

Subject: Request for Appeal, Investigation, and Corrective Action - Malden Massachusetts - Licensing Commission

Date: Tuesday, July 23, 2024 at 7:06:09 PM Eastern Daylight Time

From: Commonwealth Transparency

To: fmahony@tre.state.ma.us, rmu@sec.state.ma.us, Monica.Brookman@mass.gov, Arthur, Manza (SEC), OpenMeeting (AGO), openmeeting@state.ma.us

CC: publicrecords@cityofmalden.org, pre@sec.state.ma.us, SEC-DL-PREWEB

Priority: High

Attachments: zeibergcsv2024-0361_07232024154622.csv, Attachment_07232024102445.png, GardenofKindnessandHopeemlmsg_07232024102432.pdf, 2024-0361-Zeiberg_Redacted_07232024102257.xlsx, (Exhibit A) - Public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A.pdf, Exhibit E.csv, (Exhibit D) - June 2024 Board Meeting.pdf, (Exhibit C) - Board Meeting Minutes 6-20-2017.pdf, (Exhibit B) - City Records Retention PRR Response.pdf

Greetings:

While we recognize that this is an unusual and broad approach to request action from multiple agencies, this public records response requires the following agency involvement for the following reasons:

1. Supervisor of Public Records (“SPR”) – The request originates from a Public Records Request (“PRR”) and an appeal is requested for the following reasons below, including;
2. Division of Open Government – The PRR response factually demonstrates that a long-term sitting member of the Malden [Liquor] licensing board ***who is also an active attorney*** (“Mr. Zeiberg”) has used his private email (andy.zeiberg@gmail.com) account for public body business including business before the body, and communications thereof. Any records responsive or required by OML cannot be provided by the municipality as the municipality cannot control, monitor, or manage these communications, that is at the sole discretion of Mr. Zeiberg as this is his personal gmail account, which is completely autonomous to the municipal systems. It is unclear if The City of Malden (“Malden”) has provided or provisioned a municipal account for this Mr. Zeiberg. This is a direct violation of Open Meeting Law, public records law and records retention law.
3. Massachusetts Liquor Commission – OpenCommonwealth is requesting that the Massachusetts Liquor Commission investigate the Malden Licensing Board for potential abuse of the licensing process whereby a voting member of the Malden licensing authority maintains official licensing communications outside of the purview of the Municipal and Governmental authority where politics, favoritism and other fraudulent activities may have influenced or tainted an otherwise public process for personal or political gain.
4. State Ethics Commission – OpenCommonwealth cites the same reasoning stated above to the Massachusetts Liquor Commission, we believe that the Ethics Commission should investigate the Malden Licensing Board for potential abuse of the licensing process whereby a voting member of the Malden licensing authority maintains official licensing communications outside of the purview of the Municipal and Governmental authority where politics, favoritism and other fraudulent activities may have influenced or tainted an otherwise public process for personal or political gain.

5. Records Management Unit of the Secretary of the Commonwealth (“RMU”) – As demonstrated by the emails, the entirety of the City of Malden has been in communications with Mr. Zeiberg through his personal email account and is aware that he is conducting municipal business on non-municipal systems. Unfortunately, this is not an isolated incident and more records from Malden will be forth coming soon, as there are many City officials over the past few years that have conducted official City business over personal email accounts.
- On July 9, 2024, the attached PRR (Exhibit A) was served upon the City of Malden.
 - On July 23, 2024, the email below and attached attachments were received.
 - The PRR covered ALL email from ANY time: “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 Andrew H. Zeiberg.”, however the response documents only cover 2019 forward.
 - Mr. Zeiberg has served in his capacity on the Board since at least June of 2017 (Exhibit C) and is still serving today (Exhibit D).
 - The Municipal Data Retention Schedules appear to hold several categories of records that may be requisite to these communications which are either 10 years or even permanent records retention which are clearly not met.
 - Many City officials including the Mayor, the City Solicitor, The City Clerk, RAO’s of many departments, board members, members of the mayor’s administration and more have all chosen to communicate official city business to his private email address in direct violation of public records law (Exhibit E)
 - The City of Malden responded to a previous PRR indicating the following (Exhibit B): “email account modification records are only retained for 180 days. All associated email from accounts is retained in accordance with state of mass retention policies.”
 - The Municipal Data Retention guidelines for communications and retention of policy making have not been followed by the City as demonstrated in the responses received.

OpenCommonwealth asks that the SPR find that any Attorney-Client privilege claimed by Malden regarding Mr. Zeiberg and his work at the Licensing Board must be deemed as waived as there is no possible way to demonstrate that such privilege has not been waived.

