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To: Petrini & Associates, P.C. Clients & Friends

From: Christopher J. Petrini
Christopher L. Brown

Date: March 20, 2019

RE: Important Recent Developments in Employment and Labor Law
Petrini & Associates Client Advisory No. 2019:01

As we embark on celebrating our 15th year as a firm, we have seen some significant recent developments in labor and employment law which we wanted to share given the potential impacts of these developments in 2019. The specific developments we will address in this advisory are the Massachusetts Pay Equity Act and the Pregnant Workers Fairness Act, both of which took effect last year, and important recent labor and employment cases decided by the Massachusetts Supreme Judicial Court and the Appeals Court.

1. Massachusetts Pay Equity Act

In the summer of 2016, Governor Baker signed "An Act to Establish Pay Equity," Chapter 177 of the Acts of 2016, to combat pay equity on basis of gender in the workplace. Under the new law, no employer "shall discriminate in any way on the basis of gender in the payment of wages…or pay any person a salary or wage rate less than the rates paid to employees of a different gender for comparable work." This law took effect on July 1, 2018 and replaces G.L. c. 149, §105A, the Massachusetts Equal Pay Act, an equal pay law that has been in effect since 1945, but which has been narrowly interpreted by the courts over the years. The new law's key provision is a broadening of the definition of "comparable work," which will have the effect of lowering the required threshold for plaintiffs attempting to prove a pay discrimination claim. Comparable work is defined in the new law as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." A successful plaintiff can recover liquidated damages (twice the amount of back wages from the pay equity) as well as attorneys' fees and costs. Unlike other types of wage/employment claims, there is no administrative proceeding or hurdle for a plaintiff to satisfy before bringing suit in court.

Employers have an affirmative defense to liability in the new statute if, within the 3 year period prior to a pay discrimination claim, they have "both completed a self-evaluation of [their] pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work in accordance with that evaluation." While they have not been promulgated at this time, it is anticipated that the Attorney General will issue regulations to provide guidance to employers on how to conduct a self-evaluation. The statute also provides employer protections for pay variations that are based on a bona fide merit system or a seniority system, so long as seniority is not reduced for taking certain categories of leave.

Another major change through the new law is relative to salary history. The Pay Equity Act prohibits employers from asking applicants about their salary history before an offer is made, and also makes it unlawful to prohibit employees from sharing their wage information with their co-workers. Because salary history inquiries are an ingrained component of the hiring process for many employers, it is important for employers to review and update application materials and train staff involved in the interviewing of job applicants on these new requirements before the new law takes effect.

2. Pregnant Workers Fairness Act

On July 27, 2017, Governor Baker signed H. 3680, "An Act Establishing the Massachusetts Pregnant Workers Fairness Act." The law, which took effect on April 1, 2018, prohibits workplace and hiring discrimination related to pregnancy and related medical conditions (including breastfeeding) by amending the Massachusetts Anti-Discrimination Statute, G.L. c. 151B, to add these as protected categories, and also requires employers to provide reasonable accommodations for expectant and new mothers in the workplace, such as more frequent breaks, time off to recover from childbirth, and a private nursing space. While employers are permitted under the law to require medical documentation for some accommodations, employers will be required to provide the following accommodations with no medical documentation: (1) more frequent restroom, food or water breaks; (2) seating; (3) limits on lifting over 20 pounds; and (4) private non-bathroom space for expressing breast milk. Similar to other protected categories under Chapter 151B, the new law also prohibits employers from taking adverse action because an employee (or a prospective employee) requests accommodations for pregnancy or related medical conditions. As discrimination claims based on these new protected categories will arise under Chapter 151B, the same complaint process to MCAD and potential relief (including attorneys' fees) for existing claims under Chapter 151B will apply.

While some may have thought these protections were already legally required, the new law clarifies and fills gaps in legal protections for pregnant workers and new mothers that were not fully addressed in the various federal and state laws. For example, under the federal Americans with Disabilities Act, an ordinary, routine pregnancy is not construed to be a disability for which an employer must provide a reasonable accommodation, even though related medical conditions could rise to the level of a disability and require accommodation. Under

existing Massachusetts anti-discrimination law, pregnancy in and of itself is not per se a disability, thereby absolving employers from accommodating pregnancy-related conditions that do not rise to the level of a disability under state or federal law. For breastfeeding, recent changes to the Fair Labor Standards Act through the Affordable Care Act advanced some legal protections but these changes were of limited application. Prior to the Pregnant Worker Fairness Act, there was no affirmative obligation for employers to provide all employees with breaks related to breast feeding.

