



City of Malden

Massachusetts



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Malden City Clerk
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July 22, 2024

BY ELECTRONIC MAIL ONLY

Commonwealth Transparency

Re: City of Malden – Public Record Request, dated July 8, 2024 (11:33 PM)

Dear Sir/Madam:

The City of Malden (“City”) is in receipt of your request for public records, submitted via electronic mail.

This particular request seeks the following records:

- This is a new request and does not replace or modify any prior requests.

Please *extract* the author and all recipients (To:, Cc:, and/or Bcc:), date, and subject heading of all email sent by and/or received by any electronic mail account for Ronald B. Hogan.

- This requests specifically seeks, the To:, From:, Cc:, and Bcc: address fields, the Date and Time that the message was sent and/or received, the subject of the email and whether or not there was an attachment, and if there was an attachment, the full name of the attachment.
- This requests specifically requests that the export be provided in ONLY .CSV or .XLSX form.

This request specifically includes ALL email accounts and addresses in your possession and/or under your control, including group and resource email addresses.

Below, please find the City’s response and fee estimate with respect to this particular request for public records. Upon a determination from the Supervisor of Records regarding the City’s fee petition, and upon receipt of payment in the amount authorized and detailed below, the City will promptly locate and provide all non-exempt responsive records to you, subject to redaction and/or withholding under the Public Records Law.

Initial Response and Anticipated Bases for Withholding

As a preliminary matter, please be advised that the City's duty to respond to records requests extends only to records that are in existence and in the custody or possession of the City, and the City is under no obligation to create records in response to your request or respond to prospective requests for records. G.L. c. 4, § 7(26) (defining "public records" as materials which have already been "made or received" by a public entity). Additionally, the City is not required to answer questions in response to a public records request. See Secretary of the Commonwealth, A Guide to the Massachusetts Public Records Law, at 8, 41 (December 2022).

The City anticipates that it has voluminous records responsive to your requests, which will require time to locate such records and review the records for privileged information, as detailed below. Where permitted by law, however, please be advised that such records or material contained therein may be withheld or redacted under any of the exemptions to the Public Records Law, other applicable provisions of law, and/or common law privileges, such as the attorney-client privilege. See, e.g., G.L. c. 4, § 7(26); Suffolk Construction Co. v. Div. of Capital Asset Management, 449 Mass. 444, 449-450 (2007); 950 CMR 32.06(3). Below is a summary of the anticipated bases for withholding at this time.

Exemption (c)

Exemption (c) to the Public Records Law, G.L. c. 4, § 7(26)(c), covers "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" G.L. c. 4, § 7(26)(c). The courts have held that Exemption (c) is designed to protect from public disclosure a variety of personal information, including: marital status, paternity, substance abuse, government assistance, family disputes and reputation. People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass 280, 292 (2017). In deciding whether there is a privacy interest in requested records and the weight to be accorded any such interest, a court looks "to three factors ... : (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" (footnote omitted). PETA, 477 Mass. at 292, citing Globe Newspaper Co. v. Police Comm'r of Boston, 419 Mass. 852, 858. "[O]ther case-specific relevant factors' may [also] influence the calculus." PETA, supra, quoting Police Comm'r of Boston, supra.

Here, given the broad nature of the records involving the Chief Strategy Officer and the sensitive legal and personnel information that may be contained in the records, the City will need to conduct an individualized review of the data requested in light of Exemption (c), under the factors set forth in the PETA case, cited above. After this further review, the City will provide an updated response to determine whether redaction or withholding is necessary to protect the privacy interests of individuals identified therein.

Exemption (d)

Under Exemption (d) to the Public Records Law, the City may withhold or redact "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the

[public body].” G.L. c. 4, § 7(26)(d). This exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. The application of the exemption is limited to recommendations on legal and policy matters found within an ongoing deliberative process. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230, 237 n.8 (1988). In considering Exemption (d), the Supreme Judicial Court in General Electric Company v. Department of Environmental Protection, 429 Mass. 798, 807 (1999) stated, “[t]he purpose of Exemption (d) is to foster independent discussions between those responsible for a governmental decision in order to secure the quality of the decision.”

Here, there may data contained in the records which relate to recommendations made and ongoing positions being developed by the City and Chief Strategy Officer with respect to legal matters relating to the City matters, the premature disclosure of which could taint the deliberative processes or potential litigation involving the City. As such, some responsive records may be withheld or redacted in accordance with Exemption (d).

Attorney-Client Privilege

Numerous responsive emails contained in the records also may contain information protected from public disclosure under common law doctrines and privileges, such as attorney-client privilege and attorney work product doctrine. In this regard, “the attorney-client privilege shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice.” Suffolk Const. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 448 (2007). Confidential communications between governmental entities and their legal counsel undertaken for the purpose of obtaining legal advice or assistance are also protected under the normal rules of the attorney-client privilege, and are not subject to disclosure under the public records law. Id.

