

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

ANDREW QUEMERE,

Plaintiff,

v.

**BRISTOL COUNTY DISTRICT
ATTORNEY'S OFFICE,**

Defendant.

Civil Action No. _____

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
AND PUNITIVE DAMAGES**

1. This action is brought by Mr. Andrew Quemere under the Massachusetts Public Records Law, G.L. c. 66 § 10A, to compel disclosure of unredacted versions of records held by the Bristol County District Attorney's Office ("BCDAO").
2. The records Mr. Quemere seeks are related to Brady disclosures made by the BCDAO regarding alleged misconduct by individual police officers. These records concern exculpatory or impeaching evidence that the BCDAO is legally and ethically obligated to disclose to criminal defendants to ensure their constitutional right to a fair trial. The release of such records would serve the public interest by shedding light on the workings of the criminal legal process in Bristol County.
3. Although the BCDAO produced records responsive to Mr. Quemere's request, it did so with significant redactions and withholdings. In support of these redactions and withholdings, the BCDAO cited several exemptions to the Public Records Law:

- a. Exemption (a), which applies to records “exempted from disclosure by statute,” for which the BCDAO cites the Criminal Offender Record Information Law (“CORI”) and the Massachusetts Privacy Law;
 - b. Exemption (c), which applies to private information about specifically named individuals—but specifically states that it “shall not apply to records related to a law enforcement misconduct investigation”;
 - c. Exemption (d), which applies to “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency”; and
 - d. Exemption (f), which applies to investigatory materials, the “disclosure of which [would] prejudice the possibility of effective law enforcement.”
4. Mr. Quemere appealed the BCDAO’s response to the Secretary of the Commonwealth’s Public Records Division. After three rounds of appeals, the BCDAO was unable to show how Exemptions (a), (c), or (d) applied to the records at issue; the Supervisor of Public Records declined to comment on Exemption (f) and records related to pending criminal litigation. The Supervisor of Records ordered the BCDAO to produce the records in a manner consistent with the Supervisor’s findings.
5. Despite the clear language of the Public Records Law, and in defiance of multiple decisions from the Massachusetts Supervisor of Records, the BCDAO refused to provide the requested records as required by law.
6. A year later, after receiving notice that Mr. Quemere was considering litigation, the BCDAO finally provided a second set of new and re-processed records. While some previously redacted information was unredacted in this updated response, other

information remained redacted or withheld. Many of these redactions and withholdings continue to be inconsistent with the Public Records Law and the Supervisor's orders.

7. Accordingly, Mr. Quemere brings this action under G.L. c. 66, § 10A, seeking declaratory judgment; injunctive relief; punitive damages; and attorneys' fees and costs.

PARTIES

8. Andrew Quemere is a Massachusetts resident. Mr. Quemere operates The Mass Dump, an online news publication, and he investigates and writes about police misconduct and other legal issues in the Commonwealth, often using the public records law to do so.
9. The Bristol County District Attorney's Office is an agency of the Commonwealth of Massachusetts in possession of the records at issue in this complaint.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to G.L. c. 66, § 10A(c-d), which permits a requester of public records to bring an action in the Superior Court to enforce the requirements of the Public Records Law.
11. Venue is proper pursuant to G.L. c. 66, § 10A(b), which provides that any suit to enforce the Public Records Act against a state agency shall be brought in the Suffolk Superior Court.

FACTS

12. On January 10, 2022, Mr. Quemere emailed a request for public records to the Public Records Access Officer at the BCDAO. Mr. Quemere requested the following records:
 - a. The office's *Brady* list, which refers to a list of law enforcement officers who have credibility issues or other concerns that might need to be disclosed to defendants in criminal cases;

- b. All *Brady* information, meaning all records concerning individual law enforcement officers that might need to be, or have been, disclosed to defendants in criminal cases;
- c. All communications with criminal defendants and/or defense counsel advising them of the existence of *Brady* information or officer's placement on a *Brady* list;
- d. All communications with police departments or individual officers regarding the existence or disclosure of *Brady* information or officer's placement, or potential placement, on a *Brady* list.

13. On January 26, 2022, Mary E. Lee, an Assistant District Attorney at the BCDAO responded to Mr. Quemere's request. The BCDAO released records consisting of *Brady* letters, internal investigation findings, court orders, and press releases. The BCDAO redacted information from many of the records, including docket numbers, names of criminal defendants, and names of police officers. The BCDAO also withheld an unknown number of records in their entirety.

14. The BCDAO stated that records were redacted or withheld under Exemptions (a), (c), (d), and (f) to the Massachusetts Public Records Law, G.L. c. 4, § 7, cl. 26. With regard to Exemption (a), the BCDAO cited the Criminal Offender Record Information ("CORI") Law, G.L. c. 6, § 167, and the Massachusetts Privacy Law, G.L. c. 214, § 1B. The BCDAO also claimed that some responsive records were impounded under a court order.

15. On January 26, 2022, Mr. Quemere appealed to the Supervisor of Records. Mr. Quemere argued that information was improperly redacted from the records produced and that other records were improperly withheld.

16. On February 8, 2022, Supervisor of Records Rebecca S. Murray issued her initial determination in this matter, designated **SPR22/0185**. See Attachment A.

- a. With regard to Exemption (a), the Supervisor found that “it is not clear how the docket numbers of either the criminal defendants or the police officers fall within the definition of CORI.” *Id.* at 4. The Supervisor similarly found it unclear how the CORI law applied to communications with police departments or criminal defendants. The Supervisor ordered the BCDAO to clarify its position. *Id.*
- b. With regard to Exemption (c), the Supervisor found that the BCDAO had not met its burden to redact officer names because the BCDAO did not show that the records are “not records of law enforcement misconduct investigations.” *Id.* at 5. The Supervisor found that this was true even of investigations ending in the exoneration of the officer involved. *Id.*
- c. With regard to Exemption (d), the Supervisor found that the BCDAO had not met its burden to withhold records because it was not clear “what deliberative process remains ongoing or what legal or policy matters may be involved.” *Id.* at 6.
- d. With regard to Exemption (f), the Supervisor found that the BCDAO properly redacted the names of witnesses and victims. *Id.* at 7. However, it found that the BCDAO had not adequately described which records were being withheld in full under Exemption (f) and the impoundment order. *Id.* 7-8.