The new law requires employers to provide existing employees with written notice of their rights under the Act, for existing employees and for new employees at or prior to commencement of employment (employers might consider folding this notice into application materials), and within 10 days after an employee notifies the employer of a pregnancy or related medical condition.

3. *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017).

As you are likely aware, the law in Massachusetts regarding the use of marijuana, both recreationally and for medical reasons, has undergone dramatic changes through ballot questions approved by voters over the past several years. With a comprehensive law legalizing the use of medical marijuana approved by voters in 2012, it was only a matter of time before the use of medical marijuana and issues related to disability discrimination collided. In Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017), the Supreme Judicial Court considered the issue of whether a qualifying patient who is terminated from her employment because of lawful medical use of marijuana has a civil remedy against her employer. Relying on decisions from other jurisdictions confronted with this issue, the trial court had dismissed the plaintiff's claims, finding the employer had a right to terminate employees for marijuana use given its continuing illegal status under federal law. Reviewing the trial court's decision on direct appellate review, the SJC determined that there is no implied statutory private cause of action under the medical marijuana statute, Chapter 369 of the Acts of 2012, but also held that a plaintiff may seek a remedy through claims of handicap discrimination in violation of G.L. c. 151B, and accordingly reversed the trial court's judgment dismissing her claims.

The Barbuto case arose after the plaintiff, Cristina Barbuto, applied for and was offered a position by the defendant Advantage Sales and Marketing ("ASM"). ASM required Barbuto to take a mandatory drug test. Barbuto, who suffers from Crohn's disease, was prescribed marijuana by her physician to treat her symptoms. Barbuto informed her supervisor-to-be at ASM that she accordingly would test positive for marijuana when she took the test. According to her complaint, she uses marijuana in small quantities, usually in the evening, at her home, two to three times per week. Although the supervisor told Barbuto that her lawful medical use of marijuana would not be problem, when Barbuto (to no one's surprise) tested positive for marijuana, a Human Resources representative for ASM contacted Barbuto to indicate she was terminated due to her positive test, telling her it did not matter that Barbuto used marijuana to treat her medical condition because "we follow federal law, not state law."

The Court concluded that Barbuto, due to her Crohn's disease, was a handicapped person under G.L. c. 151B, and ASM therefore had an obligation to engage in an interactive process with her to reasonably accommodate her condition. The Court noted that the lawful medical use of marijuana, just like any other properly prescribed medication, and the modification of any policy that otherwise might prohibit its use, must be viewed as a potential reasonable accommodation for a qualified handicapped individual. While the Court noted the illegal status of marijuana under federal law, only the employee, not the employer, could be subject to prosecution under federal law for Barbuto's use and that alone did not make it per se unreasonable as an accommodation.

The Court noted that permitting the use of lawfully prescribed marijuana might not always be a reasonable accommodation, particularly where the employer could show an undue hardship, for example, that the continued use of medical marijuana would impair the employee's performance of her work or pose an unacceptably significant safety risk to the public, the employee or her fellow employees, or where permitting the use of off-duty use of marijuana would violate the employer's contractual or statutory obligations, and therefore its ability to perform its business. The last example provided by the Court is instructive for public employers attempting to negotiate this complicated area of the law. For example, Department of Transportation guidelines and other federal laws prohibit certain safety-sensitive employees from using marijuana on or off duty.

After Barbuto, employers must be prepared to approach the use of medical marijuana through the interactive framework provided in Chapter 151B and cannot simply enforce an otherwise applicable drug testing policy. Exceptions to such policies may be a reasonable accommodation depending on the circumstances. As expressly provided in the medical marijuana law, employers are not required to permit the on-site use of medical marijuana, which remains unaffected by the Barbuto decision.

4. *Malden Police Patrolman's Association v. City of Malden*, 92 Mass. App. Ct. 53 (2017).

