April 3, 2018

Representative Jennifer Benson, Co-Chair
Senator Walter Timilty, Co-Chair
Public Records Commission
State House – 24 Beacon Street
Boston, Massachusetts 02133

Dear Representative Benson and Senator Timilty,

Pursuant to Sections 20(a) and 20(f)(i) of Ch. 121 of the Acts of 2016 ("An Act to Improve Public Records"), Pioneer Institute ("Pioneer") respectfully submits this letter to assist in your deliberations "examin(ing) the accessibility of information concerning the legislative process of the general court and the expansion of the definition of public records."

As you may know, Pioneer has long promoted improved government transparency in the Commonwealth. An area where Massachusetts ranks towards the bottom nationally in transparency is the application of public records laws to the governor's office and the state legislature.[1] As you contemplate further reform to transparency laws, we wish to make you aware of key legal arguments to support eliminating the legislative exception to public records laws. We also believe the governor's office exception should be eliminated.

History of Government Transparency in Massachusetts

The Commonwealth of Massachusetts (the "Commonwealth") has provided for public access to governmental records since 1851 (See Ch. 161 of the Acts of 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 (see A. Cella, Administrative Law and Practice, 39. Mass. Prac. §1161 (1986)). Although an improvement in favor of transparency, the 1851 statute was unfortunately limited in scope and only mandated the disclosure of records and documents that government agencies or officials were required by law to make or keep.

However, in 1973, in the midst of the Watergate scandal and a wave of government transparency demands that swept the nation, the statute was amended to significantly broaden the definition of what constituted a public record and establish a process for handling requests for the examination and production of public records. An open meeting statute followed in 1975, which established openness of government meetings as the general rule. See A. Cella, Administrative Law and Practice, 39 Mass. Prac §1411 (1986). 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 G.L. c. 30A, §§18-25 (the "Open Meeting Law") (and collectively, the "Transparency Laws").

[1] Notwithstanding the Commonwealth's long history of and claimed commitment to government transparency, its 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. In fact, the State Integrity Investigation, a 50-state grade-based survey of public records and open meeting laws, gave the Commonwealth an overall grade of C- 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, March 2012.

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 Mgt.*, 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"). See *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 transparency laws claim to 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"); Attorney General, Open Meeting Law Guide, p. 1 (Aug. 1, 2013) (stating that "[t]he democratic process depends on the public having knowledge about the considerations underlying governmental action. . . ")

Legislature's Exception

Notwithstanding the Commonwealth's long history and claimed commitment to governmental transparency, our 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. In fact, the State Integrity Investigation, a 50-state grade-based survey of public records and open meeting laws, gave the Commonwealth an overall grade of C - 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, Mar. 2012. A principal reason for the Commonwealth's poor reputation for transparency and public access is that the General Court, the bicameral legislative branch of state government, is excluded from 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").

Although the legislative exceptions are generally valid and enforceable when properly invoked, the sweeping manner in which they are utilized today is not in the Commonwealth's best interest and cuts against the rights of the people set forth in the state Constitution.

The Public Records Law governs public access to government records and the government's obligation to create, maintain and disclose such records. G. L. c. 66, §10(a). Requested documents are presumed to be public records subject to disclosure and the burden is on the applicable custodian to demonstrate that a particular document is exempt from disclosure. See G. L. c. 66, §10(c). Classes of exempt documents are described in the definition of "public record."[2] Some enumerated government entities are not required to comply with the Public

[2] Excluded from the definition of "public records" are, among other things: (i) documents related to internal personnel rules and practices of the government unit, to the extent that proper performance of government function requires withholding; (ii) documents relating to a named individual where disclosure would constitute an unwarranted invasion of personal privacy; (iii) inter- and intra-agency memoranda or letters relating to policy positions being developed by the agency; and (iv) investigatory materials necessarily compiled out of public view by law enforcement or investigatory officials the disclosure of which would probably prejudice the investigation in a manner not in the public interest. See G. L. c. 4, §7(26).

