Massachusetts POST Commission
84 State Street, Suite 200, Boston, MA 02109

November 15, 2023

Francis V. Kenneally
Clerk
Supreme Judicial Court of the Commonwealth of Massachusetts
John Adams Courthouse
1 Pemberton Square, Suite 1400
Boston, MA 02108

Re: Eric Mack v. Office of the District Attorney of the Bristol District,
Appeal No. SJC-13468

Dear Clerk Kenneally:

The Massachusetts Peace Officer Standards and Training Commission ("Commission") respectfully files this letter in response to this Court's request for amicus curiae submissions in the case listed above. The Commission focuses on the question of "whether the Legislature's grant of authority to the [Commission] was intended to create the exclusive avenue for members of the public to obtain access to the names of law enforcement officers under investigation." Announcement of Aug. 4, 2023. In the Commission's view, the question should be answered in the negative. The Commission takes no position on the other questions posed by the Court's request, nor does it take a position on the proper disposition of this appeal.

The statute creating the Commission and defining its powers and obligations, Chapter 6E of the General Laws, was adopted through the landmark Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth, St. 2020, c. 253 ("2020 Act"). Nothing in the 2020 Act expressly establishes an exclusive avenue for obtaining access to the names of investigated officers. St. 2020, c. 253. Neither party to this case argues otherwise. Def.'s Principal Br.; Pl.'s Br.; Def.'s Reply Br. The issue has thus been framed as whether the Legislature implicitly provided as much by granting certain authority to the Commission, and particularly by directing it to develop a public-facing database with information about officers. More specifically, it appears that one of two theories is contemplated: (1) the Legislature intended to make the names of investigated officers in the possession of agencies other than the Commission exempt from public-records requests; or (2) the Legislature meant to charge the Commission with overseeing all other agencies' responses to public-records requests that seek such names, either by promulgating regulations or standards or by making case-by-case

determinations. Def.'s Principal Br. at 8, 19, 47-48, 54-56; Pl.'s Br. at 11, 25, 53-57.[1] This Court should not find either of these theories to be sustainable. Nor should the Court independently devise a rule or process regarding such matters.

The Legislature did not intend to create an additional exemption.

The Legislature clearly did not intend to create a new exemption that would excuse all agencies other than the Commission from disclosing the names of investigated officers.

First, "'[t]he omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes'"—that is, where the Legislature has "'demonstrated that it knows how to'" craft a certain type of provision. Doe v. Board of Registration in Med., 485 Mass. 554, 562 (2020) (quoting first Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529, 536 (2019), and then Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 129 (2014), in analyzing whether a sealed criminal record could be admitted in an agency proceeding).

Such is the case here. The Legislature knows how to create exemptions that make records unavailable to the public where those records are in the possession of particular agencies and reflect the names of certain individuals. See, e.g., M.G.L. c. 4, § 7, cl. 26(p) (providing, through 2004 and 2016 amendments, that the name and certain contact information of a state employee's relative, "in the custody of a government agency which maintains records identifying persons as falling within" certain specified categories, is not a public record); M.G.L. c. 40, § 8B (providing, through a 2002 amendment, that names and certain identifying information "about elderly persons in the possession of the council [on aging for a municipality] shall not be public records"); M.G.L. c. 51, § 47C (providing, through a 1996 amendment, that "[t]he names and addresses contained in [the] central registry [of voters maintained by the Secretary of the Commonwealth] shall not be a matter of public record"); M.G.L. c. 66, § 10B (providing, through pre-2020 enactments, that particular agencies and officials "shall not disclose" "the names and addresses of persons who own or possess" certain weaponry or are "licensed to carry or possess the same," except as indicated; and that certain individual contact information "in the custody of the governmental entity that maintains records identifying persons as falling within [particular] categories shall not be public records"). Applying the above principle, the complete absence of language creating a public-records exemption for the names of investigated officers in the possession of agencies other than the Commission should be deemed deliberate. See, e.g., Doe, 485 Mass. at 562.

