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By Electronic Mail and Hand Delivery

The Honorable Andrea Joy Campbell
Assistant Attorney General Erin Fowler
Office of Attorney General Andrea Joy Campbell
One Ashburton Place, 20th Floor
Boston, MA 02108

Dear Attorney General Campbell and Assistant Attorney General Fowler:

On behalf of Senate President Karen E. Spilka and the Massachusetts Senate, I submit this letter concerning Initiative Petition 25-14 (the "Petition"), which proposes to strike the General Court's long-recognized and constitutionally-mandated exemption from the Public Records Law. *See Westinghouse Broadcasting Co. v. Sergeant-At-Arms of the General Court*, 375 Mass. 179 (1978). The Petition seeks to infringe on one of the Legislature's most fundamental constitutional powers: its ability to control its own rules of procedure – specifically the control of its own records – without interference from the other branches of government. The Petition is wholly inconsistent with multiple provisions of the Massachusetts Constitution, including the Senate's constitutional authority to make its own rules and manage its own proceedings, separation of powers, and legislative immunity and privilege. The Petition also alters the power of the courts, making the Judiciary the prime enforcer of the Public Records Law against the Legislature and giving the courts unprecedented authority over the Legislature that the Constitution never envisioned. It is clear that the Petition should have been submitted as a constitutional amendment. As proposed, it is not in "proper form" and it includes a matter specifically excluded by Article 48 of the Massachusetts Constitution. I ask that the Attorney General decline to certify it.

Background

In analyzing the Petition, it may be useful to understand how the Senate is organized. Unlike executive agencies and similar entities, the Senate is comprised of 40 individual offices, managed by individual Senators. While the Senate President's office provides some administrative and other support for these members, she does not act as a traditional executive. Rather, the Senators make collective decisions about Senate processes and procedures and then promulgate them as Senate Rules. Those rules govern the way the Senate creates, maintains, and

disseminates its records. *See, e.g.*, Senate Rules 10D, 57C, and 62B (discussing how various officers of the Senate shall maintain certain records of the body).

Discussion

Article 48 requires that an initiative petition be in "proper form for submission to the people." Art. 48, The Initiative, II, § 3. Only laws and constitutional amendments can be presented through the initiative petition process under Article 48. Art. 48, The Initiative, II, § 1; *see also Dunn v. Att'y Gen.*, 474 Mass. 675, 682–83 (2016). Where an initiative petition neither proposes a law nor a constitutional amendment, it "is not 'in proper form for submission to the people.'" *Id.*, 474 Mass. at 682–83 (quoting Art. 48, The Initiative, II, § 3). Here, the Petition attempts to recast changes to internal rules and proceedings of the General Court as a change in law, and thus it is not in proper form within the meaning of Article 48. *See Paisner v. Att'y Gen.*, 390 Mass. 593, 599–600 (1983) ("not all legislative products are laws and we examine the proposed initiative to decide in which category of legislative power it resides, laws or rules.").

Where an initiative petition "relates to internal legislative procedures, which are within the constitutional unicameral powers of the respective" branches of the General Court, "it can logically be argued that the unicameral/bicameral distinction favors a conclusion that the proposed initiative does not concern a law." *Paisner*, 390 Mass. at 599–600; *see also Opinion of the Justices to the Senate*, 397 Mass. 1201, 1209 (1986) ("The legislative power reserved to the people under art. 48 is much narrower than the plenary powers with which their representatives are vested."). The Supreme Judicial Court has made it clear that one may not, through the initiative process, introduce rules under the guise of laws. *Paisner*, 390 Mass. at 601–02. Although the Court has avoided a "precise construction of the term 'law,'" it has "concluded that an initiative did not propose a 'law' where it sought to prescribe rules for the Legislature's internal operations that could not bind the Legislature absent a constitutional amendment, and therefore, if enacted, 'would be no more than a nonbinding expression of opinion.'" *Dunn*, 474 Mass. at 682–83 (quoting *Paisner*, 390 Mass. at 601).

