



# Guidelines on Public Records

## Massachusetts Commission Against Discrimination

September 14, 2018



As the chief civil rights agency of the Commonwealth of Massachusetts, the Massachusetts Commission Against Discrimination (“MCAD” or “Commission”) is charged with investigating, prosecuting, adjudicating, and remedying complaints of discrimination. MCAD’s mission is to eradicate discrimination in Massachusetts. See, M.G.L. c. 151B. MCAD proceedings are civil enforcement proceedings, but resemble criminal prosecutions in some important respects. Among these are (1) the undertaking of an investigation culminating in a formal charge and complaint, and (2) the initiation of a public hearing to adjudicate the charge and remedy unlawful acts.

The nature of the matters handled by the MCAD requires that highly-sensitive personal information and allegations routinely come into the Commission’s possession in the course of an investigation. For example, complainants alleging disability discrimination routinely provide particulars about the status of their health and impairments, including the medical condition(s) causing the disability. A complainant alleging sexual harassment in employment may detail specific acts that an alleged harasser involuntarily compelled a complainant to perform, some of which may also be in violation of criminal statutes. A victim of sexual-orientation discrimination who files a complaint may want to avoid publication of his/her sexual orientation or identity. In the course of the Commission’s investigations and public hearings, it often receives copies of sensitive documents such as medical records, personnel files, and personal financial documents. We also conduct interviews with witnesses, confidential informants, and others. In its Investigative Dispositions (investigative reports) and other Orders disclosed to the public, the Commission endeavors to identify these witnesses by means other than name to protect them from potential retaliation for cooperating with the Commission’s investigation. However, parties frequently identify witnesses by name in their submissions to the Commission. In all of these circumstances, private information may be subject to inadvertent disclosure unless the information is safe-guarded.

The release of all information regarding allegations of discrimination risks a chilling effect on complainants and witnesses, as well as unintended and unwarranted damage to respondents’ reputations and goodwill. Such a release may also prejudice and compromise the integrity of the Commission’s investigation. Similarly, the premature release or publication of mere allegations against potential respondents which are not well-founded may compromise the Commission’s goal to eradicate discrimination and impair its credibility and integrity as a neutral and unbiased entity. While the Investigating Commissioner may eventually determine that there is lack of probable cause for a finding of discrimination, publicizing the allegations prematurely could blunt the impact of the Commissioner’s ultimate findings in matters based upon well-founded allegations. Likewise, the public release of information regarding the participation of witnesses and confidential informants in MCAD investigations may place them at risk of retaliation for engaging in protected activity. In turn, deterring complainant and witness participation in investigations undermines the MCAD’s ability to accomplish its mission of eradicating discrimination throughout the Commonwealth. The Commission is also required by M.G.L. c. 151B §5 to keep its investigations confidential, a signal that the legislature recognized these risks when enacting the anti-discrimination statute.

Although the Commission makes reasonable efforts to protect the information which comes into its possession in the course of its investigations, it remains a public agency that supports transparency in government. The Commissioners appreciate that “sunlight” is the best “disinfectant” for preventing and eliminating fraud, waste, abuse, and corruption in government. The Massachusetts Public Records Act was

adopted in 1973, as one of the key government reform measures enacted in response to Watergate-era corruption. We believe that the law has served a valuable purpose in this regard and will continue to do so. Our goal is to preserve the balance the law strikes between transparency in government and privacy regarding sensitive and confidential personal information revealed in discrimination cases.

Advancements in technology since enactment of the Public Records Act have enhanced the ease and speed with which electronic data is transferred and has improved the accessibility to public records, making it easier for all members of the public, for whatever reason, to review government records. Hence, the existence of confidential and sensitive information in the Commission's possession can more readily be broadcast through electronic data transfer. Recognizing this heightened risk to the confidentiality of MCAD investigative materials, the Commissioners and General Counsel have undertaken a review of the Commission's policies and practices with respect to public records requests. The guidelines outlined below represent the current policy of the MCAD in responding to public records requests.<sup>1</sup> This policy recognizes that the heightened confidentiality concerns described above may vary depending upon the stage of the case and investigation. Accordingly, any request for case information will be evaluated based upon the stage of the case.

The following guidelines summarize how the law pertaining to public records requests will be applied at the Commission.

#### Categories of Public Records Maintained by and Available From the Commission

When determining what is public information, the MCAD differentiates between the parties to a complaint (Complainant and Respondent), and persons not associated with the complaint (i.e. the general public). The following categories of public records are maintained by the Commission, and available to the public depending upon the circumstances described below<sup>2</sup>:

- The Charge of Discrimination—the initial complaint filed by the Complainant
- The Investigative Disposition—the determination of the Investigating Commissioner upon completion of the investigation as to whether a fact-finder could form a reasonable belief based on the allegations of the Charge that it is more probable than not that an unlawful practice was committed.
- Investigative File—certain non-privileged and other records from the investigation maintained by the agency after issuance of the Investigative Disposition
- Hearing Records—certain non-privileged records contained in the Public Hearing files, as well as certain records contained in the Full Commission files maintained if a party appeals a Public Hearing decision to the Full Commission.

#### **1. Documents Available to the General Public:**

- Charge of Discrimination – the Charge may be made available to the general public after an Investigative Disposition has been issued by the Investigating Commissioner.
- Investigative Disposition – The Investigative Disposition may be made available to the general public after it has been issued by the Investigating Commissioner.

