MASSACHUSETTS PEACE OFFICER STANDARDS & TRAINING COMMISSION

December 8, 2022

In accordance with Sections 18-25 of Chapter 30A of the Massachusetts General Laws and Chapter 20 of the Acts of 2021, as amended by Chapter 22 of the Acts of 2022, and by Chapter 107 of the Acts of 2022, notice is hereby given of a meeting of the Peace Officer Standards and Training Commission. The meeting will take place as noted below.

NOTICE OF MEETING AND AGENDA
Public Meeting #31
December 13, 2022
8:30 a.m.
Remote Participation via Zoom
Meeting ID: 912 3887 0216

1) Call to Order

2) Approval of Minutes
   a. November 22, 2022

3) Executive Director Report – Enrique Zuniga
   a. Suspensions
   b. Staffing Update

4) Regulations Update – General Counsel Ravitz
   a. Proposed draft regulations re: Regulatory Action and Advisory Opinions
   b. Hearing update re: Regulations on Databases and Dissemination of Information (555 CMR 8.00)
   c. Hearing update re: Regulations on Specialized Certification of School Resource Officers (555 CMR 10.00)

5) General Counsel Update – General Counsel Ravitz
   a. Proposed policy on designation of hearing officers for adjudicatory hearings
   b. Definition of "Conviction" for the purposes of G.L. c. 6E, § 1 and treatment of continuances without a finding

100 Cambridge Street, 14th Floor
Boston, Massachusetts 02114
TEL: 617.701.8401
mass.gov/orgs/post-commission

6) Process for the Evaluation of the Executive Director – Chair Margaret Hinkle

7) Matters not anticipated by the Chair at the time of posting

8) Executive Session in accordance with the following:

- M.G.L. c. 30A, § 21(a)(5), in anticipation of discussion regarding the investigation of charges of criminal misconduct;
- M.G.L. c. 30A, § 21(a)(7), combined with M.G.L. c. 6E, § 8(c)(2), and to the extent they may be applicable, M.G.L. c. 6, §§ 168 and 178, in anticipation of discussion regarding the initiation of preliminary inquiries and initial staff review related to the same, and regarding certain criminal offender record information; and
- M.G.L. c. 30A, § 21(a)(7), combined with M.G.L. c. 30A, §§ 22(f) and (g), in anticipation of discussion and approval of the minutes of a prior Executive Session.

a. Division of Standards request approval of conducting Preliminary Inquiries in the following cases:
   i) PI-2022-12-13-001
   ii) PI-2022-12-13-002
   iii) PI-2022-12-13-003
   iv) PI-2022-12-13-004
   v) PI-2022-12-13-005
   vi) PI-2022-12-13-006

b. Approval of the minutes of the Executive Session of 11/22/22

2a.

PEACE OFFICER STANDARDS & TRAINING COMMISSION

PUBLIC MEETING MINUTES

November 22, 2022
8:30 AM
Remote Participation

Documents Distributed in Advance of Meeting:

- Public Meeting Minutes of October 13, 2022 (Proposed)
- Executive Director's Report Presentation
- Regulations 555 CMR 9.00: Initial Certification of Officers; And Initial or Renewed Certification of Independently Applying Officers, Including Constables (Proposed)
- Proposal for the Authorization to Publish List of Certified Officers on the Commission's Website
- Proposal for the Delegation of Authority to Issue Certain Suspensions of Certification

In Attendance:

- Chair Margaret R. Hinkle
- Commissioner Hanya H. Bluestone
- Commissioner Lawrence Calderone
- Commissioner Clementina Chéry
- Commissioner Larry Ellison
- Commissioner Marsha V. Kazarosian
- Commissioner Charlene D. Luma
- Commissioner Kimberly P. West
- Commissioner Michael J. Wynn

1. **Call to Order**

    - The Chair recognized a quorum and called the meeting to order.

2. **Approval of Minutes**

    - Commissioner Kazarosian moved to approve the minutes of the October 13, 2022 meeting. Commissioner Chéry seconded the motion.
    - The Chair took a roll call vote, and the Commissioners voted as follows:
        - Commissioner Bluestone - Yes
        - Commissioner Calderone - Yes
        - Commissioner Chéry - Yes
        - Commissioner Ellison - Yes
        - Commissioner Kazarosian - Yes
        - Commissioner Luma - Yes
        - Commissioner West - Yes

- Commissioner Wynn - Yes
- Chair Hinkle - Yes

- The Commissioners unanimously approved the minutes of the October 13, 2022 public meeting.

3. Executive Director Report – Executive Director Enrique A. Zuniga

a. Officer Recertification Update (A-H) – Executive Director Zuniga

- Executive Director Zuniga reported as follows.
  - The Commission continues to make progress with certification of new graduates and recertification of individuals with last names beginning with A-H.
  - The first level of review of those with a negative attestation during the recertification process is with the Division of Certification; the second level of review is a meeting with Executive Director; and the third level of review will eventually be before the Commission or a hearing officer, as the Chair decides.
  - The Division of Certification will classify individuals out on leave as not certified—on leave and then will conditionally certify them for 90 days after they return to duty.
  - As of November 16, 2022, 8,846 officers have submitted applications for recertification. Of those officers, 8,322 have been recertified; 269 have been conditionally recertified; and 243 were not certified (these numbers include the following categories: 133 who were out on leave; 63 who failed the Bridge Academy; 21 who retired or resigned; and 26 who have faced a disciplinary matter). The category of further review has been phased out, and there has been added a potential inquiry/hearing/suspension category of 12. Last month, there were 44 officers with validation errors, with a few involving duplicate applications.
- Commissioner Bluestone asked for clarification on the potential inquiry language in relation to Executive Director review.
- Executive Director Zuniga emphasized that the potential inquiry category is not yet final but continues to go through the pipeline and he did want to assume the result. A potential inquiry is handled by the Division of Standards.
- Commissioner Ellison asked if notifications have gone out to the 12 individuals in the potential inquiry/hearing/suspension category and what the timeline is for them to respond.
- Executive Director Zuniga answered that they have not been notified yet, as they will be seeking approval from the Commission for that designation. If it is approved, they will be notified as soon as practical. He stated that there is a 60-day timeframe for the Commission to conduct a preliminary inquiry and asked General Counsel Ravitz whether that was correct. General Counsel Ravitz stated yes, adding that there was a period of time within which a report needs to be made, so that would be 60 days.
- Commissioner Ellison asked whether a Department or an officer has the burden to notify the Commission when an officer returns from injury or other leave.

- Executive Director Zuniga answered that the staff prefers notification from the Department but can also accept notification from the officers themselves.
- Commissioner Ellison indicated that notification from the Department is a better protocol to align the start times for return.

b. Web-based Public Complaint Form

- Executive Director Zuniga provided an overview of the web-based public complaint form, which is now live, and explained the content, including required fields. Also, he explained that there is a reporting tab for law enforcement agencies.
- Chair Hinkle asked about the basis for permitting anonymity as to the person making the complaint.
- Executive Director Zuniga answered that the Commission stipulates in its regulations that the Commission will accept anonymous complaints so long as there is a basis for investigating them. Also, the forms allow for people to submit complaints on behalf of others.
- Commissioner West pointed out that there are ways to allow people to submit a complaint and obtain contact information, with anonymity, such as via a third party like a lawyer who might submit the complaint on the person's behalf.
- Executive Director Zuniga indicated that the staff can make the field required or look for alternatives, if the Commission determines that is necessary.
- Commissioner Bluestone pointed out that the Commission should plan on how to respond to individuals presenting complaints in a disrespectful or threatening manner. The Commission needs to think about how to manage those situations, she said.
- Commissioner Chéry asked what the timeline is from when a public complaint is submitted to the point when the Commission responds to it.
- Executive Director Zuniga answered that it is a fairly quick turnaround. The person who submits a complaint receives an immediate message that the complaint was received or that a field was missing. There is coordination with the law enforcement agencies. There is direct follow-up with individuals, but more resources will be needed to accommodate the number of complaints. The Commission has good coordination with law enforcement agencies.
- Commissioner Luma said she would like to see a way for an individual to remain anonymous in the event they do not feel safe in submitting a complaint.
- Executive Director Zuniga pointed out that there is a field allowing someone else to submit a complaint on behalf of others.
- Executive Director Zuniga reported that there have been approximately 1,650 complaints submitted to date, with 23% (350) submitted from a small group, and with some not being credible complaints for a variety of reasons.
- Executive Director Zuniga announced other changes to the Commission website such as the addition of areas regarding staff contact information, public records requests, and the ability to sign-up for mailing lists.

c. Finance and Administrative Update - Executive Director Enrique A. Zuniga

- Executive Director Zuniga announced that Governor Baker signed the FY22 close-out supplementary budget on November 10th and that the $2.9M leftover balance has officially rolled over into FY23.
- Executive Director Zuniga stated that under the employee performance evaluation process, there will be a merit rating of "meets" or "exceeds" which will equal an "up to" 1% or 2% salary increase depending on hire date. Eligible employees will receive a 2.5% COLA.
- Executive Director Zuniga welcomed two new Commission staff members: Chrissie Fitzpatrick, Paralegal in the Division of Standards; and Albert Fung, Business Analyst in IT. The Commission is currently hiring a Paralegal under the Legal Division as well as a Digital Communications Division Digital Manager. The Commission is currently at 22 employees with a projected number of 28 by June 30th.

4. General Counsel Update – General Counsel Randall E. Ravitz

a. Proposed draft regulations Re: Initial Certification, Independent Applicants and Constables (555 CMR 9.00) – General Counsel Ravitz

- General Counsel Ravitz presented proposed draft regulations regarding initial certification, independent applicants and constables for discussion by the Commission. He explained as follows.
  - These regulations would govern any initial certification, expanding on what the Commission has already done. They would also govern the certification of any officer who applies independently, instead of applying with the endorsement of an employing agency, whether that officer seeks an initial or a renewed certification—including any constable.
  - A prior presentation highlighted four issues with constables and certification: (1) how we know who fits in the category of constable executing an arrest for any reason; (2) how the certification process should proceed in light of their independence, such as how the background check, oral interview, and character and fitness requirements are applied; (3) ways in which constables can satisfy training; and (4) how they are subject to oversight and consequences.
  - The regulations generally apply the same standards and processes that the Commission adopted for the recertification process. But, with respect to independent applicants, including constables, these regulations provide that, to satisfy the background check requirement, the applicant can either request that a law enforcement agency conduct one, for which it may charge a fee; or request that the Commission conduct one, for which it would charge a fee.
  - To administer an oral interview, the Commission would arrange for it to be conducted by one of several approved individuals; and may prescribe

the asking of certain questions, the coverage of certain topics, or the use of a questionnaire.

- As to character and fitness, the Commission would make an assessment based on certain information collected in the process and a set of guidelines, including: the identification of three professional references, one of which must be a certified officer.
- The regulations include some additional provisions regarding constables. They provide that:
- To be certified, a constable must have a monitor that is the constable's appointing authority or a law enforcement agency; that agrees to serve; and that would need to designate one or more individuals who will take personal responsibility for overseeing the constable and taking steps that Chapter 6E requires of supervisors.
- A law enforcement agency or officer that serves in such a role is subject to discipline for nonperformance.
- A constable who is certified or executes an arrest is subject to Chapter 6E's provisions regarding officers, some regarding agencies, and Commission regulations and policies.
- A constable may execute an arrest only if certified and otherwise allowed.
- A constable who executes an arrest without certification, or otherwise violates the above, may be restricted, disciplined, or fined up to $5,000 for each impermissible arrest.
- Certification does not grant powers beyond those granted by existing law.
- Chapter 6E extends to "a constable executing an arrest for any reason." In this definition of "arrest," the first sentence is nearly identical to a definition found in Massachusetts case law.
- The second sentence takes into account: judicial decisions treating the use or display of a weapon as something that militates in favor of an action being found to constitute an arrest.
- Also, the Commission's previously expressed view that the carrying of a weapon should bring a constable within the scope of the statute is taken into account.
- There is a need to have a rule that can be applied broadly and in advance of action by a constable.
- Another option is to add that an arrest also includes any service of a capias or arrest warrant because service of that form of process is restrictive. This is a policy matter, and no vote on the regulations will be requested today.
- Section 9.08 and Section 9.08(2) provide that, if an agency has not determined that an applicant possesses character and fitness, the applicant can only proceed as an independent applicant.
- In Section 9.06, subsections (3)(b)-(d), regarding endorsed and independent applicants, both provide that the applicant will receive the results of a background check and 14 days to respond before the Division determines that the applicant failed. The Division could also post notice

on the Commission's website inviting comments from members of the public.
    - Section 9.09(2) enables the Division to evaluate the certification standards in any order that is expedient and to stop after finding one standard unmet; and thus relieves the Division of having to undertake the more onerous aspects where that would be futile, such as the background check and character and fitness test.
    - The recertification regulations provide that a serving officer is not subject to a condition until after the conclusion of review or the time for seeking it. Subsections 9.10(1) and (2) do the same with respect to any serving officer seeking recertification independently but give the Division discretion to decide whether to do so with respect to an applicant seeking initial certification and are based on the idea that there may be a need for more caution with someone who is not already serving as an officer. Failure to honor a limitation may be grounds for discipline. Certification doesn't commence until the job is assumed, and the Commission can reconsider certification.
- Commissioner West asked if the definition of arrest includes taking someone into custody.
- General Counsel Ravitz said that would fall into that definition if someone was taken into custody but oftentimes the person is not taken into custody but given an opportunity to appear.
- Chair Hinkle reiterated that no vote would be taken on the regulation at this time.

b. Dissemination of Information on Certified Status

- Deputy General Counsel Pauline Nguyen presented a proposal for the Commission to publish a list of certified officers on the Commission website.
- Certified officers include graduates from the Academy and officers who have been granted initial certification by the Commission after December 15, 2021, with last names beginning with A-H and were granted full recertification.
- Full certification means recertification with no limitation, condition, or restriction imposed. The proposal includes the release of names, employing agencies and certification statuses of officers falling within this category.
- The Commission's authority is set forth in Chapter 6E, as it is tasked with creating and maintaining a public database. The Public Records Law requires release of information in 10 days, and release of certified officers will permit directing requestors to the website.
- There will be an opportunity to officers and their chiefs to report errors if the officers are posted on the website.
- Chair Hinkle asked for a motion to authorize the POST Commission to publish a list of certified officers on the POST Commission website.
- Commissioner Kazarosian moved to publish the list of officers.
- Commissioner Bluestone seconded the motion.
- The Commissioners voted as follows:

- Commissioner Bluestone - Yes
- Commissioner Calderone - No
- Commissioner Chéry - Yes
- Commissioner Ellison - Yes
- Commissioner Kazarosian - Yes
- Commissioner Luma - Yes
- Commissioner West - Yes
- Commissioner Wynn - Yes
- Chair Hinkle - Yes

- The motion was carried by those in attendance.

c. Delegation of Authority for Immediate and Administrative Suspensions

- Deputy General Counsel Pauline Nguyen presented a proposal for the delegation of authority for immediate and administrative suspensions (3 specific types) and adoption of certain requirements and exemptions related to in-service training. She stated as follows.
  - Under 9(a)(1), suspension is for arrest, charge, or indictment for a felony; 9(b) and (c) contain provisions for administrative suspensions under specific conditions, such as in-service training and failure to report officer-alleged misconduct.
  - There is no need for a preliminary inquiry or prior hearing to impose these suspensions. The Commission would be able to act more promptly and immediately with the delegation of authority to Executive Director. The Executive Director's actions are subject to review with a hearing before a Single Commissioner within 15 days of imposition of the suspension.
  - The staff was seeking a delegation of authority from the Commission to the Executive Director to issue suspensions under M.G.L. c. 6E, §§ 9(a)(1), (b), and (c), and the adoption of the requirements and deadlines for in-service trainings established by the MPTC as the requirements and deadlines of the Commission.
- Commissioner Calderone asked for clarification on Section 9(c) as it pertains to Subsection 8 and the completion of the report. He asked whether it applied to the officer or the chief.
- Deputy General Counsel Nguyen answered that it refers to the requirement to report certain alleged misconduct to the Commission which is provided in Section 8.
- Executive Director Zuniga explained that it would be the person who failed to report certain information, including the chief.
- General Counsel Ravitz stated that, if someone has a duty to make a report in Section 8, but fails to do so, the statute says that person can be administratively suspended until they make the report. At the time of making the report, the suspension would be lifted.
- Commissioner Calderone asked if the proposal is asking to give the Executive Director the ability to make a decision based on a misdemeanor by an officer or by a chief.

- General Counsel Ravitz answered that Section 9 is referring to the officer who is suspected of committing a misdemeanor.
- Executive Director Zuniga explained that the misdemeanor provision is permissive and not the topic of delegation from the Commission to the Executive Director.
- Commissioner Calderone asked for a clarification that the 9(c), failure to make a report, refers specifically to the head of the agency for suspension, not the officer.
- Executive Directory Zuniga asked the "head of agency," or their designee, be included for the larger agencies.
- Commissioner Ellison says that the current language does not cover the Boston Police Commissioner since he is a civilian, not an appointed authority and the language of designee is therefore important with regard to suspension of the individual.
- General Counsel Ravitz stated that 9(c) says "an officer with a duty to report" and you could read the statute to require the suspension of that person.
- Commissioner Bluestone asked if there is the same level of urgency around suspending the officer with a duty to report, as with the other two suspensions.
- Chair Hinkle asked for a motion to approve the proposed amendments.
- Commissioner Calderone made a motion to amend number of the original motion by adding language to clarify that 9(c) in this instance should say the head of the agency, the designee, or the supervisor in charge.
- Commissioner Kazarosian seconded the motion.
- The Commissioners voted as follows:
  - Commissioner Bluestone - Yes
  - Commissioner Chéry - Yes
  - Commissioner Ellison - Yes
  - Commissioner Luma - Yes
  - Commissioner West - Yes
  - Commissioner Wynn - Yes
  - Chair Hinkle - Yes
- The motion was unanimously carried.

5. Matters not anticipated by the Chair at the time of posting

- There was no new business.
  Chair Hinkle asked for a motion to enter an Executive Session to approve conducting preliminary inquiries and recommendations by the Division of Police Standards to suspend the certification of individuals. She stated that it is anticipated that discussions will surround the investigation of criminal charges and criminal offender record information.
  - Commissioner Bluestone - Yes
  - Commissioner Calderone - Yes
  - Commissioner Chery - Yes
  - Commissioner Ellison - Yes
  - Commissioner Kazarosian - Yes

    - Commissioner Luma - Yes
    - Commissioner West - Yes
    - Commissioner Wynn - Yes
    - Chair Hinkle - Yes
- The Commissioners unanimously approved the Chair's request to enter an Executive Session.
- Chair Hinkle announced to members of the public that the open session would not reconvene after the Executive Session.
- Chair Hinkle concluded the open meeting.

3.