The Supervisor ordered the BCDAO to provide Mr. Quemere a response consistent with its findings within ten business days. *Id.* at 8.

17. On February 23, 2022, the BCDAO responded to the Supervisor’s initial determination. The BCDAO reiterated its claims under Exemptions (a), (c), (d), and (f). With regard to communications with defendants and defense counsel, the BCDAO stated that it would

conduct a search for records related to ten identified officers as ordered, but only after Mr. Quemere paid \$500 in fees for an estimated twenty hours of work.

18. On February 27, 2022, Mr. Quemere again appealed to the Supervisor of Records. Mr. Quemere challenged the BCDAO's continued use of Exemptions (a), (c), (d), and (f), as well as the \$500 fee estimate.
19. On March 14, 2022, the Supervisor of Records issued her second determination in this matter, designated **SPR22/0475**. *See* Attachment B. The Supervisor declined to opine on the availability of records related to pending litigation under Exemption (f). *Id.* at 4. With regard to the BCDAO's other claims, the Supervisor again found that the BCDAO had failed to meet its burden to redact or withhold records under Exemption (a), (c), or (d). *Id.* at 5-7. The Supervisor also found that the BCDAO had not provided sufficient details to justify the \$500 fee estimate. *Id.* at 3. The Supervisor ordered the BCDAO to provide Mr. Quemere a response consistent with its findings within ten business days. *Id.* at 7.
20. On March 28, 2022, the BCDAO responded to the Supervisor's second determination. The BCDAO reiterated its estimate that searching for communications with defendants and defense counsel would take twenty hours. The BCDAO then stated that, despite the Supervisor's order, it was withholding the names of police officers—whether exonerated or not—under Exemptions (a) and (c). The BCDAO also stated that it would not produce communications with police departments regarding *Brady* determinations as ordered, citing Exemption (d).
21. On May 9, 2022, Mr. Quemere appealed to the Supervisor of Records for a third time.
22. On May 20, 2022, the Supervisor of Records issued her third determination in this matter, designated **SPR22/1084**. *See* Attachment C. The Supervisor found that the BCDAO had

provided “no new arguments nor additional information that would affect the application of Exemptions (a), (c), and (d) to the responsive records.” *Id.* at 3. Accordingly, the Supervisor again ordered the BCDAO “to provide Mr. Quemere with a response in a manner consistent with this and prior orders, the Public Records Law, and its Regulations without delay.” *Id.*

23. On June 3, 2022, the BCDAO responded to the Supervisor’s third determination. The BCDAO restated its position that, despite the Supervisors repeated findings to the contrary, the names of police officers investigated for misconduct were exempt under Exemption (c). The BCDAO also continued to claim that it had properly withheld records under Exemptions (d) and (f). The BCDAO requested that the Supervisor of Records refer the question of police officers’ names to the Attorney General’s Office for review. On information and belief, the question was not referred.
24. On May 26, 2023, Mr. Quemere, through counsel, sent a letter to the BCDAO summarizing the outstanding issues with the redactions to his requests and advising that he would bring suit if those issues could not be resolved. *See* Attachment D.
25. On June 9, 2023, the BCDAO responded to Mr. Quemere’s demand letter. The BCDAO informed Mr. Quemere that it would issue a new response to his request. Mr. Quemere agreed to a June 20, 2023, production date.
26. On June 20, 2023, the BCDAO provided a response that included both previously released and new records. The response also included a letter explaining the basis for its continued redaction and withholding of records. *See* Attachment E. Specifically, the BCDAO described the following redactions and withholdings:

- a. Redaction of identifying information of defendants, defense counsel, and a private business under the CORI law and Exemption (c);
- b. Redaction of grand jury testimony under Mass. R. Crim. P. 5(d);
- c. Redaction of witness statements and information under Exemptions (c) and (f);
- d. Redaction of information about juveniles under G.L. c. 119, § 60A;
- e. Redaction of the names of exonerated police officers as “non-responsive . . . and also for privacy considerations”;
- f. Withholding of information about pending prosecutions under Exemption (f), Mass. R. Crim. P. 5(d), Mass. R. Prof. C. 3.8(f), and an impoundment order; and
- g. Withholding of communications with other agencies about “whether records constitute *Brady* matters” under Exemptions (d) and (f).

Id. at 1-3. The BCDAO also reiterated that it would not conduct a search for communications with defendants and defense counsel unless Mr. Quemere paid a \$500 assessment, although it did offer to provide exemplars of such communications. *Id.* at 3.

27. On July 5, 2023, the BCDAO sent a supplemental response to their June 20, 2023, letter, further explaining the basis for certain redactions. *See* Attachment F.

28. To date, the BCDAO has not fully complied with Mr. Quemere’s request for public records or the repeated orders from the Supervisor of Public Records.

COUNT I

Violation of Public Records Law

(G.L. c. 66, § 10)

29. Plaintiff realleges and incorporates by reference the allegations above.
30. Under the Public Records Law, G.L. c. 66, § 10, public entities of the Commonwealth must “at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record.”
31. The BCDAO is a public entity subject to the Public Records Law.
32. The BCDAO has refused to furnish unredacted copies of some of the requested public records to Mr. Quemere and has refused to furnish others in their entirety.
33. The BCDAO has redacted or withheld public records without a legal basis, including:
 - a. Redacting the names of police officers in records of police misconduct investigations under Exemption (c) and as non-responsive information;
 - b. Redacting non-CORI information, including but not necessarily limited to criminal defendants’ names, pronouns, and dates of offense under the CORI Law and Exemption (a);
 - c. Redacting non-private information, including but not necessarily limited to criminal defendants’ names, pronouns, and dates of offense as well as defense counsels’ names and addresses under Exemption (c);
 - d. Redacting non-identifying information related to witness statements under Exemption (c) and (f);
 - e. Redacting or withholding non-exempt information about grand jury proceedings under Mass. R. Crim. P. 5(d);

