

**COMMONWEALTH OF MASSACHUSETTS**

**WORCESTER, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
No. 1885CV1526A**

**GATEHOUSE MEDIA, LLC**

**vs.**

**CITY OF WORCESTER**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

The plaintiff, Gatehouse Media, LLC (plaintiff or Gatehouse), commenced this action against the defendant, the city of Worcester (city), contending that the city violated the Massachusetts Public Records Law, G. L. c. 66, § 10 (public records law), by: (1) failing to produce materials related to certain police officers and investigations in response to the plaintiff's two public records requests; and (2) requesting substantial fees to perform redactions not required by law. The plaintiff seeks a declaratory judgment that the requested documents are public records, that the city violated the plaintiff's right of access to those records, and that the city's estimated fee for reproducing those records is unreasonable and exceeds the actual cost of reproduction. It also seeks an award of reasonable attorney's fees and costs under G. L. c. 66, § 10A(d)(2), as well as an assessment of punitive damages against the city in an amount not less than \$1,000 nor more than \$5,000, to be deposited in the Public Records Assistance Fund pursuant to G. L. c. 66, § 10A. Based on the credible testimony and exhibits, along with the

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reasonable inferences therefrom, as well as considering the submissions of the parties,<sup>1</sup> the court makes the following findings of facts and rulings of law.

## FINDINGS OF FACT

### **I. Plaintiff's Requests for Documents**

On June 6, 2018, a reporter for the plaintiff, Brad Petrishen (Petrishen), emailed two requests for documents under the public records law to the Records Access Officer for the Worcester Police Department, Lieutenant Michael Hanlon (Lieutenant Hanlon). The first request was for internal affairs investigations related to twelve police incidents (first request).<sup>2</sup> The second request was for internal investigations, also known as concise officer histories (COHs), for seventeen Worcester police officers (second request).<sup>3</sup>

### **II. City's First Response**

On June 19, 2018, Lieutenant Hanlon emailed Petrishen a response. In a letter attached to the email and dated June 16, 2018, Lieutenant Hanlon stated that four of the twelve internal affairs investigations at issue in the first request were still pending and exempt from disclosure under exemption (f), the investigatory exemption, to the public records law.<sup>4</sup> As to the remaining, completed internal investigations, Lieutenant Hanlon stated that 2,189 pages may be

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<sup>1</sup> The parties submitted proposed findings of fact and rulings of law. To the extent they are not adopted by the court, they are deemed denied. As the court references *infra* the city's proposed rulings of law in discussing the city's position, those materials will be cited as the City's Proposed Rulings.

<sup>2</sup> The twelve incidents are: (1) 10/8/2015 arrest of Alison Skerrett (Skerrett); (2) 8/26/2014 arrest of Hernan Ortiz (H. Ortiz); (3) 12/18/2013 arrest of Juan Roman Rivera (Rivera); (4) 8/29/2014 arrest of Carl S. Johnson (Johnson); (5) 7/10/2013 arrest of Jose Burgos-Martinez (Burgos-Martinez); (6) 3/8/2014 detention of Jose L. Ortiz (J. Ortiz); (7) 3/31/2014 arrest of Luke Deptula (Deptula); (8) 6/4/2012 arrest of Adalberto Ruiz (Ruiz); (9) 2/23/2016 charges against Grace Katana (Katana); (10) 4/8/2011 warrant served on Jimmie Cotto at 73 Fairfax Road, Worcester (Cotto); (11) 10/8/2008 search warrant execution at 85 Lamartine Street, Worcester (Lamartine); and (12) 2/19/2010 arrest of Kenneth Brooks, Jr. and Kenneth Brooks III (Brooks).

<sup>3</sup> The seventeen officers are: (1) Neftali Batista (Batista); (2) Steve Bonczek (Bonczek); (3) Jesus Candelaria (Candelaria); (4) Terrance Cahill (Cahill); (5) Jeffrey Carlson (Carlson); (6) James Carmody (Carmody); (7) Thomas Duffy (Duffy); (8) Terrance Gaffney (Gaffney); (9) Patrick Moran (Moran); (10) Gary Morris (Morris); (11) Robert O'Rourke (O'Rourke); (12) Brian Piskator (Piskator); (13) Nathan Reando (Reando); (14) Steven Roche (Roche); (15) Kellen Smith (Smith); (16) Carl Supernor (Supernor); and (17) Larry Williams (Williams).

<sup>4</sup> The exemptions to the public records law are set forth in G. L. c. 4, § 7, Twenty-sixth.

responsive. He also stated that 80 pages of documents may be responsive to the second request (regarding COHs). Lieutenant Hanlon cautioned, however, that “[d]ue to the nature of the documents requested, there is a very high likelihood that the records will contain information which we are prohibited by law from disclosing.” He estimated that it would cost \$3,775 to perform the remainder of the work needed to provide those responsive records, including reviewing the documents and performing any redactions required by law.

Petrishen asked for the estimated cost to have the city produce the 80 pages of COHs responsive to the second request. In an email dated July 5, 2018, Joshua Martunas (Martunas), Staff Assistant & Records Access Officer for the Office of the City Manager, informed Petrishen that it would cost \$133. The city received the \$133 payment on July 10, 2018.

### **III. City’s Second Response**

On August 3, 2018, Petrishen received another email from Martunas. Martunas informed Petrishen that the COHs sought in the second request were exempt under exemption (d), the deliberative process exemption. According to Martunas, “The requested records pertain to ongoing and incomplete litigation. The City has determined that the requested records are substantially related to said ongoing litigation, and that their release could impact ongoing proceedings; accordingly the requested records are exempt from disclosure.” Martunas offered to return the \$133 check previously sent.

On August 7, 2018, Martunas sent Petrishen a supplemental response regarding the second request. He again referenced the applicability of exemption (d),<sup>5</sup> and also asserted that portions of the records were exempt under exemptions (c) and (f). According to Martunas, the records were exempt under exemption (c) because they pertained to personnel files. He asserted

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<sup>5</sup> Martunas stated the city’s view that exemption (d) applied because the records were “substantially related to ongoing and incomplete litigation, and their release could impact ongoing proceedings.”

that exemption (f) applied because the records “contain materials substantially related to ongoing investigative efforts.”

On August 22, 2018, Petrishen sent an email asking: (1) whether the remainder of the responsive documents would be released at the quoted price of \$3,775, less \$133 for the COHs that were claimed exempt; (2) if the record would not be provided, why; and (3) which laws required redaction of materials, as referenced in the city’s first response.

#### **IV. City’s Third Response**

On September 13, 2018, Martunas emailed a response to Petrishen regarding the first request, noting that the city had “performed a preliminary review to determine the current status of each case.” Martunas indicated that, of the twelve investigations, records for: (1) six of the investigations were exempt under exemption (d) due to a pending court case;<sup>6</sup> (2) three of the investigations were exempt under exemption (f) due to an ongoing investigation;<sup>7</sup> and (3) three of the investigations were closed or settled,<sup>8</sup> with those records, comprising 865 pages, to be produced after redaction as required by law.

In referencing exemption (d), Martunas included the same rationale previously provided in the city’s second response. As to exemption (f), he stated that, “The city has determined that the responsive records are substantially related to current ongoing investigations, and that their release would impede the ability of law enforcement to effectively complete said investigations.” Finally, regarding the records to be produced, Martunas indicated that the cost to review and redact the documents would be \$300. This cost was based on an estimated fourteen hours of review (865 pages at one minute per page), charged at \$25 per hour, with two hours of review

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<sup>6</sup> The Rivera, Johnson, Burgos-Martinez, J. Ortiz, Deptula, and Ruiz matters.

<sup>7</sup> The Skerrett, H. Ortiz, and Katana matters.

