The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

December 10, 2018
SPR18/1779

Dolores Randolph
Deputy Director of Communications
Boston Water and Sewer Commission
980 Harrison Avenue
Boston, MA 02119

Dear Ms. Randolph:

I have received the petition of Laura Crimaldi of the *Boston Globe* appealing the response of the Boston Water and Sewer Commission (Commission/BWSC) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Ms. Crimaldi requested the following records:

- records that reflect the employment status of Boston Water and Sewer Commission employees Henry Vitale, Phil Smith, Brian Lee, and Richard Sullivan;
- records that reflect internal complaints BWSC employees made about racial and gender discrimination from 2012 to present, including the date of the complaint, details of the allegations, the findings of any investigation, the names of the parties in involved, and what, if any, action was taken;
- records that reflect antibias and harassment training materials used by the commission;
- any invoices for antibias and harassment training services used by BWSC.

Previous appeal

This request was the subject of a previous appeal. See SPR18/1329 Determination of the Supervisor of Records (September 17, 2018). In my September 17th determination I ordered the Commission to review the responsive records, redact where necessary, and provide Ms. Crimaldi responsive records in a manner consistent with the order, the Public Records Law, and its Regulations. The Commission responded on November 16, 2018 by providing certain information but withholding other records under Exemptions (c) and (e) as well as the attorney-client privilege. G. L. c. 4, § 7(26)(c), (e).

The Public Records Law

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

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

Current appeal

In its November 16th response the Commission provided ". . . a list of racial or gender discrimination or harassment complaints asserted by Commission employees – with employee names redacted – containing the date of the complaint, the subject matter of the complaint and the Commission's findings from [2012] to the date of your above request." However, as mentioned above, the Commission cites Exemptions (c), and (e) of the Public Records Law, as well as the attorney-client privilege, to withhold responsive records. G. L. c. 4, § 7(26)(c), (e); G. L. c. 66A.

In her appeal petition Ms. Crimaldi asserts that the November 16th response ". . . does not comply with the public records law. The commission has acknowledged it has records responsive to my request, and under the law, it should make them available, albeit redacted as necessary."

Fair Information Practices Act (FIPA)

The Commission indicates that ". . . many of the materials requested are located in various Commission employees' personnel files, and are thus exempt from disclosure pursuant to MGI. c. 4, § 7(26)(c) and the Fair Information Practices Act (M.G.L. c. 66A) which governs what information can and cannot be released concerning employee information."

Please note that that FIPA and the Public Records Law are to be construed to work together consistent with the legislative purpose. 32 Op. Atty Gen. Mass. 157, 160 (May 18, 1977). FIPA cannot provide a basis for withholding the requested information unless the records fall within a statutory exemption to the definition of public records. See Allen v. Holyoke Hosp., 398 Mass. 372, 379 (1986) (stating that "determining whether the record sought is protected by FIPA depends on whether the record is a public record pursuant to G. L. c. 4, § 7 Twenty-sixth, and subject to the disclosure provisions of G. L. c. 66A"). FIPA, by itself, cannot justify withholding information. A custodian must first specifically explain how the withheld

information is exempt from the Public Records Law. Once a record is found to be exempt from the definition of public records, FIPA may also operate to restrict disclosure.

Exemption (c)

Exemption (c) permits the withholding of:

> personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy

G. L. c. 4, § 7 (26)(c).

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-33 (1983).

First clause

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-34 (1983). The first clause creates a categorical exemption for personnel information that relates to an identifiable individual and is of a "personal nature." Id. at 434. Massachusetts courts have found that "core categories of personnel information that are 'useful in making employment decisions regarding an employee'" may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee," may be withheld pursuant to the first clause of Exemption (c). Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792, 798 (2000). The courts have also discussed specific categories of records that may be redacted under the first clause. See Globe Newspaper Co. v. Exec. Office of Admin. and Finance, Suffolk Sup. No. 11-01184-A (June 14, 2013).