MASSACHUSETTS PEACE OFFICER STANDARDS AND TRAINING COMMISSION

Authorization to Publish List of Suspended Officers on the Commission's Website (Proposed)

I. AUTHORIZATION

The Commission hereby approves publication, on the Commission's public website, of a list containing the name and employing agency of all law enforcement officers who have been suspended by the Commission, including those suspended pursuant to M.G.L. c. 6E, § 9(a), (b), or (c). However, the name and employing agency of a law enforcement officer who has been suspended may not be published on the Commission's website until the Commission has sent notices of suspension to the individual and to the employing agency and has allowed sufficient time for such notices to be received. The Commission authorizes staff to update this list periodically.

II. KEY SOURCES OF AUTHORITY

M.G.L. c. 6E, § 3

(a) The commission shall have all powers necessary or convenient to carry out and effectuate its purposes, including, but not limited to, the power to:

(4) deny an application or limit, condition, restrict, revoke or suspend a certification, or fine a person certified for any cause that the commission deems reasonable;

(23) restrict, suspend or revoke certifications issued under this chapter;

(17) prepare, publish and distribute, with or without charge as the commission may determine, such studies, reports, bulletins and other materials as the commission considers appropriate;

(27) maintain an official internet website for the commission;

M.G.L. c. 6E, § 4

(h) The division of police certification, in consultation with the division of police standards, shall create and maintain a database containing records for each certified law enforcement officer, including, but not limited to:

(1) the date of initial certification;
(2) the date of any recertification;
(3) the records of completion of all training and all in-service trainings, including the dates and locations of said trainings, as provided by the municipal police training committee established in section 116 of chapter 6, and the department of state police;
(4) the date of any written reprimand and the reason for said reprimand;
(5) the date of any suspension and the reason for said suspension;
(6) the date of any arrest and the charge or charges leading to said arrest;
(7) the date of, and reason for, any internal affairs complaint;
(8) the outcome of an internal affairs investigation based on an internal affairs complaint;
(9) the date of any criminal conviction and crime for said conviction;
(10) the date of any separation from employment with an agency and the nature of the separation, including, but not limited to, suspension, resignation, retirement or termination;
(11) the reason for any separation from employment, including, but not limited to, whether the separation was based on misconduct or whether the separation occurred while the appointing agency was conducting an investigation of the certified individual for a violation of an appointing agency's rules, policies, procedures or for other misconduct or improper action;
(12) the date of decertification, if any, and the reason for said decertification; and

(13) any other information as may be required by the commission."

(j) The commission shall promulgate regulations for the division of police certification to maintain a publicly available and searchable database containing records for law enforcement officers. In promulgating the regulations, the commission shall consider the health and safety of the officers.

M.G.L. c. 6E, § 8

(e) The division of police standards shall create and maintain a database containing information related to an officer's: (i) receipt of complaints and related information, including, but not limited to: the officer's appointing agency, date, a description of circumstances of the conduct that is the subject of the complaint and whether the complaint alleges that the officer's conduct: (A) was biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level; (B) was unprofessional; (C) involved excessive, prohibited or deadly force; or (D) resulted in serious bodily injury or death; (ii) allegations of untruthfulness; (iii) failure to follow commission training requirements; (iv) decertification by the commission; (v) agency-imposed discipline; (vi) termination for cause; and (vii) any other information the commission deems necessary or relevant.

M.G.L. c. 6E, § 9

Section 9: Suspension of officer certification

(a)

(1) The commission shall immediately suspend the certification of any officer who is arrested, charged or indicted for a felony.

(2) If, after a preliminary inquiry pursuant to paragraph (1) of subsection (c) of section 8, the commission concludes by a preponderance of the evidence that a law enforcement officer has engaged in conduct that could constitute a felony and upon a vote to initiate an adjudicatory proceeding of said conduct, the commission shall immediately suspend an officer's certification.

(3) The commission may, after a preliminary inquiry pursuant to paragraph (1) of subsection (c) of section 8, suspend the certification of any officer who is arrested, charged or indicted for a misdemeanor, if the commission determines by a preponderance of the evidence that the crime affects the fitness of the officer to serve as a law enforcement officer.

(4) The commission may, pending preliminary inquiry pursuant to paragraph (1) of subsection (c) of section 8, suspend the certification of any officer if the commission determines by a preponderance of the evidence that the suspension is in the best interest of the health, safety or welfare of the public.

(5) A suspension order of the commission issued pursuant to this subsection shall continue in effect until issuance of the final decision of the commission or until revoked by the commission.

(b) The commission shall administratively suspend the certification of an officer who fails to complete in-service training requirements of the commission within 90 days of the deadline imposed by the commission; provided, however, that the commission may promulgate reasonable exemptions to this subsection, including, but not limited to, exemptions for: (1) injury or physical disability; (2) a leave of absence; or (3) other documented hardship. The commission shall reinstate the certification of an officer suspended pursuant to this subsection upon completion of the in-service training requirements of the commission.

(c) The commission shall administratively suspend the certification of an officer with a duty to report information to the commission pursuant to section 8 who fails to report such information. The commission shall reinstate the certificate of an officer suspended pursuant to this subsection upon completion of said report.

(d) A law enforcement officer whose certification is suspended by the commission pursuant to subsection (a), (b) or (c) shall be entitled to a hearing before a commissioner within 15 days. The terms of employment of a law enforcement officer whose certification is suspended by the commission pursuant to said subsection (a) (b) or (c) shall continue to be subject to chapter 31 and any applicable collective bargaining agreement to which the law enforcement officer is a beneficiary.

M.G.L. c. 6E, § 13

(a) The commission shall maintain a publicly available database of orders issued pursuant to section 10 on the commission's website, including, but not limited to: (i) the names of all decertified officers, the date of decertification, the officer's last appointing agency and the reason for decertification; (ii) the names of all officers who have been suspended, the beginning and end dates of suspension, the officer's appointing agency and the reason for suspension; and (iii) the names of all officers ordered to undergo retraining, the date of the retraining order, the date the retraining was completed, the type of retraining ordered, the officer's appointing agency and the reason for the retraining order.

M.G.L. c. 4, § 7, cl. 26

Twenty-sixth, “Public records” shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation,

association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

[There is no subclause (k).]

(l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

(o) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.
(v) records disclosed to the health policy commission under subsections (b) and (e) of section 8A of chapter 6D.

Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

M.G.L. c. 66, § 10

(a) A records access officer … shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record … or any segregable portion of a public record, not later than 10 business days following the receipt of the request….

(b) If … the magnitude or difficulty of the request… unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

(i) confirm receipt of the request;
(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;
(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;
(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;
(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;
(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and
(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request … unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in [M.G.L. c. 66, §10(b)(vi)], a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:
(i) the need to search for, collect, segregate or examine records;
(ii) the scope of redaction required to prevent unlawful disclosure;
(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;
(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;
(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and
(vi) the public interest served by expeditious disclosure. …

M.G.L. c. 66, § 6A

(d) If the public record requested is available on a public website pursuant to [G.L. c. 66, § 19(b), G.L. c. 7, § 14C,] or any other appropriately indexed and searchable public website, the records access officer may furnish the public record by providing reasonable assistance in locating the requested record on the public website.

M.G.L. c. 66, § 19

(b) Every agency shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided that any agency may withhold any record or portion thereof in accordance with state or federal law:

(i) final opinions, decisions, orders, or votes from agency proceedings;
(ii) annual reports;
(iii) notices of regulations proposed under chapter 30A;
(iv) notices of hearings;
(v) winning bids for public contracts;
(vi) awards of federal, state and municipal government grants;
(vii) minutes of open meetings;
(viii) agency budgets; and
(ix) any public record information of significant interest that the agency deems appropriate to post.

4a.

555 CMR 11.00: REGULATORY ACTION AND ADVISORY OPINIONS

Section

11.01: Authority

(1) The Commission promulgates 555 CMR 11.00 pursuant to M.G.L. c. 6E, § 3(a), and M.G.L. c. 30A, §§ 4 and 8.

11.02: Scope

(1) 555 CMR 11.00 governs:
(a) The submission, consideration and disposition of a petition requesting regulatory action, pursuant to M.G.L. c. 30A § 4;
(b) Regulatory action by the Commission other than in response to a petition, pursuant to M.G.L. c. 6E and c. 30A;
(c) The submission, consideration, and disposition of a petition requesting the issuance of an advisory opinion, pursuant to M.G.L. c. 30A, § 8; and
(d) The issuance of an advisory opinion by the Commission other than in response to a petition, pursuant to M.G.L. c. 6E, § 3(a).

(2) Nothing in 555 CMR 11.00 is intended to:
(a) Obligate the Commission to take or decline to take any regulatory action, or to issue or decline to issue any advisory opinion;
(b) Preclude the Commission from taking regulatory action or issuing an advisory opinion in the absence of a request, or from issuing other types of opinions, answers to questions, or forms of guidance;
(c) Create an attorney-client, principal-agent, or confidential relationship between the Commission, any Commissioners, or any member of the Commission's staff and any petitioner, other person, or other entity;
(d) Establish a standard of care or create any power, right, benefit, entitlement, remedy, cause of action, claim, defense, immunity, privilege, or protection on the part of any other person or entity, except as expressly provided; or
(e) Otherwise waive any power, right, benefit, entitlement, remedy, cause of action, claim, defense, immunity, privilege, or protection that may be available to the Commission.

11.03: Definitions

(1) 555 CMR 11.00 incorporates all definitions and rules of construction set forth in 555 CMR 2.02, except those definitions of terms that are defined in 555 CMR 11.03(2).

(2) For the purposes of 555 CMR 11.00, the following terms have the following meanings, unless the context requires otherwise:

Advisory Opinion. An advisory ruling with respect to the applicability to any person, property, or state of facts of any statute or regulation enforced or administered by the Commission, under M.G.L. c. 30A, § 8, or any other opinion that relates to the Commission's authority or

responsibilities and is formally issued in writing by the Commission.

Agency. An "agency" as defined in M.G.L. c. 30A, § 1.

Commission. The Massachusetts Peace Officer Standards and Training Commission established under M.G.L c. 6E, § 2 as an agency, including its Commissioners and its staff.

Executive Director. The Executive Director of the Commission appointed pursuant to M.G.L. c. 6E, § 2(g), or that person's designee for relevant purposes.

Law Enforcement Agency. A "law enforcement agency" as defined in M.G.L. c. 6E, § 1.

Officer. A "law enforcement officer" as defined in M.G.L. c. 6E, § 1.

Petition. A request for regulatory action or the issuance of an advisory opinion submitted to the Commission.

Petitioner. A person or entity who submits a request for regulatory action or the issuance of an advisory opinion to the Commission.

Regulation. A "regulation" as defined in M.G.L. c. 30A, § 1.

Regulatory Action. The adoption, amendment, or repeal of a regulation.

Vote of the Commissioners. A vote sufficient to satisfy the requirements of M.G.L. c. 6E, § 2(e).

11.04: Petition for Regulatory Action or an Advisory Opinion

(1) Any person or entity may submit to the Commission a petition requesting the adoption, amendment, or repeal of a regulation, or the issuance of an advisory opinion, concerning a matter related to the Commission's authority and responsibilities.

(2) A petitioner should:

(a) Submit a written petition containing the following:

1. The petitioner's name;
2. The petitioner's certification number, if the petitioner has been certified as a law enforcement officer by the Commission;
3. The name, an address, a telephone number, and an email address of an attorney at law who is representing the petitioner in relation to the matter, if the petitioner is so represented;
4. An address, a telephone number, and an email address of the petitioner, if the petitioner is not represented by an attorney at law in relation to the matter;
5. The name of each organization on behalf of which the petitioner is submitting the petition, and any title or role that the petitioner has with each such organization, if the petitioner is submitting the petition on behalf an organization;
6. A clear indication at the outset of the petition whether the petitioner is requesting regulatory action or the issuance of an advisory opinion;
7. A precise description of the action being requested;
8. A clear and concise statement of any facts relevant to the petition, which statement may be relied on by the Commission in rendering any opinion;
9. Citations to applicable sources of law that could be identified with reasonable effort; and
10. A listing of any other governmental regulations or advisory opinions concerning the same subject matter that have been issued

or requested and could be identified with reasonable effort;

11. The signature of the petitioner or any attorney at law representing the petitioner in relation to the matter, which shall constitute a certification that the signer has read the petition and that any facts recited therein are true to the best of the signer's belief; and

12. A certificate of service, stating the name and contact information of each person and entity upon which a copy of the petition was served pursuant to 555 CMR 11.04(2)(c);

(b) Submit the petition in an electronic format, by electronic means, and using any form or email address designated for such a purpose on the Commission's website; and

(c) Serve a copy of the petition upon each person and entity that can fairly be deemed to be in a direct, adverse position to the petitioner with respect to the matter.

(3) The Commission further requests that the petitioner include in the petition:

(a) The text of any regulation or regulatory amendment desired by the petitioner, if the petitioner is requesting regulatory action;

(b) Any arguments against the action requested by the petitioner; and

(c) Names of persons and entities that would be impacted by the action requested by the petitioner, and the form and extent of such impact.

(4) A petitioner may also include in the petition any supporting data, views, or arguments that the petitioner believes to be pertinent.

(5) A petitioner should immediately notify the Commission if, at any point in time, the petitioner or any attorney at law representing the petitioner in relation to the matter becomes aware that any facts recited in a petition are inaccurate or any circumstances referenced in the petition have changed.

(6) Officers and law enforcement agencies are obligated to ensure the accuracy of any information that they submit to the Commission in relation to a petition, or in relation to any other regulatory action or issuance of an advisory opinion by the Commission, pursuant to M.G.L. c. 6E, §§ 3(a), 4(f)(4), and 5(c).

(a) The failure of an officer or a law enforcement agency to comply with 555 CMR 11.04(6) may constitute grounds for disciplinary action, pursuant to M.G.L. c. 6E, §§ 3(a), 4(f)(4), 5(c), 8, 9, and/or 10.

11.05: Initial Processing of a Petition

(1) Where a petitioner has taken all steps listed in 555 CMR 11.04(2)(a)-(c):

(a) The Commission staff shall, with reasonable promptness, acknowledge to the petitioner that the petition was received;

(b) The Commission staff shall ensure that the petition is provided to the Chair and the Executive Director;

(c) The Chair may place the subject of the petition on the agenda of a Commission meeting to be held in accordance with M.G.L. c. 6E, § 2(e) and c. 30A; and

(d) If the subject of the petition is placed on the agenda for a public Commission meeting, the Commission shall provide notice to the petitioner of that fact with reasonable promptness, and in no event less than two business days before the meeting.

(2) Where a petitioner has not taken all steps listed in 555 CMR 11.04(2)(a)-(c), the Commission may nevertheless follow the steps listed in 555 CMR 11.05(1) or otherwise consider the petition in accordance with any applicable provisions of law.

(3) The Commission may provide a copy of a petition to any other person or entity, and may utilize any information provided in a petition in any manner, where not precluded from doing so by law.

(4) The Commission shall maintain a copy of any petition received.

(5) With respect to any matter involving regulatory action or the issuance of an advisory opinion, or contemplation of the same, whether or not the Commission has received a petition related to the matter:

(a) The Commission should take steps to communicate with any other governmental entity that possesses interests, powers, or duties that may be implicated with respect to the matter; and

(b) The Commission may:

1. Issue a request for public comment about the matter;

2. Request information or advocacy about the matter from any person or entity; or

3. Ask any person or entity to speak about the matter, or otherwise appear, at a Commission meeting.

11.06: Regulatory Action

(1) The Commission may take or decline to take any regulatory action, whether or not such action is requested by a petitioner, provided the action is allowed by law.

(2) In pursuing any regulatory action, the Commission shall proceed in accordance with M.G.L. c. 30A and 950 CMR 20.00: *Preparing and Filing Regulations*.

(3) If the Commission schedules any public hearing or commences any other public comment process related to proposed regulatory action in response to a petition, the Commission shall provide notice of the public hearing or other public comment process to:

(a) The petitioner, or where there are multiple petitioners, to any one of the petitioners; and

(b) Each person or entity referenced in any certificate of service that accompanied the petition, unless such a step would be impracticable.

(4) At any hearing conducted by the Commission with respect to proposed regulatory action, the presiding official:

(a) Shall be designated by the Chair;

(b) May impose reasonable restrictions on the speaking time or the presentation of testimony or materials; and

(c) May adjourn and continue the hearing to a specified time and place upon determining that the initial time allotted for the hearing has proven to be insufficient.

(5) Following any public hearing or other public comment process concerning proposed regulatory action, the Commission may, by a vote of the Commissioners, approve revisions to the proposed regulatory action, whether or not such revisions were suggested in such a public hearing or other public comment process.

(6) If the Commission takes any regulatory action in response to a petition, the Commission shall provide notice of the action to:

(a) The petitioner, or where there are multiple petitioners, to any one of the petitioners; and

(b) Each person or entity referenced in any certificate of service that accompanied the petition, unless such a step would be impracticable.

(7) If the Commission decides not to take a regulatory action requested by a petitioner:

(a) The Commission shall provide notice of the decision to the petitioner with reasonable promptness; and

(b) Unless the Commission expressly indicates otherwise, the decision shall not represent an affirmative adoption of a position contrary to the petitioner's, and no weight should be assigned to the decision.

(8) Following the Commission's approval of any regulation, any statement in response to a petition, or any related document, the Commission staff may make revisions to the document that are not substantive and are needed to correct clear errors in names, dates, numbers, citations, quotations, spelling, typography, or formatting.

11.07: Issuance of an Advisory Opinion

(1) The Commission may issue or decline to issue any advisory opinion, whether or not such action is requested by a petitioner, provided the action is allowed by law.

(2) The Commission shall issue an advisory opinion only if its issuance and its general substance are approved by a vote of the Commissioners, either before or after the development of a draft advisory opinion.

(3) Any advisory opinion:
(a) Shall be in writing;
(b) Shall be issued in the name of the Commission;
(c) Shall include a statement of reasons supporting any conclusion reached; and
(d) May be signed by an individual on behalf of the Commission.

(4) If the Commission issues an advisory opinion in response to a petition, the Commission:
(a) Shall provide a copy of the advisory opinion to:
1. The petitioner, or where there are multiple petitioners, to any one of the petitioners; and
2. Each person or entity referenced in any certificate of service that accompanied the petition, unless such a step would be impracticable;
(b) Shall afford the petitioner the opportunity to request, within a reasonable and specified period of time, that the Commission omit the petitioner's name from any publicized version of the opinion;
(c) Shall honor any timely request made under 555 CMR 11.07(4)(b), unless the Commission decides otherwise by a vote of the Commissioners;
(d) Shall maintain a copy of the advisory opinion; and
(e) Except as provided in 555 CMR 11.07(4)(c), may publish an advisory opinion on its website or otherwise, where such publication is not precluded by law.

(5) If the Commission decides not to issue an advisory opinion in response to a petition:
(a) The Commission shall provide notice to the petitioner of the decision with reasonable promptness; and
(b) Unless the Commission expressly indicates otherwise, the decision shall not represent an affirmative adoption of a position contrary to the petitioner's, and no weight should be assigned to the decision.

