

NEWSGATHERING IN MASSACHUSETTS

An Overview of Legal Protections for Reporters
Collecting Facts and Gathering Information in
the Commonwealth

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INTRODUCTION

Whether one is covering a city council meeting or a national crisis, the ability to report news depends on the ability to gather information. State and federal laws provide tools on which reporters can rely in collecting information – enhancing access to government proceedings and records, ensuring that journalists can document and review the actions of public officials, and shielding journalists’ communications with confidential sources. But, newsgatherers need to understand the contours and limitations of those legal protections in order to rely on them.

The Berkman Center for Internet & Society’s Cyberlaw Clinic and Digital Media Law Project (“DMLP”) present this paper in an effort to survey some of the laws most important to independent journalists and other newsgatherers in the Commonwealth of Massachusetts. The paper is not intended to provide a comprehensive summary of Massachusetts law. Rather, it highlights key doctrines, cases, and statutes and significant recent developments.

The paper is organized with an eye toward the day-to-day needs of independent reporters. To that end, it addresses Massachusetts laws relevant to newsgathering, as follows:

- Reporters seeking to cover proceedings of local and state government agencies may seek to take advantage of the Commonwealth’s **Open Meeting Law** (which provides for public access to many meetings of government bodies and describes the circumstances under which the public may be excluded) and **Public Records Law** (which establishes procedures for requesting government documents and the standards that custodians must apply when reviewing such requests).
- Reporters seeking to cover court proceedings may utilize their rights under the United States Constitution and the law of Commonwealth regarding **access to courtrooms and court records** and – for those seeking to document hearings or trials in court – their right to **record court proceedings**.
- Reporters seeking to record events in the field will be affected by the state’s **wiretap statute** and its application in the context of **recording public officials in public places**.
- Reporters seeking to preserve the anonymity of those who provide them with information will be affected by the legal protections available to **reporters and their sources**.

Note: This guide provides a general overview of several newsgathering laws in Massachusetts. To review newsgathering law in other jurisdictions, or to access additional information about Massachusetts law, visit the Digital Media Law Project’s legal guide, at <http://www.dmlp.org/>.

Specific facts may change the outcome in the law. This is not a substitute for individualized legal advice, and use of this document does not create an attorney-client relationship with the authors.

Readers should consult the DMLP's online legal guide (at <http://www.dmlp.org/legal-guide>) for more detailed information on these topics and on many additional topics, and may seek the services of the DMLP's Online Media Legal Network if they need specific advice or representation by an attorney.¹ Specific facts can always change the application of the law; this document is not a substitute for individualized legal advice, and use of this document does not create an attorney-client relationship between the reader and the Cyberlaw Clinic, the DMLP, and/or the Berkman Center for Internet & Society.²

In Summary:

- The Massachusetts Open Meeting Law allows the public to access certain meetings held by certain public bodies. It does not apply to courts or to the Massachusetts legislature.
- The law does not limit access based on profession or residency.
- Notice of meetings must be posted at least 48 hours before a meeting, excluding weekends and holidays.
- Minutes of meetings must be made available for inspection and copying after approved by the body.
- A public body may close a meeting by going into "executive session" under certain circumstances, but must follow a specific procedure to invoke the executive session.
- Both administrative and judicial remedies are available for violations of the law.

OPEN MEETING LAW

Overview

The Massachusetts Open Meeting Law³ and accompanying regulations⁴ provide the public with a right of access to the meetings of many public bodies at the state and local levels. Massachusetts law also gives members of the public the ability to inspect and copy meeting minutes and imposes requirements on public bodies to give proper notice before meetings.

What Public Bodies Are Covered?

The Open Meeting Law applies to nearly all boards, commissions, committees, and other multi-member bodies that carry out a government function at the state, county, district, city, region, or town level in Massachusetts. Public bodies covered by the Open Meeting Law include boards of selectmen, city councils, local school boards, and state boards and commissions.

The Law specifically excludes the following from its definition of "public body": (1) the judicial branch of state government; (2) the General Court (*i.e.*, the state legislature) and its committees and subcommittees; (3) boards appointed by particular government officers solely to advise the officer; (4) the Board of Bank Incorporation; and (5) the Policyholders Protective Board. It also does not apply to federal public bodies or private organizations,⁵ or to meetings held by individual government officials (such as a mayor or police chief) where no multi-member public body is participating.

What is a Meeting?

To take advantage of the Open Meeting Law, one must determine both whether the relevant public body is covered and whether the gathering of the body constitutes a "meeting" for purposes of the Law. The Open Meeting Law applies to every gathering of a quorum of a public body where attending members discuss or consider official business within the scope of

their official authority. A “quorum” means a simple majority of members of the public body, unless provided otherwise for a particular public body by law or executive order.

The Open Meeting Law does not apply to public bodies engaged in on-site inspections or attendance at private or public gatherings (such as trainings or social events). It also does not apply to public bodies attending validly open meetings of other public bodies, as long as the visiting members only communicate through open participation in the meeting being held. In all of these circumstances, the members of the public body may not deliberate; if they do, they are subject to the rest of the Open Meeting Law requirements.

The Open Meeting Law also does not apply to a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it, or a session of a town meeting which would include the attendance by a quorum of a public body at any such session.⁶

The Right to Attend Meetings

The Open Meeting Law states that if (1) a public body that falls within the statute has (2) a meeting that falls within the statute, that meeting “shall be open to the public,” with the exception of closed sessions (discussed below). Massachusetts law does not limit access to meetings to a specific category of people or a profession; anyone may attend, including non-residents and non-voters.

The Open Meeting Law provides a right to attend and observe; it does not give the public a right to participate or comment during open meetings. As a matter of practice, however, public bodies often allow members of the public to comment during public meetings. No one may address a public meeting of a public body, however, without permission of the presiding officer, and all persons must be silent upon request of the presiding officer.⁷ Once a person is allowed into an open meeting, that person may record and broadcast the meeting using video or audio, subject to rules by the head of the meeting regarding placement and operation of equipment.⁸

Notice of Meetings

The right to attend meetings is not meaningful without proper notice of those meetings. Accordingly, Massachusetts law requires public bodies to give notice to the public of its meetings. A public body must provide notice at least forty-eight hours in advance (excluding Saturdays, Sundays and holidays) – thus, if a meeting is being held at 1pm on a Monday, notice must be given by 1pm the prior Thursday. An exception applies in “emergency” meetings, that is, those that are held in response to sudden and unexpected events that

demand immediate action; in those circumstances, notice must be given “as soon as reasonably possible” for the meeting.⁹ The notice must contain the date, time, place, and anticipated subject matter of the meeting.¹⁰

Notice of a meeting must be filed and posted in specific ways depending on whether the meeting is taking place at the local, regional, district, county, or state level. Methods of notice for each level of government are described in regulations promulgated by the Attorney General.¹¹

Minutes and Recordings

Public bodies must record and maintain accurate minutes of their meetings, setting forth at a minimum the date, time, place, members present or absent, and action taken at each meeting. Public bodies must create and approve minutes in a timely fashion, and (once they have been created) must make these minutes available to the public for inspection and copying within 10 days of a request by any person.

The minutes of any open session are also public records subject to the Massachusetts Public Records Law (discussed below), along with the notes, recordings or other materials used in the preparation of such minutes, and all documents and exhibits used at the session (provided they were not related to a closed session, as discussed below).¹² The Public Records Law does not apply to: (1) materials used in a performance evaluation of an individual bearing on his professional competence, provided the materials were not created by the members of the body for the purposes of the evaluation; and (2) materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; except for any résumé submitted by an applicant.

