COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. **SJC-13468**

ERIC MACK

v.

OFFICE OF THE DISTRICT ATTORNEY OF THE BRISTOL DISTRICT

ON APPEAL FROM AN ORDER OF SUMMARY JUDGMENT OF THE SUFFOLK SUPERIOR COURT

AMICUS CURIAE BRIEF FOR NORTHWESTERN DISTRICT ATTORNEY

David E. Sullivan
District Attorney
Northwestern District

Cynthia M. Von Flatern
Assistant District Attorney
BBO# 550493
One Gleason Plaza
Northampton, MA 01060
(413)586-9225
Cynthia.vonflatern@mass.gov

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INTEREST OF AMICUS CURIAE

The District Attorney for the Northwestern District is the chief law enforcement officer in the Northwestern District. See G. L. c. 12, §§ 12, 13, 27; G. L. c. 218, § 17A (g); In re Subpoena Duces Tecum, 445 Mass. 685, 687 n.5 (2006); Commonwealth v. Liang, 434 Mass. 131, 133 (2001). He and the ten other district attorneys in the Commonwealth are responsible for responding to public records requests daily, including requests seeking records regarding open and closed criminal prosecutions and investigations. They are also responsible for the oversight of death investigations in certain enumerated circumstances within their districts. G. L. c. 38, § 4. District attorneys work with law enforcement officers in cases that are prosecuted in the district, superior and juvenile courts throughout the Commonwealth. Under the Rules of Criminal Procedure and the common law, district attorneys have an obligation to provide to defendants "any facts of an exculpatory nature" about law enforcement officers who have "participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case." Mass. R. Crim. P. 14(a)(1)(A)(iii); Commonwealth v. Mcfarlane, 102 Mass. App. Ct. 264, 275, Further appellate review granted (2023);

In the Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2020).

ARGUMENT

District Attorneys Will Satisfy Their Responsibility to Answer Public Records Requests Regarding Investigations of Law Enforcement Officers Reporting to Them or Documentation of Misconduct by Such Officers by Referring Requestors to the Peace Officer Standards and Training (POST) Commission's Publicly Available and Searchable Database Containing Comprehensive Information on Law Enforcement Officers, Including Results of Investigations and Findings of Misconduct.

The information that district attorneys possess about law enforcement misconduct investigations is often limited. The duty for district attorneys to disclose any information that they do encounter arises from their discovery obligations in cases that they prosecute or, as in the present case, when they oversee an investigation pursuant to a statutory duty. See G. L. c. 38, §4. When law enforcement officers are witnesses for the Commonwealth in criminal prosecutions, their reports, their written or recorded statements and the substance of any oral statements are subject to mandatory discovery for a defendant. Mass. R. Crim. P. 14 (a) (1) (A) (i) (vii). The grand jury testimony and names and business addresses of law enforcement officers are also provided in mandatory discovery. Mass. R. Crim. P. 14 (a) (1) (A) (ii) (v). District attorneys must provide misconduct information

about law enforcement officers reporting in a case because it is exculpatory information, Mass. R. Crim. P. 14 (a) (1) (A) (iii). Disclosure is also required in order to secure the due process rights of defendants pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963) and In the Matter of a Grand Jury Investigation, 485 Mass. 641, 646 (2020). However, releasing this information to the public in response to a public records request is unrelated to the duty to provide discovery.

Notably, district attorneys are not the employers of law enforcement officers. Although law enforcement officers are frequently witnesses for the Commonwealth, see generally Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976) (police officers report in connection with their investigation of incidents leading to criminal proceedings), police officers report to their chief or other superior officers. This is true even for state police detectives assigned to district attorneys' offices and the Office of the Attorney General. Moreover, many officers will be represented at disciplinary proceedings by a union representative under a police department's collective bargaining agreement. See e.g. Commonwealth Dep't of State Police v. Commonwealth Civ. Serv. Comm'n, 24 Mass. L. Rep.

35, 2008 Mass. Super. LEXIS 123, *1 (2008). Misconduct investigations such as internal affairs investigations are not public and are no more available to district attorney's offices than to the general public. Commonwealth v. Wanis, 426 Mass. 639, 645 (1998); Commonwealth v. Cruz, 481 Mass. 1021, 1022 (2018). Even in cases where a police officer is a witness in a case being prosecuted by the district attorney's office, there is a recognition that internal investigation reports are in the custody of the police department, not the district attorney's office. See id. (proper procedure for criminal defendant to obtain internal affairs report not in possession of prosecutor is to file Rule 17 motion where defendant's burden will be to show that report contains material and relevant information). District attorneys stand in no better position than any member of the public when it comes to information about a law enforcement misconduct investigation; their duty to know about misconduct stems from their obligation to disclose possibly exculpatory information. Mass. R. Crim. P. 14 (a) (1); Brady, supra; In the Matter of a Grand Jury Investigation, supra.

In contrast, the Peace Officer Standards and Training Commission (POST), created by the Legislature in 2020 as part of the

Police Reform Act, has the expertise to determine what information about the misconduct of any law enforcement officer within the Commonwealth should be made available to the public. In turn, POST does make the information available to the public through its statutorily-required public website.[1] POST has access to all "papers, books and records" of all law enforcement agencies in the Commonwealth. G. L. c. 6E, § 3 (21). [2] POST's Division of Police Certification, in consultation with POST's Division of Police Standards, is charged with creating and maintaining "records for each

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[1] Under the definitions within the POST statute, a "law enforcement officer" is an officer who works for a "law enforcement agency" defined as "(i) a state, county, municipal or district law enforcement agency, including, but not limited to: a city, town or district police department, the office of environmental law enforcement, the University of Massachusetts police department, the department of the state police, the Massachusetts Port Authority police department, also known as the Port of Boston Authority police department, and the Massachusetts Bay Transportation Authority police department; (ii) a sheriff's department in its performance of police duties and functions; (iii) a public or private college, university or other educational institution or hospital police department; or (iv) a humane society police department in section 57 of chapter 22C."

[2] POST not only has access to records detailing misconduct by law enforcement officers but also establishes the minimum qualifications for officer certification; certifies qualified applicants; denies an application for certification or limits, sets conditions, restricts, revokes, or suspends a certification as well as sets fines for officers. G. L. c. 6E, § 3 (2), (3), (4).

certified law enforcement officer. This division's records are comprehensive: including, but not limited to:

> (1) the date of initial certification;
> (2) the date of any recertification;
> (3) the records of completion of all training and all in-service trainings, including the dates and locations of said trainings, as provided by the municipal police training committee established in section 116 of chapter 6, and the department of state police;
> (4) the date of any written reprimand and the reason for said reprimand;
> (5) the date of any suspension and the reason for said suspension;
> (6) the date of any arrest and the charge or charges leading to said arrest;
> (7) the date of, and reason for, any internal affairs complaint;
> (8) the outcome of an internal affairs investigation based on an internal affairs complaint;
> (9) the date of any criminal conviction and crime for said conviction;
> (10) the date of any separation from employment with an agency and the nature of the separation, including, but not limited to, suspension, resignation, retirement or termination;
> (11) the reason for any separation from employment, including, but not limited to, whether the separation was based on misconduct or whether the separation occurred while the appointing agency was conducting an investigation of the certified individual for a violation of an appointing agency's rules, policies, procedures or for other misconduct or improper action;
> (12) the date of decertification, if any, and the reason for said decertification; and
> (13) any other information as may be required by the commission."

G. L. c. 6E, § 4 (a), (h).

In addition, POST's Division of Police Standards is charged with the duty "to investigate officer misconduct and make disciplinary recommendations to the commission," G. L. c. 6E, § 8 (a). The Division "may audit all records related to the complaints, investigations and investigative reports of any agency related to complaints of officer misconduct or unprofessionalism, including, but not limited to, personnel records." G. L. c. 6E, § 8 (d). The power is broad, as the Division may initiate an audit of a law enforcement agency "at any time and for any reason." G. L. c. 6E, § 8 (d). This division maintains its own detailed database "containing information related to an officer's:

(i) receipt of complaints and related information, including, but not limited to: the officer's appointing agency, date, a description of circumstances of the conduct that is the subject of the complaint and whether the complaint alleges that the officer's conduct: (A) was biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level; (B) was unprofessional; (C) involved excessive, prohibited or deadly force; or (D) resulted in serious bodily injury or death;
(ii) allegations of untruthfulness;
(iii) failure to follow commission training requirements;
(iv) decertification by the commission;
(v) agency-imposed discipline;
(vi) termination for cause; and

(vii) any other information the commission deems necessary or relevant.

G. L. c. 6E, § 8 (d).

By statute, POST's Division of Police Certification must also maintain a publicly accessible database. G. L. c. 6E, § 4 (j); G. L. c. 6E, § 13; 555 CMR 8.06. The database must be searchable, thus guaranteeing all members of the public ease of access. 555 CMR 8.06 (2). See G. L. c. 66, § 6A (d) (records made available to the public must be in "searchable, machine readable format" unless requestor requests them in another form); 555 CMR 8.07 (same). In creating the database, POST must "consider[] the health and safety of officers." G. L. c. 6E, § 4(j). Its regulations safeguard that responsibility as they are very detailed and specifically preclude the inclusion of information that is confidential; that is CORI; that refers to sealed or expunged records or juvenile records; or that would violate a person's right against "unreasonable, substantial, or serious interference with privacy under M.G.L. c. 214, § 1B," to name a few categories. See entire comprehensive list at 555 CMR 8.06. In addition, all records relating to preliminary inquiries into officer conduct are considered confidential. G. L. c. 6E, § 8 (c) (2); 555 CMR 1.03; 555 CMR 8.06 (4) (a) (1). This presumably includes all

records relating to preliminary inquiries that POST is required to conduct, including any "officer-involved injury or death." See G. L. c. 6E, § 8 (c) (1) (i). The report of the preliminary inquiry will remain confidential "to the extent permitted by law." 555 CMR 1.07 (2).

