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May 25, 2010

Members of the Records Conservation Board

Dear Board Members:

Thank you for the opportunity to come before the Board last March regarding the Department of Elementary and Secondary Education's (DESE) retention of records per DESE's Program to review and approve applications for new public charter schools. This office is seeking the Board's determination that four categories of Program documents constitute either Program Development and Review records pursuant to Section A1 (7) or Program Administration records pursuant to Section A5 (5). The documents in these categories taken together constitute important parts of the record of the evaluation process undertaken by DESE's Charter School Office to determine whether charter school applicants meet the Program criteria in order to be authorized by the Board of Elementary and Secondary Education to become a Massachusetts Commonwealth Charter School.

The four categories of documents are outlined in the attached chart. Specifically, they include:

1. Rubrics/criteria review documents completed by DESE employees at the Prospectus review stage.
2. Rubrics/criteria review documents completed by DESE's chosen external reviewers at the Prospectus review stage.
3. Rubrics/criteria review completed by DESE employees at the Final Application review stage.
4. Rubrics/criteria Review completed by DESE's chosen external reviewers at the Final Application review stage.

As you may know, the Office of the Inspector General is charged by statute to prevent and detect fraud, waste and abuse in government spending. The Ward Commission explained our role in government this way:

The basic concept behind the Office of the Inspector General is that any institution, a corporation, university, let alone the institution of government, must build into itself a mechanism for self-criticism and self correction.

Our review of DESE's Program for the 2008 – 2009 charter granting process led us to conclude that DESE's Program criteria were set aside by DESE and that politics drove the decision-making process that concluded when DESE granted a charter in contravention of the Program's rules. The reason we have brought this request to the Board is because when we used the authority of the Office of the Inspector General to request and receive all Program records supporting the applicant evaluation process, DESE informed this office that it has not been its practice to retain the records and, in fact, the Program documents had been destroyed. Retaining the records in accordance with a retention schedule and file plan provides the DESE and any other oversight entity, such as the Office of the Inspector General, with the only means available to verify the integrity of the Program's charter granting process.

The records above are lengthy evaluation review sheets/rubrics completed by employees and other evaluators that DESE invites to assist it to review the applications. The records are integral for oversight agencies to assess whether DESE's recommendation as to whether to grant a charter or not was based on objective information and whether the process was conducted fairly, and in accordance with the law, regulations and procedures.

In interviews with this office, DESE officials informed us that it is their practice not to retain the Prospectus or Final Application stage rubrics/criteria review sheets. Nevertheless, when directly requested by my office, DESE produced certain rubrics/criteria review sheets. It is this office's belief that for this and for other annual cycles of the charter granting process, records exist in electronic or written format in the files of reviewers. I am bringing this matter to the Board in order to preserve and protect any and all existing documents.

In recent correspondence with my office, and as specified in its newly adopted procedures, the DESE, through its General Counsel, acknowledged that the rubrics/criteria review sheets of the Prospectus stage are records of state government. As we explained at our appearance before the Board last March, the DESE had informed us that it has been its previous policy to authorize that the Prospectus stage rubrics/criteria review sheets and the Final Application stage rubrics/criteria review sheets be destroyed.

We are therefore seeking that the Board rule that the evaluator's rubrics/criteria review sheets for both stages of the evaluation process, and including all written notes of evaluators, be deemed Program records of state government. The same principles regarding access to and retention of records for purposes of Program oversight should prevail with regard to DESE's new (April 2010) Program procedures as well.

For each of the four categories we are seeking the Board's separate determination that these are either A1 (7) Program Development and Review records i.e. records that document the accreditation process relating to a Commonwealth Charter school and which includes background support materials, guidelines, procedures and accreditation review reports and responses; or, A1 (5) Program Administration Records i.e. work product made by an employee . . . to serve a public purpose.