<sup>8</sup> The Cotto, Lamartine, and Brooks matters.

provided free of charge. He explained that redactions would be performed as required by law under exemption (a), the statutory exemption, and that the applicable statutes requiring such information to be redacted or withheld would be identified upon review.

#### **V. City's Production of Redacted Documents**

On November 1, 2018, Martunas emailed Petrishen a letter regarding his first request, and indicated in that email that Petrishen would be receiving multiple emails with the responsive documents attached. In the attached letter, also dated November 1, 2018, Martunas noted that the city was providing records related to the three incidents for which the internal investigations were closed or settled,<sup>9</sup> and explained that redactions were made to those materials under exemptions (a), (c), and (f). Martunas claimed that the first clause of exemption (c), regarding personnel files, applied to the dispositions of the internal affairs investigations, citing *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 9-10 (2003) (*Worcester II*), as well as a memorandum of decision and order on a motion for a preliminary injunction in *Worcester Telegram & Gazette Corp. v. Gemme*, WOCA08-02742E, Doc. 12 (Mass. Super. Jan. 13, 2010) (McDonald, J.) (*Gemme PI Order*).

In February 2019, Petrishen learned that the lawsuit pertaining to Ruiz had settled (this was one of the six investigations withheld in its entirety under exemption (d)). On February 7, 2019, Petrishen submitted a third public records request<sup>10</sup> for the Ruiz investigation. On February 22, 2019, Martunas responded by email and provided the responsive records regarding

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<sup>9</sup> The same matters noted in footnote 8.

<sup>10</sup> Petrishen had submitted a second request for the Ruiz records in October 2018, to which the city gave him the same response as to his initial request.

the Ruiz investigation for no charge with redactions, noting that the redactions were made under exemptions (c) and (f).<sup>11</sup>

The city having produced redacted documents in response to four of the twelve investigations from the first request, there remain eight investigations for which no documents have been produced. In addition, no documents have been produced regarding the seventeen COHs sought in Petrishen's second request.

## **VI. Superior Court Action**

On October 3, 2018, the plaintiff commenced this action, filing its complaint and a separate motion for a preliminary injunction. The court (Donatelle, J.) denied the motion. The parties later filed cross motions for summary judgment, which were denied on December 17, 2019. In its memorandum of decision and order, the court (White, J.) determined that the record before it did not allow it to conclude as a matter of law whether the various exemptions applied to the requested documents. The court ordered that the matter be scheduled for trial and required the city to produce an itemized and indexed document log setting forth detailed justifications for the claimed exemptions. On August 14, 2020, the city provided the plaintiff with a log related to three of the four closed investigation files produced with redactions.<sup>12</sup> After the plaintiff noted in an August 31, 2020 email that the log did not cover the eight files withheld in their entirety, the city provided a supplemental log as to those files on September 2, 2020.

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<sup>11</sup> At trial, the city argued that the Ruiz records and redactions were not at issue in this case because they were produced pursuant to Petrishen's February 7, 2019 request, a request made several months after this lawsuit was filed. The court rejects this argument. Petrishen's first request included the Ruiz records, and the city's refusal to produce those records under exemption (d) was a contested issue when this litigation was filed, as well as when this court (White, J.) considered the parties' cross motions for summary judgment. In addition, when the city made the redactions to the Ruiz record in February 2019, it relied on the same exemptions it applied to the three sets of investigation records that were produced in November 2018. For these reasons, the redactions made, and the exemptions claimed as to the Ruiz records are part of this litigation and will be addressed by the court.

<sup>12</sup> The log did not include any information about redactions made to the already-produced Ruiz file.

On November 18, 2020, the plaintiff filed a stipulation regarding redactions the city made to the four internal affairs files that were produced. Without acknowledging or admitting that the exemptions invoked by the city apply, the plaintiff indicated in the stipulation that a number of redactions were uncontested.<sup>13</sup> The following redactions remain contested: (1) name and identifying information of complainants; (2) dispositions; (3) personally identifying information of victim of crime; (4) medical privacy information (de-identified); (5) medical privacy information; (6) CORI (de-identified); (7) juvenile record information; (8) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint; (9) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint including identifying information of minors; and (10) names and/or personally-identifying information of private individuals associated with and providing assistance to the complainant.

## **VII. Trial**

A four-day, jury-waived trial took place on November 2, 2020, November 20, 2020, December 11, 2020, and January 11, 2021. Forty-nine exhibits were admitted into evidence and a single witness testified: Assistant City Solicitor, Janice Thompson (Attorney Thompson), an attorney with the City of Worcester Law Department, who has worked for the city for the last eight years.<sup>14</sup>

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<sup>13</sup> The uncontested redactions were described in Exhibit 7 as: social security numbers; driver's license numbers; state-issued identification card numbers; records related to domestic violence incidents; personally identifying information for a victim of domestic violence; address of victim of domestic violence; information concerning arrest related to domestic violence; information concerning arrest/violation of 209A protective order; CORI received direct from DCJIS; and personnel communications to employee.

<sup>14</sup> Except where noted in the decision, the court credits the testimony of Attorney Thompson.

The city's law department is divided into two divisions: the departmental division and the litigation division. The litigation division primarily defends and represents the city and its employees in lawsuits. The departmental division advises city departments, offices, boards, and commissions by providing legal opinions on a variety of matters, as well as advising on policy decisions and public records requests, negotiating agreements, and drafting legal documents. Attorney Thompson works in the departmental division. She is the city attorney primarily responsible for responding to public records requests made to city departments, including the Worcester Police Department.

Attorney Thompson was made aware of Petrishen's two requests for records in June 2018. She assisted Lieutenant Hanlon in responding to the requests by reviewing and editing the June 16, 2018 letter comprising the city's first response. Although Attorney Thompson did not review the records or conduct her own investigation, she agreed with Lieutenant Hanlon's substantive response.

Sometime in July 2018, Attorney Thompson learned that officers named in Petrishen's second request were defendants in pending civil rights lawsuits.<sup>15</sup> Following a discussion between Attorney Thompson, the city's litigation attorneys involved in the lawsuits, and Worcester Police Captain Kenneth Davenport (Captain Davenport), the officer in charge of the Worcester Police Department's Bureau of Professional Standards, and after Attorney Thompson reviewed the records with Captain Davenport, the decision was made to withhold the COHs that were the subject of the second request. Attorney Thompson drafted Martunas's August 3 and August 7, 2018 emails (the city's second and supplemental responses) informing Petrishen that

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<sup>15</sup> Attorney Thompson learned this from the city attorneys involved in those lawsuits.



the COHs were exempt from disclosure under exemptions (c), (d), and (f).<sup>16</sup> Three of the officers for whom COHs were sought were not defendants in pending litigation.<sup>17</sup> Despite this knowledge, the city claimed that exemption (d) applied to those officers' COHs.

Following Petrishen's August 22, 2018 email inquiring into the twelve investigations that were the subject of the first request, Attorney Thompson drafted Martunas's September 13, 2018 response (the city's third response), but she did not conduct a review of all the records. Instead, she relied on Captain Davenport's review of the twelve investigations when she determined that nine investigation files should be withheld under exemptions (d) and (f)<sup>18</sup> and that the other three would be produced subject to redactions.<sup>19</sup>

Attorney Thompson determined that three of the investigation files should be withheld under exemption (f) after Captain Davenport told her that there were presently pending internal affairs investigations. At the time of the trial, however, those three investigations were concluded. The city concedes that withholding those records under exemption (f) is no longer applicable. Nevertheless, it continues to withhold those records in their entirety under exemption (d) because the officers involved in those matters are defendants in civil rights lawsuits.<sup>20</sup>

With regard to the three closed or settled internal investigations,<sup>21</sup> Attorney Thompson reviewed those records to make redactions based on exemptions (a), (c), and (f).<sup>22</sup> After doing

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<sup>16</sup> Attorney Thompson also testified that the records were withheld because of outstanding protective orders issued in the federal civil rights cases. The court does not credit that testimony. It was only after this lawsuit commenced that the city mentioned protective orders serving as a basis for withholding records.

