

Subject: Request for Appeal - City of Malden - Non-Responsive
Date: Tuesday, May 28, 2024 at 8:34:19 AM Eastern Daylight Time
From: Commonwealth Transparency <info@opencommonwealth.org>
To: pre@sec.state.ma.us <pre@sec.state.ma.us>, SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
CC: Carol Ann Desiderio <cdesiderio@cityofmalden.org>, publicrecords@cityofmalden.org <publicrecords@cityofmalden.org>
Priority: High

Greetings:

On May 20, 2024 the following PRR was served on. the city of Malden:

From: Commonwealth Transparency info@opencommonwealth.org
Date: Monday, May 20, 2024 at 10:32 PM
To: Carol Ann Desiderio cdesiderio@cityofmalden.org
Cc: publicrecords@cityofmalden.org publicrecords@cityofmalden.org
Subject: Public Record Request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A

Greetings:

This is a ***not*** a modification of a prior public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:

Please provide the following documents/records in the possession or under the control of town/city for the period ***any time prior to and through May 21, 2024:***
Time

Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items:

We are aware that Ms. Mertz has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

This request seeks responsive documents be delivered in electronic format and in the format in which they are regularly maintained, and specifically includes all electronic mail attachments ***and metadata.***

Where no such records in the above categories exist, please provide a written statement to that effect.

With respect to the form of production, we note that relevant regulations require the production of records in an accessible, commonly used electronic form, to the extent feasible. See 950 CMR 32.04(5)(d).

The records custodian who receives this request is required to use his or her “superior knowledge” to determine the exact records that are responsive to this request.

Your government entity may have multiple RAOs that are assigned to a specific division or department within that entity. A request to one RAO may include records of another division or department within the RAOs’ agency or municipality. RAOs must use their superior knowledge of the records to ensure that a request for records is delivered to the appropriate party. Therefore, an RAO is expected to forward such requests to the appropriate parties within its municipality or agency.

Record custodians are also required to implement new record keeping systems and databases in such a way as to allow for “retrieval of public portions of records to provide maximum public access.” See 950 CMR 32.07(1)(e).

Extraction of such data from a database or electronic record system does not constitute creating a new record. See 950 CMR 32.07(1)(f). Printing these records from a database or electronic system, redacting them with a marker, and then re-scanning them, is generally not consistent with these regulations; this process provides the digital records neither in the preferred form nor in a “searchable machine-readable form.” 950 CMR 32.04(5)(d).

If necessary, we welcome reasonable suggested modifications pursuant to 950 CMR 32.06(2)(g). Per *Attorney Gen. v. Dist. Attorney for Plymouth Dist.*, 484 Mass. 260, 141 N.E.3d 429 (2020), compiling information from a database is not tantamount to creating a new record that would otherwise be precluded under public records law. Specifically: “Where public records are in electronic form, a public records request that requires a government entity to search its electronic database to extract requested data does not mean that the extracted data constitute the creation of a new record, which would not be required, under the public records law.” *Id.* at 442 to 443.

Thus, we request that your department query its database and provide a response to the records request. Should you determine that some portions of the documents are exempt from disclosure, please release any reasonably segregable portions that are not exempt. In addition, please note for any such redactions the applicable statutory exemption and explain why it applies to the redacted or withheld information.

This request and all responsive documents are for express purposes of gathering information to promote citizen oversight and further the public understanding of the operation and activities of our government.

Kindest Regards,

OpenCommonwealth.org

On May 28, 2024 the following was received:

From: foiadirect@townforms.com <foiadirect@townforms.com>
Date: Tuesday, May 28, 2024 at 8:25 AM
To: Commonwealth Transparency <info@opencommonwealth.org>
Subject: REF: Request# 2024-0262:

Your request does not comply with the Public Records Law (PRL), G.L. c. 66 and 950 C.M.R. 32.00. Your request is excessively broad, and so broad that it is not permitted by the PRL. The Supervisor of Public Records requires that public records requests must reasonably describe the records sought. G. L. c. 66, § 10(a)(i).

In a recent Suffolk Superior Court case, the court found that under the PRL “[t]he reasonable description requirement contemplates that a requesting party will identify documents or categories of documents with sufficient particularity that government employees will be able to understand exactly what they are looking for, and then make a prompt production.”, Suffolk. Sup. No. 1784CV02087, at 2 (January 23, 2019). *Chawla v. Dep't of Revenue*

The court further indicated “[r]equests for documents that are articulated with very broad language that calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently ‘related’ to the category of materials requested, will satisfy this statutory standard.” not *Id.* (emphasis in original). In accordance with G. L. c. 66, § 10(a)(i) and the *Chawla* decision described above, whereas you seek “all information and documents” or “any and all communications, documents, e-mails, text messages, voice recordings, and other information or tangible evidence” “pertaining” to elections for example, it is unclear with “sufficient particularity” which records you seek. Thus, your request “calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently ‘[regarding]’ the category of materials requested.” *Chawla*, at 2.

Therefore, your request is not legal and not permitted under the PRL.

Should you wish to define a scope for the emails sought from the City of Malden sever, we can attempt a search.
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, § 10

Regards,
Public Records
City of Malden

The public records sought are very specifically described: **“Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items: “**

OpenCommonwealth.org hereby requests that the SPR find and Order the City of Malden to provide all responsive records without delay and without charge as they failed to provide a good-faith response within 10 business days as required under Massachusetts Public Records Laws M.G.L. c66, §§ 10-10A.

Kindest Regards,

OpenCommonwealth.org