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PUBLIC POLICY RESEARCH

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Attorney General Maura Healey
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Dear Attorney General Healey:

We are requesting an advisory opinion from you pursuant to your authority under 940 CMR 29.08 regarding the constitutionality of the Massachusetts legislature's exemption from G.L. c. 30A, §§18-25 (the "Open Meeting Law"). We direct this request to you because you are the state officer charged with enforcement of the Open Meeting Law under G.L. c. 30A, §25(b) and, therefore, you have the authority to issue advisory opinions regarding that law.

This letter summarizes the primary legal arguments and citations that we believe would comprise part of any advisory opinion ultimately issued regarding the constitutionality of the legislative exemptions to the Open Meeting Law. It is our position that the legislature's exemption from the Open Meeting Law is constitutionally unsound.

History of Government Transparency in Massachusetts

The Commonwealth of Massachusetts (the "Commonwealth" or "Massachusetts") has provided public access to government records since as early as 1851. See Chapter 161 of the Acts 1851. Before enactment of that statute, public records were not subject to mandatory disclosure because they were generally regarded as government property and access was subject to the discretion of governmental officials. Although a milestone in favor of transparency, the 1851 statute was limited in scope and mandated disclosure of only the records and documents that government agencies or officials were required by law to make or keep.

In the midst of the Watergate scandal, the public began to demand greater transparency. In 1973, the statute was amended to broaden the definition "public record" and establish a process for handling requests for them. An open meeting statute followed in 1975, which established openness of government meetings as the general rule. The current iteration of these laws is codified at G.L. c. 4, §7(26) and G.L. c. 66, §10 (the "Public Records Law") and in the Open Meeting Law, which is cited above (collectively, the "Transparency Laws").

Although our request to you as the Attorney General focuses on the Open Meeting Law, we discuss both of the Transparency Laws because their respective

purposes are intertwined historically and conceptually under the Massachusetts Constitution.

Purpose of the Transparency Laws

The purpose of the Transparency Laws is to promote more effective, accountable and responsive government. See *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. 444, 452-54 (2007) (stating that purpose of Public Records Law "is to give the public broad access to governmental records [. . . which is . . .] an essential ingredient of public confidence in government") and *Day v. BRG 161 S. Huntington, LLC*, 2013 WL 8149731 at *6 (Mass. Super. May 17, 2013) (Giles, J.) (stating that the purpose of broadly defining "public body" in the Open Meeting Law is "to promote transparency in conducting matters that concern the public").

The governing agencies charged with enforcing the Transparency Laws publicly, and correctly, embrace and support that objective. See Secretary of the Commonwealth, A Guide to Massachusetts Public Records Law, p. i, stating that "the founding fathers of our nation strove to develop an open government formed on the principles of democracy and public participation. An informed citizen is better equipped to participate in that process." Similarly, the Attorney General's Open Meeting Law Guide, p. 1 (March 18, 2015) states that "the democratic process depends on the public having knowledge about the considerations underlying governmental action. . . ."

The Commonwealth's Poor National Reputation Regarding Transparency

Notwithstanding the Commonwealth's long history and claimed commitment to governmental transparency, the Transparency Laws are generally considered among the weakest in the nation. See Reporters' Committee for Freedom of the Press, Open Government Guide, Access to Public Records and Meetings in Massachusetts, 6th ed. 2011, p. 1. Also, the State Integrity Investigation, a fifty-state grade-based survey of public records and open meeting laws, gave the Commonwealth an overall grade of D+, with an F for "Public Access to Information" and a D for "Legislative Accountability". See Center for Public Integrity, Public Radio International and Global Integrity; State Integrity Investigation, Dec. 2015, available at: http://www.publicintegrity.org/2015/11/09/18422/massachusetts-gets-d-grade-2015-state-integrity-investigation

The General Court Has Exempted Itself from the Transparency Laws

A principal reason for the Commonwealth's poor reputation for transparency and public access is that the General Court, the bicameral legislative branch of the Commonwealth, is excluded from the application of the Transparency Laws. See G. L. c. 66, §18; G. L. c. 30A, §18 (excluding the General Court and its committees and recess commissions from definition of "public body") (the "Legislative Exceptions").

The Open Meeting Law mandates that "all meetings of a public body shall be open to the public" and that notice of such meetings be posted at least 48 hours in advance (except in the case of an emergency).[1] See G. L. c. 30A, §20. The term "public body" is broadly defined in

[1] There are specified exceptions to this rule so long as procedures for conducting a closed, executive session of a properly noticed open meeting are followed. See G. L. c. 30A, §21.

G. L. c. 30A, §18, but expressly carves out among other things the General Court and its committees and recess commissions. Because it only applies to "public bod(ies)," the effect is that the legislature is not subject to the Open Meeting Law.

We contend that the legislature is the ultimate 'public body' and, as such, cannot and should not maintain a blanket exception to the Open Meeting Law.

The Supreme Judicial Court ("SJC") has not yet specifically considered the legality of the legislative exception from the Open Meeting Law. It has, though, rejected limited efforts to subject the General Court to requirements similar to those established under the Transparency Laws via initiative petition based on the General Court's "constitutional authority . . . to order their own internal procedures." See *Paisner v. Attorney Gen.*, 390 Mass. 593, 601 (1983).