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<sup>1</sup> These Guidelines are also issued to comply with the requirements of M.G.L.c.66 §6(A) and 950 CMR 32.00, effective January 1, 2017.

<sup>2</sup> Certain records other than case information are also available to the public and available on our website, including, statutes and regulations, annual reports, press releases, fact sheets, guidelines, and posters.

- **Hearing Records** – Records contained in Public Hearing Files and Full Commission Files, excluding any documents exempt from disclosure, may be made available to the general public after the Public Hearing and/or issuance of a Full Commission Decision.

## **2. Documents Only Available to the Parties to a Charge:**

The parties to a charge shall have greater access to documents contained in a MCAD complaint file than the general public. If a complaint is still under investigation, the parties will not have access to the file. After an Investigative Disposition, the parties to a complaint may review the records contained in the investigative file, with the exception of privileged and other non-public documents as described below.

### Documents Not Available to the Public

Certain Commission documents are not available to the public, including both the general public and the parties to a Charge. The documents which are not available include:

- **Investigative and Legal Notes** – Investigative work product and legal notes protected by the attorney-work product doctrine, attorney-client privilege, and deliberative process privilege, shall not be released.
- **Privileged Information** – Information protected by the attorney-work product doctrine, attorney-client privilege, and deliberative process privilege shall not be released.
- **Records under Protective Order** – Any record that has been placed under protective order by the Commission shall be exempt from disclosure.
- **Complaints Processed under a Pseudonym** – Only the “Jane Doe” version of records as permitted above are provided to the public.
- **MCAD Database Information** – The MCAD maintains a Case Management System (CMS) database in order to assist in the administration and prosecution of its cases. The only information available for disclosure from a database search is information that would be found eligible for public disclosure from a complaint file. With the exception of information which is required to be produced to the Massachusetts Legislature, the Commission generally will not release information from the CMS database regarding open cases.

### How to Request and Obtain Documents

- 1. Requesting a Public Record.** Requests for public records should be made in writing. While oral requests are permitted when made to the records access officer (RAO), the Commission prefers to receive requests in writing in order to ensure a timely response. Telephone requests are not accepted. The written request may delivered by hand or via first class mail, electronic mail, or facsimile, to the Commission’s Records Access Officer (RAO) at the following address:

Theresa Lepore  
Records Access Officer (RAO)  
Massachusetts Commission Against Discrimination  
One Ashburton Place, Room 601  
Boston, MA 02108

Email [cadrao@state.ma.us](mailto:cadrao@state.ma.us)  
Business Telephone Number: (617) 994-6039  
Fax: (617) 994-6161

For persons wishing to fill out public records requests in person at the Commission, forms for Public Records Requests and a party's Request to Review File are available at the Commission's Reception Desk. Please note that the Commission may not be able to produce the public records at the time the form(s) are filled out in person absent reasonable advance notice.

2. **Evaluation of Request.** Upon receiving a request for information, the RAO will determine which records are being requested and if the records can be disclosed to the requestor.<sup>3</sup>
3. **Response to Request.** The Commission will permit all public records to be inspected or copied by the requestor during regular business hours at reasonable times and without unreasonable delay. The Commission will permit inspection or furnish a copy of a public record no later than 10 business days following receipt of the request,<sup>4</sup> provided that: (1) the request reasonably describes the record sought; (2) the public record is within the possession, custody or control of the agency; and (3) the RAO receives payment of a reasonable fee.<sup>5</sup>
4. **Format of Records Produced.** To the extent feasible, the Commission will provide the records to the requestor by electronic means, unless the record is not available in electronic form, or the requestor does not have the ability to receive or access the records in electronic form.<sup>6</sup> If the record is available on a public website, the RAO may furnish the record by providing the requestor reasonable assistance in locating the record on the website.

#### Fees for Production of Public Records

The Commission may assess a "reasonable fee" for production of a public record, except for those records which are freely available for public inspection, such as documents on its website. Fees for public records may be assessed as follows:

1. **Storage devices or materials:** the Commission may charge the requestor for the actual cost of the device or materials on which the public records are produced.

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<sup>3</sup> If the Commission denies a public records request, or if it is unable to provide the records requested within the required time frame, it will inform the requestor in writing by email or first class mail not later than 10 business days after receipt of the request. The requestor has the right to file an appeal of the decision with the Secretary of State's Supervisor of Records (SOR) and seek judicial review with the superior court.

<sup>4</sup> In certain circumstances, the Commission may request additional time to respond to the request from the SOR.

<sup>5</sup> For further information on fees, please see section on "Fees for Production of Public Documents."

<sup>6</sup> Upon request to the RAO, the requestor may receive the records in hand, by mail, by facsimile, or electronically. As an alternative to obtaining copies of the records, the requestor is permitted, to the extent feasible, to view and inspect the records prior to obtaining copies, or to use a personal device such as a camera or portable scanner to copy the records.

2. **Standard black and white paper copies or computer printouts** (both single and double-sided black and white copies or printouts): 5 cents per page.
3. **Employee time:** If the agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce a requested record, the agency will charge an hourly rate equal to or less than the hourly rate of the lowest paid employee who has the necessary skill required to respond to the request. However, that hourly rate will not exceed \$25 per hour.
4. **Postage:** If the agency is requested to mail the records, the agency will assess the actual cost of postage to mail copies of the records.