COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2022-P-0282

GATEHOUSE MEDIA, LLC,

Plaintiff-Appellant

v.

CITY OF WORCESTER,

Defendant-Appellee

AN APPEAL FROM AN ORDER AND JUDGMENT
OF THE SUPERIOR COURT

BRIEF OF DEFENDANT-APPELLEE CITY OF WORCESTER

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Superior Court that presided over a public records case for over a year, including trial, clearly erred when it employed its due discretion in holding that duplicative, redundant and excessive work by the Appellant's attorneys warranted a reduction in the statutory fees award.

STATEMENT OF THE CASE

This appeal challenges the Worcester Superior Court's reduction of the Plaintiff-Appellant's request for attorneys' fees awarded pursuant to G. L. c. 66, § 10A, following the resolution of this public records lawsuit. In June 2018, a reporter from the Worcester Telegram and Gazette newspaper, which is owned by Appellant, Gatehouse Media, LLC (Gatehouse), made two public records requests of the Appellee, City of Worcester (Worcester), for complaint histories of seventeen Worcester Police Department police officers and internal police investigations of twelve incidents. The requests were prompted by a letter from Worcester's opposing counsel in civil rights litigation complaining to the Worcester County District Attorney about internal investigations and police officer defendants in those federal court cases. Worcester took the position that

the requests significantly interfered with its defense of the police officers, considering that the public records requests were for the same internal investigations and officer complaint records that were the subject of discovery disputes and litigation over protective orders in the cases. Therefore, the primary issue was whether the deliberative process exemption (d), G. L. c. 4, § 7, Twenty-sixth (d), to the Public Records Law, G. L. c. 66, § 10 (PRL), applied to records substantially related to pending litigation, to allow records to be redacted and withheld.

The Superior Court did not grant Gatehouse's motion for a preliminary injunction to produce records, nor did it decide the motion for summary judgment in Gatehouse's favor. The Superior Court heard the case for trial, for less than two hours in person on November 2, 2020, then over two days in November and December on Zoom, with remote closing arguments on January 11, 2021. (R.A.I 6.) In a June 2, 2021, decision, the Superior Court disagreed with Worcester's position as to the applicability of exemption (d), ordering the production of certain records. (Add. 72-3.) The trial court did not come to a final decision with regard to the applicability of other claimed exemptions, (a), (c) and (f). (Add. 72-

4.) However, given that in the approximately three years since the public requests had been made, the pending internal investigations had concluded, several related civil rights cases had resolved and Worcester had changed its practice with regard to certain public records, Worcester produced the records to Gatehouse with minimal redactions within the court-ordered time period.

On October 29, 2021, Gatehouse filed its motion for attorneys' fees and costs, with supporting paperwork and Worcester's opposition. (R.A.I 13, Doc. 34, *et seq*.) The trial court held a motion hearing before Hon. Janet Kenton-Walker, the same judge who had presided over the case since October of 2020, including trial. (R.A.I 13.) In a January 27, 2022, memorandum and order, the Superior Court set forth its analysis of the pleadings, relevant law and arguments in weighing Gatehouse's request for $214,467.00 in fees. (Add. 32-8.) The trial court first considered the hourly rates claimed by Gatehouse's attorneys and found a blended rate of $365.00 per hour to be appropriate. (Add. 35.) The court set forth the required standard for the evaluation of the request, finding that the legal issues were relatively straightforward. (Add. 34.) The decision reflected a detailed review of Gatehouse's attorneys' timesheets and

found excessive hours spent on the case, with duplication of work, overstaffing and block billing. (Add. 35.) Given that the legal arguments were repeated throughout the case stages with duplicative written submissions, the court found that some of the time spent by Gatehouse's counsel was "excessive and redundant," and reduced the fee award to $98,586.50. (Add. 36.) This appeal followed.

STATEMENT OF FACTS

Gatehouse had limited success through most phases of this case. On page 4 of Appellant's memorandum in support of its motion for attorneys' fees, it detailed the fees requested for the various stages. For the first phase, labeled, "Complaint and Preliminary Injunction Phase," Gatehouse sought 68.7 hours totaling $23,055.00. (R.A.II 274.) However, Gatehouse was not successful at the preliminary injunction phase. (R.A.I 180.)

In denying Gatehouse's motion for preliminary injunction on November 27, 2018, the Superior Court held the records "are [the] subject of dispute in active litigation [and] subject to a protective order entered by the federal district court; at this stage of the proceedings, the court is not in a position to make a finding that the records at issue are subject to

disclosure under the public records law." (R.A.I 178.) Since some of the records were also pending internal investigations, likewise, the court held that it could not make a preliminary declaration that the records were not exempt from disclosure. Id. Thus, Gatehouse failed to establish a likelihood of success on the merits of its claims. Id. at 179. The court also found that Gatehouse did not satisfy the requirements for a preliminary injunction because it did not show a lack of adequate remedy at final judgment and an absence of irreparable harm should the records be released. Id. The Superior Court rejected Gatehouse's argument that it would suffer irreparable harm without immediate access to the records, but Worcester was at risk of harm. Id. at 179-80. "[R]equiring the City to produce the officer complaint records may impact ongoing policy developments, litigation strategy, and the litigation process." Id. at 180. Therefore, the "balance of equities" weighed in Worcester's favor and the court denied the injunction. Id.

Gatehouse requested $52,482.50 for 156.2 hours spent litigating the summary judgment phase, but it did not prevail in its motion. (R.A.II 274.) In the December 17, 2019, decision denying the parties' cross-

motions for summary judgment, the Superior Court held that specific proof must be elicited regarding the exemptions to the PRL and the records reviewed on a case-by-case basis through a hearing procedure. (R.A.I 306.) The Court could not make a decision on the applicability of the exemptions as a matter of law based on the summary judgment record. Id. Thus, the Court did not find that Gatehouse was entitled to prompt production of the records and ordered that a hearing on the merits of the case was required. Id. at 307.[1]

Gatehouse next requested $65,940.50 for 182.5 hours labeled as incurred in the "pretrial phase." (R.A.II 274.) Although it is unclear why so many hours were devoted, separate and apart from the 124.7 hours labeled as "trial," this time also included unnecessary and unsuccessful litigation. Id. In particular, an excessive amount of hours was spent researching trial procedures and preparing a "pretrial report," with the

[1] Gatehouse also pursued litigation in the summary judgment phase on issues, such as exemption (a), where Worcester had a clear duty to redact information concerning domestic violence/abuse, adjudicated crimes and juvenile offender records, which Gatehouse did not continue to pursue at trial. Exemption (a), the statutory exemption, is for records "specifically or by necessary implication exempted from disclosure by statute," G. L. c. 4, § 7, cl. 26(a).

only obvious result being a joint and routine eight-page pre-trial memorandum filed on January 28, 2020, doc. 16. (R.A.II 342-3, R.A.I 10.) Eight entries, for over eleven hours, reference researching and writing a letter to Worcester regarding a "Vaughn index," which resulted in a one and a half-page letter dated February 11, 2020. (R.A.II 343.)