<sup>17</sup> The three officers were Candelaria, Piskator, and Williams.

<sup>18</sup> The matters set forth in footnotes 6 and 7 above.

<sup>19</sup> The court credits Attorney Thompson's testimony that it was Captain Davenport who reviewed the records to determine which involved officers in pending litigation and/or investigations. The court further finds that Captain Davenport's review of the twelve investigations was done after the decision was made in July and August 2018 to withhold the COH records.

<sup>20</sup> The lawsuits are the Burgos-Martinez and Deptula cases.

<sup>21</sup> The matters set forth in footnote 8 above.

<sup>22</sup> The number of hours Attorney Thompson actually spent searching for, compiling, and performing redactions to records exceeded the fourteen hours the City had estimated for the work in the September 13, 2018 email.

so, Attorney Thompson drafted the November 1, 2018 email and letter sent by Martunas to Petrishen attaching the redacted records. In February 2019, Attorney Thompson also made the redactions to the Ruiz file.

In the four closed investigations, Attorney Thompson redacted the entirety of the portions containing the Police Chief's (chief's) conclusions, claiming those conclusions involved personnel files. This was based on the law department's interpretation of *Worcester II*, 58 Mass. App. Ct. at 9-10, as well as the *Gemme* PI Order. Attorney Thompson also relied on this interpretation in concluding that certain portions of the COHs from Petrishen's second request were subject to exemption (c), as stated in Martunas's August 7, 2018 supplemental response.

In the summer of 2020, the city changed its practice with regard to redacting the chief's conclusions pursuant to exemption (c). No explanation for this change was provided. In August 2020, in a matter unrelated to this case, the city disclosed the disposition and conclusions of an internal investigation in response to a records request from Petrishen. However, in the August 14, 2020 log the city produced in accordance with this court's summary judgment order, the city nevertheless cited exemption (c) in support of redacting the chief's conclusions.<sup>23</sup>

Based on the city's change in practice regarding redactions to the chief's conclusions, Attorney Thompson reviewed the chief's conclusions in the four redacted investigation files produced in November 2018 and February 2019. After determining that the police officers involved in those investigations were defendants in pending lawsuits,<sup>24</sup> and after deciding that the chief's conclusions would reveal information at issue in those lawsuits, Attorney Thompson determined that redacting the chief's conclusions was now proper under exemption (d).

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<sup>23</sup> There was no evidence that Attorney Thompson prepared the August 14, 2020 log.

<sup>24</sup> The pending lawsuits were the Johnson, Burgos-Martinez, Michael Paris, and Deptula cases.

Attorney Thompson also redacted the names and identifying information of the complainants in the four settled or closed investigations. In three of the investigations, Attorney Thompson relied on exemptions (a), pertaining to records statutorily exempt from disclosure; exemption (c), for documents the disclosure of which would constitute an “unwarranted invasion of personal privacy;” and exemption (f), pertaining to “investigatory materials necessarily compiled out of the public view.” For the Ruiz matter, according to the city’s February 2019 email, Attorney Thompson relied on exemption (c) for documents the disclosure of which would constitute an “unwarranted invasion of personal privacy;” and exemption (f), pertaining to “investigatory materials necessarily compiled out of the public view.”

In redacting complainant names and identifying information from the settled or closed investigations, the city considered and examined the records Petrishen requested. The city did not review or investigate other records from other forums when deciding to redact the complainant information. Considering the volume of record requests the city receives, and the need to provide timely and consistent responses, the city cannot conduct separate investigations outside of reviewing the records requested to determine whether the names and identifying information of complainants may have already been made public. For the same reasons, the city does not contact each complainant, or their legal representatives, to inquire whether they would consent to the release of identifying information.

The city’s determination as to which records will be produced pursuant to a public records request, and which records or portions of records will be exempt, is based on the status of the matters at the time the request is made. The city does not reassess the exemption status of records after an initial request, even when circumstances have changed that might affect that status. Should a requester learn of a change in circumstances, the requester is free to submit a

new request. Petrishen was aware of this, having submitted his third request for the Ruiz records after learning that the lawsuit had been settled.

When the city evaluated Petrishen's public record requests at the time he made them in June 2018, some of the responsive records involved pending internal affairs investigations and/or pending lawsuits. As a result, the city applied exemptions (d) and (f) to withhold many of the internal affairs investigation records in their entirety.

Despite having no duty to reassess the status of the requested records if there is a change in circumstances, Attorney Thompson did so with regard to some of the records at issue in this litigation. First, she re-evaluated withholding the chief's conclusions in the four redacted investigations after the city's policy changed in the summer of 2020 regarding the personnel clause of exemption (c). Second, Attorney Thompson re-evaluated the three investigative matters withheld in their entirety after the relevant investigations concluded, determining that while exemption (f) no longer applied, exemption (d) did. Third, Attorney Thompson acknowledged that exemption (f) no longer applied to the COHs comprising the second request because the investigations into the named officers that were open and pending at the time of Petrishen's request have all concluded.

The city's logs regarding information redacted or withheld were admitted as evidence. Exhibit 7 is a log regarding the redactions made to portions of the three files that were produced. It does not include any information regarding redactions made to the Ruiz file. Exhibit 8 is a log regarding the remaining materials that were withheld completely (the eight investigative files and the seventeen COHs). Attorney Thompson did not prepare these logs. The logs were prepared for this litigation and each includes two columns: a description of the exempt information or

record, and a discussion of the applicable exemption(s). Exhibit 7 also includes corresponding page numbers.

Unlike the August 14, 2020 log produced by the city in response to this court's summary judgment order to explain the redactions made to the three files produced in November 2018, the log produced for this litigation in Exhibit 7 no longer relies on exemption (c) to withhold the dispositions (chief's conclusions) in those three files. The log cites to exemption (d), and further claims that when the records are subject to court issued protective orders, they are not subject to disclosure under the public records law. Copies of protective orders issued in nine federal court cases in which the city and Worcester police officers were named defendants were admitted into evidence.<sup>25</sup>

## CONCLUSIONS OF LAW

### **I. Public Records Law**

“The Public Records Act, G. L. c. 66[,] requires public access to various records and documents in the possession of public officials, with certain exceptions.” *Babets v. Secretary of Exec. Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988). General Laws c. 4, § 7, Twenty-sixth, defines “public records,” stating in part that it includes ““documentary materials or data, regardless of physical form or characteristics, made or received by an officer or employee” of any Massachusetts governmental agency.” *Rahim v. District Attorney for the Suffolk Dist.*, 486 Mass. 544, 547 (2020). The court has the duty to determine the scope of the law, keeping in mind that its purpose is “to provide ‘the public broad access to governmental records.’” *Id.* at

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<sup>25</sup> These protective orders are Exhibits 10, 12, 14, 19, 21, 23, 25, 27 and 29 (collectively, the Protective Orders). Findings as to and analysis of these orders are contained *infra* in this court's rulings. While there was evidence that some of the lawsuits have been resolved, the court could not accurately determine the present status of all of the lawsuits based on the evidence presented.

548, quoting *Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 382-383 (2002) (*Worcester I*).