Records Law. The Public Records Law expressly states that it "shall not apply to the records of the general court . . ." G. L. c. 66, §1
8.[3]

The Supreme Judicial Court (SJC) has twice affirmed the legislative exception to the Public Records Law. See *Westinghouse Broad.* Co., *Inc. v. Sergeant-At-Arms of Gen. Court of Mass.*, 375 Mass. 179, 184 (1978); *Lambert v. Executive Director of Judicial Nominating Council,* 425 Mass. 406, 409 (1997) (citing *Westinghouse* in dicta when analyzing whether certain executive branch records are subject to Public Records Law). The court in *Westinghouse* analyzed the statutory language on its face and found that the General Court was exempt from the Public Records Law and that legislative documents are not subject to public disclosure.

In *Westinghouse,* a government agency's records supervisor denied the plaintiff's request to inspect the General Court's telephone bills based on the determination that the legislative exception in G. L. c. 66, §18 shielded the bills from disclosure. See *Westinghouse,* 375 Mass. at 181. After determining that, pursuant to G. L. c. 4, §7(26), the Legislature's documents are not "public records" subject to disclosure, the court held that G. L. c. 66, §18 "specifically exempts the records of the General Court from the provisions of the public records statute." *Id.*at 184-85. It is irrelevant whether the Legislature is under some other obligation to maintain a particular record; a record of the Legislature is not subject to disclosure because the Legislature is exempt from the Public Records Law based upon the "plain language of section 18." *Id.* at 185.

There is no negative treatment of *Westinghouse* reported in subsequent SJC decisions and the SJC did not raise any constitutional considerations in the decision. Nor did the court suggest in dicta that the Legislature overstepped its authority by excluding itself from the requirements of G. L. c. 66, §18. Thus, based on *Westinghouse,* the legislative exception to the Public Records Law is valid and enforceable. *Westinghouse* affirmed the application of the Public Records Law as then in effect but did not prohibit lawful amendments or other challenges to the Public Records Law.

Though the SJC has not considered the legality of the legislative exception from open meeting laws, it has rejected 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).

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. *Id.* at 594. 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. *Id.* at 596. The Attorney General's office determined that the initiative petition did not relate to a proposed "law" as required and, therefore, was not permissible. *Id.* at 595. The plaintiffs

[3] Similarly, Congress is not subject to the Federal Freedom of Information Act because it is excluded from the definition of "agency" codified in the law. See 5 U.S.C. §552(f). Federal courts have enforced this exclusion." See e.g. *United We Stand America, Inc. v I.R.S.,* 359 F.3d 595, 597 (D.C. Cir. 2004).

subsequently sought declaratory and injunctive relief to cause the Attorney General to certify the initiative petition. *Id.* at 594.

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. *Id.* at 596, 599-602. 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. *Id.* at 600, 602-03.

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 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 exceptions undermine rights reserved to the people under the state Constitution. 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.
>
> Preamble of the Massachusetts Constitution (emphasis added).

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 court is likely to 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 arguably vests the people of Massachusetts with an equitable interest in a transparent legislative process.

The Constitution provides the General Court with the 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 passage of laws, directions and instructions that are "repugnant or contrary to this Constitution;"[4]
(ii) requiring public accountability of the legislature "at all times"[5]; and
(iii) giving the people of Massachusetts rights to (a) require of their legislators an "exact and constant observance" of fundamental constitutional principles[6] and (b) give instructions to the legislators.[7]

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 undermines 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 court 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

---

[4] Part II, c. 1, § 1, art. 4 of the Massachusetts Constitution states: "And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be *not repugnant or contrary to this constitution*, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof..." (emphasis added).

[5] Art. 5 of the Massachusetts Declaration of Rights states: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and *are at all times accountable* to them."