Here, to the extent that several responsive email data contained in the records requested may have been sent from or received by City officials, agents, and employees during the course of the City’s search for legal advice from the City Solicitor’s Office or other City attorneys in the attorneys’ capacity, which were made in confidence, and the privilege as to these communications has not been waived by any disclosure to some third party or otherwise, said emails may be withheld or redacted pursuant to the attorney-client privilege. Suffolk Const. Co., supra at 450, n.9. Under such circumstances, the City will provide you with a privilege log including a detailed description of the records, 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. See G. L. c. 66, § 10A(a); 950 CMR 32.06(3)(d).

Finally, please be advised that nothing herein shall limit the City’s ability to assert additional applicable exemptions or privileges under state or federal law, as become apparent and appropriate following the search for, and segregation of, responsive records, pursuant to G.L. c. 66, § 10(b)(iv).

Fee Estimate

As permitted by law, you will be charged for employee search time to locate and identify responsive records, at the hourly rate of the lowest paid person capable of compiling, segregating, redacting where required by law, and reproducing responsive records, in accordance with 950 CMR 32.07(2)(i).¹ Due to the scope of your request, and given that the Records Access Officer is the lowest-paid employee capable of reviewing and producing such records given their content and the confidential nature of the records at issue, the City is petitioning the Supervisor of Records for a waiver from the statutory limit on fees of \$25.00/hour. If that petition is approved, please be advised that the fee estimate is broken down as follows:

<i>Title</i>	<i>Hours</i>	<i>Per Hour Cost</i>	<i>Total</i>
IT Director	1 hours (to search for and locate responsive records)	\$65.00/hour	\$65.00
Records Access Officer	79 hours after first 2 hours at no charge to review responsive records for any attorney-client privileged material, or any material that is required by law to be redacted, before production.	\$65.00/hour	\$5,135
TOTAL	80 hours		\$5,200

Alternatively, to the extent that the Supervisor does not approve the City’s petition within the requisite five (5) business days, on which you have been copied, the fee estimate would be broken down as follows:

<i>Title</i>	<i>Hours</i>	<i>Per Hour Cost</i>	<i>Total</i>
IT Director	1 hours (to search for and locate responsive records)	\$25.00/hour	\$25
Records Access Officer	79 hours after first 2 hours at no charge to review responsive records for any attorney-client privileged material, or any material that is required by law to be redacted, before production.	\$25.00/hour	\$1,975
TOTAL	80 hours		\$2,000

Please note the City is unable to provide a column indicating the existence of an attachment nor able to provide the name of the attachment in the summary file requested.

¹ The City of Malden has more than 20,000 residents as of the last U.S. decennial census (approx. 66,263), and therefore, you will not be charged for the first two hours of employee time necessary to respond to this request. See 950 CMR 32.07(2)(m).

Please also note that the actual cost of responding to your requests may change once the City undertakes all work necessary to comply with your request, at which time, the City will provide you with an updated response and revised fee estimate.

Upon receipt of your payment in the amount detailed above, depending on the outcome of the Supervisor's determination on the City's fee petition, made payable to the City of Malden and directed to the attention of the City Clerk's Office, the City will begin the requested work necessary to comply with your request. See 950 CMR 32.06(2)(f) (municipalities not required to provide public records until all fees are paid in full). See also SPR 17/1005 (Supervisor of Records determining that the "Public Records Law requires a requester to pay a fee estimate prior to the agency or municipality conducting search, segregation and redaction of records, and prior to receipt of the records").

Please note further that the City shall endeavor to produce all responsive records within 25 business dates following receipt of your request in the event that the City's petition for additional thirty (30) business days to respond is not allowed. See Supervisor of Records, Guide to Public Records Law, at 8 (December 2022).

Recommended Modification

In the alternative, the City will work with you to modify the scope of your request, such as limiting the timeframe for the records you are seeking. If there is any further way to narrow this request, including by providing us with a list of "key words" or "search terms" you would like the City to input into its servers, or by providing specific subject matters to search for, the City may be able to respond more efficiently and affordably. Please do not hesitate to contact the Records Access Officer to work out a manner in which to narrow the scope of your request and a revised estimate will be provided.

Statement of Appeal Rights

You may appeal this response to the Supervisor of Public Records pursuant to 950 CMR 32.08(1)(d). By law, the Supervisor is required to respond within 10 business days of receipt of your appeal. You may also seek judicial review of an unfavorable response by commencing a civil action in the superior court, under G.L. c. 66, § 10A(c).

Sincerely,

Carol Ann Desiderio
Records Access Officer

CC: Secretary of State