

930 CMR: STATE ETHICS COMMISSION

930 CMR 3.00: CONFIDENTIALITY

Section

3.01: Confidentiality of Commission Proceedings

3.02: Disclosures Containing Confidential Information

3.01: Confidentiality of Commission Proceedings

- (1) 930 CMR 3.00 is made pursuant to the authority of M.G.L. c. 268B, § 3(a) and is intended to implement the confidentiality requirements of M.G.L. c. 268B, §§ 3(g), 4(a), (b), and (i), and (7).
- (2) The nature or existence of a preliminary inquiry involving allegations of violations of M.G.L. c. 268A or 268B, or of an initial staff review to determine whether to conduct a preliminary inquiry, shall be kept confidential by members and employees of the Commission.
- (3) Complainants and witnesses who contact, or who have been contacted by, an employee of the Commission, may be requested to keep confidential the nature or existence of a preliminary inquiry involving allegations of violations of M.G.L. c. 268A or 268B, or of an initial staff review to determine whether to conduct a preliminary inquiry, but are not required to comply with such a request.
- (4) If the Commission votes and makes public a finding of reasonable cause and authorization of adjudicatory proceedings in accordance with M.G.L. c. 268B, § 4(c), the participants in the Commission proceeding shall no longer be bound by the requirements of 930 CMR 3.01(2) and (3).
- (5) The identity of a complainant shall be kept confidential by Commission members and employees.
- (6) Notwithstanding the provisions of 930 CMR 3.00, the Commission may provide relevant information concerning a complaint or inquiry to a court or a law enforcement agency. The Commission will inform a complainant when a matter is concluded, and may in its discretion provide information regarding the disposition of a complaint to the complainant, subject to the confidentiality requirements of M.G.L. c. 268B, § 3(g).
- (7) Nothing contained in 930 CMR 3.00 shall be construed to require the subject of a preliminary inquiry or initial staff review to maintain the confidentiality of such proceedings, provided, however, that should the subject make a public disclosure concerning the disposition of an inquiry or staff review by the Commission, the Commission may confirm the existence of the inquiry or staff review and, in its discretion, make public any documents which were issued to the subject or which stated the resolution of the matter.
- (8) Advice given by the Commission's Executive Director, General Counsel, and Legal Division Staff and advisory opinions issued pursuant to M.G.L. c. 268B, § 3(g), shall be confidential, regardless of whether such advice or opinion is written, oral, or electronic, except that:
 - (a) the Commission may publish advisory opinions, but shall redact the name of the requesting person and any other identifying information unless the requesting person consents to the use of his or her name;
 - (b) the requesting person may waive confidentiality and disclose advice he or she received;
 - (c) in the event that the recipient of a Commission advisory opinion, Commission advice in any form (written, oral, or electronic), or private educational communication from the Commission in any form (written, oral, or electronic) materially misrepresents the contents of such opinion, advice, or communication to any person, the Commission, acting through the Executive Director, may disclose the Commission's opinion, advice, or communication, and any documents submitted to the Commission by the recipient of the opinion, advice, or communication, or anyone acting on behalf of the recipient; and

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(d) if an advisory opinion, Commission advice in any form (written, oral, or electronic), or private educational communication from the Commission in any form (written, oral, or electronic) is issued to a person who is subsequently the subject of a preliminary inquiry concerning the same or similar matters, and the Commission votes to find reasonable cause and authorizes adjudicatory proceedings, the opinion, advice, or communication may be disclosed and used as evidence.

(e) Notwithstanding the confidentiality of advice provided by the Executive Director, General Counsel, or Commission staff, a request for such advice, and the giving of such advice, does not create an attorney-client relationship between the requestor and any employee of the Commission.

(9) Memoranda prepared by the Legal Division for the Commission during deliberations in executive sessions mandated by M.G.L. c. 268B, § 4(i) shall remain confidential.

(10) Complaints that Commission members or employees have violated the provisions of M.G.L. c. 268B, §§ 3, 4, or 7 or 930 CMR 3.00 shall be referred to the Attorney General for investigation. Such referral shall not preclude additional sanctions by the Commission.

3.02: Disclosures Containing Confidential Information

(1) M.G.L. c. 268A, 930 CMR 5.00: *Exemptions from M.G.L. c. 268A and M.G.L. c. 268B Related to Gifts*, and 930 CMR 6.00: *Exemptions Unrelated to Gifts* require written disclosures in certain circumstances. These disclosures are public records.

