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September 21, 2016

The Honorable Charles D. Baker, Jr.
State House
Office of the Governor
Room 280
Boston, MA 02133

Dear Governor Baker,

Pioneer Institute applauds your administration for enhancing transparency and streamlining the process for public records requests to executive branch agencies and secretariats.

The 2015 Memorandum to Cabinet Secretaries and accompanying guidance on “best practices from around the country” encouraged the passage of the public records reform law that you signed in June, and was the first such reform since 1973.

The law is a significant step forward on, and will no doubt improve the Commonwealth’s poor national rankings for, government transparency. The Institute has long supported many elements of the new law, including subjecting the MBTA Retirement Board to public records law and making its operations transparent, establishing a public records officer for every agency, imposing stronger penalties on delinquent agencies, promoting electronic disclosure and reducing costs to obtain public records.

Yet, there is more work that is needed to promote government transparency and accountability, which are critical metrics of the health and vibrancy of any democracy.

Given your record of reform, Pioneer requests that you consider an additional step toward transparency and accountability by extending the administration’s transparency reform initiative to the Executive Office of the Governor.

In 2015, the Center for Public Integrity gave Massachusetts an “F” for public access to information. One of the key reasons for the low ranking was the Supreme Judicial Court’s 1997 ruling in *Lambert v. Judicial Nominating Council* that the Governor’s Office is exempt from public records requests.

In its most recent report on Massachusetts, The Reporters Committee for Freedom of the Press states, “the public records and open meetings laws of Massachusetts are among the weakest in any of the 50 states.” The Committee cites both the explicit statutory exemption of the state legislature and the implicit judicial exemption of the Governor’s Office from transparency laws. Massachusetts’ recent reform law did not directly address either of these issues.

Since the *Lambert* decision, Massachusetts governors have asserted that the state’s public records law does not apply to their office. Over time, these administrations have developed a reliance on *Lambert*, establishing a dubious precedent that you could resolve through executive action.

We recognize that your office has generally been responsive to public records requests; that said, fulfilling requests still remains voluntary and, as such, reversible at any time without public explanation. We further recognize that the public records reform law creates a “special legislative commission” which is mandated to “examine the constitutionality and practicality of subjecting ...the executive office of the governor...to the public records law.” The creation of such commissions in the past, however, has often done little more than kick the can down the road.

Given the importance of public information to upholding the public trust, the Institute requests that you extend your public records reform initiative specifically to the Governor’s Office through a formal device such as a gubernatorial Memorandum or, preferably, by Executive Order. This bold act would set a high bar for transparency and good government and serve as a model for future governors and, more immediately, the state legislature.

Moreover, such an action would not directly interfere with the mission of the special legislative commission in presumably identifying a long-term solution.

Although a Memorandum or Executive Order could be amended or rescinded, any future Governor would come under intense political and media pressure to stay the course. The extension of transparency to the Governor’s Office would evolve into a standard campaign threshold for future gubernatorial candidates – analogous to, but far more long-lasting than, the effect of the ‘people’s pledge.’ Candidates would be required to state their positions publicly on this Baker Administration legacy.

The Institute fully recognizes that there are reasonable categories of exceptions to public-record disclosure to which the Governor’s Office would be prudent to have recourse, should you choose not to follow the *Lambert* blanket exemption.

The Cabinet Memorandum identified a readily available source of well-defined exceptions. Indeed, M.G.L. c. 4, § 7 (26) contains twenty categories of exceptions to which you would have recourse. We would request that with regard to at least one of these categories – ‘ongoing policy deliberations’ – your administration err on the side of public disclosure to avoid overuse of the label as a rationale for failing to turn over public records (a practice evident in recent administrations).

Pioneer further recommends that the application of any gubernatorial action be prospective. This would give your Office the time needed to adjust and implement appropriate processes. The Executive Order or Memorandum could assign a specific person or job title – perhaps the Chief Counsel to the Governor (who currently vets public records requests) – to coordinate the overall effort. Further, a schedule of the costs for producing documents would be required.

We are confident that extending your public records reform initiative would not unduly burden the Governor’s Office. The Governor’s Office in Massachusetts remains one of only a handful to claim a full blanket exemption from public records laws. As it stands, approximately thirty other states have few or no exceptions to public records requests to their respective governors’ offices. These states appear to manage well enough as they have adapted to a more open form of governance.

Finally, the Institute would be pleased to assist the administration in such matters as the development of guidelines for the enforcement of an executive action, the reasonableness of providing Governor's Office records electronically through a searchable website, and whether additional exclusions would have to be added to the executive action (such as those identified in section 10B of the new law).

Massachusetts has had a proud history of transparency dating back to 1851. Only recently has the Commonwealth fallen behind its peer states. We applaud the administration for actions already taken to expand transparent government. We also believe that much more can be done, and that instituting a new formalized transparency process for the Governor's Office is the right next step.

Respectfully,



Mary Connaughton
Director of Government Transparency



John Sivoletta
Senior Fellow, Law and Policy