- f. Withholding communications with other agencies about *Brady* determinations under Exemptions (d) and (f); and
 - g. Withholding records related to pending and non-pending prosecutions, the release of which has not been shown to prejudice the possibility of effective law enforcement, under Exemption (f) and the CORI Law.
34. The BCDAO has also withheld records without clearly identifying the records or categories of records being withheld and without providing the specific reasons for such withholding.
35. The BCDAO has also refused to conduct a search for responsive records, including communications between the BCDAO and defendants or defense counsel, unless Mr. Quemere pays an excessive fee assessed at \$500.
36. The BCDAO is, therefore, in violation of the Public Records Law.
37. Pursuant to G.L. c. 66, § 10A(c), a person who requests a public record “may initiate a civil action to enforce the requirements of this chapter” in the Superior Court, which has “all remedies at law or in equity” to remedy a violation.
38. Pursuant to G.L. c. 66, § 10A(d)(2), Mr. Quemere is entitled to reasonable attorney fees and costs in this action.
39. Pursuant to G.L. c. 66, § 10A(d)(3), the court may order the BCDAO to waive any fees associated with the production of the requested records.
40. Pursuant to G.L. c. 66, § 10A(d)(4), if the court finds the BCDAO did not act in good faith, it may assess punitive damages against the BCDAO in an amount not less than \$1,000 nor more than \$5,000, to be deposited into the Public Records Assistance Fund.

RELIEF REQUESTED

41. WHEREFORE, Plaintiff Andrew Quemere respectfully requests that this Honorable Court:

- a. Issue a declaratory judgment that the BCDAO has violated the Public Records Law, G.L. c. 66, § 10, by redacting and withholding public records without a legal basis for doing so.
- b. Issue an injunction ordering the BCDAO to provide copies of all responsive records, whether previously released or otherwise, in a manner consistent with the Public Records Law within a reasonable timeframe and, further, ordering the BCDAO to waive all fees associated with the production of the requested records;
- c. Award Mr. Quemere reasonable attorney's fees and costs;
- d. Award punitive damages in an amount not less than \$1,000 nor more than \$5,000 per violation, to be deposited into the Public Records Assistance Fund.
- e. Grant such other and further relief as the Court may deem just and proper.

Dated: July 12, 2023

RESPECTFULLY SUBMITTED
BY THE PLAINTIFF



Mason A. Kortz, BBO# 691257

mkortz@law.harvard.edu

Cyberlaw Clinic
Harvard Law School
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
(617) 495-2845

Attachment A



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

Rebecca S. Murray
Supervisor of Records

February 8, 2022
SPR22/0185

Mary Lee, Esq.
Assistant District Attorney
Bristol District Attorney's Office
888 Purchase Street
New Bedford, MA 02740

Dear Attorney Lee:

I have received the petition of Andrew Quemere appealing the response of the Bristol District Attorney's Office (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 10, 2022, Mr. Quemere requested the following:

- [1.] The office's Brady list, which refers to a list of law enforcement officers who have credibility issues or other concerns that might need to be disclosed to defendants in criminal cases
- [2.] All Brady information, meaning all records concerning individual law enforcement officers that might need to be, or have been, disclosed to defendants in criminal cases
- [3.] All communications with criminal defendants and/or defense counsel advising them of the existence of Brady information or an officer's placement on a Brady list
- [4.] All communications with police departments or individual officers regarding the existence or disclosure of Brady information or an officer's placement, or potential placement, on a Brady list.

The Office responded on January 26, 2022, providing numerous records in redacted form and withholding others. Unsatisfied with the Office's response, Mr. Quemere appealed, and this case was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or

municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

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

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

The Office’s Response

In its January 26, 2022 response, and in a letter to this office and Mr. Quemere on February 4, 2022, the Office states that it has no records responsive to Item 1 of the request, and states that it “provided nine redacted documents consisting of 178 redacted pages” and withheld other records responsive to Items 2, 3, and 4, pursuant to Exemptions (a), (c), (d) and (f) of the Public Records Law. See G. L. c. 4, § 7(26)(a), (c), (d), (f).

Exemption (a)

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

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

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

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

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to

a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

CORI

The current definition of criminal offender record information (CORI) is as follows:

“Criminal offender record information,” records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 was adjudicated as an adult in superior court or adjudicated as an adult after transfer of a case from a juvenile session to another trial court department, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

G. L. c. 6, § 167.

Additionally, G. L. c. 6, § 172(m) provides in pertinent part:

Notwithstanding this section or chapter 66A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section 130 of chapter 127.

G. L. c. 6, § 172(m).

In its response, regarding Item 2, the Office states that “the records are also exempt from

dissemination because they are associated with a named individual's criminal prosecution and are protected from public disclosure under the CORI statute." Regarding Item 3, the Office argues that "communications with individual criminal defendants are protected from public disclosure pursuant to the CORI statute. . . . Providing such communications risks identifying criminal defendants."

Based on the Office's response, it is not clear how the docket numbers of either the criminal defendants or the police officers fall within the definition of CORI. In Globe Newspaper Co. v. Dist. Att'y for the Middle Dist., 439 Mass. 374 (2003) (Middle Dist.), the Supreme Judicial Court concluded that "[d]ocket numbers of criminal cases prosecuted in public judicial proceedings, correlated with information that is also available from court or other public records, but not correlated with defendant-specific information, are public records under G.L. c. 4, § 7, Twenty-sixth, subject to mandatory disclosure under G.L. c. 66, § 10, and their disclosure is not prohibited by the CORI statute." See Middle Dist., 439 Mass. at 385. Consequently, it is unclear how the narrow scope of this request would allow docket numbers to be withheld under Exemption (a) and CORI under Middle Dist.

With regard to the names and docket numbers of the police officers, it is not clear how the communications with police departments constitute "information recorded in criminal proceedings," where the letters and other communications were created after the criminal proceedings in which the police officers were involved. See G. L. c. 6, § 167. Additionally, it is not clear how written communications from prosecutors to defendants constitute "information recorded in criminal proceedings." The Office must clarify these matters.

Exemption (c)

Exemption (c) permits the withholding of:

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

G. L. c. 4, § 7(26)(c).

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

This exemption does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal

nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass. 280, 292 (2017).

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

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

Under Exemption (c), the Office argues the following:

Within the record, labeled “8-24-2021 Fall River,” several officers were exonerated. The records have been redacted with regard to the names of those exonerated officers. These records of exoneration are not records of a misconduct investigation, as the documents demonstrate no misconduct by those officers. The records therefore are simply personnel records of those officers. Having been exonerated and having no allegations made against them, there is no basis to require dissemination of their identities.

