



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

Rebecca S. Murray
Supervisor of Records

November 14, 2017
SPR17/1544

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

Dear Chief Delehanty:

I have received the petition of "Ziploc" appealing the response of the Town of Winthrop Police Department (Department) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, the requestor asked for "copies of all records pertaining to the assessment center for deputy chief of police dept." The requestor mentioned that the records should include "but not limited to final report from assessment center, audio and or video recordings of assessment center process and written documents provided by participants."

Previous appeal

This request was the subject of a previous appeal. See SPR17/1257 Determination of the Supervisor of Records (September 25, 2017). I closed the appeal ordering the Department to provide a revised response in a manner consistent with the order, the Public Records Law, and its Regulations within ten business days.

Following the Determination, the Department provided a response dated October 10, 2017, in which it continues to claim Exemption (c) of the Public Records Law to redact the scores of candidates for the deputy police chief position. G. L. c. 4, § 7(26)(c). Unsatisfied with the Department's response, the requestor petitioned this office and this appeal, SPR17/1544, 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.

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 October 10th supplemental response

In its October 10th response, the Department indicated that "... the Town has no information that indicates the scores of candidates for promotion in police departments is 'commonly displayed on state government websites.' ... The state Civil Service Commission, for instance, publishes publicly eligibility lists of candidates for promotion by name. But those lists do not contain the candidates' score. ... The same is true for the eligibility lists for employment by the Massachusetts State Police. ... Furthermore, the Town has no information, and in fact does not believe that any state government website makes available to the Public written submissions by applicants for employment as police officers. ... There is nothing that the Town could find on the state Police website that reflects this information is being posted for state police candidates."

The Department indicated that "... even considering that public employees have a diminished expectation of privacy in certain employment-related information, Exemption (c) is nonetheless properly invoked to redact the scores of the candidates for the deputy police chief position, and to withhold entirely the candidates' written submissions in support of their application for the position. The Supervisor of Records has previously determined that employment information which is subjective or evaluative in nature may be withheld from public disclosure under the first clause of Exemption (c), including scores such as the scores redacted from the consultant's report in this instance. Here, all components of the assessment center process were scored and aggregated, for a total composite score that was used in an evaluative manner, to rank the candidates. The highest ranking candidate was, in fact, the successful candidate."

Further, the Department indicated that the written submissions were also evaluated and used by the assessment center panel. The Department cited the Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792 (2000) decision, and indicated that "... the written submissions were made by the candidates in 'application' for the position, and were used in an evaluative capacity by the panel tasked with recommending a final candidate for the position ..."

Regarding the two pronoun redactions, the Department indicated that there was a single female candidate for the position whose identity was known within the Department. The Department explained that, because the consultant was describing comments made by a candidate about the assessment process during his/her "debriefing," inclusion of the pronouns in the report would have revealed the gender of the candidate and led to the identification of the candidate.

Exemption (c)

In the Department's October 10th response, it indicated the scores of candidates were withheld under Exemption (c) of the Public Records Law.

Exemption (c) applies to:

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).

First clause

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. 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 the first clause of Exemption (c). Wakefield Teachers Ass'n v. School Comm., 431 Mass. 792, 798 (2000).

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, 401 Mass. at 306, 309.

Second Clause

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.

The second clause of Exemption (c) 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 (c) allows a records custodian to withhold personnel files or information pertaining to a particular employee. Wakefield Teachers Ass'n, 431 Mass. at 798. However, based on the Department's response, it is unclear whether the candidates who applied for the deputy police chief position are employed by the Department. Therefore, in order to determine whether the personnel clause applies to all candidates, the Department must clarify whether all the candidates are employees of the Department. I understand a Public Records Division staff attorney contacted your office about this appeal.

Order

Accordingly, the Department is hereby ordered to provide Mr. Brown with a response to the request in a manner consistent with this determination, 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.

Chief Terence Delehanty
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Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first name "Rebecca" and last name "Murray" clearly distinguishable.

Rebecca S. Murray
Supervisor of Records

cc: "Ziploc"