

PUBLIC RECORDS, PRIVACY AND CONFIDENTIALITY AT COUNCILS ON AGING

THE COA PRIVACY LAW (CHAPTER 41 OF THE ACTS OF 2002)

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Note: The opinions expressed in these materials are those of Attorney Semuels. As stated in the materials, persons seeking to implement compliance procedures in their own city or town should speak with the their own city or town counsel.

1. INTRODUCTION:

Before May 22, 2002, personal information, such as the names, addresses, telephone numbers and other identifying information about elders in the possession of a COA were considered public records, and for the most part were subject to disclosure to the public. Many requests were received from third parties for personal information of elders receiving meals, rides, fuel assistance, outreach for public assistance and other services. Legislation was needed because existing privacy laws arguably were not covering COAs as they were other aging network agencies.

In late 2001, Representative Koczera of New Bedford filed a bill in the legislature on behalf of the Freetown Council on Aging. This bill, with drafting assistance from Elder Affairs, and support in the legislature and by the Governor was enacted and became Chapter 41 of the Acts of 2002. In the Massachusetts General Laws, this new law (the COA Privacy Law) became part of the Council on Aging statute, Chapter 40, Section 8B.

2. THE COA PRIVACY LAW

The COA Privacy Law became effective on May 22, 2002 and affects every Council on Aging in the Commonwealth as follows:

A. THE NAMES, ADDRESSES, TELEPHONE NUMBERS OR OTHER IDENTIFYING INFORMATION ABOUT ELDERLY PERSONS IN THE POSSESSION OF A COA ARE NO LONGER A PUBLIC RECORD.

B. AN EXCEPTION TO THIS IS THE CONTINUING RESPONSIBILITY OF THE COA TO SHARE PERSONAL INFORMATION IN PROTECTIVE SERVICES AND

ELDER AT RISK CASES; SHARE PERSONAL INFORMATION IF REQUIRED AS A CONDITION OF RECEIVING A GOVERNMENT CONTRACT, PROGRAM GRANT OR OTHER BENEFIT; OR SHARE PERSONAL INFORMATION AS OTHERWISE REQUIRED BY LAW.

Thus, this identifying information concerning elders in the possession of the COA cannot be given out on request to the public. Access to and storage of this information is subject to certain required procedures which must be followed in order to comply with the law.

3. WHAT ARE PUBLIC RECORDS UNDER THE PUBLIC RECORDS LAW?

Every record made or received by any officer or employee of any municipality or agency of the Commonwealth is presumed to be a public record, unless it is subject to an exemption, as explained below. The custodian of the record in the governmental agency has the burden of claiming the exemption, that is, either giving the requester a copy of the requested record, or not giving it and explaining why it is not public.

4. HOW DO COUNCILS ON AGING RELATE TO THE PUBLIC RECORDS AND PRIVACY LAWS ?

Councils on Aging are established under General Laws chapter 40, section 8B, as amended, to coordinate and carry out programs designed to meet the problems of the aging in coordination with programs of the Executive Office of Elder Affairs. As such, they are part of a governmental entity, a city or town. Each COA should implement procedures with its Director, keeper of the records or legal counsel in order to comply with the law if a request is received.

5. WHAT KINDS OF RECORDS ARE A PUBLIC RECORD?

Public records are all books, papers maps, photographs, recorded tapes, financial statements, statistical tabulations or other documentary materials, including computer cards, tapes or diskettes made or received by a public entity which are not exempt from disclosure under the law.

6. WHO IS A CUSTODIAN OF A PUBLIC RECORD?

By regulation, a custodian is the governmental officer or employee who in the normal course of his or her duties has access to or control of public records. Who is to have access to client records within the COA is for the COA Director to decide. If a COA has no employees, it is not clear if the COA Board would be the custodian of the client records. They are not a "governmental officer

or employee,” as required by regulation. Normally the COA Board would not have access to client records without the consent of the client. For overview or monitoring purposes, the COA Board or other city or town employees with a need to know (e.g. auditor, selectmen) could get access to redacted records, (e.g. copies of records with personal identifiers removed). To redact a record, copy it; then remove personal identifiers (e.g. name, address, phone number, other personal identifying information) with a dark marking pen; then copy it again (so personal information won't show on the other side); give out a redacted copy after reading it again to assure that personal information is covered over.

