



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

Rebecca S. Murray
Supervisor of Records

September 25, 2017
SPR17/1257

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, on June 26, 2017, 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.” The Department responded on July 11, 2017, claiming that it would redact certain portions of the records pursuant to Exemption (c) of the Public Records Law. G. L. c. 4, § 7(26)(c). Unsatisfied with the department’s response, the requestor petitioned this Office and this appeal, SPR17/1257, was opened as a result. It appears the requestor is only appealing the Department’s claim under Exemption (c) but not the fee estimate.

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 July 11th response

In its July 11th response, the Department indicated that it intends to "withhold from disclosure, certain responsive records pursuant to Exemption (c) of the Public Records Law. Specifically, the Town anticipates redacting the scores of the candidates, together with written submissions by the candidates during the assessment center evaluation process."

The Department indicated that it was withholding these records under the first clause of Exemption (c) because in its position "the scores of the candidates, together with any documents submitted by the candidates in support of their applications for the Deputy Chief position including but not limited to those written submissions made as part of the assessment center evaluation process, are precisely the types of documents 'that would be helpful in making determinations regarding hiring and firing,' and the Town may permissibly withhold from public disclosure pursuant to Exemption (c). . . ."

The Department further indicated that it "anticipates redacting two pronoun references in the report authored by the Town's assessment center consultant, under both the first and second clauses to Exemption (c), as disclosure of that information may result in an identification of the applicant's identity."

Exemption (c)

In the Department's July 11th response, it indicated its intent to withhold the records under the first clause of Exemption (c) of the Public Records Law as personnel information.

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 and medical information that relates to an identifiable individual and is of a "personal nature." Id. at 434. Medical

information that is of a personal nature and relates to a specifically named individual is exempt from disclosure. Brogan v. School Comm. of Westport, 401 Mass. 306, 308 (1987). 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). 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). Id.

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.

I find that the Department's initial July 11th response did not meet its obligation of properly claiming an exemption and providing the requisite level of specificity to withhold the records under the Public Records Law to support an exemption claim. The Department is reminded that Public employees have a diminished expectation of privacy in matters relating to their public employment. Brogan, 401 Mass. at 308. Consequently, the public will have greater access to information that relates to an individual's public employment than to the same individual's private activities. Hastings & Sons Pub. Co. v. City Treasurer of Lynn, 374 Mass. 812, 818 (1978). Therefore, the Department must explain how the scores and written submissions are useful in making employment decisions and not subject to public disclosure in light of the fact that similar information "of police officers being tested for promotion is commonly displayed on state government websites" as stated by the requestor.

Further, the Department did not explain with specificity under the first and second clauses of Exemption (c) why it "anticipates redacting two pronoun references in the report authored by the Town's assessment center consultant." The Department merely stated that "disclosure of that information may result in an identification of the applicant's identity" without explaining with specificity how the first and second clauses of Exemption (c) apply to the redacted information. Considering the factors in the PETA decision, the Department should explain how disclosing an unredacted copy of the report will implicate any privacy interests or result in an unwarranted invasion of personal privacy. I understand a Public Records Division staff attorney contacted your office about this appeal but was unable to reach you prior to the issuance of this decision.

Conclusion

Accordingly, whereas I find that the Department has not met its burden in proving with specificity how the requested records may be redacted under Exemption (c); the Department is hereby ordered to provide the requestor with a revised response to the request, 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. The requestor may appeal the substantive nature of the Department's response within ninety calendar days. 950 C.M.R. 32.08(1).

Sincerely,


Rebecca S. Murray
Supervisor of Records

cc: "Ziploc"