The regulations protect law enforcement officers by specifically denying public access to all "forms, the revelation of which could potentially impact officer health or safety, including by facilitating attempts to coerce officers or exploit any individual vulnerabilities." 555 CMR 8.06 (4) (b) (1). This category of exemptions includes many subcategories to protect an officer including documents that relate to family members; personal finances; medical or psychological condition; moral character or fitness; and conduct as a juvenile as well as law enforcement information that "could compromise law enforcement or security measures" such as undercover operations, confidential informants, clandestine surveillance, and similar types of measures. 555 CMR 8.06 19(b)1.a.-k.

On September 19, 2023, POST released its second update of its database, entitled "Officer Disciplinary Records." The database, six hundred twenty-nine pages long, sets forth a list of officers who have been terminated; have resigned or retired due to allegations; have been

suspended; have received a demotion or reassignment; have received a written reprimand, written warning or letter of counseling; have been ordered to undergo retraining; or have received a "last chance agreement" or "other discipline." See https://www.mass.gov/info-details/officer-disciplinary-records-database. POST is fulfilling its legislative mandate to provide information to the public about law enforcement officer misconduct and discipline. Notably, in the present case, where the police officer's actions were found to be justified and there was no finding of misconduct or discipline, there will be no record of this officer-involved shooting in POST's database. G. L. c. 6E, § 4; 555 CMR 8.06.

A straight-forward holding from this court that POST's records are responsive to public records inquiries about law enforcement misconduct will not impose an additional duty on POST. See 555 CMR 8.02 (5) ("Neither 555 CMR 8.00, nor the Commission's provision of any information through a public database or in response to a records request, is intended to: … (c) Impose upon the Commission any duty or obligation of any other entity or person"). If information in the POST database answers a Public Records Request addressed to a district attorney's office, the district attorney's record

access officer should be able to respond that the record is available on the POST website. G. L. c. 66, § 6A. In addition, if the record is available on POST, district attorneys' offices will know that a determination has already been made that the record is public and the privacy interests of the law enforcement officers at issue will be lowered. People for the Ethical Treatment of Animals, Inc. v. Department of Agricultural Resources, 477 Mass. 280, 295 (2017). If the record is not present on the POST website, it informs the public that POST has not found misconduct warranting revocation or suspension of certification or retraining. See G. L. c. 6E, § 10 (a), (b), (d), (g). Its absence from the POST publicly available database indicates that the record is only relevant to a district attorney's obligations to provide discovery to a defendant's counsel in a criminal case or in fulfillment of other duties. The POST publicly available database imparts valuable information about findings of misconduct by law enforcement officers.

CONCLUSION

The undersigned amicus curiae asks that this Court consider the recent establishment of the POST Commission and note that, where the Legislature has empowered POST with the authority to determine when information about officer misconduct is publicized and has drafted detailed regulations regarding what must be publicized and what should be withheld, district attorneys, with imperfect information about the nature of disciplinary proceedings of police officers who serve in their counties, will satisfy their responsibility to answer Public Records requests regarding law enforcement officer misconduct investigations by referring them to POST's publicly available Law Enforcement Officer Discipline Records Database or by providing information on misconduct investigations that is consistent with what POST has determined to be public.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
David E. Sullivan
District Attorney
Northwestern District

Cynthia M. Von Flatern
_____
Cynthia M. Von Flatern
Assistant District Attorney
One Gleason Plaza
Northampton, MA 01060
(413) 586-9225
Cynthia.von.flatern@state.ma.us
BBO# 550493

STATUTORY ADDENDUM

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STATUTES

G. L. c. 4, § 7 Definitions

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as

required by law or as a condition of receiving a governmental contract or other benefit;
(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;
(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;
(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;
(k) [Stricken.]
(*l*) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;
(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.
(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public

records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.
(*o*) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.
(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (*o*).
(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.
(r) Information and records acquired under chapter 18C by the office of the child advocate.
(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.
(t) statements filed under section 20C of chapter 32.
(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.
(v) records disclosed to the health policy commission under subsections (b) and (e) of section 8A of chapter 6D.
Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

G. L. c. 6E, § 1 Definitions

As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:
"Agency", a law enforcement agency.
"Appointing agency", the agency appointing a law enforcement officer.
"Bias-free policing", policing decisions made by and conduct of law enforcement officers that shall not consider a person's race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level. This definition shall include policing decisions made by or conduct of law enforcement officers that: (1) are based on a law enforcement purpose or reason which is non-discriminatory, or which justifies different treatment; or (2) consider a person's race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level because such factors are an element of a crime.
"Chair", the chair of the commission.
"Chokehold", the use of a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow with the intent of or with the result of causing bodily injury, unconsciousness or death.
"Commission", the Massachusetts peace officer standards and training commission established pursuant to section 2.
"Commissioner", a member of the commission.
"Conviction", an adjudication of a criminal matter resulting in any outcome except wherein the matter is dismissed or the accused is found to be not guilty, including, but not limited, to an adjudication of guilt with or without the imposition of a sentence, a plea of guilty, a plea of nolo contendere, an admission to sufficient facts, a continuance without a finding or probation.
"Deadly force", physical force that can reasonably be expected to cause death or serious physical injury.
"Decertified", an officer whose certification is revoked by the commission pursuant to section 10.
"De-escalation tactics", proactive actions and approaches used by an officer to stabilize a law enforcement situation so that more time, options and resources are available to gain a person's voluntary compliance and to reduce or eliminate the need to use force including, but not limited to, verbal persuasion, warnings, slowing down the pace of an incident, waiting out a person, creating distance between the officer and a threat and requesting additional resources to resolve the

incident, including, but not limited to, calling in medical or licensed mental health professionals, as defined in subsection (a) of section 51½ of chapter 111, to address a potential medical or mental health crisis.
“Division of standards”, the division of police standards established pursuant to section 8.
“Division of certification”, the division of police certification established pursuant to section 4.
“Executive director”, the executive director of the commission appointed pursuant to subsection (g) of section 2.
“Law enforcement agency”, (i) a state, county, municipal or district law enforcement agency, including, but not limited to: a city, town or district police department, the office of environmental law enforcement, the University of Massachusetts police department, the department of the state police, the Massachusetts Port Authority police department, also known as the Port of Boston Authority police department, and the Massachusetts Bay Transportation Authority police department; (ii) a sheriff’s department in its performance of police duties and functions; (iii) a public or private college, university or other educational institution or hospital police department; or (iv) a humane society police department in section 57 of chapter 22C.
“Law enforcement officer” or “officer”, any officer of an agency, including the head of the agency; a special state police officer appointed pursuant to section 57, section 58 or section 63 of chapter 22C; a special sheriff appointed pursuant to section 4 of chapter 37 performing police duties and functions; a deputy sheriff appointed pursuant to section 3 of said chapter 37 performing police duties and functions; a constable executing an arrest for any reason; or any other special, reserve or intermittent police officer.
“Officer-involved injury or death”, any event during which an officer: (i) discharges a firearm, as defined in section 121 of chapter 140, actually or proximately causing injury or death to another; (ii) discharges any stun gun as defined in said section 121 of said chapter 140, actually or proximately causing injury or death to another; (iii) uses a chokehold, actually or proximately causing injury or death of another; (iv) discharges tear gas or other chemical weapon, actually or proximately causing injury or death of another; (v) discharges rubber pellets from a propulsion device, actually or proximately causing injury or death of another; (vi) deploys a dog, actually or proximately causing injury or death of another; (vii) uses deadly force, actually or proximately causing injury or death of another; (viii) fails to intervene, as required by section 15, to prevent the use of excessive or prohibited force by another officer who actually or proximately causes injury or death of another; or (ix) engages in a physical altercation with a person who sustains serious bodily injury or requests or receives medical care as a result.

“Serious bodily injury”, bodily injury that results in: (i) permanent disfigurement; (ii) protracted loss or impairment of a bodily function, limb or organ; or (iii) a substantial risk of death.
“Untruthful” or “untruthfulness”, knowingly making an untruthful statement concerning a material fact or knowingly omitting a material fact: (i) on an official criminal justice record, including, but not limited to, a police report; (ii) while testifying under oath; (iii) to the commission or an employee of the commission; or (iv) during an internal affairs investigation, administrative investigation or disciplinary process.