Legislative autonomy

The Massachusetts Constitution provides wide latitude for the Senate and House of Representatives to determine their own rules and manage their own proceedings. *See* Part II, c. 1, § 2, art. 7 (the Senate shall "choose its own president, appoint its own officers, and determine its own rules of proceedings"); Part II, c. 1, § 3, art. 10 (House members shall "choose their own Speaker, appoint their own officers, and settle the rules and orders of proceeding in their own House"). That authority extends to the Senate's and House's control of their records. *See* Senate Rules 10D, 57C, and 62B (discussing how various officers of the Senate shall maintain records of the body); House Rules 10B, 17B, 90, 92, 96, and 97 (similar). Adoption of these rules is a clear and unambiguous demonstration that procedures related to recordkeeping (and the sharing of records with the public) fall within each house of the General Court's exclusive and absolute constitutional authority to determine its own rules of proceedings. Consistent with the Supreme Judicial Court's opinion in *Paisner*, any attempt to provide otherwise by initiative petition would be superseded by the Senate's or House's adoption of rules to the contrary. *Cf. Powers v. Sec'y of Admin.*, 412 Mass. 119, 125 n.7 (1992) (stating that the SJC is "unwilling to enter into an

examination of the internal record-keeping process of either branch of the Legislature" and that the Court "traditionally has avoided involvement in the internal workings of the Legislature").

This is not a far-fetched, maximalist position. Several state supreme courts agree that "the constitutional commitment of authority for the legislative houses to determine their own procedural rules necessarily means each house can interpret, amend, enforce, or disregard those rules with almost limitless impunity." *Puente v. Arizona State Legislature*, 254 Ariz. 265, 269 (2022) (citing cases). The judiciary may review legislative rules or procedures to decide whether they ignore constitutional restraints, but absent such challenges, "the judiciary cannot compel the legislature to follow its own procedural rules, ***even if the procedural rules are codified in statute***." *Id.* (emphasis added). The Petition is attempting to displace the Senate's and the House's constitutional authority to establish their own records procedures as that authority is absolute and continuous. *See United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 288 (2005) (concluding New Hampshire's open meeting law, as applicable to the legislature, is procedural "because this legislative enactment 'merely establishes a rule of procedure concerning how the legislature has decided to conduct its business,' and the legislature has sole authority to adopt such rules of procedure" (citation omitted)); *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 339 (Alaska 1987).

This intrusion into the Senate's and House's constitutional power to manage their own affairs makes the Petition quite unusual and almost without precedent nationally. Massachusetts is one of several states that explicitly exempts the Legislature from the state's public records law. *See, e.g.*, N.C. Gen. Stat. Ann. § 132-1; Okla. Stat. Ann. tit. 51, § 24A.3 (West). It is identical to Congress, which is explicitly excluded from the reach of the Federal Freedom of Information Act.[1] Beyond the states with explicit exemptions, many state legislatures have become effectively exempt from their state public records laws through statutes, court decisions, or legislative rules. *See, e.g.*, N.Y. Assemb. R. VIII § 2 (2025) (legislative rule); *Memphis Publishing Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn. 1986) (holding that, by including language reserving the right to create exemptions through statute, the legislature reserves to itself alone the power to make public policy exceptions to public records laws); S.C. Code Ann. § 30-4-40 (statute exempting legislative communications and deliberative materials); S.D. Codified Laws § § 1-27-1.5, 1-27-1.9 (similar); Wis. Stat. Ann. § 16.61 (West) (similar). Presumably because of the challenging constitutional issues at stake, nearly every state in the nation that has made its legislature subject to a public records law has done so through either (a) the consent of the legislature or (b) a constitutional amendment.[2] Neither is present here.[3]

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[1] *See* 5 U.S.C. § 551 (defining "agency" to not include the Congress or the courts of the United States).

[2] For states with constitutional amendments that include the legislature within the ambit of the public records law, *see, e.g.*, Fla. Const. art. I, § 24; Mo. Const. art. III, § 19; N.D. Const. art. XI, § 6.

[3] The only state that may prove an exception is Washington State, which has an extraordinarily robust initiative petition process. *See* Wa. Const., art. II, § 1. In 1972, a citizens' initiative petition was approved that established the state's public records law. The new law contained a definition of "agency" that included state legislative offices. Nevertheless, subsequent court decisions in Washington have significantly limited the reach of the law to legislative records, including limitations based on legislative privilege and the speech and debate clause of the Washington Constitution.