“Although the definition of ‘public records’ . . . is intentionally broad, the statute exempts twenty-one categories of information from disclosure.” *Id.* at 549. “Because the statute presumes disclosure, these exemptions ‘must be strictly and narrowly construed.’” *Id.*, quoting *Boston Globe Media Partners, LLC v. Department of Pub. Health*, 482 Mass. 427, 432 (2019). See G. L. c. 66, § 10A(d)(1)(iv) (“presumption . . . exist[s] that each record sought is public”). “[T]he decision whether an exemption to disclosure applies requires careful case-by-case consideration.” *Rahim*, 486 Mass. at 549, quoting *WBZ-TV4 v. District Attorney for Suffolk Dist.*, 408 Mass. 595, 603 (1990). “[U]nder the public records law, any ‘segregable portion’ of the record must be disclosed, if with the redaction it independently is a public record.” *Champa v. Weston Pub. Sch.*, 473 Mass. 86, 95 (2015), quoting G. L. c. 66, § 10.

A party seeking to withhold information under one of the exemptions has “the burden . . . to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.” G. L. c. 66, § 10A(d)(1)(iv). The city has claimed that four exemptions found in G. L. c. 4, § 7, Twenty-sixth, apply to the materials at issue here:

- (a) specifically or by necessary implication exempted from disclosure by statute;
- (c) 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;
- (d) 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; [and]
- (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

In some instances, the exemptions the city has claimed for specific requests have changed over time, as reflected in their responses to the plaintiff and in the logs identified as Exhibits 7 and 8. Unless otherwise discussed, the court’s analysis is based on the exemptions claimed in the logs. The court also applies the law as it currently stands. See *Boston Globe Media Partners, LLC v. Department of Criminal Justice Info Servs.*, 484 Mass. 279, 287-288 (2020) (stating that “a judgment should declare the law as of the time when a final judgment enters” and “resolving the [recurring] dispute under current law is in the public interest”).

## **II. Federal Protective Orders**

The public records law “is silent on the issue of protective orders.” *Commonwealth v. Fremont Inv. & Loan*, 459 Mass. 209, 215 (2011). Nevertheless, the Supreme Judicial Court (SJC) has concluded that the public records law is not “a legislative determination that the public interest in access to government records overrides the traditional authority of courts to enter protective orders.” *Id.* at 213. Thus, “the public records law does not abrogate judicial protective orders.” *Id.* at 219-220. In *Fremont*, the SJC concluded that a Superior Court judge did not err in dismissing an action seeking the release of documents under the public records law when the documents were subject to a protective order in a different case. See *id.* at 212, 214. “In essence, [the Court in *Fremont*] declared an implied exemption for records whose disclosure is limited by a protective order.” *DaRosa v. New Bedford*, 471 Mass. 446, 454 (2015).

In explaining its rationale, the SJC in *Fremont* expressed concern that “construing the public records law to invalidate an otherwise providently entered protective order would raise serious constitutional questions about the validity of that law.” 459 Mass. at 214. The SJC declined to “assume that the Legislature intended to impose such limitations on the judiciary,”

particularly when such construction would “effect such a significant change to a long-standing and fundamental power of the judiciary by implication.” *Id.* at 215.

The facts of this case are different from those in *Fremont*. The protective orders at issue here prohibit only the federal court plaintiffs, not the city and officer defendants in those federal cases, from disclosing and misusing the documents or confidential information subject to those orders. Compare Protective Orders par. 2 (“Plaintiff shall not disclose any documents or confidential information”), with *Fremont*, 459 Mass. at 211 (documents made confidential under protective order issued in response to plaintiff and defendants’ joint motion for protective order). They do not prohibit the city from releasing those materials and, in fact, contemplate the release of the materials in another venue. See Protective Orders par. 5 (“If another Court or an administrative agency subpoenas or orders production of documents that are the subject of this Protective Order, such party shall promptly notify the City of Worcester of the pendency of such subpoena or order.”)

The court recognizes that “[p]rotective orders serve to shield litigants and third parties from unwarranted disclosures.” *Fremont*, 459 Mass. at 214. However, in light of the specific language of the federal protective orders at issue here, the court does not find that they prohibit the city’s release of such confidential materials.<sup>26</sup> As a result, the documents at issue in the first and second requests are not subject to an implied exemption under the public records law pursuant to *Fremont* and may be withheld only if they fall within the scope of a specific exemption to the public records law.

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<sup>26</sup> It is irrelevant that in June 2017, Gatehouse filed in a federal district court case, *Diaz v. Devlin*, No. 4:16-CV-40039-TSH, a motion to modify the protective order to allow access to public records. The federal court (Hillman, J.) made no determination as to access to the requested documents under the public records law; rather, it denied the motion because Gatehouse had not moved to intervene before filing the motion and “there is no First Amendment, or common law right of access to pretrial discovery covered by a protective order satisfying Rule 26(c)’s ‘good cause’ standard.” Docket No. 97, Aug. 2, 2017.



### **III. Exemption (d)**

Under exemption (d), “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency” are not public records. G. L. c. 4, § 7, Twenty-sixth (d). However, the exemption does “not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.” *Id.*

The city contends that exemption (d), also referred to as the deliberative process exemption, applies “when the records are subject to active civil rights litigation in federal courts in which the police officers, the subjects of the requests, are defendants.” City’s Proposed Rulings par. 8. However, the city misinterprets exemption (d) and, in any event, has failed to show by a preponderance of the evidence that the records at issue are “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency.”

#### **a. City’s Interpretation**

First, as to the city’s interpretation, the language of exemption (d) cannot be reconciled with the standard apparently applied by the city. In its second and third responses, the city quoted the language of exemption (d), but then explained that it was withholding the requested documents because they related to ongoing litigation and/or their release could impact that litigation. The court is not aware of any binding case law interpreting exemption (d) so broadly; rather, the application of exemption (d) is more circumscribed, as shown in *DaRosa*, 471 Mass. at 448.

In *DaRosa*, the SJC considered whether a city defendant’s work product, “sought in discovery from [the] municipality during litigation” [under Mass. R. Civ. P. 26(b)(3)] fell within the scope of exemption (d). *Id.* at 448. The Court held that exemption (d), the “policy deliberation” exemption, encompasses “opinion” work product “prepared in anticipation of

litigation or for trial by or for a party or that party's representative," as well as "fact" work product that was "prepared in anticipation of litigation or trial . . . where it is not a reasonably completed study or report or, if it is reasonably completed, where it is interwoven with opinions or analysis leading to opinions" (quotation, brackets, and ellipses omitted). *Id.* The court concluded that "[w]here work product is exempted from disclosure under the public records act, it is protected from disclosure in discovery to the extent provided by Mass. R. Civ. P. 26." *Id.*

The Court in *DaRosa* acknowledged its observation in an earlier case, *General Elec. Co. v. Department of Env'tl. Protection*, 429 Mass. 798, 802-803 (1999), that the Legislature considered, but ultimately did not enact, a broad exemption (k) that "would have shielded from public disclosure all 'records pertaining to any civil litigation in which an agency . . . is involved, except in response to a subpoena, and only prior to final judicial determination or settlement of such litigation'" (citation omitted). 471 Mass. at 451 n.8. Although the Court in *DaRosa* "conclude[d] that little can be inferred from the rejection of so broad and ambiguous an exemption," *id.* at 455 n.12, this court cannot ignore the fact that the city's interpretation of exemption (d) here—that it applies to documents related to ongoing litigation and/or documents which, if released, could impact that litigation—is even more expansive than the exemption (k) language that the Legislature rejected.<sup>27</sup>

The existence of the federal protective orders does not change this conclusion. Although the Court in *DaRosa* found implicit in exemption (d) an exemption for work product, the Court

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<sup>27</sup> To the extent the city contends that its interpretation is supported by *Lafferty v. Martha's Vineyard Comm'n*, 17 Mass. L. Rep. 501 (Mass. Super. 2004) (Brassard, J.), this court finds that case distinguishable and, in any event, the court's decision in that case is not binding. In addition, although the city offers as further support two Supervisor of Records Letter-Determinations, in those letters the Supervisor of Records declined to opine on two record requests when the records in question were the subject of a dispute in active litigation. The letters do not mean that exemption (d) applies to records related to pending litigation merely because the release of those records could taint the deliberative process. See 950 Code Mass. Regs. § 32.08(2)(b)(1) (stating "the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor . . . the public records in question are the subjects of disputes in active litigation" and making no mention of exemption (d)).

in *Fremont* did not tether the implied exemption for materials subject to a protective order to any specific exemption set forth in G. L. c. 4, § 7, Twenty-sixth. To the extent the city asserts that the federal protective orders must be considered as evidence demonstrating that the requested records are the subject of litigation and thus relevant under exemption (d),<sup>28</sup> this fact is not relevant in light of the exemption (d) analysis as set forth above.