G. L. c. 6E, § 3 Commission; Powers

(a) The commission shall have all powers necessary or convenient to carry out and effectuate its purposes, including, but not limited to, the power to:
(1) act as the primary civil enforcement agency for violations of this chapter;
(2) establish, jointly with the municipal police training committee established in section 116 of chapter 6, minimum officer certification standards pursuant to section 4;
(3) certify qualified applicants;
(4) deny an application or limit, condition, restrict, revoke or suspend a certification, or fine a person certified for any cause that the commission deems reasonable;
(5) receive complaints from any source and preserve all complaints and reports filed with the commission for the appropriate period of time;
(6) establish, in consultation with the municipal police training committee established in section 116 of chapter 6, minimum agency certification standards pursuant to section 5;
(7) certify qualified agencies;
(8) withhold, suspend or revoke certification of agencies;
(9) conduct audits and investigations pursuant to section 8;
(10) appoint officers and approve employees to be hired by the executive director;
(11) establish and amend a plan of organization that it considers expedient;
(12) execute all instruments necessary or convenient for accomplishing the purposes of this chapter;
(13) enter into agreements or other transactions with a person, including, but not limited to, a public entity or other governmental instrumentality or authority in connection with its powers and duties under this chapter;
(14) appear on its own behalf before boards, commissions, departments or other agencies of municipal, state or federal government;

(15) apply for and accept subventions, grants, loans, advances and contributions of money, property, labor or other things of value from any source, to be held, used and applied for its purposes;
(16) provide and pay for advisory services and technical assistance as may be necessary in its judgment to carry out this chapter and fix the compensation of persons providing such services or assistance;
(17) prepare, publish and distribute, with or without charge as the commission may determine, such studies, reports, bulletins and other materials as the commission considers appropriate;
(18) gather facts and information applicable to the commission's obligation to issue, suspend or revoke certifications for: (i) a violation of this chapter or any regulation adopted by the commission; (ii) a willful violation of an order of the commission; (iii) the conviction of a criminal offense; or (iv) the violation of any other offense which would disqualify a person from being certified;
(19) conduct investigations into the qualifications of all applicants for certification;
(20) request and receive from the state police, the department of criminal justice information services or other criminal justice agencies, including, but not limited to, the Federal Bureau of Investigation and the federal Internal Revenue Service, such criminal offender record information relating to the administration and enforcement of this chapter;
(21) demand access to and inspect, examine, photocopy and audit all papers, books and records of any law enforcement agency;
(22) levy and collect assessments, fees and fines and impose penalties and sanctions for a violation of this chapter or any regulations promulgated by the commission;
(23) restrict, suspend or revoke certifications issued under this chapter;
(24) conduct adjudicatory proceedings in accordance with chapter 30A;
(25) refer cases for criminal prosecution to the appropriate federal, state or local authorities;
(26) issue subpoenas and compel the attendance of witnesses at any place within the commonwealth, administer oaths and require testimony under oath before the commission in the course of an investigation or hearing conducted under this chapter;
(27) maintain an official internet website for the commission;
(28) adopt, amend or repeal regulations in accordance with chapter 30A for the implementation, administration and enforcement of this chapter, including, but not limited to, regulations: (i) governing the conduct of proceedings hereunder; (ii) determining whether an applicant has met the standards for certification; (iii) establishing minimum standards for internal agency review of complaints of officer-involved injuries or deaths and recommendations to the commission

regarding retraining, suspension or revocation of officer certification to ensure consistency across agencies; (iv) establishing a physical and psychological fitness evaluation pursuant to section 4 that measures said fitness to ensure officers are able to perform essential job duties; and (v) identifying patterns of unprofessional police conduct, including, but not limited to, patterns of: (A) escalating behavior that may lead to the use of excessive force or conduct that is biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level; (B) an increase in the frequency of complaints regarding an individual officer or agency; or (C) the number of complaints regarding an officer or agency that are at least 1 standard deviation above the mean for similarly situated officers or agencies for a defined period; and

(29) refer patterns of racial profiling or the mishandling of complaints of unprofessional police conduct by a law enforcement agency for investigation and possible prosecution to the attorney general or the appropriate federal, state or local authorities; provided, however, that if the attorney general has reasonable cause to believe that such a pattern exists based on information received from any other source, the attorney general may bring a civil action for injunctive or other appropriate equitable and declaratory relief to eliminate the pattern or practice.

(b) The commission shall have the power to issue a specialized certification for an individual acting, or intending to act, as a school resource officer, as defined in section 37P of chapter 71; provided, however, that a person shall not be appointed as a school resource officer, as defined in said section 37P of said chapter 71, unless specially certified as such by the commission.

G. L. c. 6E, § 4 Division of Police Certification

a)

(1) There shall be within the commission a division of police certification. The purpose of the division of police certification shall be to establish uniform policies and standards for the certification of all law enforcement officers, subject to the approval of the commission. The head of the division shall be the certification director, who shall be appointed by the commission.

[There is no paragraph (2) of subsection (a).]

[There are no subsections (b) and (c).]

(d) No person shall be eligible for admission to police schools, programs or academies approved by the municipal police training committee pursuant to section 118 of chapter 6, or the training programs prescribed by chapter 22C, or for appointment as a law enforcement officer or for employment with an agency if

they are listed in the national decertification index or the database of decertified law enforcement officers maintained by the commission pursuant to clause (i) of subsection (a) of section 13.

[There is no subsection (e).]

(f)

(1) The division of police certification and the municipal police training committee established in section 116 of chapter 6 shall jointly establish minimum certification standards for all officers that shall include, but not be limited to: (i) attaining the age of 21; (ii) successful completion of a high school education or equivalent, as determined by the commission; (iii) successful completion of the basic training program approved by the municipal police training committee; (iv) successful completion of a physical and psychological fitness evaluation approved by the commission; (v) successful completion of a state and national background check, including, but not limited to, fingerprinting and a full employment history; provided, that if the applicant has been previously employed in law enforcement in any state or United States territory or by the federal government, the applicant's full employment record, including complaints and discipline, shall be evaluated in the background check; (vi) passage of an examination approved by the commission; (vii) possession of current first aid and cardiopulmonary resuscitation certificates or equivalent, as determined by the commission; (viii) successful completion of an oral interview administered by the commission; and (ix) being of good moral character and fit for employment in law enforcement, as determined by the commission.

(2) The commission shall not issue a certificate to an applicant who: (i) does not meet the minimum standards enumerated in paragraph (1) or the regulations of the commission; (ii) has been convicted of a felony or whose name is listed in the national decertification index or the database of decertified law enforcement officers maintained by the commission pursuant to clause (i) of subsection (a) of section 13; or (iii) while previously employed in law enforcement in any state or United States territory or by the federal government, would have had their certification revoked by the commission if employed by an agency in the commonwealth.

(3) The commission may issue a certificate to a qualified applicant consistent with the provisions of this chapter. The commission shall determine the form and manner of issuance of a certification. A certification shall expire 3 years after the date of issuance.

(4) An officer shall remain in compliance with the requirements of this chapter and all rules and regulations promulgated by the commission for the duration of their employment as an officer.

(g) No agency shall appoint or employ a person as a law enforcement officer unless the person is certified by the commission.
(h) The division of police certification, in consultation with the division of police standards, shall create and maintain a database containing records for each certified law enforcement officer, including, but not limited to:
(1) the date of initial certification;
(2) the date of any recertification;
(3) the records of completion of all training and all in-service trainings, including the dates and locations of said trainings, as provided by the municipal police training committee established in section 116 of chapter 6, and the department of state police;
(4) the date of any written reprimand and the reason for said reprimand;
(5) the date of any suspension and the reason for said suspension;
(6) the date of any arrest and the charge or charges leading to said arrest;
(7) the date of, and reason for, any internal affairs complaint;
(8) the outcome of an internal affairs investigation based on an internal affairs complaint;
(9) the date of any criminal conviction and crime for said conviction;
(10) the date of any separation from employment with an agency and the nature of the separation, including, but not limited to, suspension, resignation, retirement or termination;
(11) the reason for any separation from employment, including, but not limited to, whether the separation was based on misconduct or whether the separation occurred while the appointing agency was conducting an investigation of the certified individual for a violation of an appointing agency's rules, policies, procedures or for other misconduct or improper action;
(12) the date of decertification, if any, and the reason for said decertification; and
(13) any other information as may be required by the commission.
(i) Each certified law enforcement officer shall apply for renewal of certification prior to its date of expiration as prescribed by the commission. The commission shall not recertify any person as a law enforcement officer unless the commission certifies that the applicant for recertification continues to satisfy the requirements of subsection (f).
(j) The commission shall promulgate regulations for the division of police certification to maintain a publicly available and searchable database containing records for law enforcement officers. In promulgating the regulations, the commission shall consider the health and safety of the officers.

