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**BY FEDERAL EXPRESS**

November 21, 2008

Alan N. Cote

Supervisor of Records

Public Records Division

Secretary of the Commonwealth

One Ashburton Place, 17<sup>th</sup> Floor

Boston, MA 02108

**RE: Records Request of Richard Stevenson to the Town of Concord**

Dear Mr. Cote:

This letter responds to your letter dated November 7, 2008, in which you directed the Town of Concord ("Town") to revise its cost estimate, contained in my letter of May 13, to respond to a records request from Richard Stevenson on April 14, 2008. By copy of this letter, I am also notifying Mr. Stevenson of the revised cost estimate to respond to his records request. Town officials and I share your view that the public records law promotes democratic, transparent and accountable government. Yet, the public records law also restricts disclosure in a variety of instances, which the Town must adhere to. In that light, this letter responds to the points you raise in your letter, provides a revised cost estimate and proposes procedures for your review to Mr. Stevenson's extraordinarily broad request for sixteen months of email from five Selectmen, the Town Manager, the Assistant Town Manager, and the five employees in the Town's Planning Division.

### Phone Logs

The Town will prepare the phone logs requested when it receives from Mr. Stevenson payment per the Town's cost estimate, as approved by your office, for production of these records.

### Disclosure of All Emails Sent or Received by Town Officials

By way of introduction, your letter suggests that "all records made or received by a governmental body . . . are public records, subject to redaction, and that the records must be disclosed upon request". Your letter cites G. L. c. 66, § 10 (c) which provides

that in "any court proceeding . . . there shall be a presumption that a record sought is "public". Your letter's conclusion is very broad, where the statute confines the "presumption" to the more limited context of litigation. The breadth of this interpretation seems to suggest that custodians should ignore the balance struck in the public records law between general disclosure and limited non-disclosure based on specific exemptions. No presumption overcomes the duty of a custodian to protect material, which the Legislature has determined should be exempt from disclosure (e.g., personnel and medical information). The Town cannot in good faith "presume" that a record is public without someone at least looking at it. Where the requestor seeks an estimated 65,000 records, the total time required to even minimally look at each record is huge.

Fee Estimate for Email Records

Your letter includes several points of misunderstanding of my conversation with Attorney Sullivan, and otherwise.

- I did not represent to Ms. Sullivan that email records would need to be converted to PDF or TIFF or TIFX by staff.
- I did not represent to Ms. Sullivan that the only reason that emails needed to be reviewed was to separate personal emails from business emails. While I may have mentioned to Ms. Sullivan the need, potentially, to segregate personal email, this is not a significant concern of the Town with respect to its computers. Many emails on Town computers involving Town business may need to be protected as exempt or privileged. For example, the privacy exemption applies to certain personnel related records, which are not "personal email". Health related information of employees may also be contained in business emails. Even emails received from members of the public may be both related to Town business and also subject to exemption.

- Emails to and from the Selectmen are not normally sent to and received on publicly owned computers. As unpaid elected officials, Concord Selectmen regularly receive email on their non-public computers, both at home and at their private businesses or places of employment. Separate Town of Concord email accounts have been set up for several selectmen since the receipt of Mr. Stevenson's records request in an attempt, going forward, to better segregate emails related to Town business from other email. Even this system cannot ensure that constituents and others will not email the Selectmen on their non-government email accounts. Unfortunately, separate email accounts were not generally in place during the time period covered by Mr. Stevenson's request. Thus, we anticipate that segregation of the Selectmen email accounts will be particularly burdensome. They will likely have to perform initial search and segregation to generate Town business related emails, and then provide such

records to the IT Director and the Town Manager's office for further review for exempt or privileged material.

- While emails, like other records, may be kept in an orderly fashion by subject, there is no reason to expect that employees would maintain emails, or other records, in files labeled "disclose" and "exempt". Regardless of how orderly emails may be kept, they should nonetheless be reviewed individually to detect exempt and privileged information they may contain.