7. HOW LONG DOES THE CUSTODIAN OF THE RECORD HAVE TO RESPOND TO A REQUEST FOR A PUBLIC RECORD?

A Request may be received orally in person or in writing. A request received by telephone is not valid under the public records law. An appeal of the custodian's failure to provide access to a record, must be in writing. A custodian of the record (at the COA) has ten (10) calendar days to respond to the request. If (s)he fails to respond within the allotted time period, or denies the request in writing, the requester may appeal to the supervisor of public records of the Secretary of State's office within ninety (90) days. Thus, within the 10 days, the COA must either provide the record, if a public record or deny the request in writing, citing the legal basis for doing so, and advise the person of their right to appeal to the Secretary of State's Office.

8. HOW WOULD A REQUEST UNDER THE COA PRIVACY LAW BE RECEIVED AND PROCESSED?

Unless the exceptions under the COA Privacy law, or any other Public Records law exemption applies, if a person from outside the COA comes into a COA or sends a written request and asks the Director or an employee for the names, addresses, phone numbers or other identifying information of elders receiving services from the COA, and the information is "in the possession of the COA," the COA cannot release that information under the COA Privacy Law. It is confidential under the COA Privacy Law (Chapter 41 of the Acts of 2002) and the State Public Records Law (MGL chapter 4, section 7 clause 26th, (a)). The law makes it "specifically exempted from disclosure by statute."

In this case, the COA has ten days to respond. It should respond orally and in writing saying that the records are not public records and cannot be released for privacy and confidentiality reasons under Chapter 41 of the Acts of 2002 and (MGL chapter 4, section 7 clause 26th, (a)). If the COA fails to respond within ten days, or if the requester is dissatisfied with the denial, (s)he may appeal to the Secretary of the Commonwealth's Public Records

Division, (Public Records) One Ashburton Place, Room 1719, Boston, MA 02108 (617) 727-2832 within ninety days of the denial. Public Records will then open an administrative appeal on the matter. If the Supervisor of Public Records determines that the records are public, it may order the custodian to provide the records.

9. WHAT ARE THE EXCEPTIONS TO THE COA PRIVACY LAW WHICH ALLOW RELEASE OF THE NAMES, ADDRESSES, TELEPHONE NUMBERS AND OTHER IDENTIFYING INFORMATION IN THE POSSESSION OF THE COA TO OTHER PARTIES?

A. EXCEPTION: COMPLIANCE WITH THE ELDER PROTECTIVE SERVICES LAW AND ELDER AT RISK PROGRAM ADMINISTERED BY ELDER AFFAIRS

1. Limited Disclosures Allowed:

a . COAs/Protective Services/Elder At Risk

Protective Services/Elder At Risk Protocol: The Protective Services/ Elder At Risk Protocol between Aging Services Access Points (ASAPS) and Councils on Aging defines, based on law, regulation and related standards, the roles and responsibilities of Protective Services/Elder At Risk agencies and other community service, health and public safety agencies regarding the identification and response to elder abuse and elder at risk cases. The protocol addresses all aspects of the Protective Services/Elder At Risk service delivery process, as well as client confidentiality and information sharing requirements. See Elder Affairs-Program Instruction PI-01-09 attached. Page 6 of the Protocol lists the ASAP COA Implementation Requirements.

B. EXCEPTION: AS A CONDITION OF RECEIVING A GOVERNMENT CONTRACT, PROGRAM GRANT OR OTHER BENEFIT

If a federal, state or local entity provides funding under a contract or grant, or other benefit (called an award), and if such contract, grant or award requires the COA to keep client records, and allows the funding agency access to such client records, then the funding agency has a right to access such client records.

However, if a federal, state or local entity provides funding under a contract or grant, or other benefit (called an award) and if such contract, grant or award requires the COA to keep records for audit purposes, I believe that there is no right to access the personal data of clients without the consent of the data subject. Thus, the funding agency has

no right to access client records without such consent.

C. EXCEPTION: AS OTHERWISE REQUIRED BY LAW

This means that if any other law would require COAs to give unfettered access to entities or persons seeking client records, access may be required. Do not grant access until your COA Director or town legal counsel has determined that access to client is appropriate under the law. This may require an opinion of town legal counsel or a court order.

10. WHAT RECORDS ARE NOT PUBLIC?

There are 12 exceptions to the public records law which provide a basis for withholding records in whole or in part. The exemptions are strictly and narrowly construed. See page 23 of the Secretary of State's guide to the Massachusetts Public Records Law. (See attached).

A. What are the examples of Public Records Law Exemptions which may be most applicable to COAs?

Example #1: **Public Records Law Exemption (a).** The new COA Privacy Law is an example of exemption (a) to the Commonwealth's Public Records Law (records "specifically" made non-public by statute".

Example #2: **Public records law, Exemption (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"

This can also be used to determine if your COA client records are public records, or are not subject to disclosure:

In the first clause, medical information which relates to a specifically named individual and is of a personal nature is exempt from disclosure.