Closed Meetings or Sessions

If a public body in Massachusetts wants to hold a closed session, called an “executive session,” it must identify a statutory exception that permits it to do so. The Open Meeting Law lists the following exempted types of meetings that may be closed, including meetings:

- to discuss the reputation, character, physical condition, or mental health, rather than professional competence, of an individual;
- to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual;
- to conduct strategy sessions in preparation for
 - negotiations with nonunion personnel;

- to conduct collective bargaining sessions or contract negotiations with nonunion personnel; or
- collective bargaining or litigation, if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;
- to discuss the strategy or deployment of security personnel or devices;
- to investigate charges of criminal misconduct or to consider the filing of criminal complaints;
- to consider the purchase, exchange, lease, or value of real estate, if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;
- required to be closed in order to comply with, or act under the authority of, any other special law;
- to consider or interview applicants for employment or appointment by a preliminary screening committee, if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants;
- to meet or confer with a mediator with respect to any litigation or decision on any public business; or
- when the government is acting in its capacity as an energy supplier, municipal aggregator, or as part of a cooperative of government entities, to discuss trade secrets or other confidential or other proprietary information provided in the course of such activities, when the body 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.¹³

Many of these exemptions are subject to additional limitations, and the exemptions are not mandatory: a public body is not required to close a meeting that qualifies for an executive session. Assuming that a public body is dealing with one of these enumerated exemptions, it may hold an executive session as long as it satisfies the following procedural requirements:

1. the public body must first convene in an open meeting for which notice was given;
2. at this open meeting, the public body must vote by a majority of members of the body present to go into executive session;

3. prior to the vote, the presiding officer must state for the record the statutory exemption relied on to close the meeting;
4. before going into executive session, the presiding officer must state whether the body will reconvene after the executive session; and
5. accurate records of the executive session must be maintained, but the public body may keep these minutes confidential for “as long as publication may defeat the lawful purposes of the executive session, but no longer.”¹⁴

Remedies

If a person believes that a public body has violated his or her right of access under the Open Meeting Law, he or she has two options under the law.¹⁵

First, a person may ask the Attorney General for the Commonwealth to investigate and take action with respect to violations of the Open Meeting Law. Prior to doing so, however, the person must file a complaint with the relevant public body within 30 days of the alleged violation. The public body then has 14 days (subject to extension at the discretion of the Attorney General) to review the complaint and take any remedial action. If, after 30 days the complaining party is not satisfied with the remedial action taken, the party may then file a complaint with the Attorney General.¹⁶

Alternatively, a person may file a lawsuit directly against the public body in state court, but only if the person organizes three or more registered voters to act as plaintiffs in the case. A lawsuit against a public body at the state level must be filed in Suffolk County Superior Court. Lawsuits against other public bodies must be filed in the superior court for the county in which the public body acts or meets. If one sues and wins, available remedies include an order barring future violations, disclosure of meeting minutes from improperly closed meetings, invalidation of past actions taken in such meetings, and/or a civil penalty of not more than \$1,000 per intentional violation of the law.

Note: this section addresses Massachusetts Public Records Law. For information on how to request records from the federal government using FOIA, visit <http://www.dmlp.org/legal-guide/access-records-from-federal-government>.

PUBLIC RECORDS LAW

Overview

Newsgatherers reporting on the government can gain valuable insights through the use of public records laws, which allow members of the public to inspect and/or obtain copies of government documents. Many are at least generally familiar with the federal Freedom of Information Act or “FOIA,”¹⁷

which governs requests for government documents at the federal level. The Massachusetts Public Records Law provides the analogous framework for public records requests directed to state and local governments in the Commonwealth.

Pursuant to the Massachusetts Public Records Law, any person¹⁸ has a statutory right to inspect a vast number of the Commonwealth's public records. Note that the law allows persons to request copies of existing documents but does not compel the government to create a document that does not already exist. One need not explain to the government the reason for the request,¹⁹ but certain categories of requests (including requests for building and infrastructure plans, vulnerability assessments, or security measures) may give rise to a response from the party in charge of disclosure of records (the "records custodian") requesting an explanation of the purpose behind the request. Although the party requesting records is not required to answer, he or she may wish to do so, as the records custodian is empowered to refuse to disclose records if, in his or her judgment, the disclosure will jeopardize public safety.²⁰

Government Bodies Covered in Massachusetts

Any individual may inspect the public records of any Commonwealth agency, executive office, department, board, commission, bureau, division or authority, or of any of their political subdivisions, as well as any authority established by the legislature to serve a public purpose. The Public Records Law does not, however, apply to the Massachusetts state legislature or its committees, or to the state courts.

Types of Records that May be Requested

One may inspect all "public records" of the government bodies subject to the Public Records Law. The term "public records" is broadly defined to include all documents, including those in electronic form, generated or received by any government body covered under the law.²¹

Exemptions

A records custodian may (though in many cases, is not required to) refuse disclosure if the records requested fall into a category that is statutorily exempted from disclosure. Exempted categories include the following:

- records related solely to internal personnel rules and practices;²²
- records that contain personnel and medical information, the disclosure of which would constitute an unwarranted invasion of privacy;²³

In Summary:

- Under the Massachusetts Public Records Law, any person has the right to inspect the records of the Commonwealth, for any reason.
- The law allows a party to inspect and copy existing records, but does not compel the government to create a record that does not exist.
- The law does not apply to the state legislature or courts.
- A records custodian may (but is usually not required to) refuse disclosure for a number of specifically enumerated reasons.
- A custodian has ten days to comply or reject a request made orally or in writing.
- The custodian may charge fees for the time taken to locate and review records, and for the copying of any records, but such fees may be waived in some circumstances.
- A requesting party who is not satisfied with the material disclosed may petition the state Supervisor for Public Records, or file a lawsuit to compel disclosure.

- investigatory materials created by law enforcement, the disclosure of which would probably prejudice effective law enforcement;²⁴
- records containing proposals and bids to enter into any contract, and records concerning the evaluation process for reviewing bids or proposals, until the time the proposals and bids are to be opened publicly;²⁵
- the names and addresses of any persons contained in (1) applications for licenses to carry or possess firearms, or (2) sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition;²⁶
- contracts for hospital or medical services between a government-operated healthcare facility and a health maintenance organization or a health insurance corporation;²⁷
- building and infrastructure plans and emergency procedures whose disclosure might create a public safety risk;²⁸
- the home address and home telephone number of many public employees and their family members;²⁹ and
- records exempt under another statute (e.g. records of executive sessions of public bodies, the state central voter registry, or records subject to federal health and education privacy laws);³⁰

Other specific exemptions cover a government employee's personal materials not related to government function;³¹ trade secrets or other confidential commercial information given to the state for use in developing policy;³² memoranda or letters relating to policy positions being developed by the agency;³³ appraisals of real estate acquired or to be acquired (until a final agreement is entered into or any litigation relative to such appraisal has been terminated);³⁴ the questions and answers and scoring keys used with a test or examination, as long as the information is to be used for another test or examination;³⁵ contracts for hospital or medical services between a government-operated healthcare facility and a health maintenance organization or a health insurance corporation;³⁶ contracts for hospital or medical services between a government-operated healthcare facility and an HMO or health insurance corporation;³⁷ and information collected in the adoption contact information registry.³⁸

How to Request Records in Massachusetts

To request records in Massachusetts, one should make an oral or written request to the records custodian for the government body whose public records one wishes to inspect. (Because the party making the request may need to show evidence of the request at a later date, it is generally better to

make a request in writing.) If the party seeking records does not know the identity of the records custodian, he or she should call the government body and ask for the records custodian's contact information. The records custodian has ten days to refuse or comply with a request.³⁹

A party making a request is expected to pay the "actual expense" of any search conducted to obtain the record (with some specific limitations imposed by the Secretary of the Commonwealth). Additionally, the custodian may charge specific fees listed in the statute for the copying of the records.⁴⁰ The custodian of records is obligated to provide an estimate of costs whenever the expected costs of the request exceed ten dollars.⁴¹ In some cases, a records custodian has the discretion to waive fees if disclosure is in the public interest.

Remedies

If the custodian refuses to disclose any record or part thereof, the custodian is required to state in writing the justification for the refusal.⁴² If a request is denied, the requesting party should first try to resolve the issue with the records custodian. If the agency is relying on an exemption, one may ask the records custodian to release the record with the exempt portions removed or redacted. Courts have recognized that line-by-line redactions may be used when a record falls within a given exception, and at least one court has required a records custodian to provide such a redacted document.⁴³

One may also petition the Supervisor of Public Records, an administrative official within the Secretary of the Commonwealth's office, if a request is denied. Such a petition is initiated by sending the Supervisor – within ninety days following the date of the *original request* (i.e., not within ninety days following the date of the denial) – a letter stating the reasons for the appeal. The letter must be accompanied by the petitioner's original request and the written response, if any, received from the custodian of the record. If the Supervisor finds that the records are public, the Supervisor can compel the records custodian to comply.

