



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

Rebecca S. Murray
Supervisor of Records

April 2, 2021
SPR21/0248

Debra Cabral
Records Access Officer
City of Fall River Public Schools
417 Rock Street
Fall River, MA 02720

Dear Ms. Cabral:

I have received the petition of Colin Dias appealing the response of the Fall River Public Schools (School) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On January 19, 2021, Mr. Dias requested the following records,

“#1 Any report made following an investigation into alleged inappropriate conduct by [a named individual]
#2 Any document or contract handed to any member of the School Committee to sign stating they will not copy, show, or reproduce any report following an investigation into alleged inappropriate conduct by [a named individual].”

Previous appeal

This request was the subject of a previous appeal. See SPR20/0248 Determination of the Supervisor of Records (February 17, 2021). The School provided an un-redacted copy of the report as a result of a request from the Supervisor for an *in camera* review. I thank the School for its cooperation.

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.

The School's January 29th response

On January 29, 2021 the School provided a response. For Request #1, the School stated that the responsive records were exempt under the attorney-client privilege and Exemption (c). For Request #2, the School asserted they had no responsive records.

Exemption (c)

Exemption (c) applies to:

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.

Medical information that is of a personal nature and relates to a specifically named individual may be exempt from disclosure. Brogan v. School Comm. of Westport, 401 Mass. 306, 308 (1987); Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983). Generally, medical information is sufficiently personal to warrant exemption. Globe Newspaper Co., 338 Mass. at 432-34. There is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body. Globe Newspaper Co. v. Chief Med. Examiner, 404 Mass. 132, 135 (1987).

Further, 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).

When analyzing a privacy claim, there is 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.

Common law attorney-client privilege

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass, 450 n.9 (2007); see also Hanover Ins. Co. v. Rapa & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege "are required to produce detailed indices to support their claims of privilege." Suffolk, 449 Mass. at 460.

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege the Supervisor of Records " ... shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed." G. L. c. 66, § 10A(a).

The School explains that the remaining responsive records "... are exempt from disclosure due to the protection of the attorney- privilege because they are communications between the District and legal counsel made for the purpose of obtaining legal advice." The School further asserted in its cover letter dated February 25th that that the communications were made in confidence and that the privilege as to these communications has not been waived. The School provided a privilege log in support of the attorney-client privilege.

In camera inspection

Upon *in camera* review of the responsive record, I find that the School did not meet its burden to withhold the report in its entirety pursuant to Exemption (c) or the attorney-client privilege.

Order

Accordingly, the School is ordered to review the request, redact the responsive record where appropriate and provide a response to Mr. Dias made in accordance with the Public Records Law, its Access Regulations and this order within 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.

Debra Cabral
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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" and a long tail on the "y".

Rebecca S. Murray
Supervisor of Records

cc: Colin Dias