**b. City's Burden**

Setting aside the city's misinterpretation of exemption (d), the city nevertheless has failed to show by a preponderance of the evidence that the records at issue are "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency."

Although "policy" is not defined in the public records law, the SJC has stated that "the word was intended to be defined broadly to accomplish [the exemption's] purpose": "the protection of open, frank inter-agency and intra-agency deliberations regarding government decisions."

*DaRosa*, 471 Mass. at 457. Thus, the Court in *DaRosa* applied that broad understanding of "policy" to conclude that "[w]here an agency . . . is engaged in litigation, decisions regarding litigation strategy and case preparation fall within the rubric of 'policy deliberation.'"<sup>29</sup> *Id.* at 458.

Here, however, the city has failed to advance any argument that the withheld materials related to "policy positions being developed." The court understands the city to be arguing that exemption (d) applies because "the records are subject to active civil rights litigation in federal

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<sup>28</sup> The city contends that the protective orders "demonstrate the protected, confidential[,] and highly litigated nature of the records that would have an impact on the deliberative process and defense of the litigation if produced." City's Proposed Rulings par. 22.

<sup>29</sup> "By its terms, this exemption protects such documents from disclosure only while policy is 'being developed,' that is, while the deliberative process is ongoing and incomplete." *Babets*, 403 Mass. at 237 n.8. "The Legislature has thus chosen to insulate the deliberative process from scrutiny only until it is completed, at which time the documents thereby generated become publicly available." *Id.* "Thereafter, they are accessible by any person whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity" (quotation and citation omitted). *Id.*

court in which the police officers, the subjects of the requests, are defendants,” and “making them publicly accessible would interfere with the deliberative process and the City’s defense of the lawsuits.” City’s Proposed Rulings pars. 8-9. According to the city, “the BOPS [Bureau of Professional Standards] investigation reports and the officer complaint records are at the heart of the discovery disputes and active litigation,” and “[w]ith the *Monell* supervisory claims in every case against the City and its officials, the municipal customs, practices and policies related to internal investigations and discipline of police officers are under scrutiny.” City’s Proposed Rulings pars. 16-17.

Documents related to police internal investigations may well fall within the scope of exemption (d), if they are work product prepared in anticipation of litigation as set forth in *DaRosa* or if they are otherwise related to developing policy positions. But without further information or argument from the city, this court can only speculate as to the rationale under which exemption (d) might apply. It seems the city wants the court to infer that the investigation reports and complaint records are related to policies, which are the subject of the *Monell* claims in the federal litigation. It also seems that the city expects the court to infer that those materials are related to policy positions *being developed*, as exemption (d) includes this temporal limitation.

This is not enough for the city to have met its burden to show by a preponderance of the evidence that exemption (d) applies, especially in light of the presumption that records are public. The city therefore may not seek to withhold under exemption (d) information regarding unidentified dispositions as referenced in Exhibit 7, the eight internal investigations referenced in

the first request for which no materials have been produced,<sup>30</sup> or the fourteen COHs referenced in the second request.<sup>31</sup>

#### **IV. Exemption (f)**

Under exemption (f), records are not subject to disclosure if they are “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” G. L. c. 4, § 7, Twenty-sixth (f). “Among the reasons for exemption (f) are ‘the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.’” *Rahim*, 486 Mass. at 551, quoting *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976).

Exemption (f) is not “a blanket exemption for investigatory materials assembled by police departments.” *Id.* at 552, quoting *WBZ-TV4*, 408 Mass. at 603. “Depending on the contents of a particular record, exemption (f) may cover only certain aspects of the record, or encompass a certain carefully defined class of documents in its entirety” (quotations and citations omitted). *Id.* at 551-552. See *Globe*, 484 Mass. at 290 (language of exemption (f) “makes clear that some investigatory materials *are* public records”). In addition, “because the

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<sup>30</sup> Exhibit 8 reflects that the city invoked exemption (d) as to the following internal investigations: (1) Skerrett; (2) H. Ortiz; (3) Rivera; (4) Johnson; (5) Burgos-Martinez; (6) J. Ortiz; (7) Deptula; and (8) Katana.

<sup>31</sup> Exhibit 8 reflects that the city invoked exemption (d) as to the following COHs: (1) Batista; (2) Bonczek; (3) Cahill; (4) Carlson; (5) Carmody; (6) Duffy; (7) Gaffney; (8) Moran; (9) Morris; (10) O’Rourke; (11) Reando; (12) Roche; (13) Smith; and (14) Supernor.

nature of certain records' contents may require continuing secrecy, the end of an investigation does not automatically terminate the applicability of exemption (f)." *Rahim*, 486 Mass. at 552.

To meet its burden of proving by a preponderance of the evidence that exemption (f) applies, the city "need only provide enough evidence about the nature and scope of the materials' contents for a court to infer that disclosure would more likely than not prejudice effective law enforcement." *Id.* at 553. "Evidence about the materials' nature and scope can be provided 'through the use of an itemized and indexed document log in which the custodian sets forth detailed justifications for its claims of exemption.'" *Id.*, quoting *Worcester I*, 436 Mass. at 384. "Where the applicability of an exemption is questionable, in camera inspection by a judge may be appropriate." *Id.* at 553, quoting *Worcester I*, 436 Mass. at 384. However, this "should be used only in the last resort" (quotation and citation omitted). *Id.* at 553 n.15. "Because in camera review occurs in the 'absence of an advocate's eye,' judges 'are all too often unable to recognize the significance, or insignificance, of a particular document'" (quotation and citation omitted). *Id.*

In *Rahim*, the SJC distinguished between log entries that "provide a court with sufficient detail to conclude that disclosure of these materials would more likely than not prejudice effective law enforcement, and thus qualify for exemption (f)," and those that did not. *Id.* at 555. For the entries that did not, it remanded the matter to the Superior Court, requiring the district attorney to provide a revised index including enough details to allow the court to determine whether the entries fall within the scope of exemption (f). *Id.* If the district attorney was unable to do so "without disclosing information as would defeat the purpose of claiming exemption," the court instructed that the district attorney could seek in camera review of those materials. *Id.* at 555-556.

**a. Internal Investigation Files**

Exhibit 8, the city's log regarding the three internal investigation files wholly withheld under exemption (f), merely lists the three investigations—"10/8/2015 arrest of Alison Skerrett," "8/26/2014 arrest of Hernan Ortiz," and "2/23/2016 charges against Grace Katana"—without providing any detail or description of specific documents or materials that were responsive to the plaintiff's request. Although in Exhibit 8 the city discusses relevant case law and its rationale for applying exemption (f) (to avoid prejudicing pending investigations by maintaining confidentiality and candidness), its lack of any description of the files' contents leaves the court without the necessary "evidence about the nature and scope of the materials' contents for a court to infer that disclosure would more likely than not prejudice effective law enforcement." *Id.* at 553. The descriptions provided in Exhibit 8 regarding the internal investigation files are significantly less detailed than those provided in *Worcester I*, 436 Mass. at 381 n.7, where "the defendants admitted that the internal affairs file in [that] matter contained the following categories of documents: '1) the request for an investigation filed by an attorney representing a citizen involved with the police on May 1, 1999; 2) various reports of police officers to their superior officers; 3) notes of investigators on interviews and discussions; 4) memoranda analyzing the evidence gathered by the investigation; 5) memoranda between the police department and other city departments; 6) letters to the attorney for the complainant; 7) copies of [CORI] reports on various individuals; and, [8)] miscellaneous notes and documents.'"