(6) Following the Commission's approval of any advisory opinion, any statement in response to a petition, or any related document, the Commission staff may make revisions to the document that are not substantive and are needed to correct clear errors in names, dates, numbers, citations, quotations, spelling, typography, or formatting.

11.08: Effect of an Advisory Opinion

(1) The Commission's issuance of an advisory opinion shall, in any Commission proceeding, provide a defense to a person or entity that acted in accordance with that opinion, where:
(a) The circumstances at issue in the Commission proceeding are not materially different than those upon which the advisory opinion was

based;
(b) The person or entity has not acted inconsistently with 555 CMR 11.04(5); and
(c) The person or entity has not failed to comply with an obligation under 555 CMR 11.04(6).

(2) At any time, the Commission may rescind or revise an advisory opinion.
(a) Where the original advisory opinion was issued in response to a petition, the Commission shall promptly provide notice to the petitioner of any rescission or revision.

(3) An advisory opinion shall have no force or effect:
(a) With respect to circumstances that are materially different than those upon which it was based;
(b) If it is rescinded;
(c) If it is materially revised in relevant part;
(d) If it is rendered invalid by a change in law; or
(e) If a court issues a binding decision that is inconsistent with it.

(4) The circumstances described in 555 CMR 11.08(3) shall not invalidate or negate any prior Commission action or decision other than an advisory opinion, unless the Commission or any source of law expressly requires the invalidation or negation of such action or decision.

11.09: Representation by an Attorney at Law

(1) Any action that 555 CMR 11.00 contemplates being taken by a petitioner may be taken on a petitioner's behalf by an attorney at law representing the petitioner in relation to the matter.

(2) Where a petitioner, another person, or another entity is represented by an attorney at law in relation to a petition, any communication between the Commission and that petitioner, person, or entity should be made through the attorney, unless the attorney authorizes otherwise in writing.

REGULATORY AUTHORITY

555 CMR 11.00: M.G.L. c. 6E, § 3(a), and M.G.L. c. 30A, §§ 4 and 8.

4b.

State Police Association of Massachusetts

REPRESENTING SERGEANTS AND TROOPERS
OF THE MASSACHUSETTS STATE POLICE
11 BEACON STREET • SUITE 700 • 7TH FLOOR • BOSTON, MASSACHUSETTS 02108
TEL: 617-523-0130 • FAX: 617-523-0136
EMAIL: trooper@msptrooper.org

PATRICK M. McNAMARA
PRESIDENT
LUKE P. BONIN
VICE PRESIDENT
CHRISTOPHER DONAHUE
TREASURER
MATTHEW F. KANE
SECRETARY

December 1, 2022

Massachusetts Peace Officers Standards and Training Commission
General Counsel Randal E. Ravitz
100 Cambridge Street, 14th floor
Boston, MA 02114
Via email at POSTC-comments@mass.gov

Re: *555 CMR 8.00 Database and Dissemination Regulations*

Dear General Counsel Ravitz, Executive Director Zuniga and Honorable Commissioners of the Massachusetts Peace Officers Standards and Training (POST) Commission:

As the current President of the State Police Association of Massachusetts, I write this letter and provide these comments on behalf of the dedicated members of the Massachusetts State Police that serve and protect the Commonwealth each and every day. We represent a statewide police force that offers public safety to all citizens and visitors of Massachusetts. We regularly partner with local, state, and federal law enforcement agencies on investigations, operations, and training to make Massachusetts a safer place for all.

The Association supports and aligns with POST's goals to ensure safe and effective police officers and to maintain confidence in police work by promoting the public's focus on clear expectations for police. At the Association, we often talk about the evolution of policing, and it is our desire, through the positive impacts of our daily work, to promote progress and advancement for the integral and noble profession of police officers. We appreciate the opportunity to provide input and to work together with the POST Commission to strengthen our good work and shared desire to provide safety and security to our state and we welcome this occasion to provide comment and testimony to POST regarding the Commission's proposed 555 CMR 8.00 Databases and Dissemination of Information.

We recognize POST's legislative mandate for a publicly accessible database of POST's certification, recertification and decertification information. We also recognize that all records and data POST receives in the course of its work will undoubtedly give rise to additional requests for POST records. We appreciate that you are working to construct your databases with both an eye towards transparency and accessibility, as well as a focus on the health and safety of officers.

We appreciate that your proposal for what "shall" be provided in the public database, according to your proposed 8.05(4), will be done so in accordance with further "guidance" to be established by POST. We request that this guidance also be formulated with input from public comment, as we would welcome any further opportunity to provide insight into this work that directly impacts on our profession.

We also appreciate the structure and specificity POST proposed in what "shall" be provided in the public database as described 8.05(4)(a) 1 through 11, as well as the proposals for what "shall not" be included, as proposed in 8.05(5)-(6). However, we urge the Commission to reconsider 8.05 (4)(a)10 under the "shall" be provided in the public database category. While we agree that the other items of information are straightforward and will promptly answer for the public whether a particular officer is certified or decertified and the information pertinent to that public inquiry. The information that is currently proposed in 8.05 (4)(a)10 ["A summary of the officers' disciplinary record, based on information provided by agencies that have employed the officer, excluding unsustained or unfounded complaints"] is not straightforward, nor will this information be universally understood. A "disciplinary record" does not (yet) look the same across police departments and the word "summary" is not defined. We do not suggest that POST should not receive that information; of course, it will, and it must be examined by POST.

The Association was established, in part, to preserve and foster good will with the citizens of all people in the Commonwealth of Massachusetts and to encourage cooperative understandings and agreements with all organizations, agencies, and officers of government concerned with the State Police for the mutual benefit of its members, to mitigate the hazards of our work and the improvement of public service. It is with these goals we respectfully submit these comments and this letter, and together, we look towards the evolution of policing.

Respectfully,

Patrick M. McNamara
President
State Police Association of Massachusetts

From: Laurene Spiess
To: POSTC-comments (PST)
Subject: MACLEA offering comment on "Database and Dissemination Regulations".
Date: Monday, December 5, 2022 6:19:40 PM

Hello and thank you for the opportunity to make a comment. MACLEA would like to offer the following comments with regard to the Database and Dissemination Regulations CMR 555 8.00

In sections 8.05 and 8.07- there is language that talks about 'Public Employees' but does not cover all Officers that are, will be or were POST Certified such as College and University Police Officers. We offer the language change below in blue. Our concern is that without speaking of employees that are not considered 'Public Employees', they would not fall under the conditions outlined in sections 8.05 (5c) or 8.07 (9) and therefore not be afforded the same rights as those that are public employees.

8.05 Public Database

Comment: in Section 5 (c) of 8.05- Strike out the words 'public employees' and add language from section 1 of 8.05 [*The Commission shall maintain a public database of information concerning officers who are certified or conditionally certified; officers whose certifications are pending, restricted, limited, or suspended; and officers who have been decertified or not recertified.]* **See example below.**

This language revision will cover all Officers that are, will be or were POST Certified and not just Public Employees and maintain consistency with language from section 1.

Example:
Section 5 (c) Personal contact information of ~~public employees~~ *officers who are certified or conditionally certified; or whose certifications are pending, restricted, limited, or suspended; and officers who have been decertified or not recertified* or members of their families that is generally non-disclosable under M.G.L. c. 66, §§ 10B and 15;

8.07 Objections Concerning Data

Comment: In Section 9 of 8.07 – Strike out the words 'a public employee' and add language from section 1 of 8.05 [*The Commission shall maintain a public database of information concerning officers who are certified or conditionally certified; officers whose certifications are pending, restricted, limited, or suspended; and officers who have been decertified or not recertified.]* **See example below.**

This language revision will cover all Officers that are, will be or were POST Certified and not just Public Employees and maintain consistency with language from section 1.

Example:
(9) If the Commission has a good-faith, reasonable belief that ~~a public employee~~ *an officer*

who is certified or conditionally certified; or whose certifications are pending, restricted, limited, or suspended; and officers who have been decertified or not recertified may possess a right to have data in a personnel record that is maintained by an employer corrected or expunged pursuant to M.G.L. c. 149, § 52C, the Commission shall make reasonable efforts to give the employee the opportunity to exercise the right.

Thank you for your consideration.

Respectfully, Laurene Spiess

--

Laurene Spiess
President - MACLEA
Lieutenant
Boston College Police Department

P: (617) 552-4413
W: www.MACLEA-MA.org

ACLU Massachusetts

December 6, 2022

Via Email

Peace Officer Standards and Training (POST) Commission
100 Cambridge Street, 14th Floor
Boston, MA 02114
POSTC-Comments@mass.gov

Re: Comment on Proposed Regulations on Databases and Dissemination of Information at 555 CMR 8.00, *et seq.*

Dear Commissioners:

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM) submits this comment on the POST Commission's proposed regulations entitled "Databases and Dissemination of Information." *See* 555 CMR 8.00, *et seq.* ACLUM previously submitted comments on the proposed regulations concerning Complaints, Inquiries, Suspensions, Hearings (555 CMR 1.00), and thanks the Commission for considering those comments and making changes responsive to them. The regulations now being considered, which would govern the release of a public database containing information about police officer certifications and employment history, represent an important step in achieving the public accountability that was one of the goals of the policing legislation passed in 2020 after the murder of George Floyd, the death of Breonna Taylor, and the protests that swept across the Commonwealth and the world.

Against this historical backdrop, and given the intent of the 2020 legislation, ACLUM writes to raise several concerns about the proposed regulations, which fall into two broad categories. First, the proposed regulations would not include all of the categories of information listed under G.L. c. 6E, § 4(h) in the public database but instead would shield broadly defined categories of information and information that is already available to the public via the Public Records Law, G.L. c. 66, § 10 (PRL). Second, the proposed regulations could be construed as an attempt to interpret the PRL, which falls outside the Commission's purview.[1]

ACLUM urges the Commission to modify the draft regulations to ensure: (1) that the Commission's database(s) contains all the information mandated by G.L. c. 6E, §§ 4, 8, and 13, and

[1] ACLUM also agrees with the concerns raised by the Committee for Public Counsel Services (CPCS) in its public comment submitted concerning these proposed regulations, specifically the proposed timing for the release of information and that the interpretations of the CORI Act and Public Records Law may be inconsistent with Supreme Judicial Court case law.

makes as much information as feasible available to the public; and (2) that the regulations do not purport to define, modify, or restrict the Commission's obligations under the Public Records Law.

I. The proposed regulations fail to include all information required by statute in the public database, and instead shields broad swaths of information.

The proposed regulations state that they apply to the "[d]atabases that the Commission must maintain pursuant to M.G.L. c. 6E, §§ 4(h), 4(j), 8(e), and 13(a)," 555 CMR 8.02(1)(a). But, as explained below, the proposed regulations fail to meet all of the requirements of those four statutory provisions, including with respect to the collection, maintenance, and public release of records. ACLUM thus proposes the following changes to better align the regulations with the law.

a. The database requirements of the regulations must be expanded to match the stated scope.

The proposed regulations appear to be intended to discharge all of the agency's obligations to maintain databases under four separate statutory schemes: G.L. c. 6E, §§ 4(h), 4(j), 8(e), and 13(a). 555 CMR 8.02(1)(a). However, they do so without requiring the collection, maintenance, or public release of all the records required by these statutes. Therefore, the regulations need to be expanded to meet the statutory requirements. For ease of reference, we summarize the statutes briefly here.

Under §§ 4 and 13, the Commission is required to maintain publicly available databases with information about certified and non-certified officers, respectively. Section 4(h) instructs the Commission's division of police certification to "create and maintain a database containing records for each certified law enforcement officer." This database must include at least 12 categories of information, including any arrests, convictions, reprimands, and internal affairs complaints. G.L. c. 6E, § 4(h).[2] Section 4(j) requires the Commission to promulgate regulations for the division of police certification to "maintain a publicly available and searchable database containing records for law enforcement officers." Section 13(a) requires the Commission to maintain on its web site a "publicly available database of [revocation and suspension] orders issued pursuant to [G.L. c. 6E, § 10]." This

[2] The division of police certification, in consultation with the division of police standards, shall create and maintain a database containing records for each certified law enforcement officer, including, but not limited to: (1) the date of initial certification; (2) the date of any recertification; (3) the records of completion of all training and all in-service trainings, including the dates and locations of said trainings, as provided by the municipal police training committee established in section 116 of chapter 6, and the department of state police; (4) the date of any written reprimand and the reason for said reprimand; (5) the date of any suspension and the reason for said suspension; (6) the date of any arrest and the charge or charges leading to said arrest; (7) the date of, and reason for, any internal affairs complaint; (8) the outcome of an internal affairs investigation based on an internal affairs complaint; (9) the date of any criminal conviction and crime for said conviction; (10) the date of any separation from employment with an agency and the nature of the separation, including, but not limited to, suspension, resignation, retirement or termination; (11) the reason for any separation from employment, including, but not limited to, whether the separation was based on misconduct or whether the separation occurred while the appointing agency was conducting an investigation of the certified individual for a violation of an appointing agency's rules, policies, procedures or for other misconduct or improper action; (12) the date of decertification, if any, and the reason for said decertification; and (13) any other information as may be required by the commission.

database must include, at a minimum, information related to any decertifications, suspensions, or retrainings. G.L. c. 6E, § 13(a).[3]

Finally, under section 8, the Commission's division of police standards must maintain a database containing complaints about an officer, allegations against an officer of untruthfulness, an officer's failure to follow commission training requirements, decertification by the commission, agency-imposed discipline of an officer, an officer's termination for cause, and other information the Commission deems necessary or relevant. *Id.* at § 8(e). However, unlike §§ 4 and 13, section 8 does not include explicit language requiring the division of police standards to make this database public.

The database that would be created under the proposed regulations, however, would not include all the information mandated by §§ 4, 8(e), and 13(a). *See* 555 CMR 8.05(4). The regulations would not, for example, require the collection or maintenance of information related to any officer "arrest and the charge or charges leading to said arrest," G.L. c. 6E, § 4(h)(6), "any criminal conviction and crime for said conviction," *id.* at § 4(h)(9), "failure to follow commission training requirements," *id.* at § 8(e), a "termination for cause," *id.* at § 13(e)(vi), or any other "separation from employment," *id.* at § 4(h)(11). The proposed regulations, therefore, should be modified to ensure the creation of a database or databases that contains, at a minimum, each category of information mandated by §§ 4, 8(e), and 13(a).

For the reasons explained below, the Commission should also make this information available to the public to the greatest extent possible.

b. The Commission's public database should include, at a minimum, all information enumerated in § 4(h).

G.L. c. 6E, § 4 should be read to require the Commission to release all information listed under subsection (h) in a public database, and good public policy further counsels the release of the information in such a database. Sections 4(h) and 4(j), described above, work together. Section 4(h) requires the Commission to create a database containing 12 specific categories of information about certified law enforcement officers, plus "any other information as may be required by the commission." Section 4(j) requires the promulgation of regulations for a "publicly available and searchable database containing records for law enforcement officers," without reference to certification status, subject only to the admonition that "the commission shall consider the health

[3] The commission shall maintain a publicly available database of orders issued pursuant to section 10 on the commission's website, including, but not limited to: (i) the names of all decertified officers, the date of decertification, the officer's last appointing agency and the reason for decertification; (ii) the names of all officers who have been suspended, the beginning and end dates of suspension, the officer's appointing agency and the reason for suspension; and (iii) the names of all officers ordered to undergo retraining, the date of the retraining order, the date the retraining was completed, the type of retraining ordered, the officer's appointing agency and the reason for the retraining order.

and safety of the officers." None of the specifically enumerated categories of information listed in § 4(h) conceivably trigger the "health and safety" admonition of § 4(j). Thus, in instructing the Commission to create a publicly available and searchable database, § 4(j) seems to state that the public database should include all categories of information about certified officers listed in § 4(h) plus additional records concerning officers that does not impair health or safety.

Yet the proposed regulations would not permit public access to all of the categories of information enumerated in § 4(h). Under 555 CMR 8.05(4), certain "forms of information" such as officer certification status, commendations, reversals or vacaturs of adverse actions, and summaries of sustained allegations, would be available in a public database subject to the broad exclusions articulated in 555 CMR 8.06 and any guidelines established by the Commissioners or Executive Director. For example, § 4(h), but not the proposed regulations, requires a database containing the following records:

- date of **any** recertification
- records of completion of **all** trainings;
- date of any written reprimand and the reason for said reprimand;
- date of any arrest and the charge or charges leading to said arrest;
- the date of, and reason for, **any** internal affairs complaint;
- outcome of an internal affairs investigation based on an internal affairs complaint;
- date of any criminal conviction and crime for said conviction;
- date of any separation from employment with an agency and the nature of the separation; and
- reason for any separation.

ACLUM submits that these omissions are not consistent with § 4. The proposed regulations should be modified to ensure that all information required by § 4(h) be included in the publicly available and searchable database mandated by § 4(j).

This conclusion finds additional support in the Public Records Law, including changes to that law that are contained in the 2020 policing legislation. In particular, much of the information required by § 4(h) is already disclosable under the Public Records Law. The Supreme Judicial Court has repeatedly recognized the public interest "in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner." *Globe Newspaper Co. v. Police Com'r of Bos.*, 419 Mass. 852, 858 (1995) (quoting *Attorney General v. Collector of Lynn*, 377 Mass. 151, 158 (1979)). The Court stated that this interest is particularly strong with regard to the conduct of law enforcement officials who hold a position of special public trust. *Bos. Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 292 (2020); *see also id.* ("public interests furthered by the public records law – transparency, accountability, and public confidence – 'are at their apex if the conduct at issue occurred in the performance of the official's professional duties or materially bears on the official's ability to perform those duties honestly or capably"). In doing so, it held that this "substantial public interest" counsels the release under the PRL of booking photos and incident

reports regarding even merely alleged offenses by police officers. *Id.* at 294. Notably, using the PRL, several groups in Massachusetts, such as Woke Windows[4] and The Mass Dump,[5] already collect and publicly disseminate some of the information enumerated under § 4(h) about officers in certain jurisdictions.

Relatedly, the 2020 policing legislation abrogated the privacy exemption to the PRL, G.L. c. 4, Section 7, Twenty-sixth (c), in important respects relating to law enforcement officers. The legislation first carved out "records related to a law enforcement misconduct investigation" from the exemption and second seemingly removed the absolute exemption for personnel files and information thereby making those records subject to the "unwarranted invasion of personal privacy" standard. *See Globe Newspaper Co. v. Bos. Ret. Bd.*, 388 Mass. 427, 433 (1983) (ruling that the insertion of the semicolon after "personnel and medical filed or information" signified the legislature's desire to ensure that these records would not be subject to the unwarranted invasion of privacy clause).