Gatehouse further included 22.2 hours for time spent researching and writing an unsuccessful "motion to expedite," fees that the Superior Court specifically rejected for the award. (R.A.II 344, 4; Add. 35.) When Gatehouse filed the motion to expedite, the trial court had already denied summary judgment, set a pre-trial and trial schedule, and the COVID-19 pandemic had prompted the Supreme Judicial Court to issue a May 4, 2020, order tolling deadlines, so there was no basis for expedited production of the records at issue. (R.A.II 19-37; Add. 35-6.) Further, Gatehouse sought the expedited order due to the protests in the wake of the death of George Floyd, "issues unrelated to this case," as the Superior Court found. (Add. 35 and n.2.) The Superior Court properly excluded the hours for the motion, holding it was "nothing more than 'tilting at windmills," citing

Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 296 (1st Cir. 2001). Id. at 36.

Gatehouse also sought 124.7 hours, $49,539.50, for the "trial" phase of the case. (R.A.II 274.) The trial was a non-jury hearing conducted for less than two hours in-person one day, two days remotely on Zoom, with closing arguments on a fourth day. (R.A.I 6, 11-2.) The legal issues were limited to whether exemptions to the PRL applied, and were not unusually complex, as the trial court found. (Add. 34.) Although the Superior Court agreed with Gatehouse's position that Worcester could not withhold records pursuant to exemption (d), and ordered the records be produced for Gatehouse's counsel's review with redactions pursuant to (a), (c) and (f), there was initially no final judgment entered. (Add. 72-4.)

Gatehouse also sought 50.6 hours for $23,449.50 for the "post-trial phase." (R.A.II 274.) Pursuant to the court's order following trial, Worcester produced to Gatehouse the officer complaint records, without redaction, within thirty days and the eight internal investigation files, with very limited redaction to four files (together with a redaction log and the unredacted versions of the four files), within sixty days. (Add.

72; R.A.II 399.) Gatehouse did not challenge any of the redactions Worcester made and there were no further issues in dispute with regard to the records. Worcester's decision to disclose information previously redacted and withheld was not a concession of the merits of Worcester's arguments, but a recognition of the Court's decision with regard to exemption (d), the changes in the law by the police reform legislation, as well as the fact that in the three years since the public records case was pending, the related civil rights matters in federal court had mostly resolved. (R.A.II 383.) Gatehouse received all of the records it sought, pursuant to the Superior Court's order, obviating the need for further litigation, which demonstrated the excessiveness of Gatehouse's request for the amount of the post-trial fees.

Included in Gatehouse's request was 20.3 hours for the attorneys' fees petition itself, which Worcester argued should be merely a ministerial task for a minimal rate, and, thus, should be denied.[2] (R.A.II 351, 383;

[2] Citing to the federal court decision attached as Exhibit 2 to Attorney Pyle's affidavit, R.A.II 293, in Robert Thayer et al. v. City of Worcester, U.S.D.C. No. 13-40057-TSH (D. Mass. Mar. 29, 2017), which reduced the $1,016,439.60 attorneys' fees request to $596,762.50 by lowering the hourly rate, imposed an additional

Add. 36.) The Superior Court agreed, finding the hours spent on the petition to be unreasonable, and denying them in their entirety. (Add. 36.)

The time expended and attorneys' fees requested for all phases of this case was disproportionate and excessive compared to the Gatehouse's limited success only in the final stage of the case, following trial, which was reflected in the court's decision. The trial court decided that the attorneys' hourly rate should be reduced to reflect "the combined experience of counsel and the geographic area," reducing the request to a blended hourly rate of $365.00 per hour. (Add. 34-5.) The Superior Court determined there were "excessive hours spent on particular aspects of the case, along with duplication of work, overstaffing, and some block billing." (Add. 35.) Although Worcester had argued that an across the board reduction of sixty percent was warranted,[3] the court reduced Gatehouse's request by only

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$87,057.12 in reductions for inflated and duplicative hours and overstaffing, and denied the $16,888.00 for preparing the fees petition. (R.A.II 299-305.)

[3] Citing to the case attached to Attorney Pyle's affidavit as Exhibit 4, R.A.II 311, 320, Schand v. McMahon, 487 F. Supp. 3d 71, 81 (D. Mass. 2020) (holding that the attorneys' fees request of $2,778,769.50 would be twice reduced by sixty percent due to block billing, overstaffing and the time spent on unsuccessful claims,

fifty percent. (Add. 36.) The Superior Court's reduction was warranted and proper.

ARGUMENT

I. Standard of Review

A trial court has "considerable discretion" to determine the appropriate amount of attorneys' fees and such an award "is presumed to be right and should not be disturbed" unless it can be shown that the decision was clearly erroneous. Galipault v. Wash Rock Invs., LLC, 65 Mass. App. Ct. 73, 86 (2005). In this case, Gatehouse has not shown that the Superior Court clearly erred in reducing the attorneys' fees request. Thus, the attorneys' fees award should be upheld.

II. The Factors Considered in Weighing the Fees Request Were Reasonable, Appropriate and Correct.

The party seeking attorney's fees bears the burden of proof to show the reasonableness of the request. WHTR Real Estate Ltd. Partnership v. Venture Distrib., 63 Mass. App. Ct. 229, 235 (2005). "To be sure, conservative principles should apply to the determination of what is a reasonable fee when the pocket from which the fee is drawn belongs to someone other

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which after further reductions resulted in an award of $347,759.20).

than the person who hired the lawyer." Strand v. Hubbard, 31 Mass. App. Ct. 914, 915 (1991). A fees petition can be an avenue for abuse. See Robbins v. Robbins, 19 Mass. App. Ct. 538, 544 (1985) ("When fee awards appear excessive and the public hears … the soft thud of mutual backpatting, respect for the administration of justice must suffer.")

In weighing the request, the court may analyze factors that include the following:

> the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.

Linthicum v. Archambault, 379 Mass. 381, 388-9 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Berman v. Linnane, 434 Mass. 301, 303 (2001). "The judge should begin his inquiry with the amount of time documented by the plaintiff's attorney. Then the judge decides whether this amount of time was reasonably expended." Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 790-1 (2007) (quoting Stowe v.

Bologna, 417 Mass. 199, 203-4 (1994) (further quotations and citations omitted)).

The lodestar method is recommended in Massachusetts to determine attorneys' fees, although it is not required to be applied. See WHTR Real Estate, 63 Mass. App. Ct. at 236.

> A reasonable fee typically is determined through the lodestar method, which involves multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure. In fashioning the lodestar, a [trial] court may adjust the hours claimed to eliminate time that was unreasonably, unnecessarily, or inefficiently devoted to the case. Subject to principles of interconnectedness, the court may disallow time spent in litigating failed claims. It also may adjust the lodestar itself, upwards or downwards, based on any of several different factors, including the results obtained and the time and labor actually required for the efficacious handling of the matter.
>
> Reasonableness in this context is largely a matter of informed judgment. There are, however, guideposts in the case law. For instance, a district court may deem an expenditure of time unreasonable if the reported hours are "excessive, redundant, or otherwise unnecessary." By like token, it may discount or disallow the total hours claimed if it determines that the time is insufficiently documented.

Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008) (internal citations and quotations omitted) (quoted by Cocroft v. Smith, No. 10-40257-TSH, 2015 U.S. Dist. LEXIS 16013, at *3-4 (D. Mass. Nov. 30, 2015)).