This case also stands in contrast to *Bougas*, where there was trial testimony about the specific materials at issue, including police reports and letters from citizens. 371 Mass. at 66. The testimony in *Bougas* included that of the police chief, who indicated that his file on the incident contained other documents and material. *Id.* Here, however, Attorney Thompson's

testimony did not provide any meaningful description of the materials at issue in the three investigative files.

Also relevant to the court's analysis at this stage is that Attorney Thompson testified that the three investigations have since been completed. Where the city has failed to meet its burden in proving that exemption (f) applies to the entirety of the three investigative files, and where those investigations have since been completed, the court concludes that the city may no longer withhold these files under exemption (f).

Turning to the city's log regarding the three internal investigation files that were produced with redactions, Exhibit 7, the city claimed exemption (f) applied to allow redaction of the following: (1) the name and identifying information of complainants; (2) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint; (3) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint including identifying information of minors; and (4) names and/or personally-identifying information of private individuals associated with and providing assistance to the complainant.

These descriptions are more detailed and helpful than those provided in Exhibit 8. The investigative files referenced in Exhibit 8 presumably contain the various types of information identified in Exhibit 7 (and thus that information may be subject to the various exemptions identified in Exhibit 7), but the city failed to provide such detail in Exhibit 8. However, even when the court reviewed a sample of the internal investigation materials referenced in Exhibit 7, it was difficult to parse out on certain pages the various types of information redacted and the



exemptions applied.<sup>32</sup> It is clear that this “expansive public records request” requires that “the disputed materials should be personally reviewed.” *Globe Newspaper Co. v. Police Comm’r of Boston*, 419 Mass. 852, 868-869 (1995). But based on the state of the internal investigation materials before it, the court is not in the best position to conduct such a review at this time.

Rather, the court will permit counsel for both parties “to have access to the documents subject to an appropriate protective order.” *Worcester I*, 436 Mass. at 384-385. This will allow the parties to “particularize their arguments . . . , citing specific materials, or portions of materials, that are exempt or subject to disclosure.” *Id.* at 385, citing *Globe*, 419 Mass. at 868.

The court is aware that this litigation has proceeded through trial and that this course of action does not provide the final disposition for which the parties likely hoped. But the court is compelled to adopt this approach based on a number of considerations. This is a complicated case involving voluminous materials related to internal investigations of twelve police incidents and the complaint histories of seventeen Worcester police officers. The city has claimed that multiple exemptions apply to various types of information found in the investigation files that were produced with redactions, but inexplicably failed to claim that any of those exemptions apply to the investigation files that were withheld according to exemptions (d) and/or (f). The court is charged with determining the scope of the public records law exemptions, and it is vital that the materials at issue, related to alleged police misconduct, are properly reviewed and addressed.

“A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.” *Worcester II*, 58 Mass. App. Ct. at 7-8.

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<sup>32</sup> For example, the city claims in Exhibit 7 that exemptions (a), (c), and (f) all apply to the name and identifying information of complainants.

The “quintessential purpose [of the internal affairs process] is to inspire public confidence.” *Id.* at 9. By allowing plaintiff’s counsel to review the unredacted materials subject to a protective order, the court will be in a better position to make the proper determination as to the remaining issues. Cf. *Rahim*, 486 Mass. at 555-556 (SJC remanded case for Superior Court to determine whether exemption applied to certain materials referenced, but inadequately described, in index); *Bougas*, 371 Mass. at 66 (SJC remanded case for Superior Court to determine whether materials mentioned at trial fell within public records law exemption).

To that end, the city shall produce the files to the plaintiff in two forms. First, it must produce all eight of the withheld investigative files, subject only to those specific redactions under exemption (a), (c), and (f) described in Exhibit 7 that the city now has the opportunity to contend are appropriate.<sup>33</sup> The city will provide an additional exemption log to accompany this production and will also provide a similar log as to the Ruiz file.<sup>34</sup> See *Rahim*, 486 Mass. at 555-556 (SJC ordered that defendant provide revised index that included enough detail about nature and scope of materials to allow the court to determine whether exemption applied). Second, the city will simultaneously produce an unredacted version of all of the files, including the four that

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<sup>33</sup> To be clear, based on the court’s earlier conclusions, the city may not withhold any information based on the federal protective orders or exemption (d). It also may not withhold entire files under exemption (f). To the extent appropriate, the city may, however, claim that exemption (f) applies to only the following specific types of information for which exemption (f) was claimed in Exhibit 7: (1) the name and identifying information of complainants; (2) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint; (3) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint including identifying information of minors; (4) names and/or personally-identifying information of private individuals associated with and providing assistance to the complainant.

It is also worth noting that the city is only being permitted to make redactions under exemptions (a) and (c) to information contained in the eight withheld files (limited to only those specific types of information for which exemptions (a) and (c) were claimed in Exhibit 7), because to do otherwise would risk frustrating the purpose of the public records law by inconsistent treatment of the same types of information.

<sup>34</sup> The court suggests that in creating any subsequent log, the city avoid copying and pasting, or repeating verbatim, the same lengthy paragraphs of explanation for the same exemptions, as was found in Exhibits 7 and 8. The city is welcome to tailor its explanations to specific materials at issue. But a brief reference to the first location of each such repetitive explanation would suffice when appropriate and would greatly shorten the length of the log and avoid requiring plaintiff’s counsel and the court from having to reread the same verbatim text many times.

were produced in redacted form, which plaintiff's counsel may review pursuant to a protective order. After reviewing the redacted and unredacted versions, plaintiff's counsel will be able to narrow the issues and areas of dispute.

**b. Concise Officer Histories**

Exhibit 8 indicates that the city withheld twelve COHs<sup>35</sup> pursuant to exemption (f) for the same reason it withheld the internal investigation files at issue in the first response: to avoid prejudicing pending investigations by maintaining confidentiality and candidness.<sup>36</sup> The COHs are a discrete set of short documents, ranging one to three pages in length. Unlike with the voluminous investigation files, the court was able to review the COHs *in camera* and concludes that they may not be wholly withheld under exemption (f).

Exemption (f) does not apply to prevent the production of the COHs because disclosure of the basic information contained within them would not “probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” G. L. c. 4, § 7, Twenty-sixth, (f). Each history provides the following information for each officer: (1) the date of a given complaint; (2) the nature of the complaint (for example, citizen complaint, law suit, officer-initiated investigation); (3) the location; (4) the name of the complainant; (5) a brief description of the conduct at issue (for example, unnecessary force, conduct unbecoming an officer, discourtesy); and (6) the disposition of the matter (for example, sustained or not sustained, exonerated, exceptionally cleared). The public has an interest in knowing such general information about a given officer's incident history. See *Worcester II*, 58 Mass. App. Ct.

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<sup>35</sup> The city invoked exemption (f) as to the following COHs: (1) Batista; (2) Bonczek; (3) Candelaria (4) Cahill; (5) Carlson; (6) Duffy; (7) Gaffney; (8) Moran; (9) Piskator; (10) Smith; (11) Supernor; and (12) Williams. It was not invoked as to Carmody, Morris, O'Rourke, Reando, or Roche.

