

205 CMR: MASSACHUSETTS GAMING COMMISSION

205 CMR 103.00: ACCESS TO AND CONFIDENTIALITY OF COMMISSION RECORDS

Section

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103.01: Purpose, Authority and Applicability

205 CMR 103.00 is promulgated pursuant to M.G.L. c. 23K, §§ 4(37), and 5. 205 CMR 103.00 is intended to assure that public access to, and the confidentiality of, records made or received by the commission and the bureau are in conformity with M.G.L. c. 23K, § 9(b) and § 21(a)(7); M.G.L. c. 66, § 10; M.G.L. c. 4, § 7, cl. 26; and 950 CMR 32.00: *Public Records Access*.

103.02: Availability of Public Records

All records made or received by the commission or the bureau shall be public records and shall be available for disclosure on request pursuant to 205 CMR 103.00 and 950 CMR 32.00: *Public Records Access*, except the following, which shall be exempt from disclosure to the extent permitted by law:

- (1) all records, including without limitation investigatory materials, specifically excluded from the definition of "public record" pursuant to M.G.L. c. 4, § 7, cl. 26;
- (2) all confidential information as defined in 205 CMR 102.02: *Definitions*;
- (3) all records which are or which contain "criminal offender record information", "evaluative information", or "intelligence information" pursuant to M.G.L. c. 6, § 167, the disclosure of which would not be in compliance with M.G.L. c. 6, §§ 167 through 178Q;
- (4) all records which are or which contain "personal data" pursuant to M.G.L. c. 66A, § 1, the disclosure of which would not be in compliance with M.G.L. c. 66A; or which are or which contain "personal information" pursuant to M.G.L. c. 93H, § 1, the disclosure of which would not be in compliance with M.G.L. c. 93H; and
- (5) all records specifically or by necessary implication exempted from disclosure by statute including, but not limited to, the exemption statutes listed by the supervisor of public records in the official *Guide to the Massachusetts Public Records Law: Appendix*.

103.03: Official Custodians; Individual Responsible for Personal Data System

- (1) Pursuant to M.G.L. c. 66, § 6, and M.G.L. c. 23K § 3(f) and (i), subject to the oversight of the chair, the secretary shall be the official custodian of all books, documents and papers filed by the commission and of its minute book; the chief financial and accounting officer shall be the official custodian of its books of account and accounting records; the deputy director shall be the official custodian of all records of the bureau; and the executive director shall be the official custodian of all other records of the commission. In the case of an absence or vacancy in the office of an official custodian, or in the case of disability as determined by the commission, the

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chair may designate an acting custodian to serve until the vacancy is filled or the absence or disability ceases. Each official custodian may, with the permission of the chair, delegate to another commissioner, employee or employees of the commission or the bureau responsibility for the custody of some or all public records under his or her jurisdiction.

(2) Pursuant to M.G.L. c. 66A, § 2, subject to the oversight of the chair, the executive director shall be the individual immediately responsible for any personal data system maintained by the commission; the deputy director shall be the individual immediately responsible for any personal data system maintained by the bureau; and each shall conform to the requirements of M.G.L. c. 66A and 801 CMR 3.00: *Privacy and Confidentiality* for preventing unauthorized access to or dissemination of personal data under his or her jurisdiction. In the case of an absence or vacancy in the office of an individual immediately responsible for any personal data system, or in the case of disability as determined by the commission, the chair may designate an acting person to serve as the individual immediately responsible for any personal data system until the vacancy is filled or the absence or disability ceases. The executive director or the deputy director may, with the permission of the chair, delegate to another commissioner or employee of the commission or the bureau immediate responsibility for any personal data system under his or her jurisdiction.

103.04: Determinations by the Official Custodian, the General Counsel and the Commission

No information which is exempt from disclosure under 205 CMR 103.02 or which a confidentiality claimant asserts to be confidential information defined in 205 CMR 102.02: *Definitions* shall be disclosed in response to any request for public records unless the Commission has expressly so authorized in accordance with 205 CMR 103.00.

103.05: Effect of Requests for Confidentiality

Whenever a confidentiality claimant requests in writing that particular records be deemed to be or to contain confidential information as defined in 205 CMR 102.02: *Definitions*, such records or information shall be treated as confidential and may not be disclosed until the confidentiality request has been approved or denied pursuant to 205 CMR 103.04, 103.10 and 103.11.

