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Dr. John Warner, Chair  
Records Conservation Board  
Secretary of the Commonwealth  
Massachusetts Archives  
220 Morrissey Blvd.  
Boston, MA 02125

Dear Dr. Warner:

I am seeking an opinion from your office as to whether certain documents of the Department of Elementary and Secondary Education (DESE) and its Charter School Office (CSO) that are pertinent to determining whether charter school applicants meet the criteria for eligibility to be granted a charter by the Board of Elementary and Secondary Education (BESE) are public records and therefore should be retained by DESE and CSO.

The records in question are lengthy rubrics that are integral to the evaluation process of charter school applications. DESE has argued that these rubrics are exempt from public records law under M.G.L. c. 4, § 7 (26) (e), commonly referred to as the personal notes exemption.

The CSO's failure to retain evaluation rubrics has come to light because of the controversy surrounding the Gloucester Community Arts Charter School (GCACS). However, the question of record retention is relevant in every charter school approval process.

Before focusing on the rubrics and why I believe they fall outside the personal notes exemption, I would like to give you an overview of the process.

The charter school application review process is conducted in two stages: the prospectus stage and the final stage. A combination of public employees and private citizens are involved as reviewers at both stages of the evaluation process. At both stages, some of the reviewers are DESE employees, including some CSO employees, others are external experts appointed to the review panel by the DESE Commissioner.

During both the prospectus and final review processes, reviewers assess whether the charter school proposal meets certain criteria and at the end of each process, the CSO makes a recommendation to the DESE Commissioner. Charter school regulations 603 CMR 1.0 *et. seq.* provide that at the end of the prospectus review stage, the DESE Commissioner decides which applicants will be selected to move to the final application stage. During the final stage, DESE must assure that the applicant meets certain specified criteria. Per the process, established by the 2008-2009 Application, “the [DESE] commissioner will not recommend that the Board award charters to applicant groups whose applications do not meet the stated criteria for a charter in the application, as corroborated in the final interview of the applicant group by the Charter School Office.”

Per the process, the DESE commissioner receives the CSO determination and then recommends a course of action on the charter to the Board of Elementary and Secondary Education (BESE). If the DESE commissioner recommends approval, the BESE then votes to grant a charter or not. The CSO staff who reviewed the GCACS application at both the prospectus and final application review stages were: CSO Director Mary Street, CSO New Schools Development Coordinator Ruth Hersh, Barry Barnett, and Emily Lichtenstein.

### Prospectus Stage

The internal and external prospectus reviewers complete a 20-page rubric at the prospectus stage which constitutes a detailed inquiry into each criterion that the applicant must meet. At this stage, the CSO collects all the completed rubrics, including those of the CSO employees, according to the written application instructions and interviews with CSO officials.

After reviewing the prospectuses, questions and concerns that were raised, the CSO culls from the prospectus rubrics numbers to create a tally sheet that documents the overall strength of the application proposal against the criteria it is being measured against; and also creates a document with some but not all of the reviewer’s comments culled from the prospectus stage rubrics. Then the CSO makes a recommendation to the DESE Commissioner of which applicant groups should move on to the final application stage. The DESE Commissioner then makes his decision and communicates in writing to all applicants and invitations are issued to those chosen to move into the final application stage.

### Final Review Stage

The internal and external reviewers of the finalist applicants also complete a Review Sheet/Rubric. This Final Review Sheet/Rubric is 29-pages long. The rubrics are organized by sections. The scoring requires the reviewer to mark the rubric as to whether the applicant does not address the criteria, partially addresses the criteria,

addresses the criteria or exceeds the criteria. The rubric provides a space for the reviewer to explain what factors influenced his assessment.

According to the instructions as well as testimony of DESE officials, the review sheets/rubrics of the external and internal reviewers are turned in to the CSO at the prospectus stage. At the final application stage, the instructions state, “. . . copies of both the final application and the review sheets remain in your possession and are not returned to the Charter School Office.”

During the final application stage, internal and external reviewers meet to discuss the application and formulate questions that CSO employees will ask the applicant groups during subsequent interviews. After this meeting, external reviewers are no longer a part of the process, but CSO reviewers continue. Presumably, each reviewer – internal and external – left the meeting with his completed Final Review Sheet/Rubrics.

At the review panel meeting to discuss the GCACS, CSO's New Schools Development Coordinator Ruth Hersh took the official discussion notes. The CSO later used those discussion notes to generate questions for the next step in the process, an interview with the applicant group.

Following the interview, the CSO continues its assessment of whether the charter school applicant has met the criteria. In the case of GCACS, the CSO staff ultimately reached the conclusion that GCACS had not met 13 of the 103 application criteria. Given that the CSO's written recommendation used the exact nomenclature of the Final Review Sheet/Rubrics, the CSO's contention that its staffers did not use the Final Review Sheet/Rubrics to draft the recommendation strains credulity.