Alternatively, the party seeking records may seek court review of the denial by filing a lawsuit in the Superior Court of the county where the government body is located.⁴⁴

In Summary:

- Members of the public have the constitutional right to attend criminal court proceedings, but may be denied if a party can show an overriding interest that is likely to be prejudiced. A court must consider reasonable alternatives to closure, and make findings adequate to support the disclosure.
- Similar rights exist under the common law for access to civil trials, and may similarly be overcome by an overriding party interest.
- There is a First Amendment right to access court records in criminal proceedings “about which the public has a right to know,” and may only be overcome in specific circumstances.
- Both civil and criminal records are subject to a common law right of access, but such access can be overcome by compelling private interests or superseded by statutes.

ACCESS TO COURTROOMS AND COURT RECORDS

Court proceedings and documents are generally public, but there are specific limitations on the rights of independent reporters and others to cover the judicial branch. These limitations are generally oriented toward balancing the First Amendment rights of those seeking access with privacy and fair trial interests of those involved in litigation (e.g., ensuring that public access will not severely interfere with the right to a fair trial, intimidate witnesses, or prejudice a jury). Because the rights of access vary between criminal and civil proceedings, as well as between accessing the courtroom and the documents filed in the court process, each is examined in turn.

To access a court room during a trial, one needs only to go to the court and enter the courtroom. Reporters should be aware of the rules of decorum in the particular court, and be mindful not to interfere with the court process.

The Right of Access to Courtrooms: Criminal Proceedings

Members of the public, including reporters, have a constitutional right to attend criminal court proceedings.⁴⁵ This includes the preliminary hearing and the jury selection process. That said, one may be denied access to a courtroom if a party demonstrates an overriding interest that it is likely to be prejudiced. If the trial court closes the proceeding, the closure must be no broader than necessary to protect the interest of the party asserting the need for closure. The court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.⁴⁶

Unlike criminal trial proceedings, criminal grand jury proceedings are not generally open to the public and members of the media. Grand jury proceedings involve the presentation by a prosecutor of evidence before a group of jurors, who determine if there is a sufficient basis to bring criminal charges against a person. Grand jury proceedings are held in secret.⁴⁷

Some categories of criminal proceedings have traditionally been closed to the public, including “side-bar” or “in-chambers” conferences between lawyers and judges, and plea-bargaining sessions between prosecutors and the defendants. The public is also generally excluded from most juvenile proceedings in Massachusetts,⁴⁸ but one may be able to attend the proceedings if the Commonwealth proceeds by indictment (that is, if the juvenile is “tried as an adult”).⁴⁹

The Right of Access to Courtrooms: Civil Proceedings

Members of the public have a common law right of access to civil trials.⁵⁰ This right is not absolute, and may be overcome in certain circumstances, but a judge must make every effort to arrive at a reasonable alternative to closure.⁵¹

The Right of Access to Court Records

Journalists and others have a right to access most court documents in criminal and civil cases in Massachusetts. In criminal proceedings, there is a First Amendment right of access, because, in the words of the United States Court of Appeals for the First Circuit, “without access to documents the public . . . would not always be in a position to serve as an effective check on the system.”⁵² The full scope of the constitutional right of access is not settled, but courts have found that the First Amendment covers most documents associated with criminal trials. According to the Massachusetts Supreme Judicial Court, “only in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings . . . which have been held in open court; and a similar rule would apply to court files otherwise unrestricted.”⁵³ Such documents include legal memoranda filed with the court by parties in criminal cases,⁵⁴ lists of jurors,⁵⁵ and records of completed criminal cases that ended without conviction.⁵⁶

Courts have stated that judicial records in Massachusetts are presumptively open to the public,⁵⁷ including records of civil cases.⁵⁸ The right to access such records applies to all members of the public,⁵⁹ and that right includes a right to obtain copies of documents for a reasonable fee.⁶⁰ Court clerks are obligated to facilitate the public’s right of access, and parties seeking access to records should look for instructions on the relevant court’s website.⁶¹

Limitations on the Right of Access to Court Records

The right of access to court records is subject to some limitations. The First Amendment right only protects access to documents related to *criminal* proceedings, and the common law presumption of access to all judicial records (civil and criminal) is limited both by statute and by the power maintained by individual judges to control records in proceedings over which they preside and protect the interests of parties before them.⁶²

The First Amendment Right of Access to Criminal Court Records

The First Amendment protects access to “records connected with proceedings about which the public has a right to know,”⁶³ which has been defined by the Supreme Court as proceedings that have traditionally been open to the

public⁶⁴ and “where public access “plays a particularly significant positive role in the actual functioning of the process.”⁶⁵ The First Amendment does not apply to documents related to government operations that cannot be conducted openly, those that are not directly connected to a criminal case, and those that, if disclosed, may impose significant societal consequences.⁶⁶

Where a First Amendment right of access attaches, that right may be overcome only where denial of the right “is essential to preserve higher values and is narrowly tailored to serve that interest.” If the countervailing interest is the right of the accused to a fair trial, access may be denied “only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that [denial of access] would prevent and, second, reasonable alternatives to [denial of access] cannot adequately protect the defendant’s fair trial rights.”⁶⁷

A defendant’s right to privacy may outweigh the public’s right of access.⁶⁸ For example, in *In re Boston Herald*, the First Circuit held that the First Amendment did not require disclosure of documents a criminal defendant submitted to show financial eligibility for funds for legal assistance.⁶⁹ The court stated that the documents were not analogous to any documents traditionally open to the public,⁷⁰ and that their disclosure would not allow for productive public oversight but instead would negatively affect the criminal justice system by discouraging defendants from seeking funds for their defense.⁷¹ The court emphasized that “the disclosure of a defendant’s sensitive personal financial information, which has no bearing on the merits of the criminal trial, could well undermine the judicial process.”⁷² The court noted that the “invasion of privacy inherent in disclosing this data” was significant, and that it “impose[d] a high price on the exercise of one’s constitutional right to obtain counsel.”⁷³

Courts have found that the Constitution does not ensure access to documents related to grand jury proceedings, which are closed to the public,⁷⁴ discovery materials in civil proceedings,⁷⁵ and presentence reports.⁷⁶

The Common Law Right of Access to Civil and Criminal Records

The common law presumption of access applies more broadly, to all “judicial records” in all proceedings, both civil and criminal.⁷⁷ The First Circuit has stated that “only the most compelling reasons can justify non-disclosure of judicial records,” and may only be limited where access could interfere with administration of justice or court files might be used as a vehicle for “improper purposes.” Even then, a court must “weigh the presumptively paramount right of the public to know against the competing private interests at stake.”⁷⁸

In addition, Massachusetts state courts are limited in their ability to bar public access to documents by the Massachusetts Rules of Impoundment Procedure. Echoing constitutional standards, the Supreme Judicial Court of Massachusetts has held that state courts must consider the “competing rights of the parties and alternatives to impoundment” before impounding records.⁷⁹

The legislature can modify the common law right of access by passing statutes, and the Massachusetts legislature has created a number of statutes governing impoundment of court records. For example, individuals cannot access an application for a search warrant before the warrant has been granted or financial records in a divorce proceeding, and courts may restrict access to the results of mental health examinations and the names of sexual assault victims.⁸⁰

Case Study: In re Globe Newspaper Co.

In *In re Globe Newspaper Co.*, the Massachusetts Supreme Court affirmed that it will construe statutes governing access to court documents in favor of a public right of access.⁸¹ In 2010, a Massachusetts court conducted an inquest into the death of Seth Bishop, which had been deemed an accident after his sister Amy Bishop shot and killed him in 1986. Prosecutors grew concerned that the shooting had not been accidental after Amy Bishop was charged with fatally shooting three of her fellow faculty members at the University of Alabama in 2010.⁸² The judge conducting the inquest evaluated the circumstances surrounding the death and filed a report and transcript on the investigation in the court.⁸³ Soon thereafter, a grand jury indicted Bishop for murder.⁸⁴ The Boston Globe immediately filed a motion to inspect and copy the inquest report and transcript.⁸⁵ Its motion was denied.⁸⁶

The case reached the Massachusetts Supreme Judicial Court, where the court observed that an inquest proceeding is not a trial and is not traditionally open to the public, meaning that the First Amendment right of public access did not apply.⁸⁷ Under the common law right of access, inquest documents are to remain impounded until the ultimate resolution of a case.⁸⁸ However, the court held that the legislature had superseded that common law rule by enacting a statute requiring that inquest transcripts be impounded until a district attorney certifies that a case will not be presented to a grand jury, or a grand jury makes a decision on whether or not to indict the subject of the inquest.⁸⁹ The court read this statute to mean that, once either of those things occurs, an inquest transcript is no longer automatically impounded and becomes presumptively accessible.⁹⁰ The Bishop inquest documents therefore should have been presumptively available when the grand jury filed its indictment.⁹¹

