

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 2084CV01035

AMERICAN CIVIL LIBERTIES UNION OF)
MASSACHUSETTS, INC.,)
))
Plaintiff,)
v.)
))
BRISTOL COUNTY SHERIFF’S OFFICE,)
))
Defendant.)

**PLAINTIFF’S COMBINED MEMORANDUM IN SUPPORT OF
DISCLOSURE OF PUBLIC RECORDS AND MOTION FOR SUMMARY JUDGMENT**

The American Civil Liberties Union of Massachusetts (“ACLU”) respectfully submits this Memorandum pursuant to the Court’s Second Order on Plaintiff’s Request for Injunctive Relief (“Second Order”), and in support of its Motion for Summary Judgment against the Defendant, Bristol County Sheriff’s Office (“BCSO”).

INTRODUCTION

BSCO Sheriff Thomas Hodgson recently stated that the public is “long overdue” an explanation of what occurred during a violent incident at the C. Carlos Carreiro Immigration Detention Center over one year ago, on May 1, 2020 (the “Incident”). *See* Statement of Material Facts in Support of Plaintiff’s Motion for Summary Judgment (“SOF”) at ¶ 12. Yet BCSO has prevented public disclosure of numerous documents and videos recording the Incident. BCSO has not even completed its search for and review of responsive documents, claiming instead that virtually all responsive documents are exempt because of ongoing investigations, privacy, or

anti-terrorism considerations. BCSO's blanket withholding has allowed it to make numerous self-serving public statements, free from fear that it may be publicly contradicted. Meanwhile, the blanket exemptions claimed by BCSO are becoming increasingly absurd:

- Roughly a year and half after the Incident, BCSO has produced two (2) pages of public records concerning it: ministerial correspondence with the Department of Homeland Security ("DHS"). (All other records have been provided *in camera* or under seal.)
- After making a small initial *in camera* submission of records responsive to Requests 6, 8, and 10 in April, it appears BCSO unilaterally suspended its search for and production of any remaining responsive documents, even though ACLUM had negotiated search terms in good faith as BCSO requested.
- All related investigations are over, with the exception of one by the DHS Office of the Inspector General ("OIG"), which has never objected to the release of records concerning the Incident.
- The Massachusetts Attorney General's Office ("AGO") and the Massachusetts Senate have both published reports about the Incident and its aftermath, and the names of many of the involved detainees have been publicly released in federal litigation.
- DHS has terminated its contracts with BCSO due to "ample evidence" of detainee mistreatment, and BCSO consequently no longer houses immigration detainees.
- BCSO continues to make detailed public assertions about the Incident, while withholding the underlying records. Sheriff Hodgson himself recently admitted that "it's time [the public] heard what really happened." SOF Ex. 3 at pg. 1, lines 9–14.

All BCSO documents relating to the incident are public records subject to disclosure under the Public Records Law, G.L. c. 66 § 10. No exemptions apply or have ever applied.

FACTUAL AND PROCEDURAL BACKGROUND

A. BCSO Violated the Law While Housing ICE Detainees.

In general, Massachusetts officials—including Sheriffs—have no role enforcing federal civil immigration law.¹ Some years ago, BCSO signed an intergovernmental services agreement

¹ See, e.g., *Arizona v. United States*, 567 U.S. 387, 407–10 (2012); *Lunn v. Commonwealth*, 477 Mass. 517, 537 (2017).

(“IGSA”) with U.S. Immigration and Customs Enforcement (“ICE”). *See* SOF at ¶ 1. Under the IGSA, ICE paid BCSO to house federal civil immigration detainees at the Bristol County House of Correction. *See id.* ICE essentially rented bed space at BCSO on a *per diem* basis. *See id.*

In the last two years, three branches of government—executive, judicial, and legislative—made findings that BCSO operated its civil immigration detention program in violation, or likely violation, of the law. In 2019, the Office of the State Auditor for the Commonwealth found, among other things, that the BCSO had unlawfully retained, and failed to remit to the Commonwealth, more than \$300,000 in payments that it had received from ICE under the IGSA. *See id.* ¶ 2. In 2020, in *Savino v. Souza*, C.A. No. 20-10617 (D. Mass), the U.S. District Court for the District of Massachusetts found that the BCSO’s failure to take adequate COVID-19 safety precautions likely violated the Constitution through “deliberate indifference to a substantial risk of serious harm” to immigration detainees. *See id.* ¶ 3.

In 2020, the AGO’s Civil Rights Division found that, during the Incident, BCSO broke the law when it used “excessive and disproportionate” force against immigration detainees, and “acted with deliberate indifference to a substantial risk of serious harm to the health of the [immigration] detainees” when deploying “excessive amounts” of chemical irritants. *See id.* ¶ 4. The Senate’s Committee on Post Audit and Oversight found that, in the immediate aftermath of the Incident, BCSO “violated applicable state law and their own policies and procedures when they denied Senator Chang-Diaz entry to” the Bristol County House of Correction for an oversight visit. *See id.* ¶ 5.