In the analysis, the court can consider the evidence presented and impressions from the trial. Berman, 434 Mass. at 303. Much deference is given to the trial court judge who has the benefit of knowing details of the record and the ability to weigh testimony and evidence at trial. Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 431 (2005). Here, the trial judge who had the familiarity with the case and observed counsel at trial determined the fees award, a decision that should be given deference.

Although Gatehouse argues that the fifty percent reduction in the fees request was not appropriate, the judge does not have to make a decision as to each line in an itemized bill, but can consider the request as a whole. See Berman, 434 Mass. at 303 (holding that trial court's finding that much of the work performed was repetitive and unnecessary was not clearly erroneous). The Court is also "not required to make specific findings as to the amounts deemed unreasonable when awarding less in fees and costs." WHTR Real Estate, 63 Mass. App. Ct. at 237 (holding that there was no abuse of discretion or clear error although the judge did not make explicit findings as to the hours reasonably spent on the case).

In the Twin Fires case, the trial court judge weighed the Linthicum factors, acknowledging that he could not review the itemized descriptions in the voluminous time records and then discounted the plaintiffs' request by almost forty-five percent. Twin Fires, 445 Mass. at 431-2. The Supreme Judicial Court did not find that the trial court had abused its discretion and upheld the award. Id. at 432.

This case presents a reduction in a fees award for a Boston law firm, similar to the Thayer case against the City of Worcester. (R.A.II 293.) The federal court found in that case, the requested hourly rates for the attorneys were severely inflated, which led to an initial across-the-board reduction in the $1,016,439.60 fees request to $596,762.50. (R.A.II 297-9.) The court also imposed an additional $87,057.12 in reductions for inflated and duplicative hours and overstaffing, including $16,888.00 for preparing the fees petition, which was denied in its entirety. (R.A.II 299-303.) Thus, the federal court made a total reduction of the fees request of approximately fifty percent to $509,705.38. (R.A.II 305.)

In this case, the Superior Court properly developed a lodestar amount and applied an across the board

reduction. The court acknowledged the claim of a total of 582.70 hours, and an hourly rate range for the attorneys from $272.50 to $447.50 per hour, finding a blended hourly rate of $365.00 per hour to be reasonable and appropriate. (Add. 35.) The court then excluded 22.2 hours for the motion to expedite and the 20.3 hours for the fees petition, on the grounds that they were wholly unreasonable, leaving 540.2 hours. (Add. 34-5.) The excessiveness in the hours the attorneys claimed warranted a further 50 percent reduction; therefore, the reduced hours, 270.1, were multiplied by the blended rate, $365.00 per hour, to arrive at the total fee award of $98,586.50. The Superior Court properly applied the Linthicum factors, and was well within its rights to apply a total fifty percent reduction to the hours, rather than conduct a factor-by-factor analysis. See Twin Fires, 445 Mass. at 430.

A. *The hours claimed by Gatehouse were excessive.*

The reduction in excessive hours was warranted in this case. "[I]t is the court's prerogative (indeed, its duty) to winnow out excessive hours, time spent tilting at windmills, and the like." Gay Officers Action League, 247 F.3d at 296. As in Massachusetts, the First

Circuit does not require "that courts set forth hour-by-hour analyses of fee requests. Such an approach would be unduly burdensome and leave the judge 'so deluged with details that [they are] unable to view the claims for fees in perspective.'" Jacobs v. Mancuso, 825 F.2d 559, 562 (1st Cir. 1987), quoting Gabriele v. Southworth, 712 F.2d 1505, 1507 (1st Cir. 1983). In order to compensate for an excessive number of hours, courts have taken a percentage reduction from the number of hours requested. See Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emplr. v. Ray Haluch Gravel Co., 745 F.3d 1, 5 (1st Cir. 2014) (reduction of claimed hours by one-third across the board to adjust for those that were excessive and/or unnecessary). The Superior Court properly found that the excesses of Gatehouse's counsel were evident in various categories.

B. *Gatehouse was redundant in the number of attorneys for the work.*

When reviewing a fees petition, "the time for two or three lawyers in a courtroom or conference, when one would do, may obviously be discounted." Hart v. Bourque, 798 F.2d 519, 523 (1st Cir. 1986) (internal quotation and citation omitted). "Fee-shifting statutes … [are

not intended] to serve as full employment or continuing education programs for lawyers and paralegals. A trial court should ordinarily greet a claim that several lawyers were required to perform a single set of tasks with healthy skepticism." Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992).

In Cocroft, the federal court questioned the number of attorneys employed to work on the straightforward civil rights case – four senior level attorneys, one junior level attorney, and a legal intern – and applied a forty percent reduction to compensate for the excess. Cocroft, 2015 U.S. Dist. LEXIS 160310, at *7. Indeed, "a court should not hesitate to discount hours if it sees signs that a prevailing party has overstaffed a case." Gay Officers Action League, 247 F.3d at 297. Turnover within a firm and transfer of duties amongst legal representation, which is exhibited by time spent by each new attorney "reviewing files," writing reviews of case statuses and conferencing with other counsel is an indication that time was spent "without regard to productivity" and is an "office defect, not chargeable to defendants." Hart, 798 F.2d at 523.

Here, Gatehouse's counsel overstaffed the case with two attorneys, Jeffrey Pyle and Michael Lambert, and a

paralegal, when the litigation was handled by one attorney for Worcester. The case may have been used as a teaching tool for a less-experienced associate in Attorney Lambert, but that duplicative time spent without regard to productivity is a defect not chargeable to Worcester.

For example, Gatehouse sought a total of 17.3 hours and $5,900 for both Attorneys Pyle and Lambert to schedule, prepare for and attend the motion for preliminary injunction hearing, and 22.6 hours and $8,054 for both attorneys to prepare for and attend the summary judgment hearing, where only Attorney Pyle argued at both hearings. (R.A.II 338, 342.) These hours are far in excess of the number that should have been required for an experienced litigator such as Attorney Pyle to prepare for a hearing, and represent the duplication of efforts by two attorneys, when one should have sufficed. See Thayer, R.A.II 302 (expressing concern over an experienced litigator charging over thirty hours to prepare for a preliminary injunction hearing and two experienced litigators charging twenty and thirteen hours to prepare for a summary judgment hearing, which warranted a further fifteen percent reduction for overstaffing). Here, the Superior Court

properly determined that evidence of overstaffing, such as Attorneys Lambert and Pyle both billing for preparation and attendance at motion hearings and trial, warranted an across the board reduction in Gatehouse's request. (Add. 36.)