Nevertheless, the SJC further held that the statute did not take away the court's inherent authority to impound documents after they become presumptively accessible "when justice so requires,"⁹² and stated that inquest records should stay impounded for ten days following the event that triggers the presumption of openness.⁹³ The court therefore remanded the case to allow parties to move to keep the record impounded and for the judge to make findings on whether the interests of justice required impoundment of some of all of the inquest records.⁹⁴ The lower court ultimately released more than 300 pages of testimony regarding the Bishop case, though large portions of testimony were redacted due to the risk that "prejudice" would "infect prospective jurors."⁹⁵

In Summary:

- Federal courts do not generally allow cameras in the courtroom.
- Massachusetts state courts allow cameras subject to the rules and procedures of SJC Rule 1:19.
- Access is granted under Rule 1:19 to registered media entities, with registration afforded to individuals and organizations who regularly report or publish news about matters of public interest.
- Recording requires prior authorization under Rule 1:19, and must not interfere with the decorum of the proceeding.
- If a person lawfully records information in court, the government may not stop its dissemination absent a state interest of the highest order.

RECORDING COURT PROCEEDINGS

Overview

In addition to attending court sessions and accessing court documents, newsgatherers may wish to record a hearing or other court proceedings. A critical question for such newsgatherers is whether, and to what extent, cameras or other electronic devices may be used in the courtroom. Photography and recording of court proceedings raise two separate but related sets of legal issues.

First, there is the issue of electronic access – *i.e.*, whether reporters are allowed to use cameras or other electronic devices to record proceedings in court.⁹⁶ Second, there is the issue of whether the court may restrain any reporter that was allowed to record the proceeding from publishing any information that he or she obtains while doing so.

Federal and state courts have taken widely divergent approaches to the first issue (re: electronic access), with Massachusetts recognizing a presumptive right of access by a broad range of media organizations. The second issue (re: so-called "prior restraints" on dissemination) has received more uniform treatment by federal and state courts, both of which have expressed their strong disapproval of such limitations.

Camera Access and SJC Rule 1:19

Federal courts in the United States have been historically and almost uniformly hostile to camera coverage of court proceedings. Although most federal court proceedings are public, the United States Supreme Court has made clear that there is no general First Amendment right of the press to bring cameras into courtrooms. Former Supreme Court Justice David Souter notoriously quipped that "the day you see a camera come into our courtroom, it's going to roll over my dead body."⁹⁷

The courts of the Commonwealth have been far more willing than their federal counterparts to engage with the press and permit electronic coverage of state court proceedings. The Massachusetts Supreme Judicial Court maintains an active Judiciary-Media Committee, members of which include justices from the SJC and other courts throughout the Commonwealth, courtroom clerks and administrative officers, and media representatives and lawyers who have worked on issues relating to public access to the courtroom. Consistent with its general willingness to recognize the importance of press and public access to courtrooms, proceedings before the SJC itself are livestreamed and archived online.

The right of parties in the Commonwealth to use cameras to record court proceedings is governed by Supreme Judicial Court Rule 1:19. The Rule was amended in 2012, and it now permits a broad range of parties to engage in many reporting activities within courtrooms in the Commonwealth. At the heart of the amended Rule 1:19 is Section 2, which creates a presumption in favor of electronic access by providing that “[a] judge shall permit photographing or electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public,” subject to some limitations.

Rule 1:19(2) is notable for its express recognition of the rights of citizen journalists, bloggers, and other non-institutional reporters who regularly publish in electronic media. Rule 1:19(2) defines news media to include “any authorized representative of a news organization that has registered with the Public Information Officer of the Supreme Judicial Court or *any individual who is so registered*” (emphasis added), with registration “afforded to organizations that regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic, and to individuals who regularly perform a similar function.”

The rule provides that a judge “shall permit photographing or electronic recording or transmitting of courtroom proceedings open to the public . . . for news gathering purposes and dissemination of information to the public,” subject to certain limitations, and expressly permits the news media “to possess and to operate in the courtroom all devices and equipment necessary to such activities.” The Rule includes a non-exhaustive list of permitted devices, which “include, without limitation, still and video cameras, audio recording or transmitting devices, and portable computers or other electronic devices with communication capabilities.”⁹⁸ Covert recording is not permitted, and recording requires prior authorization by the supervising judge or magistrate.⁹⁹ Recording equipment should be “operated in a manner which does not detract from the dignity and decorum of the proceeding.”¹⁰⁰

A judge may limit or suspend recording “if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.” Certain proceedings are expressly precluded from recording, including the “voir dire” paneling of jurors or perspective jurors; recording or transmission of bench and sidebar conferences; recording or transmission of conferences between lawyers and their clients; and “frontal or closeup photography of jurors and perspective jurors.” The rule similarly precludes photography of minors and sexual assault victims without a judge’s consent.¹⁰¹

Although the amended Rule 1:19 contains limitations designed to preserve the integrity of court proceedings and protect privacy interests of jurors and minors, its presumption in favor of access and its recognition that a broad range of players beyond those traditionally associated with courtroom coverage currently occupy the media space provide valuable tools for independent journalists.

Prior Restraints

A court order that prospectively limits one’s right to disclose information that he or she learned in a public courtroom constitutes a prior restraint on speech. As a general matter, prior restraints are very strongly disfavored under US law. In the words of the Supreme Court, prior restraints represent “the most serious and the least tolerable infringement on First Amendment rights,” and therefore constitute “one of the most extraordinary remedies known to our jurisprudence.”¹⁰²

Although a court may order that certain information be withheld from the public prior to their disclosure, orders silencing news organizations from reporting what is already disclosed are presumptively unconstitutional.¹⁰³ This presumption applies with particular force to limitations placed on media reporting that concern criminal proceedings.¹⁰⁴ There is a “heavy presumption against [a prior restraint’s] constitutional validity.”¹⁰⁵

Given courts’ general hostility to prior restraints, it is difficult to imagine a scenario in which a court might legitimately direct members of the press to refrain from reporting on something disclosed during a public court proceeding.

Case Study: OpenCourt

Massachusetts law on both camera access and prior restraint has been shaped in recent years by WBUR’s OpenCourt project.¹⁰⁶ For more than a year and a half OpenCourt provided a regular, live, audiovisual stream and publicly accessible online archive of court proceedings at Quincy District Court. By

allowing the public to see the day-to-day operations of a state District Court first-hand, OpenCourt broke new ground and delivered on the promise of the Internet as a tool for democratizing the sharing of information and open access to government.

OpenCourt became embroiled in two separate sets of cases during its tenure in Quincy District Court, the first of which directly related to the issues of camera access and prior restraint. The litigation began shortly after OpenCourt went live in 2011, when it became the subject of two emergency petitions to a Single Justice of the Massachusetts Supreme Judicial Court. Both petitions were assigned to Justice Botsford. In one case (*Commonwealth v. Barnes*), the Norfolk District Attorney's Office argued on behalf of the Commonwealth that the district court should have the ability – at the close of a public proceeding – to order OpenCourt not to publish recordings that it lawfully made during that proceeding or to require specific redactions before the recordings are posted online in order to address concerns about the privacy of victims. In the other case (*Commonwealth v. Diorio*), a criminal defendant represented by the Committee for Public Counsel Services ("CPCS") argued that OpenCourt's archiving of audiovisual recordings of his pre-trial proceedings impacted his right to receive a fair trial under the Sixth Amendment. Justice Botsford referred both cases to the full SJC, and the Court heard oral argument in November 2011.

In a decision issued in March 2012, the SJC rejected both the Commonwealth's and CPCS's petitions and ruled in favor of OpenCourt's right to distribute its recordings of the court proceedings. The Court held that orders like those at issue in the two cases would constitute unlawful prior restraints, which violate the First Amendment in all but the most narrow of circumstances:

We conclude that any order restricting OpenCourt's ability to publish—by "streaming live" over the Internet, publicly archiving on the Web site or otherwise—existing audio and video recordings of court room proceedings represents a form of prior restraint on the freedoms of the press and speech protected by the First Amendment and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. Such an order may be upheld only if it is the least restrictive, reasonable measure necessary to protect a compelling governmental interest.

