

Special Legislative Commission On Public Records

Rep. Jennifer E. Benson, House Co-Chair

Sen. Walter F. Timilty, Senate Co-Chair

Sharon Adult Center & Council on Aging

May 4, 2018

Thank you, Senator Timilty and Representative Benson, and other members of Commission for the opportunity to present public comment today. My name is Mary Connaughton and I am the Director of Government Transparency at Pioneer Institute.

We at Pioneer recognize that your mission is important to the Commonwealth and we appreciate the time you are committing to this effort. Massachusetts has a long and proud history of transparency laws dating back to 1851. This is a tradition we should all be proud of and respect.

The purpose of transparency laws is to promote more effective, accountable and responsive government. Engaged citizens are essential for our form of government to thrive over the long-term. According to the Secretary of the Commonwealth, “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 the process.”

Yet, despite this paramount need for the long-term health of the Commonwealth, our transparency laws remain deeply flawed.

The Public Records Law expressly states that the law “shall not apply to the records of the general court” Meaning the state legislature “exempted” itself from a most important law.

Although the Supreme Judicial Court upheld the application of the legislature’s blanket exemption, it has never ruled specifically on the constitutionality of the provisions. We at Pioneer Institute believe the legislature’s exemption to this law is unconstitutional.

The legislature’s exemption from public records law undermines the rights reserved to the people in the state Constitution and makes it impossible for citizens to uphold their end of the bargain by being engaged in the democratic process.



Our letter to the Commission argues that the Commonwealth is a “social compact”—as stated explicitly in the Preamble to our constitution, The Preamble also states that, as such, it is the “duty of the people...to provide for an equitable **mode** of making laws...”

So, the “mode”, the lawmaking *process* must be reasonable and just and vests the people with an equitable interest in a transparent legislative process. The legislature, therefore, must be accountable to the people. The constitution is not focused merely on the end result. The **means** of making law must be equitable and accountable — this is a crucial point.

Our constitution also places explicit limits on the powers of the legislature. Its Declaration of Rights states that the legislature must not pass laws that are “repugnant or contrary to this Constitution.” Legislators, in their official capacity must “be at all times accountable to” the people. The courts have not yet interpreted this provision.

It also declares that it is the right of the people to “instruct their legislators...” Again, this language has not yet been interpreted by courts in its decisions regarding public records laws.

Common sense and fairness require, of course, that transparency is necessary for members of the public to be able to hold the legislature “accountable” and to be able to “instruct” their legislators.

After all, the legislature serves the people and its power is derived from the people — not the other way around.

Hiding behind a veil of legislative exemptions defies these clear constitutional mandates of accountability and deprives the people of their right, and I dare say, obligation, to effectively engage in the democratic process.

In terms of practical considerations that have been bandied about occasionally by individual legislators as reasons for the exemptions, their key arguments don’t hold water.

For instance, the protection of sensitive or personal information has been cited as one reason for the blanket exemption. Yet, a narrow exception would suffice as it does elsewhere in government.

Some might say that the concept of legislative privilege trumps all this. We say no. The underlying purpose of the privilege is to support the rights of the people by promoting free and open debate in the legislature, not undermining the people. The privilege extends to legal causes of action, not public accountability. The power resides in the people.

Pioneer believes that transparency must be pervasive throughout government.

The Governor’s Office should voluntarily become more transparent and open with regard to its records.

The 2016 revision of Public Records Law that, among other things, empowered this Commission to be here today, was certainly a step in the right direction.

But the SJC’s ruling in the Lambert case in 1997 still casts a pall over transparency in our state. And the Governor’s Office remains one of small handful nationwide to claim a blanket exemption from public records law.

We believe, as our letter to the Governor details (submitted as an attachment to the Commission), that Governor Baker is in a unique position to exercise leadership on this issue.

He should suspend the application of Lambert prospectively through an executive order — at least in the short term — as this Commission considers longer-term solutions. Such an act would not be unduly burdensome to the Governor’s Office — especially since Governors’ Offices in most other states already do this.

It would also set an appropriately high bar and serve as a model for future governors of the Commonwealth.

Thank you.