



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

Manza Arthur
Supervisor of Records

September 6, 2022
SPR22/1930

Peter Johnson-Staub
Acting Town Manager
Town of Falmouth
157 Locust Street
Falmouth, MA 02540

Dear Mr. Johnson-Staub:

I have received the petition of Richard Duby appealing the response of the Town of Falmouth (Town) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On July 19, 2022, Mr. Duby requested serial numbers of the Falmouth Police Department rifles that were traded in to a store.

Previous Appeal

This request was the subject of a previous appeal. See SPR22/1930 Determination of the Supervisor of Records (August 5, 2022). In my August 5th determination, I ordered the Town to provide Mr. Duby with a response to his request. On August 19, 2022, the Town responded. Unsatisfied with the Town's response, Mr. Duby petitioned this office and this appeal, SPR22/1930, was opened as a result.

Purpose of request; identity of requestor

Please note that the reason for which a requestor seeks access to or a copy of a public record does not afford any greater right of access to the requested information than other persons in the general public. The Public Records Law does not distinguish between requestors. Access to a record pursuant to the Public Records Law rests on the content of the record and not the circumstances of the requestor. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976). Accordingly, Mr. Duby's purpose in making the request has no bearing on the public status of any existing responsive records.

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 agency or municipality 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. Att’y for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).

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 Town’s August 19th Response

In its August 19, 2022 response, the Town asserts that it is withholding the responsive records pursuant to G. L. c. 66, § 10B, Exemption (c), and Exemption (j).

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 *Att’y Gen. v. Collector of Lynn*, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (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.

G. L. c. 66, § 10B

G. L. c. 66, § 10B provides, in pertinent part, that:

[t]he commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined in section 121 of chapter 140, *shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor*, as defined in said section 121 of said chapter 140, and names and addresses of persons licensed to carry or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in section 167 of chapter 6 and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The Town argues:

You have consistently argued that the serial numbers here are not connected to specific people, however, it is the aggregation of information that you are collecting that is alarming. Globe Newspaper v. Boston Retirement Bd., 388 Mass. 427, 438 (1983)(a record that contains no personally identifiable information, but can still lead to identification of an individual raises privacy concerns)...[I]f you are successful here, you are one step closer to tracing these 21 assault weapons to the names and addresses of their buyers. You claim that this is not your goal, but making this information public offers it to someone who might have nefarious intent to locate where these assault weapons are housed.

Section 10B protects not only records that divulge certain protected personnel information, but also records that *tend to divulge* this same information. You are currently on a track that is certain to lead to the disclosure of the location of certain assault weapons, and with that, the identities of those who own them. Disclosure of the serial numbers of these 21 assault weapons could very likely tend to divulge the home addresses of law enforcement and/or holders of valid LTCs.

Based on the Town's response, it is unclear how this statute specifically or by necessary implication exempts the serial numbers from disclosure. See G. L. c. 4, § 7(26)(a). Further it is uncertain how disclosure of the redacted serial numbers would "divulge the names or addresses

of persons who own or possess firearms . . .” See G. L. c. 66, § 10B.

Exemption (c)

Exemption (c) applies to:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation

G. L. c. 4, § 7(26)(c).

Analysis under Exemption (c) is subjective in nature and requires a balancing of the public’s right to know against the relevant privacy interests at stake. Torres v. Att’y Gen., 391 Mass. 1, 9 (1984); Att’y Gen. v. Assistant Comm’r of Real Prop. Dep’t, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case by case basis.

There are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 292 (2017). This exemption requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law abiding and efficient manner. Id. at 292.

The Town argues that:

There is a substantial risk that you will be able to piece together enough information in this crusade to enable you to identify the police officers or other properly licensed individuals who will eventually purchase these firearms. While the serial numbers, standing alone, may not be personally identifiable information, they are a unique mark that links a particular firearm to a particular person. Boston Retirement Bd., 388 Mass. at 438 (a record that contains no personally identifiable information, but can still lead to identification of an individual raises privacy concerns). If the acquisition of these serial numbers allows someone to identify the specific law enforcement personnel who purchased or who will purchase these weapons, this will place a target on the homes of the officers. These weapons are not available on the open market. Knowing where they are located would bring an increased danger of home invasion by someone who wants a firearm that they cannot legally purchase.

Conversely, there is no public good or legitimate interest under the public records law to be served in divulging the serial numbers of these 21 firearms. Indeed, your desire to obtain this information is tied to a private transaction between Powderhorn and the eventual buyers of the firearms, a commercial exchange that has nothing to do with the Town. The information sought, therefore, cannot be used to illustrate whether government officials are performing their jobs properly. Instead, weighing the privacy concerns outlined above against the recognized interests served by the public records law, only the potential for harm remains. The harm here is real and possible.... If you are able to do the same for these 21 firearms, it is entirely feasible that you will be able to trace these firearms to Powderhorn and you will be one small step closer to then being able to connect these 21 firearms to the next buyers. Should these serial numbers be used, with or without intent, to discover the location of assault weapons in the homes of law enforcement or private citizens, a target will be placed on these homes.

Based on the Town's response, it is unclear how the requested information constitutes intimate details of a highly personal nature, nor how disclosure would lead to the embarrassment of individuals of normal sensibilities.

Further, in Department of Public Health, the Supreme Judicial Court described additional factors to consider when analyzing privacy issues: (1) the extent to which multiple indices could be compared to reveal private information, (2) the availability from other sources of the information in the requested indices, (3) the risk from disclosure of identity theft or fraud, and (4) the extent to which disclosure could result in unwanted intrusions. Boston Globe Media Partners, LLC, v. Department of Public Health, 482 Mass. at 442.

Exemption (j)

Exemption (j) of the Public Records Law permits a records custodian to withhold or redact portions of records containing:

the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards

G. L. c. 4, § 7(26)(j).

The scope of the exemption is limited to restricting the public disclosure of the name and address of the individual. A records custodian may withhold an entire firearms record if the

requestor knows with certainty that this particular record pertains to a specific address or individual.

Based on the Town's response, where this exemption is limited to the withholding of names and addresses, it is unclear how the Town is permitted to withhold the serial numbers under this exemption. The Town must clarify these matters.

Consequently, I find the Town has not met its burden to withhold the requested records from disclosure under Exemptions (a), (c), and (j) of the Public Records Law.

Conclusion

Accordingly, the Town is ordered to provide Mr. Duby with a response to his request, provided in a manner consistent with this order, the Public Records Law, and its 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 the response to this office at pre@sec.state.ma.us.

Sincerely,

A handwritten signature in black ink that reads "Manza Arthur". The signature is written in a cursive style with a large, prominent initial "M".

Manza Arthur
Supervisor of Records

cc: Richard Duby