(18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.
(19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

Second, we would amend Chapter 66 to add new section 6C:

Section 6C. General Court.

The General Court shall provide legislative records in accordance with Section 6A.

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As we said at the outset, transparency in government is the cornerstone of a strong democracy. This Special Legislative Commission has a unique opportunity – to demonstrate through its recommendations that Massachusetts is committed to transparency across all branches of government. The recommendations of this commission will carry significant weight in defining the future of government accessibility in our state. We appreciate your dedication to the task, we are confident that you will consider these issues carefully, and we urge you to take concrete action to help make Massachusetts a leader in open government.