...

The redacted records demonstrate the various types of Brady materials and how this office addresses such matters, without undermining the personal privacy interests of any individuals. Such individual interests should be accommodated as fully as possible, particularly if no criminal activity is alleged, to provide such officers with the same privacy rights of officers who are charged with crimes and are protected under the CORI statute. Further, these matters do not implicate the public interests described in Boston Globe Media Partners, LLC v. Department of Criminal Justice Information Services, 484 Mass. 279, 294 (2020).

Based on the Office's response, I find the Office has failed to demonstrate how “records of exoneration” of police officers are not records of law enforcement misconduct investigations. Additionally, the Office has not demonstrated how the privacy interests involved outweigh the public interest in knowing whether public servants are carrying out their duties in a law-abiding and efficient manner. See PETA, 477 Mass. at 292. Accordingly, I find the Office has not met its burden to withhold or redact such information pursuant to Exemption (c).

Exemption (d)

Exemption (d) allows the withholding of:

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

G. L. c. 4, § 7(26)(d).

Exemption (d) is intended to avoid premature release of materials that could taint the deliberative process if disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. See Babets v. Sec’y of the Exec. Office of Human Servs., 403 Mass. 230, 237 n.8 (1988). Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. G. L. c. 4, § 7(26)(d); see also Env’tl. Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (purely factual matters used in the development of government policy are subject to disclosure).

Under Exemption (d), the Office argues that “inter-office communications are not subject to the Public Records Law” and that the “office has no duty to disclose matters that are being considered but have not yet reached any conclusion.”

It is unclear from the Office’s response what deliberative process remains ongoing or what legal or policy matters may be involved. Accordingly, I find the Office has not met its burden to withhold or redact the responsive records pursuant to Exemption (d).

Exemption (f)

Exemption (f) permits the withholding of:

investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

G. L. c. 4, § 7(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas, 371 Mass at 62. Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Att’y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a “case-by case consideration” of whether

disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” See Reinstein, 378 Mass. at 289-290.

Exemption (f) is intended to allow investigative officials to provide an assurance of confidentiality to individuals so that they will speak openly about matters under investigation. Redactions may be appropriate where they serve to preserve the anonymity of complainant and voluntary witnesses. Antell v. Att’y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979); Bougas, 371 Mass. at 62. Any information contained in a witness statement, which if disclosed would create a grave risk of directly or indirectly identifying the voluntary witness is subject to withholding. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983). The Supreme Judicial Court has held that “the inquiry as to what constitutes identifying information regarding an individual must be considered not only from the viewpoint of the public, but also from the vantage of those who are familiar with the individual and his [or her] career.” Id. at 438.

Under Exemption (f), the Office states that it has redacted the names of individuals and businesses “who are victimized or complain to law enforcement.” Where this information has been redacted to protect the identities of victims and voluntary witnesses, I find the Office may properly redact such information pursuant to Exemption (f).

Additionally, under Exemption (f), the Office argues that “the Pessoa prosecution has been pending since June, 2019. The other . . . former officer [Robillard] continues to have pending prosecutions that are proceeding in the Fall River District Court.” Based on the Office’s response, it is unclear what specific records are being withheld in regard to these ongoing prosecutions. See G. L. c. 66, § 10(b)(iv) (a written response must “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”). See also Globe Newspaper Co. v. Police Comm’r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511; Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). The Office must identify the specific records being withheld.

Impoundment Order

In its February 4th letter, the Office states the following:

An additional reason [for withholding records] exists regarding Michael Pessoa’s prosecution in that some records were impounded. Any records that have been disclosed to criminal defendants pursuant to an impoundment or protective order cannot be disclosed publicly. Two such officers are referenced in In the Matter of a Grand Jury Investigation, 485 Mass. at 642. That published decision was provided to Mr. Quemere without redaction. Impoundment is an additional basis to withhold the records from dissemination as public records. Commonwealth v. Chism, 476 Mass. 171, 185, n.9 (2017).

Based on the Office's response, it is unclear how the order described above operates through an exemption to the Public Records Law to allow for the withholding of responsive records. See G. L. c. 66, § 10(b)(iv) (written response must "provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based"). Further, it is unclear which specific records the order in question applies to, and how this order prevents disclosure of the records at issue in this appeal. Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). The Office must clarify these matters.

Records in Existence

The duty to comply with requests for records extends to those records that exist and are in the possession, custody, or control of the custodian of records at the time of the request. See G. L. c. 66, § 10(a)(ii). Additionally, under the Public Records Law, a public employee is not required to answer questions, or do research, or create documents in response to questions. See G. L. c. 66, § 10(a); 32 Op. Att'y Gen. 157, 165 (May 18, 1977).

With regard to Item 1 of the request, the Office states that it "does not maintain a 'Brady list.' There is no responsive record as to this request." Where the Office has confirmed that it has no records responsive to Item 1 of the request, I find the Office has met its burden in responding to Item 1.

Conclusion

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

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Andrew Quemere

Attachment B



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

Rebecca S. Murray
Supervisor of Records

March 14, 2022
SPR22/0475

Mary Lee, Esq.
Assistant District Attorney
Bristol District Attorney's Office
888 Purchase Street
New Bedford, MA 02740

Dear Attorney Lee:

I have received the petition of Andrew Quemere appealing the response of the Bristol District Attorney's Office (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 10, 2022, Mr. Quemere requested the following:

- [1.] The office's Brady list, which refers to a list of law enforcement officers who have credibility issues or other concerns that might need to be disclosed to defendants in criminal cases
- [2.] All Brady information, meaning all records concerning individual law enforcement officers that might need to be, or have been, disclosed to defendants in criminal cases
- [3.] All communications with criminal defendants and/or defense counsel advising them of the existence of Brady information or an officer's placement on a Brady list
- [4.] All communications with police departments or individual officers regarding the existence or disclosure of Brady information or an officer's placement, or potential placement, on a Brady list.

