



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

Manza Arthur
Supervisor of Records

April 24, 2023
SPR23/0697

Elizabeth Doherty, Esq.
Deputy General Counsel
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

Dear Attorney Doherty:

I have received the petition of Todd Wallack, of *WBUR*, appealing the response of the Executive Office of Energy and Environmental Affairs (Office) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On March 21, 2023, Mr. Wallack requested "... copies of any sexual harassment complaints against any employees of the executive office since 2020."

Prior Appeal

This request was the subject of a previous appeal. See SPR23/0685 Determination of the Supervisor of Records (April 7, 2023). The Office responded on April 5, 2023. Unsatisfied with the Office's response, Mr. Wallack petitioned this office and this appeal, SPR23/0697, 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. 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.

The Office's April 5th Response

In its April 5, 2023 response, the Office withheld the requested records pursuant to Exemptions (c) and (f) of the Public Records Law.

Exemption (c)

Exemption (c) permits the withholding of:

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.

Massachusetts courts have found that "core categories of personnel information that are 'useful in making employment decisions regarding an employee'" may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, "employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee," may be withheld pursuant to Exemption (c). Wakefield Teachers Ass'n v. Sch. Comm., 431 Mass. 792, 798 (2000). The courts have also discussed specific categories of records that may be redacted under Exemption (c). See Globe Newspaper Co. v. Exec. Office of Admin. and Fin., Suffolk Sup. No. 11-01184-A (June 14, 2013).

This exemption does not protect all data relating to specifically named individuals. Rather, 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).

The types of personal information which this exemption is designed to protect includes: marital status, paternity, substance abuse, government assistance, family disputes and reputation. Id. at 292 n.13; see also Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 (1988) (holding that a motor vehicle licensee has a privacy interest in disclosure of his social security

number).

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.

In its response, the Office states “... an agency need not consider the balancing of public and privacy interests required by the second clause of Exemption (c). In finding that a disciplinary report was exempt [for] ‘personnel information’ the *Wakefield* court stated the inquiry was ‘limited to ‘whether the records sought are or contain [personnel files or information].’”

The Office further stated, “[i]n addition, being cited as a Respondent in one of these reports could bring great embarrassment and have a negative impact on the employee’s career or other future opportunities. There is no question that the disclosure of these details would result in a personal embarrassment and could have devastating results if released. Redaction is not a satisfactory solution to this request. It is not possible to segregate the information to protect the individuals’ privacy. Disclosing information with such personalized and specific facts could lead to the identification of the individual employees. *Globe Newspaper Co. v. Boston Retirement Bd.*, at 438 (concluding that medical statements, even without other particular identifying details, creates a grave risk of indirect identification). The Appeals Court has recognized there are circumstances when a record must be withheld in its entirety because even with redactions it could lead to the disclosure of an employee’s identity.”

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 289-290.

In its response, the Office asserted, “[t]he Supreme Judicial Court recognized that the encouragement to come forward and speak freely is a principal objective of the investigatory exemption. *Globe Newspaper Co. v. Police Comm’r of Boston*, 419 Mass. 852, 862 (1995). Maintaining the integrity of the investigation, the confidential nature of the outcome, the identity of participants, protection of retaliation, and interest in encouraging future complainants or respondents to come forward and speak freely outweigh the public’s interest in disclosure.”

In camera inspection

In order to facilitate a determination as to the applicability of the Office’s Exemptions (c) and (f) claims to withhold the requested records pursuant to Exemptions (c) and (f) of the Public Records Law, the Office must provide this office with an un-redacted copy of the responsive records for *in camera* inspection. After I complete my review of the documents, I will return the records to your custody and issue an opinion on the public or exempt nature of the record. See 950 C.M.R. 32.08(4).

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations, 950 C.M.R. 32.08(4); see also G.L. c. 66, § 1. This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Massachusetts Comm’n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding. Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community. Please be aware, any cover letter submitted to accompany the relevant records may be subject to disclosure.

Order

Accordingly, the Office is ordered to provide this office with an un-redacted copy of the requested records for *in camera* inspection without delay.

Elizabeth Doherty, Esq.
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Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur". The signature is written in a cursive, flowing style.

Manza Arthur
Supervisor of Records

cc: Todd Wallack