103.06: Postponing Denial of Confidentiality Pending Appeal

Whenever the commission denies a request to deem records to be or to contain confidential information as defined in 205 CMR 102.02: *Definitions* or exempt from disclosure as described in 205 CMR 103.02(1) through (5), such denial shall take effect 14 days after the date thereof so that any person aggrieved by said denial may appeal to a court of competent jurisdiction. During this 14-day period, the records in question shall be treated as confidential and accordingly exempt from public disclosure in accordance with M.G. L. c. 4, § 7(26)(a). This 14-day period may be extended by the commission in extraordinary situations. Any extension shall be in writing and signed by the general counsel.

103.07: When Confidential or Exempt Information May be Disclosed by the Commission

(1) Notwithstanding any provision of 205 CMR 103.00 to the contrary, information otherwise exempt from disclosure as described in 205 CMR 103.02(1) through (5) shall be subject to disclosure by the commission only:

- (a) to the extent necessary to comply with Federal Law;
- (b) to the extent necessary to comply with or carry out the responsibilities contained in M.G.L. c. 23K or other state law;
- (c) to the extent necessary for any enforcement action, whether criminal or civil, judicial or administrative;
- (d) upon presentation of proper identification, to the person who furnished the specific information to the commission or the bureau; or
- (e) upon presentation of a timely and duly executed and notarized authorization by the person who furnished the specific information to the commission or the bureau, to any other person making a written request for the specifically identified information.

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(2) If information otherwise exempt from disclosure as described in 205 CMR 103.02(1) through (5) is released or otherwise disclosed to any person under any circumstances other than those identified in 205 CMR 103.07(1)(d) and (e), written notice of such release or disclosure shall be provided to the last known address the commission has in its records for the person who furnished the confidential information to the commission or the bureau, unless such notice may prejudice the possibility of effective law enforcement or otherwise imperil the integrity of the commission's or the bureau's operations. To the extent known, the notice shall include:

- (a) The name and address of the person to whom the information was released or disclosed;
- (b) A description of the information released or disclosed; and
- (c) The date of the release or disclosure.

(3) Subject to 205 CMR 103.07(2) any such notice of confidential information to be released or disclosed will be given prior to the release or disclosure to provide an opportunity for review.

103.08: Confidential Information Subject to Promise of Confidentiality

For confidential information to be protected from public disclosure by a nondisclosure agreement pursuant to M.G.L. c. 23K, § 21(a)(7) or by other promise of confidentiality pursuant to M.G.L. c. 4, § 7, cl. 26(g), the nondisclosure agreement or other promise of confidentiality must be made in writing and signed by the chair, the secretary or a person designated by the commission.

103.09: Information Provided in Response to Request for Applications - Phase 1 & Phase 2

(1) In accordance with M.G.L. c. 23K, § 9(b), an application for a license in response to the commission's Request for Applications-Phase 1, 205 CMR 110.00: *Issuance of Request for Category 1 and Category 2 License Applications*, and an RFA-2 application submitted in accordance with 205 CMR 118.00: *Phase 2- Applying for a License* shall be a public record except those portions of the application containing information otherwise exempt from disclosure pursuant to 205 CMR 103.02(1) through (5).

(2) As guidance to applicants and the public, the commission shall issue a set of specimen annotated application forms and distribute such forms together with, or incorporated as part thereof, the Request for Applications - Phase 1 pursuant to 205 CMR 111.00: *Phase 1 Application Requirements* and with or part of the Request for Applications- Phase 2 pursuant to 205 CMR 118.00: *Phase 2 - Applying For a License*. These specimen annotated application forms shall designate as "Exempt/Redact" or otherwise identify all information or categories of information which, at a minimum, the commission considers to be exempt from disclosure in accordance with 205 CMR 103.02(1) through (5).

(3) To assist the commission in protecting from inadvertent disclosure information subject to 205 CMR 103.02(1) through (5), applicants shall follow the procedures in 205 CMR 103.10(1) in completing and submitting the required forms pursuant to 205 CMR 111.00: *Phase 1 Application Requirements* and 205 CMR 118.00: *Phase 2- Applying For a License*.

(4) All information submitted by an applicant in the RFA Phase 1 or Phase 2 application, other than that described as "Exempt/Redact" or otherwise so identified in 205 CMR 103.09(2), shall be presumed to be available for public disclosure on request unless a confidentiality claimant demonstrates or the commission otherwise finds that a separable portion of the information is exempt from disclosure pursuant to 205 CMR 103.02(1) through (5). Confidentiality claimants shall make such a demonstration in accordance with the provisions of 205 CMR 103.10 through 103.12.

