



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

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SPR21/2191

Allison E. Hynes, Esq.
Staff Legal Counsel
Department of State Police
470 Worcester Road
Framingham, MA 01702

Dear Attorney Hynes:

I have received the petition of Wheeler Cowperthwaite of the *Patriot Ledger*, appealing the response of Department of State Police (Department) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On June 14, 2021, Mr. Cowperthwaite requested “[a]ll internal affairs investigation of Matthew Sheehan.” On August 9, 2021, the Department provided a response, which included responsive records redacted pursuant to Exemptions (a), (c) (f), and (n) of the Public Records Law. G. L. c. 4, § 7(26)(a), (c), (f), (n). The Department also withheld certain responsive records. Unsatisfied with the Department’s response, Mr. Cowperthwaite petitioned this office and this appeal, SPR21/2191, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also *Dist. Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records

custodian must provide the responsive records.

The Department's August 9th response

In its August 9, 2021 response, the Department claims that it redacted and withheld records under Exemptions (a), (c), (f), and (n).

Redacted records

Under Exemption (a), the Department states, “. . . redactions have been made pursuant to G.L. c. 6, § 172, the Criminal Offender Record Information (‘CORI’) statute. G.L. c. 6, § 172 prohibits the dissemination of CORI information which G.L. c. 6, §167 defines as ‘records and data in any communicable form compiled by a criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release.’”

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute.

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public’s right to inspect records under the Public Records Law is restricted. See Att’y Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either “shall not be a public record,” “shall be kept confidential” or “shall not be subject to the disclosure provision of the Public Records Law.”

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

CORI is currently defined as:

[R]ecords and data in any communicable form compiled by a Massachusetts

criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. *Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment.* Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information . . . Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

G. L. c. 6, § 167.

Based on the Department's response, it is unclear what information regarding an identifiable individual was redacted from the responsive records or how the information constitutes CORI. It is additionally uncertain how the redacted information constitutes "information recorded in criminal proceedings that are not dismissed before arraignment." See G. L. c. 6, § 167. Therefore, I find the Department has not met its burden to withhold portions of the responsive records under the CORI Act.

Exemption (c)

Exemption (c) permits the withholding of:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

G. L. c. 4, § 7(26)(c).

Analysis under Exemption (c) is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Torres v. Att'y Gen., 391 Mass. 1, 9 (1984); Att'y Gen. v. Assistant Comm'r of Real Prop. Dep't, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case by case basis.

This exemption does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass. 280, 292 (2017).

The types of personal information which this exemption is designed to protect includes: marital status, paternity, substance abuse, government assistance, family disputes and reputation. Id. at 292 n.13; see also Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 (1988) (holding that a motor vehicle licensee has a privacy interest in disclosure of his social security number).

This exemption requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law-abiding and efficient manner. Id. at 292.

Based on the Department's response, it is unclear what information was redacted from the responsive records or how the information constitutes intimate details of a highly personal nature, nor how disclosure would result in personal embarrassment to an individual of normal sensibilities. It is additionally uncertain whether this information is available from other sources. PETA, 477 Mass. at 292. Further, the Department did not provide information with respect to examining whether the public interest in obtaining the requested information outweighs the seriousness of any invasion of privacy. Id.

Exemption (f)

Exemption (f) permits the withholding of:

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(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Att'y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a "case-by-case consideration" of whether disclosure "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." See Reinstein, 378 Mass. at 289-90.

Based on the Department's response, it is unclear how the redacted information constitutes investigatory materials, nor how disclosure of the redacted information "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest" as required under Exemption (f).

Exemption (n)

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security. Exemption (n) allows for the withholding of certain records which if released would jeopardize public.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines "whether, and to what degree, the record sought resembles the records listed as examples in the statute;" specifically, the "inquiry is whether, and to what degree, the record is one a terrorist would find useful to maximize damage." PETA, 477 Mass. at 289-90.

The second prong of Exemption (n) examines "the factual and contextual support for the proposition that disclosure of the record is 'likely to jeopardize public safety.'" Id. at 289-90. The PETA decision further provides that "because the records custodian must exercise 'reasonable judgment' in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian's determination given the context of the particular case." Id.

PETA also provides that "[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian's burden in demonstrating 'reasonable judgment' and vice versa." PETA at 290.

Based on the Department's response, I find it has not established how the information is one a terrorist would find useful to maximize damage, nor, provided "sufficient factual heft" to conclude that a reasonable person would agree that disclosure of such information is "likely to

jeopardize public safety or cyber security” as required by Exemption (n). *Id.* at 290-91.

Withheld records

Further in its response, the Department states that it “. . . also located records related to Case Number 2018-0046 and Case Number 2018-0080 which are responsive to your request. However, these records relate to on-going investigations and thus the Department denies your request as relates to these records. In light of the pending investigations, these records are not subject to public disclosure at this time pursuant to G.L. c. 4, §7, cl. 26 (f).” The Department cites SPR15/0203 to support its position to withhold responsive records.

Although the Department states that these records relate to on-going investigations, it does not explain the subject of the investigation nor does it describe how the requested records are part of the investigation. Further, the Department did not demonstrate how disclosure of the responsive records or any segregable portion thereof “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest” as required to withhold records under Exemption (f). See *Reinstein*, 378 Mass. at 289-90 (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). Upon review of the Department’s response, I find the Department has not met its burden to redact and withhold the requested information.

Conclusion

Accordingly, the Department is ordered to provide Mr. Cowperthwaite with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (10) business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Wheeler Cowperthwaite