

***PUBLIC RECORDS
REQUESTS
BY CRIMINAL DEFENSE
COUNSEL***

Materials prepared by:

*David Nathanson, Wood & Nathanson, LLP
dnathanson@woodnathanson.com*

BUT HOW DO I DO THAT?

JUST ASK!: Simply write a letter to the custodian of the records at issue and request the records you want.

YOU DON'T HAVE TO GIVE A REASON: In order for a record to qualify as exempt, the custodian of the record has the burden to prove with specificity that an exemption applies. M.G.L. c. 66, § 10 (c)

YOU DON'T HAVE TO CITE CASES: The statute was designed for laypeople to use.

SEARCH FEES ARE ALLOWED: Both for copying and for searching.

THEY ARE SUPPOSED TO RESPOND WITHIN TEN DAYS: They never comply within ten days. Don't worry about the deadlines, gentle prodding and re-requesting is sufficient

APPEALS: you can appeal to the supervisor of public records at the Secretary of the Commonwealth. (And see their public records guide on the website).

HOW CAN I USE PUBLIC RECORDS?

- Obtain police reports
- Obtain witness statements
- Obtain scientific tests and reports
- Obtain internal affairs information
- Obtain financial information of Commonwealth experts
- Obtain training manuals, policies, procedures

If you receive redacted information, you can use that as your prima facie showing to seek full disclosure in the criminal case, particularly for *Wanis* motions for disclosure of IAD files.

WHAT'S PUBLIC, WHAT'S NOT PUBLIC?

PUBLIC:

- police reports created *prior* to initiation of criminal charge
- after an investigation is closed, much of the record is public
- unredacted witness statements in closed cases that received substantial publicity
- internal affairs complaints and witness statements
- search warrants and affidavits after return, if not impounded
- docket numbers of cases of with particular charges (for selective prosecution claims)
- firearm discharge reports

NOT PUBLIC:

- very few records are completely non-public, custodians should *redact* rather than withhold records containing non-public information
- CORI information regarding an identifiable individual
- “investigatory materials necessarily compiled out of the public view by law enforcement . . . the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest”
- material whose disclosure would be an “unwarranted invasion of personal privacy”
- grand jury materials

AUTHORITY

M.G.L. c. 66, § 10: Records Open for Public Inspection.

(a) Every person having custody of any public record . . . shall, at reasonable times and without unreasonable delay, permit it, **or any segregable portion** of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. . . .

(b) A custodian of a public record shall, **within ten days** following receipt of a request for inspection or copy of a public record, **comply with such request**. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. . . .

(c) In any court proceeding pursuant to paragraph (b) there shall be a **presumption that the record sought is public**, and the burden shall be upon the custodian to prove with specificity the exemption which applies. . . .

(d) . . . The **home address and home telephone number of law enforcement**, judicial, prosecutorial, department of youth services, department of social services, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel . . . shall not be public records. . . The home address and telephone number 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 and home address and telephone number, or place of employment or education of a family member of any of the foregoing **shall not be public records**.

M. G. L. c. 4, § 7 (f):

Twenty-sixth, "Public records" shall mean all . . . documentary materials or data. . . made or received by any . . . agency . . . of the commonwealth, or of any political subdivision thereof . . . unless such materials or data fall within the following exemptions in that they are: . . .

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an **unwarranted invasion of personal privacy**; . . .

(f) **investigatory materials necessarily compiled out of the public view** by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

SUPERVISOR OF PUBLIC RECORDS

Police reports generally: <http://www.sec.state.ma.us/arc/arcrmu/rmubul/bul303.htm>
and <http://www.sec.state.ma.us/arc/arcrmu/rmubul/bul303addendum.htm>

Internal affairs information: <http://www.sec.state.ma.us/arc/arcrmu/rmubul/bul401.htm>

CORI

Police and DAs will frequently refuse to release information because they claim it is protected by the CORI statute.