This Appeals Court decision contains useful guidance for municipal employers in addressing the relationship between G.L. c. 44, §53C, relative to funds related to police details, and G.L c. 149, §148, the Wage Act. The Malden Police Patrolman's Association ("Union") filed a complaint against the City in Superior Court alleging that Malden owed its officers approximately $410,000 in compensation for the performance of past detail work. Among the claims asserted by the Union was a claim under the Wage Act. The trial court entered summary judgment in favor of the City dismissing the Wage Act claim, concluding that although detail pay constituted wages under the Wage Act, the Union could not prevail on this claim because of the timing provisions in the municipal finance law, G.L. c. 44, §53C. Section 53C provides in pertinent as follows:

> All money received by a city ... as compensation for work performed by one of its employees on an off-duty work detail which is related to such employee's regular

> employment or for special detail work performed by persons where such detail is not related to regular employment shall be deposited in the treasury and shall be kept in a fund separate from all other monies of such city … and … shall be expended without further appropriation in such manner and at such times as shall, in the discretion of the authority authorizing such off-duty work detail or special detail work, compensate the employee or person for such services; provided, however, that such compensation shall be paid to such employee or person no later than ten working days after receipt by the city … of payment for such services.

The Appeals Court reversed the summary judgment in favor of Malden for the Wage Act claim based on an inadequate factual record. The Court did, however, agree with the trial court that, where detail work is performed for third parties, the plain language of G.L. c. 44, §53C governs with respect to detail pay. For detail work performed for the City, however, the Court concluded that payment would be governed by the Wage Act. On the record presented, the Court was unable to conclude what part of the detail work at issue had been performed for third parties rather than for the City or whether Malden had complied with G.L. c. 44, §53C relative to any detail work performed for third parties. The Court concluded that "[t]he more recent and more specific language of the municipal finance law signals an awareness by the Legislature that when compensation for detail work is coming from a third party, a city's prompt payment of wages to officers who have performed such work may be delayed."

Complicating matters somewhat, Malden and the Union had agreed as part of the parties' collective bargaining agreement to establish a budgetary line item of $100,000 to compensate officers for private detail work in the event a vendor did not pay the City within 14 days of the detail being performed. While again noting the record was not sufficiently developed to determine the relevant facts, the Court did indicate that the parties were not precluded from making such arrangement whereby the City would contract away its right to withhold the detail pay wages pending receipt of payment from the vendor under G.L. c. 44, §53C. Consequently, while this decision overall is helpful in that it favorably resolves an obvious inconsistency between the two statutes, depending upon the language in a community's collective bargaining agreement, it may have limited utility.

5. *Mui v. Massachusetts Port Authority*, 478 Mass. 710 (2018)

In another significant Wage Act decision, the SJC determined that accrued unused sick leave benefits paid to a separating public employee under an employer's sick leave policy were not "wages" for purposes of the Wage Act, relieving the Massachusetts Port Authority ("Massport") from liability for multiple damages and attorneys' fees. Massport had initiated disciplinary proceedings against the plaintiff, a longtime employee. Massport terminated him while he had a pending application for retirement. The application was approved and Massport's retirement system set plaintiff's retirement date retroactively, although the plaintiff had grieved his termination and the grievance was not yet resolved. An arbitrator ruled that Massport could not terminate the plaintiff because he had already retired. Under Massport's sick pay policy, eligible employees receive a percentage of the value of their accrued unused sick leave benefits

upon separation from the agency. While Massport eventually paid plaintiff the value of his accrued sick leave pursuant to its policy, it was not until over one year after plaintiff's retirement date due to the pending grievance proceedings. The plaintiff sued Massport claiming a violation of the Wage Act for failing to compensate him for his accrued unused sick time within the time frame required by the statute. After the Superior Court ruled for plaintiff and Massport appealed, the SJC on its own initiative transferred the case from the Appeals Court.

Upon review the SJC noted that the benefits were payable only to departing Massport employees meeting certain criteria and held that the benefits were contingent compensation. The Court further noted that commissions were the only other contingent compensation that the SJC had previously recognized as "wages" under the Wage Act. The SJC declined to recognize the accrued sick leave payout under Massport's policy as "wages" and therefore reversed the Superior Court judgment against Massport. Accordingly, Massport was not required to pay the accrued sick leave benefits to plaintiff under the policy within the time frame required by the Wage Act.