Given the scope of the PRL, particularly its amendment by the 2020 policing legislation, it is doubtful that the "health and safety" admonition in § 4(j) could refer to any of the categories of information listed in § 4(h)(1)-(12). Rather, that admonition should be read only to create a possible reason to limit the public disclosure of additional categories of information that the Commission could require to be collected under § 4(h)(13). Accordingly, ACLUM urges the commission to amend 555 CMR 8.05(4)(a) to add all information listed in § 4(h)(1)-(12) to the publicly available database; we also would urge the public release of any other information that the Commission requires be collected subject only to a consideration of officer health and safety.

c. In selecting categories of information to add to its database, the Commission should err on the side of inclusion.

The proposed regulations would unduly permit broad categories of information to be shielded from the public. 555 CMR 8.05(8) would allow certain forms of information to be included or excluded from the public database *ad hoc* in accordance with guidelines to be established by the Commissioners or Executive Director. 555 CMR 8.05(6)(a)(5) and (e)-(h) would shield "assessments of whether an officer possesses good moral character or fitness for employment in law enforcement," "information in a personnel record an employee has the right to have corrected or expunged pursuant to M.G.L. c. 149, § 52C," information subject to unspecified privilege(s) "held by the by the Commission" or "by a person or entity other than the Commission," and data subject to a memorandum of understanding without any checks on the Commission's ability to enter into such agreements. And, unlike the statutory language requiring "any internal affairs complaint" be reported in the database, 555 CMR 8.05(4)(10) proposes to exclude all "unsustained or unfounded complaints."

[4] https://www.wokewindows.org/
[5] https://qmr.news/

ACLUM urges the Commission to reconsider these proposed grounds for excluding information from its publicly available database, and to delete those proposed provisions from its regulations.

In asking the Commission to release all internal affairs complaints and their concluded[6] investigations through the public database, we note that limiting the reporting of internal affairs complaints only to sustained allegations may allow legitimate complaints to escape public knowledge. For instance, no uniform standard exists by which a law enforcement agency determines that a complaint is sustained, not sustained, unfounded, or exonerated. The Springfield Police Department (SPD) has deemed complaints "not sustained" where there was no neutral observer to discredit the officer's account, *Douglas v. City of Springfield*, No. 14-cv-30210 at *10 (D. Mass. Jan. 12, 2017); the Fall River Police Department (FRPD) defines "not sustained" to mean that after an investigation, there is "insufficient proof to confirm or refute the allegation because of inadequate or insufficient evidence," FRPD SOP-ADM.05.8 (2019); and the New Bedford Police Department (NBPD) defines "not sustained" to mean that the "investigation failed to objectively prove or disprove the allegations." NBPD G.O. 3-03 (2016). Thus, when an allegation of police misconduct is not sustained by the relevant department, it does not follow that the allegation was necessarily false.

Moreover, even when a complaint results in an unfounded or exonerated finding, that finding does not denote that the complained-of behavior did not occur; rather, it could simply mean that the relevant behavior occurred but merely did not violate that law enforcement agency's rules and regulations. For example, in investigating report no. 19-0099 alleging physical abuse, the Fall River Police Department exonerated the officers despite video evidence, which the investigator noted showed one officer using "unusual restraint," and an officer's own statements that he did a "leg sweep" and "guided [the complainant] to the ground;" the investigator concluded that force was "warranted to effect the lawful stop" of the complainant and that the complainant's impression that he was not under suspicion for a crime was "the wrong impression." As another example, in investigating report no. 18-0010 alleging physical abuse, FRPD deemed the complaint unfounded seemingly because the complainant refused to be further interviewed by the PD and in spite of the officer's report that he "[took] hold of the males arm by his wrist and escorted him off of the stairs" because the complainant's recording the officers' actions on his phone impeded the investigation. The officer who wrote that report later became the subject of a grand jury investigation for unlawful use of force. *See In the Matter of a Grand Jury Investigation*, 485 Mass. 641 (2020).

For these reasons and more, ACLUM urges the Commission to publicly release all concluded internal affairs complaints, investigations, and outcomes consistent with § 4(h); to remove 555 CMR 8.05(6)(a)(5) and (e)-(h) from the final regulations; and to make any later inclusions or exclusions from the database subject to the public notice and comment rules.

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[6] ACLUM agrees with CPCS that the definition of "conclusion" in the proposed regulations is overbroad and overinclusive.

d. The "each active officer" language in 555 CMR 8.05(4)(a) should be modified.

Under 555 CMR 8.05, the Commission would maintain a public database with information concerning "each active officer," but the "active" modifier may make the database non-compliant with § 13. As noted above, § 13(a) requires the Commission to maintain certain information about every officer whose certification has been suspended or revoked. In addition, § 13 does not provide a timeframe by which the information shall no longer be included in the database; to the contrary, the statute gives as one of its purposes the assurance that "officers who are decertified by the commonwealth are not hired as law enforcement officers in other jurisdictions." G.L. c. 6E, § 13(b). The statutory language further requires information about a decertified officer's "*last* appointing agency," *id.* at § 13(a) (emphasis added), thereby seeming to require the inclusion of former officers.

Yet the word "active" in the proposed regulations appears to risk excluding officers whose certifications have been revoked or suspended; officers who have separated from their employment, voluntarily or involuntarily; or both. ACLUM therefore recommends that "active" be deleted from 555 CMR 8.05(4)(a).

II. The regulations should not purport to state the Commission's obligations under the Public Records Law.

At 555 CMR 8.02(1)(c), the proposed regulations purport to address "Commission responses to requests for records served upon it pursuant to M.G.L. c. 66, § 10." For example, the proposed regulations would prescribe how the Commission receives and responds to public records requests, 555 CMR 8.08 and 8.09, how it assesses fees, *id.* at 8.11, and even how it decides what processes are "ongoing," presumably for purposes of asserting exemptions to the PRL, *id.* at 8.05(7). Regardless whether these sections accurately reflect the current state of the law (and ACLUM shares CPCS's concerns that they do not), they are more appropriately styled as internal guidance rather than as regulations.

The Commission's enabling statute does not give it the authority to promulgate regulations that define or modify the Public Records Law; the Commission is subject to the law but does not enforce it. Accordingly, the Commission lacks the authority to issue binding interpretations of that statute. *See Goldberg v. Bd. of Health of Granby*, 444 Mass. 627, 632-33 (2005) (courts give substantial deference to the statutory interpretation of the agency charged with primary responsibility for administering a statute); *Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 229 (2012) ("board's specialized [but unrelated] knowledge . . . does not give it any special competence to determine what the Legislature meant" under the statute, and thus court interpreted statute *de novo*); *see also Com. v. Maker*, 459 Mass. 46, 50 (2011) (internal marks and citations omitted) ("Regulations are invalid . . . when the agency utilizes powers neither expressly nor impliedly granted by statute").

Instead, the Legislature expressly delegated to the Supervisor of Public Records the authority to "adopt regulations pursuant to" the PRL. *See* G.L. c. 66, §; *id.* at § 1A (the supervisor of public records shall "prepare forms, guidelines and reference materials for agencies and municipalities to

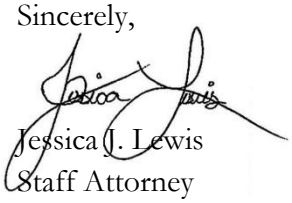
use . . . ."); *see also Kettenbach v. Bd. of Bar Overseers*, 448 Mass. 1019, 1021 (2007) (noting that the Supervisor's regulations apply to Executive Branch entities serving a public purpose and deferring to those regulations). Pursuant to this authority, the Supervisor has issued regulations (and recently amended the regulations after a public comment period) defining agencies' obligations to respond to public records requests, 950 CMR 32.00, and the Secretary of the Commonwealth has issued (and periodically updates) guidelines on the law, including on exemptions with citations to cases. William Galvin, *A Guide to the Massachusetts Public Records Law*, Secretary of the Commonwealth (Feb. 2022).

Nothing, of course, prevents the Commission from issuing internal guidance to its records access officer for how to respond to public records requests, which in turn would be subject to oversight from the Supervisor of Public Records and the courts. *See* G.L. c. 66, §§ 10(b)(ix), 10A(a)-(c). And any such guidance should be made public. But the Commission lacks the authority to issue regulations, carrying the force of law, on that issue.

* * *

For the reasons stated above, ACLUM asks that the Commission's final regulations (1) be expanded to match the statutory requirements under G.L. c. 6E, §§ 4(h), 4(j), 8(e), and 13(a) to maintain certain delineated information in a database; (2) add all information listed in § 4(h)(1)-(12) to the public database under 555 CMR 8.05(4); (3) release any information that the Commission requires be collected under § 4(h)(13) in the public database subject only to a consideration of officer health and safety; (4) limit the information to be excluded from the public database, including by removing 555 CMR 8.05(6)(a)(5) and (e)-(h) from the final regulations, deleting the phrase "active officer" from 8.05(4)(a), and by not making the information in the public subject to guidelines later created by the Commission; and (5) remove sections defining the agency's obligations under the Public Records Law, including 555 CMR 8.08, 8.09, 8.11 as well 8.05(7).

Sincerely,



Jessica J. Lewis
Staff Attorney
(617) 482-3170 ext. 334
jlewis@aclum.org

Committee for Public Counsel Services
Strategic Litigation Unit
75 Federal Street, 6th[th] Floor, Boston, MA 02110
Telephone: (617) 482-6212
Email: strategiclitigationunit@publiccounsel.net

ANTHONY J. BENEDETTI
CHIEF COUNSEL

December 6, 2022

CPCS Summary Comments on the POST Commission Proposed Regulation 555 CMR 8.00

CPCS has provided a redlined version with our proposed revisions to 555 CMR 8.00, Databases and Dissemination of Information. To assist the Commission in its decision-making process, a summary of our reasoning is below.

1. Information Excluded from Public Databases. The POST Commission collects data to assist in its decision-making process, most of which are public records. Yet the POST Commission intends on hiding that information from public view. For example:
    a. 555 CMR 8.05(4)(a)(10) states that unsustained and unfounded disciplinary records will not be in the database. There are no universal definitions of these terms, and the proposed regulations prevent oversight of problematic police internal investigation practices.
    b. 555 CMR 8.05(5)(d) withholds from public view non-CORI records pertaining to criminal misconduct by officers, yet the Supreme Judicial Court has held that the CORI law does not prevent their disclosure. *Boston Globe Media Partners, LLC v. Department of Criminal Justice Information Services*, 484 Mass. 279, 290 (2020) (booking photographs and incident reports sought are not absolutely exempt from disclosure as public records under exemption (a) of the public records law "by necessary implication" of the CORI law); *Attorney General v. Plymouth District*, 484 Mass. 260, 274 (2020), quoting *Globe Newspaper Co. v. District Attorney for the Middle Dist*., 439 Mass. 374, 384 (2003) ("The CORI statute is not intended to shield officials in the criminal justice system from public scrutiny").

c. 555 CMR 8.05(6)(a)(5) conceals assessments of whether an officer possesses good moral character or fitness, such that the public does not know whether an officer has been deemed of good moral character or if the POST Commission is certifying officers in spite of such a determination.

2. Some of the proposed regulations appear to be in direct conflict with the Public Records Law. For example:
    a. 555 CMR 8.05(6)(a)(9) permits blanket non-disclosure of pending investigations, which is impermissible under G. L. c. 7, § 4(26)(f). The Public Records Law requires case-by-case assessments in which prejudice to an investigation is weighted against the public interest in disclosure.
    b. 555 CMR 8.05(6)(h) prohibits disclosure of data if there is a non-disclosure agreement between the Commission and one of the Commonwealth's agencies. However, the Commission cannot agree to such a non-disclosure. *Champa v. Weston Pub. Sch.,* 473 Mass. 86, 98 (2015) (fact that parties contractually agreed "to keep the settlement private cannot, by itself, trump the public records law").
    c. 555 CMR 8.06(2) incorrectly suggests that the POST Commission need not follow the Public Records Law requirement that exempt information must be segregated and redacted.
    d. 555 CMR 8.11(2) improperly mandates imposing maximum fees on public records requesters.
3. Some of the proposed regulations are poorly defined, vague, redundant or are otherwise problematic. For example:
    a. 555 CMR 8.03(2) defines "conclusion" to be after the Commission has rendered its decision and there is no matter pending before a court or agency, such that disclosure of misconduct may be delayed for years after it occurs.
    b. 555 CMR 8.05(5)(j), correctly withholds reports of domestic violence or sexual offenses that are confidential under G. L. c. 41, § 97D, but the existence of domestic violence or sexual offenses by an officer, as well as the allegations and dispositions, should be disclosed. It is only the reports that should be confidential.

c. 555 CMR 8.05(5)(r) excludes private information from disclosure. However, it is unclear if the intention is to withhold more than might be exempt from disclosure under G. L. c. 7, § 4(26)(c).
d. 555 CMR 8.05(6)(a)(10), 555 CMR 8.05(6)(d) - (e), and 555 CMR 8.07(9) should be removed because these regulations are overbroad, do not clarify which records they pertain to, and/or there is no process for determining when and how these provisions bar disclosure of misconduct records.
e. 555 CMR 8.08(3) - (4) contravene the Public Records Law insofar as these regulations make the Commission the gatekeeper and records access liaison for individual law enforcement agencies.

555 CMR 8.00: DATABASES AND DISSEMINATION OF INFORMATION

Section

8.01: Authority

(1) The Massachusetts Peace Officer Standards and Training Commission promulgates 555 CMR 8.00 pursuant to M.G.L. c. 6E, §§ 3(a) and 4(j), and 801 CMR 3.01(2).

8.02: Scope

(1) 555 CMR 8.00 applies to:
(a) Databases that the Commission must maintain pursuant to M.G.L c. 6E, §§ 4(h), 4(j), 8(e), and 13(a);
(b) Other databases and electronic recordkeeping systems maintained by the Commission; and
(c) Commission responses to requests for records served upon it pursuant to M.G.L. c. 66, § 10.

(2) 555 CMR 8.00 does not apply to any of the following:
(a) A response by the Commission to compulsory legal process, except as provided in 555 CMR 8.12;
(b) A response by the Commission to a court order relative to the disclosure of information;
(c) An inquiry or request concerning personal data, made on behalf of the individual to whom the personal data refers, under M.G.L. c. 66A, §§ 2(g) or 2(i); or
(d) The Commission's treatment of evidence that it knows to be relevant to a pending criminal case or exculpatory as to any criminal case.

(3) With respect to matters to which 555 CMR 8.00 applies, it is intended to supersede 801 CMR 3.00.

(4) Nothing in 555 CMR 8.00 is intended to:
(a) Foreclose the Commission's invocation of any provision, privilege, or doctrine, regardless of whether it is cited in 555 CMR 8.00;
(b) Establish a standard of care or create any independent private right, remedy, or cause of action on the part of any person or entity on account of any action the Commission takes or fails to take; or
(c) Otherwise waive any power, right, privilege, protection, or immunity that may be available to the Commission.

(5) Neither 555 CMR 8.00, nor the Commission's provision of any information through a public database or in response to a request for records, is intended to:
(a) Create an attorney-client relationship, a principal-agent relationship, or a confidential relationship with any person or entity;
(b) Make the Commission a part of the prosecution team, the defense team, or the litigation team of any other party in relation to any criminal or civil action or controversy;
(c) Impose upon the Commission any duty or obligation of any other entity or person; or
(d) Otherwise surrender the Commission's independence.

8.03: Definitions

(1) 555 CMR 8.00 incorporates all definitions set forth in 555 CMR 2.02, except those definitions of terms that are defined in 555 CMR 8.03(2).

(2) For the purposes of 555 CMR 8.00, the following terms have the following meanings, unless the context requires otherwise:

Certification. Certification or recertification of a law enforcement officer under M.G.L. c. 6E, §§ 3(a) and 4.

Commission. The Massachusetts Peace Officer Standards and Training Commission established under M.G.L c. 6E, § 2 as an agency, including its Commissioners and its staff.

Compulsory Legal Process. A demand that is issued by or through a federal or state court or party to litigation, including any demand made by summons, subpoena, discovery request, or judicial order.

Conclusion. The point at which the Commission has rendered its ultimate decision or action on a matter~~, no proceeding regarding the matter is pending before any court or agency, ,~~ and there is no opportunity for the Commission to further review or investigate ~~further review~~ the matter~~in the normal course by any court or agency remains~~.

Decertification. A revocation of certification made by the Commission pursuant to M.G.L. c. 6E, § 10, an action distinct from a denial, a nonrenewal, or an expiration of certification.

Executive Director. The Executive Director of the Commission, appointed pursuant to M.G.L. c. 6E, § 2(g), or that person's designee for relevant purposes.

Municipal Police Training Committee and MPTC. The agency of the same name within the Executive Office of Public Safety and Security, as established in M.G.L. c. 6, § 116.

Personal Data. Personal data under M.G.L. c. 66A, including any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual, provided that such information is not contained in a public record, as defined in M.G.L. c. 4, § 7, cl. 26, and is not intelligence information, evaluative information, or criminal offender record information, as defined in M.G.L. c. 6, § 167.

Records Access Officer and RAO. The individual designated by the Commission to perform the duties of records access officer described in M.G.L. c. 66 and 950 CMR 32.00, or that person's designee.

Record, Information, and Data. Any form of document, written material, or data, regardless of whether it constitutes a "public record" under M.G.L. c. 4, § 7, cl. 26 or "personal data" under M.G.L. c. 66A.

Records Request. A request for Commission records made pursuant to, and in conformance with, M.G.L. c. 66, § 10.

Requester. Any person or entity that tenders a records request to the Commission.

Vote of the Commissioners. A vote sufficient to satisfy the requirements of M.G.L. c. 6E, § 2(e).

8.04: Submission of Information by Agencies

(1) When an agency supplies information concerning an officer to the Commission, the agency:

(a) Must notify the officer that it has done so in accordance with any other provision of 555 CMR that requires notification; or

(b) In the absence of any such provision, must notify the officer that it has done so within seven calendar days, unless such notification would compromise an ongoing investigation or the security of any person or entity, or would be precluded by federal or Massachusetts law.

8:05: Public Database

(1) The Commission shall maintain a public database of information concerning officers who are certified or conditionally certified; officers whose certifications are pending, restricted, limited, or suspended; and officers who have been decertified or not recertified.

(2) The public database must be searchable and accessible to the public through the Commission's official website.

(3) In determining what information to include in the public database, the Commission shall consider the health and safety of officers, in accordance with M.G.L. c. 6E, § 4(j).

(4) Except as provided in 555 CMR 8.05(5) or (6), the public database shall provide the following forms of information, to the extent that such forms of information are possessed by the Commission, in accordance with guidelines established by a vote of the Commissioners, or, if no such guidelines are established, in accordance with guidelines established by the Commission's Executive Director:

(a) For each active officer:

1. The officer's first name and surname;
2. The officer's current certification status in Massachusetts;
3 The dates on which the officer was first certified and was most recently certified in Massachusetts;
4. All of the officer's employing law enforcement agencies in Massachusetts and elsewhere, and the dates of the officer's employment with such agencies;
5. Commendations received by the officer in connection with the officer's service in law enforcement;
6. The date of, and reason for, any decertification by the Commission or by a comparable body in any other jurisdiction;
7. The beginning date and end date of, and the reason for, any suspension of certification by the Commission;
8. As to any retraining order issued by the Commission, the date of the order, the reason for the order, the type of retraining ordered, and any date of completion of the retraining ordered;
9. A copy of each final opinion, decision, order, set of findings, and vote issued by the Commission pursuant to M.G.L. c. 6E, § 10 in connection with any proceedings concerning the officer, accessible in a commonly available electronic format;
10. A summary of the officer's disciplinary record, based on information provided by agencies that have employed the officer~~, excluding unsustained or unfounded complaints~~; and
11. Information concerning any decision that reversed or vacated an action ~~adverse to the officer~~, or that exonerated the officer in relation to a particular matter, where such action or matter is referenced in the database.