G. L. c. 6E, § 8 Division of Police Standards

(a) There shall be within the commission a division of police standards. The purpose of the division of police standards shall be to investigate officer misconduct and make disciplinary recommendations to the commission.
(b)
(1) The head of an agency shall transmit any complaint received by said agency within 2 business days to the division of police standards, in a form to be determined by the commission; provided, that the form shall include, but shall not be limited to: (i) the name and commission certification identification number of the subject officer; (ii) the date and location of the incident; (iii) a description of circumstances of the conduct that is the subject of the complaint; (iv) whether the complaint alleges that the officer's conduct: (A) was biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level; (B) was unprofessional; (C) involved excessive, prohibited or deadly force; or (D) resulted in serious bodily injury or death; and (v) a copy of the original complaint submitted directly to the agency; provided, however, that the commission may establish a minimum threshold and streamlined process for the reporting or handling of minor complaints that do not involve the use of force or allegations of biased behavior.
(2) Upon completion of the internal investigation of a complaint, the head of each agency shall immediately transmit to the division of police standards an investigation report in a form to be determined by the commission; provided, that the form shall include, but shall not be limited to: (i) a description of the investigation and disposition of the complaint; (ii) any disciplinary action recommended by internal affairs or the supervising officer; and (iii) if the recommended disciplinary action included retraining, suspension or termination, a recommendation by the head of the agency for disciplinary action by the commission including, retraining or suspension or revocation of the officer's certification.
(3) Upon final disposition of the complaint, the head of each agency shall immediately transmit to the division of police standards a final report in a form to be determined by the commission; provided, that the form shall include, but shall not be limited to: (i) any disciplinary action initially recommend by internal affairs or the supervising officer; (ii) the final discipline imposed and a description of the adjudicatory process; and (iii) if the disciplinary action recommended or imposed included retraining, suspension or termination, a recommendation by the head of the agency for disciplinary action by the commission including, retraining or suspension or revocation of the officer's certification.

(4) If an officer resigns during an agency investigation, prior to the conclusion of an agency investigation or prior to the imposition of agency discipline, up to and including termination, the head of said agency shall immediately transmit to the division of police standards a report in a form to be determined by the commission; provided, that the form shall include, but shall not be limited to: (i) the officer's full employment history; (ii) a description of the events or complaints surrounding the resignation; and (iii) a recommendation by the head of the agency for disciplinary action by the commission, including retraining or suspension or revocation of the officer's certification.

(5) Notwithstanding any general or special law or collective bargaining agreement to the contrary, nothing shall limit the ability of the head of an agency to make a recommendation in their professional judgement to the commission relative to the certification status of an officer, after having followed the agency's internal affairs procedure and any appeal therefrom.

(c)

(1) The division of police standards shall initiate a preliminary inquiry into the conduct of a law enforcement officer if the commission receives a complaint, report or other credible evidence that is deemed sufficient by the commission that the law enforcement officer:

(i) was involved an officer-involved injury or death;

(ii) committed a felony or misdemeanor, whether or not the officer has been arrested, indicted, charged or convicted;

(iii) engaged in conduct prohibited pursuant to section 14;

(iv) engaged in conduct prohibited pursuant to section 15; or

(v) the commission receives an affirmative recommendation by the head of an appointing agency for disciplinary action by the commission, including retraining or suspension or revocation of the officer's certification.

(2) The division of police standards may initiate a preliminary inquiry into the conduct of a law enforcement officer upon receipt of a complaint, report or other credible evidence that is deemed sufficient by the commission that the law enforcement officer may have engaged in prohibited conduct. All proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry shall be confidential, except that the executive director may turn over to the attorney general, the United States Attorney or a district attorney of competent jurisdiction evidence which may be used in a criminal proceeding.

(3) The division of police standards shall notify any law enforcement officer who is the subject of the preliminary inquiry, the head of their collective bargaining unit and the head of their appointing agency of the existence of such inquiry and the

general nature of the alleged violation within 30 days of the commencement of the inquiry.

(d) The division of police standards may audit all records related to the complaints, investigations and investigative reports of any agency related to complaints of officer misconduct or unprofessionalism, including, but not limited to, personnel records. The commission shall promulgate rules and regulations establishing an audit procedure; provided, however, that said rules and regulations shall not limit the ability of the division of police standards to initiate an audit at any time and for any reason.

(e) The division of police standards shall create and maintain a database containing information related to an officer's: (i) receipt of complaints and related information, including, but not limited to: the officer's appointing agency, date, a description of circumstances of the conduct that is the subject of the complaint and whether the complaint alleges that the officer's conduct: (A) was biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level; (B) was unprofessional; (C) involved excessive, prohibited or deadly force; or (D) resulted in serious bodily injury or death; (ii) allegations of untruthfulness; (iii) failure to follow commission training requirements; (iv) decertification by the commission; (v) agency-imposed discipline; (vi) termination for cause; and (vii) any other information the commission deems necessary or relevant.

(f) The division of police standards shall actively monitor the database to identify patterns of unprofessional police conduct. Upon identification of a pattern of unprofessional police conduct, the division of police standards may recommend the evidence in its possession for review in a preliminary inquiry.

(g) The division of police standards shall be a law enforcement agency and its employees shall have such law enforcement powers as necessary to effectuate the purposes of this chapter, including the power to receive intelligence on an applicant for certification or an officer certified under this chapter and to investigate any suspected violations of law.

G. L. c. 6E, § 13 Commission; Public Database of Orders

(a) The commission shall maintain a publicly available database of orders issued pursuant to section 10 on the commission's website, including, but not limited to: (i) the names of all decertified officers, the date of decertification, the officer's last appointing agency and the reason for decertification; (ii) the names of all officers who have been suspended, the beginning and end dates of suspension, the officer's appointing agency and the reason for suspension; and (iii) the names of all officers ordered to undergo retraining, the date of the retraining order, the date the

retraining was completed, the type of retraining ordered, the officer's appointing agency and the reason for the retraining order.
(b) The commission shall cooperate with the national decertification index and other states and territories to ensure officers who are decertified by the commonwealth are not hired as law enforcement officers in other jurisdictions, including by providing information requested by those entities.

G. L. 4, § 38 Medical Examiner to Investigate Causes of Death; Duties and Responsibilities of Medical Examiner with Respect to Death of a Person

Upon notification of a death in the circumstances enumerated in section three, the chief medical examiner or his designee shall carefully inquire into the cause and circumstances of the death. If, as a result of such inquiry, the chief medical examiner or such designee is of the opinion that the death was due to violence or other unnatural means or to natural causes that require further investigation, he shall take jurisdiction. The body of the deceased shall not be moved, and the scene where the body is located shall not be disturbed, until either the medical examiner or the district attorney or his representative either arrives at the scene or gives directions as to what shall be done at the scene. In such cases of unnatural or suspicious death where the district attorney's office is to be notified, the medical examiner shall not disturb the body or the scene without permission from the district attorney or his representative.
The medical examiner shall be responsible for making arrangements for transport of the body. The district attorney or his law enforcement representative shall direct and control the investigation of the death and shall coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the death occurred. Either the medical examiner or the district attorney in the jurisdiction where death occurred may order an autopsy. Cases requiring autopsy shall be subject to the jurisdiction of the office for such purpose. As part of his investigation, the chief medical examiner or his designee may, in his discretion, notwithstanding any other provision of law, cause the body to be tested by the department of public health for the presence of any virus, disease, infection, or syndrome which might pose a public health risk.
If the medical examiner is unable to respond and take charge of the body of the deceased in an expeditious manner, the chief of police of the city or town wherein the body lies, or his representative, may, after conferring with the appropriate district attorney, move the body to another location until a medical examiner is able to respond. Before moving the body the police shall document all facts relevant to the appearance, condition and position of the body and every fact and circumstance tending to show the cause and circumstances of death.

In carrying out the duties prescribed by this section, the chief medical examiner or his designee shall be entitled to review and receive copies of medical records, hospital records, or information which he deems relevant to establishing the cause and manner of death. No person or hospital shall be subject to liability of any nature for providing such records or information in good faith at the request of the office. The chief medical examiner shall notify the local district attorney of the death of a child immediately following receipt of a report that such a death occurred.

G. L. c. 66, § 6A Records Access Officer

(a) Each agency and municipality shall designate 1 or more employees as records access officers. In a municipality, the municipal clerk, or the clerk's designees, or any designee of a municipality that the chief executive officer of the municipality may appoint, shall serve as records access officers. For the purposes of this chapter the term "agency" shall mean any entity, other than a municipality, that is identified in clause twenty-sixth of section 7 of chapter 4 as possessing "public records," as defined therein.
(b) A records access officer shall coordinate an agency's or a municipality's response to requests for access to public records and shall facilitate the resolution of such requests by the timely and thorough production of public records. Each records access officer shall:
(i) assist persons seeking public records to identify the records sought;
(ii) assist the custodian of records in preserving public records in accordance with all applicable laws, rules, regulations and schedules; and
(iii) prepare guidelines that enable a person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise.
Guidelines shall be updated periodically and shall include a list of categories of public records maintained by the agency or municipality. Each agency and municipality that maintains a website shall post the guidelines on its website.
(c) Each agency and municipality shall post in a conspicuous location at its offices and on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer. The designation of 1 or more records access officers shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any employee responsible for making public records available shall provide the records in accordance with this chapter.

(d) The records access officer shall provide the public records to a requestor by electronic means unless the record is not available in electronic form or the requestor does not have the ability to receive or access the records in a usable electronic form. The records access officer shall, to the extent feasible, provide the public record in the requestor's preferred format or, in the absence of a preferred format, in a searchable, machine readable format. The records access officer shall not be required to create a new public record in order to comply with a request, provided that furnishing a segregable portion of a public record shall not be deemed to be creation of a new record. If the public record requested is available on a public website pursuant to subsection (b) of section 19 of this chapter, section 14C of chapter 7 or any other appropriately indexed and searchable public website, the records access officer may furnish the public record by providing reasonable assistance in locating the requested record on the public website. An electronically produced document submitted to an agency or municipality for use in deliberations by a public body shall be provided in an electronic format at the time of submission.

