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May 8, 2024

BY E-MAIL

Open Commonwealth
info@opencommonwealth.org

RE: Public Records Request dated April 24, 2024

Open Commonwealth:

On April 24, 2024, Malden received the following request: "Please provide the following electronic communications of Antonietta ('Toni') Mertz:

- Any and all electronic communications from November 1, 2019 through December 31, 2019:
- Which contain any of the following words:
- NRT (N.R.T. and/ or North Reading Transport(ation))
- Abuse
- Incident
- Video
- Bus and/or Van
- Monitor

- Any and all electronic communications from July 1, 2020 through October 31, 2020:
- Which contain any of the following words:
- NRT (N.R.T. and/ or North Reading Transport(ation))
- Abuse
- Incident
- Video
- Bus and/or Van
- Testimony
- Testify
- Monitor"

Response

A search was conducted which yielded 734 emails as well as attachments for November 1 through December 31, 2019 and 1,935 for July 1 through October 31, 2020. The total number of emails and attachments is 2,669.

Based on the District's initial review, and given the broad scope of the request and volume of records, the District will request thirty (30) additional business days to reply to the request pursuant to G.L. c. 66, § 10(b)(vi).

Harassment

The District believes, pursuant to G. L. c. 66, § 10(c), that this request is part of a series of requests that is intended to harass the District and thereby will seek from the Supervisor relief from the District's obligation to provide copies of the records sought. See Erickson v. Executive Office of Environmental Affairs, 2006 WL 3010949 (Superior Court, Suffolk County) (public records requests may not be used as part of a "pattern of harassment to government officials and anyone else" with whom a party has a dispute).

950 CMR 32.06(4)(f) states that "if, when reviewing a petition for extension of time described in 950 CMR 32.06(4)(d), the Supervisor determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the Supervisor may . . . relieve the custodian of its obligation to provide copies of the records sought."

Open Commonwealth is requesting records related to a bus video that is subject of the litigation involving the Supervisor in case CIVIL ACTION NO. 21-1458-J, for which the Supervisor is considering the parties' harassment arguments. This bus video was also the subject of litigation in Federal District Court at Docket No. 1:21-cv-10190. The request for these emails relates to discovery requests in that litigation. The consistent requests from Open Commonwealth and/or Mr. Friedman for these records repeatedly and using public records to conduct further discovery is harassment. Given that it is for his own use, it is not for a public purpose.

If the District is not relieved of its obligation to provide you with copies of the records you seek, then the District will alternatively petition the Supervisor of Records to charge a fee to produce the records you seek because the records will need to be reviewed to determine if they contain information protected by the attorney-client privilege or certain statutory exemptions to the Public Record Law.

Fee Petition

The District intends to petition the Supervisor of Records to charge a fee to produce the records you seek because the records will need to be reviewed to determine if they contain information protected by the attorney-client privilege or certain statutory exemptions to the Public Record Law.

Grounds For Redaction

The records you seek need to be reviewed, and potentially redacted, for several reasons.

First, these records likely contain the content of discussions between the District and its attorneys, for purpose of obtaining legal advice, which has not been shared with the public and is therefore protected by the attorney-client privilege. See Suffolk Constr. Co., Inc. v. Div. of Cap. Asset Mgmt., 449 Mass. 444 (2007) (governmental entity may assert attorney-client privilege to protect documents against disclosure where they contain communications between lawyer and client for purpose of obtaining legal advice). "The privilege enable[s] clients to make full disclosure to legal counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice." Suffolk, 449 Mass. At 449. The Guide to the Massachusetts Public Records Law states that "[s]egregation and redaction under the attorney-client privilege has also been found to be 'require [sic] by law.'" Accordingly, the records will need to be reviewed to determine if they contain information protected by the attorney-client privilege and then any necessary redactions will need to be made.

Second, the records contain personal identifying information of public school students. In Champa v. Weston Public Schools, 473 Mass. 86 (2015), the Supreme Judicial Court held that a settlement agreement, between a

public school district and the parents of a child who required special education services at an out-of-district private institution, was not subject to disclosure under the Public Records Law based upon Exemption (a) (which protects from disclosure records that are "... specifically or by necessary implication exempted from disclosure by statute," MGL c. 4, § 7(26)(a)).

