

118 CMR 9.00: RECORDS

Section

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9.01: Scope and Purpose

118 CMR 9.00 governs the release of information in the possession of the Disabled Persons Protection Commission.

9.02: Controlling Statutes

All records of the Commission shall be subject to the provisions of M.G.L. c. 4, § 7, cl. 26, c. 19C, § 3, c. 66 and c. 66A.

9.03: Release of Information

(1) Limitation on Release of Information. For the purposes of dissemination, the records of the Commission shall not be considered "public records" and any release of said records shall be pursuant to the provisions of M.G.L. c. 4, § 7, cl. 26, c. 66, c. 66A, and 118 CMR 9.00. The following information shall be confidential and shall not be disclosed or otherwise made available to any person except duly authorized staff of the Commission and the duly authorized staff of an agency within the Executive Office of Health and Human Services to which the Commission has referred a report of abuse for investigation or for the provision of protective services:

- (a) all personal data contained within the initial report of abuse, including but not limited to, personally identifying information of the person with a disability who is the alleged victim of abuse, of the alleged abuser, of the person who made the report of abuse to the Commission, and of any other third party;
- (b) any and all notes, papers, documents or other investigative materials, including but not limited to interview summaries, collected or compiled by personnel duly authorized by the Commission during the course of an investigation.
- (c) all material subject to "peer review privilege" pursuant to M.G.L. c. 111, § 204(b) and within the possession of personnel duly authorized by the Commission.

(2) Release of Investigation Reports to Appropriate Governmental Agencies. Consistent with M.G.L. c. 19C, § 3, as part of its case processing, the Commission shall forward a copy of the Investigation Report to the appropriate agency within the Executive Office of Health and Human Services and any other agency of the Commonwealth, to facilitate the performance of that governmental agency's statutory functions, including such releases authorized by 118 CMR 5.02(3)(b)2: *Investigation Report*.

(3) Discretionary Release.

- (a) Consistent with M.G.L. c. 19C, § 3, the Commission may release any records, documents, data, or information that serves a public interest. The exercise of the Commission's discretion shall be based upon a balancing of the respective interests of the public in the protection of persons with disabilities, the privacy of the person whose records are being considered for release, and that such a release serves a public interest in protecting citizens of the Commonwealth. In any event, the discretionary release of information shall contain only that much of the personally identifiable and confidential information the disclosure of which is required by the public interest underlying the release of the information; and
- (b) Personally identifying and confidential information of data subjects and of reporters of abuse that are contained in the records of the Commission shall be redacted from the records when disclosure of such information is not required by the public interest underlying the discretionary release of such records.

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(4) Release Pursuant to Legal Process. Subject to the provisions of 118 CMR 9.00, whenever information or data contained in the documents or data in the possession of the Commission is sought by compulsory legal process in any civil or criminal proceeding, the Commission shall respond to the legal process as the Commission deems appropriate pursuant to M.G.L. c. 19C, § 3 and/or 118 CMR 9.00, which may include but is not limited to, requesting a protective order or an order quashing the process.

(5) Disclosure of Records to the District Attorney and the Attorney General.

(a) Where litigation or other legal proceeding has been threatened or instituted by a data subject against the Commonwealth, the Commission or a referral agency, or an official or employee of any said entity arising from his or her official duties or scope of employment on behalf of the Commission, any personal data concerning said data subject, held by the Commission, which is relevant to a determination of the issues in dispute, shall be furnished to the Attorney General or authorized assistant attorney general, who may further disclose such personal data to the extent he or she deems necessary for purposes of representing the defendant(s), subject to the conditions in 118 CMR 9.03(5)(a).1 and 2.:

1. Disclosure shall be furnished in response to a written request from the office of the Attorney General which shall indicate the purpose for which the personal data is requested and identify the data requested.

2. Personal data of persons not parties to the litigation or other legal proceeding may be redacted by the Commission to protect the privacy interests of such persons.

(b) In the event that the data maintained by the Commission indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising under a state law or regulation, rule or order issued pursuant thereto, consistent with M.G.L. c. 19C, § 3, the relevant data may be referred to the District Attorney for the county within which said violation occurred or may occur, to the Attorney General, and to the appropriate regulatory agency, as the case may be, to enforce or implement the statute, rule, regulation or order issued pursuant thereto, or to investigate or prosecute such violation.

(c) Nothing in 118 CMR 9.03(5) shall be construed to authorize the Commission or a referral agency to release information the disclosure of which is prohibited by any statute other than M.G.L. c. 66A.

(6) Release of Information to Data Subjects.

(a) Generally.

