



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

Rebecca S. Murray
Supervisor of Records

February 23, 2022
SPR22/0418

Cynthia Mahr
Records Access Officer
Wellesley School Department
40 Kingsbury Street
Wellesley, MA 02481

Dear Ms. Mahr:

I have received your petition on behalf of the Wellesley School Department (School) seeking permission to charge for time spent segregating or redacting responsive records and a waiver of statutory limits on fees that may be assessed in responding to the request. G. L. c. 66, § 10(c); G. L. c. 66, § 10(d)(iv). As required by law, the School furnished a copy of this petition to the requestor. G. L. c. 66, § 10(c). On February 3, 2022, Elizabeth Koh of the *Boston Globe*, requested several categories of records “pertaining to inquiries related to allegations of abuse, bullying, harassment, discrimination or other misbehavior or misconduct by students, staff members, and/or coaches.”

Petition to Assess Fees

The Supervisor of Records (Supervisor) may approve a petition from a municipality to charge for time spent segregating or redacting or to charge in excess of \$25 per hour, if the Supervisor determines that 1) the request is for a commercial purpose or 2) the fee represents an actual and good faith representation by the municipality to comply with the request. G. L. c. 66, § 10(d)(iv).

In rendering such a decision, the Supervisor is required to consider the following: a) the public interest served by limiting the cost of public access to the records; b) the financial ability of the requestor to pay the additional or increased fees; and c) any other relevant extenuating circumstances. G. L. c. 66, § 10(d)(iv).

The statute sets out a two-prong test for determining whether the Supervisor may approve a municipality’s petition to allow the municipality to charge for time spent segregating or redacting records. The first prong is whether the request for records was made for a commercial

purpose. G. L. c. 66, § 10(d)(iv). It is my determination that this request was not made for a commercial purpose.

The second prong of the test is whether the fee represents an actual and good faith representation by the municipality to comply with the request. The Supervisor must consider 1) if the fee is necessary such that the request could not have been prudently completed without the redaction or segregation or fee in excess of \$25 per hour; 2) the amount of the fee is reasonable; and 3) the fee is not designed to limit, deter or prevent access to requested public records. Id.

Fee Estimates

A municipality may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Municipalities may not assess a fee for the first 2 (two) hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested unless the municipality has 20,000 people or less. G. L. c. 66, § 10(d)(iii). Where appropriate, municipalities may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than \$25 per hour. Id. However, municipalities may charge more than \$25 per hour if such rate is approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv).

A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(iii); 950 C.M.R. 32.06(4).

Current Petition

In its petition, the School states the following:

The School Department estimates that there are 850 emails and associated records responsive to the request. It is likely that the School Department must redact or withhold many of these records because they are subject to one or more of the exemptions to the Public Records Law.

Notably, portions of the requested records may be protected under Exemption (a), which applies to records that are specifically or by necessary implication exempted from disclosure by statute. In this case, many of the records may contain student information protected from release under the Family Education Rights Privacy Act ('FERPA'), 20

U.S.C § 1232g and 34 C.F.R. Part 99.

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Additionally, it is also likely that these record could include information protected from release under one of the other exemptions to the Public Records Law. Below is an example of some exemptions that may apply:

- Exemption (c) – The records may contain information concerning medical and/or mental health information pertaining to students and staff. Further, some of the the records constitute personnel files and may contain information that would result in personal embarrassment and/or intimate details of a highly personal nature. In such instances, the information will be protected under Exemption (c).
- Exemption (f)-- The records may contain materials pertaining of ongoing investigations as well as voluntary witness statements and identities.
- Attorney Client Communications – The third-party legal investigators receive information from the Town or Department attorneys. Further, School Department employees may correspond with Town or Department attorneys in a manner covered by the attorney client privilege. It is possible that such information may not be subject to release.

Fee in Excess of \$25.00 per Hour

In its petition, the School states the following concerning its request to charge a fee in excess of \$25.00 per hour:

[The Assistant Superintendent for Finance and Operations] is the lowest paid employee capable of performing this review; the costs associated with [her] are \$87.91 per hour. She has the authority to review these records, which may include confidential privacy information. She also has the full understanding of FERPA and can interpret that law as it applies to records. However, rather than requesting to assess fees at the actual rate that the Town will be charged for [the Assistant Superintendent for Finance and Operations'] time, the School Department only seeks permission to charge \$43.86 per hour, which is the hourly rate of . . . the Administrative Assistant to the Assistant Superintendent of Finance and Operations.

Conclusion

Given the public interest served by limiting the cost of public access to the requested records, I am unable to grant permission to charge for time spent segregating or redacting responsive records or to charge in excess of \$25 an hour. Please note, this does not preclude the School from charging for segregation and redaction that is required by law at \$25.00 per hour.

Further, this office encourages Ms. Koh and the School continue to communicate to facilitate providing records more efficiently and affordably. See G. L. c. 66, § 10(b)(vii)(an agency or municipality shall suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the

agency or municipality to produce records sought more efficiently and affordably). Any fee estimate by the School must be in compliance with this determination, the Public Records Law, and its Access Regulations.

When preparing a fee estimate for the provision of the requested records the School is advised to provide a detailed explanation to the requestor detailing why the amount of time is necessary. See G. L. c. 66, § 10(d)(iv) (requiring the amount of the fee must be reasonable). The School must provide a response to Ms. Koh within five business days of receipt of this determination. See 950 C.M.R. 32.06(4)(h)(4). Ms. Koh may appeal the School's fee estimate within ninety days. See 950 C.M.R. 32.08(1).

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first letters of each word being capitalized and prominent.

Rebecca S. Murray
Supervisor of Records

cc: Elizabeth Koh