



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

Rebecca S. Murray
Supervisor of Records

April 8, 2019
SPR19/0610

Lorraine A.G. Tarrow, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Dear Attorney Tarrow:

I have received the petition of Christopher Horner of *Competitive Enterprise Institute* 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, 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.”

Previous appeal

This request was the subject of a previous appeal. See SPR19/0396 Determination of the Supervisor of Records (March 5, 2019). I closed SPR19/0396 by finding that the AGO is to provide Mr. Horner with a supplemental response in a manner consistent with the determination, the Public Records Law, and its Regulations. Subsequently, the AGO provided another response dated March 20, 2019. Unsatisfied with the AGO’s response, Mr. Horner petitioned this office and this appeal, SPR19/0610, 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 March 20th response

In its March 20, 2019 response, the AGO indicates that it is “. . . currently investigating ExxonMobil Corporation (“ExxonMobil”) and is currently engaged with ExxonMobil in pending litigation over AGO’s investigation of the Company.” The AGO additionally indicates that it possesses “. . . six (6) pages of e-mails that are responsive to [Mr. Horner’s] request.”

The AGO explains that “. . . [it] can give [Mr. Horner] no further information about these records without compromising our investigation or litigation strategies to the same extent as disclosing the records themselves. The senders and recipients, the dates, and the content of these e-mails relate to [the AGO’s] ongoing ExxonMobil investigation, or, in one instance, other potential environmental enforcement, and, if released, might not only prejudice the investigation going forward, but would also likely impact the related litigation.”

The AGO asserts that “redaction in this case would render these e-mails meaningless, as the entire bodies as well as the senders, recipients, and dates are exempt from disclosure under G.L. c. 4, § 7, cl. 26(f) as described above.”

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

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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.

Although the AGO has identified there are "six (6) pages of e-mails" responsive to Mr. Horner's request and indicates release of the records "might not only prejudice the investigation going forward, but would also likely impact the related litigation," it remains 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). Although the AGO states that "redaction in this case would render these e-mails meaningless," under the Public Records Law, 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: Christopher Horner