<sup>36</sup> In its August 7, 2018 response, the city stated that exemption (f) applied to these materials, because the records “contain materials substantially related to ongoing investigative efforts.”

at 7-9. Releasing this information thus serves the public interest, and, without more, would not probably prejudice the possibility of effective law enforcement. Even if there is a pending investigation against a given officer, such limited information is contained in each history that the release of that officer's overall history would not be prohibited under exemption (f). Concerns about confidentiality and candidness do not prevent wholesale nondisclosure of this information.

It is possible, however, that under specific circumstances effective law enforcement could be prejudiced by the release of certain types of information contained in an officer's history. For example, one of the issues with the internal investigation files produced is the redaction of complainant names and information under exemption (f). Because complainant names are also contained in the twelve COHs that the city contends are subject to exemption (f), as well as the remaining five COHs that the city contended were subject to exemption (d), the court cannot determine at this time whether the city may appropriately redact that information. The city will therefore be ordered to produce the COHs to the plaintiff in two sets. The first set will include the twelve COHs for which the city contends exemption (f) applies, as well as the other five COHs, with the city permitted to redact only those complainant names it now has the opportunity to contend fall under exemptions (a), (c), or (f),<sup>37</sup> as the court has otherwise determined as a matter of law that the remaining contents of those COHs are public records not subject to any claimed exemption. The second set will include completely unredacted copies of those

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<sup>37</sup> The court is allowing the city to redact, as appropriate, the complainant names contained in the COHs under these three exemptions in order to maintain consistency in evaluating this information. Even though the city does not claim in Exhibit 8 that exemptions (a) and (c) apply to the complainant names contained in the COHs, the city claims in Exhibit 7 that exemptions (a), (c), and (f) all apply to the names and identifying information of complainants contained in the three investigative files produced.

seventeen COHs, with the protective order covering only those portions of the histories (complainant names) that are redacted in the first set.

#### **V. Exemption (c)**

Under exemption (c), the following materials are not public records: “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.” General Laws c. 4, § 7, Twenty-sixth (c).

Exemption (c) was recently amended as a part of An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth, c. 253 of the Acts of 2020 (Act), signed by Governor Baker on December 31, 2020. Some of the Act’s provisions have an effective date of July 1, 2021; however, the Act made clear that, effective immediately, exemption (c) “shall not apply to records related to a law enforcement misconduct investigation.” General Laws c. 4, § 7, Twenty-sixth (c).

In evaluating the city’s past application of exemption (c), including whether it warrants an award of punitive damages, the court must apply the language that was in effect at that time, which did not include the recent amendment. However, there is no final judgment being entered at this time as to the city’s use of exemption (c). Going forward, in determining whether the city may continue to withhold certain information under exemption (c), the court and the parties must take into account the fact that the exemption no longer applies to “records related to a law enforcement misconduct investigation.” See *Globe*, 484 Mass. at 287 (“a judgment should declare the law as of the time when a final judgment enters”).

The city claims in Exhibit 7 that exemption (c) applies to the following portions of the three investigative files produced: (1) name and identifying information of complainants; (2)

personally identifying information of victim of crime; (3) medical privacy information (de-identified); (4) medical privacy information; (5) juvenile record information; (6) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint; (7) names and/or personally-identifying information of witnesses and individuals associated with the complainant and involved in the circumstances giving rise to the complaint including identifying information of minors; and (8) names and/or personally-identifying information of private individuals associated with and providing assistance to the complainant.

For the reasons discussed in the context of exemption (f), the court cannot at this stage determine whether the city may properly invoke exemption (c) to withhold these types of information found in the internal investigation files. Plaintiff's counsel shall therefore consider the city's application of exemption (c) in its review of the unredacted materials.

Although the city now claims in Exhibit 7 that dispositions found in the investigative files produced with redactions are exempt only under exemption (d), the city had previously taken the position that those dispositions could be withheld under the first clause of exemption (c), regarding personnel files. It stated this position in its November 1, 2018 letter, and reiterated it in the log it produced in August 2020, despite the purported change in policy that occurred during the summer of 2020.

The city now asserts that any issue related to it claiming exemption (c) as to dispositions found in internal investigation files is moot because it has changed its practice. It also notes that it "relied on the most recent litigation between the parties, [the *Gemme* case], in redacting the dispositions." City's Proposed Rulings par. 32 n.4. The city references portions of a memorandum of decision and order on the plaintiff newspaper's motion for a preliminary

injunction in *Gemme*, where a Superior Court judge cited to *Worcester II* in noting that “[i]t appears that the plaintiff will not be successful regarding the request . . . seeking unredacted disclosures of the dispositions of the complaints[,] which the Appeals Court has determined to be part of a personnel file and exempt from disclosure” and ordered that the dispositions would be redacted. *Gemme* PI Order, at 8 n.4, 13.

In *Worcester II*, the Appeals Court held that materials in a “Worcester police department internal affairs file . . . compiled during an investigation of a citizen complaint,” were public records. 58 Mass. App. Ct. at 2. It concluded that such materials “are different in kind from the ordinary evaluations, performance assessments and disciplinary determinations encompassed” in the personnel clause of exemption (c). *Id.* The court observed that, “[i]t would be odd, indeed, to shield from the light of public scrutiny as ‘personnel [file] or information’ the workings and *determinations* of a process whose quintessential purpose is to inspire public confidence” (emphasis added). *Id.* at 8-9. The court thus considered “the officers’ reports, the witness interview summaries, and *the internal affairs report itself* to be substantially different from the single, integrated report held to be ‘personnel [file] or information’ in [*Wakefield Teachers Ass’n v. School Comm. of Wakefield*, 431 Mass. 792 (2000)] (emphasis added).”<sup>38</sup> *Id.* at 9.

The court in *Worcester II* did, however, carve out one particular item in the investigative file that was not to be released: a memorandum from the police chief to a particular officer that notified the officer “of the conclusions and disciplinary determinations of the internal affairs investigation.” *Id.* at 2-3. Noting that “internal affairs investigators have no disciplinary authority and make only recommendations to the chief, who does not need to follow the recommendation,” *id.* at 8 n.7, the court found that “it is not at all illogical that the Legislature

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<sup>38</sup> In *Wakefield*, “the court determined a disciplinary decision and report of a school superintendent regarding a public school teacher to be exempt” under exemption (c). *Worcester II*, 58 Mass. App. Ct. at 8.

would intend the bricks and mortar of the investigation and the documenting of its results to the complainants to fall outside [exemption (c)], but would intend the actual order and notice of disciplinary action issued as a personnel matter from the chief to the target of the disciplinary investigation to be exempt.”<sup>39</sup> *Id.* at 10.

The city was aware of *Worcester II* and should have applied it properly. It is no excuse that approximately a decade ago, a Superior Court judge, in reviewing at an early stage the city’s application of exemption (c) in the context of a motion for a preliminary injunction, stated in a footnote that it merely *appeared* that the newspaper would not be successful in seeking *unredacted* disclosure of the complaint dispositions against the officer.<sup>40</sup> The city’s interpretation of *Worcester II* may be relevant to any later assessment of damages.

## **VI. Exemption (a)**

Under exemption (a), materials are not public records if they are “specifically or by necessary implication exempted from disclosure by statute.” General Laws c. 4, § 7, Twenty-sixth (a).

The city claims in Exhibit 7 that exemption (a) applies to the following portions of the three investigative files produced: (1) name and identifying information of complainants; (2) CORI (de-identified); and (3) juvenile record information.

As with the city’s application of exemptions (c) and (f), the court is not in a position to make a determination at this time as to the appropriateness of the city’s application of exemption

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<sup>39</sup> Going forward, this carve out may no longer be relevant, in light of the amendment to exemption (c) clarifying that it does “not apply to records related to a law enforcement misconduct investigation.” General Laws c. 4, § 7, Twenty-sixth (c).

