



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

Manza Arthur
Supervisor of Records

May 31, 2024
SPR20/1941; SPR20/1942; SPR20/1943

Carol Ann Desiderio
City Clerk
City of Malden
215 Pleasant Street
Malden, MA 02148

Dear Ms. Desiderio:

I write in connection with the petitions of Bruce Friedman appealing the response of the Malden Public Schools (School/Malden) to three requests for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). In separate requests, on September 24, 2020, Mr. Friedman requested:

- [1.] Any and all electronic communications created in, sent to and sent from Mr. Michael Wood's School District's electronic mail system including drafts, deleted items and calendar entries;
- [2.] Any and all electronic communications created in, sent to and sent from Ms. Elizabeth Cushinsky's School District's electronic mail system including drafts, deleted items and calendar entries;
- [3.] All materials relating to the conduct of any investigation within the School District; such as, witness interviews, reports, and conclusions, specifically excluding any disciplinary outcomes if they exist, which in any way include Mr. Michael Wood, Ms. Elizabeth Cushinsky, and/or the School's Special Education Department from the School District Year 2017-2018 through the date you respond to this request.

As there were no records responsive to Request number 3, this Remand will address Requests 1 and 2 only.

Factual and Procedural Background

On October 8, 2020, Mr. Friedman submitted the three aforementioned appeal petitions to the Supervisor of Records (Supervisor) contesting the timeliness of the School's response to the records requests that he made on September 24, 2020. The School estimated that Mr.

Friedman's requests would yield roughly 80,000 responsive documents, many of which would need to be reviewed and segregated or redacted to remove any confidential student information or attorney-client communications. The School estimated that it would take nearly 7,020 hours, for a cost of \$175,400 to produce the records.

On October 21, 2020, the Supervisor issued a determination ordering the School to provide Mr. Friedman with a response to his requests. The School replied that it had responded to Mr. Friedman on October 14, 2020. In its response to the Supervisor, the School stated that "[e]ffective the week of August 17, 2020, the Mayor, exercising his emergency powers during the pandemic, altered City Hall hours to afford one day, Friday, to deep clean City facilities. As a result, City buildings are unexpectedly closed on Fridays. These closures were unexpected and due to the pandemic. Consequently, Fridays do not constitute business days as they are a day where the custodian's office is unexpectedly closed."

The Supervisor issued a further determination on April 23, 2021. In the April 23rd determination, the Supervisor concluded that the Friday closures were not exempted from the ten-business day calculation, stating that "[i]f the City and School District's offices are scheduled to be closed every Friday, it is unclear how the office is closed unexpectedly on Fridays." The Supervisor found that the City did not meet its burden to prove that the City and School's offices continue to be closed unexpectedly every Friday. The Supervisor ordered that if the School wished to assess a fee, it must demonstrate its compliance with G. L. c. 66, § 10(e).

On March 2, 2021, the School through its Legal Counsel, *Murphy, Hesse, Toomey & Lehane, P.C.*, asserted that "the Friday closure was unexpected, and extraordinary, not expected or routine and thus Fridays did not count as business days and the [School] provided a response within 10 business days, not counting Fridays."

Subsequently, on May 7, 2021, the School argued for the first time that Mr. Friedman's requests were "part of a series of contemporaneous requests that are frivolous and designed to intimidate and harass the School and not intended to effect the broad dissemination of information to the public about actual or alleged government activity." The School further argued that the records requests involved litigation regarding his child, which Mr. Friedman had instituted against the School before the Bureau of Special Education Appeals. The School asserted that Mr. Friedman was individually responsible for twenty percent of the total requests that the School had received since January 2019. The School argued that "...the Supervisor should find that the request is harassing and determine that Malden does not have to comply with the request."

Also in the May 7, 2021 response, the School asked the Supervisor to reconsider her April 23rd determination regarding the timeliness issue. See SPR21/0491. In the decision dated June 1, 2021, the Supervisor declined to reverse the April 23, 2021 determination.

Subsequently, on July 21, 2021, the School filed a Complaint known as Malden Public Schools v. Manza Arthur, Supervisor of Records et al., formerly known as Malden Public

Schools v. Rebecca S. Murray, Supervisor of Records et al. Middlesex Superior Court, Docket Number 2181CV01458.

