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October 27, 2015

Jill R. Goldsmith
Town Manager
Chatham Town Hall
549 Main Street
Chatham, MA 02533

Re: Release of Town Counsel Opinion Letters

Dear Jill:

As noted in your email of October 22, 2015, upon receipt by your office, or any other Town Board, commission, committee or officer, of any written opinion, correspondence or other document from Town Counsel, said opinion, correspondence or document becomes a public record within the broad definition of that term set forth in G.L. c. 4, §7(26), unless it falls within one of the specific statutory exemptions provided therein or an applicable attorney/ client privilege. We will note, as a matter of course, on any confidential or privileged document issued to the Town that it is "Confidential – Not a Public Record", when appropriate.

The Massachusetts Public Records Law, G.L. C. 66, §10(a) provides, in pertinent part, that: "Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee." The law and its regulations (980 CMR) provide that the law applies to records created by or in the custody of a state or local agency, board or other government entity in the usual course of business. Thus, the mandatory disclosure provision of the Public Records Law applies to all relevant information that is in the custody of the governmental entity at the time the request is received. See G.L. c. 4, §7(26) (defining "public records" as materials which have already been "made or received" by a public entity). Accordingly, all non-exempt or non-privileged written correspondence from this office in the possession of any Town entity or officer/ employee would be subject to public disclosure if a

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public records request is made therefor. Local policy or regulations relative to the release or dissemination of Town Counsel opinions or other correspondence cannot, as a matter of law, supersede this statutory duty to produce documents or the timeframe (10 days) within which a reply to a public records request must be issued.

Presently, as is the customary practice among most municipalities, we will issue opinion letters or other correspondence regarding legal matters to the Town Board, Commission or officer requesting the same, with a copy of all such correspondences to the Town Manager. Subject to the above mandatory public record production obligation, the Board of Selectmen does have the authority to adopt an alternative policy or regulation relative to the release of Town Counsel correspondence to other Town departments/ employees. As you know, all requests for Town Counsel review of and/or opinions on matters are subject to prior authorization by the Town Manager's office. A protocol could be adopted whereby any correspondences from Town Counsel are issued only to your and the Board of Selectmen's attention for review and dissemination to other Town departments or officers as you and/or the Board deem appropriate. While permissible, such a policy would likely only be workable if the Town Manager had the authority to issue said correspondences to Town officers due to the often time sensitive nature and imminent need for Counsel's advice on pending Town business matters. As a multi-member public body, the Board of Selectmen would only be able to discuss and deliberate on whether to distribute Town Counsel opinions/ correspondence to other Town agencies/ officers during the course of a public meeting (or a duly convened executive session if the subject matter of the correspondence so warranted) upon publication of notice of the relevant subject matter. This would be an unwieldy process when prompt legal advice is required in order for Town officers and agencies to conduct their regular business. I believe it would be permissible for the Chairman of the Board, perhaps acting in conjunction with the Town Manager, to review and authorize the release of such correspondence provided that he exercised this function as an individual and NOT in concert with other members of the Board.

With respect to the proposed "non-object policy", noted in your email, I do believe that any discussion, deliberation or action by members of the Board sufficient in number to constitute a quorum, whether jointly or in separate, serial communications with your office, relative to review and authorization of release of Counsel correspondence would constitute "business" of the Town which would be subject to the requirements of the Open Meeting Law. Thus, such discussions and votes would have to take place in a duly noticed and scheduled open meeting of the Board, unless the specific subject matter justified convening an executive session, in which case it could be addressed in executive session. Such a "pre-release" procedure would be viable with respect to some matters which aren't time sensitive; however, it could create problems with respect to other more pressing matters.

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Certainly, nothing would preclude members of the Board from *receiving a* "transmittal copy" of Counsel correspondence as soon as it is issued, however, the Board, as a body, could not discuss said correspondence among its members nor could members of the Board respond, in serial fashion, to your office with respect to any proposed action relative to distribution of the correspondence.

Let me know if you have any further questions in this regard.

Very truly yours,

A handwritten signature in black ink that reads "Patrick J. Costello" followed by a circular stamp containing the initials "PJC".

Patrick J. Costello

PJC