[6] Art. 18 of the Massachusetts Declaration of Rights states: "A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an *exact and constant observance* of them, in the *formation and execution of the laws* necessary for the good administration of the commonwealth." (emphasis added)

[7] "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; *give instructions to their representatives,* and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." Art. 19 of the Massachusetts Declaration of Rights (emphasis added).

people. While the courts have not 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 a reality if the Legislature exercises its authority behind closed doors with its books and records shielded from public oversight. Accountability only in the end result or only in hand-picked moments of candor is not accountability "at all times." This constant accountability cannot involve "accusation or prosecution, action or complaint" because of the constitutionally granted legislative privilege discussed below, but the information derived from this accountability can be 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. While there is no definitive court opinion establishing whether this article is a direct right that is judicially enforceable by individuals or an item of instruction to guide citizens in how they should select their representatives, 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 access to the process. Without the ability to scrutinize the process, this constitutional provision is of no real consequence. That cannot be the case, however, because this provision says 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.

Finally, 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.[8] While the courts have not provided guidance on the meaning of the right to "give instructions to their representatives," the right has been codified in G. L. c. 53, §19 in relation to proposing new legislative action. Regardless of the arguments made in academic debates about this right in the absence of a court opinion, it is at least logical to conclude 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.

For more than a century, there has been the expectation that people would have a full discussion regarding politicians and political actions. This assumes a meaningful amount of information upon which to base such a discussion.

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 that "[T]he freedom of

---

[8] Speaking on the right to assemble, the Supreme Judicial Court stated that:
The extended and almost unlimited rights of suffrage, secured to the people of this commonwealth by the constitution and laws, assume and are founded on the right of voters, to have the fullest and freest discussion and consultation upon the merits and qualifications *of* candidates, for their information and the means of exercising a sound and enlightened judgment in regard to public men and political measures. Com. *v. Porter,* 67 Mass. 476, 478 (1854).

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 appears to support the assertion that the General Court to 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 those 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, not 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 publicly 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. *Id.* at 23. The statement was made by a member of the House, while in session. *Id.* at 24. 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. *Id.* at 25.

After determining that it possessed the requisite authority to review legislative action,[9] including those actions the General Court contends is within its own exclusive jurisdiction, the SJC analyzed the language of Art. 21 and found, first, that the privilege is held by each individual legislator, not 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." *Id.* 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." *Id.* 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. *Id.* 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. *Id.* at 27-28. 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,

---

[9] The issue turned on separation of powers considerations and counsel argued fervently about whether the court had jurisdiction to determine the matter. *Id.* at 32-36; see also *id.*at 6- 23 (reporting of arguments by counsel for plaintiff and defendant). The Court determined that the judiciary may review legislative action, including those actions the General Court claims is within its own exclusive jurisdiction, when the question presented concerns whether the General Court has the constitutional authority to decide such matters. *Id.* at 32-33; see also *Burnham v. Morrissey,* 80 Mass. 226, 238 (1859) ("[I]t is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity with the Constitution; and if they have not been, to treat their acts as null and void.").

which they, for their own benefit, had secured to their representatives, *should not unreasonably prejudice the rights of private citizens."* *Id.* at 28-29 (emphasis added).

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 rather that it hinged on whether the legislator was "executing the duties of his office" when he made the defamatory statement. Id. at 28. 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:

> 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.")

Practical Considerations

Two practical issues that are frequently raised in opposition to expanding legislative transparency also merit consideration.

Protecting Sensitive Information

Legislators regularly deal with the personal information of constituents. Sensitive information is obtained by representatives when communicating with constituents, drafting proposed legislation and considering the impact of legislation on their districts. In an interview conducted in 2012, Northampton Representative Peter Kocot, who served as co-chair of the Joint Committee on State Administration and Regulatory Oversight, expressed concern about protecting constituents' sensitive personal information:

> Legislators every day deal with constituents who offer confidential information, whether that information is a health record, a legal record, things they don't want made available to the public. They are coming to [their legislator] based on a confidential relationship. We want to make sure that any expansion of public records laws protects constituents and does not place them in jeopardy.

See Becker, Deborah, *Mass. Receives* C *Grade in Political Corruption Study,* Mar. 19, 2012 (available at www.wbur.org/2012/03/19/state-integrity-mass).

Maintaining constituent privacy and confidentiality is a legitimate concern and an important government function. However, when balancing this concern with the right of access to the General Court's records, a narrower legislative exception should suffice. The Public Records Law already contains exemptions for personal documents where the disclosure might "constitute an unwarranted invasion of personal privacy." This concern is better handled by applying existing or new, narrowly tailored exemptions from the transparency laws rather than the blanket Legislative Exceptions.

