

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
AT WOBURN
C.A. NO. 21 - 1913

<p>CITY OF SOMERVILLE, Plaintiff, v. REBECCA MURRAY, as SUPERVISOR OF PUBLIC RECORDS, Defendant.</p>
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COMPLAINT FOR JUDICIAL
REVIEW UNDER G. L. c. 30A,
WRIT OF CERTIORARI UNDER
G. L. c. 249, § 4 AND
DECLARATORY JUDGMENT
UNDER G. L. c. 231A, § 1

RECEIVED 9/1/2021 JP

INTRODUCTION

1. This is an appeal under M.G.L. c. 30A, § 14(1) and (7)(c), and, in the alternative, G. L. c. 249, § 4, from the Final Decision of the Supervisor of Public Records (the “Supervisor”) dated June 22, 2021, ordering the City of Somerville to provide Flavia C. Perea and Sean Roberson with clarification as to how an incident report falls within the type of records contemplated by G. L. c. 41, § 97D. In the alternative, if there is no appellate remedy, this is a claim for Declaratory Judgment in connection with the Supervisor of Records determination.

THE PARTIES

- 2. The Plaintiff City of Somerville is a municipal corporation with offices at City Hall, 93 Highland Avenue, Somerville, MA 02143.
- 3. The Defendant Rebecca Murray as the Supervisor of Public Records has offices at One Ashburton Place, Room 1719, Boston, MA 02108.

JURISDICTION

4. This Court has jurisdiction over the subject matter under G.L. c. 30A, § 14(1) and (7)(c), and in the alternative, G. L. c. 249, § 4. In the alternative, this Court has jurisdiction over the subject matter of this action pursuant to G. L. c. 231A, § 1, if there is no appellate remedy.

5. Venue is appropriate in this Court because the Plaintiff has principal offices in this County.

STATUTORY AND REGULATORY FRAMEWORK

6. G.L. c. 41, § 97D provides, in relevant part, that all reports of rape and sexual assault or attempts to commit such offenses, all reports of abuse perpetrated by family or household members, as defined in section 1 of chapter 209A, and all communications between police officers and victims of such offenses or abuse shall not be public reports and shall be maintained by the police departments in a manner that shall assure their confidentiality.

FACTS

7. On December 19, 2019, Flavia C. Perea and Sean Roberson, through their attorney, Peter A. Hahn, Esq., requested a specific police incident report. (Exhibit A).

8. The City responded to the request on December 20, 2019, claiming to withhold the responsive record pursuant to Exemption (a) of the Public Records Law, and G. L. c. 41, § 97D, on the grounds that it is prohibited by law from releasing any existing incident report. (Exhibit A).

9. On March 3, 2021, Attorney Hahn reiterated his request on behalf of Ms. Perea and Mr. Roberson. On March 12, 202, the City again denied the request, withholding the report pursuant to Exemption (a) and Exemption (c) of the Public Records Law. (Exhibit A).
10. Ms. Perea and Mr. Roberson appealed the denial to the Supervisor of Public Records. (Exhibit A).
11. On June 22, 2021, the Supervisor of Public Records ruled that the City must clarify how the incident report in question falls within the scope of G. L. c. 41, § 97D. (Exhibit A).
12. On June 29, 2021, the City wrote to the Supervisor of Public Records to request reconsideration of the June 22, 2021 decision. (Exhibit B). That request was emailed by Assistant City Solicitor David Shapiro through his email address, dshapiro@somervillema.gov.
13. On July 21, 2021, the Supervisor declined to reverse the findings in the June 22, 2021 determination. (Exhibit C).
14. Although the July 21, 2021 decision states at the bottom that it was sent by cc to David Shapiro, Esq., the attorney of record, the Supervisor of Public Records did not actually send a copy to David Shapiro. The Supervisor of Public records only emailed the decision to publicrecords@somervillema.gov (the email address on file with the Supervisor's office for the Records Access Officer), which email address is seen by support staff. David Shapiro does not use that email address but rather has his own.

15. Counsel for the City first received notice of the decision on August 30, 2021, at which time Ms. Perea and Sean Roberson followed up with the Supervisor of Public Records in connection with the City's lack of response to the reconsideration decision.

