



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

Manza Arthur
Supervisor of Records

April 13, 2023
SPR23/0607

Mark Purple
Town Administrator
Southborough Town Hall
17 Common Street
Southborough, MA 01772

Dear Mr. Purple:

I have received the petition of Thomas Grillo, of the *Boston Globe*, appealing the response of the Town of Southborough (Town) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On February 16, 2023, Mr. Grillo requested “copies of the surveys completed by police department staff that were sent from [the Town Administrator’s] office last year.”

Previous Appeal

This request was the subject of a previous appeal. See SPR23/0401 Determination of the Supervisor of Records (March 14, 2023). In my March 14th determination, I ordered the Town to clarify its claims to withhold the responsive records under Exemptions (c) and (f) of the Public Records Law, and the attorney-client privilege. Subsequently, the Town responded on March 29, 2023, citing the attorney-client privilege and Exemption (f) for withholding the responsive records. Unsatisfied with the Town’s response, Mr. Grillo appealed, and this case 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 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(b)(iv); 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). 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 Town’s March 25th Response

In its March 25, 2023 response, the Town cites Exemption (f) of the Public Records law and the attorney-client privilege for withholding responsive records. See G. L. c. 4, § 7(26)(f).

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. Att’y 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.

In its March 29th response, the Town argues the following under Exemption (f):

[T]he surveys here were voluntary and distinct from caselaw ordering disclosure. The original request to complete the survey explicitly identified the purpose behind the survey as investigating liability, that completing the survey was optional, and that all survey responses would and continue to be anonymous. ...

Further, none of the survey responses were mandatory, rather, all could be skipped.

...

Next, the surveys contain the following information related to the investigation into certain conduct by [the] Chief [of Police]: information that, in their aggregate and through comparison, could identify voluntary witnesses; information that could disclose the substance of said witnesses' statements; and information that could disclose the confidential investigative techniques, procedures, or sources of information related to the investigation. The identifying information within the surveys is extensive, as witnesses disclosed their own personal experiences within the Department. Should that information be publicized, witnesses could be identified and subject to criticism not only by their own colleagues but by the public at large. Avoiding that further discord within the Department justifies withholding the surveys.

Based on the Town's response, although the Town has explained that the surveys may contain identifying information, it is unclear why the surveys cannot be redacted in order to preserve the identities of the voluntary witnesses. The Town must explain whether segregable portions of the surveys can be provided. See G. L. c. 66, § 10(a); Reinstein, 378 Mass. at 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

Common Law Attorney-Client Privilege

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 450 n.9 (2007); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege "are required to produce detailed indices to support their claims of privilege." Suffolk, 449 Mass. at 460.

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege, the Supervisor of Records "shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a).

In its March 29th response, the Town provides a privilege log listing 22 documents that the Town intends to withhold pursuant to the attorney-client privilege. Additionally, the Town provides the following information concerning the attorney-client relationship:

First ... [Town Counsel] represent[s] the Town as a corporation, and Department staff are employees of that corporation. Second, the surveys asked respondents to detail their work place experiences, in their official capacities as police officers. Their responses therefore concern matters within the scope of the Department employees' duties. Third, [Town Counsel] commissioned these surveys in [her] representative capacity as part of the investigation into the liability of Department operations, as the email requesting the Department to take the surveys ... explicitly detailed. The Department employees therefore understood that the surveys were for the purpose of providing legal advice to the Town. Fourth and further, the email and the format of the surveys themselves conditioned responses on confidentiality and anonymity.

Although the Town has provided the above explanation concerning the existence of an attorney-client relationship between Town Counsel and the Police Department staff, in its privilege log, the Town has not provided the complete information required under G. L. c. 66, § 10A(a). Specifically, the Town has not provided the names of the authors of the responsive records. Rather, the Town has listed each author as a numbered "Anonymous Respondent." In order to withhold records under the attorney-client privilege, the Town must provide the names of the individual authors in accordance with G. L. c. 66, § 10A(a).

Conclusion

Accordingly, the Town is ordered to provide Mr. Grillo with a response to his request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within ten 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,



Manza Arthur
Supervisor of Records

cc: Thomas Grillo
Katherine McNamara Feodoroff, Esq.