



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

Manza Arthur
Supervisor of Records

May 4, 2023
SPR23/0770

Adriane Dillon
Human Resources Manager
Saugus Public Schools
23 School Street
Saugus, MA 01906

Dear Ms. Dillon:

I have received the petition of Michael J. Long, Esq., of *Long, Dipietro, And Gonzalez, LLP*, appealing the response of the Saugus Public Schools (School) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 25, 2023, Attorney Long requested the following:

[1] Any and all documents, as that term is defined under the Massachusetts Public Records law or regulations, referred to or consulted by the Chair at the Committee meeting of January 19, 2023 relative complaints, charges or concerns of any or all persons, including but not limited to, any and all town of Saugus officials, such as the Town Accountant, Town Treasurer or any other person responsible for processing/or payment bills incurred by the Saugus Public Schools for any and all Professional Development programs from and after July 1, 2022 to January 19, 2022, which relate in any way to the performance or action of [named person];

[2] Any and all documents, as that term is defined under the Massachusetts Public Records law or regulations, relative complaints, charges, or concerns of any or all persons employed by the Saugus Public Schools or the Town of Saugus about the performance or behavior of [named person] in her capacity as Superintendent of the Saugus Public Schools concerning administration of federal grants, potential conflicts of interest, vendor payment practices, or access to contractual leave time, since July 1, 2022;

[3] Copies of all emails, text messages, social media posts or any physical or electronic communications received by, or exchanged between or among, past or present Saugus School Committee members concerning, discussing, or referencing the performance or behavior of [named person] in her capacity as Superintendent of the Saugus Public Schools connected with or related to, in any way, her administration of federal grants, a

potential conflict of interest, vendor payment practices, or access to contractual leave time, since July 1, 2022;

[4] Copies of all documents in the possession, custody or control of any committee member, agent, or employee of the Committee (excluding counsel, but including, and not limited to, federal grant applications, terms and conditions applicable to administration of federal grants related to professional development for educators in the Saugus Public Schools, those related to any potential conflict of interest, and vendor payment practices), reviewed, consulted, possessed or produced by any means relative to the performance or behavior of [named person], which documents the Committee or any of its agents intend to provide to an “impartial investigator” so called, to review any complaint, concern, or allegation relative to [named person] performance or behavior since the commencement of her employment in Saugus;

[5] Copies of all telephone or cell telephone records and bills listing any and all incoming or outgoing calls, texts, emails, or any other electronic form of communication among or between past or present Saugus School Committee members and any past or present employee of the Town of Saugus, including but not limited to, the Town Treasurer and the Town Accountant, or any Saugus School Committee employee, whether personally owned, or municipally or school department issued.

Prior Appeals

The requested records were the subject of a prior appeals. See SPR23/0263 Determination of the Supervisor of Records (February 24, 2023); See SPR23/0552 Determination of the Supervisor of Records (April 5, 2023). In my April 5th determination, I closed the appeal after the School indicated that it would provide a response to Attorney Long. On April 18, 2023 the School responded and indicated that they are withholding the requested records pursuant to Exemptions (c), (f), and attorney-client privilege. Unsatisfied with the School’s response, Attorney Long petitioned this office and this appeal, SPR23/0770, 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 town 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.

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 School's April 18th response

In the School's April 18, 2023 response, they reiterated their previous responses and indicated that are withholding responsive records pursuant to Exemptions (c) and (f) and the attorney-client privilege.

Current Appeal

In this current appeal, Attorney Long suggests that the School has not meet their burden to withhold records in their entirety.

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).

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. School Comm., 431 Mass. 792, 798 (2000).

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. Attorney Gen., 391 Mass. 1, 9 (1984); Attorney Gen. v. Assistant Comm'r of Real Property 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).

When analyzing a privacy claim, there is 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 April 18th response, the School stated the following:

The record request seeks personnel information regarding the investigation into the conduct of the performance of the Superintendent which falls squarely within the "personnel and medical files or information exemption" and are absolutely exempt from disclosure. The request seeks information relative to specifically identified employees and others disclosure of which would constitute an unwarranted invasion of personal privacy pursuant to G.L. Chapter 4, Section 26C.

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, 371 Mass at 62. 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 the School's April 18, 2023, response they stated the following:

At the current time there is an investigation into the conduct and performance of the Superintendent of Schools. It is the District's position that the records requested clearly fall under the exemption created by G.L. Chapter 4, Section 7 (26)([f]) and that the

request contains information relating to an ongoing investigation. The District contends that the disclosure of the requested evidence would impede and prejudice the ongoing investigation. In addition, disclosure of the requested records would also have a chilling effect on the willingness or citizens or witnesses to come forward with their complaints which in part what the investigation exemption is designed to prevent (see Globe Newspaper vs. Police Comm(r) of Boston, 419 MA 852,862 (1995); Pintado vs. National Carpentry, MA Super. 2009).

In a phone call on May 3, 2023, the School confirmed that the investigation is ongoing.

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 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 the School's April 18th response it states, "[t]he [School] reasserts its prior response including that the request contains documents protected by the attorney-client privilege."

In camera inspection

In order to facilitate a determination as to the applicability of the claims made by the School to withhold records in their entirety, the School must provide this office with un-redacted copies 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 School'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 School is ordered to provide this office with un-redacted copies of the responsive records for *in camera* inspection without delay.

Sincerely,

A handwritten signature in black ink that reads "Manza Arthur". The signature is written in a cursive, flowing style.

Manza Arthur
Supervisor of Records

cc: Michael J. Long, Esq.
Howard L. Greenspan, Esq.