C. *Gatehouse's attorneys' block billing is also indicative of excess.*

"Block billing can be defined as the time-keeping method by which an attorney lumps together the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." Conservation Law Found., Inc. v. Patrick, 767 F. Supp. 2d 244, 253 (D. Mass. 2011) (citations omitted). Such a practice is disfavored and has prompted courts to apply a twenty percent reduction in total fees. See id. at 253-4. Here, it can be difficult to parse what hours were incurred for what specific task due to the attorneys' practice of block billing. The following entries, which are examples of block billing, but are not the only defective entries, illustrate the difficulty in parsing out specific tasks and time spent:

9/14/18	JJP	Revise complaint to track new developments; email and telephone conference with M. Lambert re drafting of	1.30	$552.50

		memorandum		
9/14/18	MJL	Review file; conference with J. Pyle; research case law on Massachusetts public records law exemption (d); draft memorandum in support of preliminary injunction	4.10	$1,025.00
12/18/18	MJL	Review case file; legal research on next steps after preliminary injunction; conference with J. Pyle re: same	2.30	$575.00
3/26/19	MJL	Research pending cases and chart of outstanding concise office histories and investigation files; draft memorandum on same; email exchanges with J. Pyle re same.	4.80	$1,272.00
4/3/19	MJL	Revise memorandum in support of motion for summary judgment; legal research re: same; conference with J. Pyle re same.	3.70	$980.00
6/4/19	MJL	Review and revise affidavit of B. Petrishen and memorandum of law in support of motion for summary judgment; draft joint appendix; locate and sort exhibits for joint appendix; review complaint and attached exhibits; conference with J. Pyle re joint appendix; conference with P. Kammer re same.	5.80	$1,537.00
1/16/20	MJL	Legal research on trial procedures in Massachusetts public records cases and joint pretrial statement;	2.20	$616.00

		conference with J. Pyle re same; review motion to convert pretrial conference to scheduling conference.		
10/9/20	JJP	Complete review of Vaughn indexes; draft letter to Court re legal issues that should be addressed pretrial; conference with W. Quinn re trial procedure and letter; finalize and send letter to Honorable J. Kenton-Walker	3.20	$1,456.00
10/20/20	MJL	Draft and revise trial memorandum; legal research re same; conference with J. Pyle re same	9.20	$2,576.00
10/23/20	JJP	Prepare trial memorandum; prepare exhibit list; email to W. Quinn re exhibits and Vaughn index.	5.70	$2,593.50
11/16/20	JJP	Review email from Court re conducting further trial by Zoom; prepare stipulation re redactions claimed; prepare for cross-examination of J. Thompson; prepare and ship box with contested exhibits to Court for trial.	4.70	$2,138.50

(R.A.II 336-51.) Given the numerous entries of block billing, the Superior Court's reduction on that basis was warranted.

D. *The burden on the Worcester taxpayers should be a consideration.*

Municipal finances should be considered in a case against a governmental entity, brought by a for-profit entity represented by counsel from a large Boston law firm. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 559 (2010). Fees statutes in cases against public entities are not intended to enrich attorneys, and because the fees are often paid by state and local taxpayers, out of limited municipal budgets, money paid for fees "cannot be used for programs that provide vital public services." Id. at 559. The court can consider the annual per capita income, since the fees would be paid by the taxpayers, as well as the annual salaries as the public attorneys for comparison, as the provision for attorneys' fees is not intended to provide a windfall. Id. at 559, n.8. Therefore, the figures from Worcester are the following:

2020 per capita income within the City of Worcester	$28,943[4]

[4]https://www.census.gov/quickfacts/fact/table/worcestercitymassachusetts/AGE295220 (last accessed on 6/8/22).

FY22 compensation range for City of Worcester attorneys	$74,425 – 168,189[5]

Gatehouse's request for fees and costs in the amount of $217,695.05 was over 7.52 times the per capita income for Worcester. The requested hourly rates for Gatehouse's attorneys were multiple times the hourly rate of compensation for Worcester's attorneys. This request, made by one of the biggest firms in Massachusetts, should not produce a windfall to the firm at the expense of Worcester taxpayers and public services. Thus, the Superior Court's reduction in the attorneys' fees request was warranted.[6]

[5]http://www.worcesterma.gov/uploads/6b/1f/6b1f2107dd73476ef0d9efad970c4705/budget-fy22.pdf (last accessed on 10/19/21).

[6] For further comparison, see the decisions attached to the Affidavit of J. Pyle as exhibit 5, R.A.II 330, Boston Globe Media Partners, LLC v. Massachusetts State Police Dept., Suffolk Sup. Ct. No. 2084CV00538 (June 7, 2021), reflecting a limited $22,592.50 attorney's fees award to the plaintiff in a public records case. See also exhibit 6, R.A.II 333, Jonathan Nyberg, et al. v. R. Bruce Wheltle, et al., Middlesex Sup. Ct. No. 2181CV00145 (Aug. 26, 2021), a notice of a $25,000 attorney's fees award to the defendants following dismissal of the suit, pursuant to G. L. c. 231, § 59H, governing strategic litigation against public participation (SLAPP) and reflecting a reduction due to the fact that some of the work performed by Attorney Pyle "could have been performed by more junior attorneys at a lower hourly rate."

CONCLUSION

The Motion for Attorneys' Fees was properly decided in this case, within the Superior Court's discretion, and there was no clear error.

For all of the aforementioned reasons, the Superior Court decision and order should be affirmed and fees and costs for the appeal should be awarded to the Appellee.

APPELLEE
CITY OF WORCESTER

By its attorneys,

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Dated: June 22, 2022

MASSACHUSETTS RULES OF APPELLATE PROCEDURE 16(k) CERTIFICATION

I, Wendy L. Quinn, pursuant to Mass. R.A.P. 16(k), hereby certify that this brief of Defendant-Appellee complies with the rules of court that govern briefs, including, but not limited to, the following: Mass. R. A. P. 16(a)(13), 16(b), 16(e), 18, 20 and 21. In compliance with Rules 16(k) and 20(a)(2)(A), the length of the brief, as measured by the Microsoft Word program is twenty-three pages, with 4,789 words in Courier New, monospaced 12-point font.

/s/ Wendy L. Quinn
Wendy L. Quinn
Special Asst. City Solicitor

CERTIFICATE OF SERVICE

I, Wendy L. Quinn, hereby certify pursuant to Mass. R. App. P. 13(d) that I served upon Appellant the within Appellee's Brief by email and electronic filing this 22nd day of June, 2022, to:

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1885CV1526A

GATEHOUSE MEDIA, LLC

vs.

CITY OF WORCESTER

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR ATTORNEY'S FEES & COSTS

The plaintiff, Gatehouse Media, LLC (Gatehouse or plaintiff), has moved for an award of attorney's fees and costs. Specifically, Gatehouse seeks $214,467.00 in attorney's fees and $3,228.05 in costs.

General Laws c. 66, § 10A(d)(2), provides as follows:

> The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:
> (i) the supervisor found that the agency or municipality did not violate this chapter;
> (ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;
> (iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;
> (iv) the request was designed or intended to harass or intimidate; or
> (v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

In its June 2021 decision, this court entered an order in favor of Gatehouse, establishing a presumption in favor of an award of fees and costs. After a thorough review of the respective pleadings and relevant law and following a hearing, the defendant, City of Worcester (city or defendant), has not established the existence of any of the exceptions necessary to overcome that

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presumption. See G. L. c. 66, § 10A(d)(2). The court finds that the plaintiff is entitled to an award of reasonable fees and costs.

"While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.'" *Twin Fires Inv., LLC* v. *Morgan Stanley Dean Witter & Co.*, 445 Mass. 411, 429-430 (2005), quoting *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." *Twin Fires*, 445 Mass. at 430, quoting *Berman* v. *Linnane*, 434 Mass. 301, 303 (2001).

