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1994 JUN -2 PM 4:58

CAMBRIDGE MA.

Michael Brandon
27 Seven Pines Avenue
Cambridge, Massachusetts 02140

June 2, 1994

Cambridge City Council
c/o City Clerk
795 Massachusetts Avenue
Cambridge, Massachusetts 02140

Re: Public Record Status and Timely Submission of City Manager's Agenda

Councilors:

Attached is a recent opinion from the Supervisor of Public Records concerning the City Manager's weekly Agenda.

Because the manager will no longer make these public records available on Friday afternoon, I respectfully ask that you instruct the City Clerk to enforce Rule 20 of the City Council.

As Councilor Duehay has pointed out, this rule states: "All matters of whatever description which may require action by the City Council shall be presented to the City Clerk by 5:00 p.m. on Thursday" in order to be placed on the Agenda for the following Monday (except in an emergency or when Friday is a holiday).

Your adopted rules do not exempt the City Manager from this provision, and he has yet to argue convincingly that the deadline imposed on everyone else in the city—private citizens, businesses and institutions, city councilors, and other public officials—should not apply to him. Indeed, he has told you he would comply with the Council's rule if asked to do so.

If everyone adheres to the same Thursday deadline, the collating and copying chores that tie up staffers in both the clerk's and the manager's offices could probably be combined and streamlined, and the complete Agenda packets produced in a more coordinated, economical, and efficient manner for pickup or delivery by 4:30 Friday afternoon. No one would have to work overtime in the manager's office at the end of the workweek. No one would have to wait until 9:30 a.m. Monday or later to access the information.

Since the Council has sent this issue to the Rules Committee and the City Clerk for research, study, and recommendation, please refer this communication accordingly and notify me when the matter will be considered.

Cambridge City Council

June 2, 1994

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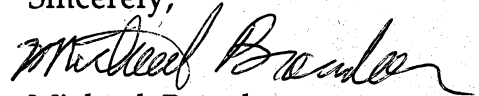
I support the suggestion made by former Mayor Al "Common Sense" Velucci: if the Department of Public Works office is indeed open all weekend, copies of the complete Agenda should be made available for pickup there. The City Hospital and the Police Department might be other round-the-clock locations to consider.

I join with those who have questioned the city manager's use of uniformed police officers to deliver the Agenda packets to councilors' homes and the libraries. If councilors are unable to pick up their packets at City Hall, the manager should find a method of delivery that will not tie up armed public safety officers.

For instance, he could engage a local courier service or cab company, as suggested by Mayor Reeves. (Perhaps an enterprising business would donate its services in exchange for being designated "The Official Courier of the City of Cambridge"). Maybe the Bicycle Committee could enlist volunteers to disseminate the information via nonpolluting vehicles. Or maybe the manager could drop off the library copies on his way home to Lowell in the perky automobile we provide him.

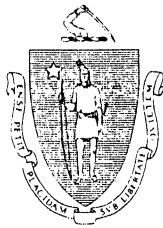
My thanks to the members of the Council for the consideration you are giving to my suggestions about making the City Manager's Agenda more promptly accessible to the public.

Sincerely,



Michael Brandon

encl.



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The Commonwealth of Massachusetts

Office of the Secretary of State
Michael Joseph Connolly, Secretary

James W. Igoe
Deputy Secretary of State
Supervisor of Public Records

May 16, 1994
SPR94/265

Donald Drisdell
Deputy City Solicitor
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Dear Mr. Drisdell:

Pursuant to 950 C.M.R. 32.07, I am initiating an advisory opinion concerning the access procedures of the Cambridge City Manager (Manager). It has come to my attention that the Manager prohibits disclosure of his written communications to the City Council to the public until copies of such communications have been delivered to the homes of the City Councilors. These communications include memoranda and planned agendas for the weekly City Council meeting. This opinion is sent to you in your capacity as Deputy City Solicitor.

"Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any city of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26)(a-m) (1992 ed.). The statutory exemptions are strictly and narrowly construed. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980); Attorney General v. Board of Assessors of Woburn, 375 Mass. 430, 432 (1978). Public records and any non-exempt, segregable portions thereof, are subject to mandatory disclosure upon request. G. L. c. 66, § 10(a) (1992 ed.); see also Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are not blanket in nature). Moreover, there is a presumption that all governmental records are public records. G. L. c. 66, § 10(c) (1992 ed.); 950 C.M.R. 32.08(4). Therefore, it is the burden of the record custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(c) (1992 ed.); 950 C.M.R. 32.08(1).

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A document becomes a public record upon creation by a governmental official or employee. G. L. c. 4, § 7(26) (1992 ed.). The fact that a document has not been received by an addressee is irrelevant to the public record status of the document where the maker of the document is a public official. Id. Therefore, please be advised that the Manager may not condition disclosure of records upon previous receipt by addressees. When denying access to records, the Manager is obligated to set forth the reasons for such denial in writing, citing the exemption or exemptions upon which the denial is based. See 950 C.M.R. 32.08(1) (obligation to cite an exemption to the Public Records Law); see also G. L. c. 4, § 7(26)(a-m) (1992 ed.) (exemptions to the Public Records Law).

This opinion should not be construed to preclude the Manager from claiming exemption (d) in an appropriate case. It applies to:

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

G. L. c. 4, § 7(26)(d) (1992 ed.).

Exemption (d) provides a limited executive privilege in the development of government policy. It is intended to avoid premature release of materials which could taint the deliberative process if disclosed. Therefore, its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n. 8 (1988); see also Vaughn v. Rosen, 523 F. 2d 1136, 1144 (D.C. Cir. 1985) (construing cognate provision of federal Freedom of Information Act). Therefore, if the Manager distributes memoranda to the City Council which contains recommendations relative to a policy which the Council is currently deliberating upon, it is conceivable that exemption (d) may apply to that internal memoranda. Once the Council makes a decision regarding that policy or position, the exemption will no longer apply.

It is my understanding that the requester in this case claimed that the Manager was obligated to comply with his request for copies of documents immediately. In a May 6, 1994, telephone conversation with Lauren Inker, an attorney on my staff, you stated that this particular requester usually arrives five minutes before the Manager's office closes and demands copies forthwith. Certainly, the Manager cannot be expected to comply

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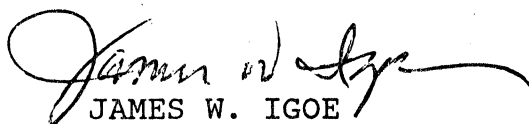
SPR94/265

immediately in these circumstances. Rather, a record custodian must comply with a public records request as soon as is practicable, without unreasonable delay, and always within ten (10) days. G. L. c. 66, § 10(a) (1990 ed.); 950 C.M.R. 32.05(2). The ten-day provision is a maximum, rather than a minimum, timeframe for complying with a public records request.

Necessarily, response time will vary, depending on the type and volume of records requested, the available staff, and the backlog of other requests. It is my understanding that the requester in this case wishes to receive a copy of the agenda each week upon its completion. The requester has previously obtained copies from the office on a weekly basis. While you have no obligation to continue this practice, you are entitled to make whatever mutually convenient arrangements you feel are necessary to provide access to records.

I hope that this opinion has been helpful to you. If you have any questions, please do not hesitate to contact this office.

Very truly yours,



JAMES W. IGOE
Supervisor of Public Records

cc: Michael Brandon
Russell Higley
Robert Healey

Consent Comm. # 23

S-260

Comm. from Michael Brandon, 27 Seven Pines
Avenue, regarding public record status and
timely submission of City Manager's Agenda.

In City Council,

June 6, 1994

Referred to the
Rules Committee
copy sent to Rules
Committee 6/8/94 (de)