16. Given that the decision states that it is actually copied to David Shapiro, who submitted the request for reconsideration, the law department staff reasonably concluded that David Shapiro received the reconsideration decision and it did not need to be forwarded to David Shapiro.

17. Although this issue was brought to the attention of the Supervisor of Public Records, the Supervisor is unwilling to take corrective action, even though the decision on its face includes an incorrect and misleading representation that counsel for the City of Somerville was sent a copy of the reconsideration decision.

COUNT I

VIOLATION OF CHAPTER 30A Section 14 (7)

18. The Plaintiff realleges and incorporates by reference each and every allegation as set forth in Paragraph's 1 – 17.

19. Good cause exists for the City's failure to file a G.L. c. 30A appeal within 30 days of the actual decision.

20. To the extent there is an incident report, it falls within one or more of the categories set forth in G. L. c. 41, § 97D and consists of information related to the type of information specifically exempted from disclosure by statute.

21. Requiring the City to clarify for the requester the factual basis for its assertions (i.e. provide the general contents of any existing report) defeats the purpose of G.L. c. 41, § 97D.

22. The decision rendered by the Supervisor of Public Records was based upon an error of law, made upon unlawful procedure, in excess of the statutory authority of the agency, unsupported by substantial evidence, unwarranted by the facts, and arbitrary or capricious, in accordance with G. L. c. 30A, Section 7(c).

COUNT II – ACTION IN THE NATURE OF CERTIORARI.

23. The Plaintiff incorporated by reference paragraph's 1 through 22 of the Complaint.

24. In the alternative, assuming that there is no available appeal under G. L. c. 30A, the Supervisor of Records is an agency exercising quasi-judicial functions.

25. Assuming there is no available appeal under G. L. c. 30A, there is no other reasonably adequate legal remedy.

26. A substantial injury or injustice arises from the proceeding under review.

27. The decision rendered by the Supervisor of Public Records was based upon an error of law, made upon unlawful procedure, in excess of the statutory authority of the agency, unsupported by substantial evidence, unwarranted by the facts, and arbitrary or capricious, in accordance with G. L. c. 249, § 4.

COUNT III – DECLARATORY JUDGMENT

28. The Plaintiff incorporates by reference each of the allegations contained in paragraphs 1 through 27.

29. Plaintiff alleges that the Supervisor of Public Records decision violates applicable public records law. Defendant states that the decision was lawful under applicable public records law.

30. An actual controversy has arisen between the Plaintiff and Defendant concerning their respective rights and duties.

31. The Plaintiff desires a judicial determination of their respective rights and duties, with respect to the controversy set forth above, in the event that there is no appeal under other applicable law.

32. A judicial determination is necessary and appropriate at this time under the circumstances in order that the Plaintiff and Defendant may ascertain their rights and duties, in the event there is no appeal under other applicable law.

WHEREFORE, the Plaintiff prays that the Court:

1. Permit the City to proceed under G. L. c. 30A, even though this appeal was filed more than 30 days after the Records Access Officer received notice of the decision;
2. Conduct an in camera inspection of any existing incident report to verify whether it falls within G. L. c. 41, § 97D;
3. Rule that the Final Decision issued by the Supervisor of Public Records is in violation of G. L. c. 30A and/or G. L. c. 249 § 4;
4. Rule that the Final decision be vacated, and of no further force and effect;
5. Stay the Decision of the Supervisor of Public Records, pending resolution of this Appeal; and

6. Grant the Plaintiff such other and further relief as the Court deems just and proper.

CITY OF SOMERVILLE
By its attorney,

/s/ David P. Shapiro
David P. Shapiro, BBO#565564
Assistant City Solicitor
Law Dept., City Hall
93 Highland Avenue
Somerville, MA 02143
(617) 625-6600, ext. 4400
law@somervillema.gov

Dated: 9/1/2021



EXHIBIT A

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

Rebecca S. Murray
Supervisor of Records

June 22, 2021
SPR21/1446

Francis X. Wright, Esq.
City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Dear Attorney Wright:

I have received the petition of Flavia C. Perea and Sean Roberson appealing the response of the City of Somerville (City) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On December 19, 2019, Ms. Perea and Mr. Roberson, through their attorney, Peter A. Hahn, Esq., requested a specific police incident report. The City responded on December 20, 2019, claiming to withhold the responsive record pursuant to Exemption (a) of the Public Records Law, and G. L. c. 41, § 97D. See G. L. c. 4, § 7(26)(a). On March 3, 2021, Attorney Hahn reiterated his request on behalf of Ms. Perea and Mr. Roberson. On March 12, 2021, the City again denied the request, claiming to withhold the report pursuant to Exemptions (a) and (c) of the Public Records Law. Unsatisfied with the City's response, Ms. Perea and Mr. Roberson appealed, and this case was opened as a result.