Specifically, in *Paisner* the plaintiffs prepared an initiative petition pursuant to Article 48 of the Amendments to the Massachusetts Constitution relating to the General Court's operational procedures and sought the Attorney General's certification. Some of the proposed requirements in the initiative petition were similar to the Open Meeting Law's requirements and included: (i) final reporting of matters by committees; (ii) recording of committee votes in certain circumstances; (iii) notice of committee sessions; and (iv) public hearings on every bill. The Attorney General's office determined that the initiative petition did not relate to a proposed "law" as required and, therefore, was not permissible. The plaintiffs subsequently sought declaratory and injunctive relief to cause the Attorney General to certify the initiative petition.

The SJC held that, even though the General Court enacted laws governing its internal procedures, it was "clear beyond dispute" that the plaintiff's initiative petition concerned a rule regarding "the internal proceedings of the two Houses of the Legislature" instead of a law "govern[ing] conduct external to the legislative body," and thus was not appropriate for the initiative process. The SJC recited both state and federal case law to support the rule that:

> Legislative rule-making authority is a continuous power absolute and beyond the challenge of any other tribunal.... it cannot be emphasized too strongly that this power over procedures rests, not in the "General Court," but in the separate Houses of the Legislature. Thus each branch of each successive Legislature may proceed to make rules without seeking concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature....Where internal proceedings are concerned, future legislative sessions cannot be bound by an action of the General Court. This discretion to determine the method of procedure cannot under the Constitution be abrogated by action taken by an earlier Legislature. In sum, the rules of future sessions of the House or the Senate cannot under one Constitution be controlled by vote of the General Court or by vote of the people, or even by vote of the respective legislative branches.

Thus, the holding in *Paisner* suggests that, if a challenge to the Legislative Exception to the Open Meeting Law were directly before the SJC based on similar arguments, the Court would uphold it based on the General Court's right to govern its own internal procedures. The holding does not, however, shut the door on subjecting the

General Court to the requirements of the Open Meeting Law through other means such as constitutional challenges.

The Commonwealth's Constitution Calls for Legislative Transparency

Notwithstanding case law suggesting that the Legislative Exceptions are valid and enforceable, there are legitimate and compelling state constitutional grounds suggesting that the Legislative Exceptions undermine rights reserved to the people under the Constitution of the Commonwealth.

The Commonwealth is a social compact government formed to assist the people in the pursuit of their natural rights. The Preamble to the Constitution sets forth the guiding principles of the Commonwealth's government and the general rights of the people over it:

> The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

As its text illustrates, the Preamble expressly limits the General Court's authority and requires that the means and ends of the legislative process be reasonable and just.

Accordingly, the judiciary may consider a challenge to the Legislative Exceptions premised on any imbalance existing between the General Court's limited constitutional authority and the Declaration of Rights, which vests the people of Massachusetts with an equitable interest in a transparent legislative process.

The Constitution provides the General Court with exclusive legislative authority within the Commonwealth. Exclusive authority is not, however, absolute authority. The Constitution limits the General Court's powers by, among other things: (i) prohibiting the passage of laws, directions and instructions that are "repugnant or contrary to this constitution"; (ii) requiring public accountability of the legislature "at all times"; and (iii) giving the people of Massachusetts rights to (a) require of their legislators an "exact and constant observance" of fundamental constitutional principles; and (b) give instructions to the legislators.

Careful analysis of these constitutional limitations on legislative authority supports the proposition that the Legislative Exceptions as currently applied extend the power of the General Court beyond the limits of its constitutional authority and undermine rights reserved by the people.

The Constitution requires that "all manner" of legislative acts must conform to the Constitution and none should be "repugnant or contrary" thereto. "All manner" of legislative acts logically must include the exercise of the legislature's authority affirmed in *Paisner* to order its own internal affairs and procedures. Similarly, the preamble to the Constitution calls for an "equitable mode of making laws," meaning that the deliberative process should be just as

equitable as the end result. Regardless of the scope of the legislature's jurisdiction to govern its own affairs, the judiciary has the authority to determine whether the legislature is "claiming privileges not belonging to it." *Coffin v. Coffin*, 4 Mass. 1, 33 (1808).

The Constitution also requires that the General Court be "at all times accountable to" the people. While the courts have not yet analyzed the words "at all times," the plain meaning is that legislators remain constantly accountable for their actions to the people of the Commonwealth.

Accountability cannot be achieved if the legislature exercises its authority behind closed doors without public oversight of the legislative process. Accountability only in the end result or only in hand-picked moments of candor is not accountability "at all times." While this constant accountability cannot involve "accusation or prosecution, action or complaint" because of the constitutionally granted legislative privilege (discussed below), the information derived from this accountability can serve as the basis for the electorate's decision whether to support incumbent politicians. Particularly in light of the purpose of the Transparency Laws, "at all times" involves comprehensive legislative transparency to encourage public participation and trust.