Next, the notion that the Legislature intended to create such an exemption is dispelled by an analysis of the 2020 Act as a whole, viewing its provisions consistently and logically. See, e.g., Metcalf v. BSC Grp., Inc., 492 Mass. 676, 681 (2023) ("'[C]ourts must look to the statutory scheme as a whole . . . so as to produce an internal consistency within the statute.'" (alterations

[1] Of course, information falls under an exemption to the statutory definition of "public records" where it is "specifically or by necessary implication exempted from disclosure by [another] statute." M.G.L. c. 4, § 7, cl. 26(a). However, that exemption to the definition of "public records" has not been invoked in this case. Def.'s Principal Br.; Pl.'s Br.; Def.'s Reply Br.

in original) (quoting, with citation and quotation omitted, Plymouth Ret. Bd. v. Contributory Ret. Appeal Bd., 483 Mass. 600, 605 (2019))); Commonwealth v. Rossetti, 489 Mass. 589, 605 n.27 (2022) ("[W]e do not interpret statutes in such a way . . . that creates an illogical result.").

The 2020 Act sets forth a carefully calibrated and balanced set of precise provisions concerning public disclosure of information about officers. The Act promotes disclosure in specific ways, such as by: carving out an exception for "records related to a law enforcement misconduct investigation" within the public-records law's privacy exemption; directing the Commission to develop public-facing databases with information on officers, to publish decertification decisions, to submit decertification information to a national index, and to furnish myriad data on officer misconduct in annual reports; and requiring various forms of information concerning law enforcement in schools to be made publicly available. St. 2020, c. 253, §§ 2, 30, 79 (respectively, amending M.G.L. c. 4, § 7, cl. 26(c); adopting M.G.L. c. 6E, §§ 4(j), 10(g), 13(a)-(b), and 16; and amending M.G.L. c. 71, § 37P). At the same time, the Act protects officers' interests in nondisclosure in other targeted ways, including by: directing the Commission to "consider the health and safety of the officers" as it "promulgate[s] regulations for" a public-facing "database containing records for law enforcement officers"; and providing that "[a]ll proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry shall be confidential," with an exception for information-sharing with prosecuting offices. St. 2020, c. 253, § 30 (adopting M.G.L. c. 6E, §§ 4(j) and 8(c)(2), respectively).

Notably, the 2020 Act does not compel the Commission to gather all records related to all investigated officers. While the Act broadly authorizes the Commission to obtain information concerning law enforcement agencies and officers, it requires the Commission to collect only certain specified records. See St. 2020, c. 253, §§ 4, 30, 99 (respectively, amending M.G.L. c. 6, § 116; adopting M.G.L. c. 6E, §§ 3(a), 4(h), 4(j), 8, 13(a), 13(e), and 16; and requiring the Commission to collect historical disciplinary records).

Thus, rendering the names of investigated officers in the possession of agencies other than the Commission unobtainable through public-records requests would significantly limit the amount of meaningful information available to the public. Records provided to requesters by those other agencies would be incomplete, and it would be difficult for requesters to connect them to any records received from the Commission. The resulting information gaps would prevent the public from making use of otherwise-available records simply because they were in the possession of an agency other than the Commission.

It is too hard to accept that the Legislature that developed such a balanced and precise set of disclosure provisions also intended to make a substantial quantity of information unavailable, based solely on which agency possesses it—and to do so sub silentio.

The Legislature did not intend to charge the Commission with overseeing all other agencies' public-records responses.

There is also no basis for concluding that the Legislature meant to require the Commission to oversee all other agencies' handling of public-records requests, either by promulgating regulations or guidelines or by making case-by-case determinations.

The Legislature knows how to require an agency to issue regulations and guidance on public-records matters for other governmental bodies. See M.G.L. c. 66, § 1 (providing, through a 1976 amendment, that "[t]he supervisor of records shall adopt regulations pursuant to the provisions of [M.G.L. c. 30A] to implement the provisions of [M.G.L. c. 66]"); M.G.L. c. 66, § 1A (providing, through a 2016 amendment, that "[t]he supervisor of records shall" "create educational materials or guides for agencies and municipalities"; "prepare forms, guidelines and reference materials for [them] to use and disseminate to individuals seeking access to public records . . ."; and, where requested and feasible, "assist [them] in developing best practices . . ."). The Legislature likewise knows how to require the Commission to adopt regulations and standards, including those that would govern other agencies and officials. See M.G.L. c. 6E, §§ 2(e), 4(f)(1), 4(j), 5(b), 8(d), 10(f), 15(d) (providing, through the 2020 Act, that the Commission "shall" do so regarding various matters).