On May 16, 2023, the Court issued an Order and remanded the matter back to the Supervisor for reconsideration. See Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings (Decision), page 6.

In the Court's May 16, 2023 Order, the Court found that the School's "response to Mr. Friedman's request on October 14, 2021, should have been deemed to be within ten business days for the purpose of G. L. c. 66, § 10(e)." See Decision, page 11. Further, the Court stated that the Supervisor is to review the School's "request, pursuant to G. L. c. 66, § 10(c), that [the School] should be relieved of its obligation to provide the requested information as the request is part of Mr. Friedman's 'series of contemporaneous requests that are frivolous or designed to intimidate or harass'." See Decision, page 12.

In accordance with the Court's May 16, 2023 Order in Malden Public Schools v. Manza Arthur, as Supervisor of Public Records et. al., I will now issue a reconsideration of my April 23, 2021 determination with respect to the fee estimate and issue a determination regarding the alleged harassment by Mr. Friedman to the School as delineated in G. L. c. 66, § 10(c) as remanded by the Court.

Fees - Municipalities

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.

A municipality may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents (\$.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Municipalities may not assess a fee for the first two (2) hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested unless the municipality has 20,000 people or less. G. L. c. 66, § 10(d)(iii). Where appropriate, municipalities 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 a record requested, but the fee shall not be more than \$25 per hour. Id. However, municipalities may charge more than \$25 per hour if such rate is approved by the Supervisor under a petition under G. L. c. 66, § 10(d)(iv).

A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor under a petition under G. L. c. 66, § 10(d)(iv). G. L. c. 66, § 10(d)(iii); 950 C.M.R. 32.06(4).

The School's November 30, 2020 Fee Estimate

In its November 30, 2020 response, the School asserted,

[i]t will take approximately 7,020 hours to search, segregate and redact all of the Records that you have requested. The [School] needs to review every mail outlined. The [School] estimate[s] that it will take 5,175 hours to review the emails in your first request and 1845 hours for your second request. The estimate is based on five minutes per email, with additional time required for calendar entries. In accordance with 950 C.M.R. 37.02(2)(m)(1) you will not be charged for the first (2) hours of those services. Seven Thousand Sixteen hours multiplied by \$25 per hour yields a fee estimate of \$175,400.

Upon review, it is unclear how the School calculated the number of hours, because 7,020 – 2 hours = 7,018 hours.

In a March 11, 2021 determination, the Supervisor requested that, “[t]he [School] must clarify whether it has assessed time for segregating and/or redacting records under Exemption (c), how much time was allocated to ‘search of the records,’ and whether the School District filed a petition for approval to charge fees for segregation and redaction that is not required by law.” See SPR21/0491. In addition, it was determined that it was not clear what tasks were involved to prepare responsive records for production. Further, although the School explained that redactions are necessary pursuant to Exemption (a) of the Public Records Law, specifically the Family Educational Rights and Privacy Act (FERPA), as well as the attorney-client privilege, it was determined that it was unclear whether the School is charging for exemptions that are not required by law. See G. L. c. 66, § 10(d)(iii) (a fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law for Exemption (a) or attorney-client privilege or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv)).

The School's March 19th Revised Fee Estimate

In its March 19, 2024 response, attached as **Exhibit A**, the School asserted,

On March 15, 2021 the School reduced its fee estimate to \$150,400 which subtracted 1,000 hours of time segregating and redacting personnel records under Exemption (c).

In its March 19th response, the School provided a revised fee estimate of \$245,825. The School advised:

... to ensure a reasonable and accurate estimation of hours, Malden has conducted a sample of the amount of time it would take to review and redact ten of the subject emails. Together, these ten emails comprised of two hundred seventy-four (274) pages. Based on this average (79.5 minutes multiplied by

8,178 groups of ten, equaling 650,151 minutes) it would take approximately 10,835 hours to review and redact 81,780 emails. Malden has not included any costs for search time ... and will subtract the first two (2) hours of work as required.... Additionally Malden will subtract one thousand (1,000) hours from this estimate, so as not to charge for segregations and redactions made pursuant to Exemption (c). Malden anticipates that the vast majority of hours will be needed to segregate and make redactions required by law [Exemptions (a) Family Educational Rights And Privacy Act (FERPA)]... [and] redactions will need to be made for emails between Malden and its attorney ... This amounts to an estimated ... 9,833 hours to segregate and redact the requested records ... the lowest paid employee whose has the necessary skill to respond to this request is a salaried employee whose effective hourly rate exceeds \$25 per hour. Notwithstanding that rate, a rate of \$25 per hour will be used to calculate the following fee estimate. Accordingly, Malden makes a revised fee estimate of \$245,825.

