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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
C.A. No. 1885CV01526A

GATEHOUSE MEDIA, LLC,)
Plaintiff,)
v.)
CITY OF WORCESTER,)
Defendant)

FILED

AUG 13 2019

ATTEST: *[Signature]* CLERK

**CITY OF WORCESTER'S REPLY TO PLAINTIFF'S OPPOSITION TO
THE CITY'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant, City of Worcester (City), hereby replies to the opposition of Plaintiff Gatehouse Media, LLC (Gatehouse), parent company of the Worcester Telegram & Gazette newspaper (T&G), to the City's cross-motion for summary judgment, seeking judgment as a matter of law that the Worcester Police Department (WPD) records at issue were properly withheld pursuant to exemptions of the Public Records Law (PRL), G. L. c. 66, § 10.

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Plaintiff's public records request was prompted by a letter written by Attorney Hector E. Pineiro (Pineiro Letter), who represents several plaintiffs in civil rights lawsuits against the City and members of the WPD, complaining of the actions of the police officers, the majority of whom are defendants in pending federal civil rights lawsuits and/or who have investigated or arrested Attorney Pineiro's son. Although Plaintiff argues that the City "impugns" its motives, the City does not misstate these facts,¹ and Plaintiff acknowledges that the Pineiro Letter has prompted its public records request. (J.A. Exh. 25.) Thus, under the guise of its role as "watchdog," the T&G has published several articles based on the allegations of Attorney Pineiro, who has a strategic interest in maligning the WPD and causing the public dissemination of police records that either cannot be obtained in the discovery process in the civil rights cases, or cannot

¹ Although Plaintiff argues that some of the City's factual assertions are unsupported by record evidence, (Plaintiff's Opposition at 2), the Statements of Fact that Plaintiff references are supported by two attorneys' affidavits, J.A. Exhs. 31 and 36.

be publicly released because of the protective orders in place. Therefore, the public records request at issue is a strategic attempt to obtain records that are not discoverable in the civil rights litigation, or subject to protective orders, and release them in the public domain. The release of the records would severely disadvantage the City and the police officers in the litigation by allowing public access to confidential, protected information and influencing the litigation through media coverage. Although the City acknowledges that the PRL is theoretically blind to the status of the requestor, the PRL also does not provide a greater right of access to records than a party in litigation.

The complaint history records of the police officers and the internal investigation reports fall within the exemptions to the PRL for records that are substantially related to litigation/deliberative process and investigatory matters. Plaintiff's request implicates exemption (d) to the PRL, G. L. c. 4, § 7, Twenty-sixth (d), the "deliberative process" exemption, in a distinct circumstance not specifically addressed by any prior case where a party seeks complaint records of the police officers who are defendants and involved in civil rights lawsuits and pending internal investigations. The prior cases involving the T&G and the WPD did not involve police records of officers subject to active civil rights litigation.

The courts have now recognized that a public entity, when engaged in litigation, should not be impeded in its defense of matters by being required to produce documents that are the subject of the litigation due to its status as a public entity. See DaRosa v. City of New Bedford, 471 Mass. 446, 453-4 (2015). Plaintiff distinguishes the DaRosa case by arguing that it only exempted "opinion work product" from the definition of public records. (Plaintiff's Opposition at 3.) There is no doubt that the DaRosa case involved records different from those at issue in this case; however, the important precedent established by DaRosa was the recognition that records that are the subject of the litigation fall within the exemption while the litigation is

pending. When the materials are the subject of litigation, “the need for nondisclosure is greater ... where the disclosure of these materials might be used to the detriment of the government by its litigation adversary.” Id. at 458. Exemption (d) was also applied to attorney-client privileged communications where the court noted the disadvantage a public entity faces in litigation when it is also subject to the PRL, which may “severely inhibit the ability of government officials to obtain quality legal advice ... place public entities at an unfair disadvantage vis-à-vis private parties with whom they transact business ... and impede the public’s strong interest in the fair and effective administration of justice” if the records are subject to disclosure. Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 446 (2007); DaRosa, 471 Mass. at 453–4. Likewise, the Superior Court and the Supervisor of Records have found that records that are substantially related to ongoing litigation fall within exemption (d). Lafferty v. Martha’s Vineyard Comm’n, No. CIV.A. 03-3397, 2004 WL 792712, at *3 (Mass. Super. Apr. 9, 2004); J.A. Exh. 32.