In any fee award against an opposing party, "there must be a relationship 'between the depth of the services provided and what is at stake'" (citations omitted). *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. 153, 176 (1999). Also, in the usual case, "[w]hen legal expenses are collected from a party other than the one who received the legal services, a degree of conservatism in fee determination is in order. . . . As between lawyer and client, the case stands differently; courts then are less conservative because the amount of the fee is ordinarily something that has been discussed and agreed upon." *Smith* v. *Consalvo*, 37 Mass. App Ct. 192, 196 (1994). See *Price* v. *Cole*, 31 Mass. App. Ct. 1, 7 (1991).

The basic measure of reasonable attorney's fees is a "fair market rate for the time reasonably spent preparing and litigating a case." *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 326 (1993). This method is known as the "lodestar" method and, "as its name suggests, [has] become the guiding light of our fee-shifting jurisprudence." *Perdue* v. *Kenny A.*, 559 U.S. 542,

551 (2010), quoting *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 801 (2002). See *Fontaine*, 415 Mass. at 325-326.

"The plaintiff bears the burden of establishing and supporting the number of hours billed." *Haddad* v. *Wal-Mart Stores, Inc.*, 455 Mass. 1024, 1026 (2010). Gatehouse is only entitled to recover reasonable attorneys fees, not to recover for every hour its lawyers chose to spend working on the matter. "In determining time reasonably spent on a matter, the court must be mindful of 'the difficulty of the case' and 'the results obtained,' . . . and 'compensable hours may be reduced if the time spent was wholly disproportionate to the interests at stake'" (citations omitted). *Killeen* v. *Westban Hotel Venture, LP*, 69 Mass. App. Ct. 784, 792 (2007). A request for attorney fees must be reduced where "[t]he time and labor devoted to the case [are] excessive" in light of "the difficulty of the legal and factual issues, and the amount at stake." *Rex Lumber Co.* v. *Acton Block Co.*, 29 Mass. App. Ct. 510, 521 (1990). Accord *Haddad*, 455 Mass. at 1027.

From the pleadings submitted in this case, and this court's observations during trial and motion hearings, the plaintiff's attorneys were experienced and capable. The issues at stake were significant. This case presented complex factual issues as to what records were exempt from the plaintiff's request; however, considering the case law in the Commonwealth, the legal issues were reasonably straightforward.

From the affidavit of Attorney Jeffrey Pyle ("Attorney Pyle"), and the time sheets submitted, Attorney Pyle, along with Attorney Michael Lambert ("Attorney Lambert") and paralegal Janine Sheehan ("Ms. Sheehan"), worked on this case for a total of 582.70 hours beginning mid-August of 2018 through early October of 2021. Over the three plus years this case was pending, the hourly rates for the attorneys ranged from an average of $272.50/hour for

Attorney Lambert up to an average of $447.50/hour for Attorney Pyle. The city does not contest the reasonableness of the hourly rates; however, the standard of reasonableness depends not on what the attorney usually charges, but on what his services are objectively worth. Based on the combined experience of counsel and the geographic area, the court finds that a blended hourly rate of $365.00/hour is reasonable and appropriate, and the rate this court will apply in this case. See *Haddad*, 455 Mass. at 1026. See also *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Commonwealth* v. *Ennis*, 441 Mass. 718, 722 (2004); *Society of Jesus of New England*, 411 Mass. 754, 759 n.11 (1992); *Stratos* v. *Department of Pub. Welfare*, 387 Mass. 312, 323-325 & n.12 (1982).

A detailed review of the timesheets shows excessive hours spent on particular aspects of the case, along with duplication of work, overstaffing, and some block billing. Both Attorneys Pyle and Lambert billed for preparation and attendance on motion hearings and trial; however, only Attorney Pyle made presentations. In addition, both attorneys billed many hours for drafting the memoranda for the preliminary injunction, summary judgment, trial, and the final request for findings and rulings. Attorney Lambert spent many hours researching the applicable law. However, the legal arguments raised were virtually the same at each stage of the proceedings, and the written submissions were duplicative, such that the time spent was excessive and redundant.[1]

Of particular note, the court found the 22.2 hours spent on a motion to expedite resolution (Paper #18) unreasonable, in that the motion was based on issues unrelated to this case,[2] and

[1] In its reply to the city's opposition, Gatehouse recognized the duplicity when it argued that the time spent on the motion for summary judgment was well-spent because it contributed to Gatehouse's trial memoranda and request for findings and rulings.

[2] From this court's reading of the motion, despite the denial of the motion for summary judgment, Gatehouse sought an "expedited" order in its favor. Plaintiff's grounds for this request were the public's need to be aware of potential problem officers, and what the Worcester Police department had done to address incidents of police misconduct, because of the death of George Floyd.

because a final pre-trial conference had already determined, with the parties' agreement, a pre-trial and trial schedule.[3] The court finds the time spent on that motion to be nothing more than "tilting at windmills," and it is the duty of the court to exclude that time. See *Gay Officers Action League* v. *Puerto Rico*, 247 F.3d 288, 296 (1st Cir. 2001). The court also finds the 20.3 hours spent on preparing this fee petition unreasonable, and those fees are denied in their entirety. After deducting those hours, the total remaining hours are 540.2 at the blended rate of $365/hour for a total remaining fee of $197,173.00.

The court recognizes that some of the fees came from responding to the city's filings, including continually responding to the city's bad faith reliance on exemptions (c) and (d), as well as deciphering the verbose, confusing, and incomplete *Vaughn* affidavits. The court also recognizes that Gatehouse was successful in this litigation. The city cannot complain that fees for work made necessary by its own litigation tactics are excessive in light of the results achieved. See *A.C. Vaccaro, Inc.* v. *Vaccaro*, 80 Mass. App. Ct. 635, 643 (2011). Even taking into account the defendant's behavior, the court still finds the 540.2 hours to be unreasonable as excessive, duplicative, and redundant. Based on all of the above, and considering the billing as a whole, the court finds that it is reasonable to reduce the number of billable hours by 50% to 270.1. At the blended rate of $365/hour, the total fee awarded will be $98,586.50.

In reviewing the costs, the court determined that the photocopying costs had two rates, $.15/page for black and white and $.75/page for color. Given the nature of the case, there appears to be no reason for color photocopies, and if there were any, it was unreasonable. Therefore, the photocopying costs will be reduced to $791.25. The legal research costs incurred on July 22, 2019, and October 15, 2020, will be denied, as there is no corresponding time record

[3] The court further notes that, despite the COVID-19 pandemic, this matter proceeded to trial on the scheduled trial date.

that research was performed on those days. The legal research cost incurred on August 12, 2021, will be denied as it appears to relate to research for the fee petition. The legal research cost, therefore, will be reduced to $1,036.23. The total costs approved are $2,362.63.

ORDER

Based on the foregoing, the court **ORDERS** the city to pay Gatehouse its reasonable attorney's fees in the amount of $98,586.50, together with costs of $2,362.63, for a total of $100,949.13.

Janet Kenton-Walker
Justice of the Superior Court

Dated: January 26, 2022

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1885CV1526A

GATEHOUSE MEDIA, LLC

vs.

