



The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Rebecca S. Murray
Supervisor of Records

August 13, 2018
SPR18/1133

Robin Vaccaro
Somerset-Berkley Regional School District
580 Whetstone Hill Road
Somerset, MA 02726

Dear Ms. Vaccaro:

I have received the petition of Tim McGuire appealing the response of the Somerset-Berkley Regional School District (District) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Mr. McGuire requested “[a]ll documents including e-mails distributed by the faculty adviser to the Somerset-Berkley Regional H.S. chapter of the Gay Straight Alliance (“GSA”) to students who are members of that group. This request is limited to materials distributed since January 2017,” and “[a]ll documents including e-mails exchanged between the Somerset-Berkley chapter of the GSA with any Planned Parenthood office Since January 2017.”

Previous appeal

This request was the subject of a previous appeal. See SPR18/895 Determination of the Supervisor of Records (July 2, 2018). I closed SPR18/895 by finding the District must revise its fee estimate or provide further explanation of how the fee assessed is provided for and consistent with G. L. c. 66, 10(d). The District provided another response on July 12, 2018. Unsatisfied with the District’s July 12th response, Mr. McGuire petitioned this office and this appeal, SPR18/1133, 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 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.

Fee estimates

A municipality may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Municipalities may not assess a fee for the first two hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested unless the municipality has 20,000 people or less. G. L. c. 66, § 10(d)(iii). Where appropriate, municipalities may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than \$25 per hour. Id. However, municipalities may charge more than \$25 per hour if such rate is approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv).

A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(iii); 950 CMR 32.06(4).

The District's July 12th response

In the District's July 12th response, it indicates that on July 5, 2018 Mr. McGuire confirmed that he is limiting his request to "those [emails] sent by the GSA faculty advisor to more than one of the student members." The District indicates it's "revised fee estimate is based on this narrowed request."

The District has assessed a total revised fee of \$125 for 5 hours of time spent segregating and redacting responsive records at a rate of \$25 an hour. The District indicates that the rate of the lowest paid employee capable of performing the segregation and redaction exceeds \$25 an hour; however, the District has capped its hourly rate at \$25 as permitted by the Public Records Law. See G. L. c. 66, § 10(d)(iii). The District indicates that it "has identified approximately 175 pages of potentially responsive emails."

The District identifies the Family Educational Rights and Privacy Act (FERPA) and Exemptions (a) and (c) of the Public Records Law as those statutes requiring segregation and

redaction. The District is reminded that although Exemption (c) permits redaction of certain information that constitutes an invasion of privacy, it does not require it by law. See G. L. c. 4, § 7(26)(c); see also SPR18/895. Consequently, the District is not permitted to charge to segregate or redact information under Exemption (c). See G. L. c. 66, § 10(d)(ii); 950 C.M.R. 32.06(4).

With respect to the District's fee for segregation and redaction under FERPA and Exemption (a), the District explains the responsive emails represent “[c]ommunication and correspondence by and between students and the GSA faculty advisor,” which constitute “educational records under the Family Educational Rights and Privacy Act (FERPA).” The District explains further that “there is a high likelihood that [the records] include [personally identifying information (PII)] and that the District has an obligation to review and redact such information, including but not limited to: names; email addresses; parents’ names; addresses; personal identifiers; pictures; social media handles/names; date of birth; school schedules; and names of other family members or personal connections that can be used to identify a student’s identity.” See 34 C.F.R. § 99.3.

The District explains that “[b]y its nature, the GSA is an organization intended to be a safe and supportive resource that deals with personal and confidential issues related to one’s sexuality, gender, gender identity, self-expression, and issues related to bullying, harassment, social acceptance, and creating safe and supportive school and community environments. The mere identification of student names and email addresses linked as a member of the GSA, without their permission, is a violation of privacy and may be harmful. Even if a student is out to the other members of the GSA, that does not mean that he or she is comfortable having his or her identity, opinions, concerns, discussions, and sexuality shared with third parties, and FERPA prohibits the disclosure of PII to third parties.”

FERPA provides a mechanism which allows for the public disclosure of information from education records when information classified as personally identifiable information is removed. Under 34 C.F.R. 99.3 *personally identifiable information* includes, but is not limited to, student’s name; name of the student’s parents or other family member; address of the student or student’s family; a personal identifier, such as the student’s social security number, student number, or biometric record; other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates. 34 C.F.R. § 99.3(g).

Based on the District’s July 12th response, I find the District has demonstrated how redaction is required by law and is permitted to charge the estimated fee amount to segregate and redact personally identifying information from the records pursuant to FERPA.

Conclusion

Accordingly, it is my determination that based on the explanation provided in the District's response relating to the necessary redactions to remove personal information, the District is permitted to charge for time spent segregating and redacting the requested records.

Sincerely,

Rebecca Murray

Rebecca S. Murray
Supervisor of Records

cc: Timothy R. McGuire