



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

Rebecca S. Murray
Supervisor of Records

March 5, 2019
SPR19/0396

Lorraine A. G. Tarrow, Esq.
Assistant Attorney General/Records Access Officer
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Dear Attorney Tarrow:

I have received the petition of Chris Horner appealing the response of the Office of the Attorney General (AGO) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on January 17, 2019, Mr. Horner requested “all correspondence dated from January 1, 2016, through April 15, 2016, inclusive, which was sent to or from or copying (whether as cc: or bcc:) Christopher Courchesne and/or Michael Firestone, which also includes any party, be it to, from or copying (again whether as cc: or bcc:), a) mp@pawalaw.com, b) steve@hbsslaw.com c) any address ending in @sheredling.com, d) any address including Oreskes, and/or e) any address ending in @bordaslaw.com.” The AGO provided a response on February 5, 2019, denying access to responsive records pursuant to Exemption (f) of the Public Records Law. G. L. c. 4, § 7(26)(f). Unsatisfied with the AGO’s response, Mr. Horner petitioned this office and this appeal, SPR19/0396, 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 AGO's February 5th response

In its February 5, 2019 response, the AGO indicates “. . . that records responsive to [Mr. Horner's] request relate to open investigation(s) being conducted by the AGO and related litigation. As such, the records in [the AGO's] possession and any identification of those records are exempt from disclosure under G. L. c. 4, § 7, cl. 26(f), as they are materials necessarily compiled out of the public view to avoid prejudice to law enforcement efforts and related pending litigation.” The AGO contends that “[d]isclosure of these records could prejudice ongoing and incomplete investigations by revealing the nature and extent of [the AGO's] information gathering to both targets and other parties - to the detriment of the AGO and the general public, whose interests we represent.”

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. Attorney 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.

To deny access to a record 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. See 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 . . .”). Therefore, the AGO must provide additional information regarding the nature of the responsive records, categories of records, or portions of the records it intends to withhold under Exemption (f).

Additionally, although the AGO contends that “[d]isclosure of these records could prejudice ongoing and incomplete investigations by revealing the nature and extent of [its] information gathering to both targets and other parties . . .,” it is unclear why the AGO is withholding the records in their entirety. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). The AGO must explain why segregable portions cannot be provided.

Conclusion

Accordingly, I find that the AGO is to provide Mr. Horner with a supplemental response 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.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Chris Horner