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TO: TOWN ADMINISTRATORS AND MANAGERS

FROM: KATE FEODOROFF, TOWN COUNSEL
LISA MEAD, TOWN COUNSEL

RE: CLIENT ADVISORY
SUBPOENA GUIDE

DATE: MARCH 16, 2017

As you are aware, there have been substantial revisions to the Massachusetts Public records Law. In the process of advising clients on the new provisions of the law, we have been asked how a subpoena for records differs from a public records request. Both such devices are tools for obtaining documents from public entities and municipalities' responses differ in several respects. As the differences between these two tools may be subtle, it is encouraged that you work closely with counsel in responding to subpoenas. This client advisory is intended as a tool in assisting the Town in responding appropriately to subpoenas.

The Subpoena

Overview

A court, Grand Jury, legislative body, or administrative agency may use a subpoena to compel an individual or entity to appear before it at a specified time to give testimony. In contrast, a subpoena that commands a person to bring certain evidence, usually documents or papers, is called a *Subpoena Duces Tecum*, from the Latin "under penalty to bring with you." Generally, the Town can comply with a *Subpoena Duces Tecum* by providing the documents without the need to appear and give testimony. This type of subpoena is often used in a civil lawsuit where one party resists giving the other party documents through the discovery process or where documents are sought from a non-party. A subpoena of this type is the most typical use of subpoena power that a city or town will encounter. A sample subpoena is attached for your reference.

In civil cases filed in state court, subpoenas are governed by Rule 45 of the Massachusetts Rules of Civil Procedure. Pursuant to that rule, a notary public may issue subpoenas; consequently, most lawyers issue subpoenas, without judicial review.

Procedural Compliance

It is incumbent upon the Town to first confirm the issuer's procedural compliance with Rule 45, as the Town need only comply with subpoenas which satisfy these requirements. Rule 45 imposes the following requirements:

1. a subpoena must state the name of the court and the title of the action;

Newburyport Office
30 Green Street
Newburyport, MA 01950
Phone 978.463.7700
Fax 978.463.7747

2. a subpoena must specify the time and place to attend and give testimony or produce designated documents;
3. a subpoena must be served. In some cases, where the Town is a party, Town Counsel may receive the subpoena. In other instances, the Town, or an official or board thereof may be served directly with a subpoena. If you are served, please refer the subpoena to the Town Administrator and Counsel.
4. a subpoena must permit a minimum of thirty (30) days for compliance;
5. the person issuing a subpoena must take reasonable steps to avoid imposing undue burden or expense on a town subject to the subpoena. If a subpoena is overly broad or unduly burdensome, Counsel will assist in narrowing the subpoena or objecting to the same.

The Response

In responding to a subpoena, the Town has the following options: (1) to comply; (2) to file a written objection¹ within ten (10) days of service; (3) to file a stipulated motion for protective order; or (4) to file a motion to quash or motion for a protective order².

Compliance

If the subpoena is seeking documents which are clearly public record, not subject to public record exemption(s), immediate compliance is the recommended course of action. These records could include: public contracts with outside vendors, utility billing schedules, job descriptions, or other similar documents. It is important to note that the exceptions applicable to the public records law may form the basis of an objection to a subpoena. For example, an objection may be raised with respect to documents shielded by executive session or attorney-client privilege. Counsel should be consulted to determine the applicability of any particular objection to disclosure.

Written Objection

However, where the documents requested potentially are protected documents, such as executive session minutes, personnel files, medical files, CORI protected documents or documents shielded by attorney-client privilege, it is advised that a written objection be submitted. The time to file a written objection is relatively short: ten (10) days. A sample written objection is included for your reference.

Stipulated Motion

Another option available to the Town is to file a stipulated motion for a protective order. A stipulated motion for a protective order is appropriate either (1) to protect a Town asset; or (2) to insulate the Town from liability for violations of privacy laws. Naturally, to file a stipulated motion, assent from the attorneys involved in the case is required. Again, this type of response is appropriate to protect a Town asset, namely where the document(s) in

¹ A person commanded to produce documents or tangible things or to permit inspection may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the party or attorney designated in the subpoena written objection to inspecting, copying, testing, or sampling any of the materials; to inspecting the premises; or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection is made, move at any time upon notice to the commanded person for an order compelling production or inspection. Such an order to compel production or inspection shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance. Mass. R. Civ. P. 45

² The court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the documents, electronically stored information, or tangible things. Mass. R. Civ. P. 45

question contain information, not subject to public disclosure, but appropriate for limited disclosure. Examples include requests for schematics of a municipal plant, locations of cable fiber optics and a police department building layout, all of which could compromise security if made available to the public.