Previous Appeal

This request was the subject of a previous appeal. See SPR22/0185 Supervisor of Records Determination (February 8, 2022). In my February 8th determination, I ordered the Office to clarify its claims under Exemptions (a), (c), and (f) of the Public Records Law. Subsequently, the Office responded on February 23, 2022. Unsatisfied with the Office's response, Mr. Quemere appealed, and this case was opened as a result.

The Public Records Law

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

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

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

Fee Estimates - Agencies

An agency may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Agencies may not assess a fee for the first four (4) hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested. G. L. c. 66, § 10(d)(ii). Where appropriate, agencies 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 a record requested, but the fee shall not be more than \$25 per hour. Id.

A fee 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 a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(ii); 950 C.M.R. 32.06(4).

G. L. c. 66, § 10(e)

G. L. c. 66, § 10(e) provides that “[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).” In this case, Mr. Quemere submitted his request after business hours on January 10, 2022, and the Office initially responded on January 26, 2022, within 10 business

days, by providing some records and a written response explaining why the Office was withholding others. Following my February 8, 2022 determination, the Office again responded to Mr. Quemere within 10 business days, providing a fee estimate under G. L. c. 66, § 10(b). Accordingly, I find the Office may assess a fee to produce responsive records.

The Office's February 23rd Fee Estimate

In its February 23, 2022 response, the Office provides the following information concerning its fee estimate:

Records that have been withheld, that would be responsive to [Mr. Quemere's] request but for the CORI exemption (communications with defendants and their attorneys), are not located in one place. Rather they require a search through individual case files and then once gathered would require redaction after review. [The Office] anticipate[s] that this process will require approximately twenty hours, given that the records provided to [Mr. Quemere] reference eleven separate officers. The statute permits a fee of \$25 per hour and there is no person who can conduct this work who is paid less than that amount.

In a letter to this office and Mr. Quemere on March 10, 2022, the Office provides the following additional information:

The estimate of time is actually quite low, in that it permits less than two hours per officer to locate Brady disclosures (which are not located in one place but are instead kept in individual case files), review each set of records, and redact where necessary to protect private individual information, e.g. witness identification, personal identifying information, and CORI. Each record will also have to be reviewed to determine whether any protective order or order of impoundment, or some other reason, prohibits its public dissemination.

Based on the Office's response, it is unclear why it requires twenty hours to search for, redact, and compile the responsive records. The Office must provide further details regarding the tasks involved and what each task entails, including the time it is allocating to compiling, segregating, redacting and reproducing the requested records. See G. L. c. 66, § 10(d)(iv) (requiring the amount of the fee be reasonable).

This office encourages Mr. Quemere and the Office to communicate to facilitate providing records more efficiently and affordably. See G. L. c. 66, § 10(b)(vii) (an agency shall 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 to produce the records sought more efficiently and affordably).

The Office's February 23rd Response

In its February 23, 2022 response, the Office cites Exemptions (a), (c), (f), and (d) for redacting and withholding responsive records, and indicates that some responsive records are the

subject of pending criminal prosecutions.

Pending Litigation

950 C.M.R. 32.08(2)(b) provides in pertinent part:

the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor:

1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation.

In its February 23, 2022 response, the Office indicates that criminal prosecutions are currently pending in Fall River Superior Court for Michael Pessoa, and in Fall River District Court for “the other former officer with pending criminal prosecutions.” In light of the pending criminal matters, I decline to opine on the Office’s claims, based on Exemption (f) and an impoundment order, concerning records involved in these pending criminal matters at this time. See 950 C.M.R. 32.08(2)(b). It should be noted that a change in the status of these criminal prosecutions could impact the applicability of 950 C.M.R. 32.08(2)(b).

Exemption (a)

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

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

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

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

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

G. L. c. 214, § 1B, The Privacy Statute

In its February 23, 2022 and March 100, 2022 responses, the Office cites G. L. c. 214, § 1B, known as the Privacy Statute, which provides:

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

G. L. c. 214, § 1B.

This statute does not specifically, nor by implication, exempt any particular records from disclosure; therefore, this statute does not operate under Exemption (a) for the withholding of records or information responsive to this request. See Cape Cod Times v. Sheriff of Barnstable Cty., 443 Mass. 587, 595 (2005) (explaining G. L. c. 214, § 1B provides no alternative legal basis to resist inspection of requested materials). Therefore, this statute does not allow for the withholding of the requested records.

Exemption (c)

Exemption (c) applies to:

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

G. L. c. 4, § 7(26)(c).

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

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

When analyzing a privacy claim, there is a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477

Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law abiding and efficient manner. Id. at 292.

The Office argues that it “respectfully disagrees with the finding that exonerations constitute records of misconduct” and further argues that “the names of exonerated officers were withheld from a record, labeled “8-24-2021 Fall River,” where several officers simply responded to a citizen’s request for help, and a different officer was found to have acted poorly. This office declines to provide the names of officers who were exonerated, as if their actions constituted misconduct.”

Additionally, under Exemption (c), the Office argues that it is “respectfully declining to name individual officers who are the subject of the Brady records, with the exception of [the two] whose names were already made public.” Further, the Office contends that it “is complying with the newly amended language in subclause 26(c) that has not yet been interpreted by the courts in this regard, while at the same time protecting individual privacy rights under G.L. c. 214, § 1B.”

Based on the Office’s response, I find that the Office has not met its burden to demonstrate how the responsive records are not “related to a law enforcement misconduct investigation.” G. L. c. 4, § 7(26)(c). Please note that the amended language of Exemption (c) does not distinguish whether responsive records “constitute records of misconduct,” as argued by the Office.

Exemption (d)

Exemption (d) allows the withholding of:

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

G. L. c. 4, § 7(26)(d).

Exemption (d) is intended to avoid premature release of materials that could taint the deliberative process if disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. See Babets v. Sec’y of the Exec. Office of Human Servs., 403 Mass. 230, 237 n.8 (1988). Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. G. L. c. 4, § 7(26)(d); see also Env’tl. Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (purely factual matters used in the development of government policy are subject to disclosure).

Under Exemption (d), the Office reiterates its argument that “inter-office communications are not subject to the Public Records Law,” and further argues that it “has no

Mary Lee, Esq.
Page 7
March 14, 2022

SPR22/0475

duty to disclose matters that are being considered but have not yet reached any conclusion.” In this case, the Office has not met its burden to show how the decision to make Brady disclosures constitutes a policy position.