And earlier in 2021, the Hon. Alejandro N. Mayorkas, Secretary of Homeland Security, found that there is “ample evidence” that the BCSO’s “treatment of detained individuals and

conditions of detention are unacceptable,” and directed ICE to terminate all agreements with BCSO. *See id.* ¶ 7. BCSO’s involvement in federal civil immigration matters is over. *See id.* But questions of great public importance remain.

B. BCSO’s Blanket Refusal to Release Any Records of the Incident.

Although many aspects of BCSO’s terminated detention program deserve public scrutiny, the gravity of the Incident, as well as the BCSO’s unchecked public assertions about it, creates a particularly strong interest in public access to the underlying records of what happened.

According to the AGO, the Incident not only involved serious civil rights violations against a group of about twenty-five civil detainees, but also physical harm: two detainees were transported to the hospital following the incident, while a third was revived with emergency chest compression. *See id.* ¶ 4. That same detainee was not taken to the hospital, but continued to be held on site. *Id.* Although the AGO did not identify any of the detainees, many of their identities are publicly available, having been disclosed in public filings in the *Savino* litigation. *See id.* ¶ 9.

Shortly after the Incident, BCSO began to make public statements absolving itself of any blame for the altercation. *See id.* ¶ 10. On May 2, 2021 Sheriff Hodgson gave a fifteen minute press conference during which he made various detailed assertions about the Incident. *See id.* He further remarked that “we have it all on film.” *See id.* That same day, Sheriff Hodgson invited members of the press into the affected immigration detention unit, where he allowed them to inspect and photograph the facility’s interior. *See id.*

Since then, Sheriff Hodgson has continued making assertions regarding the Incident in the press and on social media. For example, on May 4, 2020 Sheriff Hodgson again gave a

detailed account of the Incident during a more than thirty minute interview with WBSM's Chris McCarthy Show. *See id.* ¶ 11. Most recently, on June 11, 2021 Sheriff Hodgson released a twenty-two minute podcast where he again recounted in detail his version of what occurred during the Incident. *See id.* ¶ 11. Among other things, Sheriff Hodgson admitted, in substance, that he had personally initiated the use of force during the Incident by forcibly removing a phone from a detainee's hand while the latter attempted to speak with his attorney. *See id.*

ACLUM sent BCSO a public records request on May 4, 2020, requesting ten categories of records relating to the Incident (the "Requests"). *See id.* ¶ 21. On May 7, 2020, BCSO responded with a blanket refusal to comply with the Requests, claiming that all responsive materials were exempt from disclosure under G.L. c. 4 § 7(26) (f) and (n), the investigatory and anti-terrorism exemptions. *See id.* ¶ 23.

BCSO failed to indicate whether it had even attempted to locate responsive materials. *See id.* ¶ 24. Instead, BCSO merely stated generally, and circularly, that (1) all requested materials were central to ongoing investigations and thus exempt from disclosure under the investigatory materials exemption, and (2) that photographs and videos of its facility and its response to the Incident were exempt from disclosure under the public safety exemption because their release would endanger public safety. *See id.* By denying ACLUM access to literally every piece of paper and frame of video concerning the Incident, BCSO not only frustrated public transparency and violated the public records law, but also left itself in a position to continue to make assertions about what happened without fear of being contradicted by the underlying records.

C. BCSO Makes a Vague, Materially Incomplete Submission for *In Camera* Review.

In response to this blanket denial, ACLUM filed this lawsuit on May 18, 2020. The Court held a hearing for a motion for judgment on ACLUM’s pleadings. *Id.* at ¶ 28. After that hearing, this Court issued its Decision and Order on Plaintiff’s Request for Injunctive Relief on June 25, 2020, having converted ACLUM’s motion to a motion for summary judgment. *Id.* The Court then directed BCSO to provide, under seal to the Court within 30 days, (1) all materials that it claimed were entirely exempt from disclosure, (2) all materials for which redaction of names would allow for release, and (3) all materials for which redaction of names and camera locations would allow for release. *Id.*

On August 4, 2020, BCSO submitted to the Court under seal photocopies of 719 records—including photos, phone call transcripts, and incident reports—and five flash drives containing thirty-four video recordings. *Id.* ¶ 29. It further provided an index of these documents that included claimed exemptions. *Id.*

BCSO continued to claim that all responsive materials filed with the Court were exempt under G.L. c. 4 § 7(26) (c), (f), or (n). *See id.* ¶ 30. BCSO claimed that the investigatory materials exemption protected every responsive record. *Id.* BCSO justified its reliance on this exemption with only conclusory assertions, such as claiming that disclosure of each photograph showing property damage under investigation by BCSO and federal law enforcement agencies, “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” *Id.* Similarly, BCSO made no attempt to show why redaction of detainee names or other identifying information could not enable disclosure of documents allegedly protected by the privacy exemption. *Id.* And although ACLUM’s Requests

included requests for communications between BCSO and federal agencies, BCSO's August 4 filing also failed to include any such communications, indicating that even after the June 25 Order BCSO failed to conduct a complete search for responsive records. *See* SOF Ex. 7 (Index).

