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CLIENT ALERT

TO: Municipal Clients

FROM: Murphy, Hesse, Toomey & Lehane, L.L.P., Municipal Law Practice Group

DATE: January 2003

RE: Advisory on Responding to Public Records Requests and Subpoenas

Public employers often receive requests for a variety of records in their possession including personnel files and police accident reports. The "public records" statute, M.G.L. c. 66, § 10, provides that "every person having custody of any public record as defined in clause Twenty Sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it. . . to be inspected and examined by any person The law provides that there is a presumption that records in possession of a public employer are public records. M.G.L. c. 66, § 10 (c). The definition of public records is found in M.G.L. c. 4, §7, clause twenty sixth. Section 7 also provides the types of documents which are exempt from disclosure in a public records request.

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Section 7, clause twenty sixth (c) provides an exemption for "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy." Recent case law has interpreted this section as it applies to the disclosure of personnel information in response to a public records request.

In Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792 (2000), the Supreme Judicial Court held that personnel information which is "useful in making employment decisions regarding an employee" is subject to withholding in accordance with exemption (c). The Court stated that those records which may be withheld include "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee." *Id.*, at 798. Information such as an employee's full name, address, and salary is not exempt from disclosure as such information is typically available from other sources, and it is not sufficiently personal to be withheld in response to a public records request. However, the home address and home phone number of law enforcement or public safety personnel is not a public record and is not subject to disclosure.

Section 7, clause. twenty sixth, (f) provides an exemption for withholding those "investigatory material 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." This exemption does not exclude from production all records maintained by a police department. The exemption also does not exclude all police reports and witness statements taken by the police in the conduct of an investigation. Instead, the Supreme Judicial Court has held that "that some exempt material may be found in a document or report of an investigatory character does not justify cloture as to all of it." Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 287-288 (1979). Where a particular record can be redacted to exclude material which would

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harm an investigation, or reveal investigatory techniques, or to remove information identifying witnesses, the document should be redacted and then produced. Each request must be evaluated along with the requested materials to determine if the investigatory exemption is applicable and whether materials should be redacted prior to production.

While the personnel and investigatory records are two of the most commonly requested records and therefore subject to exemptions (c) and (f), there are other types of records which if requested, may be exempt from disclosure in accordance with the statute. Each public records request must be evaluated on a case by case basis to determine which, if any, exemptions are applicable.

The Supervisor of Public Records has issued numerous opinions addressing whether certain items are covered by an exception to the public records law. Exemption (c) which deals with personnel, medical and otherwise private information has been analyzed at length by the Supervisor. An individual's name and address are "commonly available" and are not sufficiently private to warrant invocation of the exception. Telephone numbers are likewise considered to be public, however, if an individual's phone number is unpublished, the Supervisor has recognized the existence of a privacy interest which may warrant invoking the exception. The Supervisor has acknowledged that social security numbers, information dealing with wage garnishment, marital status, legitimacy of children, paternity, government assistance, substance abuse and family disputes would all, as a general rule, be covered by the exception. The privacy exemption has been interpreted by the Supervisor as only applying to individuals and not business entities.

By the same token, the Supervisor has concluded that information about a municipal utility company's customers, such as billing address, service address, name, account number, meter number, amount of most recent bill and delinquency status, is not exempt information and should be disclosed if requested. Also, information such as that contained on annual statements

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submitted to public retirement boards, or even municipal payroll records would be subject to disclosure.

In contrast to a public records request, a subpoena for a public employee's personnel file or investigatory materials is not subject to M.G.L. c. 66, §10. A subpoena issued pursuant to Mass.R.Civ.P. 45 commands "the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . ." Public employers often receive subpoenas for personnel files and investigatory files for litigation in which the town is not a party (e.g. divorce actions, custody disputes, accident cases). Unlike a public records request, there is no statutory list of exemptions which the town may use to withhold a these records in response to a subpoena. However, there may be non-statutory reasons for withholding certain information contained in a personnel file in response to a subpoena. These non-statutory reasons may include some of the same exemptions in the public records law, including privacy and investigatory exemptions. Any subpoena for such records must be resolved on a case by case basis and counsel should be consulted prior to responding to any subpoena for such records.