



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

Rebecca S. Murray
Supervisor of Records

June 26, 2019
SPR19/1180

Michael Halpin, Esq.
Department of State Police
470 Worcester Road
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Dear Attorney Halpin:

I have received the petition of Todd Wallack of the *Boston Globe* appealing the response of the Department of State Police (Department) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Mr. Wallack requested "photos of two former [Department] employees."

Previous appeal

The requested records were the subject of a previous appeal. See SPR19/906 Determination of the Supervisor of Records (May 10, 2019). In my May 10th determination, I ordered the Department to provide Mr. Wallack with a response made in accordance with the Public Records Law, its Access Regulations and the order. Following the May 10th determination, the Department provided a response dated June 12, 2019, denying access to responsive records pursuant to Exemptions (a), (b), (c), (o), and (n) of the Public Records Law. G. L. c. 4, § 7(26)(a), (b), (c), (o), (n). Unsatisfied with the Department's response, Mr. Wallack petitioned this office and this appeal, SPR19/1180, 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 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.

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 Department's June 12th response

In its June 12, 2019 response, the Department asserts that the records are exempt from disclosure and indicates that it incorporates by reference its previous responses to a similar request in SPR19/963. The Department claims Exemptions (a), (b), (c), (o), and (n) to withhold the responsive records from disclosure.

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.

Under Exemption (a), the Department references various state and federal statutes in support of its position to withhold responsive records from disclosure. The Department indicates that "[s]tate and federal statutes also reflect that photographs of individuals (including public

employees) are often, by themselves or in combination with other information, ‘personal information,’ ‘personal identifying information,’ or ‘personal data’ that a range of statutory schemes protect from public dissemination. Accordingly, the record are . . . by necessary implication exempted from disclosure by statute pursuant to exemption (a).” The Department states that “[t]o protect against identity fraud, G.L. c. 266, §37E, defines ‘personal identifying information’ to include an employee’s name, place of employment, and employee identification number, whether used ‘alone or in conjunction with other information,’ including but not limited to photographs. Similarly, G.L. c. 66A, §1 defines ‘personal data’ to include ‘any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual.’”

Further, the Department posits that “[i]n relation to its employees, the Department, consistent with G.L. c. 149, §52C and G.L. c. 66A, §1-3, maintains personnel files and attendant personal data systems that include employee ID Photos. The Secretary of State’s regulations on the Fair Information Practices Act recognize that a ‘personal identifier’ is ‘any data [such as a photograph] which may be used to fix a person’s identity either by itself or when combined with other data. . . .’ 950 CMR 33:04.” The Department also states that “[f]ederal law also protects ‘personal information’ required for motor vehicle licensing, including an individual’s photograph.’ 18 U.S.C. §2725 (3). In fact, federal law treats an individual’s photograph or image as ‘highly restricted personal information’ and places additional restrictions on the unauthorized use and dissemination of such information. 18 U.S.C. §§2715 (4) & 18 U.S.C. §2721 (a)(2).”

Fair Information Practices Act (FIPA)

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.

Based on the Department’s response, it is unclear how the listed statutes, by necessary implication, permit the Department to withhold the duty photos from disclosure. Consequently, I find the Department has not met its burden to withhold the requested records from disclosure under Exemption (a).

Exemption (b)

Exemption (b) permits the withholding of:

records that are related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary government functions requires such withholding

G. L. c. 4, § 7(26)(b).

There are no authoritative Massachusetts decisions interpreting Exemption (b). The general purpose of the cognate federal exemption is to relieve agencies of the burden of assembling and maintaining for public inspection materials in which the public cannot reasonably be expected to have an interest. See Department of the Air Force v. Rose, 425 U.S. 352, 362-70 (1976) (interpreting the federal Freedom of Information Act, which provides an exemption for records which are “related solely to the internal personnel rules and practices of an agency”); see also Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432 (1983) (Massachusetts Public Records Law modeled on federal Freedom of Information Act).

The courts have interpreted the federal exemption to allow withholding of materials that, if released, could cause agency rules or regulations to be circumvented. See Fiumara v. Higgins, 572 F. Supp. 1093, 1102 (1983) (internal codes are exempt where disclosure may enable outsiders to circumvent agency functions). The analysis employed by the federal courts requires a two-pronged test. Material is exempt if it is predominantly used internally and if disclosure would significantly risk circumvention of agency regulations and statutes. See Marrera v. United States Dep’t of Justice, 622 F. Supp. 51, 55 (D.D.C. 1985) (Bureau of Prisons access and identity codes were properly withheld as materials in which the public would have no legitimate interest or which would compromise security if disclosed).

Under Exemption (b), the Department states that “[g]iven the lack of case law regarding the application of exemption (b) in Massachusetts, the federal courts interpretation of 5 U.S.C. § 552(b)(2), the federal equivalent to exemption (b), is instructive.” The Department explains that “5 U.S.C. § 552(b)(2)(hereinafter ‘exemption 2’), shields from public disclosure information that is ‘related solely to the internal personnel rules and practices of an agency.’ The courts have interpreted the phrase ‘personnel rules and practices to include not only ‘minor employment matters’ but also ‘other rules and practices governing agency personnel.’ See Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056 (D.C.Cir.1981)(en banc).”