In reaching this conclusion, the Court rejected arguments that the nature of OpenCourt's operation (including its use of cameras to permit an online stream and archive) made prior restraint analysis improper. Although there is no constitutional right to record or broadcast court proceedings, the SJC held

that “if a court chooses in its discretion to allow recording, the person or entity making it has the same First Amendment freedom to disseminate the information it records as any other member of the print media or public, and the court is limited by the prior restraint doctrine in its ability to restrain the publication of the recording.” Indeed, the Court noted, even if a lower court were found to have abused its discretion by permitting a recording, “there can be no restraint on publication of the recording unless the court also determines that such a restraint is necessary to protect a compelling governmental interest and is the least restrictive reasonable method to do so.”

Considering arguments advanced by the Commonwealth and Diorio, the SJC held that neither had proffered sufficient evidence to support a finding that the interests in question – the interest in protecting the privacy of a minor victim in *Barnes* and the interest in a criminal defendant’s right to a fair trial in *Diorio* – were sufficiently compelling to justify a prior restraint. And, even if those interests were sufficiently compelling, the SJC ruled that a prior restraint would not be the “least restrictive means” of addressing the Commonwealth’s and Diorio’s concerns.

THE MASSACHUSETTS WIRETAP STATUTE: RECORDING PUBLIC OFFICIALS IN PUBLIC

Overview

At the heart of the rise of independent journalism is the democratization of the tools required to produce and distribute news content in the hands of individual citizens. One example of this is the recent and rapid spread of cell phones and other affordable handheld devices capable of recording video. Virtually any person now has the ability to capture footage at any time, including footage of government officials carrying out their professional responsibilities in public.

Of particular note, the ease of access to high-quality portable video recording equipment has allowed citizens to document police misconduct. In 2009, for example, a Springfield, Massachusetts woman with a handheld video recorder filmed a police officer beating a man unconscious.¹⁰⁷ The officer was fired and sentenced to eighteen months in jail for assault and battery, and the City ultimately settled with the arrestee for \$575,000.¹⁰⁸

In response to the growing prevalence of citizens recording the police, there appears to be a countering trend of prosecutions against such citizens under state wiretap laws. State wiretap statutes differ, but they generally criminalize

certain recordings made without the consent of some or all participants in the conversation or event being recorded.

The Massachusetts wiretap act is notably different from other state and federal wiretap laws. Many such statutes are expressly limited to situations in which the parties being recorded have a reasonable expectation of privacy, but Massachusetts's statute does not contain such a limitation, and instead punishes "secret" recording of conversations, looking to the nature of the recording instead of the substance of what was recorded.¹⁰⁹

The Massachusetts wiretap act has been applied to those recording the police in several cases. In the 2009 Springfield case referenced above, the officer caught beating a suspect applied to have a criminal wiretapping charge filed against the recorder.¹¹⁰ The officer was unsuccessful in that case. But, in 2001, Massachusetts' highest court upheld a citizen's conviction for violating Massachusetts' wiretap statute after he secretly recorded his interaction with a police officer at a traffic stop.¹¹¹ The application of the wiretap law to such conduct received its first significant constitutional analysis, however, after the landmark 2011 case *Glik v. Cunniffe*.

Case Study: *Glik v. Cunniffe*

Glik v. Cunniffe concerns the arrest of Simon Glik by Boston Police officers for a violation of Massachusetts wiretap law after he used a cell phone to record them while they were making an arrest on Boston Common.¹¹² A Boston municipal court later dismissed all charges against Glik, and, with the help of the American Civil Liberties Union of Massachusetts, he filed a civil rights action against the officers and the City of Boston claiming that he was arrested for exercising his constitutional rights.¹¹³

In its opinion in the case, the First Circuit held that private citizens have a "basic, vital, and well-established" First Amendment right to "film government officials, including law enforcement officers, in the discharge of their duties in a public space."¹¹⁴ The right to videotape police officers was not limited to members of the institutional media; it was "of no significance" in the *Glik* case that Glik was a "private individual, and not a reporter."¹¹⁵ After the First Circuit affirmed that Glik was exercising a "clearly established" First Amendment right by videotaping the officers, the City settled with Glik for \$170,000.¹¹⁶ Glik had recorded police openly (and thus was found by the earlier municipal court not to have violated the wiretap act), but that fact was not important to the court's First Amendment analysis. Rather, the court broadly stated that it was unambiguous that there is a "constitutionally protected right to videotape police carrying out their duties in public."¹¹⁷

In Summary:

- The Massachusetts wiretap statute punishes secret audio recording of conversations, regardless of the nature of the conversation.
- There has been a trend in recent years with law enforcement attempting to enforce wiretap laws against individuals recording the police.
- The federal appeals court governing Massachusetts has recognized a constitutional right to record the police in the discharge of their duties in public, but it is as yet unclear whether that right would extend to secret recordings.
- Those recording the police should keep a respectful distance away and not interfere with the activity being recorded.

The Eleventh,¹¹⁸ Ninth,¹¹⁹ and Seventh¹²⁰ Circuits have also found a First Amendment right to videotape police officers or matters of public interest in public places, and none of them have limited the right to institutional media.

Secret vs. Obvious Recordings

While citizen journalists should feel empowered to take advantage of this right to collect news and monitor police behavior, it is important that they be aware of restrictions on the right to record. First, when recording police, individuals should generally do so openly, because it remains unclear whether *secret* recordings of police officers receive the same First Amendment protection as the recordings in *Glik*. In 2012, an individual was arrested and charged with violating the Massachusetts wiretap law for secretly videotaping an officer during a traffic stop in Shrewsbury.¹²¹ The case has not yet gone to court, but it could clarify whether *Glik* is limited to open recording or recognizes a First Amendment right to secretly record police in public. In the meantime, it is wise for news gathers to make sure that all recordings are made openly.¹²²

Interference with Police Activities

Additionally, citizen reporters must record from a place where they are legally allowed to be and must be peaceful and not interfere with officers' ability to do their jobs. It was important to the *Glik* court that *Glik* recorded "peaceful[ly]" in a public forum, kept a comfortable distance from the officers, did not speak to them except to respond to their questions, and generally did "not interfere with the police officers' performance of their duties."¹²³ Similarly, in *Alvarez*, the Seventh Circuit limited the right to record to situations where individuals record from public locations where they "have a legal right to be . . . and to watch and listen to what is going on around them" and their behavior is "otherwise lawful—that is, not disruptive of public order or safety."¹²⁴

Citizen reporters should be particularly careful not to interfere with officers' ability to do their jobs in potentially dangerous situations. In *Gericke v. Begin*, a New Hampshire court interpreting *Glik* held that "non-peaceful recording of police officers, in a way that does interfere with the performance of their duties, is not constitutionally protected conduct (or, at the very least, it has not been 'clearly established' that it is)."¹²⁵ Unlike in *Glik*, the officers in the case "face[d] a potentially dangerous situation: a late night traffic stop involving multiple vehicles, six citizens (some of whom were quite vocal, even confrontational, in expressing their opposition to the officers), and at least one firearm."¹²⁶ The court concluded that, in this situation, if the plaintiff had behaved as disruptively as the officers alleged she had (questioning the validity of the traffic stop and shouting at the driver to not

cooperate with the vehicle stop), her recording was not clearly protected by the First Amendment.¹²⁷

Individuals should therefore maintain a safe and respectful distance from officers while videotaping. In *Glik*, the court noted that Glik videotaped from approximately ten feet away.¹²⁸ In contrast, in *Bleish v. Moriarty*, a New Hampshire court found that a plaintiff had not shown that she was arrested for exercising her constitutional right to videotape when “by positioning herself extremely close to the officers as they made the arrest,” she had “helped to create a hostile and potentially very dangerous situation for all involved.”¹²⁹ Bleish followed police, shouted questions at them, engaged in a conversation with the arrestee, videotaped the handcuffing at close range, and, upon being asked to back away from the patrol car, stuck the video camera into the car through the open window.¹³⁰ She was arrested and charged with disorderly conduct, not for violating a wiretap law, and the court noted that “being arrested *while* exercising constitutional rights is very different from being arrested *for* exercising those rights.”¹³¹

Individuals who choose to record police officers in Massachusetts still face the threat of arrest while making such recordings if they record secretly or if their behavior is disruptive or dangerous. But, when lawfully in a public place, individuals have a clearly established constitutional right to videotape and audio record police officers at work as long as they do so openly, peacefully, and without interfering with officers’ ability to do their jobs.