Category 1: These rubrics/criteria review sheets at the Prospectus review stage are completed by DESE employees. These documents are initially collected by DESE. They are used by DESE to assess criteria in formulating its recommendation as to whether the applicant advances or not to the final round of application review. It was DESE's practice during the 2009 -2010 cycle not to retain these documents. It is the opinion of this Office that this category of documents is a record of state government and should be retained in accordance with the statewide retention schedule. The Inspector General seeks the Board's determination so that any still-existing records from the 2008-2009 cycle, and previous and subsequent cycles, are retained.

Category 2: These rubrics/criteria review sheets at the Prospectus review stage are completed by individuals that DESE invites to assist it in evaluating whether the charter school applicants have met the Program criteria. These documents are initially collected by DESE. They are used by DESE to assess criteria in formulating its recommendation as to whether the applicant advances or not the final round of application review. It was DESE's practice during the 2009-2010 cycle not to retain these documents. It is the opinion of this Office that the completed rubrics/review sheets are a record of state government and should be retained in accordance with the statewide retention schedule. The Inspector General seeks the Board's determination so that any still-existing records from the 2008-2009 cycle, and previous and subsequent cycles, are retained.

Category 3: These rubrics/criteria review sheets at the Final Application review stage are completed by DESE employees to assist it in evaluating whether the charter school applicants have met the final stage Program criteria. The instructions for these sheets state that they will remain in the possession of the reviewer. DESE uses the information to formulate questions for applicant interviews and, to assess whether the charter applicant met all the Program criteria. It was DESE's practice during the 2009-2010 cycle not to retain these documents. It is the opinion of this office that the completed rubrics/review sheets are a record of state government and should be retained in accordance with the statewide retention schedule. The Inspector General seeks the Board's determination so that any still-existing records from the 2008-2009 cycle, and previous and subsequent cycles, are retained.

Category 4: These rubrics/criteria sheets at the Final review stage are completed by individuals that DESE invites to assist it in evaluating whether the charter school applicants have met the final stage Program criteria. The instructions for these sheets state that they will remain in the possession of the reviewer. DESE uses the

information to formulate questions for applicant interviews and to assess whether the charter applicant met all the Program criteria. These documents are made by individuals not employed by the Commonwealth. It was DESE's practice during the 2009-2010 cycle not to retain these documents. It is the opinion of this office that the completed rubrics/review sheets are a record of state government and should be retained in accordance with the statewide retention schedule. The Inspector General seeks the Board's determination so that any still-existing records from the 2008-2009 cycle, and previous and subsequent cycles, are retained.

With respect to the documents in category four, we wish to present some additional information for your consideration. Treating external reviewers' review materials as records of state government is consistent with best practices guidance issued by the Commonwealth's Operational Services Division (OSD). The OSD acknowledges that "[t]he evaluation process is a critical aspect of the RFR process." *How to Do a Competitive Procurement* (11/1/05, revised 8/13/07), p.16. When the OSD uses external reviewers to evaluate procurement proposals, it recommends that the inquiry and all related information be included as part of the documentation of the procurement. "It is advisable that the nature of the inquiry and other relevant information be documented in the procurement file" which would typically include any "[w]ritten summary of the evaluation process, completed evaluation forms and any minutes or notes from evaluation committee meetings." *Id.* at pp. 5-6, These would include whatever is necessary to document the evaluation process, "including scoring sheets, list of reviewers, written comments or written reports summarizing the evaluation process, rankings of responses and selection recommendations." *Id.* at 16.

External evaluators' rubrics/criteria review sheets should also be considered records of state government because the evaluators are acting solely in a public capacity. Moreover, the effect of their decisions could result in significant public expenditure. External evaluators meet all the elements of the public instrumentality test found in *Globe Newspaper Company et al. v. MBTA Retirement Board et al.*, 416 Mass. 1007 (1993) and *MBTA Retirement Board et al. v. State Ethics Commission et al.*, 414 Mass. 582 (1993). In that case, a newspaper sought a ruling that the MBTA Retirement Board was a public agency subject to the Commonwealth's public records law. Admittedly, the test was not created for individuals but the factors created to assist with a determination are relevant to the question of whether documents created by individuals performing services related to a public purpose. The factors are:

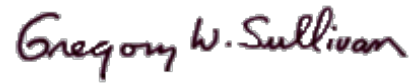
- (1) the means by which the entity was created;
- (2) whether the entity performs some "essentially governmental function";
- (3) whether the entity receives or expends public funds;
- (4) the involvement of private interests; and,
- (5) the extent to which the government controls or supervises the entity.

