



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

Rebecca S. Murray
Supervisor of Records

April 10, 2020
SPR20/0603

Sarah G. Kim, Esq.
Deputy Treasurer and General Counsel
Office of the State Treasurer and Receiver General
One Ashburton Place, 12th Floor
Boston, MA 02108

Dear Attorney Kim:

I have received the petition of Matthew Rocheleau of the *Boston Globe* appealing the response of the Office of the State Treasurer and Receiver General (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on February 3, 2020, Mr. Rocheleau requested the following records:

- “[1] . . . copies of the materials that MSP sent last week to the SRB when it referred cases of 24 retired troopers for review in light of the OT cases . . .
- [2] . . . copies of the retirement applications for those 24 individuals and
- [3] . . . any materials the SRB has received from any referral the MSP made regarding retired Lt. Paul Wosny.”

The Office responded on March 2, 2020, providing portions of the responsive records and denying access to others pursuant to Exemptions (d), (f), and (n) of the Public Records Law. G. L. c. 4, § 7(26)(d), (f), (n). Unsatisfied with the Office’s response, Mr. Rocheleau petitioned this office and this appeal, SPR20/0603, 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 Office's March 2nd response

In its March 2, 2020 response, the Office indicates that it enclosed certain records responsive to requests 1, 2 and 3. However, the Office states that it withheld the following records responsive to request 1 pursuant to Exemptions (d), (f), and (n): “. . . 1) a January 14, 2020 memo prepared by the Internal Affairs Section of the State Police concerning thirteen retired members of Troop E; 2) for each of the thirteen retired members, individualized memos and spreadsheets documenting the confidential investigative techniques described in the January 14, 2020 memo; and 3) documents showing the State Police's investigation pertaining to a fourteenth retired member of Troop E and discussing its confidential investigative techniques.”

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 Envtl. Protection Agency v. Mink, 410 U.S. 73, 89 (1973) (purely factual matters used in the development of government policy are subject to disclosure).

Under Exemption (d), the Office states that it withheld these records because, at the request of the State Police, it “. . . is reviewing whether it may act pursuant to G. L. c. 32, § 15(1) ('Section 15(1)'), a provision which is rarely invoked. [The Office] must assess whether the withheld documents are of the kind sufficient to form the basis of a case and whether to require

the same kinds of documents from other state agencies before pursuing cases under Section 15(1) in the future. For the fourteen cases at issue, the withheld documents will be the basis for [Office] staff's further investigation and potential litigation strategy."

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. Bogas 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 Office indicates that the records were withheld, because they "... reflect the scope, methods, and various tools available to and used by the State Police to conduct its inquiry. The advanced disclosure risks future investigations by providing information that would enable others to tamper with or evade these methods and tools." The Office further explains that "... the memos also reflect statements provided by named witnesses, including civilians. Of concern for [Office] staff, the witnesses named in the documents may refuse to cooperate further due to concerns about retribution or intimidation. Further, in current and future matters, individuals with pertinent information, who have not yet been identified, may not come forward or cooperate due to the same concerns."

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. Exemption (n) allows for the withholding of certain records which if released would jeopardize public

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.” PETA, 477 Mass. at 289-90.

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 “because 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.

PETA also provides that “[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian’s burden in demonstrating ‘reasonable judgment’ and vice versa.” PETA at 290.

Under Exemption (n), the Office indicates that it is withholding the records “. . . in the interest of the security, safety, transportation, and cyber security of the Commonwealth.” The Office explains that “. . . the documents describe aspects of the electronic and telecommunication systems used by at least two different state agencies. The disclosure of this and other information contained in the withheld documents is likely to jeopardize safety of state employees and the public and cyber security.”

While this appeal was pending, this office was notified that a representative from the Office intends on providing a supplemental response to Mr. Rocheleau regarding his request.

Accordingly, the Office is ordered to provide Mr. Rocheleau with a response to his request in a manner consistent with this order, the Public Records Law and its Regulations as soon as practicable. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us. Mr. Rocheleau may appeal the substantive nature of the Office’s response within ninety days. See 950 C.M.R. 32.08(1).

Sarah G. Kim, Esq.
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Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first name "Rebecca" and last name "Murray" clearly distinguishable.

Rebecca S. Murray
Supervisor of Records

cc: Matthew Rocheleau