One of the items to which the legislature (along with all other members of the government) must be held accountable for "at all times" is the "exact and constant observance" of fundamental constitutional principles in the formation of law. The plain meaning of the word "formation" includes not just the end result of a bill signed by the Governor, but the deliberative process used to shape and form draft proposals into law. This is consistent with the language in the Preamble that the "mode" of making laws, far broader than the laws themselves, must be equitable.

Whether members of the legislature are exactly and constantly observing constitutional principles can only be determined by the people when they have real access to the process. Without the ability to scrutinize the process, this constitutional provision is of no real consequence. This cannot be the case, however, because the provision states that it is "absolutely necessary." Regardless of whether this article is enforceable in the courts, the public cannot put the instruction to practice if there is only limited and highly edited access to the legislative process.

Massachusetts residents have a constitutional right to instruct their legislators. This constitutional article has been given extensive judicial treatment, particularly in relation to the right to assemble. While the courts have not yet provided guidance on the meaning of the right of the people to "give instructions to their representatives," the right has been codified in G. L. c. 53, §19 in relation to proposing new legislative action. Notwithstanding the arguments made in an academic debate regarding this right in the absence of a court opinion, it is reasonable and logical to conclude at a minimum that this right of instruction is meaningless if the people do not have access to information on issues before the legislature upon which any instruction can be based.

Legislative Privilege Is Not a Carte Blanche

Those favoring the Legislative Exceptions frequently rely on the legislative privilege set forth in Article 21 of the Massachusetts Declaration of Rights, which states:

> The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

This language may appear to some to support the assertion that the rights of the General Court in the Legislative Exceptions outweigh any constitutional rights reserved to the people regarding access to the legislative process.

As discussed below, however, it actually supports the opposite principle because: (i) the underlying purpose of the privilege is to support the rights of the people and thus should not be exercised in a manner that undermines the people's rights; (ii) the privilege is held by each individual legislator and not by either or both bodies of the General Court as a whole; (iii) the privilege extends only to legal causes of action rather than public accountability for legislative acts (which accountability is required elsewhere in the Constitution); and (iv) a broad construction of the privilege assumes that the public has access to the deliberative process and protects legislators from legal action initiated by the public based on this publically available information.

The leading case concerning the legislative privilege is *Coffin v. Coffin*, 4 Mass. 1 (1808). In that case, a legislator made a defamatory statement about an individual supporting a proposed legislative resolution. The statement was made by a legislator in the House, while in session. There was no contradictory evidence presented to rebut the assertion that the statement was defamatory so the sole issue before the Court was whether the legislative privilege shielded the declarant from liability.

After determining that it possessed the requisite authority to review legislative action, including those actions the General Court contends are within its own exclusive jurisdiction, the SJC analyzed the language of Article 21 and found, first, that the privilege is held by each individual legislator and not by the legislative body as a whole, "even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature." 4 Mass. at 27.

The court next found that the purpose of the privilege is not for "protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." Accordingly, the privilege should be construed liberally for everything said and done as a representative while exercising the functions of that office regardless of whether done according to the rules of the House. The House must be in session, but the statement can be made outside the walls of the chamber if it is made pursuant to the legislative function. The court recognized that, on occasion, "a private benefit must submit to the public good," but that a "more extensive construction of the privileges of the members secured by this article, [the court] cannot give. . . . But so careful were the people in providing that the privileges, which they, for their own benefit, had secured to their representatives, *should not unreasonably prejudice the rights of private citizens*." *Id.* at 28-29.

Despite broadly construing the legislative privilege, the Court determined that the privilege is not a carte blanche for legislators to act without refrain or accountability, but hinged on whether the legislator was "executing the duties of his office" when he made the defamatory statement. The Court ultimately found the legislator's privilege inapplicable because the words in issue "were not spoken by him on a subject before the house, either in an address to the chair, or by way of deliberation or advice with another member." *Id.* at 29, 33. The Court opined that, to extend the privilege to any statement made by a representative within the walls of the chamber not in relation to an official duty "would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny - an effect which never has been, and I confidently trust, never will be, endured by any House of Representatives of Massachusetts." *Id.* at 31.

The Constitution and the people who delegated authority to the legislature, and not the legislature itself, have the final word on the extent of the rights and privileges of the legislature and the individual members thereof. As the SJC stated in *Coffin*:

> In this state, we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges of the house, either by express words, or by necessary implication. A struggle for privileges [by the legislature], in this state would be a contest against the people to wrest from them what they have not chosen to grant. And it may be added that the grant of privileges is a restraint on the rights of private citizens, which cannot be further restrained but by some constitutional law.

Coffin, 4 Mass. at 34; see also *Holden v. James*, 11 Mass. 396, 404 (1814) (stating that, in the Commonwealth "the sovereign and absolute power resides in the people; and the Legislature can only exercise what is delegated to them according to the constitution").

Conclusion

We hope that providing this fundamental argument and the accompanying legal citations regarding the constitutionality of the Open Meeting Law is helpful to your deliberations on this issue.

We also request that you endorse our position and render an advisory opinion to that effect.

Please let us know if you have any questions or require further information from us. Thank you very much in advance for considering our arguments.

Regards,

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