



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

Rebecca S. Murray
Supervisor of Records

October 13, 2020
SPR20/1820

Sean Driscoll, Esq.
Records Access Officer
Martha's Vineyard and Nantucket Steamship Authority
22 Palmer Avenue
Falmouth, MA 02543

Dear Attorney Driscoll:

I have received the petition of Rich Saltzberg of the *Martha's Vineyard Times* appealing the response of the Martha's Vineyard and Nantucket Steamship Authority (Authority) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on September 11, 2020, Mr. Saltzberg requested "any and all video footage from the Vineyard Haven terminal on Saturday May 9, 2020 that captures 15 seconds prior, through to 15 seconds after, the cable to a bundle of counterweights for the Slip 2 transfer bridge broke, sending the counterweights into Vineyard Haven Harbor." On September 25, 2020, the Authority provided a response denying access to responsive records pursuant to Exemptions (a) and (n) of the Public Records Law. G. L. c. 4, § 7(26)(a), (n). Unsatisfied with the Authority's response, Mr. Saltzberg petitioned this office and this appeal, SPR20/1820, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also *Dist. Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

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.

The Authority's September 25th response

In its September 25, 2020 response, the Authority cites Exemptions (a) and (n) to withhold responsive records.

Exemption (a)

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

Under Exemption (a), the Authority states that it ". . . refer[s] to the Maritime Transportation Security Act of 2002, 33 CFR, c. 1, § H (101-105), which designates the Authority's security program as Sensitive Security Information. Sensitive Security Information is subsequently governed by 49 CFR B, c. 12, §B, Part 1520, which prohibits disclosure of, among other things, 'security plans, measures, and screening information.' [The Authority] find[s] that video or still images from our security cameras would reveal information regarding the Authority's security plans, measures, and screening information in violation of those federal statutes and, thus, are exempt from disclosure under the state public records law."

Although the Authority cites the above referenced statutes and regulation, which designates the Authority's security program as Sensitive Security Information, it remains unclear how the statutes and regulation specifically or by necessary implication permit the Authority to withhold the responsive video from disclosure. Please be advised that for Exemption (a) to apply, said statute must either expressly state that the withheld record is not subject to disclosure under the Public Records Law, or limit dissemination of said information to a defined group or individuals or entities.

Exemption (n)

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security. Exemption (n) allows for the withholding of certain records which if released would jeopardize public

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines "whether, and to what degree, the record sought resembles the records listed as examples in the statute;" specifically, the "inquiry is whether, and to what degree, the record is one a terrorist would find useful to maximize damage." PETA, 477 Mass. at 289-90.

The second prong of Exemption (n) examines "the factual and contextual support for the proposition that disclosure of the record is 'likely to jeopardize public safety.'" Id. at 289-90. The PETA decision further provides that "[because the records custodian must exercise 'reasonable judgment' in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian's determination given the context of the particular case." Id.

PETA also provides that "[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian's burden in demonstrating 'reasonable judgment' and vice versa." PETA at 290.

Under Exemption (n), the Authority explains that “. . . the information you request satisfies the first prong of the test in that it relates to, at a minimum, security measures as the Authority’s video cameras are part of its security program and relate directly to the security and safety of its persons, buildings, structures, facilities and transportation, all of which are located within the Commonwealth.” The Authority further explains that “. . . the information you seek satisfies the second prong of the test in that revealing any footage from the security cameras, even with the redactions you propose in your request . . . would be likely to jeopardize public safety. There is no realistic way to redact or limit the release of this information without revealing the technological capabilities of the cameras, their placement, and/or their field of view, the release of any of which would be likely to jeopardize public safety by revealing the capabilities and limitations of the Authority’s security program.”

To the extent that the video contain information that would reveal security measures that a terrorist would find useful to maximize damage or jeopardize public safety, the Authority may permissibly withhold such portions from disclosure. However, it remains unclear how the record cannot be redacted and non-exempt portions provided. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

In camera inspection

In the alternative, in order to facilitate my review, the Authority may provide this office with an un-redacted copy of the responsive record for *in camera* inspection. See 950 C.M.R. 32.08(4); see also Bougas, 371 Mass. at 66 (explaining that “[o]n doubtful questions an *in camera* inspection may be appropriate”). After I complete my review of the documents, I will return the record to your custody and issue an opinion on the public or exempt nature of the record.

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations. 950 C.M.R. 32.08(4); see also G. L. c. 66, § 1. This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Massachusetts Comm’n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding.

Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone

under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community.

Order

Accordingly, the Authority is ordered to provide Mr. Saltzberg with a response, in a manner consistent with this order, the Public Records Law and its Regulations within 10 business days. A copy of any such response 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. In the alternative, the Authority may provide this office with an un-redacted copy of the responsive record for an *in camera* inspection without delay.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Rich Saltzberg