The Department further states that “[t]he information need not actually be ‘rules and practices’ to qualify under exemption 2, as the statute provides, but also exempts matters ‘related’ to agency rules and practices. Concepcion v. F.B.I., 606 F. Supp. 2d 14, 30-31 (D.D.C. 2009)(citation omitted). Information is exempt from disclosure under exemption 2 if, like the photograph in question here, it is ‘used for predominantly internal purposes,’ Crooker, 670 F.2d at 1074 and ‘the material relates to trivial administrative matters of no genuine public interest.’

Schwanner v. Dep't of the Air Force, 898 F.2d 793, 794 (D.C.Cir.1990)(citations omitted).” The Department cites several other cases to support its Exemption (b) claim, and contends that “[a]n employee’s appearance in an ID photograph does not, in any way, promote such a purpose and reveals nothing about government operations or whether an agency employee is ‘carrying out [her] duties in an efficient and law-abiding manner.’”

Based on the Department’s response, I find the Department has not met its burden to establish that these duty photos are solely related to internal personnel rules and practices of the government unit; for example, they are not policies or procedures that pertain to personnel rules or practices of the Department. It is additionally uncertain how disclosure of the duty photographs would hinder the proper performance of a necessary government function. Therefore, the Department has not met its burden to withhold responsive duty photos under Exemption (b).

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).

First clause of Exemption (c) – personnel

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 Publishing 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).

Under Exemption (c), the Department explains that its “. . . duty photographs are taken by the Photo ID Unit located at General Headquarters. The Photo ID Unit creates and provides each Department member, sworn and civilian, with an identification card featuring his or her photo. All photos taken of Department members are created, stored and maintained by the Photo ID Unit.” The Department explains that “[t]he purpose of the photo ID is twofold. The ID photograph itself promotes safety in that it identifies the bearer as a State Police employee with the proper authorization to be in a State Police building. Second, it creates a unique record of an individual for the Department’s own internal administrative and personnel purposes. The photographs exists within a Department database and identifies the employee as State Police personnel. The photo ID is a unique record of an individual for the Department’s own documentation purposes.” As such, the Department asserts that the “. . . photo ID’s of Department employees are personnel information for purposes of exemption (c). While employee ID photos may not be contained solely in personnel files, exemption pursuant to the personnel clause of M.G.L. c. 4, §7, cl. 26 (c) is appropriate where the photographs are used exclusively for employee identification,” and cites the Wakefield and Globe Newspaper Co. decisions to support its position.

Based on the Department’s response, I find the Department has not met its burden to show how the responsive duty photos constitute one of the “core categories of personnel information,” such as an employment application, employee work evaluation, disciplinary documentation, or promotion, demotion, or termination information, that is useful in evaluating and making employment decisions regarding an employee, and which may be properly withheld from disclosure under the personnel clause of Exemption (c). See Worcester, 58 Mass. App. Ct. at 5; Wakefield, 431 Mass. at 798.

Exemption (o)

Exemption (o) applies to:

the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in

section 167 of chapter 6.

G. L. c. 4, § 7(26)(o).

Exemption (n)

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what degree, the record sought resembles the records listed as examples in the statute;” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage.’” People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 289-90 (2017).

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” Id. at 289-90. The PETA decision further provides that “[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” Id.

Under Exemptions (o) and (n), the Department asserts that “[s]afety and security concerns for an individual’s identity, particularly public employees, are also reflected in the law. See, G.L. c. 4, §7, cl. 26 (o), which protects the home addresses, personal email address and home telephone number of a Commonwealth employee and G.L. 4, §7, cl. 26 (n) which protects, in part, material and information relating to the security and safety of individuals.” The Department posits that “[e]ach of these statutes and regulatory provisions reflect the desire to protect individuals from increasing privacy and safety risks accompanying indiscriminate collection and disclosure of their personal data. See, e.g., Georgiou v. Commissioner of the Department of Indus. Aces., 78 Mass. App. Ct. 1128 (2011) (Unpublished) (‘Georgiou’)(Injured

public employees' privacy interests in their names and addresses not outweighed by 'the public interest in knowing whether the department's servants are carrying out their duties in an efficient and law-abiding manner')." The Department asserts that "[c]ollectively, these decisions, statutes, and regulations reflect a public policy (and consensus) that privacy and security interests in personal data and information are seldom outweighed by a public interest in compelled disclosure. See e.g., Georgiou."

Based on the Department's response, whereas Exemption (o) does not contemplate the non-disclosure of an employee's photograph, it is unclear how the exemption permits the Department to withhold the duty photos from disclosure.

With respect to Exemption (n), based on its response, I find the Department has not met its burden to withhold duty photos under Exemption (n). In particular, the Department has not met its burden to show how the duty photos sufficiently "resemble the records listed as examples in the statute" as contemplated in PETA. Id. The examples provided in the statute are "blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure." G. L. c. 4, § 7(26)(n). As such, it is unclear how the requested records are similar to these examples or are one a terrorist would find useful to maximize damage.

Further, I find the Department has not provided "sufficient factual heft" to conclude that a reasonable person would agree that disclosure of the duty photos is "likely to jeopardize public safety or cyber security" as required by Exemption (n). Id. at 290-91. Therefore, the Department has not met its burden to show how Exemption (n) applies to withhold the responsive records.

Conclusion

Accordingly, the Department is ordered to provide Mr. Wallack 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.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Todd Wallack