The second clause exemption applies to requests for records that involve privacy interests. Its application is limited to "**intimate details of a highly personal nature.**" **examples include "marital status, paternity, substance abuse, government assistance, family disputes and reputation."** Portions of the record containing such information are exempt unless there is a paramount public interest in disclosure.

Thus, there is a two step process.

1/ Does the information constitute an "intimate detail of a highly personal nature? and;

2/ Does the public interest in disclosure outweigh the privacy interest associated with disclosure of the highly personal information?

The legal decision maker for these questions is your town counsel. Again appeals are to the Supervisor of Public Records in the office of the Secretary of State in Boston, 1-617-727-2832.

In addition to the COA Privacy Law, it is my opinion that the term "government assistance" makes the personal data of COA participants, including, but not limited to the following, confidential and not a public record:

nutrition program, applicant for public assistance, support groups, social day care, S.H.I.N.E. counseling, transport to doctor, transport to shopping, picking up medication, food shopping, information and referral, counseling, fitness classes, computer classes, etc.

11. IS THERE A SEPARATE PRIVACY LAW THAT APPLIES TO STATE AGENCIES AND NON-MUNICIPAL AGENCIES?

There are separate rules which apply to non-municipal entities where an Elder Affairs or other state agency grant or contract specifically requires the contractor or grantee to be a "holder of the personal data for Elder Affairs" under MGL c. 66A, The Fair Information Practices Act (See 801 Code of Mass. Regulations 3.00 and Elder Affairs Program Instruction, PI-97-55). Examples of this are home care client records held by Aging Services Access Points (ASAPs) and Protective Services records held by designated Protective Services Agencies.

In these cases, the general rule is that the ASAP cannot share this client record information without the consent of the data subject, if allowed, or in accordance with regulations consistent with the statute or a court order.

12. HOW MUCH MAY A CUSTODIAN CHARGE FOR COPIES OF PUBLIC RECORDS?

If the record is a public record and can be released, unless a statute says otherwise, a custodian may charge twenty cents (\$.20) a page for

photocopies, twenty five cents (\$.25) a page for microfilm copies and fifty cents (\$.50) a page for computer print outs. The actual cost of reproduction may be charged for records "not susceptible to ordinary means of reproduction" (such as oversized documents). A custodian may charge for the time it takes to search for the records, remove any exempt data, photocopy the record and re-file it. Here, the charge is the prorated hourly wage of the lowest paid employee capable of performing the task. The custodian may waive fees in its discretion and must make a good faith estimate in writing when the cost will exceed ten (\$10) dollars. A custodian may require prepayment of the estimate prior to beginning the process of compiling the records.

13. DO I HAVE TO CREATE A PUBLIC RECORD IF I RECEIVE A VAGUE REQUEST OR THE RECORD SOUGHT DOES NOT ALREADY EXIST?

The requester should provide a reasonable description of the records they seek. If you are not able to identify the records sought, you should tell the requester so. Also, the Public Records law only applies to public records which are in existence and in the custody of the government agency (e.g. COA). The custodian of the record is not required to create records in response to a request.

14. RECOMMENDATIONS ON HOW TO STORE AND SAFEGUARD COA CLIENT PERSONAL RECORDS

Though it is not required by the COA Privacy Law, Elder Affairs recommends that personal client records be stored in a manner in which state agencies and non-municipal state contractors store their client records.

- A. Identify a person who will be responsible for the personal data system who will oversee safeguarding the personal data system;
- B. Develop written procedures based on these rules which will safeguard this information;
- C. Train staff on these procedures;
- D. Take reasonable precautions to protect personal information from the dangers of fire, theft, flood or other physical threat;
- E. In an automated system, maintain records of access and use of personal client information;
- F. Maintain personal data with accuracy, completeness, timeliness, pertinence and relevance;
- G. If requested by the person whose personal information you hold, inform him/her if you hold information about him/her and make it

available to him/her (you may withhold information that may prejudice effective law enforcement);

- H. Allow the individual whose personal information is held to contest the accuracy of that information;
- I. Don't give out personal information without the consent of the person whose information you hold;
- J. If information is sought by subpoena, or other legal means, contact your supervisor or town counsel.
- K. Back up your important files in another secure storage medium and/or place.

I hope this is helpful to you. Legal questions on issues which arise should be addressed to your COA Director, and then to your City or Town's Legal Counsel. Again, the agency which decides the Public Records status of government records is the Secretary of State's Division of Public Records, One Ashburton Place, Room 1719, Boston, MA 02108, 617-772-2832, or on-line at www.state.ma.us/sec/pre .