(e) Each records access officer of an agency shall document each request for public records submitted to the records access officer. The records access officer shall document:

(i) the nature of the request and the date on which the request was received;

(ii) the date on which a response is provided to the requestor;

(iii) the date on which a public record is provided to the requestor;

(iv) the number of hours required to fulfill the request;

(v) fees charged to the person making the request, if any;

(vi) petitions submitted under clause (iv) of subsection (d) of section 10;

(vii) requests appealed under section 10A;

(viii) the time required to comply with supervisor of records orders under said section 10A; and

(ix) the final adjudication of any court proceedings under subsection (d) of said section 10A.

Nothing in this subsection shall require a records access officer to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall annually collect the information from the records access officers, post the information on a website maintained by the secretary and report the same to the clerks of the house of representatives and senate.

(f) The supervisor of records shall document appeals filed under section 10A, including:

(i) the date the request was submitted to the records access officer;

(ii) the date the records access officer responded;

(iii) the amount of fees charged to the requestor, if any;
(iv) petitions made pursuant to clause (iv) of subsection (d) of section 10;
(v) the time required to comply with supervisor of records orders under said section 10A; and
(vi) the final adjudication of any court proceedings under subsection (d) of said section 10A.
Nothing in this subsection shall require the supervisor to disclose information otherwise protected from public access. The secretary of the commonwealth shall prescribe a form for recording such information and shall post the information on a website maintained by the secretary.

G. L. c. 66, § 10 Public Records Request - Procedure

(a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:
(i) the request reasonably describes the public record sought;
(ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and
(iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).
A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.
(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:
(i) confirm receipt of the request;
(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;

(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;
(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;
(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;
(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;
(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and
(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.
(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting

the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:
(i) the need to search for, collect, segregate or examine records;
(ii) the scope of redaction required to prevent unlawful disclosure;
(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;
(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;
(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and
(vi) the public interest served by expeditious disclosure.
If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.
(d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:
(i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;
(ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or

less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than $25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than $25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of $25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of $25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;
(vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;
(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;
(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and
(ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education
(e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).
(f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

G. L. c. 214, § 1B Right of Privacy; Remedy to Enforce

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

RULES

Rule 14. Pretrial Discovery

(a) Procedures for Discovery.
(1) *Automatic Discovery.*
(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:
(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
(iii) Any facts of an exculpatory nature.
(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.
(v) The names and business addresses of prospective law enforcement witnesses.
(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.
(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.
(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.
(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any

material and relevant evidence discoverable under subdivision (a)(1)(A)(vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) *Motions for Discovery.* The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) *Certificate of Compliance.* When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery

other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) *Continuing Duty.* If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) *Work Product.* This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) *Protective Orders.* Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) *Amendment of Discovery Orders.* Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) *Notice of Alibi.*

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of

his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule l3(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical, psychiatric, and psychological tests as the court appointed examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (I) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the Commonwealth's examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the

expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B).

(i) If the judge orders the defendant to submit to an examination under Rule 14(b)(2)(B), the defendant shall, within fourteen days of the court's designation of the examiner, make available to the examiner the following:

(a) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;

(b) All medical records concerning the defendant in defense counsel's possession; and

(c) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(ii) The defendant's duty of production set forth in Rule 14(b)(2)(C)(i) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

(iii) In addition to the records provided under Rule 14(b)(2)(C)(i) and (ii), the examiner may request records from any person or entity by filing with the court under seal, in such form as the Court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.

Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14(b)(2)(C)(iii). Within thirty days of the

court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judges discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the court, in its discretion, determines that it would be unfairly prejudicial to the defendant to do so.

If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the Court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying subject to a protective order under the same terms as govern disclosure of reports under Rule 14(b)(2)(B)(iii). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.

(iv) Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant, by the Commonwealth's examiner or at the request of the Commonwealth's examiner.

(D) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) *Notice of Other Defenses.* If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) Self Defense and First Aggressor.

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21

days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

(c) Sanctions for Noncompliance.

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) *Exclusion of Evidence.* The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made, signed, or by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

Rule 17 Summonses for Witnesses

Applicable to District Court and Superior Court)

(a) Summons.

(1) *For Attendance of Witness; Form; Issuance.* A summons shall be issued by the clerk or any person so authorized by the General Laws. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(2) *For Production of Documentary Evidence and of Objects.* A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

(b) Defendants Unable to Pay. At any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness, the court shall order the issuance of an indigent's summons. The witness so summoned shall be paid in accordance with the provisions of subdivision (c) of this rule. If the court so orders, the costs incurred shall be assessed to the defendant in accordance with the General Laws or the provisions of these rules.

(c) Payment of Witnesses. Expenses incurred by a witness summoned on behalf of a defendant determined to be indigent under this rule as well as expenses incurred by a witness summoned on behalf of the Commonwealth, as such expenses are determined in accordance with the General Laws, shall be paid after the witness certifies in a writing filed with the court the amount of his travel and attendance.

(d) Service.

(1) *By Whom; Manner.* A summons may be served by any person authorized to serve a summons in a civil action or to serve criminal process. A summons shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing to the witness' last known address.

(2) *Place of Service.*

(A) Within the Commonwealth. A summons requiring the attendance of a witness at a hearing or a trial may be served at any place within the Commonwealth.

(B) Outside the Commonwealth or Abroad. A summons directed to a witness outside the Commonwealth or abroad shall issue and be served in a manner consistent with the General Laws.
(3) *Return.* The person serving a summons pursuant to this rule shall make a return of service to the court.
(e) Failure to Appear. If a person served with a summons pursuant to this rule fails to appear at the time and place specified therein and the court determines that such person did receive actual notice to appear, a warrant may issue to bring that person before the court.

REGULATIONS

555 CMR 1.03 Confidentiality of Preliminary Inquiries

All proceedings and records relating to a preliminary inquiry by the division of standards, including any internal review to determine whether there is sufficient credible evidence to initiate a preliminary inquiry, shall be kept strictly confidential pursuant to M.G.L. c. 6E, § 8(c)(2) and M.G.L. c. 4, § 7, twenty-sixth, the exemptions to the definitions of public records, except that the executive director may provide evidence which may be used in a criminal proceeding or investigation to the attorney general, the United States Attorney, or a district attorney of competent jurisdiction. Nothing in 555 CMR 1.03 shall prevent the division of standards from notifying any other prosecuting attorney, upon reasonable request, of the commencement of the preliminary inquiry and the nature of the alleged conduct at issue.

All proceedings and records relating to a preliminary inquiry by the division of standards, including any internal review to determine whether there is sufficient credible evidence to initiate a preliminary inquiry, shall be kept strictly confidential pursuant to M.G.L. c. 6E, § 8(c)(2) and M.G.L. c. 4, § 7, twenty-sixth, the exemptions to the definitions of public records, except that the executive director may provide evidence which may be used in a criminal proceeding or investigation to the attorney general, the United States Attorney, or a district attorney of competent jurisdiction. Nothing in 555 CMR 1.03 shall prevent the division of standards from notifying any other prosecuting attorney, upon reasonable request, of the commencement of the preliminary inquiry and the nature of the alleged conduct at issue.

555 CMR 1.05 Conduct of Preliminary Inquiries

(1) Collection of Information.
(a) The division of standards may, in connection with a preliminary inquiry, obtain or provide pertinent information, including any information regarding grants of immunity, regarding officers, agencies, witnesses, or complainants, from or to law enforcement agencies and other domestic, federal or foreign jurisdictions, including the Federal Bureau of Investigation, and may transmit or receive such information electronically or *via* other secure methods.
(b) To support its own preliminary inquiry the division of standards may request, by writing to the head of the agency, that the agency produce all records relating to its internal investigation of a complaint. The agency shall produce all such records to the division of standards within 15 days of the division of standards' demand, unless the division of standards allows a longer period of time.
(c) Upon written request by the division of standards, the agency shall make its best efforts to make witnesses available to the division of standards, or if requested by the division of standards, to coordinate its internal investigation with the division of standards' preliminary inquiry.
(2) Subpoenas. The division of standards is authorized in the name of the commission to issue subpoenas in the conduct of preliminary inquiries, to compel the attendance of witnesses, to compel the production of documents and records at any place within the commonwealth, to administer oaths, and to require testimony under oath. Subpoenas may be served by commission employees and agents, including contracted investigators. Any witness summoned may petition the commission to vacate or modify a subpoena issued in its name. After such investigation as the commission considers appropriate, the commission may grant the petition in whole or in part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested. The commission shall exercise all legal remedies available to it to enforce any subpoenas issued under 555 CMR 1.05(2).
(3) Contractor Investigators. The commission may retain qualified contractor investigators, either directly or pursuant to contracts with private investigative businesses or other qualified entities, to assist the division of standards in conducting preliminary inquiries. Before a contractor investigator can participate in any preliminary inquiry, the investigator shall execute a certification acknowledging: the investigator's full understanding and acceptance of the authority given; the investigator's freedom from conflict of interest, bias, prejudice

or self-interest; applicable confidentiality provisions; and appropriate limits to the investigator's authority.