The utility of the Final Review Sheet/Rubrics does not culminate in the formulation of questions for an interview with the applicant. These rubrics contain the assessments and judgments of the same CSO employees that have to make a determination after the interview to corroborate that an application fully meets the criteria established by the BESE. As I stated in a letter dated January 2, 2010 to Senator Bruce E. Tarr and state Representative Ann-Margaret Ferrante, “These records provide accountability and transparency for a determination about whether the applicant met the stated criteria.” Pursuant to the regulation, meeting the criteria is the minimum requirement for a determination as to whether the Commissioner can recommend to the BESE to grant a charter to the applicant group.

This office requested, pursuant to M.G.L. c.12A, all documents referencing the review, analysis, and consideration of the GCACS application including but not limited to documents from or to DESE employees, external reviewers, Commissioner Mitchel D. Chester, or Secretary Paul Reville. After several requests, the DESE finally provided this office with the prospectus stage rubric for a single CSO employee, Barry Barnett, and the final application stage rubric for Ms. Hersh.

DESE officials told this office that the rubrics completed by the internal and external reviewers are later discarded by the CSO. The DESE indicated that it was an anomaly that Mr. Barnett kept this document. In providing Ms. Hersh's Final Review Sheet/Rubric, DESE maintained that it was her personal possession – not a public record.

I am seeking a determination about whether either the prospectus stage rubrics or the final stage rubrics fall under the narrow personal notes exemption at M.G.L. c. 4 §7 (26) (e). I believe they do not.

“A Guide to the Massachusetts Public Records Law”, published by the Secretary of the Commonwealth and Updated March 2009, stresses that “The application of Exemption (e) is limited to records that are work-related but can be characterized as personal to an employee. Materials covered by the exemption include personal reflections on work-related activities and notes created by an employee to assist him in preparing reports for other employees or for the files of the governmental entity. The exemption may not be used to withhold any materials that are shared with other employees or are being maintained as part of the files of a governmental unit.”

Both the prospectus and final stage rubrics are structured checklists addressing specific criteria required by the charter school application review process. Many of the criteria are subjective. For instance, in analyzing the applicant's mission statement, reviewers are asked, “Does the mission statement define succinctly the purpose and values of the school?” In answering the question, reviewers pick among four answers: Does Not Address, Partially Addresses; Addresses Criteria, and Exceeds Criteria. They are then asked to add context by answering the question, “What factors influenced your assessment?” While such open-ended questions may require the reviewer to draw on personal knowledge, they do not transform the rubrics into “personal reflections.”

We are seeking your opinion as to what documents are necessary to be maintained as public records in order to fulfill this public purpose of full transparency of the charter school evaluation process.

I have included documents electronically that may serve as a foundation to inform your office's opinion. Specifically, included are:

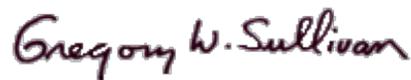
1. The legal authority, M.G.L. c.71, §89 (f) and 603 CMR 1.00 et seq, for the charter school application and review process.
2. A document entitled, 2008-2009 Prospectus and Final Application Reviewers. This document identifies the names of individuals (public employees and others) who served as charter school application reviewers for the 2008-2009 charter school application cycle.
3. A document entitled, Charter Application Review Process and Criteria for Review. This document was distributed to the list of individuals who served

as reviewers at the "Prospectus Review" and "Final Application Review" stages. It outlines the review process and criteria. The document states: "Teams of reviewers read the prospectuses and final charter applications thoroughly, using a rubric to guide their work. At the prospectus stage, Charter School Office staff incorporated the written review of the external reviewers into their discussion and evaluation of each prospectus."

4. A document entitled, Instructions Prospectus Review/Rubric. This document categorizes the criteria on a scoring sheet for detailed completion by the individual reviewers (public employees and others) at the prospectus stage. It was completed and retained by CSO staff member Barry Barnett.
5. A document labeled Gloucester complied review 9/19/08. This is the prospectus rubric for the Gloucester Community Arts Charter School incorporating information from all reviewers.
6. A document in memo form dated November 14, 2008 and addressed to Final Application Reviewers Re: Instructions for Final Application Review and Review Panel Discussion Information. This document instructs reviewers that their input will be used when formulating questions for the applicant group during their interview. It also states that "the review sheets remain in your possession and are not returned to the Charter School Office."
7. A document entitled, Review Sheet/Rubric Charter School Prospectus 2008-2009 belonging to the CSO's New Schools Development Coordinator, Ruth Hersh. This is the completed Final Application rubric. Ms. Hersh is responsible for culling the information as to whether the applicant group met the criteria and writing the report of the process for the CSO.
8. A document entitled, Charter School Recommendations – Application Cycle 2008-2009, which summarizes the reviews of GCACS and two other charter school applicants.

I would be happy to meet with you to further discuss this material or other related aspect of this matter.

Sincerely,



Gregory W. Sullivan  
Inspector General

cc: Mr. Alan Cote, Supervisor Public Records