It is equally clear that the Legislature knows how to craft a provision requiring one agency to make case-by-case determinations for other agencies about whether their materials should be disclosed in response to public-records requests. See M.G.L. c. 4, § 7, cl. 26(n) (providing, through 2002 and 2016 amendments, that certain materials are not public records if the "disclosure of [them], in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under [M.G.L. c. 66, § 10(c)], is likely to jeopardize public safety or cyber security"); M.G.L. c. 66, § 10(c) (providing, through a 2016 amendment, that "the supervisor of records may" "relieve [an] agency or municipality of its obligation to provide copies of the records sought" in certain circumstances); M.G.L. c. 66, § 10A(a) (providing, through a 2016 amendment, that a public-records requester "may petition the supervisor of records for a determination as to whether a violation [of M.G.L. c. 66, § 10] has occurred," and "the supervisor" "may inspect any record" "in camera").

The absence of language in the 2020 Act requiring the Commission to issue public-records regulations or guidance for other agencies, or to review their public-records matters individually, should therefore be viewed as intentional. See, e.g., Doe, 485 Mass. at 562.[2]

[2] Regulations and advisories issued by the Commission do not reflect a different understanding. Cf. 555 CMR 8.02(5) (providing that neither the Commission's regulations concerning its databases and dissemination of information nor its provision of information through a public database or a public-records response is intended to: create any attorney-client, principal-agent, or confidential relationship with another; make the Commission part of the prosecution or litigation team of another; impose another's duty or obligation on the Commission; or surrender the Commission's independence); Guidance to Law Enforcement Agencies and Prosecuting Offices Regarding 555 CMR 1.00 and 6.00, available at https://www.mass.gov/lists/regulations-advisories-and-guidance (making clear that, while 555 CMR 1.00 provides in part for the Commission to furnish certain confidential and other information to the Attorney General's, United States Attorney's, and district attorneys' offices, the regulations do not govern the conduct of those offices).

If this Court perceives any statutory ambiguity, it should accord deference to the Commission's interpretation.

For the reasons offered above, the Commission sees no statutory ambiguity to be resolved in answering the question presented here. However, should the Court conclude that the statutory scheme is ambiguous, the Commission respectfully suggests that this Court should accord substantial deference to the Commission's interpretation of the statute it is charged with administering and enforcing. See, e.g., McCauley v. Superintendent, Mass. Corr. Inst., Norfolk, 491 Mass. 571, 584-85 (2023) ("[W]e apply '"substantial deference" to the expertise and statutory "interpretation of [the] agency charged with primary responsibility" for administering a statute . . . [A] "[S]tate administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing," unless a statute unambiguously bars the agency's approach.'" (second through fifth alterations in original) (quoting Zoning Bd. of Appeals v. Housing Appeals Comm., 457 Mass. 748, 759-760 (2010))); see also, e.g., Everett v. 357 Corp., 453 Mass. 585, 612 (2009) (stating, as to an agency's arguments in an amicus brief and a post-argument letter, "We give great deference to the agency's interpretation of its rules and authority."). This principle provides another basis for concluding that the establishment of the Commission did not "create the exclusive avenue for members of the public to obtain access to the names of law enforcement officers under investigation." Announcement of Aug. 4, 2023.

This Court should decline any invitation to devise a new rule or process.

Finally, this Court should resist any invitation to """read into [the] statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose."""" Doe, 485 Mass. at 562 (quoting Fernandes, 470 Mass. at 129).