Status of Requestor

In their appeal petition, Ms. Perea and Mr. Roberson state that "[t]he report is being requested on the basis of [their] rights as parents" of a minor child named in the incident report. Please note that the reason for which a requestor seeks access to or a copy of a public record does not afford any greater right of access to the requested information than other persons in the general public. The Public Records Law does not distinguish between requestors. Access to a record 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, Ms. Perea and Mr. Roberson's status as the parents of a child named in the requested record will play no role in a determination as to whether the record should be disclosed or redacted under the Public Records Law.

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.

Current Appeal

In their appeal petition, with regard to Exemption (a) and G. L. c. 41, § 97D, Ms. Perea and Mr. Roberson contend:

What is alleged in the “incident” report does not constitute rape, sexual assault, or sexual abuse, and in Massachusetts a six-year-old cannot even be criminally culpable. A crime was not committed, could not have been committed, and there is, therefore, no victim, specifically a victim of a crime of rape, sexual abuse, or sexual assault in this instance. M.G.L. c. 41, section 97D therefore does not apply.

In addition, concerning Exemption (c), Ms. Perea and Mr. Roberson contend that:

[T]he names of both children involved in the alleged incident are known to all parties. . . Moreover, the names of [their] son and the other child are both contained in [their] son’s student conduct record which was provided to [them] by the school district in response to a School Records Request. Importantly, the name of the other child involved in the incident with [their] son is not redacted in the school conduct record provided to [them] by the school district. [Their] son’s case has also been widely profiled in local and national media, and the characteristics of the alleged incident are in the public domain.

The City’s March 12th Response

In its March 12, 2021, response, the City claims to withhold the responsive record pursuant to Exemptions (a), citing G. L. c. 41, § 97D, and also pursuant to Exemption (c) of the

Public Records Law.

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, §7 (26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

G. L. c. 41, § 97D provides in relevant part:

All reports of rape and sexual assault or attempts to commit such offenses, all reports of abuse perpetrated by family or household members, as defined in section 1 of chapter 209A, and all communications between police officers and victims of such offenses or abuse shall not be public reports and shall be maintained by the police departments in a manner that shall assure their confidentiality; provided, however, that all such reports shall be accessible at all reasonable times, upon written request, to: (i) the victim, the victim's attorney, others specifically authorized by the victim to obtain such information, prosecutors and (ii) victim-witness advocates as defined in section 1 of chapter 258B, domestic violence victims' counselors as defined in section 20K of chapter 233, sexual assault counselors as defined in section 20J of chapter 233, if such access is necessary in the performance of their duties; and provided further, that all such reports shall be accessible at all reasonable times, upon written, telephonic, facsimile or electronic mail request to law enforcement officers, district attorneys or assistant district attorneys and all persons authorized to admit persons to bail pursuant to section 57 of chapter 276

Exemption (c)

Exemption (c) permits the withholding of:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

G. L. c. 4, § 7(26)(c).

Analysis under 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.

This exemption 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 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 exemption 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.

In its March 12th response, under Exemption (a), the City states that “the City reserves additional legal argument and its rights to supplement this response with additional details reflecting the factual basis using this exemption, in camera, for the benefit of the Supervisor of Records, in the event of an appeal.”

Under Exemption (c), the City contends that the requested record “consists of information of a highly sensitive and private nature involving one or more minor children. The privacy exemption of the public records law is specifically designed to protect information relating to individuals under the age of 18. SPR14/284 (June 3, 2014). As a result, the requested

Francis X. Wright, Esq.
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incident report is also exempt from disclosure under . . . Exemption (c) of the Massachusetts Public records law and is being withheld accordingly.”

