

MEMORANDUM

To: University of Massachusetts Campus Public Records Access Officers
From: Karen Laisne, Associate Counsel, General Counsel's Office
Re: SJC Decision on Public Records Exemptions (c) and (n)
Date: June 19, 2017

The Massachusetts Supreme Judicial Court ("SJC") recently released a decision that interpreted two of the exemptions to the public records law, exemption (c) and exemption (n). You may recall that exemption (c) relates to privacy records, and prohibits the release of personnel or medical records, or if it relates to a specifically named individual and its disclosure may constitute an unwarranted invasion of personal privacy. Exemption (n) concerns records related to public safety, allowing a records custodian to withhold an otherwise public record if it sufficiently relates to the safety or security of persons or infrastructure. Exemption (n) allows the records custodian to exercise their reasonable judgment as to whether such release would likely jeopardize public safety.

In People for the Ethical Treatment of Animals, Inc. ("PETA") v. Department of Agricultural Resources et al. ("Department"), the SJC closely reviewed both exemptions and interpreted both quite narrowly. By way of background, PETA submitted two public records requests to the Department in 2014, asking for permits, licenses, health certificates, and other documentation related to the export and/or import of nonhuman primates in Massachusetts in 2013. The Department responded and provided copies of interstate health certificates, but redacted three categories of information: (1) the names and addresses of consignors and consignees; (2) U.S. Dept. of Agriculture license or registration numbers; and (3) names, addresses, telephone numbers, and license numbers of all veterinarians whose information appeared on the certificates. The Department's justification for these redactions were that "disclosing such information 'could compromise the security of locations housing the non-human primates, thus increasing the risk to public safety of the animals as well as the people and buildings involved with housing and transporting the animals.'" Decision, pg. 6. PETA appealed these redactions to the Secretary of State's Supervisor of Records, who upheld the redactions, relying on a memorandum provided by the Department from the federal Department of Veteran's Affairs. The federal memorandum directed FOIA field officers not to release any personal information about persons involved in any way in animal research, in response to requests for that information.

While federal FOIA exemptions do not apply to Massachusetts, the Supervisor's Office nonetheless found the memorandum persuasive. PETA then filed a complaint in the Superior Court, and the judge also ruled in the Department's favor. He found that the language in exemption (n) included was deferential, as it allowed the keeper of records to exercise their reasonable judgment as to whether the information requested, if released, was likely to jeopardize public safety. He also concluded that the redacted names and addresses identifying individual persons, including the consignees, consignors and veterinarians, were protected under exemption (c). PETA then appealed, and the SJC heard the case.

In examining exemption (n), the SJC found that it required a two-part test – first, what is the nature of the requested record (is it a blueprint or schematic, or is it "any other record"); and

second, the records custodian must exercise “reasonable judgment” in determining that disclosure of the record is “likely to jeopardize public safety.” Decision, p. 11. The SJC took a narrow view, in light of the legislative history underlying exemption (n)¹. The exemption was intended to be a narrow carve-out to protect those materials pertaining to public safety, including threat assessments, security plans, and records depicting critical infrastructure. Decision, pgs. 15-16. The SJC vacated the lower court’s decision with exemption (n), and remanded it back to the court for a new look, including on whether “the record sought resembles the records listed as examples in the statute,” and whether the records custodian has provided enough facts for “the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” Decision, pg. 17. While it seems unlikely that the animal health certificates will pass the first test, as they do not resemble the other records listed in exemption (n), it will be interesting to see how the court rules on the second point. PETA has a reputation for protesting and other disruptive activities at animal research facilities, and whether those potential activities rise to the level of jeopardizing public safety so as to protect those involved with such facilities, is a question for the court to determine.

The court’s look at exemption (c) was much more brief, as many cases have examined this exemption in detail. In particular, courts look at the privacy interests at stake such as “(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.” Decision, pg. 21. As the request in question asks for business addresses of nonpublic employees, the balancing test here accounts for the different interests in privacy of a business address over a home address. The Department also stressed the suggestion of risks to the personal safety of individuals from the release of the requested information. The SJC again remanded this point to the lower court to review, to specifically focus on to what extent “the [D]epartment can identify specific information demonstrating that a significant risk to an individual’s personal safety is posed by the disclosure of a home address or telephone number than may be among the redacted information.”

While the SJC remanded this case back to the Superior Court to make final determinations about what information may be withheld from PETA, the decision makes clear that when claiming an exemption to withhold information, you must provide a detailed explanation as to why the exemption applies. Should you need assistance with whether an exemption applies to a public records request, please reach out to the General Counsel’s office at (774) 455-7300 or gcounsel@umassp.edu.

¹ Exemption (n) was signed into law on September 11, 2002, the one-year anniversary of the attacks on the World Trade Center and Pentagon.