



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

Manza Arthur
Supervisor of Records

September 14, 2023
SPR23/2089

Terry Delehanty
Chief of Police
Winthrop Police Department
3 Metcalf Square
Winthrop, MA 02152

Dear Chief Delehanty:

I have received the petition of Pedro Fontes appealing the response of the Winthrop Police Department (Department) to his request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On August 10, 2023, Mr. Fontes requested the following records for August 7, 2023, "... all video cameras footage in front of Winthrop Police Station specifically the parking spots in front of the ramp showing two vehicles a champagne color Lexus and a silver Toyota Sienna [including] all footage of the vehicle from their approach to their approval to their departure from and in front of Winthrop Police Station and also the videos coming into Winthrop Police Station door including the lobby."

The Department responded on August 31, 2023. Unsatisfied with the response, Mr. Fontes petitioned this office and this appeal, SPR23/2089, 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.

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 August 31st Response

In its August 31, 2023 response, the Department cited Exemptions (f) and (n) of the Public Records Law to withhold the records in their entirety.

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 289-90.

As a matter of course, witness provided information is essential to efficient and effective law enforcement. This exemption is intended to allow investigative officials to provide an assurance of confidentiality to private citizens so that they will speak openly and voluntarily about matters. Bougas, 371 Mass at 62. Any information contained in a witness statement, which if disclosed would create a grave risk of directly or indirectly identifying the voluntary witness is subject to withholding Globe Newspaper Co., 388 Mass. at 438. The disclosure of the names and other identifying information of victims, complainants and voluntary witnesses may deter other potential witnesses and citizens from providing information to law enforcement agencies in future investigations. Therefore, Exemption (f) will allow the withholding of the name and identifying details of any victims, complainants and voluntary witnesses, and where the individuals can be indirectly identified even with redaction.

In its response, the Department stated, “[t]he records requested contain a witness or witnesses entering or existing the police station to assist in an investigation in which you may be a party ... this information could prejudice the case and also would discourage future witnesses from coming forward and reporting violations of the law ...”

Although Exemption (f) would permit the redaction of identifying information of a witness or witnesses, the Department has not demonstrated how the witnesses can be directly or indirectly identified even with redactions. The Department must clarify.

Exemption (n)

Exemption (n) permits the withholding of:

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).

Under Exemption (n), a records custodian may withhold a record if its release is likely to jeopardize public safety or cyber security. It is the duty of the custodian to exercise “reasonable judgment” to determine whether disclosure of the record may impact public safety. *Id.*

Exemption (n) requires a two prong analysis. People for the Ethical Treatment of Animals (PETA) v. Dep’t. of Agric. Res., 477 Mass. 280, 286 (2017). The first prong 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.’” *Id.* at 289-90.

With regard to a prong one analysis, if the requested record is not expressly listed in the text of the exemption, then Exemption (n) does not apply unless the record is related to one of the statute’s enumerated examples. See PETA, 477 Mass. at 288 (“we must interpret the ‘any other records’ clause as embracing only those records that, when released, are ‘likely to jeopardize public safety [or cyber security]’ in a similar way to one of the examples listed in exemption (n)”).

The second prong examines whether, in the record custodian’s reasonable judgment, the requested records are factually and contextually likely to jeopardize public safety or cyber security. *Id.* at 289-90. However, the “reasonable judgment” language in Exemption (n) does not

imply a heightened level of deference to the records custodian's initial denial. *Id.* at 291. "[T]he primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records . . . to conclude that a reasonable person would agree with the custodian's determination given the context of the particular case." *Id.* at 289-90.

In its response, the Department asserts, "[t]he camera in question is in an integral part of the security of the police station and it specifically shows individuals entering and exiting the police station, as well as police officers the number of cruisers at the station on a particular day and the entrances which [are] used by the police personnel. The entrances are restricted access areas and are not unrestricted to the public. In this case, the safety of the witnesses is paramount to releasing this camera footage."

Based on the Department's response, I find that the Department did not provide sufficient factual heft to support the withholding of the requested records pursuant to Exemption (n). Specifically, the Department has not sufficiently explained how disclosure of the records are likely to jeopardize public safety. *See PETA*, at 289-90. Further, it is unclear if the Department could provide segregable portions of the responsive records. Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). The Department must clarify this matter.

As a result, I find that the Department has not met its burden of specificity to withhold the requested records under Exemptions (f) and (n) of the Public Records Law.

Conclusion

Accordingly, the Department is ordered to provide Mr. Fontes with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (10) business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of the response to this office at pre@sec.state.ma.us. Mr. Fontes may appeal the substantive nature of the Department's response within ninety days. *See* 950 C.M.R. 32.08(1).

Sincerely,

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

Manza Arthur
Supervisor of Records

cc: Pedro Fontes