Nevertheless, there is a strong public interest in monitoring public expenditures and public employees have a diminished expectation of privacy with respect to public employment matters. See George W. Prescott Publ'g Co. v. Register of Probate for Norfolk Cnty, 395 Mass. 274, 278 (1985); Globe Newspaper Co., 388 Mass. at 436 n.15. Further, the public has an interest in knowing whether public employees are "carrying out their duties in an efficient and law-abiding manner." Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1979). As a result, certain information that is considered personal in the ordinary sense of the word may be considered part of a public record if relating to an individual's official responsibilities. See Brogan v. School Comm. of Westport, 401 Mass. 306, 309 (1987).

Second clause

Analysis under the second clause of 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 clause 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 the second clause of 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 clause 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.

The Commission asserts that "[h]ere, both the complaining and accused employees certainly have a privacy interest that would be implicated by the disclosure of the requested information. Many of the employees expected anonymity when discussing these matters with the Commission."

Exemption (e)

Exemption (e) permits the withholding of:

> notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit
>
> G. L. c. 4, § 7 (26)(e).

The exemption may not be applied by custodians of records to withhold materials intended for communication or preservation. Records are protected from mandatory disclosure by Exemption (e) only if they meet the two criteria of the exemption.

The first criterion of Exemption (e) limits its application to work-related records that can be characterized as "personal" to the employee, such as personal reflections on work-related activities and notes created by an employee to assist him/her in preparing reports for other employees or for the files of the governmental entity. Notes that have been shared by the employee may not be considered to be "personal" pursuant to Exemption (e).

The second criterion of Exemption (e) requires that the notes not be kept in a government file. Under the exemption, "files of the governmental unit" excludes working files that are transitory in nature. Such files lack the permanent nature of a government file. Therefore, the retention of materials in such a working file would not bar the application of Exemption (e) and the records custodian may withhold from disclosure any personal notes that were not shared with others and were not part of such a governmental file.

The Commission claims that "[m]any of these records are also exempt from disclosure pursuant to M.G.L. c. 4, § 7(26)(e) as some of the materials include personal reflections on work-related activities and notes created by employees to assist him or her in preparing reports for other employees or for the files of the governmental entity. These personal notes were not shared with other employees and are not maintained as part of the files of a governmental unit."

Burden of specificity; segregable portions

Pursuant to the Public Records Law, the burden shall be upon the records custodian to establish the applicability of an exemption. G. L. c. 66, § 10(b)(iv) (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.

I find that the Commission has not met its burden to withhold responsive records under the exemptions described above; in particular, it has not identified which specific records it is withholding, nor has it provided specific reasons for the applicability of these exemptions as required by G. L. c. 66, § 10(b)(iv). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

Common law attorney-client privilege

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) that the communications were

made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div.of Capital Asset Mgmt., 449 Mass, 450 n.9 (2007); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege "are required to produce detailed indices to support their claims of privilege." Suffolk, 449 Mass. at 460.

In camera review of records withheld under a claim of attorney-client privilege

Please note that G. L. c. 66, § 10A(a) discusses the ability of the Supervisor of Records to conduct an *in camera* inspection of records withheld on the basis of a claim of attorney-client privilege. This section provides in pertinent part:

> In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and the attorney work product privilege.
>
> G. L. c. 66, § 10A(a).

As noted above, pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor of Records ". . . shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a).

The Commission explains that ". . . the investigatory notes of the Commission's Labor Relations employees regarding complaints of racial and gender discrimination and/or harassment are not being provided, as those records are exempt from the Massachusetts public records law as they are protected by the attorney-client privilege and/or the attorney work product privilege." You also note that these notes ". . . involve investigation by the Commission's internal counsel and are prepared in anticipation of litigation relating to said complaints; therefore, such materials are not being produced herewith as they are protected under the attorney-client privilege and therefore exempt from disclosure under the Public Records Law. It is the Commission's further position that these documents reflect communications that were made in confidence for the

purpose of soliciting and/or obtaining legal advice. Furthermore, the Commission has not waived the attorney-client privilege with respect to these documents or matters." The Commission also references DaRosa v. New Bedford, 471 Mass. 446, 462 (2015).

Although the Commission provides information regarding the nature of these records, I find that in accordance with G. L. c. 66, § 10A(a), the Commission must provide "a detailed description of the record[s], including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed" as required by G. L. c. 66, § 10A(a).

Conclusion

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

Sincerely,

Rebecca Murray

Rebecca S. Murray
Supervisor of Records

cc: Laura Crimaldi