



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

Rebecca S. Murray
Supervisor of Records

January 24, 2020
SPR20/0049

Jennifer Robertson
Public Records Manager
Bureau of Environmental Health
Massachusetts Department of Public Health
250 Washington St.
Boston MA 02108

Dear Ms. Robertson:

I have received the petition of Daniel DeFraia appealing the response of the Massachusetts Department of Public Health (Department) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on November 21, 2019, Mr. DeFraia requested "childhood lead poisoning and level of concern data maintained by the Massachusetts Department of Public Health and other sources for the year of 2018." He noted "I am not requesting the [D]epartment's pre-decision analysis, but the data itself...."

The Department responded on December 6, 2019 by denying access to responsive records pursuant to Exemption (d) of the Public Records Law. G. L. c. 4, § 7(26)(d). Unsatisfied with the Department's response, Mr. DeFraia petitioned this office and this appeal 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. 32.06(3). "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.

Appeal

The Department cited Exemption (d) in support of withholding responsive records.

Exemption (d)

Exemption (d) allows the withholding of:

inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based

G. L. c. 4, § 7 (26)(d).

Exemption (d) is intended to avoid premature release of materials that could taint the deliberative process if disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. See Babets v. Sec'y of the Exec. Office of Human Servs., 403 Mass. 230, 237 n.8 (1988). Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. G. L. c. 4, § 7(26)(d); see also Env'tl. Protection Agency, 410 U.S. at 89 (purely factual matters used in the development of government policy are subject to disclosure).

The Department's December 6th response indicates "[t]he Childhood Lead Poisoning Prevention Program (CLPPP) Screening and Prevalence Statistics report for 2018 is presently undergoing data validation and quality control review to ensure the accuracy and completeness of the data. As such, this report and the underlying data are exempt from disclosure under the 'deliberative process' exemption (M.G.L. c. 4, § 7 (26)(d) in that the report constitutes an intra-agency or inter-agency memoranda or letter under policy development and the underlying data, which forms the basis for the report, are an incomplete factual study upon which such policy positions are based." You further assert "[i]n order to protect the integrity of Department policies under development, BEH [Bureau of Environmental Health] cannot publicly disclose incomplete or inaccurate factual data on childhood lead poisoning which would compromise the Department's policy development. The report and data will be published on the Department's website and publicly available once finalized."

In his appeal Mr. DeFraia argues, in part, "... the denial tries to create the false categories 'incomplete' and 'under review' which have no legal barring on the release of data. Besides, the fact of data being under review does not change its legal status." He also notes "... the courts have long held that data itself does not constitute an interagency memo or fall within deliberative process" and he refers to Env'tl. Protection Agency v. Mink, 410 U.S. 73, 89 (1973).

In a recent, similar case, the Superior Court found that certain data files “do not fall within [E]xemption (d), as a matter of law, because they are not ‘factual studies or reports’ that are part of ‘inter-agency or intra-agency memoranda or letters.’ While the data at issue may be used by [the Department] to develop policies, [E]xemption (d) cannot be read so broadly as to apply to any compilation of data used by state agencies for this purpose.” See Boston Globe Media Partners, LLC vs. Dep’t of Pub. Health, Suffolk. Sup. No. 19-02387, at 8 (October 21, 2019). The court concluded by indicating “[E]xemption (d) does not apply to the requested data and it must be produced to the Globe.” Id.

In light of the above, I find that the Department has not met its burden to establish that the requested records, specifically a copy of data, meet the threshold criteria of “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency” required for Exemption (d) to apply. Further, despite the Department’s argument that the requested data is part of an “incomplete” and “inaccurate” factual study or report, Mr. DeFraia is not seeking a draft copy of the agency’s report, but the underlying data itself and it is unclear how the requested data is not a purely factual matter that is subject to disclosure. See id.

Conclusion

Accordingly, the Department is ordered to provide Mr. DeFraia records responsive to his request, 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.

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: Daniel DeFraia