<sup>40</sup> While not specifically stated in the footnote, the court may have been referring to redacting from the disposition the actual order and notice of disciplinary action issued as a personnel matter from the chief to the target of the disciplinary investigation, which would have been exempt under *Worcester II*.



(a) to the above information. Plaintiff's counsel shall review the unredacted materials and explain why the above redactions remain contested.

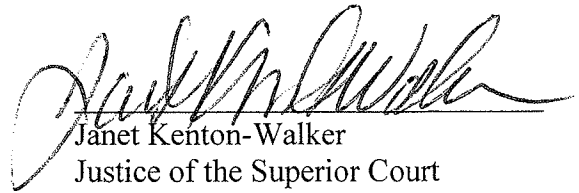
**ORDER**

For the foregoing reasons, it is **ORDERED** that:

- A. The contents of the following seventeen COHs, with the exception of any complainant names the city claims fall under exemptions (a), (c) or (f), which may be temporarily redacted, are public records and, within thirty days of the date of this order, the city shall produce the redacted records to the plaintiff: (1) Batista, (2) Bonczek, (3) Candelaria, (4) Cahill, (5) Carlson, (6) Carmody, (7) Duffy, (8) Gaffney, (9) Moran, (10) Morris, (11) O'Rourke, (12) Piskator, (13) Reando, (14) Roche, (15) Smith, (16) Supernor, and (17) Williams).
- B. Within thirty days of the date of this order, the city shall produce to plaintiff's counsel unredacted versions of all seventeen COHs, subject to a protective order covering only those portions of the COHs (complainant names) that the city redacted pursuant to item A above.
- C. Within sixty days of the date of this order, the city shall produce the following eight internal investigation files, subject to any redactions the city may make based only on those exemptions (a), (c), and (f) claimed for the specific types of information described in Exhibit 7, along with a corresponding exemption log: (1) 10/8/2015 arrest of Alison Skerrett; (2) 8/26/2014 arrest of Hernan Ortiz; (3) 12/18/2013 arrest of Juan Roman Rivera; (4) 8/29/2014 arrest of Carl S. Johnson; (5) 7/10/2013 arrest of Jose Burgos-Martinez; (6) 3/8/2014 detention of Jose L. Ortiz; (7) 3/31/2014 arrest of Luke Deptula; and (8) 2/23/2016 charges against Grace Katana.

- D. Within sixty days of the date of this order, the city shall produce a redaction log corresponding to the already produced and redacted file regarding Adalberto Ruiz.
- E. Within sixty days of the date of this order, the city shall produce to plaintiff's counsel unredacted versions of the following twelve internal investigation files, subject to a protective order covering only those portions of the investigation files (complainant names) that the city redacted pursuant to item C above: (1) 10/8/2015 arrest of Alison Skerrett; (2) 8/26/2014 arrest of Hernan Ortiz; (3) 12/18/2013 arrest of Juan Roman Rivera; (4) 8/29/2014 arrest of Carl S. Johnson; (5) 7/10/2013 arrest of Jose Burgos-Martinez; (6) 3/8/2014 detention of Jose L. Ortiz; (7) 3/31/2014 arrest of Luke Deptula; (8) 6/4/2012 arrest of Adalberto Ruiz; (9) 2/23/2016 charges against Grace Katana; (10) 4/8/2011 warrant served on Jimmie Cotto at 73 Fairfax Road, Worcester; (11) 10/8/2008 search warrant execution at 85 Lamartine Street, Worcester; and (12) 2/19/2010 arrest of Kenneth Brooks, Jr. and Kenneth Brooks III.
- F. Plaintiff's counsel, and their employees directly engaged in the provision of legal services in connection with this litigation, shall execute and submit to this court a signed statement as described in the Protective Order of this same date, attached hereto.
- G. Following full examination of the above-mentioned redacted and unredacted records by plaintiff's counsel, the parties shall narrow the issues and areas of dispute as to the applicability of exemptions (a), (c) and (f) to redacted information contained in the twelve investigative files and the seventeen COHs as described in items A and C above. In the event that disputes remain, the parties shall submit appropriate requests for further hearing.

H. The court will reserve further findings and rulings regarding exemptions, damages and costs, as well as any *in camera* review of records, until after plaintiff's counsel has completed their review, and the parties have worked cooperatively to narrow the issues and areas of dispute.



Janet Kenton-Walker  
Justice of the Superior Court

DATED: June 2, 2021

**COMMONWEALTH OF MASSACHUSETTS**

**WORCESTER, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
No. 1885CV1526A**

**GATEHOUSE MEDIA, LLC**

**vs.**

**CITY OF WORCESTER**

**PROTECTIVE ORDER**

1. The records subject to examination pursuant to this court's Findings of Fact, Conclusions of Law, and Order of this date (Order), shall be examined only by counsel of record for the parties, and those persons employed by the attorneys of record directly engaged in the provision of legal services in connection with this litigation. The parties shall exchange the names of those participating in the examination five days prior thereto.
2. Any documents produced for examination by the defendant (city) in response to the court's Order, and all information contained therein, shall be deemed "confidential information."
3. Such confidential information provided during examination may not be disclosed to any person other than attorneys of record for the parties and those persons employed by attorneys of record directly engaged in the provision of legal services in connection with this litigation. Such confidential information shall be used solely to formulate an opinion whether the documents are exempt from public disclosure until further order of the court. Any recipient of such confidential information shall not

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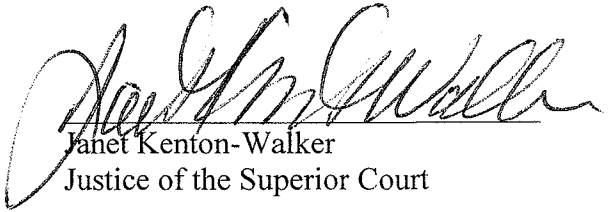
disclose the same to any person to whom disclosure is not authorized by the terms of this protective order (Protective Order) until further order of the court.

4. Each person who will participate in the examination and each person who will have access to the information revealed thereby, as authorized above, shall, prior thereto, file with the court a statement signed under the penalties of perjury in the following form:

“I have read the Protective Order of June \_\_\_, 2021 in the matter of *Gatehouse Media, LLC v. City of Worcester* (Civil Action No. 1885CV1526) and understand the provisions of the Protective Order. I acknowledge that I am and will be subject to the provisions of the Protective Order. I will not disclose “confidential information,” as defined in the Protective Order, to any person not authorized by the Protective Order to have access to such information until authorized to do so by further order of the court. I further acknowledge that violation of the Protective Order may be punished as a contempt of the court.”

5. The plaintiff is specifically prohibited from using the confidential information in connection with the content of anything it publishes absent further order of the court after notice and opportunity to be heard by the city.
6. In the event that such confidential information is used in any court proceeding, it shall not lose its confidential status through such use, and the parties shall take all steps necessary to protect its confidentiality during such use in compliance with this Protective Order.
7. The Clerk of the Court shall be and is directed to maintain under seal those portions of materials containing confidential information filed with the court by the parties. Counsel of any party filing materials containing confidential information shall advise the Clerk of the Court in writing that the materials are confidential and are to be kept under seal.

8. Within sixty (60) days after the final conclusion of this litigation, the plaintiff will return to the city or destroy, at the city's option, all documents and copies of documents produced to it during this litigation and designated as confidential pursuant to this Protective Order.<sup>1</sup>



Janet Kenton-Walker  
Justice of the Superior Court

Dated: June 2, 2021

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<sup>1</sup> With the exception of those documents determined to be public records.