COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

No. SJC-12690

BOSTON GLOBE MEDIA PARTNERS, LLC,
PLAINTIFF-APPELLEE,

v.

DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES,
MASSACHUSETTS STATE POLICE, and
BOSTON POLICE DEPARTMENT,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF AMICUS CURIAE
OF THE AMERCIAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the American Civil Liberties Union of Massachusetts (ACLUM) represents that it is a 501(c)(3) organization under the laws of the Commonwealth of Massachusetts. ACLUM does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in ACLUM.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), ACLUM and their counsel declare that:

(a) no party or a party's counsel authored this brief in whole or in part;

(b) no party or a party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the amici curiae contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTRODUCTION

The conduct of law enforcement personnel is a matter of high public importance and arrest records and booking photographs of such personnel may be important to shedding light on their performance and holding them accountable. *Amicus curiae*, the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM"), urges this Court to reject the assumption of the parties to this case – that any record that would be part of a compiled package of Criminal Offender Record Information (CORI) is therefore exempt from the public records law "by necessary implication" of the CORI statute. The CORI statute concerns only state-aggregated or compiled records and does not create a wholesale exemption from the public records law for individual records that would be included in an aggregated CORI package. Adoption of the parties' assumption that anything that is part of a CORI package is therefore exempt from the public records law would undermine the purpose and value of the public records law.

For the reasons set forth below, ACLUM urges the Court to find that the records requested by the Boston Globe that are at issue in this case are indeed public records. ACLUM also urges the Court to provide guidance as to when arrest-related or charge-related records, particularly concerning those who are not law

enforcement personnel, might be exempt from the public records law as an unwarranted invasion of privacy.

QUESTIONS PRESENTED

1. Whether booking photographs and arrest or charge related police reports are protected as "criminal offender record information" under G.L. c. 6, § 167, and are exempt from disclosure under the Public Records Law as records that are "specifically or by necessary implication exempted from disclosure by statute." G.L. c. 4, § 7, Twenty-sixth (a).

2. Whether the answer to the question of whether the records are exempt from disclosure under the Public Records Law differs depending on whether the person who is the subject of the booking, arrest or charge is a law enforcement officer.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") is a statewide non-profit organization dedicated to safeguarding the civil rights and civil liberties of residents of the Commonwealth. ACLUM has long worked in pursuit of the interests represented by the opposition parties in this case: transparency with regard to government activities and the conduct of law enforcement officers

and the privacy interests of those accused of criminal conduct.

STATEMENT OF THE CASE AND THE FACTS

ACLUM incorporates the statements of the case and the facts from the Brief of Plaintiff-Appellee Boston Globe Media Partners, LLC, while emphasizing the following:

This case centers on a Boston Globe request, under the state public records law, for booking photographs and arrest or charge related police reports (hereinafter "arrest-related records" or "the requested records"). The requested records relate to (i) arrests of police officers for allegedly driving under the influence and (ii) charges against a state court judge who was accused of stealing a watch.

The sole basis on which the Defendants-Appellants – the Massachusetts State Police (MSP), the Boston Police Department (BPD), and the Department of Criminal Justice Information Services (DCJIS) – claim the right to withhold the documents is their assertion that the records are exempted from the definition of a public record "by necessary implication" of the Criminal Offender Record Information (CORI) statute.

Notably, it is not uncommon — for better or worse — for booking photographs of arrestees who are not employed by law enforcement to be provided by police

to, and then published by, local media. RA 32-43, 95, 97. *See also, e.g.*, Robert Gearty, *2 Strippers Charged with Stealing Boston Cop's Gun During Night Out*, Fox News (Feb. 8, 2019);[1] *MUG SHOTS: Arrests in May Around the Brockton Region*, Brockton Enterprise (June 6, 2017).[2]

SUMMARY OF ARGUMENT

The Massachusetts Public Records Law ("PRL"), codified at G.L. c. 66, § 10 and G.L. c. 4, § 7, twenty-sixth, creates a presumption that government-held records are public. This is in furtherance of the goal of allowing residents to hold their public officials accountable. Consistent with this statutory presumption, exemptions from the PRL are to be strictly construed, and the governmental entity from which the records are sought bears the burden of proof that an exemption applies. (pp. 14-16).

Meanwhile, there is a strong public interest in holding law enforcement officers to account, including with regard to their off-duty behavior. This strong public interest, coupled with substantial ambiguities

[1] Available at https://www.foxnews.com/us/2-strippers-charged-with-stealing-boston-cops-gun-during-night-out.

[2] Available at https://danvers.wicked-local.com/news/20170606/mug-shots-arrests-in-may-around-brockton-region.

as to legislative intent with regard to arrest-related records in both the CORI statutes and the PRL, should lead the Court to conclude that the arrest-related records sought in this case are not exempt "by necessary implication" and are indeed public records. (pp. 16-19 and 22–28).

The parties to this action seem to proceed on an assumption that, if a record is part of a compiled aggregation of Criminal Offender Record Information ("CORI"), it is "by necessary implication" exempt from the PRL under exemption (a) of G.L. c. 4, § 7, twenty-sixth. ACLUM respectfully suggests that this dichotomous analysis is not appropriate, particularly given the different purposes of the two statutes and the ambiguity of the CORI statute in conjunction with the PRL. (pp. 20-21).

Given the competing and various implications in relevant statutes, including but not limited to the CORI statute, the Defendants-Appellants have not met their burden of showing that the requested records are exempt from the public records law "by necessary implication."

ACLUM also submits that guidance from the Court would be appropriate as to application to arrest-related records of PRL exemption (c), particularly as to persons who are not law enforcement officers. (pp. 28-31).

ARGUMENT

I. This case is governed by established rules of statutory construction and the great public interest in being informed about the conduct of law enforcement officers.

The PRL establishes an express presumption that government records are public and imposes on government record-holders the burden to prove that a record qualifies for one of the exemptions. G.L. c. 66, § 10A(d)(1)(iv). At the time of the requests in this case, the law provided that there is a "presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies." As amended by St. 2016, c. 121, § 10, effective as of January 1, 2017, this provision now reads: "a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law."

Several statutory exemptions to the PRL are set forth in G.L. c. 4, § 7, twenty-sixth (a) through (u).[3]

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[3] A list of the exemptions with plausible relevance to this case are:
(a) specifically or by necessary implication exempted from disclosure by statute; ...
(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may

The only one that the Defendants-Appellants in this case assert is applicable is exemption (a), which provides that records are exempt if they are "specifically or by necessary implication exempted from disclosure by statute." Defendants-Appellants contend that, simply because the records at issue would qualify as part of someone's CORI, they

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constitute an unwarranted invasion of personal privacy; . . .
(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;
(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest; . . .
(o) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.
(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o) . . . .

therefore are "by necessary implication" exempt under the PRL.[4] This contention is not well founded.

All statutory exemptions from the public records law "must be strictly construed." *Attorney General v. Ass't Comm'r of the Real Property Dep't of Boston,* 380 Mass. 623, 625 (1980). Accordingly, not only do the Defendants-Appellants and other public agencies bear the burden of showing that an exemption applies, this Court must strictly construe the term "by necessary implication" in exemption (a). Indeed, a broad interpretation of the term "by *necessary* implication" in the PRL might "exceed [the Court's] authority to construe reasonably the [legislation] and [ ] result in judicial legislation." *See Commonwealth v. Williams,* 395 Mass. 302, 306 (1985). *See also Commonwealth v. Tavares,* 459 Mass. 289, 305 (2011) (Gants, J., concurring) (noting that the Legislature can amend a statute to clarify its intent).

Critical to this case, as well, is the courts' long-standing recognition that information about the

[4] This same assumption underpins a portion of the Attorney General's argument in another case pending before this Court. *See* Brief of the Plaintiff-Appellee Maura Healey at 11, *Healey v. Cruz*, No. SJC-12722 (Mass. July 11, 2019). ACLUM agrees with the position of the Attorney General that the records at issue in that case are public records, but not with the premise that that conclusion turns on whether the records qualify as part of someone's CORI.

conduct of public officials, especially law enforcement officers, both on and off duty, is of great public importance. *See, e.g.*, *Boston Globe Media Partners, LLC v. Chief Justice of the Trial Court,* 483 Mass. 80, 102 (2019) ("where the accused is a public official, the interests of transparency, accountability, and public confidence are at their apex if the conduct at issue occurred in the performance of the official's professional duties or materially bears on the official's ability to perform those duties honestly or capably"); *Boston Herald v. Sharpe,* 432 Mass. 593, 606 (2000) (quoting *George W. Prescott Publ. Co.,* 395 Mass. 274, 279 (1985)) (public has a "right to know 'whether public servants are carrying out their duties in an efficient and law-abiding manner'"); *Mulgrew v. City of Taunton,* 410 Mass. 631, 637 (1991)(no unwarranted invasion of privacy under G.L. c. 214, § 1B where disclosures were related to conduct of police officer in light of the public's "important interest in having a police force comprised of competent and able individuals"); *George W. Prescott Publ. Co.,* 395 Mass. at 278 ("public official has a significantly diminished privacy interest with respect to information relevant to his [or her] office"); *Broderick v. Police Comm'r of Boston,* 368 Mass. 33, 42 (1975)(quoting *Gardner v. Broderick*, 392 U.S. 273, 277-278 (1968))(police

officer "is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer"); *Furtado v. Town of Plymouth,* 69 Mass. App. Ct. 319, 324 n.12 (2007) (police officers can be questioned about off-duty conduct because of the relationship between off-duty conduct and the role of a police officer).[5]

This principle has repeatedly informed the courts' interpretation of relevant statutes, including but not limited to the PRL, and should inform the

[5] See *also Glik v. Cunniffe,* 655 F.3d 78, 84 (1st Cir. 2011) (recording of police officers protected by the First Amendment because "[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their" rights); *Jean v. Mass. State Police,* 492 F.3d 24, 30 (1st Cir. 2007) (in affirming grant of preliminary injunction against police interference with posting of tape recorded in violation of the Massachusetts wiretap statute, any "interest in protecting private communication . . . is virtually irrelevant here, where the intercepted communications involve a search by police officers of a private citizen's home"); *id*. ("[t]he police do not deny that the event depicted on the recording – a warrantless and potentially unlawful search of a private residence – is a matter of public concern."); *Pasadena Police Officers Assn. v. Superior Court*, 240 Cal. App. 4th 268, 283 (2015)("Given the extraordinary authority with which they are entrusted, the need for transparency, accountability and public access to information is particularly acute when the information sought involves the conduct of police officers."); *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal.4th 278, 297-298 (2007)(privacy interests of law enforcement officers less strong than those of other public employees because of power with regard to members of the public).

Court's decision here. *See, e.g.*, *O'Connor v. Police Comm'r of Boston,* 408 Mass. 324, 328-329 (1990) (drug testing of police cadets not an unwarranted invasion of privacy under G.L. c. 214, § 1B because "drug use by police officers has the obvious potential, inimical to public safety and the safety of fellow officers, to impair the perception, judgment, physical fitness, and integrity of the users. Furthermore, the unlawful obtaining, possession, and use of drugs cannot be reconciled with respect for the law" and "public confidence in the police is social necessity"); *Police Comm'r of Boston v. Civil Serv. Comm'n*, 39 Mass. App. Ct. 594, 601 (1996) (in interpreting civil service statute, status as police officer is relevant to appropriate punishment, regardless of whether conduct occurred on or off duty); *Police Comm'r of Boston v. Civil Serv. Comm'n*, 22 Mass. App. Ct. 364, 371 (1986) ("In accepting employment by the public [police officers] implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities" and therefore modification of penalty under civil service law was error). *See also Attorney Gen. v. Collector of Lynn,* 377 Mass. 151, 158 (1979)(in interpreting PRL, public right to know if public employees are performing their duties outweighs any

invasion of privacy of those identified as delinquent on taxes).