103.10: Requests for Protecting Confidential Information

Except as set forth in 205 CMR 103.09, no record shall be deemed to be or to contain confidential information as defined in 205 CMR 102.02: *Definitions* unless a person submits a written request to the commission to deem the information confidential information and accordingly exempt from public disclosure in accordance with M.G. L. c. 4, § 7(26)(a). The request shall be made and substantiated as follows:

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- (1) Each record containing information that is the subject of a confidentiality request shall be clearly marked "CONFIDENTIAL". To assist the commission in complying with 205 CMR 103.02, persons shall separately submit confidential portions of otherwise non-confidential records. If submitted separately, the record that is the subject of a confidentiality request shall be clearly marked "CONFIDENTIAL" and the record from which confidential information has been redacted shall be clearly marked "REDACTED".
- (2) The request for confidentiality shall be supported with the following information, which shall be treated as a public record:
 - (a) The time period for which confidential treatment is desired.
 - (b) The reason the record was provided to the commission or the bureau, and the date of submittal.
 - (c) The basis for the claim that the record contains confidential information and, if applicable, the basis for believing that the criteria in 205 CMR 103.11 are satisfied.
 - (d) The extent to which the person requesting that the record be kept confidential has disclosed the contents of that record to other persons without a restriction as to confidentiality imposed by agreement or by law.
 - (e) A statement whether, to the best of the provider's knowledge, the information has previously been provided to a governmental entity that does not treat the information as confidential or that has denied a request for confidential treatment.
 - (f) A statement that the information is not required to be disclosed or otherwise made available to the public under any other Federal or state law.
 - (g) How making the record a public record would place the applicant at a competitive disadvantage pursuant to M.G.L. c. 23K, § 9(b), or would be detrimental to a gaming licensee if it were made public pursuant to M.G.L. c. 23K, § 21(a)(7).
 - (h) If the record was submitted voluntarily for use in developing governmental policy and upon a promise of confidentiality pursuant to M.G.L. c. 4, § 7, cl. 26(g), and not in compliance with a regulation or order of the commission or a court, whether and if so why making the record a public record would tend to lessen the availability to the commission or the bureau of similar records in the future.

103.11: Procedure for Acting on Requests for Protecting Confidential Information

The commission shall act on a confidentiality request made pursuant to 205 CMR 103.10 subject to the following provisions:

- (1) If the commission has received a request to inspect or copy a record which is the subject of a confidentiality request on which the commission has not made a final decision, the commission shall notify the person who made the request to inspect or copy the record that the record in question is the subject of a pending confidentiality request and a final decision will be made when the commission determines whether the record in question is entitled to confidentiality protection and shall notify the confidentiality claimant of the request to inspect or copy the record.
- (2) The commission shall determine whether the record is confidential information as defined in 205 CMR 102.02: *Definitions*. The Commission shall give notice of its determination(s) to the confidentiality claimant and all persons who requested to inspect or copy the record.
- (3) If the commission determines that a record is confidential information as defined in 205 CMR 102.02: *Definitions*, the record in question, or portion thereof, shall be exempt from public disclosure in accordance with M.G. L. c. 4, § 7(26)(a) for such length of time, and subject to such terms, conditions and limitations, as the commission may include in the determination. The commission shall so notify the person who submitted the record to the commission or the bureau, the confidentiality claimant, and all persons making a request to inspect or copy the record in question.

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(4) All notices given pursuant to 205 CMR 103.11(2) and (3) shall be in writing, shall be delivered by hand, by first class mail, or by electronic mail, and shall include:

- (a) the reasons for the determination,
- (b) notice that the determination constitutes a final decision of the commission,
- (c) notice that the determination may be subject to review by the supervisor of records of the Office of the Secretary of the Commonwealth or by the courts, as applicable.
- (d) if the determination is that the record in question, or portion thereof is not confidential information as defined in 205 CMR 102.02: *Definitions*, notice that the record in question shall become a public record 14 days after the date of the commission's determination unless, a person aggrieved by said determination appeals the determination to a court of competent jurisdiction. This 14-day period may be extended only in extraordinary situations, and any such extension must be in writing and signed by the commission's general counsel.

(5) If pursuant to 205 CMR 103.11, the commission denies a request to protect confidential information made pursuant to 205 CMR 103.10, the confidentiality claimant may, within ten days from the date of the commission's notice of such determination, submit to the commission one request to reconsider such determination, which request to reconsider shall set forth any and all supplemental information supporting the claim of confidentiality and further addressing the criteria of 205 CMR 103.10(2). The commission shall act on the request to reconsider following the procedures in 205 CMR 103.11(1) through (4). The request for reconsideration shall stay the effect of the commission's original denial and the 14-day period set forth in 205 CMR 103.11(4) shall run from the date of the commission's notice of its ruling on the request for reconsideration.