Further, the Office is advised that the Exemptions to the Public Records Law are not blanket in nature. The Office must explain whether segregable portions of the records can be provided. See G. L. c. 66, § 10(a); Reinstein, 378 Mass. at 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

Conclusion

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

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive style with a large, looped "y" at the end.

Rebecca S. Murray
Supervisor of Records

cc: Andrew Quemere

Attachment C



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

Rebecca S. Murray
Supervisor of Records

May 20, 2022
SPR22/1084

Mary Lee, Esq.
Assistant District Attorney
Bristol District Attorney's Office
888 Purchase Street
New Bedford, MA 02740

Dear Attorney Lee:

I have received the petition of Andrew Quemere appealing the response of the Bristol District Attorney's Office (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 10, 2022, Mr. Quemere requested the following:

- [1.] The office's Brady list, which refers to a list of law enforcement officers who have credibility issues or other concerns that might need to be disclosed to defendants in criminal cases
- [2.] All Brady information, meaning all records concerning individual law enforcement officers that might need to be, or have been, disclosed to defendants in criminal cases
- [3.] All communications with criminal defendants and/or defense counsel advising them of the existence of Brady information or an officer's placement on a Brady list
- [4.] All communications with police departments or individual officers regarding the existence or disclosure of Brady information or an officer's placement, or potential placement, on a Brady list.

Previous Appeals

This request was the subject of previous appeals. See SPR22/0185 Supervisor of Records Determination (February 8, 2022); SPR22/0475 Supervisor of Records Determination (March 14, 2022). In my March 14th determination, I declined to opine on the status of certain records that are currently involved in pending criminal litigation. I also found that the Office had not met its burden to withhold other responsive records under Exemptions (a), (c), and (d) of the Public Records Law. Subsequently, the Office responded to Mr. Quemere on March 28, 2022. Unsatisfied with the Office's response, Mr. Quemere appealed, and this case was opened as a result.

The Public Records Law

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

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

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

The Office’s March 28th Response

In its March 28, 2022 response, and in a letter to this office and Mr. Quemere on May 20, 2022, the Office reiterates its claims under Exemptions (a), (c) and (d) for withholding the names of exonerated officers, the names of Brady officers, and responsive communications with police departments concerning whether information constitutes Brady material.

In my March 14th determination, I declined to opine on the Office’s claims concerning the records of the officers currently involved in pending criminal litigation. As to the other responsive records, I found that G. L. c. 214, § 1B, operating through Exemption (a) of the Public Records Law, does not allow for the withholding of the requested records. See G. L. c. 4, § 7(26)(a); G. L. c. 214, § 1B. Additionally, I found that the Office has not met its burden to demonstrate how the responsive records are not “related to a law enforcement misconduct investigation” as required under Exemption (c). See G. L. c. 4, § 7(26)(c). Further, I found that the Office has not met its burden to show how a decision to make Brady disclosures constitutes development of a policy position under Exemption (d). See G. L. c. 4, § 7(26)(d).

In its March 28th response, with regard to the names of exonerated officers, the Office states that it “disagrees with the decision of the Supervisor, for the reasons stated in [the] office’s previous letters and notes that these theories of withholding are still open questions in the courts.” As to the names of Brady officers, the Office states that it “continues to maintain, in good faith, that the privacy right protects the names of the officers from disclosure but not the description of the conduct.” Finally, in regard to the communications with police departments, the Office states that “as previously noted in [the] office’s prior letters, [the] office believes that

Mary Lee, Esq.
Page 3
May 20, 2022

SPR22/1084

it has complied with the law by providing communications in closed cases” and the Office “respectfully declines to provide any communications made prior to a determination that information constitutes *Brady* information.”

The Office’s March 28th response and May 20th letter, while thoroughly restating the Office’s position on these matters, contain no new arguments nor additional information that would affect the application of Exemptions (a), (c), and (d) to the responsive records.

Order

Accordingly, the Office is again ordered to provide Mr. Quemere with a response in a manner consistent with this and prior orders, the Public Records Law, and its Regulations without delay. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us. Please be advised that failure to comply with this order may result in referral of this matter to the Office of the Attorney General. See G. L. c. 66, § 10A(b).

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Andrew Quemere

Attachment D



MASON A. KORTZ
CLINICAL INSTRUCTOR, CYBERLAW CLINIC
LECTURER ON LAW, HARVARD LAW SCHOOL

DIRECT DIAL: 858-922-1990
EMAIL: MKORTZ@LAW.HARVARD.EDU

ADMITTED TO PRACTICE: MA, NY

BY EMAIL (publicrecords@bristolda.com)

Mason A. Kortz
Reginald F. Lewis Law Center
1557 Massachusetts Ave, 4th Fl
Cambridge, MAa 02138

May 26, 2023

Courtney Almeida
Records Access Officer
Bristol County District Attorney's Office
218 South Main Street
Fall River, MA 02721

Re: Andrew Quemere Public Records Request

Dear Ms. Almeida,

I write on behalf of my client, Andrew Quemere, to request the production of records, including unredacted versions of records already provided, requested by Mr. Quemere on January 10, 2022. If your office fails to produce such records, or to set to a mutually acceptable timeframe for production, by June 9, 2023, Mr. Quemere will be forced to file suit so that production can be conducted under the supervision of the court.

I. Background

On January 10, 2022, Mr. Quemere submitted a request to the Bristol County District Attorney's Office ("BCDAO"). Pursuant to the Massachusetts Public Records Law ("MPRL"),¹ Mr. Quemere requested a fee waiver and the following records:

1. The office's Brady list, which refers to a list of law enforcement officers who have credibility issues or other concerns that might need to be disclosed to defendants in criminal cases;

¹ M.G.L. c.66, § 10.

2. All Brady information, meaning all records concerning individual law enforcement officers that might need to be, or have been, disclosed to defendants in criminal cases;
3. All communications with criminal defendants and/or defense counsel advising them of the existence of Brady information or an officer's placement on a Brady list; and
4. All communications with police departments or individual officers regarding the existence or disclosure of Brady information or an officer's placement, or potential placement, on a Brady list.