Thus, Plaintiff, in arguing that exemption (d) only applies to “policy positions being developed” construes the exemption too narrowly. (Plaintiff’s Opposition at 3.) Where the records Plaintiff seeks are at the heart of civil rights litigation – vigorously litigated and/or produced only on a limited basis and also subject to protective orders – the records are certainly “substantially related” to civil rights litigation and subject to exemption (d). The City is not acting “secretively as a private litigant,” but in accordance with its duties as a public employer to defend the City and its employees. See G. L. c. 258, § 2 (“[t]he public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee”) (emphasis added); Maimaron v. Com., 449 Mass. 167, 173 (2007). Indeed, hindering the defense of the police officers in the civil rights actions by forcing production of confidential and protected records may impede their due process rights. See Davis v. Scherer, 468 U.S. 183, 194–

6 (1984) (Recognizing due process rights of police officers in the application of the doctrine of qualified immunity “officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated.”) The City is not “ignoring” the PRL as Plaintiff argues; once the Ruiz case was resolved, the City honored Mr. Petrishen’s request and produced the records. However, while the civil rights litigation is pending, the release of complaint histories of the officers and internal investigations would severely impede the defense of the police officers in the federal litigation.

The City does not maintain that the protective orders in the federal suits prohibit the City from releasing its own records – the fact that protective orders are in place to restrict access to the records demonstrates the confidential nature of the documents, the lack of access by non-parties to the litigation and the application of exemption (d). In Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 211-16 (2011), documents in the custody of the Attorney General, but under a protective order in an enforcement action, were not subject to disclosure under the PRL. The argument that because the documents were held by the Attorney General they were subject to production was “based on the mistaken premise that all documents in the hands of public officials must, absent an applicable exception, be made public notwithstanding a court order prohibiting their circulation.” Id. at 215; DaRosa, 471 Mass. at 454. This Court should not interfere with the authority of the federal court to issue protective orders and regulate discovery, one of the “inherent powers” of the court. Id. With the protective orders in place to restrict access to the documents, the PRL cannot be used as an end run around its protection. Plaintiff labels the City’s argument as a “red herring” in an effort to distract from Plaintiff’s earlier efforts to gain access to some of the documents directly from the federal court in the Diaz et al. v. City of Worcester et al. case, U.S. District Court C.A. No. 16-40039-TSH. (J.A. Exh. 34.) After the

federal court denied Plaintiff's motion to modify the protective order to gain access to what Plaintiff argued were "public records," (See J.A. Ex. 34, Doc. 91, filed 6/19/17), Plaintiff sought access to the records through its public records request and this suit. Thus, here, the T&G seeks access to the information in a separate public records suit, after an unsuccessful attempt to gain access through the case itself, just as the requestor did in the Fremont Investment & Loan case, 459 Mass. at 210. As in Fremont, this Court should hold that the protective orders in the federal court cases preclude Plaintiff's access to the records. The City has a reasonable expectation that the information produced pursuant to the protective orders remain confidential during the pendency of the federal litigation, and this Court should not interfere with the inherent powers of the federal court to regulate discovery and issue protective orders.

The City is entitled to judgment that the redactions and withholding of records based upon other exemptions to the PRL are valid. Exemption (f), G. L. c. 4, § 7, Twenty-sixth (f), applies to pending investigations and the officers subject to those investigations, thus the applicable records were properly withheld. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 61-2 (1976). (Ex. 31 at ¶ 10; SOF ¶ 26.) Exemption (c) of the PRL exempts from mandatory disclosure "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G. L. c. 4, § 7, Twenty-sixth (c). The records were properly redacted pursuant to exemption (c) for medical information and conclusions of investigations. (J.A. Ex. 35 at 13.)² The City properly redacted information from the BOPS investigation reports produced that was within the parameters of exemption (a), which applies to records "specifically or by necessary implication exempted from disclosure by statute." G. L. c.

² Worcester Telegram & Gazette Corp. v. Gary J. Gemme and City of Worcester, Worcester Superior Court No. 08-2742E, Doc. 12 (Jan. 13, 2010) (issuing an order in the most recent litigation between the parties that provided for the redaction of complainant and non-police witness names and other identifying information, together with the dispositions of the internal police investigations, prior to the production of the records to the T&G).

4, § 7, cl. 26(a). The redactions did not concern the conduct of police officers, but rather included statutorily protected information concerning domestic violence/abuse, adjudicated crimes and juvenile offender record information. The City was not protecting information with these redactions about the police officers; instead, it was satisfying its duty to comply with the PRL.

The City complied with the Public Records Law in withholding or redacting, as appropriate, portions of the requested records of the Worcester Police Department. To order production of the withheld information would be a disservice to the public interest because it would impede the City's ability to investigate complaints and defend litigation against its police officers when exemptions apply to prevent municipalities from being placed at a disadvantage in litigation by the PRL, as well as interfere with the City's duty to protect information as a records custodian. Plaintiff's motion should be denied; the City is entitled to judgment as a matter of law that it complied with the Public Records Law.

CITY OF WORCESTER

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CERTIFICATE OF SERVICE

I, Wendy L. Quinn, hereby certify that I served upon Plaintiff the within City of Worcester's Reply to Plaintiff's Opposition to the City of Worcester's Cross-Motion for Summary Judgment by emailing and mailing a copy of the same, postage prepaid, to the following on this 7th day of August, 2019:

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