CITY OF WORCESTER

JUDGMENT

37*

This matter having been adjudicated by this court, and this court having issued an order dated June 2, 2021 (June 2021 decision), requiring the defendant, the city of Worcester (city), to provide public records to the plaintiff, Gatehouse Media, LLC (plaintiff), and all remaining issues having been rendered moot by the city's compliance with the June 2021 decision, and in accordance with this court's subsequent orders on the plaintiff's motion for a permanent injunction, entry of judgment, and punitive damages, and on the plaintiff's motion for attorney's fees and costs, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Judgment shall enter in favor of the plaintiff on counts I and II of the complaint insofar as the court declares that the materials requested by the plaintiff and referenced in the June 2021 decision were public records and that the city violated the Massachusetts Public Records Law, G. L. c. 66, § 10, by failing to produce them.
2. Pursuant to G. L. c. 66, §10A(d)(2), the court orders the city to pay $100,949.13 in attorney's fees and costs.
3. Pursuant to G. L. c. 66, §10A(d)(3), any fees assessed by the city under G. L. c. 66, §10(d) are waived.

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4. Pursuant to G. L. c. 66, § 10A(d)(4), the court orders the city to pay $5,000 in punitive damages to the Public Records Assistance Fund established by G. L. c. 10, § 35DDD.

Janet Kenton-Walker
Justice of the Superior Court

Dated: January 26, 2022

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

reasonable inferences therefrom, as well as considering the submissions of the parties,[1] 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).[2] The second request was for internal investigations, also known as concise officer histories (COHs), for seventeen Worcester police officers (second request).[3]

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.[4] As to the remaining, completed internal investigations, Lieutenant Hanlon stated that 2,189 pages may be

---

[1] 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.

[2] 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).

[3] 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).

[4] 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),[5] 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

[5] 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;[6] (2) three of the investigations were exempt under exemption (f) due to an ongoing investigation;[7] and (3) three of the investigations were closed or settled,[8] 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

[6] The Rivera, Johnson, Burgos-Martinez, J. Ortiz, Deptula, and Ruiz matters.
[7] The Skerrett, H. Ortiz, and Katana matters.
[8] 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,[9] 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[10] for the Ruiz investigation. On February 22, 2019, Martunas responded by email and provided the responsive records regarding

[9] The same matters noted in footnote 8.
[10] 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).[11]

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.[12] 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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[11] 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.

[12] 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.[13] 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.[14]

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[13] 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.

[14] 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.[15] 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

[15] Attorney Thompson learned this from the city attorneys involved in those lawsuits.

the COHs were exempt from disclosure under exemptions (c), (d), and (f).[16] Three of the officers for whom COHs were sought were not defendants in pending litigation.[17] 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)[18] and that the other three would be produced subject to redactions.[19]

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.[20]

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

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[16] 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.
[17] The three officers were Candelaria, Piskator, and Williams.
[18] The matters set forth in footnotes 6 and 7 above.
[19] 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.
[20] The lawsuits are the Burgos-Martinez and Deptula cases.
[21] The matters set forth in footnote 8 above.
[22] 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.[23]

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,[24] 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).

[23] There was no evidence that Attorney Thompson prepared the August 14, 2020 log.
[24] 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.[25]

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

[25] 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.[26] 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.

[26] 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 Envtl. 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.[27]

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

[27] 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),[28] 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.'"[29] *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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[28] 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.

[29] "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,[30] or the fourteen COHs referenced in the second request.[31]

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

[30] 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.

[31] 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.[32] 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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[32] 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.[33] The city will provide an additional exemption log to accompany this production and will also provide a similar log as to the Ruiz file.[34] 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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[33] 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.

[34] 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[35] 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.[36] 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.

[35] 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.

[36] 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),[37] 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

[37] 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)."[38] *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

[38] 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."[39] *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.[40] 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

[39] 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).

[40] 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

Entered and Copies Mailed 6/2/2021

Part I ADMINISTRATION OF THE GOVERNMENT

Title X PUBLIC RECORDS

Chapter 66 PUBLIC RECORDS

Section 10A PETITION FOR DETERMINATION OF VIOLATION OF SEC. 10; ENFORCEMENT BY ATTORNEY GENERAL; CIVIL ACTIONS

Section 10A. (a) If an agency or municipality fails to comply with a requirement of section 10 or issues a response the requestor believes in violation of section 10, the person who submitted the initial request for public records may petition the supervisor of records for a determination as to whether a violation has occurred. In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; provided, however, that where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and

the attorney work product privilege. The supervisor of records shall issue a written determination regarding any petition submitted in accordance with this section not later than 10 business days following receipt of the petition by the supervisor of records. Upon a determination by the supervisor of records that a violation has occurred, the supervisor of records shall order timely and appropriate relief. A requestor, aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of records to issue a timely determination, may obtain judicial review only through an action in superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as prescribed in subsection (d).

(b) If an agency or municipality refuses or fails to comply with an order issued by the supervisor of records, the supervisor of records may notify the attorney general who, after consultation with the supervisor of records, may take whatever measures the attorney general considers necessary to ensure compliance. If the attorney general files an action to compel compliance, the action shall be filed in Suffolk superior court with respect to state agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor of records. In addition to any other duties the attorney general may impose, the designee shall serve as a primary point of contact within the office of the attorney general regarding notice from the supervisor of records that an agency or municipality has refused or failed to comply with an order issued by the supervisor of records.

(c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).

(d)(1) In any action filed by a requestor pursuant to this section:

(i) the superior court shall have jurisdiction to enjoin agency or municipal action;

(ii) the superior court shall determine the propriety of any agency or municipal action de novo and may inspect the contents of any defendant agency or municipality record in camera, provided, however, that the in camera review shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and the attorney work product privilege;

(iii) the superior court shall, when feasible, expedite the proceeding;

(iv) a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality 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.

(2) The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of

a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

(i) the supervisor found that the agency or municipality did not violate this chapter;

(ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;

(iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;

(iv) the request was designed or intended to harass or intimidate; or

(v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial.

(3) If the superior court awards reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it shall order the agency or municipality to waive any fee assessed under subsection (d) of section 10. If the superior court does not award reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it may order the agency or municipality to waive any fee assessed under said subsection (d) of said section 10. Whether the superior court determines to waive any fee assessed under said subsection (d) of said section 10, it shall issue findings specifying the basis for such decision.

(4) If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than $1,000 nor more than $5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

(e) Notwithstanding any other provision of this chapter, the attorney general may, at any time, file a complaint in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located, to ensure compliance with this chapter and may further intervene as of right in any action filed in accordance with this section. In any action filed or in which the attorney general has intervened under this subsection, paragraphs (1) and (4) of subsection (d) shall apply and any public records the court orders produced shall be provided without a fee.

Part I ADMINISTRATION OF THE GOVERNMENT

Title X PUBLIC RECORDS

Chapter 66 PUBLIC RECORDS

Section 10 INSPECTION AND COPIES OF PUBLIC RECORDS; REQUESTS; WRITTEN RESPONSES; EXTENSION OF TIME; FEES

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

(i) the request reasonably describes the public record sought;

(ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and

(iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

(i) confirm receipt of the request;

(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;

(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;

(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;

(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;

(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;

(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and

(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the

agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

(i) the need to search for, collect, segregate or examine records;

(ii) the scope of redaction required to prevent unlawful disclosure;

(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;

(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;

(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and

(vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought.

The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

(d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:

(i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;

(ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee (A) shall not be more than $25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) shall not be assessed for time

spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than $25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of $25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of $25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;

(vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and

(ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education

(e) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).

