



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

Rebecca S. Murray  
Supervisor of Records

February 11, 2020  
**SPR20/0177**

Jennifer M. Staples, Esq.  
Records Access Officer  
Massachusetts State Police  
470 Worcester Road  
Framingham, MA 01702

Dear Attorney Staples:

I have received the petition of Laura Crimaldi 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, on October 11, 2019, Ms. Crimaldi requested:

“Any and all photographs of drugs seized from [an] [individual] on 8/10/2018 for [a] [certain] case[;]  
Any and all photographs/video from the booking of [an] [individual] at the Springfield State Police barracks on 8/10/2018 for [a] [certain] case;  
Any and all police radio transmissions associated with the arrest of [identified] [individuals] on 8/10/2018 for [a] [certain] case.”

***Previous appeal***

This request was the subject of a previous appeal which I closed because the Department indicated it would provide Ms. Crimaldi with a further response to her request. See SPR20/0007 Determination of the Supervisor of Records (January 13, 2020). Unsatisfied with the Department’s response, Ms. Crimaldi petitioned this office and as a result, SPR20/0177 was opened.

***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(d)(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...”); 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).

### *The Department’s responses*

The Department responded on December 5, 2019 and denied access to responsive records pursuant to Exemptions (a) and (f) of the Public Records Law. The Department provided a subsequent response on January 27, 2020. In its January 27<sup>th</sup> response, the Department identified the records as follows: arrest report, administrative journal log and the radio transmissions related to the incident and denied access to the responsive records pursuant to Exemptions (a) and (f) of the Public Records Law. G. L. c. 4, § 7(26)(a), (f). The Department further asserted that there are no responsive records regarding the request for photographs of drugs and the Department was unable to identify a booking video related to the incident.

### *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, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-546 (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.

In its January 27<sup>th</sup> response the Department stated that the responsive records are exempt pursuant to G. L. c. 6, §167 and G. L. c. 6, §72 which prohibits the dissemination of criminal offender record information (CORI) information.

The updated definition of CORI states in relevant part:

[R]ecords and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. *Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment.* Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information . . . Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration

G. L. c. 6, § 167 (*emphasis added*).

Under Exemption (a), the Department asserts that “police report and journal log associated with this arrest was compiled by a criminal justice agency [and] concerns ... an identifiable individual, and relates directly to the nature of his criminal charges and his arrest ...” and is exempt from disclosure pursuant to Exemption (a).

It is unclear how all the withheld records falls under the CORI Act; specifically, it is unclear how it is "information recorded in criminal proceedings that are not dismissed before arraignment," as described above. In addition, the Supreme Judicial Court has held "there is no violation of the CORI statute when the search specifications consist of information that would also be revealed on the court's records accessible to the public." Globe Newspaper Co. v. Dist. Attorney for the Middle Dist., 439 Mass. 374, 384 (2003). The Department has not explained whether it possesses responsive records that are considered public in light of the updated CORI definition and/or the Globe decision. The Department must address these issues. Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

#### *Exemption (f)*

Exemption (f) permits the withholding of:

investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest

G. L. c. 4, § 7(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Attorney Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a "case-by-case consideration" of whether disclosure "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." See Reinstein, 378 Mass. at 289-90.

Under Exemption (f), the Department states that it is exempt from disclosing the police report, journal log and radio transmissions "... because the police report and journal log were compiled out of the public view by members of the Massachusetts State Police and their disclosure would hinder the Troopers' ability to be ... candid in recording ... observations, hypotheses and interim conclusions and the disclosure of radio transmission would prohibit the Troopers' ability to be ... candid while speaking on the air ...". The Department cites the Bougas case to explain the policy positions behind the exemption.

I find that the Department has not met its burden of specificity in withholding portions of the responsive records under Exemption (f). The Department did not provide supporting information concerning how disclosure of the information would hinder the Troopers' ability to be candid in recording or speaking on the air. It is additionally uncertain how disclosure "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest" as required by Exemption (f). It is also unclear why the Department cannot redact where necessary to preserve confidentiality and provide the remaining portions of the record. See Antell, 52 Mass. App. Ct. at 248.

### ***No Duty to Create Records***

Please be advised, under the Public Records Law the Department is not required to create a record in response to a public records request. See G. L. c. 66, §6A(d). The duty to comply with requests for records extends to those records that exist and are in the possession, custody, or control of the custodian of records at the time of the request. See G. L. c. 66, §10(a)(ii). In a conversation between a Public Records Division staff attorney and a Department representative, the Department confirmed that it had no records pursuant to photographs of drugs or a booking video related to the incident.

### ***Conclusion***

Accordingly, the Department is ordered to provide Ms. Crimaldi with a response to the request, provided in a manner consistent with this order, the Public Records Law and its

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Regulations within ten (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 Laura Crimaldi