555 CMR 8.02 Scope

(1) 555 CMR 8.00 applies to:
(a) Databases that the Commission must maintain pursuant to M.G.L c. 6E, §§ 4(h), 4(j), 8(e), and 13(a);
(b) Other databases and electronic recordkeeping systems maintained by the Commission; and
(c) Commission responses to requests for records served upon it pursuant to M.G.L. c. 66, § 10.
(2) 555 CMR 8.00 does not apply to any of the following:
(a) A response by the Commission to compulsory legal process, except as provided in 555 CMR 8.10;
(b) A response by the Commission to a court order relative to the disclosure of information;
(c) An inquiry or request concerning personal data, made on behalf of the individual to whom the personal data refers, under M.G.L. c. 66A, §§ 2(g) or 2(i); or
(d) The Commission's treatment of evidence that it knows to be relevant to a pending criminal case or exculpatory as to any criminal case.
(3) With respect to matters to which 555 CMR 8.00 applies, it is intended to supersede 801 CMR 3.00: *Privacy and Confidentiality*.
(4) Nothing in 555 CMR 8.00 is intended to:
(a) Foreclose the Commission's invocation of any provision, privilege, or doctrine, regardless of whether it is cited in 555 CMR 8.00;
(b) Establish a standard of care or create any independent private right, remedy, or cause of action on the part of any person or entity on account of any action the Commission takes or fails to take; or
(c) Otherwise waive any power, right, privilege, protection, or immunity that may be available to the Commission.
(5) Neither 555 CMR 8.00, nor the Commission's provision of any information through a public database or in response to a records request, is intended to:
(a) Create an attorney-client relationship, a principal-agent relationship, or a confidential relationship with any person or entity;
(b) Make the Commission a part of the prosecution team, the defense team, or the litigation team of any other party in relation to any criminal or civil action or controversy;

(c) Impose upon the Commission any duty or obligation of any other entity or person; or
(d) Otherwise surrender the Commission's independence.

555 CMR 8.05 Division Databases

1) The Division of Police Certification, in consultation with the Division of Police Standards, shall establish, by a date adopted by a vote of the Commissioners, and thereafter shall maintain, a database containing records for each certified law enforcement officer including, but not limited to:
(a) The date of initial certification;
(b) The date of any recertification;
(c) The records of completion of all training and all in-service trainings, including the dates and locations of said trainings, as provided by the MPTC and the Department of State Police;
(d) The date of any written reprimand and the reason for said reprimand;
(e) The date of any suspension and the reason for said suspension;
(f) The date of any arrest and the charge or charges leading to said arrest;
(g) The date of, and reason for, any internal affairs complaint;
(h) The outcome of an internal affairs investigation based on an internal affairs complaint;
(i) The date of any criminal conviction and crime for said conviction;
(j) The date of any separation from employment with a law enforcement agency and the nature of the separation including, but not limited to, suspension, resignation, retirement or termination;
(k) The reason for any separation from employment including, but not limited to, whether the separation was based on misconduct or whether the separation occurred while the appointing law enforcement agency was conducting an investigation of the certified individual for a violation of an appointing law enforcement agency's rules, policies, procedures or for other misconduct or improper action;
(l) The date of decertification, if any, and the reason for said decertification;
(m) Any other information as may be required by the Commission; and
(n) Any other information expressly required by M.G.L. 6E, § 4(h).
(2) The Division of Police Standards shall establish, by a date adopted by a vote of the Commissioners, and thereafter shall maintain, a database containing information related to the following for each officer serving on or after July 1, 2021:
(a) The officer's receipt of complaints including, but not limited to:
1. The officer's appointing law enforcement agency;

2. The date of the alleged incident and the date of the complaint;
3. A description of circumstances of the conduct that is the subject of the complaint; and
4. Whether the complaint alleges that the officer's conduct:
a. Was biased on the basis of race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level;
b. Was unprofessional;
c. Involved excessive, prohibited or deadly force; or
d. Resulted in serious bodily injury or death;
(b) Allegations that the officer was untruthful;
(c) The officer's failure to follow Commission training requirements;
(d) The officer's decertification by the Commission;
(e) Discipline of the officer imposed by a law-enforcement agency;
(f) The officer's termination for cause;
(g) Any other information the Commission deems necessary or relevant; and
(h) Any other information expressly required by M.G.L. 6E, § 8(e).
(3) The Commission may combine the databases prescribed by 555 CMR 8.05(1) and (2) within a single database.

555 CMR 8.06 Public Database

(1) The Commission shall establish, by a date adopted by a vote of the Commissioners, and thereafter shall maintain, a public database of information concerning individuals who, at any point since July 1, 2021, have served as an officer or have been certified.
(2) The public database must be searchable and accessible to the public through the Commission's official website.
(3) Except as provided in 555 CMR 8.06(4), the public database shall make the following available to the general public, to the extent that the information is possessed by the Commission:
(a) These forms of information for each officer identified in 555 CMR 8.06(1):
1. The officer's first name and surname;
2. The officer's current certification status in Massachusetts, provided that, if the officer is challenging, or has the opportunity to challenge, a certification decision before the Commission or any of its personnel in accordance with a Commission regulation or policy, the officer's status shall be listed as under review or described in a comparable manner;
3. The dates on which the officer, in Massachusetts, was first certified, was most recently certified, and ceased being certified;

4. All of the officer's employing law enforcement agencies in Massachusetts and elsewhere, and the dates of the officer's employment with such law enforcement agencies;
5. Commendations received by the officer in connection with the officer's service in law enforcement;
6. The date of, and reason for, any decertification by the Commission or by a comparable body in any other jurisdiction;
7. The beginning date and end date of, and the reason for, any suspension of certification by the Commission;
8. As to any retraining order issued by the Commission, the date of the order, the reason for the order, the type of retraining ordered, and any date of completion of the retraining ordered;
9. A copy of each final opinion, decision, order, set of findings, and vote issued by the Commission pursuant to M.G.L. c. 6E, § 10 in connection with any proceedings concerning the officer, accessible in a commonly available electronic format; and
10. A summary of the officer's disciplinary record, which may incorporate information provided by law enforcement agencies that have employed the officer, and which shall list:
a. Complaints against the officer;
b. The final disposition of each listed complaint;
c. The nature of any discipline imposed as a result of each listed complaint;
d. Whether each complaint was submitted anonymously; and
e. Whether each complaint was submitted under the pains and penalties of perjury.
11. For each decision and action referenced in the database that is being challenged through a proceeding before the Commission, the Civil Service Commission, an arbitrator, or a court, an accompanying notation of that fact; and
(b) Prominently displayed advisories concerning the possibility that decisions and actions concerning officers have been or will be challenged and the benefit of independently seeking the most current information.
(c) To the extent reasonably feasible, ways for public users to obtain information regarding the following, aggregated by rank, by department, or statewide:
1. Decisions by the Commission and comparable bodies in other jurisdictions to decertify officers;
2. Decisions by the Commission to suspend the certification of officers;
3. Decisions by the Commission to order the retraining of officers;
4. Officers who have served;
5. The number of complaints that were resolved adversely to officers; and
6. The number of complaints that were not resolved adversely to officers.

(4) Except as provided in 555 CMR 8.06(5), the public database shall not make available to members of the general public:
(a) The following forms of information:
1. Records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry that are confidential under M.G.L. c. 6E, § 8(c)(2), or 555 CMR 1.03: *Confidentiality of Preliminary Inquiries* or 1.07(2);
2. Other information related to disciplinary proceedings that is confidential under 555 CMR 1.01(2)(d), 1.09(6)(c): *Public Access*, or 1.10(4)(a): *Public Access*;
3. Identifying or contact information that is generally non-public and non-disclosable under M.G.L. c. 66, §§ 10B and 15;
4. Criminal offender record information that cannot be communicated under M.G.L. c. 6, §§ 168 or 178, 803 CMR 2.00: *Definitions*, or 803 CMR 7.00: *Criminal Justice Information System (CJIS)*; and criminal history record information that cannot be disseminated under 803 CMR 7.00;
5. Sealed or expunged records that are non-public and confidential or are unavailable for inspection under M.G.L. c. 276, §§ 100L, 100O, or 100Q;
6. Juvenile delinquency records that must be withheld under M.G.L. c. 119, § 60A, or juvenile criminal records that cannot be communicated under M.G.L. c. 6, §§ 168 and 178;
7. Police-log entries pertaining to arrests of juveniles that are non-public and non-disclosable under M.G.L. c. 41, § 98F;
8. Police-log entries pertaining to handicapped individuals that are non-public and non-disclosable under M.G.L. c. 41, § 98F;
9. Police-log entries pertaining to alleged domestic violence or sex offenses that are non-public and non-disclosable under M.G.L. c. 41, § 98F;
10. These records, to the extent that they are not public reports and generally must be maintained by police departments in a manner that shall assure their confidentiality under M.G.L. c. 41, § 97D:
a. Reports of rape and sexual assault or attempts to commit such offenses;
b. Reports of abuse perpetrated by family or household members, as defined in M.G.L. c. 209A, § 1; and
c. Communications between police officers and victims of such offenses or abuse;
11. Information in court and police records that identifies alleged victims of sex offenses or trafficking and is non-public, must be withheld, and cannot be published, disseminated, or disclosed under M.G.L. c. 265, § 24C;
12. Identifying, contact, employment, or educational information of victims of crimes or domestic violence or members of their families that is non-public and non-disclosable under M.G.L. c. 66, §§ 10B and 15;