(f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

Part I ADMINISTRATION OF THE GOVERNMENT

Title I JURISDICTION AND EMBLEMS OF THE COMMONWEALTH, THE GENERAL COURT, STATUTES AND PUBLIC DOCUMENTS

Chapter 4 STATUTES

Section 7 DEFINITIONS OF STATUTORY TERMS; STATUTORY CONSTRUCTION

Section 7. In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

First, "Aldermen", "board of aldermen", "mayor and aldermen", "city council" or "mayor" shall, in a city which has no such body or officer, mean the board or officer having like powers or duties.

Second, "Annual meeting", when applied to towns, shall mean the annual meeting required by law to be held in the month of February, March or April.

Second A, "Appointing authority", when used in connection with the operation of municipal governments shall include the mayor of a city and the board of selectmen of a town unless some other local office is designated as the appointing authority under the provisions of a local charter.

Third, "Assessor" shall include any person chosen or appointed in accordance with law to perform the duties of an assessor.

Third A, "Board of selectmen", when used in connection with the operation of municipal governments shall include any other local office which is performing the duties of a board of selectmen, in whole or in part, under the provisions of a local charter.

[There is no clause Fourth.]

Fifth, "Charter", when used in connection with the operation of city and town government shall include a written instrument adopted, amended or revised pursuant to the provisions of chapter forty-three B which establishes and defines the structure of city and town government for a particular community and which may create local offices, and distribute powers, duties and responsibilities among local offices and which may establish and define certain procedures to be followed by the city or town government. Special laws enacted by the general court applicable only to one city or town shall be deemed to have the force of a charter and may be amended, repealed and revised in accordance with the provisions of chapter forty-three B unless any such special law contains a specific prohibition against such action.

Fifth A, "Chief administrative officer", when used in connection with the operation of municipal governments, shall include the mayor of a city and the board of selectmen in a town unless some other local office is designated to be the chief administrative officer under the provisions of a local charter.

Fifth B, "Chief executive officer", when used in connection with the operation of municipal governments shall include the mayor in a city and the board of selectmen in a town unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter.

Sixth, "City solicitor" shall include the head of the legal department of a city or town.

Sixth A, "Coterminous", shall mean, when applied to the term of office of a person appointed by the governor, the period from the date of appointment and qualification to the end of the term of said governor; provided that such person shall serve until his successor is appointed and qualified; and provided, further, that the governor may remove such person at any time, subject however to the condition that if such person receives notice of the termination of his appointment he shall have the right, at his request, to a hearing within thirty days from receipt of such notice at which hearing the governor shall show cause for such removal, and that during the period following receipt of such notice and until final determination said person shall receive his usual compensation but shall be deemed suspended from his office.

Seventh, "District", when applied to courts or the justices or other officials thereof, shall include municipal.

Eighth, "Dukes", "Dukes county" or "county of Dukes" shall mean the county of Dukes county.

Ninth, "Fiscal year", when used with reference to any of the offices, departments, boards, commissions, institutions or undertakings of the commonwealth, shall mean the year beginning with July first and ending with the following June thirtieth.

Tenth, "Illegal gaming," a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) a game

conducted under chapter 23K; (iii) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (iv) a game of bingo conducted under chapter 271; and (v) charitable gaming conducted under said chapter 271.

Eleventh, "Grantor" may include every person from or by whom a freehold estate or interest passes in or by any deed; and "grantee" may include every person to whom such estate or interest so passes.

Twelfth, "Highway", "townway", "public way" or "way" shall include a bridge which is a part thereof.

Thirteenth, "In books", when used relative to the records of cities and towns, shall not prohibit the making of such records on separate leaves, if such leaves are bound in a permanent book upon the completion of a sufficient number of them to make an ordinary volume.

Fourteenth, "Inhabitant" may mean a resident in any city or town.

[There is no clause Fifteenth.]

Sixteenth, "Issue", as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor.

Seventeenth, "Land", "lands" and "real estate" shall include lands, tenements and hereditaments, and all rights thereto and interests therein; and "recorded", as applied to plans, deeds or other instruments affecting land, shall, as affecting registered land, mean filed and registered.

Eighteenth, "Legal holiday" shall include January first, June nineteenth, July fourth, November eleventh, and Christmas Day, or the day following when any of said days occurs on Sunday, and the third Monday in January, the third Monday in February, the third Monday in April, the last Monday in May, the first Monday in September, the second Monday in

October, and Thanksgiving Day. "Legal holiday" shall also include, with respect to Suffolk county only, Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday; provided, however, that all state and municipal agencies, authorities, quasi-public entities or other offices located in Suffolk county shall be open for business and appropriately staffed on Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, and that section forty-five of chapter one hundred and forty-nine shall not apply to Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday.

Eighteenth A, "Commemoration day" shall include March fifteenth, in honor of Peter Francisco day, May twentieth, in honor of General Marquis de Lafayette and May twenty-ninth, in honor of the birthday of President John F. Kennedy. The governor shall issue a proclamation in connection with each such commemoration day.

Eighteenth B, "Legislative body", when used in connection with the operation of municipal governments shall include that agency of the municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled a city council, board of aldermen, town council, town meeting or by any other title.

Nineteenth, "Month" shall mean a calendar month, except that, when used in a statute providing for punishment by imprisonment, one "month" or a multiple thereof shall mean a period of thirty days or the corresponding multiple thereof; and "year", a calendar year.

Nineteenth A, "Municipality" shall mean a city or town.

Twentieth, "Net indebtedness" shall mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included.

Twenty-first, "Oath" shall include affirmation in cases where by law an affirmation may be substituted for an oath.

Twenty-second, "Ordinance", as applied to cities, shall be synonymous with by-law.

Twenty-third, "Person" or "whoever" shall include corporations, societies, associations and partnerships.

Twenty-fourth, "Place" may mean a city or town.

Twenty-fifth, "Preceding" or "following", used with reference to any section of the statutes, shall mean the section last preceding or next following, unless some other section is expressly designated in such reference.

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds

for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) 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.

(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;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(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;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

[There is no subclause (k).]

(l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) 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.

(o) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board,

commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities

making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

(v) records disclosed to the health policy commission under subsections (b) and (e) of section 8A of chapter 6D.

Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

Twenty-seventh, "Salary" shall mean annual salary.

Twenty-eighth, "Savings banks" shall include institutions for savings.

[There is no clause Twenty-ninth.]

Thirtieth, "Spendthrift" shall mean a person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery.

Thirty-first, "State", when applied to the different parts of the United States, shall extend to and include the District of Columbia and the several territories; and the words "United States" shall include said district and territories.

Thirty-second, "State auditor" and "state secretary" shall mean respectively the auditor of the commonwealth and the secretary of the commonwealth. "State treasurer" or "treasurer of the commonwealth"

shall mean the treasurer and receiver general as used in the constitution of the commonwealth, and shall have the same meaning in all contracts, instruments, securities and other documents.

Thirty-third, "Swear" shall include affirm in cases in which an affirmation may be substituted for an oath. When applied to public officers who are required by the constitution to take oaths therein prescribed, it shall refer to those oaths; and when applied to any other officer it shall mean sworn to the faithful performance of his official duties.

