The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

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SPR18/679

Daniel Brunelli, Esq.
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Dear Attorney Brunelli:

I have received the petition of Nicole Dungca of the *Boston Globe* appealing the response of the Department of State Police (Department) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Ms. Dungca requested "PDFs of the narratives and criminal complaints related to [identified] cases." The Department denied her request, claiming that the responsive records are exempt from disclosure pursuant to the Criminal Offender Record Information (CORI) Act and various other statutes as they operate through Exemption (a) of the Public Records Law. G. L. c. 6, §§ 167-178B; G. L. c. 94C, § 44; G. L. c. 41, § 98F; G. L. c. 276, § 100; G. L. c. 276, § 100L; G. L. c. 4, § 7(26)(a). The Department additionally cites "the investigatory and privacy exemptions" as its basis for denying Ms. Dungca's request. G. L. c. 4, § 7(26)(c), (f).

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 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 Department's April 27th response

In its April 27th response, the Department indicated that it "has concluded that the police reports [Ms. Dungca has] requested are not public records, pursuant to [Exemption (a)] because they are material specifically (M.G.L. c. 6, §§167-178B) or by necessary implication (*e.g.*, M.G.L. c. 94C, §44 & M.G.L. c. 41, §98F & M.G.L. c. 276, §100 & M.G.L. c. 276, §100L)) exempted from disclosure by statute." The Department additionally indicates that "[v]arious other exemptions, including but not limited the investigatory and privacy exemptions, independent from and/or in combination with Exemption (a), similarly preclude dissemination of all or so much content of any given police report that the effort and results of any such endeavor would be futile." The Department cites SPR13/144 Determination of the Supervisor of Records (September 11, 2013) and G. L. c. 4, § 7(26)(a-u) in support of its position.

Exemption (a)

The Department indicates that it has withheld responsive records pursuant to the CORI Act as it operates through Exemption (a) of the Public Records Law.

Exemption (a), 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 Attorney 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.

Under the first category, the Department indicates that "[t]he police reports [Ms. Dungca] requested are CORI and are not a public record because they are 'records and data in any communicable form compiled by a Massachusetts criminal justice agency… which concern an identifiable individual and relate to the nature or disposition of a criminal charge [or] an arrest.'"

It should be noted that as part of the criminal justice reform bill recently signed by Governor Baker on April 13, 2018, there has been an update to the definition of CORI. Section 3 of Chapter 69 of the Acts of 2018. Given that it was signed with an emergency preamble, this is the current definition of CORI:

> "Criminal offender record information", records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. *Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment.* Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.
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> G. L. c. 6, § 167 (emphasis added).

It is unclear how all of the withheld records fall under the CORI Act; specifically, it is uncertain how it is "information recorded in criminal proceedings that are not dismissed before arraignment," as described above. In addition, the Supreme Judicial Court has held "there is no violation of the CORI statute when the search specifications consist of information that would also be revealed on the court's records accessible to the public." Globe Newspaper Co. v. Dist. Attorney for the Middle Dist., 439 Mass. 374, 384 (2003).

Under the second category, the Department indicates that "[e]ven were these reports not subject to the express CORI protections, police reports are by necessary implication, entirely exempt from public disclosure by statute." The Department cites G. L. c. 41 § 98F, G. L. c. 6 § 167(m)(1), G. L. c. 94C, § 44; G. L. c. 6 § 172D, G. L. c. 6 § 172F, G. L. c. 276, § 100, G. L. c. 276, § 100L, 803 C.M.R. 7.02, and 28 C.F.R. 20.3 in support of its position. Despite the

Department's response, it remains unclear how the responsive records are entirely exempt from disclosure by necessary implication pursuant to the cited statutes and regulations.

The Department must clarify these matters under the first and second categories of Exemption (a) and produce any such records. Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

Exemption (c)

Exemption (c) permits the withholding of:

> personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy

G. L. c. 4, § 7(26)(c).

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-33 (1983). The first clause creates a categorical exemption for personnel information that relates to an identifiable individual and is of a "personal nature." Id. at 434. The Supreme Judicial Court of Massachusetts found that a records custodian may withhold from disclosure as personnel information records containing information that is "useful in making employment decisions regarding an employee." Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792, 798 (2000). The courts have discussed specific categories of records that may be redacted under the first clause. See Globe Newspaper Co v. Exec. Office of Admin. and Finance, Suffolk Sup. No. 11-01184-A (June 14, 2013).

Nevertheless, there is a strong public interest in monitoring public expenditures and public employees have a diminished expectation of privacy with respect to public employment matters. See George W. Prescott Publishing Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 278 (1985); Globe Newspaper Co., 388 Mass. at 436 n.15. Further, the public has an interest in knowing whether public employees are "carrying out their duties in an efficient and law-abiding manner." Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1979). As a result, certain information that is considered personal in the ordinary sense of the word may be considered part of a public record if relating to an individual's official responsibilities. See Brogan v. School Comm. of Westport, 401 Mass. 306, 309 (1987).

Analysis under the second clause of 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.

This clause 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 the second clause of 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 clause 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

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. Attorney 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.

Specificity

As mentioned above, in its response the Department indicates that "[v]arious other exemptions, including but not limited the investigatory and privacy exemptions, independent from and/or in combination with Exemption (a), similarly preclude dissemination of all or so much content of any given police report that the effort and results of any such endeavor would be futile." If the Department maintains that any portion of the responsive records are exempt from disclosure it must provide a written explanation, with specificity, how a particular exemption applies to each record. 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. G. L. c. 66, § 10(b)(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...").

I understand a member of the Public Records Division staff contacted your office about this matter.

Conclusion

Given that the Department did not meet its burden to explain how an exemption applies to the records, the requested records may not be withheld. Accordingly, the Department is ordered to review the requested records, redact where necessary, and provide Ms. Dungca with responsive records, 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 this response to this office at pre@sec.state.ma.us.

Sincerely,

Rebecca Murray

Rebecca S. Murray
Supervisor of Records

cc: Nicole Dungca