PROTECTIONS FOR REPORTERS AND THEIR SOURCES

Overview

In the context of criminal and civil proceedings, parties generally have “a right to every man’s evidence,”¹³² and all people are required to respond to subpoenas by testifying and providing any and all evidence they have. There are, however, exceptions to this general rule. Certain individuals may invoke a “privilege” not to testify on certain topics. For instance, in most states, doctors cannot be required to testify on patient communications.¹³³ If a court determines that a privilege does not apply, however, a person must either provide the requested information or face stiff civil and criminal penalties. Independent reporters must therefore be aware of their vulnerability to subpoenas when discussing confidentiality with sources.

Some states have extended such a privilege against disclosure to reporters, either through “shield laws” protecting reporters’ confidential sources or unpublished documents or through court interpretation of a privilege rooted

In Summary:

- Massachusetts does not have a reporters' shield statute.
- State courts apply a common law balancing test, protecting reporters the need for the information is outweighed by the harm that the disclosure would cause to future reporting. Application of this test is rather uncertain.
- The federal courts in Massachusetts recognize a limited protection for reporters rooted in the First Amendment, as long as the party invoking the privilege gathered the information with the intent to use it in reporting.
- Given the uncertain nature of privilege law in Massachusetts, reporters should make clear that they cannot promise absolute confidentiality to their sources.

in the First Amendment. Massachusetts, however, does not have a shield law, and neither the federal nor state courts in Massachusetts have found an absolute privilege for journalists. Nevertheless, there are certain limited protections found in both state and federal court drawing from the common law and the First Amendment.

Massachusetts State Courts and Their Common Law Balancing Test

Courts have found a limited reporter's privilege based in the state rules of discovery that prevents disclosure when a judge determines that the need for the information is outweighed by the harm that disclosure would cause to future reporting.¹³⁴ This is a balancing test,¹³⁵ which gives judges considerable discretion.¹³⁶ In state court, the application of the privilege depends on a balancing of the interests regardless of whether the reporter has been subpoenaed in a civil or criminal case.

Courts have not provided a conclusive list of elements necessary to overcoming the privilege, and a wide range of considerations may be included in the balancing. State courts consider First Amendment rights generally, the defendant or litigant's constitutional rights or interests, and the public's interest. More specifically, courts have considered whether the material is available from other sources,¹³⁷ whether the reporter has volunteered information that would narrow the range of possible sources,¹³⁸ whether the source's identity is promised to be kept confidential,¹³⁹ whether the reporter is a party to the case (party reporters being more likely to have to disclose material),¹⁴⁰ and whether the evidence sought is central to the case. The privilege does not apply to a reporter's personal observation of criminal activity.¹⁴¹

Courts have not clarified who is entitled to invoke the privilege. However, one court that has considered the question held that an investment analyst who had written a report on a company could invoke the reporter's privilege.¹⁴² The court noted that, "[w]hether or not [the analyst] is a member of the 'organized press' per se, . . . he is engaged in the dissemination of investigative information . . . It further appears that the 'speech' at issue relates to 'matters of public concern.'" The court therefore held that the analyst was entitled to the privilege like "any other media reporter."¹⁴³

The bottom line for independent journalists is that there is no clear protection for confidential sources or documents under the state law. The court will decide whether, based on balancing all the interests involved, the privilege applies. If the court determines that it does not apply, the reporter will be compelled to testify or be held in contempt of court. It is therefore wise for reporters to be clear with sources about the state of the law and to not promise sources absolute confidentiality.

The First Circuit: Qualified Reporters Privilege Based on the First Amendment

Despite the lack of a statute protecting reporters' sources, the lack of an absolute constitutional protection, and a weak privilege found in the common law, there does exist a fourth grounds for protection of sources.

Some federal courts, including the First Circuit, recognize a qualified reporter's privilege based on the First Amendment. The right is found through analysis of a complicated Supreme Court case called *Branzburg v. Hayes*.¹⁴⁴ In *Branzburg* the Supreme Court considered whether the First Amendment provides a privilege for reporters to protect their sources when being called before a grand jury. While a majority of the court declined to "grant newsmen a testimonial privilege that other citizens do not enjoy,"¹⁴⁵ the Court decided the case with a bare majority of five justices, and one of the five wrote separately to "emphasize . . . the limited nature of the Court's holding"¹⁴⁶ and state that the First Amendment does provide some limited protection for journalists which courts must evaluate by balancing "freedom of the press [against] the obligation of all citizens to give relevant testimony . . . on a case-by-case basis."¹⁴⁷ Thus, the case was decided with four justices saying no privilege applies, four justices saying a privilege always applies, and one justice saying that a privilege *may* apply based on specific facts.

The First Circuit has interpreted this to mean that the First Amendment affords some degree of protection to journalists "as long as [they] intended at the inception of the newsgathering process to use the fruits of [their] research to disseminate information to the public."¹⁴⁸ The degree of protection depends upon the circumstances of each case. First, courts must make a threshold finding that the evidence sought is relevant to the case at issue, and the subpoena is not being used to harass the reporter.¹⁴⁹ Then, based on the circumstances, courts "balance the potential harm to the free flow of information that might result from disclosure against the asserted need for the requested information,"¹⁵⁰ keeping in mind that disclosure should not be "casually" or "cavalierly" compelled.¹⁵¹ In civil cases, courts consider factors including whether or not there is an alternative means of obtaining the information,¹⁵² the importance to society of reporters disseminating information on the particular topic and the importance of confidential sources to their ability to report on that topic,¹⁵³ whether or not information was truly obtained in confidence,¹⁵⁴ and whether or not the reporter is a party to the case.¹⁵⁵

It is unclear whether the privilege applies to independent (as opposed to institutional) journalists. In fact, one of the considerations that led the Supreme Court not to adopt a reporter's privilege was the difficulty in determining to whom it would apply.¹⁵⁶ In the First Circuit, protection has

been extended to academic researchers as well as institutional journalists, but it is clear that the privilege only applies if the person claiming the privilege was intentionally engaged in gathering and dissemination of information to the public.¹⁵⁷

Case Study: In re Request from the United Kingdom

Because the interests of the government and society in solving criminal cases is very high, and because the Supreme Court in *Branzburg* strongly indicated that this interest generally outweighs the interests underlying the reporter's privilege, the First Circuit is unlikely to recognize a privilege in a criminal case. In fact, in 2012, the First Circuit reiterated that information gatherers who promise their subjects confidentiality have no privilege against complying with a subpoena in a criminal case. In *In re Request from the United Kingdom*,¹⁵⁸ the court required academic researchers (who have been granted the same protection as journalists in the First Circuit)¹⁵⁹ to turn over recordings of confidential interviews with former members of the Irish Republican Army that potentially implicated sources in a murder investigation. Researchers had promised interviewees confidentiality in order to obtain a historical record of the "Troubles" in Ireland.

The court found that it was bound by the Supreme Court's decision in *Branzburg*, because the Court there "weighed the interests against disclosure pursuant to subpoenas and concluded they were so wanting as not to state a claim,"¹⁶⁰ and, because the evidence in the case at hand was requested pursuant to an international treaty, the government's interest in accessing it was arguably greater than the government's interest in *Branzburg*.

¹ See Online Media Legal Network, <http://www.omln.org>

² The Clinic and DMLP are pleased that the release of this paper coincides with the celebration of the 25th anniversary of Cambridge Community Television (“CCTV”). For more than two decades, CCTV has served as a vital source of support for community-based journalism in Cambridge and a primary channel for disseminating news and cultural programming throughout the City. Cable access television broadly speaking represents the pre-Internet ideal for democratized mass communications and, in many ways, was the precursor to activities that come under the umbrella of citizen journalism today. Through its NeighborMedia blogging platform, CCTV has expanded its reach, augmented its mission, and embraced the possibilities afforded by new media and online reporting.

³ Mass Gen. Laws. ch. 30A, §§ 18-25.

⁴ 940 CMR § 29.00.

⁵ See Mass Gen. Laws. ch. 30A, § 18.

⁶ See Mass Gen. Laws. ch. 30A, § 18.

⁷ See Mass Gen. Laws. ch. 30A, § 20.

⁸ Mass. Gen. Laws. ch. 30A § 20.

⁹ See Mass Gen. Laws. ch. 30A, §§ 18, 20.