Accepting such an invitation would be especially unwarranted in these circumstances. It would upset the policy choices of the 2020 Legislature that are referenced above. It would likewise disturb policy choices previously made by the Legislature in establishing a public-records scheme—one that generally defines the universe of public records broadly, carves out particular exemptions, and requires all agencies to comply with standardized procedures. M.G.L. c. 4, § 7, cl. 26; M.G.L. c. 66, §§ 10, 10A. See, e.g., Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792, 802 (2000) (stating, as to the public-records law's privacy exemption, M.G.L. c. 4, § 7, cl. 26(c), that "[t]he Legislature clearly balanced competing public policy considerations that we shall not second-guess"). And it would require this Court to weigh and choose among competing new policy options in a way that is appropriate for the Legislature. See, e.g., Chadwick v. Duxbury Pub. Sch., 475 Mass. 645, 65 (2016) (recognizing that the question of whether to create a privilege that would make union members' communications to labor representatives confidential is more appropriate for the Legislature, as it would involve balancing policy considerations and competing social values).

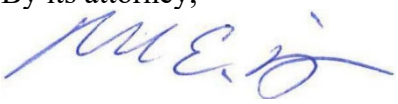
Such a step would be all the more problematic to the extent that it would require the Court to prescribe an intricate new system that places the Commission in an oversight role with respect to other agencies' public-records matters. "The prudent course is not for this [C]ourt to create, and attempt to define, some new authority . . . that heretofore has been unrecognized and undefined." Lunn v. Commonwealth, 477 Mass. 517, 534 (2017). Nor should it "create additional schemes, standards, or devices for dealing with a problem that already has had the benefit of the

Legislature's considered judgment." Houde v. Contributory Ret. Appeal Bd., 57 Mass. App. Ct. 842, 847-48 (2003). "The better course is for [the Court] to defer to the Legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth." Lunn, 477 Mass. at 534.

Respectfully submitted,

MASSACHUSETTS PEACE OFFICER
STANDARDS AND TRAINING COMMISSION

By its attorney,



Randall E. Ravitz, BBO No. 643381
Special Assistant Attorney General
General Counsel
Massachusetts Peace Officer Standards and
Training Commission
84 State Street, Suite 200
Boston, MA 02109
(617) 418-0882
Randall.E.Ravitz@mass.gov

CERTIFICATE OF SERVICE

I hereby certify that, on this day, November 15, 2023, the foregoing amicus curiae letter on behalf of the Massachusetts Peace Officer Standards and Training Commission in connection with Eric Mack v. Office of the District Attorney of the Bristol District, Appeal No. SJC-13468 in the Supreme Judicial Court of the Commonwealth of Massachusetts, is being served through the Court's Electronic Filing Service Provider upon the following:

Mary E. Lee, Esq.
Office of the District Attorney of the Bristol District
218 South Main Street, Suite 101
Fall River, MA 02721
Mary.E.Lee@mass.gov
Counsel for Defendant-Appellant Office of the District Attorney of the Bristol District

Howard Friedman, Esq.
Law Offices of Howard Friedman, PC
1309 Beacon Street, Suite 300
Brookline, MA 02446
hfriedman@civil-rights-law.com
Counsel for Plaintiff-Appellee Eric Mack

Mason Andrew Kortz, Esq.
Harvard University Law School
1557 Massachusetts Avenue, 4th Floor
Cambridge, MA 02138
mkortz@law.harvard.edu
Counsel for Amicus Curiae Andrew Quemere

Rebecca A. Jacobstein, Esq.
Committee for Public Counsel Services
75 Federal Street, 6th Floor
Boston, MA 02110
rjacobstein@publiccounsel.net
Counsel for Amicus Curiae Committee for Public Counsel Services

Jessica Lewis, Esq.
American Civil Liberties Union of Massachusetts
One Center Plaza, Suite 850
Boston, MA 02108
jlewis@aclum.org
Counsel for Amicus Curiae American Civil Liberties Union of Massachusetts

Randall E. Ravitz
BBO No. 643381
Special Assistant Attorney General
General Counsel
Massachusetts Peace Officer Standards and Training Commission
84 State Street, Suite 200
Boston, MA 02109
(617) 418-0882
Randall.E.Ravitz@mass.gov