(b) To the extent reasonably feasible, aggregations of, or ways for public users to aggregate, information regarding the following:

1. Decisions by the Commission and comparable bodies in other jurisdictions to decertify officers;
2. Decisions by the Commission to suspend the certification of officers;
3. Decisions by the Commission to order the retraining of officers;
4. Officers who have served in a particular department; and
5. The total number of complaints reportable to the Commission pursuant to 555 CMR 1.00.

([5]) The public database shall not include any of the following forms of information:

(a) Information relating to a preliminary inquiry, or initial staff review used to determine whether to initiate an inquiry, that is confidential under M.G.L. c. 6E, §

8(c)(2), or 555 CMR 1.03 or 1.07(2);
(b) Other information related to disciplinary proceedings that is confidential under 555 CMR 1.01(2)(d), 1.09(6)(c), or 1.10(4)(a);
(c) Personal contact information of public employees or members of their families that is generally non-disclosable under M.G.L. c. 66, §§ 10B and 15;
(d) ~~Criminal offender record information, criminal history information, or criminal~~Criminal history record information that cannot be communicated under M.G.L. c. 6, §§ 168 or 178, 803 CMR 2.19(1), or 803 CMR 7.10 through 7.14;
(e) Sealed or expunged records that are confidential or unavailable for inspection under M.G.L. c. 276, §§ 100L, 1000, or 100Q;
(f) Juvenile delinquency records that must be withheld under M.G.L. c. 119, § 60A, or juvenile criminal records that cannot be communicated under M.G.L. c. 6, §§ 168 and 178.
(g) Police-log information pertaining to arrests of juveniles that is non-disclosable under M.G.L. c. 41, § 98F;
(h) Police-log information pertaining to handicapped individuals that is non-disclosable under M.G.L. c. 41, § 98F;
(i) Police-log information pertaining to alleged domestic violence or sex offenses that is non-disclosable under M.G.L. c. 41, § 98F;
(j) Reports of domestic violence or sex offenses, and associated communications, that are not public reports and are to be treated by police departments as confidential under M.G.L. c. 41, § 97D, provided that the existence of reports, allegations, and dispositions shall be disclosed;
(k) Information in court and police records that identifies alleged victims of sex offenses or trafficking and is non-disclosable under M.G.L. c. 265, § 24C;
(1) Personal contact, employment, or educational information of victims of crimes or domestic violence, or members of their families, that is non-disclosable under M.G.L. c. 66, §§ 10B and 15;
(m) Personal contact, employment, or educational information of victims, members of their families, or witnesses that is non-disclosable under M.G.L. c. 258B, §§ 3(h) and 3(w);
(n) Personal contact, employment, or educational information of family-planning personnel or members of their families that is non-disclosable under M.G.L. c. 66, §§ 10B and 15;
(o) Personal data that is non-accessible under M.G.L. c. 66A and M.G.L. c. 214, § 3B;
(p) Forms of "personal information" referenced in M.G.L. c. 9311, § 1, other than the names of individuals;
(q) Data that the Commission is precluded from disclosing pursuant to a court order;
~~(r) Information the disclosure of which may constitute an unreasonable, substantial or serious interference with a person's privacy under M.G.L. c. 214, § 1B~~; and
~~(s)~~(r) Any other information that is non-disclosable under federal or Massachusetts law.

(6) The public database also shall not include:
(a) The following forms of information, the revelation of which could potentially impact officer health or safety, including by facilitating attempts to coerce officers or exploit any individual vulnerabilities:
1. Information relating to a member of an officer's family, except where such family member is an officer and any relation between the two officers is not revealed;
2. Information concerning an officer's personal finances that is not otherwise publicly available;
3. Information that could readily be used to facilitate identity theft or breaches of data security, including, but not limited to, an officer's date of birth, passwords, and entry codes;
4. Information concerning an officer's medical or psychological condition;
5. REMOVED ~~Assessments of whether an officer possesses good moral character or fitness for employment in law enforcement under M.G.L. c. 6E, § 4(f)(1)(ix), made pursuant to 555 CMR 7.05 or 7.06(9) or otherwise;~~
6. Information concerning an officer's conduct as a juvenile;

7. Information concerning any firearm, or firearms license or permit, that an officer currently possesses in a personal capacity;

8. Law enforcement information, including information concerning the following subjects, if disclosure could compromise law enforcement or security measures:

a. Undercover operations;

b. Confidential informants;

c. Clandestine surveillance;

d. Secretive investigative techniques;

e. Passwords and codes;

f. The details of security being provided to a person or place; or

g. Subjects of comparable sensitivity.

9. ~~Information concerning a disciplinary matter before the Commission that has not reached a conclusion; and~~REMOVED

10. ~~Any other information that could readily be used in an attempt to coerce action or inaction, or exploit individual vulnerabilities, of an office~~REMOVED~~r.~~

(b) ~~Agency data that is subject to an ongoing audit by the Commission pursuant to M.G.L. c. 6E, §§ 3(a)(9), 3(a)(21), and 8(d);~~REMOVED

(c) Records associated with Commission meetings that may be withheld under M.G.L. c. 30A, § 22;

(d) ~~Personal data that an individual has the ability to have corrected or amended under M.G.L. c. 66A, § 2(j) or 555 CMR 8.07~~REMOVED~~.~~

(e) ~~Information in a personnel record that an employee has the right to have corrected or expunged pursuant to M.G.L. c. 149, § 52C;~~REMOVED

(f) Information that is subject to a privilege held by the Commission;

(g) Information that is subject to a privilege held by a person or entity other than the Commission;

(h) ~~Data that is non-disclosable under any formal agreement or memorandum of understanding between the Commission and any other unit of the government of the Commonwealth, including, but not limited to, any Commonwealth of Massachusetts Data Sharing Memorandum of Understanding, and any Data Use License Agreement between the Commission and the MPTC~~REMOVED~~;~~

(i) Information that a court has expunged, placed under seal, impounded, or relieved the Commission of having to disclose;

(i) Information the confidentiality of which is the subject of dispute in litigation or an administrative proceeding; and

(k) Information that otherwise does not constitute a public record under M.G.L. c. 4, § 7, cl. 26.

(7) For purposes of determining whether a matter is ongoing, as that question relates to the applicability of exemptions under M.G.L. c 4, § 7, cl. 26 or other provisions or doctrines, the following guidelines shall apply.

(a) A certification matter should be deemed subject to Commission oversight, and ongoing, beginning upon the earliest of the following:

1. The Commission's receipt of an application for certification on behalf of an officer, including one made pursuant to M.G.L. c. 6E, § 4, M.G.L. c. 30A, § 13, or 555 CMR 7.03; or

2. An agency's receipt from an officer of an application for certification or any materials required for the agency to complete an application for certification on the officer's behalf.

(b) A certification matter should be deemed no longer ongoing upon the conclusion of the matter.

(c) A disciplinary matter should be deemed subject to Commission oversight, and ongoing, beginning upon the earliest of the following:

1. The Commission's receipt of a complaint or information warranting a determination of whether to initiate a preliminary inquiry under M.G.L. c. 6E, § 8; or

2. An agency's receipt of a complaint that must or will be reported to the Commission under 555 CMR 1.01.

(d) A disciplinary matter should be deemed no longer ongoing upon the earliest of the following:

1. The conclusion of the matter;

2. The point at which all entities that the Commission knows to have

been investigating the matter have decided not to pursue any associated disciplinary or legal action; or

3. An officer's communication to the Commission of a decision not to challenge any disciplinary action.

(8) To the extent allowed by law, the Commission may include in the public database~~, or exclude from the public database,~~ other forms of information not specifically referenced in 555 CMR 8.05(4), (5), or (6), in accordance with guidelines established by a vote of the Commissioners, or, if no such guidelines are established, in accordance with guidelines established by the Commission's Executive Director.

8.06: Maintenance of Databases and Electronic Recordkeeping Systems Generally

(1) The Commission's RAO and its Chief Technology Officer shall consult with each other, and with the Commission's Executive Director, its Chief Financial and Administrative Officer, or the Massachusetts Executive Office of Technology Services and Security to ensure that, to the extent feasible, any electronic recordkeeping system or database that the Commission maintains is capable of providing data in a commonly available electronic, machine readable format.

(2) ~~To the extent feasible, any~~Any database ~~should~~ shall allow for information storage and retrieval methods that permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access.

(3) The Commission shall not enter into any contract for the storage of electronic records that:

(a) Prevents or unduly restricts the RAO from providing public records in accordance with M.G.L. c. 66;

(b) Relieves the Commission of its obligations under M.G.L. c. 66A or any governing regulations promulgated thereunder; or

(c) Omits provisions that are necessary to ensure compliance with M.G.L. c. 66A or any governing regulations promulgated thereunder.

8.07: Objections Concerning Data

(1) An individual who is identified in data maintained by the Commission, or the individual's representative, may raise objections related to the accuracy, completeness, pertinence, timeliness, relevance, or dissemination of the data, or the denial of access to such data by filing a written petition for relief with the Executive Director, in a form prescribed by the Commission, at any time.

(2) Upon receiving a petition filed pursuant to 555 CMR 8.07(1), the Executive Director shall promptly evaluate the petition, including by obtaining relevant information.

(3) If the Executive Director determines that the relief requested in a petition filed pursuant to 555 CMR 8.07(1) is warranted, the Executive Director shall promptly:

(a) Take appropriate steps to grant such relief, or comparable relief;

(b) Make information concerning the action taken available to the Commissioners;

(c) Notify the petitioner of the status of the petition.

(4) After the Executive Director takes the steps prescribed by 555 CMR 8.07(3):

(a) The Chair may take any further action allowed by law with respect to the petition filed pursuant to 555 CMR 8.07(1); and

(b) The Executive Director shall notify the petitioner regarding any change in the status of the petition.

(5) If the Executive Director determines that the relief requested in a petition filed pursuant to 555 CMR 8.07(1) is unwarranted, the Executive Director shall:

(a) Within a reasonable time, notify the petitioner in writing that such determination was made and that the petitioner shall have the opportunity to submit a statement reflecting the petitioner's position regarding the data; and

(b) Cause any such statement to be included with the data and with any subsequent disclosure or dissemination of the data.

(6) Within thirty days of receiving a notification pursuant to 555 CMR 8.07(5)(a), a petitioner may file a written request for further review with the Executive Director.

(7) The Executive Director shall provide any request for further review made pursuant to 555 CMR 8.07(6) to the Chair promptly upon receiving it.

(8) The Chair may take any action allowed by law with respect to a request for further review made pursuant to 555 CMR 8.07(6).

(9) ~~If the Commission has a good-faith, reasonable belief that a public employee may possess a right to have data in a personnel record that is maintained by an employer corrected or expunged pursuant to M.G.L. c. 149, § 52C, the Commission shall make reasonable efforts to give the employee the opportunity to exercise the right.~~REMOVED

8:08: Receipt and Referral of Records Requests

(1) The Commission may decline to accept records requests by telephone, pursuant to 950 CMR 32.06(1)(a).

(2) If the Commission receives a records request and determines that the MPTC is the data owner as to all responsive materials, the Commission shall refer the records request to the MPTC and request that the MPTC respond in accordance with any Data Use License Agreement between the Commission the MPTC, and the Commission may presume that the MPTC will assume responsibility for responding.

(3) ~~If the Commission receives a records request, it may consult with a law enforcement agency to determine if similar requests have been received by the agency.~~REMOVED

(4) ~~The Commission may establish a policy providing for agencies that receive records requests for documents that are also held by the Commission to be required to provide the Commission with timely notice of the records request, a copy of any response to the records request, and copies of any documents produced.~~REMOVED

8:09: Responses to Records Requests

(1) Except as provided in 555 CMR 8.09(2), (3), or (4), a record requested through a records request shall be provided in accordance with M.G.L. c. 66 and 950 CMR 32.00.

(2) If a record includes information identified in 555 CMR 8.05(5), such information shall not be disclosed;

(3) If a record includes information identified in 555 CMR 8.05(6), taking into account the provisions of 555 CMR 8.05(7), such information shall not be disclosed, unless:

(a) Disclosure is required under M.G.L. c. 66A, § 2 or any other source of federal or Massachusetts law; or

(b) Disclosure:

1. Is not prohibited by federal or Massachusetts law;

2. Will not jeopardize any law enforcement efforts or the security of any person or entity; and

a. Will be made to the person or entity who is the subject of the information;

b. Will be made to a law enforcement agency or a criminal justice agency in Massachusetts or elsewhere;

c. Is warranted by public interests that are substantially greater than any interests in non-disclosure; or

d. Has previously been made publicly by the officer at issue or the Commission in litigation.

(4) If a record constitutes a public record and is made available on a public website pursuant to M.G.L. c. 66, § 19(b), M.G.L. c. 7, § 14C, 555 CMR 8.05, or any other appropriately indexed and searchable public website, the RAO may furnish the record by providing reasonable assistance in locating it on the public website, pursuant to M.G.L. c. 66,

§ 6A(d).

8:10: Privileged Information

(1) Where information that is responsive to a records request is subject to a privilege recognized by law:

(a) If the Commission is the holder of the privilege, the privilege may be waived only through a vote of the Commissioners; and

(b) If a person or entity other than the Commission is the holder of the privilege, the Commission shall:

1. Notify the holder regarding the records request; and

2. Make reasonable efforts to give the holder the opportunity to protect the information.

8:11: Fees for Producing Records

(1) In response to any records request that does not address the requester's eligibility for a waiver of fees under M.G.L. c. 66, § 10(c)(v) and 950 CMR 32.07(2)(k), the Commission may seek information from the requester regarding the purpose of the records request, in accordance with M.G.L. c. 66, § 10(d)(viii) and 950 CMR 32.06(2)(h).

(2) ~~Where a requester requests records that are substantially similar to information available through the public database prescribed by 555 CMR 8.05, the Commission shall direct the requester to the database and, if that does not satisfy the requester, then decline to provide records without payment of the maximum fee permitted by law, notwithstanding the provisions of M.G.L. c. 66, § 10(c)(v) and 950 CMR 32.07(2)(k).~~REMOVED

(3) Where the Commission has determined that records are not to be provided without payment of a fee:

(a) The requester shall not be obligated to pay any fee without having agreed to do so;

(b) The Commission may decline to continue assembling or reviewing potentially responsive documents until the full fee has been paid; and

(c) The Commission ~~shall~~ may not provide documents until the full fee has been paid.

8:12: Compulsory Legal Process

(1) When any person or entity seeks personal data maintained by the Commission through compulsory legal process, the Commission, except as provided in 555 CMR 8.12(2):

(a) Shall notify the individual to whom the personal data refers in reasonable time that the individual may seek to have the process quashed; and

(b) If appearing or filing any paper in court related to the process, shall notify the court of the requirement of M.G.L. c. 66A, § 2(k).

(2) The Commission need not provide the notification described in 555 CMR 8.12(1) if a court orders otherwise upon a finding that notice to the individual to whom the personal data refers would probably so prejudice the administration of justice that good cause exists to delay or dispense with such notice.

REGULATORY AUTHORITY

555 CMR 8.00: M.G.L. c. 6E, §§ 3(a) and 4(j), and 801 CMR 3.01(2).

Committee for Public Counsel Services
Strategic Litigation Unit
75 Federal Street, 6th[th] Floor, Boston, MA 02110
Telephone: (617) 482-6212
Email: strategiclitigationunit@publiccounsel.net

ANTHONY J. BENEDETTI
CHIEF COUNSEL

December 6, 2022

Good morning. We believe the POST Commission is in a powerful and unique position to bolster public confidence in law enforcement. The best way the Commission can foster public confidence is through transparency and accountability. Unfortunately, the regulations as they are currently written will undermine this goal. We hope you will consider our concerns as you finalize these important regulations.

We would like to discuss four overarching concerns today. First, the regulations codify unreasonable prolonged delays in disclosure. Second, the regulations permit permanent exclusion of information that the public has a right to know. Third, aspects of the regulations are vague and overbroad, enabling abuse of discretion. Fourth, the regulations contradict and undermine the public records law.

First, 555 CMR 8.03 defines the "conclusion" of a matter as the point when there is no opportunity for further review by any court or agency. This is overbroad and overinclusive. Matters in the court system can take years to conclude. Since sections of the regulations, such as 555 CMR 8.05(6)(a)(9), exclude disclosure of information before a matter reaches its conclusion, there will be yearslong delays in disclosure. Instead, conclusion should mean when the POST Commission has rendered its ultimate decision on a matter. The Commission should be equipped to investigate misconduct, make findings, and ensure officers receive due process. To withhold information, even after the Commission has made its final decision, undermines trust in

law enforcement by suppressing potentially powerful information about misconduct for years, and shields POST Commission decision-making from oversight.

Second, there are multiple sections of the regulations that explicitly enable exclusion of information the public has a right to know. The POST Commission collects information about officers who have been convicted of felonies, but under 555 CMR 8.05(5)(d), will not disclose these convictions in their database erroneously citing to the CORI law. The Supreme Judicial Court has repeatedly emphasized that the CORI law does not prohibit disclosure of public official misconduct. The POST Commission also collects assessments regarding whether police officers have good moral character, but under 555 CMR 8.05(6)(a)(5), the POST Commission states it will be concealing this information as well. This is unacceptable. Not only does the public have a strong interest in knowing which officers were not deemed to be of good moral character, the public also has a strong interest in knowing whether this Commission has decided to certify them anyway. The proposed regulations shield both law enforcement officials and this Commission from scrutiny. In addition, 555 CMR 8.05(4)(a)(10) withholds unsustained and unfounded complaints, regardless of the reason for these conclusions or the underlying nature of the matter. There are police departments that do not have robust internal investigation units that regularly deem complaints "unsustained." If an officer has a history of complaints, whether sustained or not, that pattern can be important.

Third, sections of the regulations are vague and appear to authorize alarming nondisclosure and expungement practices. 555 CMR 8.05(5)(r) precludes disclosure of private information but does not clarify what records that may pertain to, and whether the result will be wholesale withholding of records or reasonable redaction of private information. 555 CMR 8.05(6)(d)-(e) forbids disclosure of records an individual has the right to correct or expunge, without specifying what that includes and excludes. Based on prior communications from the Commission's General

Counsel, the Commission's interpretation appears to deny disclosure of misconduct investigation records.