Given that many communities have "sick leave buyback" benefits that are similar to Massport's sick leave payout policy at issue in this case, this is another important decision for public employers in clarifying the scope of a public employer's obligations under the Wage Act.

6. *Town of Framingham v. Framingham Police Officers Union,* 93 Mass. App. Ct. 537 (2018)

In this case, P&A was able to secure an important victory on management rights not only for the City of Framingham but for other police departments throughout the Commonwealth dealing with similar issues everyday regarding decisions on the assignment of law enforcement personnel. This case involved the reassignment of a police officer who was returning from an unpaid suspension and a lengthy period of paid administrative leave before that. After returning to duty, he was reassigned from the Department's Detective Bureau to the Patrol Division. The Union grieved the reassignment as disciplinary in nature and sought to have the reassignment arbitrated. The City responded by filing an action in Superior Court and sought a preliminary injunctive to stop the arbitration going forward, arguing that reassignments are not arbitrable. The Superior Court denied the City's motion and a second motion requesting consideration of the original decision.

On appeal, the Appeals Court reversed the lower court's denial of the City's motion and issued a preliminary injunction in favor of Framingham, making several crucial findings. First, the Court held that Framingham did not need to show irreparable harm to obtain a preliminary injunction where it was seeking to enforce a statute and declared policy of the Legislature, specifically G.L. c. 41, §97A, the so-called Strong Chief's Statute. Second, because the assignment and deployment of police officers is a non-delegable management right under G.L. c. 41, §97A, the Court held that it was not a proper subject of collective bargaining, and therefore was not arbitrable under the FPOU CBA's grievance procedure, even where it was claimed that the reassignment was motivated by the Chief's perception of the officer's misconduct. The

Court's decision expanded a similar holding by the SJC in 2013 regarding the Boston Police Commissioner's Statute to the more widely applicable G.L. c. 41, §97A. The Court further found that an injunction would promote public safety by allowing the effective and flexible deployment of law enforcement resources and personnel by the Chief, as well as preserving the intended role of the governmental agency and its accountability in the political process. The Court directed the lower court to enter an order allow the City's motion for a preliminary injunction.

7. *City of Pittsfield v. Local 447 International Brotherhood of Police Officers,* 480 Mass. 634 (2018)

This 2018 SJC decision distinguishes the circumstances in which a police officer terminated for untruthfulness may be reinstated after arbitration without offending public policy. The officer was terminated from his position in the Pittsfield police department on grounds of conduct unbecoming a police officer, untruthfulness, and falsifying records. His union filed a grievance and the arbitrator found that there was not just cause for termination and reinstated the officer with a three-day suspension.

Pittsfield commenced an action pursuant to G. L. c. 150C, § 11 in the Superior Court to vacate the arbitrator's award, arguing that it was contrary to public policy. The Superior Court judge confirmed the arbitration award and the SJC granted the City's application for direct appellate review. In the circumstances of the case, where the arbitrator found that the officer's statements were "intentionally misleading" but not "intentionally false" and where the statements did not lead to a wrongful arrest or prosecution, or result in any deprivation of liberty or denial of civil rights, the SJC found that the arbitration award did not violate public policy and affirmed the lower court's ruling. In reaching its decision, the SJC emphasized the limited application of the exception allowing vacation of arbitration awards on public policy grounds, and found that because the officer's "knowingly inaccurate" and "intentionally misleading" statement in his police report "was not made with the intent to impede, obstruct, or otherwise interfere with any criminal investigation or proceeding," the arbitration award reinstating him did not violate public policy.

Although the SJC intended to draw a bright public policy "line" on when termination is proper in police officer untruthfulness disciplinary matters, the SJC went to great lengths to distinguish a statement that is "intentionally misleading" and "knowingly inaccurate" from one that is "intentionally false," i.e., a lie. This arcane fact-specific distinction will likely provide fertile ground for future litigation.

8. *Yee v. Massachusetts State Police,* 481 Mass. 290 (2019)

Though much of the news focus in 2018 when it comes to the State Police was on the fraudulent overtime claims submitted by several officers, a more significant case for employment law purposes was the decision issued in January 2019 by the SJC on plaintiff Warren Yee's

claim alleging age, race and national origin discrimination due to the State Police's failure to allow his request for a transfer to a different troop. Lt. Yee had requested a transfer to Troop F, the unit located at Logan Airport. Although State Police lieutenants earn the same base pay and benefits regardless of station, Yee wanted to transfer to Troop F because there were better opportunities for overtime and paid details there. The Superior Court allowed the State Police's motion for summary judgment on the grounds that there was no adverse employment action taken against Lt. Yee when his request for a lateral transfer was declined. Yee appealed and the SJC transferred the case on its own motion for direct appellate review.