¹⁰ See Mass Gen. Laws. ch. 30A, § 20.

¹¹ See 940 CMR § 29.03, available at <http://www.mass.gov/ago/government-resources/open-meeting-law/940-cmr-2900.html>.

¹² See Mass Gen. Laws. ch. 30A, § 22.

¹³ Mass Gen. Laws. ch. 30A, § 21

¹⁴ Mass Gen. Laws. ch. 30A, § 22.

¹⁵ See Mass Gen. Laws. ch. 30A, § 23.

¹⁶ 940 CMR § 29.05.

¹⁷ See 5 U.S.C. § 552.

¹⁸ Whereas some states permit only state residents to exercise rights under their public records laws – a policy that the United States Supreme Court recently held to be constitutional with respect to the Commonwealth of Virginia’s public records statute, *McBurney v. Young*, 569 U.S. ____ (2013) – the Massachusetts statute provides that “any person” may make a request for state public records in Massachusetts. Mass. Gen. Laws, ch. 66, § 10(a).

¹⁹ 950 CMR 32.05(5).

²⁰ Mass. Gen. Laws, ch. 4, § 7(26)(n).

²¹ See Mass. Gen. Laws, ch. 4, § 7(26).

²² Mass. Gen. Laws, ch. 4, § 7(26)(b).

²³ Mass. Gen. Laws, ch. 4, § 7(26)(c).

²⁴ Mass. Gen. Laws, ch. 4, § 7(26)(f).

²⁵ Mass. Gen. Laws, ch. 4, § 7(26)(h).

²⁶ Mass. Gen. Laws, ch. 4, § 7(26)(j).

²⁷ Mass. Gen. Laws, ch. 4, § 7(26)(m).

²⁸ Mass. Gen. Laws, ch. 4, § 7(26)(n).

²⁹ Mass. Gen. Laws, ch. 4, §§ 7(26)(o), (p).

³⁰ Mass. Gen. Laws, ch. 4, § 7(26)(a).

- ³¹ Mass. Gen. Laws, ch. 4, § 7(26)(e).
- ³² Mass. Gen. Laws, ch. 4, § 7(26)(g).
- ³³ Mass. Gen. Laws, ch. 4, § 7(26)(d).
- ³⁴ Mass. Gen. Laws, ch. 4, § 7(26)(i).
- ³⁵ Mass. Gen. Laws, ch. 4, § 7(26)(l).
- ³⁶ Mass. Gen. Laws, ch. 4, § 7(26)(m).
- ³⁷ Mass. Gen. Laws, ch. 4, § 7(26)(m).
- ³⁸ Mass. Gen. Laws, ch. 4, §§ 7(26)(q).
- ³⁹ Mass. Gen. Laws, ch. 66, § 10(b).
- ⁴⁰ Mass. Gen. Laws, ch. 66, § 10(a).
- ⁴¹ 950 CMR § 32.06.
- ⁴² 950 CMR § 32.08.
- ⁴³ *Antell v. Attorney General*, 752 N.E.2d 823, 827 (2001).
- ⁴⁴ Mass. Gen. Laws, ch. 66, § 10(b).
- ⁴⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).
- ⁴⁶ *See generally Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986).
- ⁴⁷ See Mass. Gen. Laws ch. 277, § 5.
- ⁴⁸ Mass. Gen. Laws ch. 119, § 65.
- ⁴⁹ Mass. Gen. Laws ch. 119, § 54.
- ⁵⁰ *See Boston Herald v. Superior Court Dep't of the Trial Court*, 658 N.E.2d 152, 155 n.7 (Mass. 1995).
- ⁵¹ Other jurisdictions have held that the First Amendment guarantees access to civil trials, *see Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *Westmoreland v. Columbia Broad. System, Inc.*, 752 F.2d 16, 23 (2nd Cir. 1984), but the common law right of access in Massachusetts is strong enough that Massachusetts courts have not needed to distinguish between the two rights.
- ⁵² *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989); *see also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that the right to attend criminal trials is implicit in the First Amendment).
- ⁵³ *Ottaway Newspapers, Inc. v. Appeals Court*, 362 N.E.2d 1189, 1195 (Mass. 1977).
- ⁵⁴ *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002).
- ⁵⁵ *In re Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 97 (1st Cir. 1990).
- ⁵⁶ *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003).
- ⁵⁷ *In re Boston Herald*, 321 F.3d at 189.
- ⁵⁸ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).
- ⁵⁹ Trial Court Administrative Directive No. 2-93, "Public Access to Court Records of Criminal Proceedings" ("Access to public records shall not be restricted to any class or group of persons").
- ⁶⁰ *New Boston Garden Corp. v. Bd. of Assessors*, 507 N.E.2d 756, 759 (Mass. App. Ct. 1987) ("In this day and age, the right of access to a document generally includes the right to make a copy of it.").
- ⁶¹ Code of Professional Responsibility for Clerks of the Court, S.J.C. Rule 3:12, Canon 3(A) (6).
- ⁶² *Estate of Hearst*, 67 Cal. App. 3d 777, 783 (Cal. Ct. App. 1977).

- ⁶³ *Pokaski*, 868 F.2d at 509; *In re Boston Herald*, 321 F.3d at 184.
- ⁶⁴ *Pokaski*, 868 F.2d at 502 (quoting *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 9 (1986)).
- ⁶⁵ *Pokaski*, 868 F.2d at 502 (quoting *Press-Enterprise II*).
- ⁶⁶ *In re Boston Herald*, 321 F.3d at 187; *Press-Enterprise II*, 478 U.S. at 9 (1986).
- ⁶⁷ *Press-Enterprise II*, 478 U.S. at 14-15.
- ⁶⁸ *Pokaski*, 868 F.2d at 506 (“[W]e proceed on the assumption that there exist at least some instances in which defendants will be able to show that their privacy interests outweigh the public’s right of access.”); *In re Boston Herald*, 321 F.3d at 182 (“If our inquiry into these considerations were to yield affirmative answers, the right could be overcome only by an ‘overriding interest.’”).
- ⁶⁹ *In re Boston Herald*, 321 F.3d at 191.
- ⁷⁰ *Id.* at 184-86.
- ⁷¹ *Id.* at 186-89.
- ⁷² *Id.* at 188.
- ⁷³ *Id.*
- ⁷⁴ *Id.*; *Pokaski*, 868 F.2d at 509.
- ⁷⁵ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).
- ⁷⁶ *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989).
- ⁷⁷ *In re Boston Herald*, 321 F.3d at 189.
- ⁷⁸ *FTC v. Std. Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).
- ⁷⁹ *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 605 n. 24 (2000) (“The Supreme Court of the United States has established a three-pronged test to determine whether an order of closure comports with the constitutional presumption of access to criminal proceedings and records. The burden falls on the party seeking closure to demonstrate that (1) there exists a substantial probability that permitting access to court records will prejudice his fair trial rights; (2) closure will be effective in protecting those rights, and that the order of closure is narrowly tailored to prevent potential prejudice; and (3) there are no reasonable alternatives to closure. ... The uniform rules require a judge to take into account essentially the same factors in the “good cause” analysis[.]”).
- ⁸⁰ For a more comprehensive list of judicial documents statutes require or allow courts to impound, visit the Massachusetts courts webpage at <http://www.mass.gov/courts/sjc/docs/pubaccess.pdf>.
- ⁸¹ *In re Globe Newspaper Co.*, 958 N.E.2d at 829.
- ⁸² *Id.* at 825.
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*
- ⁸⁷ *Id.*
- ⁸⁸ *Id.* at 826.
- ⁸⁹ *Id.* at 827 (citing Mass. Gen. Laws ch. 38 § 10).
- ⁹⁰ *Id.*
- ⁹¹ *Id.* at 828.
- ⁹² *Id.* at 827-28.

⁹³ *Id.* at 831.

⁹⁴ *Id.* at 832.

⁹⁵ Peter Schworm, *Bishop transcript raises new questions*, BOSTON.COM (Feb. 23, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/02/23/testimony_raises_new_questions_about_amy_bishop_shooting_in_1986/.

⁹⁶ Note, there is a threshold question in any court proceeding about whether that proceeding should be closed to the press and public entirely. Courtroom closure is permitted in both federal and state courts under extraordinary circumstances. The legal provisions addressed herein concern electronic access to *public* court proceedings – i.e., proceedings that are not closed to the general public.