Based on the City’s response and the information provided in the appeal petition, it is unclear how the incident report in question falls within the type of records contemplated in G. L. c. 41, § 97D. The City must clarify this.

Further, while portions of the responsive incident report may fall under Exemption (c), it is uncertain how the record can be withheld in its entirety. The City must explain whether segregable portions of the report can be provided. See G. L. c. 66, § 10(a); Reinstein, 378 Mass. at 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).

Conclusion

Accordingly, the City is ordered to provide Ms. Perea and Mr. Roberson a response to their request 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.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Flavia C. Perea and Sean Roberson

EXHIBIT B

From: [David Shapiro](#)
To: [Susan Tkaczuk](#)
Subject: FW: SPR21/1446 Appeal Decision - request for reconsideration
Date: Tuesday, August 31, 2021 10:50:49 AM

From: David Shapiro
Sent: Tuesday, June 29, 2021 11:29 AM
To: rebecca.murray@state.ma.us
Cc: Gottfredsen, Jeffrey (SEC) <jeffrey.gottfredsen@state.ma.us>; flaviap@gmail.com; sec-dl-preweb@sec.state.ma.us; Susan Tkaczuk <STKACZUK@somervillema.gov>; Francis Wright <fwright@somervillema.gov>
Subject: SPR21/1446 Appeal Decision - request for reconsideration

Dear Ms. Murray,

On behalf of the City of Somerville, I write to request reconsideration of your June 22, 2021 decision in case no. SPR21/1446.

To the extent that there is an incident report, it falls within one or more of the categories set forth in G. L. c. 41, s. 97D and consists of information related to the type of information specifically exempted by statute. As such, the City is prohibited by law from releasing any existing incident report.

In SPR 17/1455, your office ruled that "Whereas responsive records consist of information related to the type of information specifically exempted by [G.L. c. 41, s. 97D], the [Boston Police] Department has acted properly in withholding those records which fall within the claimed statutory exemption from disclosure."

Your ruling on this matter conflicts with your prior ruling in 2017, which permitted the City of Boston to use the exemption. Likewise, requiring the City to clarify for the requester the factual basis for its assertions (i.e. provide the general contents of any existing report) defeats the purpose of G. L. c. 41, s. 97D.

As to exemption (c), segregable portions of a report, to the extent it exists, cannot lawfully be provided, in light of the statutory prohibition from releasing the document set forth in G. L. c. 41, s. 97D.

For the above requested reasons, the City requests that you reconsider this matter. In the event that you deny the request for reconsideration, the City respectfully requests that you enter a final decision so that the City may seek Court guidance.

I look forward to hearing from you soon.

David Shapiro
City of Somerville
Assistant City Solicitor
93 Highland Avenue
Somerville, MA 02143
(617) 625-6600 Extn. 4409
DShapiro@somervillema.gov

City of Somerville Public Records Notice

Please be advised that the Massachusetts Attorney General has determined that email is a public record unless the content of the email falls within one of the stated exemptions under the Massachusetts Public Records Laws.



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

Rebecca S. Murray
Supervisor of Records

July 21, 2021
SPR21/1446

Francis X. Wright, Esq.
City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Dear Attorney Wright:

I have received the petition of Flavia C. Perea and Sean Roberson appealing the response of the City of Somerville (City) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On December 19, 2019, Ms. Perea and Mr. Roberson, through their attorney, Peter A. Hahn, Esq., requested a specific police incident report.

Previous Appeal

This request was the subject of a previous appeal. See SPR21/1446 Determination of the Supervisor of Records (June 22, 2021). In my June 22nd determination, I ordered the City to clarify how the incident report in question falls within the type of records contemplated in G. L. c. 41, § 97D. In an email to this office on June 29, 2021, the City requested that I reconsider my previous determination.

Reconsideration Request

After another careful and thorough review of this matter, I respectfully decline to reverse my findings in the June 22nd determination. The City must clarify how the incident report in question falls within the type of records contemplated in G. L. c. 41, § 97D.

If the parties are not satisfied with the resolution of this administrative appeal, please be advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10(b)(ix); § 10A(c) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

Francis X. Wright, Esq.
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Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive style with a large, looping 'M' at the end.

Rebecca S. Murray
Supervisor of Records

cc: Flavia C. Perea and Sean Roberson
David Shapiro, Esq.