In short, the Petition is not in proper form. It neither proposes a law nor a constitutional amendment. It proposes a legislative rules change, which Article 48 prohibits.

Separation of powers and the powers of courts

Among its significant flaws, the Petition also disregards basic separation of powers principles. *See* Art. 30. The Supreme Judicial Court has previously cautioned that interference by one branch with another branch's records procedures raises the specter of violating Article 30. *See New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. of Bristol*, 377 Mass. 404, 411 (1979) ("Legislation restricting the use of judicial records by the judicial branch of government, so far as it interferes with the internal functioning of the judicial branch, may violate art. 30.").

In particular, the Petition makes the Legislature subject to the Public Records Law, including oversight by the Secretary of the Commonwealth and the Supervisor of Records. *See* G.L. c. 66, §§ 10, 10A. Such oversight is completely inconsistent with Article 30 and separation of powers principles.[4] The Secretary, through the Supervisor of Records, has the authority under the Public Records Law to order "appropriate relief" and to refer any matter to the Attorney General against state entities who refuse to produce requested documents. *See* G.L. c. 66, § 10A. Worse, any requestor "may initiate a civil action [in Superior Court] to enforce the requirements" of the law. *Id.* The Petition, therefore, would grant the Judiciary "jurisdiction to enjoin" the Legislature and "award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint." *Id.*

The Judiciary, of course, is not currently permitted to enjoin the Legislature. *See, e.g., LIMITS v. President of the Senate*, 414 Mass. 31, 35-36 (1992) ("The courts should be most hesitant in instructing the General Court when and how to perform its constitutional duties. Mandamus is not available against the Legislature."); *cf. Town of Milton v. Commonwealth*, 416 Mass. 471, 475-76 (1993) (stating that "[d]eclaratory relief is not available against the...Legislature"). Indeed, Massachusetts courts have repeatedly stated that they are hesitant to interfere in any way in the internal workings of the Legislature, never mind by injunction. *See First Just. of Bristol Div. of Juv. Ct. Dep't Clerk-Magistrate of Bristol Div. of Juv. Ct. Dep't*, 438 Mass. 387, 408 (2003) ("This Court traditionally has avoided involvement in the internal workings of the Legislature in deference to the unique role of the Legislature"). Nonetheless, the Petition would grant the courts new and sweeping powers over the Legislature, including the ability to impose punitive damages for certain violations of the Public Records Law. *See* G.L. c. 66, § 10A(d)(4) (allowing court to impose fines of "not less than $1,000 nor more than $5,000" against an agency that withholds or fails to timely furnish records not in good faith). And this new power is not merely incidental: it is the primary enforcement mechanism of the proposed law. Thus, not only does the Petition present significant separation of powers issues, it also substantially affects the powers of the courts, which Article 48 prohibits. *See* Art. 48, The Initiative, II, § 2; *see also Albano v. Att'y Gen.*, 437 Mass. 156, 159 (2002) (initiative or referendum "relates to...the powers...of courts" when "they altered the courts' basic ability to

[4] Not only would the Secretary of the Commonwealth's office be the initial arbiter of disputes between requestors and the Legislature, but it would also be the entity to whom the Legislature is required to file annual reports containing data and information concerning its public records requests. *See* G.L. c. 66, § 6A(e).

render decisions in an entire category of cases" and "in more than an incidental or subsidiary way").

The Petition here unquestionably relates to the powers of courts, an excluded matter under Article 48. It would fundamentally rearrange the relationship between the Legislature and the Judiciary, empowering the courts to decide questions that up to now were exclusively within the province of the Legislature. Such a Petition cannot survive scrutiny under Article 48 and cannot be certified.

Legislative immunity and privilege

Beyond the Petition's offenses to legislative autonomy and separation of powers is its failure to properly preserve legislative immunity and privilege. *See Babets v. Sec'y of the Exec. Office of Human Svcs.*, 403 Mass. 230, 233 (1988) (recognizing "explicit constitutional grant to the Legislature of a 'privilege' as to its deliberations"). The Petition will likely intrude, directly or indirectly, with legislators' rights under Article 21 to the Constitution, which protects "freedom of deliberation, speech and debate, in either house of the legislature." The Supreme Judicial Court has recognized that legislative immunity, which derives from Article 21, is necessary to allow legislators "to execute the functions of their office without fear" of adverse legal consequences. *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). Legislative privilege is a natural extension of legislative immunity, and it protects legislators (and their staff) from the burdens and disruptions of intrusions into the legislative process. *Gravel v. United States*, 408 U.S. 606, 616-622 (1972). The privilege reaches not just speech or debate in a legislative body but any matter that is "an integral part of the deliberative and communicative processes" by which legislators participate in committee and legislative proceedings with respect to legislation or other matters which are constitutionally within the jurisdiction of the legislative body. *Id.* at 625.

