



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

Rebecca S. Murray
Supervisor of Records

February 4, 2019
SPR19/124

Lisa Howard, M.Ed.
Superintendent and Records Access Officer
Town of Winthrop Public Schools
1 Metcalf Square
Winthrop, MA 02152

Dear Superintendent Howard:

I have received the petition of J. Gregory Batten, Esq. appealing the response of the Town of Winthrop – Public Schools (School) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on December 5, 2018 and January 12, 2019, Attorney Batten requested the following, on behalf of his identified clients pertaining to an incident/accident that occurred on August 13, 2018:

- A copy of all accident reports;
- A copy of all school applications;
- A copy of all attachments to all accident reports, including, all photographs, written statements, witness statements, etc.;
- A copy of the entire employment files of four (4) identified employees

In an email on January 15, 2019 and in response to Attorney Batten's December 5, 2018 requests for the accident reports, school applications and all attachments to the accident reports, you stated, "[a]s a result of the clarifying information provided during [a January 3, 2019] phone discussion, I informed you of the [School's] intent to [provide] you with the documents that the [School] system was obligated to release which did not include employee records/files, as personnel file information is exempt from disclosure under the [P]ublic [R]ecords [L]aw. On 1/3/19, I followed up with an email indicating the same."

In response to Attorney Batten's January 12, 2019 request for the entire employment files of 4 identified School employees, you informed Attorney Batten, "...once again the [School] would not be providing personnel/employee records/files, as personnel file information is exempt from disclosure under the [P]ublic [R]ecords [L]aw. I have forwarded a copy of your most recent record request to the insurance company handling this claim."

As a result of the School's denial to provide the employment files of the 4 identified School employees, Attorney Batten petitioned the Supervisor of Records, and this appeal was opened.

Status of the requestor

In his December and January requests, Attorney Batten asserts, "[b]e advised that this office represents [two identified individuals]." It is import for Attorney Batten to understand that his interest in the responsive records to represent his clients in a claim against the School does not afford him any greater right of access to the requested information under the Public Records Law than any other person. The Public Records Law does not distinguish between requestors. Access to a record requested pursuant to the Public Records Law rests on the content of the record and not the circumstances of the requestor. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976). Accordingly, Attorney Batten's status and that of his clients will play no role in a determination as to the public status of any existing responsive records.

The discovery process and the Public Records Law are two distinct and independent avenues for gaining access to records. The Massachusetts Supreme Judicial Court has held that while a party's access to records may be limited by the Public Records Law, this may not preclude obtaining the records through discovery. Commonwealth v. Wanis, 426 Mass. 639 (1998); 950 C.M.R. 32.08(1)(a) (the administrative appeal process "shall not apply to records in which an individual, or a representative of the individual, has a unique right of access to the record through statutory, regulatory, judicial or other applicable means.") 950 C.M.R. 32.08(1)(a). As such, Attorney Batten may wish to consider another means of seeking to obtain any existing responsive records.

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) (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..."); 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).

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.

Exemption (c)

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). 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). The courts have also 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 Publ’g Co. v. Register of Probate for Norfolk Cnty., 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).

A personnel file or information “is not limited to nor does it extend to, all ‘files or information’ that are located physically in an individual employee’s personnel file.” Wakefield, 431 Mass. at 797 n. 13; see also Globe Newspaper Co., 388 Mass. at 435 (not every bit of information which might be found in a personnel or medical file is necessarily personal so as to fall within the exemption’s protection).

The School has not met its burden of specificity in claiming that the records in their entirety pertaining to the identified employees is personnel information that may be withheld under the first clause of Exemption (c) of the Public Records Law.

Burden of specifically claiming exemptions; duty to segregate

Your January 15th response asserts that the records of the identified employees are exempt personnel files and/or information; however, did not cite any exemptions to withhold records or portions of records that may be responsive. The School is advised, under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3)(c)(4). If the School is withholding records, after identifying the responsive records in a search, it must identify what type of record(s) it has in its possession that are responsive and that the School withheld under one or more exemptions in the Public Records Law.

Under the Public Records Law, the burden shall be upon the custodian to prove with specificity the exemption which applies. G. L. c. 66, § 10(b)(iv); see also Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 857 (1995); Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995). Further, the School must produce any non-exempt, segregable portions of the public records. G. L. c. 66, § 10(a).

Furthermore, the School's response did not identify the records responsive to Attorney Batten's December 5th request that it intends to provide. I find that the School has not met its burden of responding to Attorney Batten's requests consistent with G. L. c. 66, § 10(d).

Conclusion

Accordingly, the School is ordered to provide Attorney Batten with a response to the requests, 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 this response to this office at pre@sec.state.ma.us.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: J. Gregory Batten, Esq.