On January 26, 2022, the BCDAO responded to Mr. Quemere's request. The BCDAO produced some records with information redacted and withheld other records in full. The redacted information included, among other things, docket numbers and police officers' names. To justify the redactions and withholdings, the BCDAO cited Exemptions (a), (c), (d), and (f) to the MPLR,² the Criminal Offender Record Information ("CORI") Law,³ and the Massachusetts Privacy Law.⁴

On January 26, 2022, Mr. Quemere appealed the BCDAO's response. On February 8, 2022, the Supervisor of Records for the Commonwealth released a determination finding that the BCDAO's redaction of docket numbers and police officers' names, the withholding of communications with defendants, and the withholding of communications with police departments were unjustified.⁵ She further found that the BCDAO had not adequately described the records withheld due to pending litigation.⁶ She ordered the Office to provide Mr. Quemere with a new response within ten business days.⁷

Despite the Supervisor's finding, the BCDAO declined to provide the unredacted records, leading Mr. Quemere to appeal again. On March 14, 2022, the Supervisor of Records issued another determination finding that the BCDAO had improperly redacted and withheld records.⁸ The BCDAO again declined to comply with the Supervisor's order, and Mr. Quemere filed a third appeal. On May 20, 2022, the Supervisor of Records issued another determination in favor of Mr. Quemere, ordering the BCDAO to provide Mr. Quemere with the requested records without delay.⁹ On June 3, 2022, the BCDAO

² G.L. c. 4, § 7, cl. 26.

³ G.L. c. 6, §§ 167, et seq.

⁴ G.L. c. 214, § 1B.

⁵ Attachment 1 (First Appeal Determination) at 4-6.

⁶ *Id.* at 7-8.

⁷ *Id.* at 8.

⁸ See Attachment 2 (Second Appeal Determination) at 4-8.

⁹ See Attachment 3 (Third Appeal Determination) at 3.

informed the Supervisor of Records and Mr. Quemere of its intention not to comply with the Supervisor's order.

II. Demand

Democracy requires an informed public. Through his written work, Mr. Quemere brings information to the public that will enable citizens to better understand consequential outcomes from law enforcement. Delaying the disclosure of this information for over a year denies Mr. Quemere and his audience timely access to information that should be available for their consideration. Accordingly, Mr. Quemere hereby requests that the BCDAO provide unredacted versions—specifically, with unredacted docket numbers and officers' names—of the documents it has already provided as well as any responsive documents that have not yet been produced. Mr. Quemere asks that your office respond with the unredacted documents, or a plan to produce such documents in a timely manner, by June 9, 2023.

Mr. Quemere's request is supported by the plain text of Massachusetts Public Records Law, as repeatedly interpreted by the Supervisor of Records. He would prefer to resolve this matter out of court and spare the taxpayers of Bristol County the expense of defending an unnecessary lawsuit. However, in the event that the BCDAO fails to produce the unredacted documents, or to propose a reasonable timeframe for production, Mr. Quemere is prepared to file suit to compel your office to respond to their request. Any such suit would be filed in the Superior Court for Suffolk County.

III. Conclusion

Thank you for your attention in this matter. You may deliver the unredacted records to the mailing address above or via email at mkortz@law.harvard.edu. Please feel free to contact me with any questions.

Nothing herein shall be deemed an admission or waiver of any rights, remedies, defenses, or positions, all of which are expressly reserved.

Sincerely,



Mason A. Kortz
Clinical Instructor, Cyberlaw Clinic
Lecturer On Law, Harvard Law School

Reginald F. Lewis Law Center
1557 Massachusetts Ave, 4th Fl
Cambridge, MA 02138

Attachment E



The Commonwealth of Massachusetts

OFFICE OF THE
DISTRICT ATTORNEY
BRISTOL DISTRICT

THOMAS M. QUINN III
DISTRICT ATTORNEY

218 S. Main Street
Fall River MA 02721

June 20, 2023

Andrew Quemere
Aquemere0@gmail.com

Re: Public Records Request
Brady Information

Dear Mr. Quemere:

On May 26, 2023, our office received a demand letter from Attorney Mason Kortz on your behalf. This response is timely. G.L. c. 66, § 10(b) (agency shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records that the agency requires more time to respond to requestor).

Please find the attached fourteen records that are provided as *Brady* notice regarding police officers' misconduct. The names of officers who have been found to have committed misconduct are included in the records and are not redacted. Some information has been redacted from those records and some records have been withheld.

Please be advised that this office cannot publicly provide records regarding **pending** criminal prosecutions of former police officers. G.L. c. 4, § 7, cl. 26(f); Mass. R. Prof. Cond. 3.8(f)(1)-(2); *Commonwealth v. Wood*, 469 Mass. 266, 291-292 (2014). In addition to the Michael Pessoa matter (for which this office is providing a press release), there is one other known former police officer with pending prosecutions in the Fall River District Court. In addition to the pendency of these prosecutions, the records are also exempt from dissemination because they are associated with a named individual's criminal prosecution and are protected from public disclosure under the criminal offender record information (CORI) statute. *Attorney General v. District Attorney for the Plymouth District*, 484 Mass. 260, 267-274 (2020); G.L. c. 6, §§ 167, et seq. (CORI statute protecting criminal offender record information from disclosure). This office cannot publicly release records that can interfere with a criminal defendant's right to a fair trial, *Wood*, 469 Mass. at 291-292, regardless of the defendant's current or former occupation.

Although one of Michael Pessoa's trials recently concluded, his criminal charges were severed and there are two more cases pending in which impoundment orders are still in effect. Any records that have been disclosed to criminal defendants pursuant to an impoundment or protective order cannot be disclosed publicly. Two such officers are referenced in *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 642 (2020), attached and labeled 9-8-2020 Pessoa and Fall River two officers. Impoundment is an additional basis to withhold the records from

dissemination as public records. *Commonwealth v. Chism*, 476 Mass. 171, 185, n.9 (2017). Additionally, grand jury materials, if deemed responsive, are not subject to public dissemination. Mass. R. Crim. P. 5(d) (grand jury secrecy).