II. There is no "necessary implication" in existing statutes that arrest records relating to law enforcement personnel are exempt from the PRL.

In light of the principles set forth in Part I, there is no "necessary implication" in the CORI statute or other statutes that anything and everything that qualifies as CORI is therefore not a public record.[6] This is particularly the case as it relates to information concerning the conduct of law enforcement officials with respect to which there is a great public interest and need for accountability.

A. The purposes of the CORI statute and the PRL are different and hence what is covered by the former is not necessarily exempted from the latter.

The CORI statute, G.L. c. 6, § 167 *et seq.*, governs when the Commonwealth must, may, or may not "compile" and distribute criminal record information to designated third parties, including law enforcement, members of the public, and some employers and housing providers. This Court has recognized that

[6] Likewise, just because something does *not* qualify as CORI does not necessarily mean that the CORI statute does not create a "necessary implication" that the record is not public. As discussed in the next footnote, the Legislature has determined that some things are *not* CORI precisely because it wants to provide more, not less, protection against dissemination, at least in the CORI context.

it is such "aggregation and dissemination of publicly available information" that triggers privacy interests. *Doe v. Attorney Gen.,* 426 Mass. 136, 143 (1997). The goal of the CORI statute thus is to prevent undue distribution of this *aggregated* or *compiled* criminal record information about an individual, and to prevent authorized recipients of that aggregated CORI from releasing or using any portion of that aggregated data for unauthorized purposes.[7]

The PRL serves a different purpose, which is to make most governmental records public, which is important to holding public officials accountable. *See Harvard Crimson, Inc. v. President& Fellows of Harvard Coll.,* 445 Mass. 745, 749, 754 (2006). Indeed, this Court has previously noted that whether or not something is or is not technically CORI does not necessarily determine whether it should be disclosed as a public record. *Reinstein v. Police Comm'r of Boston,* 378 Mass. 281, 294 (1979) (whether or not

[7] The definition of CORI in 803 CMR 2.02 and the regulation in 803 CMR 2.03(4), on which Defendants-Appellants rely, do not govern a decision as to what is and is not exempt from the PRL. Indeed, 2.03(4) expressly says it applies only "[f]or purposes of 803 CMR 2.00."

something is CORI "may be too fine a point" to determine if it is a public record).[8]

B. Various statutory provisions create competing implications as to whether the Legislature intended arrest records of law enforcement personnel to be public records.

Different portions of relevant statutes create competing *potential* implications related to the question before this Court: are the records at issue "by necessary implication" of any statute, including the CORI statute, exempt from the PRL? Given the

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[8] ACLUM takes no definitive position on whether the requested records fall within the definition of "criminal offender record information" pursuant to G.L. c. 6, § 172. For one thing, for the reasons discussed herein, ACLUM does not believe that an answer to this question is necessary to a decision in this case. For another, the statutory definition, as recently amended by St. 2018, c. 69, § 3, is ambiguous. The definition provides *inter alia* that CORI is only that which is "compiled" by a Massachusetts criminal justice agency. Individual records merely kept in the normal course seemingly are not "compiled" within the meaning of the CORI statute. The definition also now provides that "[s]uch information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment" and previously provided that CORI was limited to information "recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto." But other provisions in the CORI statute expressly provide for "arrest data" to be provided to certain entities by the commissioner of the criminal justice information system. *See, e.g.*, G.L. c. 6, § 172F. And "[a]ll available criminal offender record information," which is separately defined in G.L. c. 6, § 167, and which under the statute must be distributed to certain prospective employers, *see, e.g.*, G.L. c. 6, § 172H, includes "non-convictions" — which may often reveal information related to arrests.

competing potential implications, the strong public interest in holding law enforcement-related officials to account, and the requirement that exemptions from the PRL be strictly construed, there is no "*necessary* implication" that the individual records at issue are exempt from the PRL.

Although some and perhaps many documents containing material that would be included in a compiled CORI package will fall under an exemption to the PRL, the CORI statute does not *necessarily* imply that each and every record containing material that would also be in a CORI compilation is, *by virtue of that fact alone*, exempt from the PRL.

Indeed, there are at least three statutory provisions that tend to undermine a claim that all records containing CORI are *necessarily* exempt from the PRL. First, in the PRL, the Legislature specifically chose to protect only certain limited kinds of information concerning public employees and their family members, namely their "home address, personal email address and home telephone number." G.L. c. 4, § 7, twenty-sixth, clauses (o) and (p), as recently amended by St. 2016, c. 121, § 22. This exemption plainly does not exempt arrest records, police reports or booking photos of these same public employees. Rather, the Legislature has made clear that documents containing exempted information must be

produced, albeit with the exempted information redacted. G.L. c. 66, § 10, discussing throughout the duty to redact. *See, e.g.*, *Reinstein v. Police Comm'r of Boston,* 378 Mass. 281, 287-288 (1979) (discussing segregable portions of records). These express exemptions therefore imply that arrest records of public employees, including their names but not their home addresses, personal emails and home telephone numbers, are not exempted from the PRL and, indeed, are public records.

Second, the PRL's investigatory exemption, clause (f), makes clear that not all investigatory materials created by police are exempt from the PRL; indeed, they are exempted only if they were "necessarily compiled out of the public view" and their disclosure would "so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." This formulation strongly implies that some investigatory materials, including police reports and booking photos, are public records.

Third, under G.L. c. 6, § 172(a)(6), the CORI statute affords the commissioner of the Department of Criminal Justice Information Systems the power to provide access to "criminal offender record information" beyond the generally applicable limits in the CORI statute any time "the commissioner finds that such dissemination to such requestor serves the public

interest." This confirms that not everything that qualifies as CORI is confidential or exempt from distribution outside the generally applicable CORI system, *provided there is a public interest in its disclosure*.[9]

On the other hand, there are provisions of the CORI statute that create a *potential* implication that the Legislature did not intend that all police arrest reports and booking photographs are public records. For one, the CORI statute provides that "police daily logs, arrest registers, or other similar records compiled chronologically" "shall be public records." G.L. c. 6, § 172(m), language added by St. 1977, c. 841. *See also* G.L. c. 41, § 98F (establishing requirement to keep police logs and make them available to the public without charge). An argument could be made that, if the Legislature had intended booking photographs and arrest reports to be public, it would have included those items in this list.[10]

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[9] That said, ACLUM has serious concerns about this portion of the CORI statute and the lack of sufficient, legislatively-established standards to guide its application. And the annual reports to the Legislature and others that are mandated by this portion of the statute shed no light on to whom or for what reason special access has been granted. Exhibit A attached.

[10] Along these same lines, the MSP and DCJIS contend that if such arrest records were public records within the meaning of the PRL this language would be superfluous. Brief of the State Appellants at 24-25. In essence, the state agencies argue that this

But this implication is not a *necessary* one, at least with respect to law enforcement officers. As a threshold matter, the statute refers to "similar records," which the records at issue here may be. In addition, the doctrine of *expressio unius* is to be applied sparingly and is not sufficient to establish "manifest intent." *Lazlo L. v Commonwealth,* 482 Mass 325, 332 (2019).

Further, Section 172(m) was a first step toward establishing the mandate that appears in G.L. c. 41, § 98F that police departments must create arrest logs and provide access free of charge. In that context, it may have made sense for the Legislature to emphasize that the records shall be public, even if the same result would obtain under the PRL and even if other arrest-related records are also intended to be public. Under G.L. c. 41, § 98F, the required police logs must be provided "without charge" – whereas government is allowed under the PRL to charge reasonable fees for public records. G.L. c. 66, § 10(d). Hence, the Legislature may have been focused on which records are public without charge, making the situation similar to the one at issue in *Attorney General v. Collector of Lynn,* 377 Mass. 151, 154-155 (1979). There, the Court

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provision creates the "necessary implication" that arrest records other than those specifically listed in this provision are *not* public records.

held that a separate statute expressly conferring expedited access to records for certain officials did not "necessarily imply" that other individuals were not allowed access on the different terms applicable under the PRL.

Another *potential* implication is perhaps created by the fact that the Legislature, in G.L. c. 263, § 1A as it existed at the time of the decision below, mandated that all persons who are arrested must be fingerprinted and "may be photographed" but made no provision one way or the other as to whether such fingerprints or photographs are or are not "public records."[11] While this could be interpreted to imply that fingerprints or arrest photographs, in contrast to arrest logs and similar records, are not public records, this implication is not a *necessary* one within the meaning of exemption (a) of the PRL. The omission from G.L. c. 263, § 1A of the language from G.L. c. 41, § 98F making the records public and available free of charge may simply mean that the Legislature assumed the public records law separately

[11] Effective after the decision by the Superior Court in this matter, this statute was amended to provide that whoever is arrested or taken into custody and charged with "a felony shall be fingerprinted . . . and photographed." St. 2018, c. 69, § 125. The statute therefore apparently no longer has application to arrests for non-felonies.

required disclosure and/or did not intend for all members of the public to obtain the records at issue *for free*.

Against the foregoing backdrop of potentially conflicting implications, the statutory command to strictly construe PRL exemptions compels the conclusion that the requested arrest-related records of law enforcement officials are not, "by necessary implication" of the CORI statute, exempt from the PRL. Since the Defendants-Appellants rely only on the "necessary implication" portion of exemption (a) to justify their withholding of the records at issue in this case, and make no argument that the requested records should be exempt under exemption (c), which is discussed more below, ACLUM respectfully submits that Defendants-Appellants have not met their burden to show that the requested records are exempt from the PRL.

III. Particularly with respect to private parties, portions of police reports and booking photos may be exempt from the PRL, pursuant to exemption (c).

To resolve this specific case, the Court need not decide if the result would be different if the requested records concerned persons who are not public employees or, more specifically, are not officials connected to law enforcement, or if exemption (c) had been invoked. But guidance on that issue may be

appropriate, pending any future clarification by the Legislature, so as to ensure that the legislative intent behind exemption (c) is honored.

As applied to arrest-related records concerning persons who are not law enforcement officers – or perhaps even those who are,[12] the portion of exemption (c) which exempts "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy," may be applicable in certain cases.

For one thing, as the Superior Court noted, exemption (c) might well be construed to protect information specifically exempted from the requirement in G.L. c. 41, § 98F that arrest logs and similar chronological records are available to the public without charge. RA 71. Those exemptions are: "(i) any entry in a log which pertains to a handicapped individual who is physically or mentally incapacitated to the degree that said person is confined to a wheelchair or is bedridden or requires the use of a

[12] *See Reinstein,* 378 Mass. at 293 ("Materials not unfavorable to the officer would naturally make a weaker claim for exemption than those that picture him in a more garish color. There is certainly room for argument in the present context that the public interest does not demand connecting officers by name to particular incidents . . .").

device designed to provide said person with mobility, (ii) any information concerning responses to reports of domestic violence, rape or sexual assault or (iii) any entry concerning the arrest of a person for assault, assault and battery or violation of a protective order where the victim is a family or household member, as defined in section 1 of chapter 209A, or (iv) any entry concerning the arrest of a person who has not yet reached 18 years of age."[13]

Moreover, exemption (c) also could apply, for instance, when the fact of an arrest and the identity of the arrestee are not already public knowledge (due, e.g., to the absence of press coverage based on sources other than public records), *see Boston Globe Media Partners,* 480 Mass. at 102 (quoting *Eagle-Tribune,* 456 Mass. at 656), and the government can articulate legitimate, credible, unbiased reasons for withholding the records, for instance, on the basis that there is a high likelihood the allegations are not factually supported or disclosure of the documents

[13] Indeed, this information might be exempt from the PRL pursuant to exemption (a) since it is "specifically . . . exempted from disclosure by statute." ACLUM expresses no view as to the wisdom of the statutory exemptions as set forth in G.L. c. 41, § 98F, including as to whether it would be better public policy not to categorically exempt documents covered by them but to exempt such documents only and to the extent that release would cause an unwarranted invasion of privacy.