Thirty-fourth, "Town", when applied to towns or officers or employees thereof, shall include city.

Thirty-fifth, "Valuation", as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax.

Thirty-sixth, "Water district" shall include water supply district.

Thirty-seventh, "Will" shall include codicils.

Thirty-eighth, "Written" and "in writing" shall include printing, engraving, lithographing and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall always be his own handwriting or, if he is unable to write, his mark.

Thirty-ninth, "Annual election", as applied to municipal elections in cities holding such elections biennially, shall mean biennial election.

Fortieth, "Surety" or "Sureties", when used with reference to a fidelity bond of an officer or employee of a county, city, town or district, shall mean a surety company authorized to transact business in the commonwealth.

Forty-first, "Population", when used in connection with the number of inhabitants of a county, city, town or district, shall mean the population as determined by the last preceding national census.

[There is no clause Forty-second.]

Forty-third, "Veteran" shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, than any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service; (2) a member of the American Merchant Marine who served in armed conflict between December 7, 1941 and December 31, 1946, and who has received honorable discharges from the United States Coast Guard, Army, or Navy; (3) any person (a) whose last discharge from active service was under honorable conditions, and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than 180 days active service; provided, however, that any person who so served and was awarded a service-connected disability or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 180 days of active service.

"Wartime service" shall mean service performed by a "Spanish War veteran", a "World War I veteran", a "World War II veteran", a "Korean veteran", a "Vietnam veteran", a "Lebanese peace keeping force veteran", a "Grenada rescue mission veteran", a "Panamanian intervention force veteran", a "Persian Gulf veteran", or a member of the "WAAC" as defined in this clause during any of the periods of time described herein or for which such medals described below are awarded.

"Spanish War veteran" shall mean any veteran who performed such wartime service between February fifteenth, eighteen hundred and ninety-eight and July fourth, nineteen hundred and two.

"World War I veteran" shall mean any veteran who (a) performed such wartime service between April sixth, nineteen hundred and seventeen and November eleventh, nineteen hundred and eighteen, or (b) has been awarded the World War I Victory Medal, or (c) performed such service between March twenty-fifth, nineteen hundred and seventeen and August fifth, nineteen hundred and seventeen, as a Massachusetts National Guardsman.

"World War II veteran" shall mean any veteran who performed such wartime service between September 16, 1940 and July 25, 1947, and was awarded a World War II Victory Medal, except that for the purposes of chapter 31 it shall mean all active service between the dates of September 16, 1940 and June 25, 1950.

"Korean veteran" shall mean any veteran who performed such wartime service between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive,

and any person who has received the Korea Defense Service Medal as established in the Bob Stump National Defense Authorization Act for fiscal year 2003.

"Korean emergency" shall mean the period between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive.

"Vietnam veteran" shall mean (1) any person who performed such wartime service during the period commencing August fifth, nineteen hundred and sixty-four and ending on May seventh, nineteen hundred and seventy-five, both dates inclusive, or (2) any person who served at least one hundred and eighty days of active service in the armed forces of the United States during the period between February first, nineteen hundred and fifty-five and August fourth, nineteen hundred and sixty-four; provided, however, that for the purposes of the application of the provisions of chapter thirty-one, it shall also include all active service between the dates May seventh, nineteen hundred and seventy-five and June fourth, nineteen hundred and seventy-six; and provided, further, that any such person who served in said armed forces during said period and was awarded a service-connected disability or a Purple Heart, or who died in said service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete one hundred and eighty days of active service.

"Lebanese peace keeping force veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing August twenty-fifth, nineteen hundred and eighty-two and ending when the President of the United States shall have withdrawn armed forces from the country of Lebanon.

"Grenada rescue mission veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing October twenty-fifth, nineteen hundred and eighty-three to December fifteenth, nineteen hundred and eighty-three, inclusive.

"Panamanian intervention force veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing December twentieth, nineteen hundred and eighty-nine and ending January thirty-first, nineteen hundred and ninety.

"Persian Gulf veteran" shall mean any person who performed such wartime service during the period commencing August second, nineteen hundred and ninety and ending on a date to be determined by presidential proclamation or executive order and concurrent resolution of the Congress of the United States.

"WAAC" shall mean any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran.

None of the following shall be deemed to be a "veteran":

(a) Any person who at the time of entering into the armed forces of the United States had declared his intention to become a subject or citizen of the United States and withdrew his intention under the provisions of the act of Congress approved July ninth, nineteen hundred and eighteen.

(b) Any person who was discharged from the said armed forces on his own application or solicitation by reason of his being an enemy alien.

(c) Any person who has been proved guilty of wilful desertion.

(d) Any person whose only service in the armed forces of the United States consists of his service as a member of the coast guard auxiliary or as a temporary member of the coast guard reserve, or both.

(e) Any person whose last discharge or release from the armed forces is dishonorable.

"Armed forces" shall include army, navy, marine corps, air force and coast guard.

"Active service in the armed forces", as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

Forty-fourth, "Registered mail", when used with reference to the sending of notice or of any article having no intrinsic value shall include certified mail.

Forty-fifth, "Pledge", "Mortgage", "Conditional Sale", "Lien", "Assignment" and like terms, when used in referring to a security interest in personal property shall include a corresponding type of security interest under chapter one hundred and six of the General Laws, the Uniform Commercial Code.

Forty-sixth, "Forester", "state forester" and "state fire warden" shall mean the commissioner of environmental management or his designee.

Forty-seventh, "Fire fighter", "fireman" or "permanent member of a fire department", shall include the chief or other uniformed officer performing similar duties, however entitled, and all other fire officers of a fire department, including, without limitation, any permanent crash

crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department.

Forty-eighth, "Minor" shall mean any person under eighteen years of age.

Forty-ninth, "Full age" shall mean eighteen years of age or older.

Fiftieth, "Adult" shall mean any person who has attained the age of eighteen.

Fifty-first, "Age of majority" shall mean eighteen years of age.

Fifty-second, "Superior court" shall mean the superior court department of the trial court, or a session thereof for holding court.

Fifty-third, "Land court" shall mean the land court department of the trial court, or a session thereof for holding court.

Fifty-fourth, "Probate court", "court of insolvency" or "probate and insolvency court" shall mean a division of the probate and family court department of the trial court, or a session thereof for holding court.

Fifty-fifth, "Housing court" shall mean a division of the housing court department of the trial court, or a session thereof for holding court.

Fifty-sixth, "District court" or "municipal court" shall mean a division of the district court department of the trial court, or a session thereof for holding court, except that when the context means something to the contrary, said words shall include the Boston municipal court department.

Fifty-seventh, "Municipal court of the city of Boston" shall mean the Boston municipal court department of the trial court, or a session thereof for holding court.

Fifty-eighth, "Juvenile court" shall mean a division of the juvenile court department of the trial court, or a session thereof for holding court.

Fifty-ninth, "Gender identity" shall mean a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.

Sixtieth, "Age of criminal majority" shall mean the age of 18.

Sixty-first, "Offense-based tracking number" shall mean a unique number assigned by a criminal justice agency, as defined in section 167 of chapter 6, for an arrest or charge; provided, however, that any such designation shall conform to the policies of the department of state police and the department of criminal justice information services.