Fourth, the regulations contradict and appear in some instances to even violate the public records law which clearly and deliberately states that "a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove" that such record may be withheld.[1] Of course, the POST Commission does not have the authority to promulgate regulations interpreting the public records law. But putting that aside, we wanted to emphasize the following concerns. First, *555* CMR 8.06(2) makes segregation and redaction optional and contingent on what the Commission believes is feasible. Segregating and redacting exempt materials so that remaining records can be disclosed is not discretionary, it is required. Second, the regulations include impermissible, blanket nondisclosure practices. For example, *555* CMR 8.05(6)(a)(9) conceals any disciplinary matter that has not reached a conclusion whereas General Law c. 4, § 7(26)(f), requires the balancing of investigatory prejudice and public interest in disclosure on a case-by-case basis. Third, *555* CMR 8.08(3) and (4) allow the Commission to force individual law enforcement agencies to coordinate their public records request responses with the Commission. This glaring attempt by the Commission to gatekeep access to public records undermines the public records law. Fourth and finally, *555* CMR 8.011(2) mandates maximum payment of fees to receive records "substantially similar" to those in the forthcoming public database. Given the many concerns we outline above about records the Commission plans to exclude from its public database, it is easy to imagine a great deal of records detailing police

[1] M. G. L. c. 66, § 10A(d)(1)(iv).

misconduct will trigger this provision. This regulation seemingly exists to suppress access to records of vital public importance the Commission does not want to share through exorbitant fees.

The legislature entrusted the Commission with a mandate of ensuring transparency and accountability when law enforcement officers commit misconduct. We believe these regulations hinder, and at times outright flout, this directive. We hope the POST Commission carefully considers our feedback as it embarks on fulfilling its mandate, so we can achieve our shared goals of transparency and accountability in law enforcement.

Thank you.

Rebecca Jacobstein

4c.

The Commonwealth of Massachusetts
Supreme Judicial Court
MENTAL HEALTH LEGAL ADVISORS COMMITTEE

MHLAC

24 SCHOOL STREET • SUITE 804 • BOSTON • MASSACHUSETTS • 02108
MAIN 617.338.2345 • FAX 617.338.2347 • WWW.MHLAC.ORG

PHILLIP KASSEL
EXECUTIVE DIRECTOR

December 6, 2022

Massachusetts Peace Officers Standards & Training (POST) Commission
100 Cambridge Street, 14th Floor
Boston, MA 02114
Submitted via email: POSTC-comments@mass.gov

RE: Comments on Proposed School Resource Officer Certification Regulations

Dear Judge Hinkle and POST Commissioners:

Thank you for the opportunity to comment on the proposed school resource officer (SRO) certification regulations. For nearly 50 years, the Mental Health Legal Advisors Committee (MHLAC) has worked to protect and advance the rights of persons with mental health-based disabilities in the Commonwealth. Our advocacy encompasses discrimination against students with mental health needs. We believe that their mistreatment often wreaks lifelong negative consequences; exacerbating mental health issues and limiting clients' ability to function independently. Such concerns motivate these comments.

Whether due to lack of clarity on their role,[i] lack of awareness about students' diagnoses, or a lack of understanding of special educational rights, SROs disproportionately arrest students with mental and/or behavioral health needs in the Commonwealth's public schools.[ii] A first-time arrest doubles the odds a student drops out,[iii] substantially diminishing students' future prospects.[iv] Moreover, the mere presence of police in schools can traumatize students, particularly if they have witnessed or experienced unfair treatment by police in their community.[v] To address the problem of over policing in schools, MHLAC has undertaken much advocacy on school policing issues, including serving on the Model SRO Memorandum of Understanding (MOU) Commission established by the police reforms of 2020.

The proposed regulations are critical to ensuring that police power is not misused in schools. To that end, the regulations must specify the following:

1. **The regulations should require that SROs are trained on the requirements of the Model MOU by use of pre-service and in-service training.**

In compliance with the police reforms of 2020, Massachusetts created a Model SRO MOU that all districts with SROs must adopt.[vi] The MOU specifies the situations in which SROs may become involved, among other key details.[vii] As this MOU is mandatory for all school districts, it is essential that present and future SROs receive training on what circumstances warrant their intervention under the Model MOU so they can make that call in real time. The current regulations are silent on training requirements related to the Model MOU. They should be revised to require both pre-service and in-service training on the MOU as a condition of certification. Moreover, any request for certification from an officer working in a jurisdiction that has yet to adopt the Model MOU should be deferred until the local law enforcement agency and school district have done so.

2. **The regulations should restate the topics required by law in which SROs must be trained.**

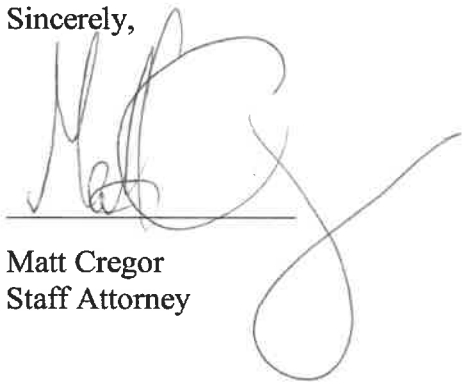
We understand that the Municipal Police Training Committee (MPTC) has begun training SROs for certification in compliance with G.L. c. 6 § 116H. That said, the MPTC has not provided "the course of instruction, the learning and performance objectives and the curriculum and standards for training"[viii] required by the law. Similarly, we are not aware of their efforts – also required by statute – to develop these materials "with educators and attorneys experienced in juvenile and education law."[ix] To ensure that SROs are taught what the law requires, the regulations should restate the mandatory training topics listed in § 116H,[x] while stressing the law's basic requirements that SRO's "shall not: (i) serve as school disciplinarians, enforcers of school regulations or in place of licensed school psychologists, psychiatrists or counselors; and (ii) use police powers to address traditional school discipline issues, including non-violent disruptive behavior."[xi]

3. **The POST Commission should incorporate complaints into determination of when an SRO's certification is revoked, suspended, or not renewed.**

Apart from a failure to meet the training requirements, the proposed regulations are silent on what would trigger the revocation, suspension, and non-renewal of SRO certification. The regulations should specify what actions warrant changes in an SRO's certification status, drawing from the Model MOU's complaint process[xii] and requirements for annual review of an SRO, namely: "...SRO efforts to prevent unnecessary student arrests, citations, court referrals, and other use of police authority... and, feedback from the school community, including principal(s), teachers, students, and families of the school(s) to which the SRO is assigned."

We thank you for your attention to these issues and are happy to discuss any of the above.

Sincerely,



Matt Cregor
Staff Attorney

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[i] Johanna Wald and Lisa Thurau, *First, Do No Harm* (2010).

[ii] Robin Dahlberg, *Arrested Futures: The Criminalization of School Discipline in Massachusetts's Three Largest School Districts* (2012).

[iii] Gary Sweeten, *Who Will Graduate?*, 23 Justice Quarterly 462, 473-477 (2006).

[iv] Stuit & Springer, *California's High School Dropouts: Examining the Fiscal Consequences*, The Found. for Educ. Choice, 7 (Sept. 2010), available at http://files.eric.ed.gov/fulltext/ED517469.pdf (dropouts are more likely to be unemployed or out of the labor force and twice as likely to be living in poverty). A high school diploma is necessary to have any reasonable chance to compete in today's job market. *See* Carnevale, Smith & Strohl, *Recovery: Job Growth and Education Requirements Through 2020 (Executive Summary)*, Georgetown Public Policy Inst., Ctr. on Educ. and the Workforce, 5 (June 26, 2013) (of 55 million job openings expected between 2010 and 2020, only 7 million, or 12%, won't require a high school diploma). Without meaningful employment opportunities, youth are substantially more likely to live in poverty and depend on public benefits as

adults. *See* Rumberger, "Poverty and high school dropouts: The impact of family and community poverty on high school dropouts," Am. Psychological Assoc. (May 2013), http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx (citation omitted). This poverty can exacerbate mental health issues. [iv] See Lund, Breen, Flisher, Kakuma, Corigall, Joska, Swartz & Patel, *Poverty and common mental disorders in low and middle income countries: A systematic review* (Author Manuscript), 16 (Aug. 2016), available at https://www.ncbi.nlm.nih.gov/pmc /articles/PMC4991761/; see also McSilver Institute for Poverty Policy and Research, *Mental Health and Poverty*, New York Univ., available at http://mcsilver.nyu.edu /sites/default/files/reports/Mental_Health_and_Poverty_one-sheet.pdf.

[v] Research demonstrates that being stopped at school by police officers is a "potent" predictor of heightened emotional distress and post-traumatic stress symptoms in youth. And, the presence of guards and metal detectors in schools significantly increased students' perceptions of fear. Bachman, R. et al. *Predicting Perceptions of Fear at School and Going to and From School for African American and White Students: The Effects of School Security Measures*, Youth and Society, 43(2): 705–726 (2011). https://doi.org/10.1177/0044118X10366674.

[vi] G.L. c. 71 § 37P(b) ("The model memorandum of understanding shall be developed for schools and police departments as the minimum requirement for schools to formalize and clarify implementation of the partnership between the school and the school resource officer.")

[vii] The 2022 *Model School Resource Officer Memorandum of Understanding* focuses police involvement on students' "[c]riminal and delinquent conduct that (1) poses substantial harm to the physical well-being of another person or (2) is willful and malicious and causes substantial harm to the property of the school or (3) constitutes the taking of property of substantial value belonging to another with intent to permanently deprive the property owner of the property." Commonwealth of Massachusetts, *Model School Resource Officer Memorandum of Understanding* 2 (2022).

[viii] G.L. c. 6 § 116H

[ix] *Id.*

[x] G.L. c. 6 § 116H requires the Municipal Police Training Committee to provide training to SROs on: "(i) the ways in which legal standards regarding police interaction and arrest procedures differ for juveniles compared to adults; (ii) child and adolescent cognitive development, which shall include instruction on common child and adolescent behaviors, actions and reactions as well as the impact of trauma, mental illness, behavioral addictions, such as gaming and gambling disorder, and developmental disabilities on child and adolescent development and behavior; (iii) engagement and de-escalation tactics that are specifically effective with youth; and (iv) strategies for resolving conflict and diverting youth in lieu of making an arrest. Such program shall also include training related to: (i) hate crime identification and prevention training curriculum including acquisition of practical skills to prevent, respond to and investigate hate crimes and hate incidents and their impacts on victim communities; (ii) anti-bias, anti-racism and anti-harassment strategies; (iii) bullying and cyberbullying; and (iv) comprehensive training to help school resource officers interact effectively with school personnel, victim communities and build public confidence with cooperation with law enforcement agencies."

[xi] G.L. c. 71 § 37P(b).

[xii] "The Parties shall develop and implement a simple and objective complaint resolution system for all members of the school community to register concerns that may arise with respect to the SRO. The system shall comply with Police Department policies and shall provide for timely communication of the resolution of the complaint to the complainant." Commonwealth of Massachusetts, *Model School Resource Officer Memorandum of Understanding* 10 (2022).

75 Federal Street, 6th Floor, Boston, MA 02110
617/910-5829 (p) • 617/988-8494 (f)
Marlies Spanjaard, Director of Education Advocacy
Katherine DiVasto • Diana Howat • Elizabeth Levitan • Elizabeth McIntyre
Erin Hehn O'Sullivan • Michele G. Scavongelli • Tim Sindelar

December 6, 2022

Massachusetts POST Commission
100 Cambridge Street, 14th Floor
Boston, MA 02114

Dear members of the POST Commission,

My name is Marlies Spanjaard, and I am the Director of Education Advocacy for the Committee for Public Counsel Services. In that role, I oversee the EdLaw Project, which provides education legal services to court-involved children and youth. Our project is specifically set up to disrupt the school to prison pipeline. We have unique access to the hundreds of court-appointed attorneys across the state representing children charged with offenses in the juvenile court.

Under, Chapter 253 of the Acts of 2020, section 23, the MPTC was explicitly instructed by the legislature to consult attorneys experienced in juvenile law, education law in the development of the course of instruction, learning and performance objectives, and curricula and standards for training. Given our unique access to both education law and juvenile law, the EdLaw Project would be an obvious choice for consultation. We have not been consulted, nor has the leadership of the Youth Advocacy Division, the juvenile defender branch of the Committee for Public Counsel Services. We are further unaware that any of our colleagues in the education legal advocacy community have been consulted about the curriculum.

We ask that you assist the MTPC to fulfil their requirement to consult with education and juvenile attorneys so that we may share our experience. The attorneys from the Youth Advocacy Division, both staff and private, represent most students arrested in school across the state and have unique insight into some of the current challenges with SRO training and program implementation. We have knowledge and data to share about the disproportionate rate of arrest of students with disabilities and students of color.

We know from the 2020 juvenile arrest data, that although black youth account for just 10% of the population, they account for 30% of arrests, and Hispanic students account for 18% of population and 30% of arrests.[1]

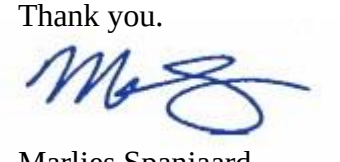
We also have data from the American Civil Liberties Union that shows that students with disabilities were nearly three times more likely to be arrested than students without disabilities.[2] This risk is higher at schools with police.

[1] Arrest data available at: https://www.mass.gov/info-details/data-about-youth-arrests
[2] https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors (based on data from U.S. Department of Education, 2015-2016 Civil Rights Data Collection (CRDC))

If we are going to have police within our schools, it is imperative that they be trained to understand implicit bias, child development, trauma, and disability related conduct.

We remain open and available for this conversation.

Thank you.



Marlies Spanjaard
Director of Education Advocacy

Strategies for Youth

P.O. Box 390174 • Cambridge, MA 02139 • 617.714.3789
www.strategiesforyouth.org

Comments on

Policies of Massachusetts Peace Officers Standards & Training on Certification of School Resource Officers

Presented December 6, 2022

Good morning. My name is Lisa Thurau. I am the Executive Director of Strategies for Youth, an organization that seeks to ensure the best outcomes for youth who interact with law enforcement by promoting the use by officers and law enforcement agencies of developmentally appropriate, trauma-informed, racially equitable policies, practices and partnerships.

Today I wish to comment on the MA POST Commission's School Resource Officer policies. I want to begin, however, with a restatement of the purpose of a POST. As I understand it, and as the literature on POST Commission describes, the purpose of a standards and training commission for law enforcement serves to:

- Transcend local control and determination of police oversight,
- Create statewide, uniform policies and standards,
- Create systems and mechanisms of accountability.

Until 2020, Massachusetts lagged behind 46 other states which have adopted POSTs to date. The enactment of Chapter 253 of the Acts of 2020 represents a major step forward in regulation of Massachusetts police officers and police departments. For these reasons, Strategies for Youth strongly supports the establishment of the POST and commends the speed with which it has gotten up and running, achieving major milestones even during Covid.

Most police accountability mechanisms, like lawsuits filed under Section 1983 federal civil rights claims, come into effect after a bad act by an officer. These lawsuits have limited power to change law enforcement policies that are ineffective or harmful. Civilian oversight agencies rarely have the legal authority to fully examine conduct or compel policy changes. For these reasons, we are heartened by the creation of the Massachusetts POST, because it has the authority to create policy and standards, ensure training requirements are met, and establish hiring criteria that *could prevent harm and misconduct before they occur.*

Because the POST has these powers, it can ensure accountability, build trust, and command deterrence and thereby ensure greater professionalism of the policing field statewide. In view of the potential for the POST to bring about meaningful and important changes to the policing profession in the Commonwealth, we ask the Commission to reconsider three key aspects of the SRO certification policies it has circulated.

Ensuring Certification only for Properly Training Officers

First, when the POST certifies school resource officers, it is telling parents, students, and school administrators that officers have met the legal standards for selection, completed training provided by the Municipal Police Training Committee (MPTC), and understand their obligations pursuant to the state's Memorandum of Understanding between law enforcement agencies and schools, which delimits school resource officers' roles.

Certification necessarily requires the POST to be aware of the training curricula offered by the MPTC and ensure that the MPTC has complied with its legal obligations to consult with experts and ensure specific performance standards are met when creating this curricula.

Until the POST can ensure the MPTC has met its legal obligations, we recommend that it should not certify officers as equipped and ready to work in the Commonwealth's schools.

Incorporate the Laws Requiring MOUs

Second, the deployment of SROs is now more regulated in Massachusetts, especially after data indicated the disproportionately harmful effects of some SROs on youth of color and students with disabilities. As a result, the legislature enacted language for a memorandum of understanding that makes clear to law enforcement and schools the limits of officers' roles in schools. We commend the adoption of this MOU for its explicit limitation on schools' ability to ask officers to use their law enforcement authority to serve as disciplinarians.

In short, this MOU is a public agreement and commitment to parents and students about how both schools and law enforcement will behave. In view of how few law enforcement agencies in Massachusetts have explicit policies for officers' interactions with youth outside of the school environment, much less inside it, the need for clear guidance and policies is *especially* necessary.

This is why we emphasize the importance of considering the MOU. While its existence may appear to have no relation to whether an officer is qualified and should be certified, a school district's adoption of an MOU is a necessary predicate for the placement of an officer.

Until the MPTC integrates training on the MOUs into its curriculum, and until a school district has adopted an MOU, we recommend the POST not certify officers to work in public schools.

Offering Chiefs More Support for Recruiting SROs

Third, our concern with the SRO certification application to be completed by law enforcement chiefs should more closely follow best practices and track legislative requirements for identifying, hiring, and assessing persons most qualified to be SROs. This oversight in the proposed policies is easily fixed.

But it is critically important because not all officers are well suited to work in a school environment and many do not want to. For too long, being an SRO was either considereda plum position available only through seniority for those who wanted a certain schedule, or it was considered a dumping ground for officers. Consideration of which characteristics officers should bring to the position—including past experience working with youth, or post-secondary school education in child and adolescent development—were immaterial. The Commission needs to change this approach by clarifying what characteristics Chiefs should look for when recruiting officers who will interact on a daily basis with youth in an educational environment.

The Commission can list the qualities highlighted in the governing statute, M.G.L. c. 71, Section 37P, or look to publications issued by the U.S. Department of Justice and U.S. Department of Education and the Community Oriented Policing Services for guidance.

Conclusion:

Now more than ever, the public and students want reassurance that officers in their children's schools are skilled, equipped, and guided by clear policies by which they will be held accountable.

Because the role of the POST is key to establishing professionalism and oversight, and because certification is Massachusetts' endorsement of an officer's capacity to serve

professionally, we urge the POST to consider making these changes to the SRO certification policies.

Thank you for considering our recommendations.