13. Contact, employment, or educational information of victims, members of their families, or witnesses that is confidential and non-disclosable under M.G.L. c. 258B, §§ 3(h) and 3(w);
14. Identifying, contact, employment, or educational information of family-planning personnel or members of their families that is non-public and non-disclosable under M.G.L. c. 66, §§ 10B and 15;
15. Personal data that is non-accessible under M.G.L. c. 66A;
16. Forms of "personal information" referenced in M.G.L. c. 93H, § 1, other than the names of individuals;
17. Data that the Commission is precluded from disclosing pursuant to a court order;
18. Information the disclosure of which would violate a person's right against unreasonable, substantial, or serious interference with privacy under M.G.L. c. 214, § 1B; and
19. Any other information that is non-disclosable under federal or Massachusetts law; and
(b) The following additional forms of information:
1. These forms, the revelation of which could potentially impact officer health or safety, including by facilitating attempts to coerce officers or exploit any individual vulnerabilities:
a. Information relating to a member of an officer's family, except where such family member is an officer and any relation between the two officers is not revealed;
b. Information concerning an officer's personal finances that is not otherwise publicly available;
c. Information that could readily be used to facilitate identity theft or breaches of data security including, but not limited to, an officer's date of birth, passwords, and entry codes;
d. Information concerning an officer's medical or psychological condition;
e. Any assessment of whether an officer possesses good moral character or fitness for employment in law enforcement under M.G.L. c. 6E, § 4(f)(1)(ix) that was made:
i. By a person or entity other than the Commission or its personnel; and
ii. Pursuant to 555 CMR 7.05: *Determination of Good Character and Fitness for Employment* or 7.06(9): *Good Character and Fitness for Employment* or otherwise in response to a request by the Commission in connection with a process of determining whether to initially certify or recertify an officer;
f. Information concerning an officer's conduct as a juvenile;
g. Information concerning any firearm, or firearms license or permit, that an officer currently possesses in a personal capacity;

h. Law enforcement information, including information concerning the following subjects, if disclosure could compromise law enforcement or security measures:
i. Undercover operations;
ii. Confidential informants;
iii. Clandestine surveillance;
iv. Secretive investigative techniques;
v. Passwords and codes;
vi. The details of security being provided to a person or place; or
vii. Subjects of comparable sensitivity.
i. Information concerning any complaint or disciplinary matter that has not been resolved adversely to the officer, unless the matter was resolved in a manner that the Commission determines to have been unwarranted;
j. Information concerning a decision or action that has been reversed or vacated; and
k. Any other information that could readily be used in an attempt to coerce action or inaction, or exploit individual vulnerabilities, of an officer.
2. Law enforcement agency records that are within the scope of those being audited by the Commission pursuant to M.G.L. c. 6E, §§ 3(a)(9), 3(a)(21), and 8(d);
3. Records associated with Commission meetings that may be withheld under M.G.L. c. 30A, § 22;
4. Information that an individual has the ability to have corrected, amended, or removed pursuant to M.G.L. c. 66A, § 2(j) or 555 CMR 8.08;
5. Information that shall not be disclosed pursuant to 555 CMR 8.08(10);
6. Information that is protected by a privilege against disclosure recognized by law and is held by the Commission;
7. Information that is protected by a privilege against disclosure recognized by law and is held by a person or entity other than the Commission;
8. Data that is non-disclosable under any formal agreement or memorandum of understanding between the Commission and any other federal, state, local, or tribal governmental entity including, but not limited to, any Commonwealth of Massachusetts Data Sharing Memorandum of Understanding, any Data Use License Agreement between the Commission and another governmental entity, and any Massachusetts Criminal Justice Information System (CJIS) User Agreement;
9. Information that a court has expunged, placed under seal, impounded, or relieved the Commission of having to disclose;
10. Information the confidentiality of which is the subject of dispute in litigation or an administrative proceeding;
11. Any document, record, or petition generated by the Witness Protection Board or by a prosecuting officer and related to witness protection services that is non-

public and non-disclosable under 501 CMR 10.14: *All Other Disclosures Related to Witness Protection*;
12. Information concerning a complaint or disciplinary matter that the Commission, by vote of the Commissioners, has decided not to make available to members of the general public;
13. Information concerning any individual who is no longer serving as an officer and who last received a certification more than three years earlier, but who has not been decertified; and
14. Information that otherwise does not constitute a public record under M.G.L. c. 4, § 7, cl. 26.
(5) The public database may be designed to allow particular individuals to access certain forms of information that are listed in 555 CMR 8.06(4) to the extent that the Commission is not precluded by law from making such information available to those individuals.
(6) The Commission may make other determinations concerning the content, the accessibility of information, and the format of the public database as follows:
(a) Any such determination shall be made in accordance with guidelines established by a vote of the Commissioners following an opportunity for public input, or, if no such guidelines are established, in accordance with guidelines established by the Commission's Executive Director;
(b) Such a determination may provide for forms of information that are not specifically referenced in 555 CMR 8.06(3) or (4) to be made available, or to be made unavailable, to the general public or to particular individuals;
(c) Any such determination must be consistent with 555 CMR 8.00 and other relevant provisions of law; and
(d) Any such determination must be made with due consideration for the health and safety of officers.

555 CMR 8.07 Maintenance and Security of Databases and Electronic Recordkeeping Systems Generally

(1) When designing or acquiring an electronic record keeping system or database, the Commission's RAO and its Chief Technology Officer shall consult with each other, and with the Commission's Executive Director, its Chief Financial and Administrative Officer, or the Massachusetts Executive Office of Technology Services and Security to ensure, to the extent feasible, that the system or database is capable of providing data in a commonly available electronic, machine readable format.

(2) Any database designs or acquisitions shall allow for, to the extent feasible, information storage and retrieval methods that permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access.
(3) The Commission shall not enter into any contract for the storage of electronic records that:
(a) Prevents or unduly restricts the RAO from providing public records in accordance with M.G.L. c. 66;
(b) Relieves the Commission of its obligations under M.G.L. c. 66A or any governing regulations promulgated thereunder; or
(c) Omits provisions that are necessary to ensure compliance with M.G.L. c. 66A or any governing regulations promulgated thereunder.
(4) The Commission shall implement safeguards to ensure the security and integrity of its databases, and to the extent otherwise provided, the confidentiality of such databases.
(5) The Commission shall take reasonable steps to prevent misuse of any Commission database by any of the Commission's Commissioners, staff, vendors, contractors, or agents, which steps shall include, but need not be limited to:
(a) Prohibiting use and access to the database for purposes other than Commission-related business; and
(b) Prohibiting improper disclosure of confidential information.

555 CMR 8.08 Objections Concerning Data

(1) An individual who is identified in data maintained by the Commission, or the individual's representative, may raise objections related to the accuracy, completeness, pertinence, timeliness, relevance, or dissemination of the data, or the denial of access to such data by filing a written petition for relief with the Executive Director, in a form prescribed by the Commission, at any time.
(2) Upon receiving a petition filed pursuant to 555 CMR 8.08(1), the Executive Director shall promptly evaluate the petition, including by obtaining relevant information.
(3) If the Executive Director determines that the relief requested in a petition filed pursuant to 555 CMR 8.08(1) is warranted, the Executive Director shall promptly:
(a) Take appropriate steps to grant such relief, or comparable relief;
(b) Make information concerning the action taken available to the Commissioners;
(c) Notify the petitioner of the status of the petition.
(4) After the Executive Director takes the steps prescribed by 555 CMR 8.08(3):
(a) The Chair may take any further action allowed by law with respect to the petition filed pursuant to 555 CMR 8.08(1); and

(b) The Executive Director shall notify the petitioner regarding any change in the status of the petition.
(5) If the Executive Director determines that the relief requested in a petition filed pursuant to 555 CMR 8.08(1) is unwarranted, the Executive Director shall:
(a) Within a reasonable time, notify the petitioner in writing that such determination was made and that the petitioner shall have the opportunity to submit a statement reflecting the petitioner's position regarding the data;
(b) At or around the same time, make information concerning the determination available to the Commissioners; and
(c) Cause any such statement to be included with the data and with any subsequent disclosure or dissemination of the data.
(6) After the Executive Director takes the steps prescribed by 555 CMR 8.08(5):
(a) The Chair may take any further action allowed by law with respect to the petition filed pursuant to 555 CMR 8.08(1); and
(b) The Executive Director shall notify the petitioner regarding any change in the status of the petition.
(7) Within 30 days of receiving a notification pursuant to 555 CMR 8.08(3)(c), (4)(b), 5(a), or 6(b), a petitioner may file a written request for further review with the Executive Director.
(8) The Executive Director shall provide any request for further review made pursuant to 555 CMR 8.08(7) to the Chair promptly upon receiving it.
(9) The Chair may take any action allowed by law with respect to a request for further review made pursuant to 555 CMR 8.08(7).
(10) If the Commission has a good-faith, reasonable belief that an employee possesses a right to have information that is contained in a personnel record maintained by an employer corrected or expunged by an employer pursuant to M.G.L. c. 149, § 52C, the Commission shall not disclose such information without first giving the employee the opportunity to exercise the right, unless the law requires otherwise.