(even with redaction) might invade the privacy of victims of the alleged crime.[14]

Further, this Court could make clear that a case-by-case analysis is warranted in each situation and, if a government entity seeks to withhold arrest-related records under exemption (c), it must articulate with some precision which documents are being withheld and why disclosure would constitute an unwarranted invasion of privacy in the particular instance. *Reinstein,* 378 Mass. at 292 ("Against the prospective invasion of individual privacy is to be weighed in each case the public interest in disclosure: the tilt of the scale will suggest whether the subdivision (c) exemption should be allowed."); *id.* at 295 & n.22 (discussing cases in which a detailed index of what is being withheld and why may be warranted).

CONCLUSION

For the foregoing reasons, ACLUM respectfully submits that the judgment of the Superior Court should be affirmed and additional guidance may be warranted as to the potential applicability of exemption (c) to

[14] In evaluating such claims, the risk that members of the criminal law system are acting, or could be perceived to be acting, to protect their own, without due regard for the public interest, should be given consideration.

future requests of a similar nature to those at issue in this case.

Respectfully submitted,

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MASS. R. APP. P. 16(K)

I hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 17 and 20 (form of briefs, appendices, and other papers). It is typewritten in 12-point, Courier New font and has 25 non-excluded pages.

Ruth A. Bourquin

AFFIDAVIT OF SERVICE

I, Ruth A. Bourquin, counsel for the ACLU of Massachusetts, Inc., do hereby certify under the penalties of perjury that on this 15th day of October, 2019, I caused two copies of the foregoing document to be served by U.S. mail as well as a courtesy email copy on the following counsel:

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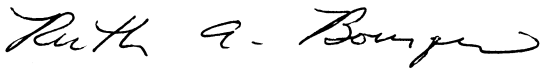

Ruth A. Bourquin

ADDENDUM

12/5

Notice

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL NO. 15-1404-D

BOSTON GLOBE MEDIA PARTNERS, LLC,

Plaintiff,

vs.

DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES, MASSACHUSETTS DEPARTMENT OF STATE POLICE, DEPARTMENT OF CORRECTIONS, NORTH ANDOVER POLICE DEPARTMENT and THE BOSTON POLICE DEPARTMENT,

Defendants.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Boston Globe Media Partners, LLC ("Globe") brought this declaratory judgment action regarding the scope of the Criminal Record Information Act, G.L. c. 6, § 167 et seq. ("CORI") statute against the defendants Department Of Criminal Justice Information Services ("DCJIS"), Massachusetts Department Of State Police ("MSP"), Massachusetts Department of Correction ("DOC"), North Andover Police Department ("Town PD") and The Boston Police Department ("BPD"). On November 13, 2017, the Globe filed "Plaintiff's Motion for Summary Judgment" ("Motion"), which all defendants have opposed. DCJIS, MSP and DOC (collectively, "State Defendants") filed "State Defendants' motion for Summary Judgment" ("State Motion"). The other defendants have cross-moved for summary judgment in their oppositions. After hearing on November 21, 2017, the Motion is ALLOWED; the State Motion is DENIED; and the Court enters declaratory relief except as to the Town PD, which is dismissed for lack of an actual controversy.

Notice Sent 12.05.17
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BACKGROUND

The Parties' Rule 9A(b)(5) statement establishes the following, drawing all inferences in favor of the defendants, as opposing parties.

Booking Photographs

MSP and the Town PD, like many law-enforcement agencies in the Commonwealth, regularly photograph persons who have been detained, arrested, or otherwise taken into custody. Photographs of such individuals often are referred to as booking photographs or mugshots. Both the MSP and Town PD have on occasion released booking photographs of private citizens before and after those persons were apprehended or detained.

In the late summer of 2015, Globe reporter Todd Wallack made a series of public records requests for booking photographs of law enforcement officers arrested for operating automobiles while under the influence. Two of the requests were made to the State Police and a third to the Town PD. Each of the public records requests was denied on the asserted grounds that booking photographs are criminal offender record information the disclosure of which was prohibited by law by the CORI Act. The Globe appealed the denial of the public records requests to the Supervisor of Public Records. The Supervisor denied all three appeals on February 20, 2015.

The BPD publishes information regarding incidents on-line at www.bpdnews.com. This information may include the identity of a suspect when the posting is made contemporaneous to the arrest. The BPD does not identify an arrested individual when publishing historical information.

Police Incident Reports

In October 2014, Wallack made a public records request to the BPD for, among other things, police incident reports, and names and photographs of BPD officers charged with driving under the influence. The BPD refused to produce the incident reports on the grounds that disclosure was

prohibited by the CORI Act. The Globe appealed the BPD's decision to the Supervisor of Public Records. The Supervisor denied the Globe's appeal.

In other cases, MSP has released information about the arrest of private persons. The Globe appealed to the Supervisor of Public Records. The Supervisor denied the appeal.

The Globe frequently has received incident reports and booking photographs from other law enforcement agencies, both shortly after an arrest and years later.

Inmate Logs

In September 2014 the Globe, acting through Wallack, made a public records request to the DOC asking for a copy of the "chronological booking log" maintained by the DOC. The DOC denied the request on the grounds that the booking log is comprised of CORI exempt from public disclosure. The Globe appealed the DOC's denial to the Supervisor of Public Records, which denied the appeal. The DOC maintains an Inmate Management System, a data base that tracks the location on inmates from the time they enter the correctional system until they are released.

Appriss Inc., operates a web site called VineLink where anyone can look up the status of people incarcerated in the DOC and Essex County. VineLink is a service "provided through the collaboration of the Massachusetts Department of Corrections [sic] and the Essex County Sheriff's Department." Users of the site are not limited to victims, attorneys, or law enforcement officials. Anyone can access the site from anywhere in the world. Wallack has used the site in the course of his duties as a reporter. The site can be used to look up a person by typing in a last name and first initial. Alternatively, one can search names by Offender Identification Number. For instance, Wallack was able to randomly type in an Offender (D (W103402) and get the full name of an inmate, as well as the person's location, custody status and gender. The site typically lists a person's full

name, custody status, location, gender, and offender identification. In many cases, the site also lists the person's date of birth, race and scheduled release date.

DCJIS has confirmed in writing that since the Criminal Record Review Board was established in May 4, 2012 under the amended CORI law, the agency has not found one violation of CORI involving the disclosure of booking photographs, police incident reports, or booking logs. DCJIS also has confirmed that none of the CORI violations found during that time period involved information obtained from a source other than the CJIS or iCORI system.

Boston PD's Additional Undisputed Facts

In some circumstances, a police officer is called upon to respond to an incident during which s/he makes observations that arise to probable cause necessary to make an arrest. Once a person is arrested, they are taken into police custody and processed (a/k/a booked). After booking, the individual is transferred to court for criminal prosecution. The identity of an individual arrested is included in an incident report and booking paperwork. The criminal prosecution of an individual arrested at a scene and of an individual that is the subject of an allowed criminal complaint is the same.

Not all incident reports include an arrest. Not all arrests lead to criminal prosecution. For example, police officers can document the circumstances of a motor vehicle accident, assistance to an outside agency, or a call for police services where the suspect is not known. Incident reports are maintained in the BPD Record Management System ("RMS") and booking sheets are maintained in the RICI System.

In response to the Globe's October, 2014 requests, Lt. Det. Mike McCarthy, the Director of the BPD Office of Media Relations, and Wallack exchanged e-mails in an effort to narrow the request and provide Wallack with the necessary information to meet his needs. In the end, the BPD agreed to

provide summaries of five Internal Affairs Division ("IAD") cases in resolution of the October 21, 2014 request. On November 5, 2014, BPD provided Wallack with five (5) summaries of incidents in which officers were arrested for OUI, via e-mail. The names of the officers involved in the underlying incidents were withheld as CORI pursuant to G.L. c. 6, § 167-168. After Wallack's appeal to the Supervisor of Public Records on November 17, 2014, BPD provided Wallack with a further response to his October 2014 request.

DISCUSSION

On summary judgment, the moving party has the burden to demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Foley v. Boston Hous. Auth., 407 Mass. 640, 643 (1990). The movant may meet this burden by showing that the plaintiff has no reasonable expectation of producing evidence on a necessary element of his case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party meets the burden, the opposing party must advance specific facts that establish a genuine dispute of material fact. Id.

I.

The Supervisor of Public Records upheld withholding of the public records under Exemption (a) of the Public Records Act, G.L. c. 4, §7(26)(a), which allows public agencies to withhold records which are ". . . specifically or by necessary implication exempted from disclosure by statute." This exemption applies where a statute restricts the public's right to inspect records under the Public Records Law. Attorney General v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977). CORI is the only statute involved here. The Court's review of the grounds for withholding a record under the public records law, G.L.

c. 66, 710, is *de novo*. People for the Ethical Treatment of Animals, Inc., v. Department of Agricultural Resources, 477 Mass. 280, 291 (2017).

The CORI statute reads, in relevant part:

> *Section 167: Definitions applicable to Secs. 167 and 168 to 178L*
>
> Section 167. The following words shall, whenever used in this section or in sections 168 to 178L, inclusive, have the following meanings unless the context otherwise requires:
>
> * * *
>
> "Criminal offender record information", records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. **Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. . . .**

G.L. c. 6, § 167 (emphasis added). The key dispute involves the bolded text.

To define that language, the Supervisor relied upon DCJIS regulation, 803 Code Mass. Regs. 2.03(3), which defines "initiation of criminal proceedings" as "the point when a criminal investigation is sufficiently complete that the investigating officers take actions toward bringing a specific suspect to court." DCJIS has authority "to promulgate rules and regulations to carry out the provisions of this section." G.L. c. 6, § 172(n). The Supervisor found that the information that Wallack requested fell within the regulation's definition.

The regulation is somewhat elastic. It turns on information that may not be readily available to the requestor, may be malleable, and may turn on nebulous questions of intent.[1] If the initial call to

[1] The "sufficiently complete" test is subjective. The concept of "actions toward bringing" appears to turn upon the officers' purpose in taking certain actions. These uncertainties, not apparent in the

the police, or police stop, identifies a specific person who committed a crime, everything the police do arguably qualify as "actions toward bringing a specific suspect to court" even though a criminal complaint or indictment may be well in the future. The regulation's broad potential reach might well qualify the contested records as CORI, although a more limited construction might not. DCJIS and the Supervisor have adopted the broader construction here.

This regulation is entitled to the same deference given a statute. See Massachusetts Fed'n of Teachers, AFT, AFL-CIO v. Board of Educ., 436 Mass. 763, 771 (2002). DCJIS's interpretation of its own regulation is entitled to "considerable deference." Rasheed v. Commissioner of Corr., 446 Mass. 463, 475-477 (2006); Ten Local Citizen Group v. New England Wind, L.L.C., 457 Mass. 222, 228 (2010). It cannot overturn the agency's interpretation unless DPH's construction was "arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 550 (1991). In Warcewicz, the Court rejected DEP's interpretation of its own wetlands regulation, saying that the "principle is deference, not abdication, and courts will not hesitate to overrule if agency interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." Id. Given the elasticity of the regulation, the Court cannot say that the agency interpretation is unreasonable.