Additionally, a stipulated motion for protective order may be appropriate to protect the Town from liability for violations of privacy laws. If sensitive documents have been requested such as personnel or medical information, a stipulated motion ensures that all parties have knowledge and agree that this information can be disclosed for litigation purposes (if so ordered by the court or agency by grant of the aforesaid motion) but remain protected from public dissemination. Notably, the motion should indicate that the attorneys of record, not the Town, must comply with newly enacted Rule 5(h) which requires publicly accessible documents filed with the court shall protect personal identifying information. Mass. R. Civ. P. 5(h). A sample stipulated motion is included for your reference.

Motion to Quash or Motion for a Protective Order

A further course of action available to the Town is to unilaterally file a motion to quash or a motion for a protective order. This type of motion is advisable if the Town and the entity serving the subpoena cannot agree on limitations of disclosure, if the Town has missed the deadline for filing a written objection, if it has failed to attain assent from counsel in the case, or in other applicable circumstances. In examining motions to quash a subpoena or for a protective order, courts weigh the need of the party seeking discovery against any undue hardships created by permitting it, by considering issues such as relevance, the requesting party's need, the breadth of the request, and the burden imposed when analyzing whether the subpoena places an undue burden on a nonparty. This course of action will require Counsel to prepare the motion and appear in court to present it. Please note, filing such a motion may be appropriate at the outset, in instances where records are sought pursuant to a subpoena in a criminal matter and police personnel files are requested. If such a situation arises, it is critical that Counsel be contacted immediately.

Conclusion

We are hopeful that the above advisory will be of assistance to the Town in determining the type of subpoena received, in evaluating its procedural compliance with Rule 45 and in choosing the appropriate response. Of course, we are always available to assist should the need arise. Please do not hesitate to contact us with your questions.

Sample Subpeona

COMMONWEALTH OF MASSACHUSETTS

COUNTY, SS.

SUPERIOR COURT DEPARTMENT
TRIAL DIVISION
Civil Action No. PLCV0000-0000

JOHN DOE,)
Plaintiff,)
)
v.)
)
)
JANE DOE,)
Defendant.)
)

SUBPOENA DUCES TECUM Mass.R.Civ.P. 30(a) and 45

TO:

Town ABC
Town Address
Town Address

GREETINGS:

YOU ARE HEREBY COMMANDED in the name of the Commonwealth of Massachusetts, pursuant to the provisions of Rules 45 of the Massachusetts Rules of Civil Procedure, to appear and testify on behalf John Doe before a Notary Public of the Commonwealth or some other person authorized by law to take this deposition and hear testimony, at the office of *Attorney for Doe, Attorney address in the City of Attorney, Massachusetts on Date at ? o'clock* and testify as to your knowledge, at the taking of the deposition in the above-entitled action.

You are further required to bring with you the documents listed in Schedule A attached hereto. Hereof fail not as you will answer to your default under the penalties in the law made and provided.

Notary Public

Schedule A

1. Personnel file for Jane Doe
2. W-2s for Jane Doe

Sample Written Objection

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH OF MASSACHUSETTS

COUNTY, SS.

SUPERIOR COURT DEPARTMENT
TRIAL DIVISION
Civil Action No. PLCV0000-0000

JOHN DOE,)
Plaintiff,)
)
v.)
)
)
JANE DOE,)
Defendant.)
)

WRITTEN ASSURANCE AFFIDAVIT

AFFIDAVIT OF _____, being duly sworn and personally
appearing before the undersigned attesting officer, duly authorized by law to administer oaths,
deposes and says that the within statements are true and correct:

1. I have read the Protective Order attached hereto and I understand the terms
and meanings.
2. I agree that my signature below submits me to the jurisdiction of the County
Superior Court – Trial Division, in which the action of *John Doe v. Jane Doe* is
pending, and binds me to the provisions of the Protective Order, including to all
promises undertaken in the

Order as if originally agreed to by me.

FURTHER AFFIANT SAYETH NOT

SIGNATURE

ADDRESS

CITY, STATE, and ZIP

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me this ____ day of _____, 2017
by _____, who is personally known to be who has produced
_____ as identification.

Notary Public

Printed Name, Date, Page -#-

My Commission Expires

Sample Stipulated Protective Order

COMMONWEALTH OF MASSACHUSETTS

COUNTY, SS.

SUPERIOR COURT DEPARTMENT
TRIAL DIVISION
Civil Action No. PLCV0000-0000

JOHN DOE,)
Plaintiff,)
)
v.)
)
)
JANE DOE,)
Defendant.)
)

STIPULATED PROTECTIVE ORDER

In order to preserve and maintain the alleged confidentiality of certain documents to be produced by Town of Anywhere (the “Town”) in this action, it is ordered that:

1. Documents to be produced by the Town that contain alleged proprietary information, confidential business information, trade secrets, and/or other competitively sensitive data shall hereafter be referred to as “Protected Documents.” The Town will visibly mark – without obscuring any information – all such materials “Subject to Protective Order.”