CORI INFORMATION IS NOT PUBLIC:

DEFINITION: M GL c. 6, § 167 "Criminal offender record information", records and data . . . compiled by a criminal justice agency which concern an **identifiable individual** and relate to the nature or disposition of a criminal charge. . . Such information shall be restricted to that recorded as the result of the **initiation of criminal proceedings** Criminal offender record information **shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information.** . . . Criminal offender record information shall not include information concerning any offenses which are **not punishable by incarceration.**

BUT EXCLUDED FROM CORI, AND THEREFORE PUBLIC, IS:

INFORMATION REGARDING YOURSELF:

M.G.L. c. 6, § 175: "Each individual shall have the right to inspect, and if practicable, copy, criminal offender record information which refers to him."

INFORMATION REGARDING DECEASED INDIVIDUALS:

M.G.L. c. 6, § 178B: Restrictions on Dissemination to Terminate on Subject's Death.

The restrictions on the dissemination of criminal offender record information as provided in this chapter shall cease to exist at the death of the individual for whom a criminal justice agency has maintained criminal offender record information.

EVALUATIVE INFORMATION

M.G.L. c. 6, § 167: "Evaluative information", records, data, or reports concerning individuals charged with crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress and the like, and which are primarily used in connection with **bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation or parole.**

INTELLIGENCE INFORMATION

M.G.L. c. 6, § 167: "Intelligence information", records and data compiled by a criminal justice agency for the purpose of criminal investigation, **including reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual.** Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

CASES

RECORDS HELD PUBLIC

Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 295 (1979) (firearm discharge reports public subject to redaction)

In re Subpoena Duces Tecum, 445 Mass. 685, 689 (2006) (SAIN interview tape of concluded investigation held public record)

Antell v. Attorney General, 52 Mass. App. Ct. 244, 247 (2001) (“The Attorney General no longer contemplates any criminal charges against Cronin. The . . . the public interest in disclosing allegations of official misconduct at the conclusion of an investigation generally outweighs the privacy interests of participants in a cold investigation.”)

Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 8-9 (2003) (IAD complaints, notes, interviews public record, but disciplinary decision not public)

Globe Newspaper Co. v. DA for the Middle Dist., 439 Mass. 374 (2003) (docket number and charge for each case involving municipal corruption)

Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993) (alphabetical index of defendants held public record, voiding as unconstitutional restrictions on access to index)

Rafuse v. Stryker, 61 Mass. App. Ct. 595, 601 (2004) (staleness of pending investigation can defeat privacy interest of witnesses who gave statements; “witnesses were well aware that in the event of a criminal prosecution this information could be revealed”)

Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 457 (2007) (“the Legislature expressly intended to truncate the protections of the attorney work-product doctrine under the public records law”)

Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 864 (1995) (extensive publicity can undermine privacy exemption)

RECORDS HELD NOT PUBLIC

With requests for witness statements, you will frequently have the following thrown at you:

discovery should follow normal procedures in criminal cases where its availability lies in the discretion of the trial judge under standards developed by this court. *See Commonwealth v. Lewinski*, 367 Mass. 889, 900-903 (1975). It is sufficient to say that **pre-trial** discovery is not available to defendants in criminal cases under G. L. c. 66, § 10, and that the position of the plaintiffs under the latter statute is not enhanced by the lodging of criminal charges against them.

Bougas v. Chief of Police, 371 Mass. 59, 64 (1976) (emphasis added). Note that this case deals with pre-trial requests. Note also that anyone can make a public records request and the custodian is not permitted to ask the purpose of the request. The SJC has explained that *Bougas* means only that the defendant does not get more public records access simply because he is the defendant: “In *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64, 354 N.E.2d 872 (1976), we stated that, if a defendant wants information *not available as a public record*, ‘such discovery should follow normal procedures in criminal cases where its availability lies in the discretion of the trial judge under standards developed by this court.’” *Commonwealth v. Wanis*, 426 Mass. 639, 642 (1998)

In re Doe Grand Jury Investigation, 415 Mass. 727, 731 (1993) (videotape of grand jury lineup not public record).

Commonwealth v. Montefusco, 425 Mass. 1015, 1016 (“materials relating to an allegation of sexual assault are exempt from [M.G.L. c. 66, § 10].. See G.L. c. 41, § 97D; G.L. c. 265, § 24C”).

Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 215-216 (2011) (public records law does not supersede inherent power of court to enter protective order).