The Globe therefore cannot prevail unless the regulation is inconsistent with the statute. Here, the Court applies a very deferential test. A duly adopted regulation "has the force of law and must be accorded all the deference due to a statute." Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 723, appeal dismissed, 464 U.S. 923, cert. denied, 464 U.S. 936 (1983). See Mass. Federation of Teachers, AFT, AFL-CIO v. Board of Education, 436 Mass. 763, 771-772 (2002); City

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statute, could lead to inconsistent application and create a temptation to withhold embarrassing records that might not be withheld under a bright line test.

of Quincy v. Mass. Water Resources Auth., 421 Mass. 463 (1995); Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd., 421 Mass. 196 (1995). Worcester Sand & Gravel Co. v. Board of Fire Prevention Regulations, 400 Mass. 464 (1987). A court "must apply all rational presumptions in favor of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." Id. Accord, Arthur D. Little, Inc. v. Commissioner of Health & Hospitals of Cambridge, 395 Mass. 535, 553-554 (1985).

Here, the legislative mandate specifically "restrict[s]" the reach of any attempt to define CORI. There is no broad delegation to DCJIS to fill in the interstices of this statute. Compare Mass. Federation of Teachers, AFT, AFL-CIO v. Board of Education, 436 Mass. 763, 774 (2002) (broad construction to further the legislature's goal of education reform). The regulation therefore cannot survive unless it rests upon a plausible definition of the statutory language, particularly the words "initiation" and "proceedings" as incorporated in the phrase "recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto." The defendants have not cited any statute or case law defining these words in a manner consistent with the DCJIS regulation. The Globe has (Mem. at 7.

The Merriam-Webster Internet Dictionary defines "initiation" as "1a : the act or an instance of initiating/ b : the process of being initiated." In turn, it defines "initiate" as "1: to cause or facilitate the beginning of : set going." See also Webster's Encyclopedic Unabridged Dictionary of the English Language (Deluxe ed. 1994) ("Initiate" means "to begin, set going or originate.") Concise Oxford American Dictionary ("initiate . . . 1 cause (a process or action) to begin . . ..)"). These definitions focus upon actually beginning the event, not just reaching the point of taking steps to begin the event.

Here, the event is "criminal proceedings." The same dictionary defines "proceeding" as "1: legal action • a divorce proceeding 2: PROCEDURE 3. proceedings plural : EVENTS, HAPPENINGS; 4: TRANSACTION; 5., proceedings plural : an official record of things said or done." The most pertinent part of this definition is the first definition, "legal action," which most logically applies to the beginning of court proceedings. See also Black's Law Dictionary (10th ed. 2014) ("Criminal proceedings" mean a "judicial hearing session or prosecution . . ."). Because it involves the plural, the third definition also arguably could apply. If so, the context makes the meaning clear. The "events" or "happenings" must be something that begins (i.e. gets "initiat[ed]"). That is true of a criminal court case. It is not true of "tak[ing] actions toward bringing a specific suspect to court," which occurs in the midst, or toward the end, of an investigation, but not yet at the commencement of the criminal case.

As the Globe points out, there are well-settled rules that govern initiation of criminal proceedings. These rules use some of the same words that appear in the CORI definition (and in the dictionary definitions of those words) – which is no coincidence. Thus, "[a] **criminal proceeding** shall be **commenced** by the District Court by a complaint and in the Superior Court by an indictment . . .." Mass. R. Crim. P. 3(a) (emphasis added). The Reporters Notes to Mass. R. Crim. P. 3(a) state: "It is only the issuance of a complaint or an indictment that **begins** the criminal process, **initiates** a defendant's right to counsel under the Sixth Amendment to the United States Constitution, and tolls the statute of Limitations." (Emphasis added). See also Eagle-Tribune Pub. Co., v. Clerk-Magistrate of the Lawrence Div. of the Dist. Ct. Dep't., 448 Mass. 647, 647-648 (2007) ("Show cause hearings . . . precede the formal initiation of criminal prosecution . . .."). The plain language of the CORI definition, as used in Court Rules, case law and dictionaries, simply does not permit the regulation's interpretation.

The regulation is invalid because "its provisions cannot in any appropriate way, be interpreted in harmony with the legislative mandate." Student No. 9 v. Board of Education, 440 Mass. 752, 763 (2004).[2] In this context, "an 'incorrect interpretation of a statute . . . is not entitled to deference.' . . . In discerning a statute's meaning, '[w]e interpret the words used in a statute with regard to both their literal meaning and the purpose and history of the statute within which they appear.'" Atlanticare Medical Center v. Commissioner of the Division of Medical Assistance, 439 Mass. 1, 6 (2003).

If any doubt remained, the statute establishes a clear 'presumption that the record sought is public' and places the burden on the record's custodian to 'prove with specificity the exemption which applies' to withheld documents." Suffolk Constr. Co, Inc. v. Division of Capital Asset

[2] See also Moot v. Department of Environmental Protection, 448 Mass. 340, 353 (2007)("the department has exceeded its authority by promulgating a regulation that relinquishes its obligations under G.L. c. 91. . ."); Atlanticare Medical Center v. Commissioner of the Division of Medical Assistance, 439 Mass. 1 (2003); Greater Boston Real Estate Board v. Department of Telecommunications and Energy, 438 Mass. 197, 205 (2002) (rejecting the agency's definition of "utility" as beyond its authority); Leopoldstadt, Inc. v. Commissioner of the Division of Health Care Finance & Policy, 436 Mass. 80 (2002) (rate regulations invalid for failure to comply with the plain language authorizing promulgation of the rates); Massachusetts Hospital Association v. Department of Public Welfare, 412 Mass. 340 (1992) (statute authorizing regulations to establish "criteria" for credit and collection policies does not authorize promulgation of "performance standards"); Telles v. Commissioner of Insurance, 410 Mass. 560 (1991) (invalidating regulations designed to prohibit sex discrimination on the ground that a statute appeared to require the allegedly discriminatory practice and the agency could not use regulations to enforce its view of the constitution); Steinbergh v. Rent Control Board of Cambridge, 410 Mass. 160 (1991) (invalidating regulation affecting sale of rent controlled property); Sturdy v. SOMWBA, 409 Mass. 587 (1991) (agency had no inherent authority, absent statutory authorization, to adopt regulations); Arlington Housing Authority v. Secretary of Communities & Development, 409 Mass. 354 (1991) (regulations establishing priorities for rental assistance based on need conflicted with preferences stated in the statute and was invalid); Greater Boston Real Estate Board v. Board of Registration of Real Estate Brokers & Salesmen, 405 Mass. 360 (1989) (narrow grant of regulatory authority led to conclusion that the Board lacked power to promulgate regulations about deposits -- an aspect of sales contracts negotiated between buyer and seller); Life Ins. Assoc. of Mass. v. Commissioner of Insurance, 403 Mass. 410 (1988) (Regulation prohibiting testing for HIV went beyond specific rulemaking authority to promulgate regulation of policy forms and content).

Planning and Management, 449 Mass. 444, 447, 454 (2007) (quoting G.L. c. 66, § 10(c)). The record on summary judgment does not meet that burden as to the withheld documents. Moreover, the statutory exemptions to mandatory disclosure in the public records law "must be strictly construed." Attorney General v. Ass't Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980).

Of course, the inapplicability of the CORI statute does not automatically make booking photos, police reports and the like subject to production under public records requests. Other exemptions may apply, if, for instance, the documents would cause an unreasonable invasion of privacy, include information kept private by other statutes (such as information relating to incapacitated persons, domestic violence or victims of sexual assaults) or they are investigative records necessarily compiled out of the public view. G.L. c. 4, § 7 (clause 26(c)), G.L. c. c. 41, § 98F. No such exemption is claimed in this case, however.

II.

The Globe's request for chronological inmate logs of individuals currently incarcerated for criminal offenses raises different issues. The definition of criminal offender record information includes records and data relating to the "incarceration, rehabilitation or release" of an individual. G.L. c. 6, § 167. However, a different section of the CORI Act states that "[n]otwithstanding any other provisions of this section, information indicating custody status and placement within the correction system shall be available to any person upon request." G.L. c. 6, § 172(i). Similarly, "[a]ny member of the general public may upon written request to the department and in accordance with regulations established by the department obtain the following criminal offender record information on a subject: . . . (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term

of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board." G.L. c. 6, § 172(a)(4).

The Globe's request falls within the scope of these provisions. It has not sought information beyond "custody status and placement", such as prison incident reports (Massachusetts Correction Officers Federated Union v. Department of Correction, 76 Mass. App. Ct. 111, 920 N.E.2d 326 (2010)) or prison disciplinary reports. Hastings v. Commissioner of Correction, 406 Mass. 898, 899 (1990).

The Commonwealth's brief does not address the statutes just cited. It does, however, devote substantial attention to the facts regarding dissemination of this information to Appriss, Inc., while refusing to disclose it to the Globe. The point is not that providing the information to Appriss makes it public. Rather, it is that such disclosure calls into question whether the information is protected from disclosure in the first place – and whether there is a constitutional equal protection problem with disclosing to one recipient but not to the press. The Court does not reach any constitutional question, but does consider disclosure to Appriss as inconsistent with the position DOC takes in this case that it cannot disseminate this information.

Because G.L. c. 6, § 172(i) and G.L. c. 6, § 172(a)(4) make the information indicating custody states and placement within the correction system, as set forth in the chronological inmate logs "available to any person upon request," DOC cannot withhold them from the Globe as CORI.

III.

The Town PD has moved to dismiss this case for lack of subject matter jurisdiction, because there is no actual controversy under G.L. c. 231A, §2. On the contrary, declaratory relief "is available to challenge the legality of administrative action even though the action concerns neither adjudication nor rule making."

In Villages Dev. Co. v. Secretary of the Executive Office of Envtl. Affairs, 410 Mass. 100, 106 (1991), the Supreme Judicial Court articulated four requirements for maintaining a declaratory judgment action:

> To secure declaratory relief in a case involving administrative action, a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) available administrative remedies have been exhausted.

Id. The Globe must show that it has a ripe, actual controversy regarding the request for public records which is likely to lead to litigation unless resolved by declaratory judgment. See generally Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 546-547 (2012).

The sole controversy concerning the Town PD concerned a request for booking photographs and an incident report. The Globe has now received those documents. Unlike DCJIS, DOC and MSP, the Town PD will not necessarily encounter the same type of dispute in the future. There is no actual controversy between the Globe and the Town PD on the issues in the complaint.

IV.

The Globe has properly abandoned its request for injunctive relief, because declaratory relief is sufficient. Where, as here, the Court enters a declaration under G. L. c. 231A, § 2, declaring an administrative practice or procedure unlawful, the plaintiff or any other person with standing may seek further relief or may file "a petition for contempt." G. L. c. 231A, § 5. Particularly in light of those consequences, the Court relies upon the good faith of executive branch officials to comply with the law, once declared by the Court. See Massachusetts Coalition for the Homeless v. Secretary of Human Servs., 400 Mass. 806, 825 (1987) ("[I]t has been our practice to assume that public officials will comply with the law declared by a court. . . ."); Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 425 n.18 (1988) ("[C]ourts may appropriately assume that public officials will act in accordance with their judicially defined duties, even when the individuals involved are other than the

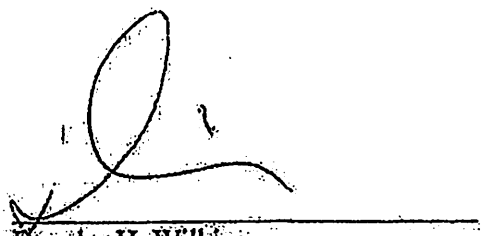
plaintiffs in the original action."). This case has certainly not reached a point where judicial injunctions are necessary, let alone where the Courts may prescribe how the defendants should exercise their discretion. See Perez v. Boston Hous. Auth., 379 Mass. 703, 739-740 (1980) (judicial intervention appropriate where public officials "persist[ ] in indifference to, or neglect or disobedience of court orders"). In these circumstances, declaratory relief alone is the appropriate remedy at this time.