In its March 19th response, the School has explained that it will charge less than the hourly rate of the lowest paid employee with the necessary skill to perform the tasks, and will not charge for the first two hours of work. Consequently, to the extent that responsive records require redactions by law, I find that the School has met its burden of supporting its \$25.00 per hour rate for the tasks of segregating and redacting those records.

In its March 19th revised fee estimate, the School has removed the previous charges assessed in its November 30th fee estimate for segregation and redaction not required by law, and has confirmed that it will now only charge for segregation and redaction required by law under Exemption (a) and under the attorney-client privilege. However, while the School has claimed that the requested records may contain FERPA and attorney-client privileged materials, the School has not demonstrated that all of the responsive records are likely to contain information the redaction of which is required by law.

Under the Public Records Law, a municipality must “identify any records, categories of records or portions of records that the ... municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based.” G. L. c. 66, § 10(b)(iv); Flatley, 419 Mass. at 511; see also 950 C.M.R. 32.06(3)(c)(4-6). Given the broad nature of Mr. Friedman’s request and significant number of responsive records, it is unclear what categories of records are responsive to this request and how many records fall under each category.

Further, it is uncertain how many categories of records the School believes likely to contain information falling under FERPA and the attorney-client privilege. Without further information about the categories of records the School is withholding and the specific reasons for the withholding, this office cannot determine whether the fee estimated for segregation and redaction is reasonable in compliance with the law. Consequently, in order to facilitate a determination, the School must provide Mr. Friedman with an index of records or categories of records, including an identification of which records or categories are likely to contain

information subject to redactions that are required by law. See G. L. c. 66, § 10(b)(iv); G. L. c. 66, § 10(d)(iii); 950 C.M.R. 32.06(3).

Custodial Index of Records

To facilitate closure of this matter and to aid in the cooperation of the parties, I find that the School must provide Mr. Friedman with a custodial index of the records and the basis of the exemption claims for each record or each category of records. Please note that “the Supervisor may require a records access officer or custodian to compile an index of the requested records within the context of a public records appeal under 950 C.M.R. 32.08.” 950 C.M.R. 32.08(5)(a).

I find that a custodial index of the records and/or categories of records may allow Mr. Friedman to determine which types of records are responsive to his request and how much of the fee estimate is attributed to each type. See 950 C.M.R. 32.08(5). This may allow for narrowing or modification of the request, and revision of the fee estimate.

The School’s Request for Relief from the Obligation to Provide Records

In its decision, the Court references G. L. c. 66, § 10(c), which provides in pertinent part:

If the supervisor of records 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 of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought.

G. L. c. 66, § 10(c).

In its May 7, 2021 response, and as summarized by the Court, see Decision, page 5:

...the School opines for the first time ... that the requests were “part of a series of contemporaneous requests that are frivolous and designed to intimidate and harass Malden and not intended to effect the broad dissemination of information to the public about actual or alleged government activity.”

Contending that the records requests implicated administrative proceeding that Mr. Friedman had instituted against Malden before the Bureau of Special Education Appeals and asserting that Mr. Friedman was individually responsible for twenty percent of the total requests that Malden had received since January 2019, the School argued that “the Supervisor should find that the Request is harassing and determine that Malden does not have to comply with the request.”

In its response dated March 19, 2024, the School provided additional information regarding the alleged harassment by Mr. Friedman. See Exhibit A. In this response, the School asserts:

[Mr. Friedman's] request is needlessly broad and unlimited in time, seeking any and all electronic communication created or received by two specific employees, amounting to more than 80,000 records ... [Mr. Friedman] has failed and refused to make any attempt to limit his request by topic, time or otherwise ... The fact that Mr. Friedman] made such a broad and unlimited request by itself indicates harassment.