Advocating for a fair and effective juvenile justice system in Massachusetts

44 School Street, Suite 415, Boston MA 02108
617.338.1050 | cfjj@cfjj.org | www.cfjj.org

Citizens for Juvenile Justice

December 6, 2022

The Honorable Margaret R. Hinkel, Chair
Randall E. Ravitz, General Counsel
Massachusetts Peace Officers Standards & Training Commission
100 Cambridge Street, 14th Floor
Boston, MA 02114

Dear Judge Hinkel and the esteemed members of the POST Commission,

This testimony is offered on behalf of Citizens for Juvenile Justice (CfJJ), an independent, statewide non-profit organization that works to improve the Commonwealth's juvenile justice, and other youth serving systems, through advocacy, research, coalition building and public education. We believe that both youth and public safety are best served by systems that are fair, effective and utilize resources wisely.

As the Executive Director of CfJJ, I had the honor and privilege of being appointed to, and serving on, the Model School Resource Officer Memorandum of Understanding Review Commission. This commission, which was created by the same law as the POST,[1]was charged with creating a statewide model memorandum of understanding "for schools and police departments as the minimum requirement for schools to formalize and clarify implementation of the partnership between the school and the school resource officer."[2] In executing the development of the Model MOU, the 25 person commission followed it's legislative charge to "determine the necessary provisions to achieve the district's educational and school safety goals and to help maintain a positive school environment for all students." Given the tremendous work of the commission to develop the Model MOU and provide an important and necessary statewide standard to govern the interactions between students and SRO's, I am testifying today to express concerns that the draft regulations proposed by the POST will undermine the requirements in this statute setting forth the minimum requirements for the assignment of an SRO to a school district.

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[1] The Commission's authorizing statute: section 37P of chapter 71 of the General Laws, as amended by Section 79 of chapter 253 o f the Acts of 2020.
[2] Id at c. 71 § 37P(b)

The legislature acknowledged and acted upon the necessity for distinct protections for children during police interactions by creating additional requirements and standards for all police officers who interact with children and even further standards and requirements for officers choosing to work primarily with children in school settings.

1. The draft regulations must reiterate the requirements of the law that SROs shall not be involved in school discipline matters, enforce school regulations, nor act as counselors. The proposed SRO Certification Requirement (CMR 10.04) vaguely references "maintaining positive school climate" while excluding the clear parameters set by the law[3] mandating that "school resource officers shall not: (i) serve as school disciplinarians, enforcers of school regulations or in place of licensed school psychologists, psychiatrists or counselors; and (ii) use police powers to address traditional school discipline issues, including non-violent disruptive behavior. "The legislature found this restriction crucial enough to require this exact language in the Model SRO MOU, and similarly this language must be included in the regulations to ensure that SROs are clear on this core restriction to their role. The vague statement offered in the Certification Requirement leaves this up to each officer to interpret in contravention of the standard in the law.

2. The decision to omit the requirement that a law enforcement agency submit an approved MOU and operating procedures for the purpose of certifying officers is problematic and risks subverting the intent of the MOU legislation under Ch. 71 § 37P.

   Although the Commission's focus is on individual officer certification, it is imperative that the POST certification requirements and the statutory requirement in the model SRO MOU are harmonized to create a common and consistent standard governing the role and responsibilities of SROs in our schools. This includes the absolute necessity of ensuring that each district has the model SRO MOU implemented and that any SRO seeking certification be trained on the provisions of the model SRO MOU. If said MOU is not in place, we run the risk of an SRO being certified and placed in a school without guidance on their role, responsibilities and standards governing their interaction with students in the school. This is why it's so important that certification standards be connected to the guidelines and protocols created by the MOU provisions in c.71 § 37P. This language was adopted to honor the Legislature's clear intent of providing law enforcement and school agencies clear rules of "engagement" and with standard operating procedures that provide SROs with the necessary level of guidance to avoid

[3] "The model memorandum of understanding shall expressly state that school resource officers shall not: (i) sUerve as school disciplinarians, enforcers of school regulations or in place of licensed school psychologists, psychiatrists or counselors; and (ii) use police powers to address traditional school discipline issues, including non-violent disruptive behavior." Ch.71 Section 37P(b)

some of the harmful impacts that occur when school administrators and SROs lack explicit guidance about the use of law enforcement in schools. To ensure this, **the regulations must state that if an officer is certified as an SRO, appointment to a school district is contingent on a finalized MOU between the school district and the police department and adopted standard operating procedures that meet the minimum requirements of the model SRO MOU and legal requirements of 37P.**[4]

3. The POST regulations must include a section detailing the impact that formal complaints, and any adverse findings, have on the officer's certification as an SRO.

   The state's model SRO MOU mandates that "a simple and objective complaint resolution system for all members of the school community to register concerns that may arise with respect to the SRO."[5] The system was largely included to ensure that there were formal avenues for parents and guardians to submit complaints about the SRO and that these complaints were handled in a timely manner, including communication of the resolution to the complaints. This inclusion was driven by parent and student frustration expressed in cities and towns across the Commonwealth at the lack of process to issue complaints about SRO behavior, or the lack of complaints being addressed in a satisfactory and timely manner. Given the required implementation of this complaint process, the POST must create protocols for the timely sharing of complaints where an SRO found to be out of compliance with the SRO MOU or state law or is otherwise engaging in conduct that is unsuitable and unbecoming of the position. These types of complaints must not only be conveyed to the POST but must also have an impact their certification as an SRO. The POST only envisions a threshold of decertification that applies to all police officers; however, an SRO-specific threshold must also be established which allows an officer to remain on the police force but no longer be authorized to serve as an SRO in any school district based on certain levels of noncompliance or misconduct revealed and validated in these complaints.

In conclusion, while the POST's focus is on individual officer's histories and actions, it is crucial to recognize that the legislature specifically mandated specialized parameters with respect children, including students in school settings, and police officers due to the systemic – and at times harmful – impact of policing in schools.[6] These requirements were

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[4] The superintendent and the chief of police shall adopt, at minimum, the model memorandum of understanding developed by the commission pursuant to subsection (b) and may add further provisions as they mutually deem fit; provided, however, that no further provision included in the memorandum of understanding adopted by said superintendent and said chief of police shall conflict with or omit any provisions of this section.

[5] See Section VII at https://www.mass.gov/doc/2022-school-resource-officer-memorandum-of-understanding/download

[6] Citizens for Juvenile Justice, *Fail: School Policing in Massachusetts*, 2020. Available at https://www.cfjj.org/policing-in-schools

established to ensure that the role and power of policing that contributes to the school-to-prison pipeline are addressed through regulation of the role of SROs.

The steps illustrated in this testimony are necessary to protect children from this pipeline, and I respectfully request that you, the civilian-led POST, use your power to implement these provisions to ensure that SROs in Massachusetts are held to the higher standard set by our laws and that can balance the best interest of our students and school safety.

Sincerely,

Leon Smith, Esq.
Executive Director
Citizens for Juvenile Justice

Strategies for Youth
CONNECTING COPS & KIDS™

Comments prepared for the December 6, 2022 POST Commission Public Hearing on proposed regulations

Good morning, I am David Walker, the Director of Training for Strategies for Youth and I would like to raise two concerns about the proposed regulations.

Concern #1: – The POST's promulgation of policies for certifying school resource officers deserves another review.

The POST must rely on the Municipal Police Training Committee which is charged with providing the training of SROs. Unfortunately, it appears that the MPTC has not developed and implemented robust, consistent, and evidence-based training to ensure Massachusetts School Resource Officers are prepared to work in the Commonwealth's schools in accordance with legislative requirements and the state's law regarding implementation of a Memorandum of Understanding between law enforcement agencies and schools.

Why is this a concern? – The POST is in the position to certify SROs as ready to be placed in schools. To do so, it must proceed on the assumption that the MPTC has properly trained officers that the POST can certify. This is essential to protecting the students SROs serve as well as reducing the exposure of school administrations, law enforcement agencies, and the Commonwealth to litigation for improper, and potentially harmful, interactions with students. This is of especial importance for children of color and children with learning and behavioral disabilities entitled to state and federal protection under special education laws.

What is the solution? – The POST's role in certifying the preparedness of SROs depends predominantly on certifying that officers completed a course based upon an MPTC training curriculum. The POST must therefore be able to coordinate with the MPTC and ensure that the MPTC's legislative mandate has been met to ensure officers are prepared and equipped according to those mandates. Presently, in view of the lack of certainty that the MPTC has offered, the POST cannot "certify" that officers are prepared and ready.

The law of the Commonwealth requires that the MPTC's "course of instruction [for SROs], the learning and performance objectives and the curriculum and standards for training developed pursuant to this section shall be developed in consultation with experts on child and adolescent development and child trauma and with educators and attorneys experienced in juvenile and education law and preventing and addressing youth hate crimes." It also appears to be the case that the state's model MOU must be part of the training as the purpose of the MOU is to describe the role of the SRO and the legal and policy obligations they must follow in an educational environment.

Until the MPTC can guarantee the POST that it has taken the following 3 steps required by state law, the POST should not certify SROs as prepared. Those 3 steps are:

1. Developing a performance standards rubric for School Resource Officers;

2. Provide an opportunity for public review & comment, on the performance standards rubric for School Resource Officers; and

3. Ensure inclusion of relevant laws, including the law requiring adoption of MOUs.

Concern #2: We offer recommendations here to ensure that the POST can give chiefs support and guidance in choosing officers most suited to become SROs. The current language regarding the selection of SROs leaves this decision to each Chief. SFY suggests consideration of specific features that, in our experience, lead to the deployment of officers best suited to working with youth in the school context.

Why Is This a Concern?
Historically, the deployment of officers to the position of SRO has been determined by seniority, union rules, schedules, and sometimes, the decision to place officers who could not be placed elsewhere. This has often led to officers uninterested in working with youth, which has, in turn, led to bad outcomes for youth.

What is the Solutions:
SFY recommends offering a selection criteria rubric for officers working in a school environment using criteria set forth by the U.S. Department of Education (see below) as well as other organizations. The POST's efforts to further define who should be considered for the SRO position will serve Chiefs, officers, and schools well if review of these useful criteria is considered at the outset of the selection process.

For law enforcement officers who are already working in school environments, encouraging Chiefs to use the selection rubric and consider their "fit" for the school environment may also be useful in determining whether to keep officers in place or re-assign them. We also suggest creating a Review Board to enforce adherence to the selection criteria and performance standards as adopted by the Commonwealth.

School Resource Officer Selection Rubric

1. Bachelor's degree in the social sciences or equivalent
2. Minimum of 2 years of law enforcement experience
3. Have no disciplinary actions in their file
4. Commissioned as a qualified law enforcement officer
5. Demonstrated ability to teach and engage with youth, such as past coaching or mentoring experience

6. Demonstrated knowledge of social issues affecting youth and their families
7. Demonstrated ability to be culturally and socially competent
8. Demonstrated knowledge of the juvenile criminal justice system and K-12 school-based legal issues
9. Demonstrated ability to work collaboratively with non-law enforcement stakeholders and a willingness to develop partnerships with students, parents, families, community organizations, and school administrators
10. Excellent communication and interpersonal skills and interpersonal skills coupled with an understanding of teen use of social media
11. Demonstrated positive approach to community-based policing
12. Demonstrated ability to work independently
13. Demonstrated excellent interpersonal communication skills
14. Experience working with youth in a civilian capacity (coach, youth group leader, etc)
15. Demonstrated proficiency in tactical response to anticipated school situations
16. Willingness to work within a fluid environment – shifting schedule, call-outs, etc
17. Demonstrated experience as a moral and ethical role model

With warm regards,

W. David Walker
Operations / Training Director
Strategies for Youth
207.752.6274 cell

www.strategiesforyouth.org

December 6, 2022

The Honorable Margaret R. Hinkel, Chair and Commission Members

Dear Judge Hinkel and the members of the POST Commission,

I am submitting this testimony as a retired juvenile court judge with twenty-three and a half years of experience on the bench and in my capacity as the Interim Executive Director of the Massachusetts Advocates for Children. MAC's mission is to address educational issues facing children and youth and all contexts, with a focus on school discipline and the intersection of disability and race.

At the time of my judicial retirement, I was the First Justice of the Middlesex County Division of the Massachusetts Juvenile Court. Prior to being appointed to the bench, I was a public defender for twenty-years and the first director of the Roxbury Youth Advocacy Project. YAP became the template for the creation of the statewide Youth Advocacy Division as part of the Committee for Public Counsel Services. As a juvenile court judge I collaborated on a variety of initiatives designed to address the realities of the school to prison pipeline. These endeavors included working with systemic players, including prosecutors, attorneys, educators and police in developing memoranda of understanding to ensure that when and if police are deployed in schools their roles and relationship to school officials are clearly defined. The goal as regards the interaction of police and educators and teachers should always be to ensure that police defer to school official on issues of routine school discipline which implicates normative child and adolescent behavior. If deployed in schools, police action should be limited to palpable public safety issues that threaten or cause the infliction of real harm.

My work experience in this context has included convening and participating in local and national projects and presentations in conjunction with organizations such as the National Council of Juvenile and Family Court Judges, the Annie E. Casey Juvenile Detention Alternative Initiative (JDAI), the Adolescent Research Network and Models for Change programs of the MacArthur Foundation, and the American Bar Association. I believe the breadth of my experience is relevant as I have come to learn that the majority of those who choose to work with young people are well motivated. This is not a question of good or bad police. If we choose to have police in schools, we must do so thoughtfully with an understanding of the necessity for clearly defined guidelines which include fidelity to the aspirational goals and training requirements first articulated in this state in the context of the 2018 criminal justice reforms which addressed school-based memoranda of understanding.

The historical context is important. I have referenced the 2018 criminal justice reforms. As noted by the Juvenile Justice and Policy Data Dashboard report a year after the 2018 mandate requiring that schools and police develop MOUs compliance was variable as regards promulgating memoranda which were consistent with Attorney General's template. In addition, many school districts were not reporting data regarding race, ethnicity and gender of school-based arrests. The tragic death of George Floyd was a seminal event in the call for police reform. Massachusetts reforms, including the creation of the SRO Commission and this group are examples. This history underlines the need to view issues through a lens of racial and ethnic equity. Police were first placed in schools as part of the public reaction to court ordered desegregation. The process was dramatically accelerated during the atmosphere of apprehension following the 1999 Columbine, Colorado school shooting. From the outset police were placed in larger numbers in schools of color. The narratives about school policing are complicated but whatever the intent or reason for their use, a robust body of research and data has shown that schools

with SROs have higher rates of arrests for school-based conduct. A 2015 Justice Policy Institute Report noted that schools with SROs had nearly five times the arrest rates of schools without police after controlling for demographics such as race and income. *Effects of School Resource Officers on School Crime and Responses to School Crime,* a July 2020 mega-analysis comparing schools utilizing police in schools with those that do not, found that the presence of school police increased the likelihood of school arrests, especially as regards special education students, and recommended that educators seeking to improve school climates pursue alternatives such as restorative justice, positive social learning and counseling.

Given this landscape it is important that this Commission re-think the draft regulations for SRO certification and not put the cart before the horse. We should not be certifying SROs without rigorous training and certification. The MPTC training curricula in its current form is vague as are the certification requirements. For example, CMR 10.04 refers to maintaining a positive school climate but is lacking in specifying how that laudable goal is to be attained. Critically, the regulation does not include the bedrock requirement that police should not serve as school disciplinarians. This requirement was present in the 2018 Attorney General model MOU template and in the MOU recommendations from the recently concluded SRO commission. Failure to address this issue will lead to criminalizing childhood and adolescence. Who runs the schoolhouse must also be addressed. The proposed regulations also allow for police chiefs to appoint who serves as SROs. As *Arrested Futures*, a 2012 ACLU-CfJJ study of Massachusetts school policing demonstrated, when police are placed in schools who are solely under the aegis and supervision of city police, arrest rates for young people increase. Training and related certification consistent with the SRO Commission MOU model should be the ground floor for the training and certification of school resource officers. Certification and deployment of police in schools should not be placed in schools without MOUs in place which follow the requirements of the SRO Commission.

Jay Blitzman, First Justice, Middlesex Juvenile Court, Retired

Interim E.E., Massachusetts Advocates for Children

Strategies for Youth

P.O. Box 390174 • Cambridge, MA 02139 • 617.714.3789
www.strategiesforyouth.org

October 27, 2022

The Honorable Margaret R. Hinkel, Chair
Randall E. Ravitz, General Counsel
Massachusetts Peace Officers Standards & Training Commission
100 Cambridge Street, 14th Floor
Boston, MA 02114

Dear Judge Hinkel and Mr. Ravitz:

To Members of the POST Commission:

Our statewide coalition of youth advocates carefully reviewed the revised draft of certification standards for school resource officers (SROs) working in Massachusetts issued on October 13th and discussed at the POST Commission's meeting that day. We write to share our thoughts in advance of the open comment period in the hope this will assist the POST more immediately.

We are pleased to see that this draft of the standards clarified the definition of an SRO (removing the confusing term "special" which implicated the Special Officers law of 1898), that it clarified who may claim to be a "certified" SRO, and that it will automatically suspend or revoke an SRO's certification if the officer's police certification is suspended or revoked, respectively.

We are, however, concerned about certain aspects of this new version of the SRO certification standards. We are concerned that the gaps that exist between the POST and the MPTC, as well as some of the proposed regulatory changes, will undermine the legislation's dual objectives of: (1) ensuring that all SROs in Massachusetts are well-equipped and prepared to work in schools with young people, and (2) avoiding well-documented harmful impacts on students, especially those of color and with disabilities, that occur when poorly trained and supervised SROs interact with students in schools. Below, we detail these concerns.

1. Certification of officers is premised on successful completion of MPTC training. However, MPTC's training curriculum for SROs was reported to be "in development." We understand from comments made at the POST meeting that the MPTC is relying on the National Association of School Resource Officers (NASRO) curriculum to prepare the mandated MPTC curriculum. This is problematic for two reasons:

   (a) MGL Chapter 6, Section 116H, requires that the "course of instruction, the learning and performance objectives and the curriculum and standards for training developed pursuant to this section shall be developed in consultation with experts on child and adolescent development and child trauma and with educators and attorneys experienced in juvenile and education law and preventing and addressing youth hate crimes." As leading state-level

organizations with many staff who meet these qualifications, we have consistently offered our expertise to the MPTC to help draft and review key sections of the curriculum. Yet, none of us – in spite of repeated offers of support – have been contacted or asked for input by MPTC's leadership.

If the Massachusetts Legislature had intended the MPTC to adopt the NASRO curriculum, it would have said so, as other legislatures have done in laws mandating SRO training. Instead, the Massachusetts Legislature explicitly recognized the value of including key experts, educators, and youth advocates in creating this curriculum, along with state agencies like the Office of Child Advocate or the Committee for Public Counsel Services, the Mental Health Legal Advisors Committee and the Department of Mental Health.

The NASRO curriculum does not cover the topics that Section 116H requires, nor would it meet the standards that many local experts would recommend, as its perspective views normative youth conduct as being criminal in nature and requiring a law enforcement response. Further, the NASRO curriculum does not prepare officers to interact effectively with youth with emotional disabilities, or those who have experienced trauma. Indeed, the curriculum focuses primarily on how youth conduct justifies law enforcement involvement, with little guidance on how best to employ discretion in a school environment. The NASRO curriculum is routinely taught by officers, not psychologists, mental health experts, or others who could deepen and support officers' understanding of trauma, and how exposure to trauma can affect young people's behaviors. This perspective is critical to ensure that SROs do not unnecessarily push young people into the justice system and accelerate such paths through the school-to-prison pipeline.