CONCLUSION

For the above reasons:

1. Plaintiff's Motion for Summary Judgment (Docket #15) is ALLOWED.
2. The State Defendants' Motion for Summary Judgment (Docket #17) is DENIED.
3. Defendant North Andover Police Department's . . Cross-Motion for Summary Judgment (Docket #16) is DENIED.
4. Defendant Boston Police Department's . . Cross-Motion to Plaitniff's Motion for Summary Judgment (Docket #19) is DENIED.
5. The Complaint against North Andover Police Department is dismissed for lack of subject matter jurisdiction to enter declaratory relief in the absence of an actual controversy.
6. The Court declares that the Criminal Record Information Act, G.L. c. 6, § 167 et seq., does not prohibit the defendants from providing public access to (a) booking photographs of police officers arrested for alleged crimes; (b) police incident reports involving public officials; and (c) chronological inmate logs of individuals currently incarcerated for criminal offenses, and that such records therefore are not exempt from the Public Records Law under G.L. c. 4, § 7, cl. 26(a).

7. The Clerk shall enter judgment for the Plaintiff on Counts I-VI against all defendants except the North Andover Police Department and for the defendants on Count VII, dismissing that count as moot.



Dated: December 4, 2017 Douglas H. Wilkins

G.L. c. 4, § 7, cl. 26 (excerpts)

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

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(c) 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;

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(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

M.G.L.A. 6 § 167

§ 167. Definitions applicable to Secs. 167 and 168 to 178L

Effective: April 13, 2018

Currentness

The following words shall, whenever used in this section or in sections 168 to 178L, inclusive, have the following meanings unless the context otherwise requires:

"All available criminal offender record information", adult and youthful offender convictions, non-convictions, previous and pending hearings conducted pursuant to section 58A of chapter 276, including requests of such hearings, transfers by the court, disposition of such requests, findings and orders, regardless of the determination, and pending criminal court appearances, but excluding criminal records sealed under section 34 of chapter 94C or sections 100A to 100C, inclusive, of chapter 276 or the existence of such records.

"Board", the criminal record review board established under section 168.

"Commissioner", the commissioner of criminal justice information services under section 167A.

"Criminal justice agencies", those agencies at all levels of government which perform as their principal function, activities relating to (a) crime prevention, including research or the sponsorship of research; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information.

<[Definition of "Criminal offender record information" effective until April 13, 2018. For text effective April 13, 2018, see below.]>

"Criminal offender record information", records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

<[Definition of "Criminal offender record information" as amended by 2018, 69, Secs. 3 and 4 effective April 13, 2018. For text effective until April 13, 2018, see above.]>

"Criminal offender record information", records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the

defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276, sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained the age of 18 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18; provided, however, that if a person under the age of 18 was adjudicated as an adult in superior court or adjudicated as an adult after transfer of a case from a juvenile session to another trial court department, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

"Department", the department of criminal justice information services established pursuant to section 167A.

"Evaluative information", records, data, or reports concerning individuals charged with crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation or parole.

"Executive office", the executive office of public safety and security.

"Intelligence information", records and data compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual. Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

"Interstate systems", all agreements, arrangements and systems for the interstate transmission and exchange of criminal offender record information. Such systems shall not include recordkeeping systems in the commonwealth maintained or controlled by any state or local agency, or group of such agencies, even if such agencies receive or have received information through, or otherwise participated or have participated in, systems for the interstate exchange of criminal record information.

"Person", a natural person, corporation, association, partnership or other legal entity acting as a decision maker on an application or interacting directly with a subject.

"Purge", remove from the criminal offender record information system such that there is no trace of information removed and no indication that said information was removed.

"Requestor", a person, other than a criminal justice agency, submitting a request for criminal offender record information to the department.

"Secretary", the secretary of public safety and security.

"Self-audit", an inquiry made by a subject or his legally authorized designee to obtain a log of all queries to the department by any individual or entity, other than a criminal justice agency, for the subject's criminal offender record information, but excluding any information relative to any query conducted by a criminal justice agency.

"Subject", an individual for whom a request for criminal offender record information is submitted.

Credits

Added by St.1972, c. 805, § 1. Amended by St.1977, c. 691, § 2; St.2010, c. 256, §§ 2 to 7, eff. May 4, 2012; St.2013, c. 84, § 1, eff. Sept. 18, 2013; St.2014, c. 260, §§ 2, 3, eff. Aug. 8, 2014; St.2018, c. 69, §§ 3, 4, eff. April 13, 2018.

M.G.L.A. 6 § 172

§ 172. Maintenance of criminal offender record information in electronic format; accessibility via world wide web; eligibility for access to database; use and dissemination of criminal offender record information

Effective: September 30, 2018

Currentness

(a) The department shall maintain criminal offender record information in a database, which shall exist in an electronic format and be accessible via the world wide web. Except as provided otherwise in this chapter, access to the database shall be limited as follows:

(1) Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties. Licensing authorities, as defined in section 121 of chapter 140, may obtain all criminal offender record information, including sealed records, for the purpose of firearms licensing in accordance with sections 121 to 131P, inclusive, of chapter 140. The criminal record review board may obtain all criminal offender record information, including sealed records, for the actual performance of its duties.

(2) A requestor authorized or required by statute, regulation or accreditation requirement to obtain criminal offender record information other than that available under clause (3) may obtain such information to the extent and for the purposes authorized to comply with said statute, regulation or accreditation requirement.

<[Clauses (3) and (4) of subsection (a) effective until April 13, 2018. For text effective April 13, 2018, see below.]>

(3) A requestor or the requestor's legally designated representative may obtain criminal offender record information for any of the following purposes: (i) to evaluate current and prospective employees including full-time, part-time, contract, internship employees or volunteers; (ii) to evaluate applicants for rental or lease of housing; (iii) to evaluate volunteers for services; and (iv) to evaluate applicants for a professional or occupational license issued by a state or municipal entity. Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody, and (iii) pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed pursuant to section 18 of chapter 278; provided, however, that prior misdemeanor and felony conviction records shall be available for the entire period that the subject's last available conviction record is available under this section; and provided further, that a violation of section 7 of chapter 209A and a violation of section 9 of chapter 258E shall be treated as a felony for purposes of this section.

(4) Any member of the general public may upon written request to the department and in accordance with regulations established by the department obtain the following criminal offender record information on a subject: (i) convictions for any felony punishable by a term of imprisonment of 5 years or more, for 10 years following the disposition thereof, including termination of any period of incarceration or custody; (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board; (iii) felony convictions for 2 years following the disposition thereof, including any period of incarceration or custody; and (iv) misdemeanor convictions for 1 year following the disposition thereof, including any period of incarceration or custody.

<[Clauses (3) and (4) of subsection (a) as amended by 2018, 69, Sec. 6 effective April 13, 2018. For text effective until April 13, 2018, see above.]>

(3) A requestor or the requestor's legally designated representative may obtain criminal offender record information for any of the following purposes: (i) to evaluate current and prospective employees including full-time, part-time, contract, internship employees or volunteers; (ii) to evaluate applicants for rental or lease of housing; (iii) to evaluate volunteers for services; and (iv) to evaluate applicants for a professional or occupational license issued by a state or municipal entity. Criminal offender record information made available under this section shall be limited to the following: (i) felony convictions or findings of not guilty by reason of insanity for 10 years following the disposition thereof, including termination of any period of incarceration or custody, (ii) misdemeanor convictions for 5 years following the disposition thereof, including termination of any period of incarceration or custody, and (iii) pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed pursuant to section 18 of chapter 278; provided, however, that prior misdemeanor and felony conviction records shall be available for the entire period that the subject's last available conviction record is available under this section; and provided further, that a violation of section 7 of chapter 209A and a violation of section 9 of chapter 258E shall be treated as a felony for purposes of this section.

(4) Any member of the general public may upon written request to the department and in accordance with regulations established by the department obtain the following criminal offender record information on a subject: (i) convictions or findings of not guilty by reason of insanity for any felony punishable by a term of imprisonment of 5 years or more, for 10 years following the disposition thereof, including termination of any period of incarceration or custody; (ii) information indicating custody status and placement within the correction system for an individual who has been convicted of any offense and sentenced to any term of imprisonment, and at the time of the request: is serving a sentence of probation or incarceration, or is under the custody of the parole board; (iii) felony convictions or findings of not guilty by reason of insanity for 2 years following the disposition thereof, including any period of incarceration or custody; and (iv) misdemeanor convictions for 1 year following the disposition thereof, including any period of incarceration or custody.

(5) A subject who seeks to obtain his own criminal offender record information and the subject's legally designated representative may obtain all criminal offender record information from the department pertaining to the subject under section 175.

(6) The commissioner may provide access to criminal offender record information to persons other than those entitled to obtain access under this section, if the commissioner finds that such dissemination to such requestor serves the public interest. Upon such a finding, the commissioner shall also determine the extent of access to criminal offender record information necessary to sustain the public interest. The commissioner shall make an annual report to the governor and file a copy of the report with the state secretary, the attorney general, the clerk of the house of representatives and the clerk of the senate documenting all access provided under this paragraph, without inclusion of identifying data on a subject. The annual report shall be available to the public upon request.

(7) Housing authorities operating pursuant to chapter 121B may obtain from the department conviction and pending criminal offender record information for the sole purpose of evaluating applications for housing owned by such housing authority, in order to further the protection and well-being of tenants of such housing authorities.

(8) The department of telecommunications and cable and the department of public utilities may obtain from the department all available criminal offender record information for the purpose of screening applicants for motor bus driver certificates and applicants who regularly transport school age children or students under chapter 71B in the course of their job duties. The department of public telecommunications and cable and the department of public utilities shall not disseminate such information for any purpose other than to further the protection of children.

(9) The department of children and families and the department of youth services may obtain from the department data permitted under section 172B.

(10) A person providing services in a home or community-based setting for any elderly person or disabled person or who will have direct or indirect contact with such elderly or disabled person or access to such person's files may obtain from the department data permitted under section 172C.

(11) The IV-D agency as set forth in chapter 119A may obtain from the department data permitted under section 172D and section 14 of chapter 119A.

(12) A long-term care facility, as defined in section 72W of chapter 111, an assisted living residence as defined in section 1 of chapter 19D, and any continuing care facility as defined in section 1 of chapter 40D may obtain from the department data permitted under section 172E.

<[Clause (13) of subsection (a) effective until the earlier of promulgation of revised background record check regulations by the Department of Early Education and Care or September 30, 2018. For text effective upon the earlier of promulgation of revised background record check regulations by the Department of Early Education and Care or September 30, 2018, see below.]>

(13) The department of early education and care may obtain from the department data permitted under section 172F.

<[Clause (13) of subsection (a) as amended by 2018, 202, Sec. 1 effective upon the earlier of promulgation of revised background record check regulations by the Department of Early Education and Care or September 30, 2018. See 2018, 202, Sec. 26. For text effective until the earlier of promulgation of revised background record check regulations by the Department of Early Education and Care or September 30, 2018, see above.]>

(13) The department of early education and care and adoption and foster placement agencies licensed by the department may obtain from the department data permitted under section 172F.

(14) Operators of camps for children may obtain from the department data permitted under section 172G.

(15) An entity or organization primarily engaged in providing activities or programs to children 18 years of age or younger that accepts volunteers may obtain from the department data permitted under section 172H.

(16) School committees or superintendents that have contracted with taxicab companies to provide for the transportation of pupils pursuant to section 7A of chapter 71 may obtain from the department data permitted under section 172I.