The School further asserts:

...the request was made to serve Mr. Friedman and the litigation he has brought against Malden, rather than for the broad dissemination of the information relating to government activity. In October of 2019 Mr. Friedman engaged in litigation with Malden at the Bureau of Special Education Appeals ("BSEA"), regarding perceived issues with his child's special education plan. This later snowballed into a total of four BSEA cases, two of which involved litigation relative to records for his child.

It is the School's position that Mr. Friedman's requests was brought "in an attempt to use the Public Records Law to obtain information related to the bus incident" which was the basis of one of the BSEA cases. The School further states in support of Mr. Friedman's alleged harassment:

... between May 17, 2019 and the date of this specific request, September 24, 2020, Mr. Friedman made 125 public record requests under his name and 83 under Open Malden, bringing the total to 208. He appealed nearly every one of Malden's Responses to these requests. Between January 1, 2021 and approximately June of 2022, Mr. Friedman made an additional 42 public record requests under his name and 83 under Open Malden. He again appealed nearly every one of Malden's responses to these requests. These requests made up more than a third of the requests by Malden at the time.

The time consuming, frivolous and harassing nature of Mr. Friedman's requests have already diverted school resources away from students, residents and the public at large. This harm will inevitably continue without the Supervisor relieving Malden of its obligation to respond.

In his March 18, 2024 response, Mr. Friedman provided information contesting the allegation of harassment. See Exhibit B. Mr. Friedman asserts:

The request is neither contemporaneous requests nor frivolous nor designed to intimidate or harass. The requests are intended for the broad dissemination of

information to the public about actual or alleged government activity. Mr. Friedman has reported on and published thousands of public records publicly to a wide audience of the general public. Through his efforts, OpenCommonwealth.org has published 100's of articles and 1000's of posts regarding public records and how they relate to the activities of government. His work is primarily focuses [sic] on the Commonwealth of Massachusetts, its municipalities, and especially its schools." Mr. Friedman is well known throughout the Commonwealth for his work in public records, and his work has been referenced in multiple unrelated court cases, proposed legislation, and has caused multiple changes in both public policy and administration of government in Massachusetts.

Mr. Friedman further claims that OpenCommonwealth.org has thousands of visitors since January 2019.

The decision by the Supervisor concerning whether to relieve a municipality of its obligation to provide records requires a review of the factors set forth in G. L. c. 66, § 10(c). In this case, the School has offered information to support its contentions that the requests from Mr. Friedman are part of a series of cotemporaneous requests, and that the requests are frivolous and designed to harass. However, the School has failed to demonstrate that the requests "are not intended for the broad dissemination of information to the public about actual or alleged government activity." See G. L. c. 66, § 10(c). On the contrary, Mr. Friedman has provided ample information to demonstrate that he broadly disseminates the records through his website posts and articles, and that those records concern government activity in the Malden Public Schools. Accordingly, where the records are broadly disseminated and concern actual or alleged government activity, the Supervisor is unable to relieve the School from its obligation to provide records.

Conclusion

After careful and thorough review of the Court's May 16, 2023 Order in Malden Public Schools v. Manza Arthur, as Supervisor of Public Records et. al, the School's March 19, 2024 response, and Mr. Friedman's March 18, 2024 response, I find that a custodial index of the records and/or categories of records may allow Mr. Friedman to determine which types of records are responsive to his request and how much of the fee estimate is attributed to each type. See 950 C.M.R. 32.08(5). As discussed above, this may allow for narrowing or modification of the request, and further revision of the fee estimate.

Accordingly, the School is ordered to provide Mr. Friedman with a custodial index of the records in a manner consistent with this order, the Public Records Law and its Regulations without delay. A copy of the custodial index 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.

Further, this office notes that there was no petition filed in support of a harassment claim pursuant to G. L. c. 66, § 10(c). Upon review and in light of Mr. Friedman and

Carol Ann Desiderio
Page 9
May 31, 2024

SPR20/1941; SPR20/1942; SPR20/1943

OpenCommonwealth having published many articles and posts regarding public records, and how they relate to the activities of government, I am not able to relieve the School from its obligation to provide records. G. L. c. 66, § 10(c).

Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur". The signature is written in a cursive, flowing style.

Manza Arthur
Supervisor of Records

cc: Bruce Friedman