



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

Rebecca S. Murray
Supervisor of Records

February 6, 2019
SPR19/0150

Jennifer Sulla, Esq.
Deputy General Counsel
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 100
Boston, MA 02114

Dear Attorney Sulla:

I have received the petition of Matthew Rocheleau of the *Boston Globe* appealing the response of the Executive Office of Energy and Environmental Affairs (EOEEA) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on November 19, 2018, Mr. Rocheleau requested "[a]ny/all documents/materials, including but not limited to full case files, related to internal investigation and internal/external complaints filed, received, or reported to [] whoever handles internal affairs/internal investigations for the Massachusetts Environmental Police-- including but not limited to cases involving individual officers -- from Jan. 1, 2015 through present."

Previous appeal

This request was the subject of a previous appeal. See SPR18/2056 Determination of the Supervisor of Records (January 3, 2019). In my January 3rd determination, I directed the EOEEA to demonstrate that it responded to Mr. Rocheleau's request within 10 business days following receipt of the request in compliance with G. L. c. 66, § 10(e) and 950 C.M.R. 32.06(2)(c), and provide a response in a manner consistent with the order, the Public Records Law, and its Regulations within ten business days. Following the January 3rd determination, in a response dated January 18, 2019, the EOEEA provided additional information regarding its compliance with its statutory and regulatory obligation in assessing fees. Unsatisfied with the EOEEA's response, Mr. Rocheleau petitioned this office and this appeal, SPR19/0150, was opened as a result.

Fee estimates

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 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).

The EOEEA's January 18th response

In its January 18, 2019 response, the EOEEA states that one of the public records regulations, “. . . make clear that a written request is ‘deemed received on the first business day following receipt [of] the request by the records access officer.’ 950 C.M.R 32.06(2)(e). A plain reading of this sentence indicates that the Supervisor intended for records custodians to ‘deem’ a request received on the next business day following the actual delivery of the request at the agency’s offices, regardless of form.” The EOEEA posits that “[t]his allows the agency to complete processing of the request internally – for instance, by routing a paper correspondence to the appropriate department – before the clock starts on a response. And even for email requests which may be more immediately accessible, a request received after hours can be ‘deemed received’ on the next business day so that the custodian may begin the clock for a response upon his or her return to the office.”

The EOEEA further explains that, “[its] records access officer received the request by e-mail on November 19, 2018. Accordingly, the request was ‘deemed received’ on November 20, the next business day. The regulations also set forth how to compute the statutory and regulatory deadlines. The computation of time for responding to the request ‘shall begin with the first business day following the date of receipt of any request, regardless of physical form.’ 950 C.M.R 32.03(3). Here, the computation of time began on November 21, the first business day following November 20.” As such the EOEEA claims the tenth business days from November 20th was December 5, 2018.

The EOEEA contends that “. . . if the deadline in this case were set at December 4, this would ignore the regulatory provisions regarding both: (1) the definition of ‘deemed received’; and, (2) the distinction between written and oral requests. Failing to give meaning to regulatory provisions is a disfavored way of reading regulations. ‘Where reasonably possible, no portion of the language of a regulation should be treated as surplusage.’ *Warcewicz v. Dep’t of Env’tl. Prot.*, 410 Mass. 548, 551 (1991). If a request were deemed received on the day actually received, no regulatory language would be necessary. And there would be no reason to distinguish between

written and oral requests. [Thus, the EOEEA] provided the fee estimate on December 5, in compliance with the statute and regulations.”

Based on the language of the regulations, I find the EOEEA responded to Mr. Rocheleau’s request within ten business days and therefore, can assess a fee for the production of responsive records.

The EOEEA’s December 5th cost estimate

In its December 5, 2018 response, the EOEEA stated that this request would require it to review and process approximately 22 case files containing over 300 pages of material. The EOEEA indicated that it maintains a centralized electronic database which is a repository of all relevant materials related to its internal affairs investigations. The EOEEA explained that based on a review of its database, it has “. . . determined that five case files will be withheld from production under [Exemption (f)], as the officer in question is currently under investigation.”

The EOEEA stated that it would require approximately 10 hours to review and redact potentially exempt material from the remaining 17 case files before production of responsive records. As such the EOEEA indicates that the total cost is \$250 (10 hours x \$25/hour). The EOEEA explained that this amount “. . . excludes the four (4) hours that [its] staff has already spent locating and segregating this material.”

The EOEEA further noted that it reserves the right to charge for the production of the five remaining case files which are being withheld at this time pursuant to Exemption (f). As such, the EOEEA estimated that it would require an additional 20 hours to process responsive records should Mr. Rocheleau request them in the future. Thus, 20 hours x \$25/hour = \$500.

Fees to search for, compile, segregate, redact or reproduce a record request

The Regulations provide that in cases where necessary to reproduce the requested records a records access officer may charge a fee to search for, compile, segregate, redact or reproduce a record requested based on the hourly rate of the lowest paid employee who is capable of performing the task. G. L. c. 66, § 10(d); see also 950 C.M.R. 32.07(2). Additionally, the reasonable fee for reproduction shall not exceed the actual cost of reproducing the record. Id. An agency may not charge for segregation and redaction unless required by law or a petition has been filed and approved by the Supervisor of Records. G. L. c. 66, § 10(d); see also 950 C.M.R. 32.06(4).

The EOEEA indicated that it would require approximately 10 hours to review and redact potentially exempt material from the remaining 17 case files before production of responsive records. Based on the EOEEA’s response, it is uncertain how redaction is required by law in this matter. For example, it is not clear what type of information is contained in the responsive records, and which statutes, if any, require redaction. Please note that under the Public Records Law, a fee may 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). I am not aware that the EOEEA has submitted a petition under G. L. c. 66, § 10(d)(iv). Please note that petitions seeking permission to assess fees must be made within ten business days after receipt of a request for public records; therefore, the EOEEA may not currently seek permission to assess fees for this November 19th request through a petition under G. L. c. 66, § 10(d)(iv). See 950 C.M.R. 32.06(4)(g). As such, I find the EOEEA must provide information about whether the responsive records contain information that is required by law to be segregated or redacted, as well as the applicable statutes, if any.

Further, I find the EOEEA has not explained with specificity why the indicated amount of time is required to produce the responsive records. Specifically, the EOEEA has not demonstrated why ten hours is required to redact the 17 case files. The EOEEA must provide further information regarding the documents contained in each of the 17 case files.

Narrowing of request

In his appeal petition, Mr. Rocheleau states “. . . the Globe also asks the [EOEEA] be ordered to provide a clearer breakdown of the responsive records and also a brief description of each case file (the name and/or subject matter that was investigated), which may help the Globe determine if it can narrow its request to exclude certain responsive case files. The [EOEEA's] explanation does not make clear how many of the 300+ pages are contained within the 17 case files versus how many are contained in the five cases it says it is withholding.” In light of Mr. Rocheleau's statement, this office encourages both parties to communicate further to enable the EOEEA to provide the requested records. 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 records sought more efficiently and affordably).

Clarification

In its December 5th response, the EOEEA had indicated that it intends to withhold 5 case files under Exemption (f) because of an ongoing investigation. Based on Mr. Rocheleau's appeal petition, it is unclear if he is objecting to the withholding of these 5 files at this time.

Conclusion

Accordingly, the EOEEA is ordered to provide Mr. Rocheleau with a response to the 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 this response to this office at pre@sec.state.ma.us.

Jennifer Sulla, Esq.
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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: Matthew Rocheleau