



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

Rebecca S. Murray  
Supervisor of Records

February 22, 2019  
**SPR18/2081**

Julia O'Leary, Esq.  
Counsel  
Executive Office of Energy and Environmental Affairs  
100 Cambridge Street, Suite 900  
Boston, MA 02114

Dear Attorney O'Leary:

I have received the petition of Matthew Rocheleau of the *Boston Globe* appealing the response of the Executive Office of Energy and Environmental Affairs (EEA). Specifically, Mr. Rocheleau requested the following:

- A list of all employees of EEA and its subagencies\* who were suspended/placed on involuntary leave since Jan. 1, 2015, showing their names, titles, date suspension began and ended (if it has), and reason for suspension.
- A list of all employees of EEA and its subagencies\* who departed/left the agency since Jan. 1, 2015, showing their names, titles, date they left/departed, whether they retired/resigned, were terminated/fired, or left on some other terms, and, if they were terminated/fired, the reason.
- A list of all people hired as employees of EEA and its subagencies\* since Jan. 1, 2015, showing their names, titles, and the date their employment began.
- A list of any/all promotions and demotions of employees at EEA and its subagencies\* since Jan. 1, 2015, showing the name of the employee promoted/demoted, the effective date of that change, and the change in job title.

This request was the subject of a previous determination. See SPR18/2081 Determination of the Supervisor of Records (January 8, 2019). In my January 8<sup>th</sup> determination I ordered EEA to provide Mr. Rocheleau with responsive records, provided in a manner consistent with the order, the Public Records Law, and its Regulations. EEA sought reconsideration on January 30, 2019.

### ***Request for reconsideration***

EEA initially responded on December 20, 2018 by providing 3 spreadsheets; however, EEA withheld certain information under the personnel clause of Exemption (c) of the Public Records Law. G. L. c. 4, § 7(26). In my January 8<sup>th</sup> determination I found that EEA had not met its burden to withhold the remaining information at issue. In particular, it was unclear how employee suspensions or notations indicating the circumstances under which an employee left state employment are collected in order to make employment decisions. I also found it was unclear how this information, which describes the *result* of the disciplinary actions, is one of the “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’” that may be withheld from disclosure under the first clause of Exemption (c).

In its January 30<sup>th</sup> request for reconsideration EEA indicates “[f]or the reasons described below, we respectfully disagree with the two premises stated in your January 8 determination as excluding the records at issue from the scope of the ‘c’ exemption.”

### ***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.

### ***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). 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 County, 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).

EEA references specific cases and provides a detailed argument in support of its position that this information may be withheld. EEA further asserts "[f]or the reasons stated above, both of the approaches proffered by the Supervisor—i.e., limiting the scope of the 'c' exemption to exclude 'results' of personnel investigations and require documents to have been 'collected' by the agency—run afoul of the plain language of G.L. c. 4, § 7, cl. 26(c), and the fundamental intent of the 'c' exemption to preserve the integrity of the employer-employee relationship. See, Sterlite Corp. v. Continental Cas. Co. 397 Mass 837, 839 (1986) (statute should be interpreted to give effect to legislature's intent). The Supreme Judicial Court has repeatedly recognized that these protections are 'absolute' in nature and should be construed as covering all records that are 'of a personal nature' and 'relate to a particular individual.' Wakefield, 431 Mass. at 799 (quoting Boston Retirement, 388 Mass. at 435)."

You continue by noting "[t]his language indicates that, unlike other exemptions in the public records law, the personnel exemption should be construed to include any information that could bear on an employment decision, regardless of the point at which such records are generated during the HR process and who is responsible for creating them. While we acknowledge that not all information in a personnel file would qualify, see Brogan v. School Comm. of Westport, 401 Mass. 306 (1987) (involving absenteeism records, which were deemed to be akin to payroll records), information about suspensions and terminations strikes at the heart of the government's status as an employer and the special relationship between the employer and its employees." You indicate that "[f]or these reasons, we respectfully request that you

reconsider your January 8, 2019 determination ordering us to produce lists of employee suspensions and the reasons for employee terminations.”

Although EEA asserts that the information at issue, namely the results of specific employment investigations in which decisions have already been made, could serve to inform future decisions about the employees, I decline to expand the scope of the personnel clause to include any record that may be useful in future employment decisions. See 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); 32 Op. Atty Gen. 157, 164 (May 18, 1977) (finding that the final disciplinary dispositions that are the official act of an agency do not fall under Exemption (c) or any other exemption). Therefore, with respect to the list of employee suspensions and terminations, I find EEA has not met its burden to withhold this information under the personnel clause of Exemption (c). See Worcester, 58 Mass. App. Ct. at 10 (finding that the same information may simultaneously be contained in a public record and in exempt personnel files or information).

However, with respect to the reasons for employee suspensions and terminations, I find EEA has met its burden to withhold this information because it falls under one of the enumerated core categories of information useful in making employment decisions about identified employees.

### ***Conclusion***

Given that the EEA has not met its burden to explain how an exemption applies to withhold all the information at issue, the EEA is ordered to provide Mr. Rocheleau with the requested records, provided 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](mailto:pre@sec.state.ma.us).

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