



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

Rebecca S. Murray
Supervisor of Records

July 29, 2021
SPR21/1759

Dolores Randolph
Director of Communications
Boston Water and Sewer Commission
980 Harrison Avenue
Boston, MA 02119

Dear Ms. Randolph:

I have received the petition of Laura Crimaldi, of the *Boston Globe* appealing the response of the Boston Water and Sewer Commission (Commission) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Ms. Crimaldi requested records regarding Atlantic Coast Utilities, LLC and two identified persons pertaining to an incident at a construction site on High Street in Boston.

Prior appeals

The requested records were the subject of prior appeals. See SPR21/1089 and SPR21/1093 Determinations of the Supervisor of Records (Supervisor) (May 11, 2021).

In a February 26, 2021 response, the Commission denied the request under Exemption (f) due to an ongoing investigation. In its February 26th response, the Commission posits, "...disclosure of these records will compromise an ongoing law enforcement investigation and is, therefore, not in the public interest." As a result, Ms. Crimaldi petitioned the Supervisor, and an appeal was opened. I closed the appeal with the Commission's intent to provide a response.

In its April 27, 2021 response, the Commission denied the request for the records a second time under Exemption (f) of the Public Records Law due to an ongoing investigation. As a result, Ms. Crimaldi petitioned the Supervisor again, and appeal SPR21/1093 was opened. On May 26th the Commission provided a response to SPR21/1093, explaining that the records are the subject of a Grand Jury investigation by the Suffolk County District Attorney's Office, therefore, the Commission continues to withhold the records under Exemption (f) of the Public Records Law. Unsatisfied with the Commission's May 26th response, Ms. Crimaldi petitioned the Supervisor, and the current appeal 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).

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, 371 Mass at 62. 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 289-290. To properly claim that Exemption (f) applies, a custodian must demonstrate that the disclosure of the records would have a prejudicial effect on its investigative efforts. The following three categories could justify withholding records under Exemption (f):

- The records reflect an ongoing investigation, such that any information relating to an ongoing investigation that could potentially alert suspects or targets to the activities of investigative officials;
- The records reflect internal techniques, procedures, or sources, such that their disclosure would prejudice not only ongoing, but future law enforcement efforts; or
- Disclosure of records would cause a chilling effect, because the exemption allows investigative officials to provide an assurance of confidentiality to individuals so that they will speak openly about matters under investigation. Such records in this third category include: any details in statements that directly or indirectly identify a private

citizen who volunteers as a witness; an entire statement if the identity of witnesses is known to the requestor; and information voluntarily provided by an individual or entity to aid in the investigation.

Whether an investigation is ongoing and active bears some weight on whether the investigatory exemption will apply. Where an investigation remains open, the courts will look to the effect disclosure of the investigatory materials will have on the ability of law enforcement to effectively prosecute a case. The Commission is advised, a showing that the requested records are “investigatory materials” relating to an ongoing investigation is not enough; the Commission’s February, April and May responses did not demonstrate that the disclosure of any of the records, even in a redacted format, would likely be so prejudicial to effective law enforcement that disclosure would not be in the public interest.

In its May 26th response, the Commission asserts, “[p]lease be advised that the requested records are the subject of a subpoena issued on behalf of the Suffolk County District Attorney’s office pursuant to a Grand Jury criminal investigation.” The Commission’s footnote 1 states, “as a point of note, the requested records are also the subject of a subpoena issued on behalf of Occupational Safety and Health Administration (OSHA) pursuant to its investigation into potential OSHA violations.” In addition, the Commission asserts, “[t]he requirement that grand jury proceedings remain secret is deeply rooted in the common law of the Commonwealth.” *citing, WBZ-TV4 v. Dist. Att’y for Suffolk Cnty*, 408 Mass. 595, 599-600 (1990).

Finally, the Commission contends, “[d]ue to the ongoing investigatory nature of this review, this office does not have adequate information as to what particular parts of the documents may prejudice the investigation should they be made available to the public realm prior to the completion of the grand jury’s investigation.”

Based on the Commission’s responses, it is still unclear what type(s) or categories of records, in the Commission’s possession, it is withholding under Exemption (f). G. L. c. 66, § 10(b)(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 . . .”); *see also Globe Newspaper Co. v. Police Comm’r*, 419 Mass. 852, 857 (1995); *Flatley*, 419 Mass. at 511.

Additionally, it is unclear what records or categories of records withheld by the Commission, under Exemption (f), that are the subject(s) of the grand jury investigations. Therefore, the Commission must provide this office with a custodial index of the records which identifies the records responsive to Ms. Crimaldi’s request that the Commission has withheld.

Custodial indexing of records

“The Supervisor may require a records access officer or custodian to compile an index of the requested records within the context of a public records appeal under 950 C.M.R. 32.08.” 950 C.M.R. 32.08(5)(a).

Said index shall be a public record and shall meet the following requirements:

1. the index shall be contained in one document, complete in itself;
2. the index shall adequately describe each withheld record or redaction from a released record;
3. the index must state the exemption or exemptions claimed for each withheld record or each redaction of a record; and
4. the descriptions of the withheld material and the exemption or exemptions claimed for the withheld material must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt.”

950 C.M.R. 32.08(5)(b).

Conclusion

Accordingly, the Commission is ordered to provide this office with a custodial index of the records responsive to the request, 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: Laura Crimaldi, the *Boston Globe*