(17) The commissioner of banks may obtain from the department data permitted under section 172J, section 3 of chapter 255E and section 3 of chapter 255F.

(18) A children's camp or school that plans to employ a person or accept a volunteer for a climbing wall or challenge course program may obtain from the department data permitted under section 172K.

(19) A victim of a crime, a witness or a family member of a homicide victim, as defined in section 1 of chapter 258B, may obtain from the department data permitted under section 178A.

(20) The motor vehicle insurance merit rating board may obtain from the department data permitted under section 57A of chapter 6C.

(21) The department of early education and care, or its designee, may obtain from the department data permitted under sections 6 and 8 of chapter 15D.

(22) The district attorney may obtain from the department data permitted under section 2A of chapter 38.

(23) A school committee and superintendent of any city, town or regional school district and the principal, by whatever title the position be known, of a public or accredited private school of any city, town or regional school district, may obtain from the department data permitted under section 38R of chapter 71.

(24) The Massachusetts Port Authority may obtain from the department data permitted under section 61 of chapter 90.

(25) The department of children and families may obtain from the department data permitted under section 26A of chapter 119, section 3B of chapter 210.

(26) The state racing commission may obtain from the department data permitted under section 9A of chapter 128A.

(27) A court, office of jury commissioner, and the clerk of court or assistant clerk may obtain from the department data permitted under section 33 of chapter 234A.

(28) The pension fraud unit within the public employee retirement administration commission may obtain from the department data permitted under section 1 of chapter 338 of the acts of 1990.

(29) Special education school programs approved under chapter 71B may obtain from the department all criminal offender record information provided for in paragraph (3) of subsection (a).

(30) The department shall configure the database to allow for the exchange, dissemination, distribution and direct connection of the criminal record information system to criminal record information systems in other states and relevant federal agencies including the Federal Bureau of Investigation and Immigration and Customs Enforcement that utilize fingerprint or iris scanning and similar databases.

(31) Navigator organizations certified by the commonwealth health insurance connector authority under 42 U.S.C. § 18031(i) may obtain from the department data permitted under section 172L.

(31) A person licensed pursuant to section 122 of chapter 140 may obtain from the department data permitted under section 172L.

(32) A person licensed pursuant to section 122 of chapter 140 may obtain from the department data permitted under section 172M.

(33) The department of public utilities and its departments or divisions may obtain from the department all available criminal offender record information, as defined in section 167, to determine the suitability of an applicant to obtain a transportation network driver certificate pursuant to chapter 159A ½. Information obtained pursuant to this section shall not be disseminated for any purpose other than to further public protection and safety.

(b) Notwithstanding the foregoing, convictions for murder, voluntary manslaughter, involuntary manslaughter, and sex offenses as defined in section 178C of chapter 6 that are punishable by a term of incarceration in state prison shall remain in the database permanently and shall be available to all requestors listed in paragraphs (1) through (3), inclusive, of subsection (a) unless sealed under section 100A of chapter 276.

(c) The department shall specify the information that a requestor shall provide to query the database, including, but not limited to, the subject's name, date of birth and the last 4 digits of the subject's social security number; provided, however, that a member of the public accessing information under paragraph (4) of subsection (a) shall not be required to provide the last four digits of the subject's social security number. To obtain criminal offender record information concerning a subject pursuant to subsection (a)(2) or (a)(3), the requestor must certify under the penalties of perjury that the requestor is an authorized designee of a qualifying entity, that the request is for a purpose authorized under subsection (a)(2) or (a)(3), and that the subject has signed an acknowledgement form authorizing the requestor to obtain the subject's criminal offender record information. The requestor must also certify that he has verified the identity of the subject by reviewing a form of government-issued identification. Each requestor shall maintain acknowledgement forms for a period of 1 year from the date the request is submitted. Such forms shall be subject to audit by the department. The department may establish rules or regulations imposing other requirements or affirmative obligations upon requestors as a condition of obtaining access to the database; provided, however, that such additional rules and regulations are not in conflict with the state and federal Fair Credit Reporting Acts.

In connection with any decision regarding employment, volunteer opportunities, housing or professional licensing, a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source, (a) prior to questioning the applicant about his criminal history and (b) if the person makes a decision adverse to the applicant on the basis of his criminal history; provided, however, that if the person has provided the applicant with a copy of his criminal offender record information prior to questioning the person is not required to provide the information a second time in connection with an adverse decision based on this information. Failure to provide such criminal history information to the individual in accordance with this section may subject the offending person to investigation, hearing and sanctions by the board.

(d) Except as authorized by this section, it shall be unlawful to request or require a person to provide a copy of his criminal offender record information. Violation of this subsection is punishable by the penalties set forth in section 178.

(c) No employer or person relying on volunteers shall be liable for negligent hiring practices by reason of relying solely on criminal offender record information received from the department and not performing additional criminal history background checks, unless required to do so by law; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the subject's identifying information consistent with the requirements set forth in this section and in the department's regulations.

No employer shall be liable for discriminatory employment practices for the failure to hire a person on the basis of criminal offender record information that contains erroneous information requested and received from the department, if the employer would not have been liable if the information had been accurate; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the individual's information consistent with the requirements set forth in this section and the department's regulations.

Neither the board nor the department shall be liable in any civil or criminal action by reason of any criminal offender record information or self-audit log that is disseminated by the board, including any information that is false, inaccurate or incorrect because it was erroneously entered by the court or the office of the commissioner of probation.

(f) A requestor shall not disseminate criminal offender record information except upon request by a subject; provided, however, that a requestor may share criminal offender record information with individuals within the requesting entity that have a need to know the contents of the criminal offender record information to serve the purpose for which the information was obtained; and provided further, that upon request, a requestor shall share criminal offender record information with the government entities charged with overseeing, supervising, or regulating them. A requestor shall maintain a secondary dissemination log for a period of one year following the dissemination of a subject's criminal offender record information. The log shall include the following information: (i) name of subject; (ii) date of birth of the subject; (iii) date of the dissemination; (iv) name of person to whom it was disseminated; and (v) the purpose for the dissemination. The secondary dissemination log shall be subject to audit by the department.

Unless otherwise provided by law or court order, a requestor shall not maintain a copy, electronic or otherwise, of requested criminal offender record information obtained from the department for more than 7 years from the last date of employment, volunteer service or residency or from the date of the final decision of the requestor regarding the subject.

(g) The department shall maintain a log of all queries that shall indicate the name of the requestor, the name of the subject, the date of the query, and the certified purpose of the query. A self-audit may be requested for no fee once every 90 days. The commissioner may impose a fee in an amount as determined by the secretary of public safety and security, for self-audit requests made more than once every 90 days. Upon request, the commissioner may transmit the self-audit electronically. Further, if funding is available and technology reasonably allows, the department shall establish a mechanism that will notify a subject, or an advocate or agent designated by the subject, by electronic mail or other communication mechanism whenever a query is made regarding the subject. The self-audit log and query log shall not be considered a public record.

(h) Notwithstanding the provisions of this section, the motor vehicle insurance merit rating board may disseminate information concerning convictions of automobile law violations as defined in section 1 of chapter 90C, or information concerning a charge of operating a motor vehicle while under the influence of intoxicating liquor that results in assignment to a driver alcohol

program as described in section 24D of chapter 90, directly or indirectly, to an insurance company doing motor vehicle insurance business within the commonwealth, or to such insurance company's agents, independent contractors or policyholders to be used exclusively for motor vehicle insurance purposes.

(i) Notwithstanding any other provisions of this section, information indicating custody status and placement within the correction system shall be available to any person upon request; provided, however that no information shall be disclosed that identifies family members, friends, medical or psychological history, or any other personal information unless such information is directly relevant to such release or custody placement decision, and no information shall be provided if its release would violate any other provisions of state or federal law.

(j) The parole board, subject to sections 130 and 154 of chapter 127, the department of correction, a county correctional authority or a probation officer with the approval of a justice of the appropriate division of the trial court may, in its discretion, make available a summary, which may include references to criminal offender record information or evaluative information, concerning a decision to release an individual on a permanent or temporary basis, to deny such release, or to change the individual's custody status.

(k) Notwithstanding any other provision of this section or any other general or special law to the contrary, members of the public who are in fear of an offender may obtain from the department advance notification of the temporary or permanent release of an offender from custody, including but not limited to expiration of a sentence, furlough, parole, work release or educational release. An individual seeking access to advance notification shall verify by a written declaration under the penalties of perjury that the individual is in fear of the offender and that advance notification is warranted for physical safety reasons.

(*l*) Any individual or entity that receives or obtains criminal offender record information from any source in violation of sections 168 through 175 of this chapter, whether directly or through an intermediary, shall not collect, store, disseminate, or use such criminal offender record information in any manner or for any purpose.

(m) Notwithstanding this section or chapter 66A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically; (2) chronologically maintained court records of public judicial proceedings; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section 130 of chapter 127.

(n) The commissioner, upon the advice of the board, shall promulgate rules and regulations to carry out the provisions of this section.

(o) Notwithstanding any other provision of this section or any other general or special law to the contrary, all gaming service employees shall be required to register with the investigations and enforcement bureau established in section 6 of chapter 23K but the Massachusetts gaming commission may, in its discretion, exempt certain gaming service employees by job position from the registration requirement. The commission and the bureau may require a gaming service employee to produce any information deemed necessary.

Credits

Added by St.1972, c. 805, § 1. Amended by St.1977, c. 365, § 1; St.1977, c. 691, § 4; St.1977, c. 841; St.1982, c. 31; St.1989,

Section 172F: Conviction and arrest data available to department of early education and care

[Text of section applicable as provided by 2018, 202, 27.]

Section 172F. Notwithstanding section 172, the following information shall be available, upon request, to the department of early education and care for the purposes of evaluating any residence, facility, program, system or other entity licensed under chapter 15D whether public or private, or any child care provider or program exempt from licensure under said chapter 15D that receives federal or state funding in order to further the protection of children: conviction data, arrest data, sealed record data and juvenile arrest or conviction data. The same information shall be available, upon request, to adoption and foster placement agencies licensed by the department of early education and care for purposes of evaluating prospective or current adoptive or foster parents and their household members 15 years of age and older. The department of early education and care and adoption and foster placement agencies licensed by the department in receipt of such data shall not disseminate this information for any purpose other than to further the protection of children.

Section 172H: Children's programs to obtain criminal and juvenile data

Section 172H. Notwithstanding section 172 or any other general or special law to the contrary, any entity or organization primarily engaged in providing activities or programs to children 18 years of age or less, shall obtain all available criminal offender record information from the department prior to accepting any person as an employee, volunteer, vendor or contractor. Any entity or organization obtaining information under this section shall not disseminate such information for any purpose other than to further the protection of children.

M.G.L.A. 6 § 178

§ 178. Requesting or obtaining criminal offender record information or self-audit under false pretenses; unlawful communication of record information; falsification of record information; unlawful request or requirement that person provide his or her record information; punishment

Effective: May 4, 2012

Currentness

An individual or entity who knowingly requests, obtains or attempts to obtain criminal offender record information or a self-audit from the department under false pretenses, knowingly communicates or attempts to communicate criminal offender record information to any other individual or entity except in accordance with the provisions of sections 168 through 175, or knowingly falsifies criminal offender record information, or any records relating thereto, or who requests or requires a person to provide a copy of his or her criminal offender record information except as authorized pursuant to section 172, shall for each offense be punished by imprisonment in a jail or house of correction for not more than 1 year or by a fine of not more than $5,000 or by both such fine and imprisonment, and in the case of an entity that is not a natural person, the amount of the fine may not be more than $50,000 for each violation.