As noted above, this office is providing fourteen records which now include the names of police officers and the docket numbers as you have requested. The following redactions have been made for the following reasons:

- “2-2-21 NB:” the criminal defendant’s name and pronouns have been redacted pursuant to the personal privacy exemption amended. G.L. c. 4, § 7, cl. 26(c) and criminal offender record information (CORI) statute. *Attorney General v. District Attorney for the Plymouth District*, 484 Mass. 260, 267-274 (2020); G.L. c. 6, §§ 167, et seq. (CORI statute protecting criminal offender record information from disclosure). The criminal defendant is not a police officer.
- “7-5-22 FR:” the defendant’s name and date of offense have been redacted pursuant to the privacy exemption and CORI. Additionally, any references to grand jury testimony have been redacted pursuant to Rule 5 (d) of the Massachusetts Rules of Criminal Procedure. Prosecutors are prohibited from disseminating grand jury information without a court order. “A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court.” Mass. R. Crim. P. 5 (d). Grand Jury materials are therefore exempt from the definition of public records. G.L. c. 4, § 7, cl. 26 (a) (“specifically or by necessary implication exempted from disclosure by statute”).
- “7-12-2021 Fall River Corrected:” defense counsel’s name and address have been redacted pursuant to the privacy exemption as cited above.
- “8-15-22 Taunton:” defense counsel’s name and address have been redacted pursuant to the privacy exemption. Additionally, the defendant’s name has been redacted pursuant to the privacy exemption and CORI.
- “8-24-21 FR:” Witness names and identifying information as well as witness statements have been withheld pursuant to the privacy exemption and exemption (f). Statements of identifiable individuals who served as witnesses or who reported information to investigators are exempt from disclosure under the investigatory exception to the Public Records Law. G.L. c. 4, § 7, cl. 26(f) (protection of confidentiality for witnesses to preserve future investigatory techniques). See also *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 438 (1983) (explanation of “identifying details” and “grave risk of indirect identification” of witnesses). Furthermore, defendant’s names and identifying information have been redacted pursuant to the privacy exemption. Additionally, juvenile investigations and statements of witnesses are exempt from public dissemination under the Public Records Law. G.L. c. 4, § 7, cl. 26(a) (“specifically or by necessary implication exempted from disclosure by statute”); G.L. c. 119, § 60A (confidentiality of juvenile court records); *Commonwealth v. Boe*, 456 Mass. 337, 344 (2010) (concern for confidentiality of juvenile court records). For the same reasons, juveniles’ names and identifying information must be redacted. *Id.* Further, the names of officers who were exonerated, as having committed no wrongdoing, have been redacted as being non-responsive to your request for *Brady* information and also for privacy considerations.

- “12-20-19 New Bedford:” A private business address has been redacted pursuant to the privacy exemption, where such disclosure could harm the business owner and/or employees and to prevent any sort of inappropriate or retaliatory conduct against the individuals involved in that business.

The remaining records have no redactions. These records include the communications with other agencies on final matters. Open investigations to determine whether records constitute *Brady* matters have been withheld under G.L. c. 4, § 7, cl. 26 (f) (investigatory exemption), and work product confidentiality under *DaRosa v. New Bedford*, 471 Mass. 446, 458 (2015), citing G.L. c. 4, § 7, cl. 26(d).

Furthermore, as stated in our email to Attorney Kortz on June 15, 2023, this office respectfully declines to waive the assessment of \$500. This request will require our office to review our individual case files, review each set of records, and redact where necessary to protect private individual information and CORI. However, as proposed in our email, this office would be willing to waive said fee if you would agree to receive an exemplar of the disclosures as it applies to each officer. The exemplar would provide you with the standard information provided to defense counsels. Your acceptance of an exemplar would prevent our office from expending the time needed to perform the search of our case files and redactions of the documents, for which the fee has been assessed.

To the extent that you view this response as a partial denial of your request, you have the right to appeal to the Supervisor of Public Records and to seek a judicial remedy in Superior Court pursuant to 950 C.M.R. 32.06(3)(c); 950 C.M.R. 32.08(1); G.L. c. 66, §§ 10(b), 10A(a).

Sincerely,

Courtney Almeida

Courtney Almeida
Assistant District Attorney
Bristol District

Cc: Attorney Mason Kortz

Attachment F



The Commonwealth of Massachusetts

OFFICE OF THE
DISTRICT ATTORNEY
BRISTOL DISTRICT

THOMAS M. QUINN III
DISTRICT ATTORNEY

218 S. Main Street
Fall River MA 02721

July 5, 2023

Andrew Quemere
Aquemere0@gmail.com

Re: Public Records Request
Brady Information - Addendum

Dear Mr. Quemere:

On June 26, 2023, our office received a follow up email from Attorney Mason Kortz on your behalf. Please see the below response to that email.

Attorney Kortz inquired as to whether our office provided all responsive documents or whether the search was limited to a specific time period. All records provided to you on June 20, 2023, are all the responsive records our office currently possesses. The search was not limited to a specific time period.

Attorney Kortz also inquired as to the redactions made in two specific documents. Those redactions are explained below. Our office apologizes for having missed these explanations in our June 20, 2023, response.

- “9-6-22 TPD:” the criminal defendant’s name and pronouns have been redacted pursuant to the personal privacy exemption amended. G.L. c. 4, § 7, cl. 26(c) and criminal offender record information (CORI) statute. Attorney General v. District Attorney for the Plymouth District, 484 Mass. 260, 267-274 (2020); G.L. c. 6, §§ 167, et seq. (CORI statute protecting criminal offender record information from disclosure). The criminal defendant is not a police officer.
- “9-8-22 TPD:” the criminal defendant’s name and pronouns have been redacted pursuant to the personal privacy exemption amended. G.L. c. 4, § 7, cl. 26(c) and criminal offender record information (CORI) statute. Attorney General v. District Attorney for the Plymouth District, 484 Mass. 260, 267-274 (2020); G.L. c. 6, §§ 167, et seq. (CORI statute protecting criminal offender record information from disclosure). The criminal defendant is not a police officer.

To the extent that you view this response as a partial denial of your request, you have the right to appeal to the Supervisor of Public Records and to seek a judicial remedy in Superior Court pursuant to 950 C.M.R. 32.06(3)(c); 950 C.M.R. 32.08(1); G.L. c. 66, §§ 10(b), 10A(a).

Sincerely,

Courtney Almeida

Courtney Almeida
Assistant District Attorney
Bristol District

Cc: Attorney Mason Kortz