OpenCommonwealth asks that the SPR find that any privacy claims claimed by Malden regarding Mr. Zeiberg and his work at the Licensing Board must be deemed as waived as there is no controls available to Malden to maintain the privacy of any communications.

OpenCommonwealth asks the SPR to find and Order that Malden violated public records law, violated municipal data retention law, and require that Malden require Mr. Zeiberg provide all emails involving city business to the City for proper retention, destruction and management, and further direct Mr. Zeiberg to destroy all communications in his private gmail account which belong to the City.

OpenCommonwealth requests that the SPR in concert with the RMU of the Secretary of the

Commonwealth audit the city for compliance with municipal data retention and re-train all records custodians and RAO's to their obligations under Massachusetts public records and data retention laws. Further we ask that the RMU and SPR Order and audit that all employees, board members, contractors, etc. exclusively use municipal email systems and exclusively use municipal telephony to conduct communications regarding municipal business. Where this has/is not found to be the case, that Malden direct these employees, board members, contractors, etc. to relinquish these previous communications for proper retention, destruction and management, and further direct them to destroy all communications non-compliant with these requirements.

OpenCommonwealth also asks the SPR to find and Order that Malden search for all responsive records, as the records provided do not begin prior to 1-2-2019, provide all responsive records, remove current redactions, and do so without delay and without charge.

Kindest Regards,

OpenCommonwealth.org

From: foiadirect@townforms.com <foiadirect@townforms.com>
Date: Tuesday, July 23, 2024 at 3:47 PM
To: Commonwealth Transparency <info@opencommonwealth.org>
Cc: publicrecords@cityofmalden.org <publicrecords@cityofmalden.org>, GChristenson@cityofmalden.org <GChristenson@cityofmalden.org>, publicrecords@cityofmalden.org <publicrecords@cityofmalden.org>
Subject: Request# 2024-0361 : Response to your Request

Please [click here](#) to download your response document(s).

Please DO NOT reply to this email !! Please use the email address of the sender at bottom of this email, in order to communicate with the request management team.

Malden, MA

Public Record Request Number:2024-0361

Requester: Commonwealth Transparency

Request Date: Tuesday, July 9, 2024 9:39:00 AM

Response Due Date: Tuesday, August 13, 2024

Dear Commonwealth Transparency:

We have completed the work in reference to your request as referenced above. The response is given below.

Request Response

The records you sought were reviewed, and redacted, for several reasons.

First, 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, communications contained 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. Specifically, the records were redacted for a student's email as that would identify the identity of the student and student record information relative to that student.

Finally, the responsive records included 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).

The Supervisor states in its guide:

For example: Are cell phone numbers and personal email addresses of private citizens public? A private citizen whose cell phone number and personal email address is unpublished may have a reasonable expectation of privacy in this information. Any public interest in the disclosure of cell phone numbers and personal email addresses of citizens likely does not outweigh the privacy interest because this information would not shed light on whether government officials are carrying out their duties in a law-abiding and efficient manner. Therefore, this information can likely be withheld under Exemption (c).

[A Guide to the Massachusetts Public Records Law \(state.ma.us\)](http://state.ma.us)

In this case, personal emails were redacted pursuant to this guidance under Exemption (C).

Attachments

This response may or may not contain separate Response Documents to include specific response and data. In case such separate response documents exist, they are represented by attachments to this response email. Therefore, please look for any attachments if they exist. Between Request Response and attachments, we believe

you are receiving a comprehensive response to your request.

If you have any questions or comments, please do not hesitate to contact us at the following email address.

Thank you.

Public Records, Super RAO

Clerk Department

Malden

215 Pleasant St

Malden, MA 02148

Tel: (781)-397-7000

Email: publicrecords@cityofmalden.org

You are advised that if you object to this response to your request, you have the right to petition the Commonwealth of Massachusetts Supervisor of Public Records. Your petition for appeal of this response must be made within 90 calendar days of the date of this response, in writing, and must specify the nature of your objections to this response, and include a copy of your electronic request with all header information including the time, date, subject, sender and recipient email address, and a copy of the within written response, and the attachment(s) related hereto.

Your petition should be sent to the Supervisor at the following address: Supervisor of Records Division of Public Records, Office of the Secretary of the Commonwealth, One Ashburton Place, Room 1719, Boston, Massachusetts 02108 or: pre@sec.state.ma.us. Electronic communication is strongly encouraged and is the preferred method of correspondence.