(6) If pursuant to 205 CMR 103.11, the commission denies a request to protect confidential information made pursuant to 205 CMR 103.10, the confidentiality claimant may, at any time before the expiration of the applicable 14 day period set forth in 205 CMR 103.11(4), submit a written request to the commission pursuant to 205 CMR 111.05: *Withdrawal of Application*, to withdraw with prejudice the application to which the information relates and to order the information permanently sealed or returned to the applicant. If the commission allows the request to withdraw the application with prejudice, the commission may order the information permanently sealed or returned to the applicant to the extent permitted by M.G.L. c. 4, § 7, cl. 26, and M.G.L. c. 23K.

103.12: Reconsidering Confidentiality Determinations

If the commission determines that newly discovered information or changed circumstances make it appropriate for the commission to reconsider and possibly modify a prior grant of confidentiality, the commission shall so notify the person who submitted the record to the commission or the bureau, and the confidentiality claimant. The notice shall give the person and the confidentiality claimant a reasonable period of time to substantiate, pursuant to 205 CMR 103.10, keeping the record in question confidential. The amount of time originally established in the notice may be reasonably extended by the commission. After this time has passed, or after the commission has received a written response from the confidentiality claimant, whichever occurs first, the commission shall make a new determination whether the record in question shall be deemed either confidential or a public record.

103.13: Executive Session Consideration of Confidential or Exempt Information

Pursuant to M.G.L. c 30A, § 21(a)(7), the commission may meet in executive session to review information which is exempt from disclosure as described in 205 CMR 103.02(1) through (5); or to conduct an in camera inspection of records to enable the commission to resolve matters as to confidentiality or exemption pursuant to 205 CMR 103.04(1) or (2), to act on requests for protecting confidential information pursuant to 205 CMR 103.11, or to reconsider confidentiality determinations pursuant to 205 CMR 103.12.

103.14: Security Protocols; Restricted Access

(1) The executive director, subject to the direction of the commission, shall establish and maintain secure storage areas, methodologies and procedures to protect tangible and electronic information exempt from disclosure as described in 205 CMR 103.02(1) through (5) contained in the records of the commission or the bureau. Records containing such information shall be kept, managed, accessed and used in accordance with the security protocols.

(2) Records for which confidential information claims have been made and related supporting materials, and information for which such claims have been finally adjudicated in favor of the confidentiality claimant, shall be kept, managed, accessed and used in accordance with the security protocols. Materials and information for which such claims have been finally adjudicated against the confidentiality claimant may be permanently removed from the protection of the security protocols.

(3) The executive director the deputy director and the official custodians shall be responsible for implementing the security protocols for records under their respective custody.

(4) Personnel and authorized agents of the commission or the bureau who require information contained within the secure tangible and electronic storage areas for the effective performance of their duties may, upon request to its official custodian, examine documents containing such information in accordance with the security protocols.

(5) The commission and the bureau shall keep the number of tangible and electronic copies of information exempt from disclosure as described in 205 CMR 103.02(1) through (5) to a minimum and shall ensure that all copies of such information are maintained in a manner consistent with the requirements of the security protocols. No copies of such documents or information may be made or transmitted except in accordance with the security protocols; where necessary to the authorized duties and operations of the commission, the bureau, or their employees and authorized agents; or where release of the confidential information is authorized pursuant to 205 CMR 103.00. Any notes concerning such information made by commission or bureau employees or agents shall be treated as confidential pursuant to 205 CMR 103.00.

(6) Commission or bureau employees or authorized agents who violate the procedures required by 205 CMR 103.00 or the security protocols established pursuant thereto shall be subject to disciplinary action.

103.15: Records Retention

The commission shall follow the records retention schedule set forth in the *Massachusetts Statewide Records Retention Schedule* (2011 Edition) published by the Records Conservation Board in conjunction with the Massachusetts Archives and the supervisor of public records, which records retention schedule shall apply to all records within the commission's possession including all records containing information exempt from disclosure as described in 205 CMR 103.02(1) through (5).

REGULATORY AUTHORITY

205 CMR 103.00: M.G.L. c. 4, § 7; c. 6, §§ 167 through 178Q; c. 23K, §§ 4(37); 5; 9(b); 21(a)(7); c. 30A, § 21; c. 66, § 10; c. 66A, § 1; and c. 93H, § 1.

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