⁹⁷ *On Cameras in Supreme Court, Souter Says, "Over My Dead Body,"* N.Y. Times, March 30, 1996, at 24

⁹⁸ Supreme Judicial Court Rule 1:19(2).

⁹⁹ Supreme Judicial Court Rule 1:19(1).

¹⁰⁰ Supreme Judicial Court Rule 1:19(2)(d).

¹⁰¹ Supreme Judicial Court Rule 1:19

¹⁰² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976).

¹⁰³ *Id.* at 558 (citing *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

¹⁰⁴ *George W. Prescott Publ'g Co. v. District Court*, 428 Mass. 309, 311 (1998); and see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975).

¹⁰⁵ *United States v. Quattrone*, 402 F.3d 304, 308, 310 (2d Cir. 2005), (citing *Bantam Books, Inc.*, 372 U.S. at 70); *United States v. Salameh*, 992 F.2d 445, 446-47 (2d Cir. 1993) (per curiam). In *Quattrone*, the Second Circuit reversed an order barring the press from reporting the names of jurors that were recited during an open court proceeding. 402 F.3d at 308. The court reiterated the First Amendment right to “report . . . with impunity” any information spoken in open court. *Id.* at 313 (citing *Craig v. Harney*, 331 U.S. 367 (1947)). The court further stated that “[t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.” *Id.*

¹⁰⁶ The Cyberlaw Clinic and DMLP had the pleasure of working with OpenCourt since its inception. The Clinic helped the project in its early days to navigate issues around privacy and access to courts in Massachusetts. And, once the project launched (and prosecutors and criminal defendants sought to curtail its operations), the Clinic worked with Boston University’s Office of General Counsel to represent OpenCourt in two separate rounds of litigation that made their way to the Massachusetts Supreme Judicial Court. DMLP’s staff lawyers served as consultants and advisors during all phases of the project, and DMLP Director Jeff Hermes is on the project’s Board of Advisors.

¹⁰⁷ Former Springfield police officer Jeffrey Asher sentenced to 18 months in jail for Melvin Jones III beating, MASSLIVE.COM (March 28, 2012), http://www.masslive.com/news/index.ssf/2012/03/former_springfield_police_offi_4.html.

¹⁰⁸ Stephanie Barry, *Springfield lawyer on Melvin Jones III police brutality settlement: Time to move on*, MASSLIVE.COM (Sept. 5, 2012), http://www.masslive.com/news/index.ssf/2012/09/melvin_jones_iii_and_attorneys.html.

¹⁰⁹ Mass. Gen. Laws ch. 272, § 99.

¹¹⁰ Stephanie Barry, *Chicopee magistrate Joanne McCarthy refuses to issue wiretapping charge against Tyrisha Greene in Melvin Jones beating case*, MASSLIVE.COM (AUG. 18, 2011), http://www.masslive.com/news/index.ssf/2011/08/officer_michael_sedergren_fall.html.

¹¹¹ Denise Lavoie, *SJC upholds conviction of man who secretly taped police*, BOSTON.COM (July 13, 2001), http://www.boston.com/news/daily/13/police_recording.htm.

¹¹² *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011). The Cyberlaw Clinic and DMLP, joined by other media organizations, submitted an *amicus* brief to the First Circuit in the Glik case.

¹¹³ Press Release, American Civil Liberties Union, City of Boston pays \$170,000 to settle landmark case involving man arrested for recording police with cell phone (March 27, 2012), available at http://www.aclum.org/news_3.27.12.

¹¹⁴ *Glik*, 655 F.3d at 85 (1st Cir. 2011).

¹¹⁵ *Id.* at 83.

¹¹⁶ Press Release, *supra* note 113.

¹¹⁷ *Glik*, 655 F.3d at 82.

¹¹⁸ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

¹¹⁹ *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995).

¹²⁰ *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012). The Cyberlaw Clinic contributed to, and the DMLP joined, an *amicus* brief filed with the Seventh Circuit in the *Alvarez* case.

¹²¹ John Swinconeck & Jeff Nowak, *Man Charged with Wiretapping Shrewsbury Police*, SHREWSBURY DAILY VOICE (Nov. 16, 2012), <http://shrewsbury.dailyvoice.com/police-fire/man-charged-wiretapping-shrewsbury-police>.

¹²² In *ACLU v. Alvarez*, a Seventh Circuit case recognizing that individuals have a right to record police officers in public places, that court expressly did not limit the scope of the right to open and obvious recordings, though it stated that the right to record secretly might be more restricted than the right to record openly, because greater privacy rights are implicated. *Alvarez*, 679 F.3d at 595, 607 n.13. Because police in public places arguably do not have a legitimate privacy interest, however, *Alvarez* indicates that the First Amendment may protect secret recording of police. *Id.* at 607 n.13.

¹²³ *Glik*, 655 F.3d at 84.

¹²⁴ *Alvarez*, 679 F.3d at 606.

¹²⁵ *Gericke v. Begin*, No. 11-cv-231, 2012 WL 4893218 at *7 (D.N.H. Oct. 15, 2012).

¹²⁶ *Id.*

¹²⁷ *Id.* at *7-*8.

¹²⁸ *Glik*, 655 F.3d at 80.

¹²⁹ *Bleish v. Moriarty*, No 11-cv-162, 2012 WL 2752188 at *3 (D.N.H. July 9, 2012).

¹³⁰ *Id.* at *2-*3.

¹³¹ *Id.* at *11.

¹³² *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

¹³³ *Travelers' Ins. Co., v. Bergeron*, 25 F.2d 680, 682 (8th Cir. 1928).

¹³⁴ See generally *Wojcik v. Boston Herald, Inc.*, 803 N.E.2d 1261, 1264-65 (Mass. App. Ct. 2004).

¹³⁵ See *Petition for the Promulgation of Rules*, 479 N.E.2d 154 (Mass. 1985). See also *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *In re Roche*, 411 N.E.2d 466 (Mass. 1980); *Ayash v. Dana Farber Cancer Inst*, 822 N.E.2d 667, 696 (Mass. 2005).

¹³⁶ *Petition for Promulgation of Rules*, 479 N.E.2d at 158.

¹³⁷ See, e.g., *Summit Tech., Inc. v. Healthcare Capital Grp, Inc.*, 141 F.R.D. 381 (D. Mass. 1992); *Massachusetts v. McDonald*, 6 Med. L. Rep. 2230, 2231 (Mass. Super. Ct. 1980).

¹³⁸ *In re Roche*, 411 N.E.2d at 635.

- ¹³⁹ See *Russo v. Geagan*, 35 Fed. R. Serv. 2d 1403 (D. Mass. 1983). See also *Astra USA, Inc. v. Bildman*, 13 Mass. L. Rep. 300 (Mass. 2001).
- ¹⁴⁰ See *Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973).
- ¹⁴¹ *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).
- ¹⁴² *Summit Technology, Inc.*, 141 F.R.D. at 381.
- ¹⁴³ *Summit*, 141 F.R.D. at 384.
- ¹⁴⁴ 408 U.S. 665 (1972).
- ¹⁴⁵ *Id.* at 690.
- ¹⁴⁶ *Id.* at 709 (Powell, J. concurring).
- ¹⁴⁷ *Id.* at 710.
- ¹⁴⁸ *Cusumano*, 162 F.3d at 714.
- ¹⁴⁹ *Branzburg*, 408 U.S. at 709-10 (Powell, J. concurring).
- ¹⁵⁰ *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980).
- ¹⁵¹ *In re Special Proceedings*, 291 F. Supp. 2d 44, 55 (D.R.I. 2003) *aff'd*, 373 F.3d 37 (1st Cir. 2004).
- ¹⁵² *Cusumano*, 162 F.3d at 716-17.
- ¹⁵³ *Id.* at 717.
- ¹⁵⁴ *Id.* at 715.
- ¹⁵⁵ *Id.* at 717.
- ¹⁵⁶ *Branzburg*, 408 U.S. at 704.
- ¹⁵⁷ See *Cusumano*, 162 F.3d at 714.
- ¹⁵⁸ *In re Request from United Kingdom*, 685 F.3d 1 (1st Cir. 2012) *cert. denied*, No. 12-627, 2013 WL 1500380 (U.S. Apr. 15, 2013).
- ¹⁵⁹ *Cusumano*, 162 F.3d at 714 (1st Cir. 1998) (“Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists.”).
- ¹⁶⁰ *Id.* at 718.



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