UNPUBLISHED CASES

Commonwealth Dep't of State Police v. Commonwealth Civ. Serv. Comm'n, 2008 Mass. Super. LEXIS 123, *1-8

MEMORANDUM AND ORDER ON THE MOTIONS FOR JUDGMENT ON THE PLEADINGS
Before the Court is the plaintiffs' motion for judgment on the pleadings and the defendants' cross motions for the same and for entry of final judgment affirming the defendant Commonwealth of Massachusetts Civil Service Commission's (the

"Commission's") decision below. The Court *DENIES* the plaintiffs' motion and *ALLOWS* the defendants' motions for the following reasons.

In summary form, the plaintiffs challenge the Commission's statutory authority to modify a disciplinary decision of the Colonel of the plaintiff Commonwealth of Massachusetts Department of State Police (the "State Police"). After a hearing before a State Police trial board, the State Police Colonel adopted the findings of the trial board that the defendant State Trooper Jody A. Reilly ("Reilly") had on five occasions violated State Police Rules and Regulations Section 5.27.2 requiring truthful answers to questions directed to her employment, two times violated Section 5.27.1 that requires troopers to be truthful at all times and twice violated Section 5.2 prohibiting conduct unbecoming a [*2] trooper. The Colonel further adopted the trial board's recommendation that Reilly be punished by a 13-month suspension without pay.

Reilly then exercised her statutory right of appeal to the Commission pursuant to G.L.c. 22C, § 13. The Commission held a three-day evidentiary hearing. Thereafter, it issued its decision upholding the Colonel's disciplinary action but modified the sanction by reducing Reilly's suspension to 8 months. The Commission found that two of the five violations of Section 5.27.2 lacked reasonable justification and that the 13-month sanction was disproportionate considering the Colonel's record of disciplinary action against similarly situated uniformed troopers and what the Commission found to be the Colonel's failure to have investigated and disciplined a senior officer who was complicit with Reilly in the underlying misconduct.

The plaintiff State Police submits that the Commission is without statutory authority to modify the Colonel's disciplinary action. It argues that the 2002 amendment of G.L.c. 22C, § 13, which provided appellate recourse to the Commission for the first time (previously it had been to the District Court), left the Colonel with the ultimate [*3] authority to determine disciplinary sanctions. The State Police submit that the "only intent (or result) of the 2002 amendment of [G.L.c. 22] Section 13 was to create an unbiased forum [i.e., the Commission] for an aggrieved member to voice a complaint." "The disciplinary authority of the Colonel of the Massachusetts State Police is simply not, under Massachusetts General Laws, Chapter 22C, § 13 or any other mandate, subject to the jurisdiction of the Commission."

The problem with the position of the State Police is that runs afoul of the basic principle of statutory construction that a court will "not 'interpret a statute so as to render it or any portion of it meaningless or superfluous.' " *Volin v. Board of Public Accountancy,* 422 Mass. 175, 179, 661 N.E.2d 639 (1996), quoting *Andamowicz v. Ipswich,* 395 Mass. 757, 760, 481 N.E.2d 1368 (1985).

The parties agree that the 2002 amendment of Section 13 was filed on behalf of the State Police Association of Massachusetts (the "Association"). The Association represents all state troopers holding the rank of Trooper or Sergeant. Its clear purpose was to obtain what was perceived as the greater protection for Troopers and Sergeants of review by the Commission. The State Police [*4] acknowledges that the 2002 revision entitles a trooper to a hearing before the Commission, but, as quoted above, it submits the appellate remedy is limited to the hearing itself, i.e., that it provides no authority in the Commission to alter the Colonel's discipline. Apart from the inherent illogic of such an outcome, this interpretation would result in troopers having substantially less protection from alleged administrative error they previously had. There is no support in the statutory text or in the legislative history of the 2002 revision for the plaintiff's position. Among other things, the legislative history includes the event that the Acting Governor's veto of the revised statute (such veto reasonably seen as intended to protect the executive prerogatives of the Colonel) was overridden in the Senate by a vote of 32 to 2.

The State Police further challenges the "just cause" of Commission's modification of the Colonel's factual determinations and the sufficiency of the evidence before the Commission.

In these circumstances, the Court is required to give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary [*5] authority conferred upon it." G.L.c. 30A, § 14(7). See *Thomas v. Civil Service Commission*, 48 Mass.App. 446, 451, 722 N.E.2d 483 (2000); *Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of the Div. of Employment and Training*, 54 Mass.App.Ct. 405, 408, 765 N.E.2d 810 (2002). The agency's decision, however, must be supported by substantial evidence. G.L.c. 30A, § 14(7). "Substantial evidence" means such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*., § 1(6). When applying the substantial evidence standard, the Court considers the record as a whole. *The Black Rose, Inc. v. City of Boston,* 433 Mass. 501, 503, 744 N.E.2d 640 (2001). "[T]he substantial evidence test accords an appropriate degree of judicial deference to administrative decisions, ensuring that an agency's judgment on questions of fact will enjoy the benefit of the doubt in close cases, but requiring reversal by a reviewing court if the cumulative weight of the evidence tends substantially toward opposite inferences." *Cobble v. Comm'r of the Dept. of Social Services,* 430 Mass. 385, 391, 719 N.E.2d 500 (1999).

In substance, the Court is required to give the Commission, as an agency of the Commonwealth, wide discretion within the subject matter of [*6] its statutory jurisdiction. However, the Commission itself, in exercising its own review function pursuant to G.L.c. 31, § 43, is not free to substitute its judgment as to matters that relate to merit and policy considerations within the bounds of the reviewed

agency's lawful discretionary authority. *Town of Falmouth v. Civil Service Commission,* 61 Mass.App.Ct. 796, 800, 814 N.E.2d 735 (2004). "The issue for the commission is 'not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.' " *Id.* (quoting *Watertown v. Arria,* 16 Mass.App.Ct. 331, 334, 451 N.E.2d 443 (1983).

In advancing its argument that the Commission lacked substantial evidence and just cause to vacate two violations found by the Colonel and to modify the Colonel's sanctions, the State Police runs into the obstacle that it failed to incorporate into the appellate record a transcript of the proceeding before the Commission. The Commission informed the State Police of its right to have such a transcript [*7] be part of the record pursuant to Superior Court Standing Order 1-96.

In *Covell v. Department of Social Services,* 439 Mass. 766, 782, 791 N.E.2d 877 (2003), the SJC stated that in an administrative appeal, "a transcript must be submitted to support a claim that the evidence was insufficient." Otherwise, "both sides have . . . to rely on the contents and analysis reflected in the hearing officer's decision." *Id.*

The Commission found that the State Police had failed to inform Reillly of their purpose in advance of the interview in violation of her rights under Article 27 of the collective bargaining agreement. It further found that the sanction against Reilly was disproportionate when viewed against sanctions imposed in comparable cases. And the Commission found that the disciplinary action against Reilly was inequitable when measured against the State Police's action against her superior who was complicit in Reilly's underlying misconduct. Without a transcript, those findings by the Commission must stand.

Further, judicial deference to the Commission's judgment with regard to modification of sanctions is especially appropriate where the Commission is acting out its statutory function to guard against [*8] inequitable treatment between similarly situated persons, see *Town of Falmouth*, 61 Mass.App.Ct. at 800, and to protect employees from "overtones of political control or objectives unrelated to merit standards". *Cambridge v. Civil Service Commission,* 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923 (1997). The Commission fully articulated its reasons for modifying the Colonel's penalty based on facts on the record. Accordingly, there is no basis disturb the Commission's decision.

The Commission had the authority to review the Colonel's disciplinary action, in general, and Reilly's rights under the collective bargaining agreement, in particular,

for the reasons stated by the Commission in its memorandum in opposition at section B(3) at pages 23-24.

ORDER

1. The plaintiff State Police's motion for judgment on the pleadings is *DENIED*.
2. The defendant Reilly's cross motion for judgment on the pleadings and the defendant Commission's motion that judgment enter affirming the Commission are *ALLOWED*.
3. The May 4, 2006 decision of the Commission in case number D-05-382 is *AFFIRMED*.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs including Rule 16(a)(13); Rule 16(e); Rule 18; Rule 20; and Rule 21 of the Massachusetts Rules of Appellate Procedure. The font is the proportional Times New Roman, size 14. The brief contains 2,511 total words in the parts of the brief required by Rule 16(a)(3)-(9) as counted by the word count feature on Microsoft Office Word.

Cynthia M. Von Flatern

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Cynthia M. Von Flatern

Date: 11/16/23

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this date, I served the Commonwealth's Amicus Curiae Brief, through the Massachusetts Supreme Judicial Court's electronic filing system upon the following parties:

Howard Friedman, Esquire
Law Offices of Howard Friedman
1309 Beacon Street, 3rd Floor
Brookline, MA 02446

Office of the District Attorney of the Bristol District
Michael Garvey Scott, A.D.A.
Patrick O. Bomberg, A.D.A.
Alysia Victoria Sanchez, A.D.A.
Mary E. Lee, A.D.A.

Date: 11/16/23

Cynthia M. Von Flatern

Cynthia M. Von Flatern
Assistant District Attorney
Northwestern District
One Gleason Plaza
Northampton, MA 01060
(413)586-9225
BBO# 550493