An individual or entity who knowingly requests, obtains or attempts to obtain juvenile delinquency records from the department under false pretenses, knowingly communicates or seeks to communicate juvenile criminal records to any other individual or entity except in accordance with the provisions of sections 168 through 175, or knowingly falsifies juvenile criminal records, shall for each offense be punished by imprisonment in a jail or house of correction for not more than 1 year or by a fine of not more than $7,500, or by both such fine and imprisonment, and in the case of an entity that is not a natural person, the amount of the fine may not be more than $75,000 for each violation.

This section shall not apply to, and no prosecution shall be brought against, a law enforcement officer who, in good faith, obtains or seeks to obtain or communicates or seeks to communicate criminal offender record information in the furtherance of his or her official duties.

Credits

Added by St.1972, c. 805, § 1. Amended by St.1979, c. 702, § 7; St.1990, c. 319, § 16; St.2010, c. 256, § 36, eff. May 4, 2012.

St.2010, c. 256, § 36, approved Aug. 6, 2010, and by § 145, as amended by St.2010, c. 359, § 102, made effective May 4, 2012, rewrote the section, which prior thereto read:

"Any person who willfully requests, obtains or seeks to obtain criminal offender record information under false pretenses, or who willfully communicates or seeks to communicate criminal offender record information to any agency or person except in accordance with the provisions of sections one hundred and sixty-eight to one hundred and seventy-five, inclusive, or any member, officer, employee or agency of the board or any participating agency, or any person connected with any authorized research program, who willfully falsifies criminal offender record information, or any records relating thereto, shall for each offense be fined not more than five thousand dollars, or imprisoned in a jail or house of correction for not more than one year, or both."

"Any individual or agency, public or private, that receives or obtains criminal offender record information, in violation of the provisions of this statute, whether directly or through any intermediary, shall not collect, store, disseminate, or use such criminal offender record information in any manner or for any purpose. Notwithstanding the provisions of this section, the dissemination of information relative to a person's conviction of automobile law violations as defined by section one of chapter ninety C, or information relative to a person's charge of operating a motor vehicle while under the influence of intoxicating liquor which resulted in his assignment to a driver alcohol program as described in section twenty-four D of chapter ninety, shall not be prohibited where such dissemination is made, directly or indirectly, by the motor vehicle insurance merit rating board established pursuant to section one hundred and eighty-three of chapter six, to an insurance company doing motor vehicle insurance business within the commonwealth, or to such insurance company's agents, independent contractors or insurance policyholders to be used exclusively for motor vehicle insurance purposes. Notwithstanding the provisions of this section or chapter sixty-six A, the following shall be public records: (1) police daily logs, arrest registers, or other similar records compiled chronologically, provided that no alphabetical arrestee, suspect, or similar index is available to the public, directly or indirectly; (2) chronologically maintained court records of public judicial proceedings, provided that no alphabetical or similar index of criminal defendants is available to the public, directly or indirectly; (3) published records of public court or administrative proceedings, and of public judicial administrative or legislative proceedings; and (4) decisions of the parole board as provided in section one hundred and thirty of chapter one hundred and twenty-seven."

G.L. c. 41, § 98F

Section 98F. Each police department and each college or university to which officers have been appointed pursuant to section 63 of chapter 22C shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records available without charge to the public during regular business hours and at all other reasonable times; provided, however, that the following entries shall be kept in a separate log and shall not be a public record nor shall such entry be disclosed to the public, or any individual not specified in section 97D: (i) any entry in a log which pertains to a handicapped individual who is physically or mentally incapacitated to the degree that said person is confined to a wheelchair or is bedridden or requires the use of a device designed to provide said person with mobility, (ii) any information concerning responses to reports of domestic violence, rape or sexual assault or (iii) any entry concerning the arrest of a person for assault, assault and battery or violation of a protective order where the victim is a family or household member, as defined in section 1 of chapter 209A.

G.L. c. 66, § 10

Section 10: Public inspection and copies of records; presumption; exceptions

[Text of section effective until January 1, 2017. For text effective January 1, 2017, see below.]

Section 10. (a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the Massachusetts bay transportation authority police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion,

obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of the department of criminal justice information services, the department of criminal justice information services and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The home address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of children and families, department of correction and any other public safety and criminal justice system personnel, and of unelected general court personnel, shall not be public records in the custody of the employers of such personnel or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed, but such information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180 or to a criminal justice agency as defined in section 167 of chapter 6. The name and home address and telephone number of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons or the public employee retirement administration commission or any retirement board established under chapter 32 and shall not be disclosed. The home address and telephone number or place of employment or education of victims of adjudicated crimes, of victims of domestic violence and of persons providing or training in family planning services and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

Chapter 66: Section 10. Inspection and copies of public records; requests; written responses; extension of time; fees

[Text of section as recodified by 2016, 121, Sec. 10 effective January 1, 2017 applicable as provided by 2016, 121, Sec. 18. See 2016, 121, Sec. 22. For text effective until January 1, 2017, see above.]

Section 10. (a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

(i) the request reasonably describes the public record sought;

(ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and

(iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

(b) If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records. The written response shall be made via first class or electronic mail and shall:

(i) confirm receipt of the request;

(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;

(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;

(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency's or municipality's ability to redact or withhold information in accordance with state or federal law;

(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;

(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;

(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;

(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and

(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

(i) the need to search for, collect, segregate or examine records;

(ii) the scope of redaction required to prevent unlawful disclosure;

(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;

(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;

(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and

(vi) the public interest served by expeditious disclosure.

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. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

(d) A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. The reasonable fee shall not exceed the actual cost of reproducing the record. Unless expressly provided for otherwise, the fee shall be determined in accordance with the following:

(i) the actual cost of any storage device or material provided to a person in response to a request for public records under subsection (a) may be included as part of the fee, but the fee assessed for standard black and white paper copies or printouts of records shall not exceed 5 cents per page, for both single and double-sided black and white copies or printouts;

(ii) if an agency is required to devote more than 4 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested, the records access officer may also 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 (A) shall not be more than $25 per hour; (B) shall not be assessed for the first 4 hours of work performed; and (C) 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 of records under clause (iv);

(iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer 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 the record requested but the fee (A) shall not be more than $25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the responding municipality has a population of over 20,000 people; and (C) 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 of records under clause (iv);

(iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of $25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of $25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:

1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

2. an agency or municipality, upon submitting a petition under this clause, shall furnish a copy of the petition to the requestor;

3. the supervisor of records shall issue a written determination with findings regarding any such petition within 5 business days following receipt of the petition by the supervisor of public records; and

4. the supervisor of records shall provide the determination to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court;

(v) the records access officer may waive or reduce the amount of any fee charged under this subsection upon a showing that disclosure of a requested record is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full amount of the reasonable fee;

(vi) the records access officer may deny public records requests from a requester who has failed to compensate the agency or municipality for previously produced public records;

(vii) the records access officer shall provide a written notification to the requester detailing the reasons behind the denial, including an itemized list of any balances attributed to previously produced records;

(viii) a records access officer may not require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver; and

(ix) as used in this section "commercial purpose" shall mean the sale or resale of any portion of the public record or the use of information from the public record to advance the requester's strategic business interests in a manner that the requester can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education

(c) A records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).

(f) As used in this section, "employee time" means time required by employees or necessary vendors, including outside legal counsel, technology and payroll consultants or others as needed by the municipality.

G.L. c. 66, § 10A

Section 10A: Petition for determination of violation of Sec. 10; enforcement by Attorney General; civil actions

[Text of section added by 2016, 121, Sec. 10 effective January 1, 2017 applicable as provided by 2016, 121, Sec. 18. See 2016, 121, Sec. 22.]

Section 10A. (a) If an agency or municipality fails to comply with a requirement of section 10 or issues a response the requestor believes in violation of section 10, the person who submitted the initial request for public records may petition the supervisor of records for a determination as to whether a violation has occurred. In assessing whether a violation has occurred, the supervisor of records may inspect any record or copy of a record in camera; provided, however, that where a record has been withheld on the basis of a claim of the attorney-client privilege, the supervisor of records shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, 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. If an agency or municipality elects to provide a record, claimed to be subject to the attorney-client privilege, to the supervisor of records for in camera inspection, said inspection shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and the attorney work product privilege. The supervisor of records shall issue a written determination regarding any petition submitted in accordance with this section not later than 10 business days following receipt of the petition by the supervisor of records. Upon a determination by the supervisor of records that a violation has occurred, the supervisor of records shall order timely and appropriate relief. A requestor, aggrieved by an order issued by the supervisor of records or upon the failure of the supervisor of records to issue a timely determination, may obtain judicial review only through an action in superior court seeking relief in the nature of certiorari under section 4 of chapter 249 and as prescribed in subsection (d).

(b) If an agency or municipality refuses or fails to comply with an order issued by the supervisor of records, the supervisor of records may notify the attorney general who, after consultation with the supervisor of records, may take whatever measures the attorney general considers necessary to ensure compliance. If the attorney general files an action to compel compliance, the action shall be filed in Suffolk superior court with respect to state agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The attorney general shall designate an individual within the office of the attorney general to serve as a primary point of contact for the supervisor of records. In addition to any other duties the attorney general may impose, the designee shall serve as a primary point of contact within the office of the attorney general regarding notice from the supervisor of records that an agency or municipality has refused or failed to comply with an order issued by the supervisor of records.

(c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed

in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).

(d)(1) In any action filed by a requestor pursuant to this section:

(i) the superior court shall have jurisdiction to enjoin agency or municipal action;

(ii) the superior court shall determine the propriety of any agency or municipal action de novo and may inspect the contents of any defendant agency or municipality record in camera, provided, however, that the in camera review shall not waive any legally applicable privileges, including without limitation, the attorney- client privilege and the attorney work product privilege;

(iii) the superior court shall, when feasible, expedite the proceeding;

(iv) a presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.

(2) The superior court may award reasonable attorney fees and costs in any case in which the requester obtains relief through a judicial order, consent decree, or the provision of requested documents after the filing of a complaint. There shall be a presumption in favor of an award of fees and costs unless the agency or municipality establishes that:

(i) the supervisor found that the agency or municipality did not violate this chapter;

(ii) the agency or municipality reasonably relied upon a published opinion of an appellate court of the commonwealth based on substantially similar facts;

(iii) the agency or municipality reasonably relied upon a published opinion by the attorney general based on substantially similar facts;

(iv) the request was designed or intended to harass or intimidate; or

(v) the request was not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.

If the superior court determines that an award of reasonable attorney fees or costs is not warranted, the judge shall issue written findings specifying the reasons for the denial.

(3) If the superior court awards reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it shall order the agency or municipality to waive any fee assessed under subsection (d) of section 10. If the superior court does not award reasonable attorneys' fees and other litigation costs reasonably incurred to the requestor, it may order the agency or

municipality to waive any fee assessed under said subsection (d) of said section 10. Whether the superior court determines to waive any fee assessed under said subsection (d) of said section 10, it shall issue findings specifying the basis for such decision.

(4) If a requestor has obtained judgment in superior court in a case under this section and has demonstrated that the defendant agency or municipality, in withholding or failing to timely furnish the requested record or any portion of the record or in assessing an unreasonable fee, did not act in good faith, the superior court may assess punitive damages against the defendant agency or municipality in an amount not less than $1,000 nor more than $5,000, to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10.

(e) Notwithstanding any other provision of this chapter, the attorney general may, at any time, file a complaint in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located, to ensure compliance with this chapter and may further intervene as of right in any action filed in accordance with this section. In any action filed or in which the attorney general has intervened under this subsection, paragraphs (1) and (4) of subsection (d) shall apply and any public records the court orders produced shall be provided without a fee.