### Hourly Rates for Search and Segregation (Benefits)

Your letter states that the Town is entitled to charge the hourly rate of an employee's time to search and segregate records, but may not recover from the requestor any additional fee to cover the benefits or additional employer costs for such employee's time. According to your conclusion, the costs that are not recoverable include the employer's payroll taxes for federal social security, Medicare and unemployment and for state unemployment and workers compensation, as well as benefits which include a minimum, health insurance. Yet, all of these are actual costs incurred by public employers, largely mandated by law, and incurred mostly as a percentage of each employee's gross pay.

Your letter cites no basis in the statute, regulations or case law for your conclusion, but merely states that recovery of such payroll taxes and benefits is "unreasonable". General Laws c. 66, §10, states that "[e]very person for whom a search of public records is made shall . . . pay the actual expense of such search" (emphasis added). The regulations state that "a prorated fee based on the hourly rate" of employees time may be charged. 950 CMR 32.06(1)(c). Neither the statute nor the regulations define "hourly rate". Nor do the regulations prohibit charging a fee based on the prorated portion of the hourly rate that is attributed to payroll taxes and benefits.

Courts often look to the federal Freedom of Information Act for analogies to help with interpretation of the Massachusetts Public Records Act. See, e.g., *Wakefield Teachers Assn. v. School Comm. of Wakefield*, 431 Mass. 792, 796 (2000); *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 433, n. 11 (1983). Federal agencies routinely include employee benefits as direct hourly costs for time spent in responding to records request. See, e.g., 5 CFR § 294.109 (fees charged for employee time by federal Office of Personnel Management include "salary rate plus 16% to cover benefits"); 5 CFR 1631.14 (Federal Retirement Thrift Investment Board "will charge at the salary rate(s) plus 23.5 percent (to cover benefits) of the employee(s) conducting the search"; 15 CFR 4.11 (Office of the Secretary of Commerce includes 16% benefits in direct costs of employee time to respond to FOIA requests). Indeed, in promulgating a Uniform Freedom of Information Act Fee Schedule, the Office of Management and Budget explained that "[t]he elements used to calculate an employee's total salary are the pay grade of the employee and any fringe benefits." 52 Fed Reg 10012-01 (March 27,

1987). Your conclusion is inconsistent with standard federal practice, and you provide no rationale why the Massachusetts Public Records law is different from federal law with respect to the determination of the "actual cost" to respond to a records request.

### Hourly Rates for Search and Segregation (Management Rates)

Your letter also states that neither the Town Manager, Assistant Town Manager, Planning Director nor other department head should review their own email records, and that the hourly rate for segregation of email should be reduced to that of the lowest paid employee. Your letter concludes that the lowest paid employee is capable of making a determination on each record whether any one of numerous exemptions apply, and can then specify in writing, informed by the statute, regulations and case law, why the exemption applies. Moreover, your letter, as did Ms. Sullivan, suggests that the lowest paid employee could make determinations segregating personal email, exempt materials and attorney client privilege by looking at the To, From, Subject Matter and Date lines. While reviewing those fields first may make the segregation task easier, emails often embed replies and forwards of other emails and contain attachments. A printout of To, From, Subject Matter and Date lines will be entirely inadequate to carefully segregate the records. Only by review of the text of each email is exempt or privileged material likely to be detected.

Although your letter suggests that the Town Manager may review an electronic file of segregated attorney client material, you make no allowance to charge a fee for him or any other custodian of the emails to review the segregation work of the lowest paid employee. Bear in mind that this request is unlike most requests that specify particular subjects of interest. The custodian is likely to be familiar enough with subject matter records to know and be able to direct a lower paid employee on what exempt or privileged material, if any, is likely to be found in a classification of records by subject. Where all email records are requested, such guidance will be of little utility.

Moreover, with respect to the review of email, the person who has sent and received the email is likely to be far more efficient at segregating records, and take much less time, because of his or her familiarity with the subjects of the emails and the persons they were received from and sent to. Differences therefore in the pay rate of employees may well be offset by the greater efficiency of review of higher paid employees reviewing their own email.

### Production of Electronic Records in Electronic Format

We are informed by Microsoft that emails duplicated on a CD or DVD, in their native format in Microsoft Outlook, cannot be secured by read only or other security measures to ensure that the records cannot be changed after they have been produced. The emails could be converted to Word documents and produced as read-only records, as you suggest, but this conversion would likely be less efficient and more costly than