On review, the SJC held that where an employee can show there are material differences between two positions in the opportunity for compensation, the failure to grant a lateral transfer to the preferred position may constitute an adverse employment action under G.L. c. 151B. Rejecting the State Police's argument that a transfer denial should only be considered adverse where the transfer would have constituted a promotion, the Court noted "it suffices that an employee who is denied a lateral transfer puts forth evidence of any objective indicator of desirability that would 'permit a reasonable factfinder to conclude that the sought for position is materially more advantageous" (citations omitted). The SJC found that sufficient evidence had been presented by Yee to create a genuine issue of material fact that there were greater opportunities available in Troop F to work overtime and obtain paid details and remanded the case to the Superior Court for further action.

The Yee decision is an important illustration that what may constitute an adverse employment action differs from case to case and may be a factually based determination, which may make it more challenging for employers seeking summary judgment on these types of claims.

9. Ferman v. Sturgis Cleaners, Inc., 481 Mass. 488 (2019)

This SJC decision was issued last month after the Court granted an application for direct appellate review on an appeal regarding whether an employee who obtains a favorable settlement agreement and stipulation of dismissal of a Wage Act claim "prevails" for purposes of an award of attorney's fees and costs under the Act's fee-shifting provisions. In a notable victory for plaintiff's side employment lawyers, the SJC held that the so-called "catalyst test" applies to Wage Act claims, that the plaintiffs in this matter had satisfied that test, and therefore the lower court's award of attorney's fees was affirmed.

The plaintiffs in this case were former employees of a dry cleaning business who claimed the defendant business had failed to pay them approximately $28,000 in regular and overtime wages. The Wage Act, in conferring a private right of action to employees aggrieved by an employer's violation of the Act, provides that "[a]n employee so aggrieved who prevails in such an action shall be awarded treble damages . . . and shall also be awarded the costs of the litigation and reasonable attorneys' fees." G.L. c. 149, §150. The case was originally filed in November 2014. In November 2016, several weeks before the scheduled trial date, the parties

resolved the matter in mediation, which the defendant agreeing to settle the case for $20,500, but reserving the issue of the plaintiffs' entitlement to attorney's fees for resolution by the court.

In evaluating the plaintiffs' motion for costs and attorney's fees, the Superior Court applied the "catalyst test," which provides that if the plaintiff's lawsuit is a necessary and important factor in causing the defendant to grant a material portion of the requested relief, a settlement agreement, even without any judicial involvement, may qualify the plaintiff as a prevailing party for fee-shifting purposes. The defendant had argued that an alternative test recognized by the U.S. Supreme Court for fee-shifting federal statutes called the "Buckhannon test" should have applied, where the Court to recognize the plaintiff as a "prevailing party" for fee-shifting purposes must find there was a "material alteration of the legal relationship of the parties" (citation omitted) and a "judicial imprimatur on the change."

The SJC affirmed the lower court's award of attorney's fees, rejecting the Buckhannon test as the applicable standard under Massachusetts law. The Court observed that "successful litigation may be reflected in settlements as well as court rulings, as settlements are often 'products of pressure exerted by [a] lawsuit,'" (citations omitted) and reasoned that "[i]f such settlements did not result in the obligation to pay attorney's fees, there would be a disincentive to bring such cases in the first place, thereby leaving other unlawful conduct unaddressed and uncorrected."

The holding in Ferman accentuates the need to craft precise language in Wage Act settlement agreements. Settlement agreements of wage claims should clearly state if the settlement is meant to be inclusive of attorney's fees.

Please contact Petrini & Associates should you have any questions or concerns regarding any of the statutes or decisions discussed in this advisory and how to respond to these various developments in your jurisdiction. Thank you.

Globe Local

THE ARGUMENT

Should the state have more discretion to exempt municipalities from public record requests?