Section 1B: Right of privacy

Section 1B. A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

G.L. c. 263, § 1A (original and as amended)

Section 1A: Fingerprinting and photographing

[Text of section effective until July 1, 2019. For text effective July 1, 2019, see below.]

Section 1A. Whoever is arrested by virtue of process, or is taken into custody by an officer, and charged with the commission of a felony shall be fingerprinted, according to the system of the bureau of investigation and intelligence in the department of state police, and may be photographed. Two copies of such fingerprints and photographs shall be forwarded within a reasonable time to the colonel of state police by the person in charge of the police department taking such fingerprints and photographs.

Chapter 263: Section 1A. Fingerprinting and photographing; contents of record; audits

[Text of section as amended by 2018, 69, Sec. 125 effective July 1, 2019. See 2018, 69, Sec. 233. For text effective until July 1, 2019, see above.]

Section 1A. Whoever is arrested by virtue of process or is taken into custody by an officer and is charged with the commission of a felony shall be fingerprinted according to the system of the department of state police and photographed. The fingerprints and photographs shall be immediately forwarded to the department of state police to allow a biometric positive identification. The fingerprint record shall be suitable for comparison and shall include an offense-based tracking number, completed description of the offenses charged and other descriptors as required. The executive office of public safety and security may audit police departments for compliance with this section.

SECTION 3. The definition of "Criminal offender record information" in section 167 of said chapter 6, as appearing in the 2016 Official Edition, is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:- Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment.

Code of Massachusetts Regulations Currentness
Title 803: Department of Criminal Justice Information Services
Chapter 2.00: Criminal Offender Record Information (CORI)

CMR T. 803, Ch. 2.00, Refs & Annos

REGULATORY AUTHORITY

803 CMR 2.00: M.G.L. c. 6, §§ 167A and 172; and c. 30A.

Currency of the Update: The Massachusetts Administrative Code titles are current through Register No. 1377, dated November 2, 2018

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Code of Massachusetts Regulations Currentness
Title 803: Department of Criminal Justice Information Services
Chapter 2.00: Criminal Offender Record Information (CORI) (Refs & Annos)

803 CMR 2.01

2.01: Purpose and Scope

(1) 803 CMR 2.00 is issued in accordance with M.G.L. c. 6, §§ 167A and 172, and M.G.L. c. 30A.

(2) 803 CMR 2.00 sets forth the establishment and use of the iCORI system to access CORI 803 CMR 2.00 further sets forth procedures for accessing CORI for the purpose of evaluating applicants for employment, volunteer opportunities, or professional licensing, as well as CORI complaint procedures.

(3) 803 CMR 2.00 applies to all users of the iCORI system, including employers, governmental licensing authorities, and individuals seeking to obtain criminal history information.

(4) Nothing contained in 803 CMR 2.00 shall be interpreted to limit the authority granted to the Criminal Record Review Board (CRRB) or to the Department of Criminal Justice Information Services (DCJIS) by the Massachusetts General Laws.

Currency of the Update: The Massachusetts Administrative Code titles are current through Register No. 1377, dated November 2, 2018

Mass. Regs. Code tit. 803, § 2.01, 803 MA ADC 2.01

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Code of Massachusetts Regulations Currentness
Title 803: Department of Criminal Justice Information Services
Chapter 2.00: Criminal Offender Record Information (CORI) (Refs & Annos)

803 CMR 2.02

2.02: Definitions

All definitions set forth in 803 CMR 5.00: *Criminal Offender Record Information (CORI) - Housing*, 7.00: *Criminal Justice Information System (CJIS)* 8.00: *Obtaining Criminal Offender Record Information (CORI) for Research Purposes*, 9.00: *Victim Notification Registry (VNR)*, 10.00: *Gun Transaction Recording* and 11.00: *Consumer Reporting Agency (CRA)* are incorporated in 803 CMR 2.02 by reference. The following additional words and phrases as used in 803 CMR 2.00 shall have the following meanings:

Adjudicated as an Adult. For purposes of CORI dissemination under 803 CMR 2.00, an offense may be considered as adjudicated as adult if the individual was adjudicated as a youthful offender pursuant to the provisions of M.G.L. c. 119, § 58 and an adult sentence or combination thereof, has been imposed.

Advocate. An individual authorized to act on a subject's behalf to obtain the subject's CORI for the purpose of assisting the subject with employment, housing or other purposes authorized by the DCJIS.

Apostille. A form of authentication applied by the Secretary of the Commonwealth to documents for use in countries that participate in the Hague Convention of 1961.

Consumer Reporting Agency (CRA). Any person or organization which, for monetary fees, dues, or on a cooperative, not-for-profit basis, regularly engages in whole, or in part, in the practice of assembling or evaluating criminal history, credit, or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Criminal Justice Agency (CJA). A Massachusetts agency which performs, as its principal function, activities relating to crime prevention, including the following: research or the sponsorship of research; the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or the collection, storage, dissemination, or usage of criminal offender record information.

Criminal Offender Record Information (CORI) Records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to M.G.L. c. 276, § 58A where the defendant was detained prior to trial or released with conditions under M.G.L. c. 276, § 58A(2), sentencing, incarceration, rehabilitation, or release. Such information shall be restricted to that recorded as the result of the initiation of criminal proceedings or any consequent proceedings related thereto. Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. Criminal offender record information shall be limited to information concerning persons who have attained 18 years of age and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he or she attained 18 years of age; provided, however, that if a person younger than 18 years old is adjudicated as an adult, information relating to such

criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

Criminal Record Review Board (CRRB). A statutorily-created board within the Department of Criminal Justice Information Services (DCJIS) that reviews complaints and investigates incidents involving allegations of violations of the laws and regulations governing CORI.

Department of Criminal Justice Information Services (DCJIS). The Commonwealth agency statutorily designated to provide a public safety information system and network to support data collection, information sharing, and interoperability for the Commonwealth's criminal justice and law enforcement communities; to oversee the authorized provision of CORI to then on-criminal justice community; to provide support to the Criminal Record Review Board (CRRB); to operate the Firearms Records Bureau (FRB); and to operate and technically support the Victim Notification Registry (VNR).

Disabled Person. An individual with an intellectual disability, as defined by M.G.L. c. 123B, § 1, or who is otherwise mentally or physically disabled and, as a result of such mental or physical disability, is wholly or partially dependent on others to meet daily living needs.

Elderly Person. An individual who is 60 years of age or older.

Employment Applicant. An individual who has applied for employment or a volunteer opportunity and who meets the requirements for the position for which the individual is being screened for criminal history by an employer or volunteer organization. An employment applicant, as referenced in 803 CMR 2.00, shall also include volunteers, subcontractors, contractors or vendor applicants, and individuals applying for a special state, municipal, or county employee position as those terms are defined in M.G.L. c. 268, § 1.

Employee. Refers to individuals currently employed by the requestor. As referenced in 803 CMR 2.00, employee also includes volunteers, subcontractors, contractors, vendors and special state, municipal, or county employees as those terms are defined in M.G.L. c. 268, § 1.

Evaluative Information. Records, data, or reports regarding individuals charged with a crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress, and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation, or parole.

Housing Applicant. An individual who applies to rent or lease housing, including market rate and subsidized housing.

iCORI. The internet-based system used in the Commonwealth to access CORI and to obtain self-audits.

iCORI Agency Agreement. An agreement signed by an individual with signatory authority for an iCORI requestor whereby the requestor agrees to comply with the CORI laws, regulations, policies and procedures associated with CORI access and dissemination.

Intelligence Information. Records and data compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants, investigators, or other persons, and information obtained from any type of surveillance associated with an identifiable individual. Intelligence information shall also include records and data compiled by a criminal justice agency for the purpose of investigating a substantial threat of harm to an individual, or to the order or security of a correctional facility.

Legally Authorized Designee. Any person authorized to submit and receive CORI on behalf of a requestor. Legally Authorized Designee shall be synonymous with Legally Designated Representative.

Legally Designated Representative. Any person authorized to submit and receive CORI on behalf of a requestor. Legally Designated Representative shall be synonymous with Legally Authorized Designee.

Licensing Applicant. An otherwise qualified individual who is being screened for criminal history by a governmental licensing agency. Licensing applicant, as referenced in 803 CMR 2.00, includes new and renewal license applicants, as well as current licensees. Licensing for purposes of 803 CMR 2.00 also includes licenses, permits or certificates issued by government agencies.

Open Access to CORI. The level of CORI access available to any member of the general public upon production of a subject's correct name and date of birth.

Person. A natural person, corporation, association, partnership, or other legal entity.

Requestor. A person, other than a law enforcement or criminal justice agency official, submitting a request for CORI or criminal history information.

Required Access to CORI. The level of CORI access available to requestors who are authorized or required by statute, regulation, or accreditation requirement to obtain CORI.

Self-audit. An inquiry made by a subject or a legally authorized designee to obtain a log of all queries to the DCJIS iCORI system by any individual or entity for the subject's CORI, but excluding any information relative to any query conducted by a law enforcement or criminal justice agency official.

Standard Access to CORI. The level of CORI access available to any requestor, or any requestor's legally designated representative, to evaluate: current and prospective employees, including full-time, part-time, contract, or internship employees or volunteers; applicants for rental or lease of housing; volunteers for services; and licensing applicants for a professional or occupational license issued by a state or municipal entity.

Subject. An individual for whom a request for CORI is submitted to the DCJIS.

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Mass. Regs. Code tit. 803, § 2.02, 803 MA ADC 2.02

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Code of Massachusetts Regulations Currentness
Title 803: Department of Criminal Justice Information Services
Chapter 2.00: Criminal Offender Record Information (CORI) (Refs & Annos)

803 CMR 2.03

2.03: CORI Inclusions and Exclusions

(1) CORI shall be limited to the information recorded as the result of the initiation of criminal proceedings or any consequent related proceedings regarding individuals 18 years of age or older for offenses after September 18,2013. For offenses prior to September 18, 2013, CORI includes offenses for individuals 17 years of age or older.

(2) If a person younger than 18 years old is adjudicated as an adult, CORI shall include information relating to that adjudication.

(3) CORI shall include fingerprints, photographs, and other identifying data that is recorded as the result of the initiation of a criminal proceeding.

(4) For purposes of 803 CMR 2.00, the initiation of criminal proceedings is the point when a criminal investigation is sufficiently complete that the investigating officer takes actions toward bringing a specific suspect to court.

(5) CORI shall not include:

(a) information regarding criminal offenses or acts of delinquency committed by any individual younger than 18 years old unless the individual was adjudicated as an adult and except as otherwise noted in 803 CMR 2.03(1);

(b) photographs, fingerprints, or other identifying data of an individual used for investigative purposes, provided the individual is not identified;

(c) evaluative information;

(d) statistical and analytical reports and files in which individuals are not directly or indirectly identifiable;

(e) intelligence information;

(f) information regarding any offenses which are not punishable by incarceration;

(g) public records as defined in M.G.L. c. 4, § 7(26);

(h) daily police logs;

(i) decisions of the Parole Board;

(j) published records of public court or administrative proceedings;

(k) published records of public judicial, administrative, or legislative proceedings;

(l) federal criminal record information; and

(m) anything otherwise excluded by law.

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Mass. Regs. Code tit. 803, § 2.03, 803 MA ADC 2.03

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No. SJC-12690

BOSTON GLOBE MEDIA PARTNERS, LLC,
PLAINTIFF-APPELLANT,

v.

DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES,
MASSACHUSETTS STATE POLICE, and
BOSTON POLICE DEPARTMENT,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF AMICUS CURIAE
OF THE AMERCIAN CIVIL LIBERTIES UNION OF MASSACHUSETTS