The SJC in Champa relied upon state and federal regulations mandating confidentiality of student/education records; ruled that the settlement agreement was an education record; and likewise noted, in footnote 8 of its opinion, that the school district's receipt of federal funds was conditioned on non-disclosure of education records. Accordingly, the settlement agreement was not a public record based upon Exemption (a). While Exemptions (a) exempted the agreement from the definition of a public record, the Champa court nonetheless ruled that the agreement should be redacted to protect personally identifying information; and that once redacted, the agreement shall be disclosed. The SJC likewise remanded the case to the trial court "... regarding the necessary and appropriate redactions of personally identifying information to be made ..." 473 Mass. at 98-99.

Like the agreement at issue in Champa, communication between the District and legal counsel contain personal identifying information of public school students who enjoy mandated confidentiality; indeed, such documents, if released, would reveal the identities, disabilities and information on their educational programming. Further, since legal counsel is counseling the District on the educational services and programming that is providing to students, especially special education students, these records should be deemed exempt from Public Records Law disclosure under Exemption (a) because, as supported by Champa, state and federal regulations compel the District to protect educational records from disclosure. Specifically, they are protected by the Federal Education Rights Privacy Act, Massachusetts General Law, Chapter 71, Section 34A to 34H, and 603 CMR 23.00 et. seq. At the very least, the records will need to be reviewed to determine if they contain any student information, and then any necessary redactions will need to be made.

Finally, the responsive records may include personnel record information or private personal information which is not subject to disclosure pursuant to Exemption (c) to the Public Records Law. 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).

In terms of the first clause of the privacy exemption, the Supreme Judicial Court has held that "[w]hile the precise contours of the legislative term "personnel [file] or information" may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personnel information that are 'useful in making employment decisions regarding an employee.'" Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. 792, 798 (2000). The second clause of the privacy exemption applies to requests for records that implicate privacy interests. 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 the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980).

Records responsive to your request will thus need to be reviewed and redacted to the extent they contain private email addresses and contact information and information concerning employees that relate to performance, complaints, evaluations, discipline, and any other exempt information. As noted previously, the District will petition to charge a fee to redact under this exemption.

Calculation of Fee Estimate

To produce these records, the District provides the following fee estimate. Pursuant to G. L. c. 66, § 10(d)(iii) *et seq.*, “if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested.” In this case, the lowest paid employee who has the necessary skill required to segregate and redact the records requested is a salaried employee whose effective hourly rate exceeds \$25 per hour. In accordance with 950 CMR 37.02(2)(m)(1), you will not be charged for the first two (2) hours of those services and will only be charged at a rate of \$25 per hour.

Each page of the records you seek must be reviewed to determine which exemption or privilege applies. Segregation time “includes the time used to review records to determine what portions are subject to redaction or withholding under G. L. c. 4, § 7(26) or other legally applicable privileges. Redaction time includes the time to delete, or otherwise remove that part of a public record that is exempt from disclosure under G. L. c. 4, § 7(26) or other legally applicable privileges from non-exempt material. The District estimates that it will take one minute per email to segregate and redact the email. As a result, the District estimates a total of 44.48 hours.

You will not be charged for the first two hours. 42.48 hours for segregation and redaction at the rate of \$25 per hour, yields a total fee estimate of \$1,062.00. The actual fee to produce these records may vary based on the actual time spent to complete the necessary review and redaction process. The District will not begin to review the records you seek until it receives a check in the amount of \$1,062.00.

Please be advised that your fee estimate may be reduced if you narrow the scope of your request (*i.e.* reduce the period of time for the records you seek or reduce the number of search words).

The District will provide a copy of its fee petition to the Supervisor.

Right of Appeal

Pursuant to G.L. c. 66, § 10(b)(ix), please note you have a right of appeal to the Supervisor of Records under G.L. c. 66, § 10A(a) and the right to seek judicial review by commencing a civil action in the Superior Court under G.L. c. 66, § 10A(c).

Respectfully,

Shirley Dorai
Malden Public Schools

cc: Supervisor of Public Records
Stephanie Muccini Burke, Records Access Administrator
Carol Ann Desiderio, City Clerk