Documents to be produced by the Town that contain sensitive information with the potential to be used to perpetrate acts of terrorism or vandalism shall similarly be referred to as protected documents. Such documents produced by the Town will be visibly marked – without obscuring any information – all such materials “Subject to Protective Order.”

Documents to be produced by the Town that contain sensitive information, such as personnel or medical information that, if disclosed publicly, would interfere with an individual's privacy rights, or are that contain intimate details of a highly personal nature that, if disclosed publicly, would interfere with an individual's privacy rights shall similarly be referred to as protected documents. Such documents produced by the Town will be visibly marked – without obscuring any information – all such materials “Subject to Protective Order.”

2. The Protected Documents shall be treated as confidential, unless a party objects. To object to the confidentiality of certain Protected Documents, the objecting party must serve a written objection identifying by bates number the Protected Documents to which it objects and the basis therefore. The party requesting protection shall have 30 days to move the Court to establish a need for protection.
3. Except upon the prior written consent of the Town and the parties or upon further Order of this Court, the Protected Documents may be shown, disseminated, or disclosed only as necessary for the prosecution of this lawsuit and only to the following persons:
 - a. The parties (the “Receiving Party”) and their counsel of record in this case, including other members of counsel's law firm and any other counsel associated to assist in the preparation or trial of this case;
 - b. Employees of counsel, or of associated counsel, who assist in the preparation or trial of this case;
 - c. Experts and consultants retained by the parties for the preparation or trial of this case; and
 - d. The Court, the Court's staff and witnesses in this case.

Before any person identified in this paragraph (with the exception only of those identified in subsection (d)) may review or obtain copies of Protected Documents, such person shall be presented with a copy of this Protective Order and shall execute a "Written Assurance" in the form attached hereto. Counsel for Plaintiff will retain the Written Assurance forms for a period of three years following withdrawal or entry of final judgment not subject to further appeal. Counsel for Plaintiff will also produce to counsel for the Town copies of all Written Assurances signed by any person identified in this paragraph (with the exception only of those identified in subsection (d)) upon request of the Town. The persons identified in this paragraph shall not share protected documents with any third person or entity (other than those identified in this paragraph) at any time.

4. All persons describe in paragraph 3 may not post Protected Documents on any website or internet accessible document repository, and shall not under any circumstance sell, offer for sale, advertise, or publicize either the Protected Documents and the confidential information contained therein or the fact that such persons have obtained Protected Documents.
5. Any Protected Documents attached as an exhibit to any deposition taken in this action, and any deposition testimony containing information from Protected Documents, shall be protected from disclosure by this Protective Order.
6. If any party wishes to file Protected Documents with the Court before trial, that party shall file the documents under seal or file only a list of the bates numbers of the documents the party wishes to have shown to the court. Within ten (10) days of the filing of documents under seal or the filing of a list of bates numbers

by any party, the Town may make a motion to have the documents submitted under seal for in-camera review. Pending determination of the motion, the Protected Documents will not be made part of the court file, but may be shown to the Court under seal or in camera. In any event, counsel of record shall comply with Rule 5(h) which requires counsel to protect personal identifying information from publicly accessible documents filed with the court. Mass. R. Civ. P. 5(h).

7. Should any party wish to file Protected Documents, or disclose Protected Documents or the information contained therein, at the time of trial through the receipt of Protected Documents into evidence or through the testimony of witnesses, that party shall move the Court at the time of trial.
8. If any party wishes to modify this Order or its application to certain Protected Documents, the party shall first request such modification from the Town or their counsel, and if no satisfactory agreement is reached, may petition the Court for modification. Until modification is granted by agreement or Order, the terms of this Order will govern.
9. Within thirty days after withdrawal or entry of final judgment not subject to further appeal, all Protected Documents shall be returned to the Town unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so. Notwithstanding the above requirements to

return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to information designated as SUBJECT TO PROTECTIVE ORDER, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be SUBJECT TO PROTECTIVE ORDER under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use Protected Documents.

10. Unless otherwise agreed or ordered, this Order shall remain in force after withdrawal or entry of judgment not subject to further appeal.

SO ORDERED.

Entered on _____, 2017.

Judge

Respectfully submitted,

DEFENDANT
JANE DOE
By its Attorney,

PLAINTIFFS
JOHN DOE
By its Counsel,

THE TOWN
By its attorneys

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