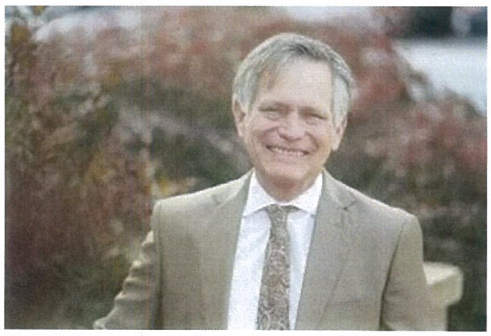
FEBRUARY 28, 2019

YES

Christopher J. Petrini

Framingham city solicitor; past president of the Massachusetts Municipal Lawyers Association

Public records should be freely and widely available. At the same time, local officials should be allowed to perform their core duties to the public free from the burden of responding to repetitive public records requests. Legislation filed by state Representative David Linsky of Natick would balance access to public records and preservation of municipal resources so local officials can do the jobs their constituents hired them to do.



KELLY DAVIDSON STUDIO

Christopher J. Petrini

In 2016, Massachusetts enacted changes to modernize the process of producing public records. Most use the law for its intended purposes of facilitating the free flow of public information to promote government transparency and accountability. One unintended consequence of the new law, however, is that it has empowered a small but insistent cadre of requestors to file repetitive, harassing, or vexatious requests that have required local government to expend excessive human resources and taxpayer dollars to respond.

For example, one Metrowest resident filed over 200 public records requests with the town of Wellesley between 2013 and 2017 - some for documents already provided - according to the town, as well as 79 public records requests with the Natick School Committee during a four-month period in 2018, according to school officials. I am aware of similar cases across the state. Repetitive records requests require dozens of hours of staff time to respond. During the first six months alone under the new law, nearly a dozen municipalities requested relief from frivolous requests.

The public records law is enforced by the Secretary of State's office, through its state supervisor of public records. The supervisor can relieve local government from responding to public records requests "that are frivolous or designed to intimidate or harass" and "not intended for the broad dissemination of information to the public about actual or alleged government activity." Inclusion of the latter phrase means that the supervisor must force municipalities to respond to repetitive requests if the search results are posted to a website. The proposed legislation would give the supervisor more discretion to deny vexatious or repetitive public records requests by eliminating the shielding language. This change would help restore balance to our public records law and preserve scarce taxpayer resources.

NO

Jessie Gomez

Somerville resident; Sam Whitmore FOIA Fellow at MuckRock, a nonprofit, collaborative news site that works to make government transparent and accountable.

The Massachusetts Public Records Law grants the right to access records in a "reasonable time" and without "unreasonable delay." Yet a proposed bill before the Legislature would support the ability of cities and towns to reject records requests it contends are frivolous or harassing.

DEREK KOUYOUMJIAN

If an agency contends the number of requests filed by the same person is too much to deal with or conducive to a

pattern of abuse, it can currently refuse the release of records. Requesters in this situation can only turn to the state's Supervisor of Public Records, the neutral mediator between local agencies and requesters. But the proposed bill gives that supervisor more power to validate the local agency's decision by allowing a ruling in favor of the municipality even if the records request was intended for broad public dissemination. This would only bolster the ability of cities and towns to reject what they dem to be "frivolous" requests.

Allowing the state to more easily side with municipalities on frequent records requesters would further diminish the spirit of open government. This new legislative loophole leaves out records requesters seen as annoying and infringes on their right to government information.

Massachusetts Public Records Law was intended for all, but that right is threatened if both the state and municipality work together to obstruct the law.

Furthermore, Massachusetts already ranked 40th out of 50 states in providing public access to information, in a 2015 survey by the Center for Public Integrity. I agree a level of cooperation between requesters and government is necessary for a steady flow of information, but not at the expense of transparency. If requesters resort to records law to participate with government, the solution isn't to limit them.

At the end of the day, the bill adds another level of tension between constituency and government. Records requesters are left facing the consequences of a government that further limits access to public information. The proposed bill is a troubling threat to Massachusetts Public Records Law and oversight. Although written to protect public servants, it allows those who are most in need of oversight to escape the necessary scrutiny for a fair government.

This is an informal poll, not a scientific survey. Please vote only once.

Should the state have more discretion to exempt municipalities from public record requests it finds frivolous or designed to intimidate or harass?