The Petition's stated exemptions are no cure for its various constitutional infirmities. The Petition proposes to exempt from the public records law "communications between a member of the general court, or such member's employee...and any constituent of such member" provided the communications "relate to a constituent's request for assistance in obtaining government-provided benefits or services" or interacting with a state or federal agency. Petition at § 2. This exemption is much too narrow. It does not cover, for example, communications between constituents and members about bills under consideration by the Legislature or potential legislation; courts have found such communications within the quintessential area protected by legislative privilege. *See Brown and Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (stating that legislative privilege permits Congress to "obtain information without interference"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528-31 (9th Cir. 1983) (finding that a legislator's receipt of "information pertinent to potential legislation or investigation" is a part of the privileged legislative process).

The Petition also proposes to exempt "communications, memoranda, drafts or other documents relating to developing policy positions of members of the general court." Petition at § 2. The Petition does not define the phrase "developing policy positions" and leaves open the

possibility that it could be limited to matters short of legislation.[5] Would such an exemption include drafts of legislation? Would it include communications between members of a legislative conference committee? It remains entirely unclear, and that lack of clarity casts a long shadow over Article 21. Regardless, there can be no doubt that the Petition will chill internal debate and communications within the Legislature and prompt self-censorship, thus undermining Article 21 both directly and indirectly. Again, if the Petition's authors seek to fundamentally alter the Massachusetts Constitution, including infringement of Article 21, then they should have submitted a constitutional amendment for consideration rather than take a problematic shortcut via a statutory amendment.[6]

Conclusion

The Petition harnesses the laudable goal of increasing legislative transparency. The Senate shares that goal, which is visible in its approved legislative rules package for the 2025-2026 legislative session.[7] But, constitutionally speaking, there is a right way of doing things and a wrong way. The Petition is most certainly the wrong way, as seen by its disregard for constitutional principles.

The Petition is a rules proposal dressed up as an initiative petition that seeks to fundamentally alter the internal rule-making and proceedings of the General Court, the separation of powers, and legislative immunity and privilege. If the Petitioners desire to change the architecture of the Massachusetts Constitution, they should have made their proposal in the form of a constitutional amendment. Their failure to do so has left them with an initiative petition that is not in "proper form for submission to the people." Moreover, the Petition clearly relates to the powers of courts, which is an excluded matter under Article 48. For any of the foregoing reasons, it should not be certified.

Sincerely,

James E. DiTullio

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Counsel to the Senate

Cc: Karen E. Spilka, President of the Massachusetts Senate

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[5] The vagueness of the language also leaves open the possibility that records relating to "developing policy positions" may no longer be exempt from disclosure once the policy position is fully developed.

[6] The state of Missouri is instructive here. A citizen-initiated constitutional amendment was passed in 2018. *See* Mo. Const. amend. I (adopted Nov. 6, 2018, effective Dec. 6, 2018). Among other things, the amendment changed the Missouri state constitution's speech and debate clause to expressly state that legislative records are public records subject to the state's Sunshine Law. Mo. Const. art. III, § 19.

[7] The 2025-2026 Joint Rules of the Senate and House of Representatives require: 10 days' notice for joint committee hearings (an increase from 72 hours); joint committee votes to be recorded and posted on the General Court's website; members of the public to be able to participate remotely in joint committee hearings; the first meeting of any conference committee to be open to the public and media; joint committees to make a summary of each bill publicly available on the General Court's website prior to its hearing; and joint committees to adopt rules making written testimony publicly available. In addition, all the Senate's and the General Court's expenditures are publicly posted on the Massachusetts Comptroller's website (CTHRU), and all legislative sessions and committee hearings are broadcast live and archived for public viewing on the General Court's website.