Inasmuch as this category of evaluators are convened by the DESE; they fulfill a governmental function by assisting DESE to decide whether charter applicants meet the Program criteria; their decisions affect the allocation of public funds; there is no private

interest involved; and they work under the direction of the DESE, it is this office's opinion that they function as representatives of the public interest.

I would be glad to answer any questions that you may have.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive style with a prominent "G" and "S".

Gregory W. Sullivan  
Inspector General

attachment

DESE/DOE employees

External Reviewers

Prospectus Stage Rubrics/  
Criteria Review

Category 1 - Prospectus Stage Rubrics/Criteria Review completed by DESE/DOE employees

- \* Completed by DESE/DOE employees, including Charter School Office (CSO) Director and New Schools Development Coordinator;
- \* Collected by DESE Charter School Office;
- \* Used by CSO in formulating CSO's recommendation to Commissioner of whether applicant charter school should advance to final round;

IG opinion: Category 1 documents are A1(7) Accreditation Records; i.e., "Documents the accreditation process relating to an agency's program or programs as required by federal or state statute, or other body. Includes background support materials, accrediting agency correspondence, guidelines, reports, procedures, and accreditation review reports and responses" or A5(5) Program Administration Records; i.e., "work product made by an employee . . . to serve a public purpose"

Category 2 - Prospectus Stage Rubrics/Criteria Review completed by external reviewers

- \* Completed by external reviewers;
- \* Collected by DESE Charter School Office;
- \* Used by CSO in formulating CSO's recommendation to Commissioner of whether applicant charter school should advance to final round;

IG opinion: Category 2 documents are A1(7) Accreditation Records; i.e., "Documents the accreditation process relating to an agency's program or programs as required by federal or state statute, or other body. Includes background support materials, accrediting agency correspondence, guidelines, reports, procedures, and accreditation review reports and responses" or A5(5) Program Administration Records; i.e., "work product made by an employee . . . to serve a public purpose"

Final Stage Rubrics/  
Criteria Review

Category 3 - Final Stage Rubrics/Criteria Review completed by DESE/DOE employees

- \* Completed by DESE employees, including CSO Director and New Schools Development Coordinator;
- \* Used by Charter School Office to assess criteria in formulating questions for interviews of charter school finalists;
- \* Used by CSO in the process of recommending whether charter applicant "meets the criteria for the final application."

IG opinion: Category 3 documents are A1(7) Accreditation Records; i.e., "Documents the accreditation process relating to an agency's program or programs as required by federal or state statute, or other body. Includes background support materials, accrediting agency correspondence, guidelines, reports, procedures, and accreditation review reports and responses" or A5(5) Program Administration Records; i.e., "work product made by an employee . . . to serve a public purpose."

Category 4 - Final Stage Rubrics/Criteria Review completed by external reviewers

- \* Completed by external reviewers;
- \* Instructions: "Review Sheets remain in your possession and are not returned to the Charter School Office."
- \* Used during process whereby CSO assesses criteria in formulating questions for interviews of charter school finalists;
- \* Used during process whereby CSO recommends whether charter applicant "meets the criteria for the final application."

IG opinion: Category 4 documents are A1(7) Accreditation Records; i.e., "Documents the accreditation process relating to an agency's program or programs as required by federal or state statute, or other body. Includes background support materials, accrediting agency correspondence, guidelines, reports, procedures, and accreditation review reports and responses" or A5(5) Program Administration Records; i.e., "work product made by an employee . . . to serve a public purpose."