2. The disconnect between MPTC and the POST is concerning. We understood from remarks at the POST meeting that the POST is unaware of, and uninvolved in, the development of the SRO curriculum. Given that it is the POST's duty to ensure that an officer is adequately trained to serve as an SRO, full and comprehensive understanding of the mandated SRO curriculum is essential to determining whether an officer/SRO is fit for this job.

   There are reasons to be skeptical on this score. The MPTC has been seriously under-funded since 2010. In fact, a leader of a police Union publicly complained last year that Massachusetts ranked 48th in state funding for training of law enforcement officers. And the 2019 State Auditor's report showed that law enforcement agencies across the Commonwealth are not in compliance with *existing* training requirements overseen by the MPTC. The Audit's report found that the MPTC directly provided in-service training courses to only 38.4 percent of eligible municipal officers in 2019. The lack of funding for the MPTC, and the history of poor attendance at its trainings, gives considerable cause for scrutiny of MPTC plans to ensure that the training aligns with the statute's directives, that SROs attend and are required to demonstrate proficiency in content taught in the training.

There is some positive news. We recently learned that the MPTC held a training for SROs in June 2021. A week ago, we were offered a chance to review the list of speakers and agenda, although notably not the curriculum, and were impressed by the psychologists involved in the *presentations*, including renowned and highly skilled experts Jamie Barrett and James Restuccia. Nevertheless, in order to do its duty to make the certification process meaningful, the POST must be able to verify that the MPTC training curriculum is adequate and aligns with the Legislature's mandate. Otherwise, the efforts of the POST, as well as the Legislature, will be viewed as a "rubber stamp" instead of a careful, rigorous inspection of officers' preparedness for the position.

3. <u>The decision to omit the requirement that a law enforcement agency submit an approved MOU and operating procedures for the purpose of certifying officers is problematic</u> and risks subverting the intent of the MOU legislation under Ch. 71 Section 71P.

   First, the statute requiring the adoption of an MOUalso requires schools and law enforcement agencies to adopt "operating procedures" to guide SROs.[1] Indeed, Ch. 71 Section 37P(b) views the MOU as "the minimum requirement for schools to formalize and clarify implementation of the partnership between the school and the school resource officer." The exact obligations are significant and extensive.[2] This language was adopted to honor the Legislature's intent: provide law enforcement and school agencies clear rules of "engagement" and ensure, through operating procedures, that SROs are provided the level of guidance they need to avoid some of

[1] "The chief of police, in consultation with the school superintendent, shall establish operating procedures to provide guidance to school resource officers about daily operations, policies and procedures. At a minimum, the operating procedures as established by the chief of police, shall describe the following for the school resource officer:
(i) the school resource officer uniform;
(ii) use of police force, arrest, citation and court referral on school property;
(iii) a statement and description of students' legal rights, including the process for searching and questioning students and circumstances requiring notification to and presence of parents and administrators;
(iv) chain of command, including delineating to whom the school resource officer reports and how school administrators and the school resource officer work together;
(v) performance evaluation standards, which shall incorporate monitoring compliance with the memorandum of understanding and use of arrest, citation and police force in school;
(vi) protocols for diverting and referring at-risk students to school and community-based supports and providers; and
(vii) information sharing between the school resource officer, school staff and parents or guardians." Ch. 71, Section 37P(d)

[2] "The model memorandum of understanding shall expressly state that school resource officers shall not: (i) serve as school disciplinarians, enforcers of school regulations or in place of licensed school psychologists, psychiatrists or counselors; and (ii) use police powers to address traditional school discipline issues, including non-violent disruptive behavior." Ch.71 Section 37P(b)

the harmful impacts that occur to vulnerable students when school administrators and SROs have no explicit guidance about the use of law enforcement in schools.

We understand that the Commission seeks to focus solely on the individual officer's certification. But in this instance, it is equally important to harmonize the POST certification requirements with the statute that delimits their conduct of SROs. If the MOU is not in place, the SRO will be certified, but essentially unguided when working in the school. Certification standards must be connected to the guidelines and protocols created by the MOU law. Ultimately, students will pay the price for the lack of such requirements.

In view of how few law enforcement agencies have implemented explicit policies for officers' interactions with youth outside of the school environment, much less inside it, the need for clear guidance and policies is *especially* necessary.

4. The proposed SRO certification application to be completed by law enforcement chiefs does not follow best practices or track legislative requirements for identifying, hiring, and assessing persons most qualified to be SROs. Section 10.06 of the proposed standards require officers to complete an application and a questionnaire. We recommend that when creating this application, the Commission use the statutory language of the governing statute, G.L. c. 71, Section 37P, directing what qualities a law enforcement chief should seek when assigning officers for this role, language which we have highlighted as being useful to include in any application process:

> …an officer [who] would strive to foster an optimal learning environment and educational community that promotes a strong partnership between school and police personnel. The chief of police shall give preference to candidates who demonstrate the requisite personality and character to work effectively with children, youth and educators in a school environment with a demonstrated ability to work successfully with a population that has a similar racial and ethnic background as those prevalent in the student body, and who have received specialized training relating to working with adolescents and children, including cognitive development, de-escalation tactics, as defined in section 1 of chapter 6E and alternatives to arrest and diversion strategies. The appointment shall not be based solely on seniority. 37P(d)

The application and questionnaire should be designed to determine if SRO applicants meet this criteria.

These statutory requirements are consistent with language issued in 2010 by the COPS office (see pages 23-24) governing performance assessment, which identifies key qualities of SROs. We recommend that Section 10.06(1)(c) of the proposed SRO standards list some of these skillsets to ensure that the evaluation process elicits information indicating that officers have demonstrated they effectively work with youth and understand that they are working in a setting where the educational well-

being of the child overrides all other priorities. The unique role of law enforcement officers working in schools requires an approach that keeps in mind that the educational setting is not a place where law enforcement is the sole or primary goal.

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In sum, we hope this letter conveys our organizations' position on these issues and indicates what we will raise publicly about drafted standards if presented in their current form.

We would be grateful for the opportunity to discuss our concerns in greater detail with members of the Commission or the entire Commission prior to engaging in the public comment period.

Thank you for reviewing our concerns and considering our request to discuss these with the Commission.

We appreciate your consideration of our concerns and invite you to reach out to us should you wish to discuss them in greater depth. Thank you.

Very truly yours,

Lisa H. Thurau, Executive Director
Strategies for Youth

Leon Smith, Executive Director
Citizens for Juvenile Justice

Phillip Kassel, Executive Director
Mental Health Legal Advisors Committee

Judge Jay Blitzman, Interim Director
Massachusetts Advocates for Children

Marlies Spanjaard, Director of Education Advocacy
Committee for Public Counsel Services

5a.

MEMORANDUM

TO Commissioners of the POST Commission

FROM Legal Division

DATE December 8, 2022

SUBJECT Utilizing Hearing Officers in the Commission's Adjudicatory Process

This memorandum proposes that the POST Commission grant the Chair of the Commission authority to utilize the services of hearing officers within adjudicatory proceedings before a Single Commissioner and the full Commission.[1] The proceedings before the Single Commissioner and the full Commission will involve challenges from applicants who have had their applications for certification or recertification denied or granted with a condition (from the Division of Police Certification) and officers who have had their certifications revoked or suspended for alleged misconduct (from the Division of Police Standards). Specifically, the request for the Chair to have the authority to appoint hearing officers pertains to the use of former Massachusetts Judges initially, until the Commission establishes a more formal policy on the appointment of hearing officers to conduct these proceedings. The Single Commissioner and the full Commission would retain the ultimate authority to make an independent determination of the issues.[2]

The Authority for the Chair to Appoint Hearing Officers

Pursuant to M.G.L. c. 6E, § 3(a), "[t]he commission shall have all powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to: … (16) provide and pay for advisory services and technical assistance as may be necessary in its judgment to carry out this chapter and fix the compensation of persons providing such services or assistance; … (24) conduct adjudicatory proceedings in accordance with chapter 30A…."[3] In addition to the overarching statutory

[1] At this time, particulars such as compensation and schedule rotation will not be addressed. The Commission staff has reached out to other agencies in a comprehensive search of the use of hearing officers in comparable agencies with similar regulatory structure.

[2] See A. Cella, Administrative Law and Practice § 349 (1986) (as to matters handled by a hearing officer on its behalf, "[t]he agency, board, or commission [appointing the hearing officer] retains all ultimate authority"); Bos. Police Superior Officers Fed'n v. City of Bos., 414 Mass. 458, 464 (1993) (same).

[3] M.G.L. c. 6E, § 3(a)(16) and (24).

100 Cambridge Street, 14th Floor
Boston, Massachusetts 02114
TEL: 617.701.8401
mass.gov/orgs/post-commission

authority previously cited in § 3(a), the regulations also lend support for the Chair appointing a hearing officer. For example, in proceedings involving a Single Commissioner's review of suspensions, the authority for the Chair to appoint a hearing officer generally resides in 555 CMR 1.09, which states that "the single commissioner assigned to conduct a hearing shall be selected pursuant to a policy to be established by the commission."[4] With regard to final disciplinary hearings and appeals of certification decisions that come before the full Commission, 555 CMR 1.10(1) governs. It states:

> The following types of adjudicatory hearings shall be held by the full commission, but may, in the chair's discretion, be heard in the first instance by a presiding officer selected pursuant to a policy established by the commission: (a) M.G.L. c. 6E, § 10(a) hearings regarding mandatory revocation of an officer's certification; (b) M.G.L. c. 6E, § 10(b) hearings regarding discretionary revocation or suspension of an officer's certification; (c) M.G.L. c. 6E, § 10(d) hearings regarding officer retraining; and (d) Appeals of a decision by the commission declining to certify or recertify a law enforcement officer pursuant to M.G.L. c. 6E, § 4.[5]

As set forth below, the expediency of the processes within the Commission, necessitated by stringent timelines in the applicable regulations, and the Commission's responsibility to oversee a mandatory certification process for law enforcement officers and enforce discipline when there is officer misconduct, warrants the recommendation that the Commission permit the Chair to designate a former Judge as a hearing officer to conduct adjudicatory proceedings. This would be extremely beneficial to the orderly process of the Commission, and the decision-making authority entrusted to the Single Commissioner and the full Commission is safeguarded by the fact that the hearing officer will not issue the final decision of the Commission.

Officers Receiving Adverse Certification Determinations Can Seek Further Review

The Division of Certification has provided notice to applicants, pursuant to what was effectively a legislative mandate that the Commission complete the certification process for officers with last names beginning with A-H no later than July 1, 2022, that their applications for recertification were granted in full, granted on a condition under 555 CMR 7.04, denied, or denied and placed on administrative hold. Several of the applicants aggrieved by the Division of Certification's decision to grant them less than full recertification have exercised their right to request review by filing a petition for review by the Executive Director.[6] The Executive Director has commenced review of those applications. If the applicant receives an adverse determination from the Executive Director, the applicant has 30 days to file a request for review of the

[4] 555 CMR 1.09(5).

[5] 555 CMR 1.10(1).

[6] See 555 CMR 7.10(1)(a) ("Within 21 days of a decision by the division of certification declining to grant full recertification, an officer may submit a written petition to the executive director requesting review of the decision….").

Executive Director's determination. That challenge from the aggrieved applicant would come before the full Commission for review and consideration and a final agency determination.[7] It is noteworthy that with Executive Director review of challenges to certification determinations already underway, requests for adjudicatory proceedings could potentially be received before the end of calendar year 2022.

Mandatory Suspensions Require Immediate Action by the Commission

On November 22, 2022, the Commission unanimously voted to expressly grant authority for the Executive Director, or the Executive Director's designee, to issue suspensions of a law enforcement officer's certification under three categories of mandatory suspensions.[8] If an officer is subject to any of these mandatory suspensions, outlined below, the officer would be entitled to a prompt appeal to the Single Commissioner once the mandatory suspension is imposed by the Executive Director, or his designee. The three relevant sections provide, in part, as follows:

1. Arrested, charged or indicated for a felony - "The commission shall immediately suspend the certification of any officer who is arrested, charged or indicted for a felony."[9] The immediate suspension must be issued as soon as reasonable diligence will allow, without regard to the status of another agency's investigation. "A suspension order of the [C]ommission issued pursuant to this subsection shall continue in effect until issuance of the final decision of the Commission or until revoked by the [C]ommission."[10]
2. Failure to complete in-service training - Unless a "reasonable exemption[]" promulgated by the Commission applies, "[t]he commission shall administratively suspend the certification of an officer who fails to complete in-service training requirements of the commission within 90 days of the deadline imposed by the commission," and until "completion of the in-service training requirements of the commission."[11] The statute does not say "immediately," but appears to contemplate prompt issuance. The grace period is limited to 90 days.
3. Duty to report information - The Commission shall administratively suspend the certification of an officer with a duty to report information to the Commission who fails to report such information.[12] Here, the statute does not say "immediately," but appears to contemplate prompt issuance. Section 8 requires certain complaints to be transmitted within two business days and certain reports to be transmitted immediately to the Commission. It follows that an

[7] 555 CMR 7.11.

[8] See M.G.L. c. 6E, §§ 3(a), 8, 9, 10 (Chapter 6E of the Massachusetts General Laws references at least nine forms of suspension of a law enforcement officer's certification.); see also 555 CMR 1.06-1.10.

[9] M.G.L. c. 6E, § 9(a)(1).

[10] M.G.L. c. 6E, § 9(a)(5).

[11] M.G.L. c. 6E, § 9(b).

[12] M.G.L. c. 6E, § 9(c).

administrative suspension for failure to report information should be issued immediately, or at least promptly. It would lead to an odd result, and appear to disserve the Legislature's goals, if a law enforcement official were required to take steps immediately, but then upon failing to do so, was not immediately suspended.[13]

The request for a hearing on a suspension matter referenced above must be filed by the officer with the Executive Director no later than five days from the date of the officer's notice of the Commission's suspension, unless the officer is granted an extension of the time to request a hearing.[14] The decision to grant an officer's request for an extension of time is vested with the Single Commissioner and shall be granted only upon a demonstration of good cause. Unless otherwise agreed to, the Executive Director shall schedule a hearing not less than five days and not more than 15 days after the effective date of the suspension.[15] The Chair, after receiving the request for a hearing and the scheduled hearing date from the Executive Director, has two days to assign a Single Commissioner to conduct the requested hearing. ***In sum, the Single Commissioner could have approximately eight days to prepare for and conduct a hearing on a mandatory suspension***.[16] Upon completion of the hearing, the Single Commissioner shall render a written decision as promptly as administratively feasible.[17] The written decision of the Single Commissioner shall be the final decision of that Single Commissioner. The filing of any appeal of a final decision of the Single Commissioner shall be to the Superior Court, pursuant to chapter 30A.[18]

Condensed Timeframes Warrant Additional Avenues for Adjudicatory Review

Authorizing the Chair of the Commission to appoint a hearing officer will facilitate the timely and efficient review of challenges to adverse suspension decisions and certification and recertification determinations decided by the Executive Director that will come before the Single Commissioner (addressing mandatory suspensions) and the full Commission (addressing denials of full certification and recertification). The hearing officer, a former Judge, would serve in a capacity similar to that of an administrative magistrate, conducting the hearing; monitoring and

[13] See M.G.L. c. 6E, §§ 3(a), 8, 9(c), 9(d), 10(f), 10(h). See also 555 CMR 1.08(3) ("Any commission decision to suspend the certification of an officer pending or following a preliminary inquiry by the division of standards shall be transmitted immediately . . . .").

[14] 555 CMR 1.09.

[15] M.G.L. c. 6E, § 9(d).

[16] The general rule of construction found at 555 CMR 2.03(2) provides for periods of seven days or less to exclude weekends and holidays, and periods of more than seven days include weekends and holidays. Thus, the "two-day" and "five-day" provisions are most likely based on business days and the "15-day provision" should be based on calendar days.

[17] M.G.L. c. 30A, § 11(8).

[18] M.G.L. c. 30A, § 14.

processing the documentary materials submitted by the parties; compiling the evidentiary record to be included in the administrative record; providing an appraisal of the evidence in the case; recommending a disposition; and writing a tentative decision, subject to adoption by the Single Commissioner or the full Commission, that sets forth the findings of facts and conclusions of law.[19] Any agreement by the Commission to authorize the Chair to appoint a hearing officer, in the absence of express statutory authority, is not final and does not abdicate the responsibilities the Legislature vested in the Commission. The decision of the hearing officer, similar to the administrative magistrate, does not constitute the final administrative decision and is subject to adoption by the Single Commissioner or full Commission, whichever is warranted by the nature of the request for review.[20]

Recommendation: For the reasons set forth above, staff recommends that the Commission authorize the Chair of the Commission to appoint a hearing officer, as the need arises, to preside over hearings before the Single Commissioner and the full Commission. At this time, the hearing officer appointed by the Chair would be a former Judge. The Chair's ability to appoint a hearing officer, for the noted proceedings, would go in effect immediately upon a vote by the Commission to pass the measure.

[19] 38 Mass. Prac., Administrative Law & Practice § 9:1. Hearing officers and the conduct of administrative agency adjudications—In general.

[20] 38 Mass. Prac., Administrative Law & Practice § 9:7, n.23. Hearing officers in Massachusetts—The central panel approach and the Division of Administrative Law Appeals ("Any agreement by a state administrative agency, in the absence of express statutory authority, to treat the decision of the hearing officer, now the administrative magistrate, as final and as constituting the ultimate decision of the agency would not only constitute an impermissible abdication of the agency's authority and duty to make the final administrative decision, but would undoubtedly also constitute ultra vires agency action.").

5b.

G.L. c. 6E, § 1, defines “conviction” as an

> adjudication of a criminal matter resulting in any outcome except wherein the matter is dismissed or the accused is found to be not guilty, including, but not limited, to an adjudication of guilt with or without the imposition of a sentence, a plea of guilty, a plea of nolo contendere, an admission to sufficient facts, a continuance without a finding or probation.

(Emphasis added.)

A continuance without a finding (CWOF) is defined as:

> the order of a court, following a formal submission and acceptance of a plea of guilty or an admission to sufficient facts, whereby a criminal case is continued to a date certain without the formal entry of a guilty finding. A continuance without a finding may include conditions imposed in an order of probation (1) the violation of which may result in the revocation of the continuance, entry of a finding of guilty, and imposition of sentence, and (2) compliance with which will result in dismissal of the criminal case.

Mass. Dist. /Muni. Ct. R. for Probation Violation Proc., Rule 2.

Statutory interpretation for adoption by the Commission:

For purposes of M.G.L. c. 6E, a CWOF is a “conviction” at the point at which it is imposed. If a matter in which a CWOF is imposed is dismissed, however, the CWOF is no longer a “conviction” because the definition of conviction carves out an exception for matters that have been dismissed.