1. Subject to the provisions of M.G.L. c. 19C, § 3 and c. 66A under which such disclosure may be made, any person who is mentioned in an investigation report shall have access to, and may have a copy of, that portion of the investigation report in which he or she is mentioned.

2. To obtain a copy of such information, any data subject including, but not limited to, the person with a disability and the alleged abuser, or their respective legal representatives, must file a written request for such information with the Commission.

3. The Commission shall respond to said request, subject to those restrictions in 118 CMR 9.00, pursuant to the time frames and procedures established in M.G.L. c. 66 and 66A.

(b) The Person with a Disability.

1. Subject to 118 CMR 9.00, M.G.L. c. 19C, § 3 and c. 66A, information contained in the Commission's investigation report regarding the person with a disability shall be available to that person with a disability, his or her legal representative or his or her legally appointed conservator or guardian where the person with a disability has been determined by a court of competent jurisdiction to be incapacitated.

2. When requesting records, the said legally appointed conservator or guardian shall provide the Commission with court documentation verifying his or her appointment by a court of competent jurisdiction.

(c) The Alleged Abuser.

1. Subject to 118 CMR 9.00, M.G.L. c. 19C, § 3 and c. 66A, information contained in the Commission's investigation report regarding the alleged abuser shall be available to that person or his or her legal representative unless the Commission determines that the granting of the request would be contrary to the safety of the person with a disability.

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2. The decision of the Commission not to release such records shall be final and not subject to administrative review; however, the aggrieved party may exercise any other rights or remedies which may be available at law.

(7) Other Provisions.

(a) Prior to the release of any records pursuant to 118 CMR 9.03, the general counsel for the Commission or his or her designee shall review the records and remove any portion of the records which:

1. may be considered attorney work product or privileged;
2. may be personally identifying or confidential information regarding any third party data subject and the individual who reported the abuse to the Commission; and
3. is subject to any further provisions contained in 118 CMR 9.00, M.G.L. c. 19C, § 3, c. 66A, and/or c. 4, § 7, cl. 26.

(b) Upon the written request of any individual or any authorized representative of the individual as to whether the Commission has any records in its possession regarding that individual the Commission shall respond pursuant to 118 CMR 9.00, M.G.L. c. 19C, § 3 and/or c. 66A.

(c) The Commission may deny access to information which, at the time the request for such data is received by the Commission, is subject to further investigation by the Commission, a referral agency, or another law enforcement agency, provided that such denial of access shall not in any way affect a data subject's rights under judicial discovery procedures. Such denial and notification thereof shall be governed by M.G.L. c. 66A, and may continue until said further investigation has been completed, any resulting administrative or judicial proceeding has concluded or one year from the commencement of said further action, whichever is sooner.

(d) Neither the Commission nor the referral agency shall disclose any information about a pending investigation except as may be determined by the Commissioners or their designee to be necessary to fulfill the purposes of M.G.L. c. 19C.

(e) The Executive Director, General Counsel and/or a designee of either may determine, in their discretion, that due to either the specific nature of the request and/or the extensive publicity accorded an investigation, that mere removal of identifying personal data would be insufficient to protect existing privacy interests, or that disclosure would not be in the public interest; and that accordingly, certain documents or data otherwise subject to disclosure should not be disclosed. In such event, the Executive Director, General Counsel, or a designee shall file in the investigation case file a statement of such determination, together with a specification of the document(s) or data to be withheld as an exemption to the definition of a "public record" set forth in M.G.L. c. 4, § 7, cl. 26, the conditions of withholding such information and a brief statement of reasons for withholding such information. Such withholding of data shall be governed by M.G.L. c. 66A, § 2(i).

(f) Any employee of the Commission who is found to have breached the confidentiality of a data subject through the willful violation of 118 CMR 9.00, in addition to any other applicable penalty, shall be subject to disciplinary action including, but not limited to, reprimand, suspension, dismissal or other such action consistent with the rules and regulations of Massachusetts governing its employees, any relevant collective bargaining agreement or any other contract, and said employee may be denied future access to personal data.

(g) When any employee of a referral agency is found by the Commission to have breached the confidentiality of a data subject during the course of an investigation through a violation of 118 CMR 9.00, the Commission shall refer the matter to the appropriate agency of the Commonwealth for consideration by that agency of imposition of disciplinary measures in accordance with the requirements of any applicable law, regulation, or collective bargaining agreement.

REGULATORY AUTHORITY

118 CMR 9.00: M.G.L. c. 19C, §§ 3(b), 3(g), 3(i); chs. 4, 66, and 66A; Massachusetts Guide to Evidence Section 515.

NON-TEXT PAGE