



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

Manza Arthur
Supervisor of Records

April 28, 2023
SPR23/0600; SPR23/0745

Cole Cagle, Esq.
Assistant General Counsel
Office of the State Auditor
One Ashburton Place, Room 1819
Boston, MA 02108

Dear Attorney Cagle:

I have received the petition of Colman Herman appealing the response of the Office of the State Auditor (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On March 25, 2023, Mr. Herman requested “the separate complete report” of the audit of the “Plymouth County Sheriff’s Department dated March 15, 2023.”

Previous Appeals

This request was the subject of a previous appeal. See SPR23/0600 Determination of the Supervisor of Records (April 13, 2023). In my April 13th determination, I found that where the office had not required use of its portal in order for Mr. Herman to submit his request, the Office had complied with the requirements of 950 C.M.R. 32.06(1)(a)–(d). In an email to this office on April 14, 2023, Mr. Herman asks that I reconsider this portion of the determination, and SPR23/0600 was opened for reconsideration as a result.

Additionally, in my April 13th determination, I also ordered the Office to clarify its claims under Exemption (n) for redacting the responsive records. Subsequently, the Office responded on April 14, 2023. Unsatisfied with the Office’s response, Mr. Herman further appealed, and SPR23/0745 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.

Request for Reconsideration

In his April 14, 2023 request for reconsideration, Mr. Herman notes that the Office’s online portal includes a “declaration” and argues that the Office should be required “to remove the declaration from [its] online portal,” and “to make provision for requesters to keep a copy of their requests.”

As explained in the April 13th determination, while the Office has made its on-line portal available to submit public records requests, the Office has not required use of the portal in order for Mr. Herman to submit his request. Accordingly, after another careful and thorough review of this matter, I respectfully decline to reverse my findings in the April 13th determination.

The Office’s April 14th Response

In its April 14, 2023 response, the Office reiterates its claim under Exemption (n) for redacting the responsive records. See G. L. c. 4, § 7(26)(n).

Exemption (n)

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what

degree, the record sought resembles the records listed as examples in the statute;” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage.’” People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 289-90 (2017).

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” Id. at 289-90. The PETA decision further provides that “[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” Id.

PETA also provides that “[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian’s burden in demonstrating ‘reasonable judgment’ and vice versa.” PETA, at 290.

In its April 14th response, the Office argues the following under Exemption (n):

[T]he redactions include discussion of “records, including ... policies [and] procedures ... which relate to security measures, emergency preparedness [and] threat or vulnerability assessments ...” G. L. c. 4, § 7(26)(n). The audit report in question is of the Plymouth County Sheriff’s Department, a law enforcement agency, and there is a high likelihood that the redacted record “is one a terrorist ‘would find useful to maximize damage.’” People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 289-90 (2017). Importantly, threat assessments are one of the specified types of records that were envisioned as protected by exemption (n).

Additionally, in an April 19, 2023 email to Mr. Herman and this office, the Office further argues the following:

First, the OSA affirms that the redacted information is among the types of information not only contemplated by the statute but specifically listed (threat or vulnerability assessments) in the statute.

...

Moreover, it is wholly reasonable to infer that that mere disclosure of this highly sensitive and confidential information that identifies “vulnerabilities and threats” is “likely to jeopardize public safety or cyber security” as required by Exemption (n).

In Camera Inspection

In order to facilitate a determination as to the applicability of the Exemption (n) claim made by the Office to redact the responsive records, the Office must provide this office with an un-redacted copy of the responsive records for *in camera* inspection. See 950 C.M.R. 32.08(4). After I complete my review of the records, I will return the records to the Office's custody and issue an opinion on the public or exempt nature of the records.

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. Mass. 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 responsive records for *in camera* inspection without delay.

Sincerely,



Manza Arthur
Supervisor of Records

cc: Colman Herman