(2) For purposes of 930 CMR 3.02, confidential information is information that is legally required to be kept confidential, or that is protected from disclosure by a legally recognized privilege.

(3) If a disclosure required by M.G.L. c. 268A, 930 CMR 5.00: *Exemptions from M.G.L. c. 268A and M.G.L. c. 268B Related to Gifts*, or 930 CMR 6.00: *Exemptions Unrelated to Gifts* will contain confidential information, the public employee making the disclosure must proceed in one of the following ways:

(a) If the disclosure is required to be made to an appointing authority, then the public employee shall include the confidential information in the disclosure, shall conspicuously mark the disclosure "CONFIDENTIAL", and shall give the disclosure to his or her appointing authority, if the applicable legal requirement of confidentiality or privilege permits doing so. The appointing authority shall maintain the confidentiality of that disclosure. The public employee shall also provide the appointing authority, and any other entity to which the disclosure is required to be given, with a version of the disclosure omitting the confidential information ("redacted disclosure"), conspicuously marked "REDACTED". The redacted disclosure shall be maintained as a public record. If, subsequently, the requirement of confidentiality or the privilege ceases, the unredacted disclosure shall be made publicly available.

(b) If the public employee is a member of a public board, commission, council, or similar entity ("board"), and cannot make a disclosure pursuant to 930 CMR 3.02(3)(a) because the applicable legal requirement of confidentiality or privilege does not permit the confidential information to be shared with the employee's appointing authority or otherwise made public, the following procedure may be used only for disclosures made pursuant to M.G.L. c. 268A, § 23(b)(3). If the applicable legal requirement of confidentiality or privilege permits the board to be given the confidential information, then the public employee shall include the confidential information in the disclosure, shall conspicuously mark the disclosure "CONFIDENTIAL", and shall give the disclosure to the board. The board shall maintain the disclosure as a confidential record. The public employee shall also complete a version of the disclosure omitting the confidential information ("redacted disclosure"), conspicuously marked "REDACTED", and shall file it with his or her appointing authority, or, if elected, shall file it in a manner which is public in nature, such as with the municipal clerk or the Commission. The redacted disclosure shall be maintained as a public record. If, subsequently, the requirement of confidentiality or the privilege ceases, the unredacted disclosure shall be made publicly available.

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(c) If the public employee is unable to make a disclosure pursuant to 930 CMR 3.02(3)(a) or (b) for any reason, including because the public employee has no appointing authority, then the public employee may not take any action that otherwise would be permitted under M.G.L. c. 268A, 930 CMR 5.00, or 930 CMR 6.00 if a disclosure were made.

Example: An assistant district attorney is assigned to work on a grand jury investigation in which a witness is someone he knows from law school, such that the attorney is required to make a disclosure by M.G. L. c. 268A, § 23(b)(3). The attorney prepares two versions of the disclosure: a version containing all the facts, which he gives to his appointing authority, the District Attorney, and a version omitting confidential information, which the District Attorney maintains as a public record. After an indictment has been issued and the grand jury minutes disclosed to the defendant, the unredacted disclosure should be made publicly available.

Example: A state board investigates charges of misconduct by licensed professionals. The board's enabling act requires that board investigations be kept confidential. A witness in a board investigation is a long-time personal friend of a board member, such that, pursuant to M.G.L. c. 268A, § 23(b)(3), the board member is required to make a written disclosure to his appointing authority, the Governor, of his friendship with the witness prior to participating in decisions concerning the investigation, to avoid an appearance that he could be improperly influenced by that friendship. However, the statutory requirement of confidentiality prohibits the board member from disclosing facts about the investigation to the Governor. The board member prepares two versions of the disclosure: a full version, which he shares with the other members of the board, and a redacted version, which he provides to the Governor. Thereafter, the board member may participate in board action concerning the investigation.

Example: A select board will be asked to consider a matter by an applicant. One of the selectmen is an attorney who represents the applicant in an unrelated confidential legal matter. The selectman knows that his client wants his representation of the applicant in the unrelated matter to remain confidential. The selectman is unable to disclose his familiarity with the applicant, as required by M.G.L. c. 268A, § 23(b)(3), because his client's identity is protected by the attorney-client privilege. The selectman also cannot use the procedures set forth in 930 CMR 3.02(a) or (b) because the selectman has no appointing authority, and because he cannot share the fact that the applicant is his client with the other select board members. The selectman is required to abstain from participating in the matter in which the applicant is involved.

REGULATORY AUTHORITY

930 CMR 3.00: M.G.L. c. 268B, § 3(a).

NON-TEXT PAGE