Promoting Government Efficiency

As the sayings go, "time is money" and "too many cooks spoil the cake." The court in *Paisner* held that the Legislature has authority over certain internal procedural matters, including notice of committee sessions and public hearings, so an argument that increased transparency inhibits the legislative process is somewhat sympathetic. To this point, House Speaker Robert DeLeo said that "[t]he discussion [in private] becomes a lot more open and in that fashion moves the process along a whole lot faster." Bierman, Noah, *Legislators' Vital Work Veiled from Public's Eye,* The Boston Globe, July 8, 2011. Similarly, former Senate President Therese Murray says taking hundreds of amendments "out of conference and put[ting them] in the public realm, then the conferees are never going to get to finishing up the budget within the time frame we need them to finish." *Id.*

To a certain degree, this is a reasonable argument. A policy based on efficiency promotes the people's interest in a well-functioning legislative body. Certainly, open meetings with the opportunity for endless public debate would arguably result in an unwieldy direct democracy. Further, applying the transparency laws to every encounter between legislators in State House hallways and stairwells to negotiate and discuss pending legislation would be counter-productive.

Consideration is warranted, however, as to whether opening up the Legislature's various meetings to public observation via application of the transparency laws, including any currently existing exemptions and any new, narrowly tailored exemptions necessitated by unique legislative needs, would unduly inhibit the legislative process. Based on an analysis by the New England Center for Investigative Reporting, ample opportunity apparently exists to open a broader portion of the legislative process to the public than is presently permitted. For example, between January 2011 and March 2014, the House met in formal session for the equivalent of only 69 eight-hour days and the Senate met for 43 eight-hour days. On more than half of the days that legislators met during this period, they were in session for less than half an hour. See Shenoy, Rupa, *Mass. Legislature Among States That Pass The Fewest Bills,* Apr. 20, 2014, New England Center for Investigative Reporting.

The study also shows that the General Court already has difficulty working efficiently. Although Massachusetts is one of only a small number of states to block public access to legislative meetings and records, the Commonwealth is ranked 47th for the percentage of laws enacted out of all proposed bills (which for the period of January 2011 through March 2014 totaled 5.4 percent, or just 945 bills enacted out of the 17,596 proposed.). *Id.* Although Speaker DeLeo and other legislators argue that "[t]he success of a legislature is not measured numerically like a

scorecard but on the basis of groundbreaking, substantive pieces of lawmaking that save cities and towns money, preserve and create jobs, and improve peoples' lives," the analysis indicates that only 21 percent of the bills enacted during the relevant period had a broad impact across the Commonwealth. *Id.* The rest had limited application, such as 466 laws applying to only one community, 158 laws creating a sick-leave bank for a single state worker and 78 that granted a liquor license. *Id.*

Opening up the Legislature to public scrutiny might enhance the legislative process because increased accountability may encourage legislators to diligently pursue their constituents' interests and give the public an informed basis on which to provide suggestions about the process and "give instructions to their representatives." At a minimum, removing the legislative exceptions can hardly be said to inhibit the legislative process, given the General Court's performance record.

Governor's Exception

Pioneer also strongly believes that the Governor's Office should be subject to public records laws. We have made a formal request to Governor Baker to abandon the notion that the Governor's Office is exempt from public law despite the shelter governors have utilized from the decision in the 1997 ruling in *Lambert v. Judicial Nominating Council*. We reiterate that the Governor's Office in Massachusetts is one of only a small handful nationwide that claims full blanket exemption from state public records laws.

We have attached Pioneer's initial letter to Governor Baker on the subject (we received no reply). We have also attached Pioneer's follow-up request (again, no reply). These letters describe Pioneer's measured and reasonable request of the Governor's Office regarding public records.

Thank you for considering our legal and policy arguments on legislative transparency. We would welcome the opportunity to appear before the Commission.

Sincerely,

Mary Connaughton
Director of Government Transparency

John Sivolella
Senior Fellow in Law & Policy