On October 27, 2020, the Court entered an Order directing ACLUM to review records filed with the court under seal by BCSO, and thereafter to prepare a memorandum indicating what records it believed should be disclosed under G.L. c. 66 § 10. SOF ¶ 31.

D. The Senate Concludes its Investigation and Issues a Report.

Because BCSO failed to provide an update on the status the investigations for nearly two months after the Court directed it to do so, ACLUM requested a status conference on December 17. *Id.* at ¶ 35. Only after filing this request did BCSO partially comply with the Court Order, indicating in its December 23 Response to Plaintiff's Request for Status Conference that investigations by DHS and the Senate were ongoing. SOF Ex. 24 (Affidavit of Lorraine Rousseau) at ¶ 24–25. But BCSO failed to note that the Senate Investigation had concluded and the Senate issued a report on December 18, 2020. *See* SOF Ex. 5 (Senate Report) at 1. BCSO further failed to fully comply with the Court order by neglecting to provide any update about its internal investigation, waiving any reliance on any such investigation. BCSO also contended that ACLUM's Requests Nos. 6, 8, and 10 were overly burdensome, and that ACLUM should provide specific search terms to narrow BCSO's burden—a request it had never before made. SOF ¶ 37. BCSO's Response was accompanied by an Affidavit by Lorraine Rousseau and a Second Custodial Index that highlighted two electronic communications BCSO produced. SOF Ex. 9 (BCSO Response) at 7.

E. BCSO Fails To Complete Its Search For Responsive Materials.

Following a meet and confer on January 27, ACLUM provided BCSO with proposed search terms on January 28 in an effort to reach a good-faith resolution regarding Responses 6, 8, and 10 of the Requests. *See* SOF Ex. 10 (Proposed Search Terms). On March 3, BCSO communicated to ACLUM that it had run a test search using the domain names indicated in Requests 6, 8, and 10, but that it had not yet run specific search terms provided by ACLUM to narrow the scope of Request 6. SOF Ex 11. After receiving no additional communication from BCSO regarding these proposed search terms, ACLUM sent BCSO a request for an update on March 24 asking that BCSO prioritize this search. SOF Ex. 12. On April 9, BCSO produced 43 emails and an index directly to ACLUM, indicating that it would be producing further documents soon. *See* SOF Ex. 13 (the April 9 Emails); SOF Ex. 25 (April 9 Cover Letter). At the time of production, BCSO made no claim that the emails were covered by the Protective Order or that any were exempt from production. Later that day, when asked whether BCSO acknowledged that the emails were produced as public records, BCSO replied that they were produced subject to the protective order. SOF Ex. 14. Again, BCSO did not cite any specific exemptions to the Public Records Law that would protect the Emails from disclosure.

The emails BCSO produced (the “April 19 Emails”) include the following:

- Seventeen daily facility status reports.
- Seven communications with attorneys [REDACTED]
- Two communications with immigration judge Maureen O’Sullivan [REDACTED]

- Thirteen emails reflecting communications between BCSO and the Office of the Inspector General of the Department of Homeland Security [REDACTED]
- Two emails [REDACTED] SOF ¶ 44.

Over a year has passed since ACLUM sent its Requests, but BCSO has still not completed its production of responsive emails. Despite complaining about the burden of having to review and produce thousands of emails, BCSO has produced next to nothing: for example, BCSO indicated that a preliminary search under Request 6, without including narrowing search terms previously provided by ACLUM, would produce 29,542 emails for review. SOF Ex. 11. It has produced 43 *See* SOF Ex. 13. Aside from this limited production on April 9, BCSO has not provided any recent update as to the status of its review for emails responsive to Requests 6, 8, and 10. BCSO has shown no intention to review or produce an untold number of responsive documents.

F. ACLUM Reviews Impounded Documents.

Because of various access restrictions to Suffolk Superior during the Covid-19 pandemic, undersigned counsel was not readily able to review the documents BCSO filed under seal in August (the “Impounded Documents”). Over a series of visits throughout 2021, and in coordination with the Clerk’s office, undersigned counsel reviewed the unredacted documents, including video that BCSO produced. SOF ¶ 47.

As of the date of service of this Memorandum, BCSO has not produced any documents beyond its April 9, 2021 production, despite BCSO’s representation that further production would be forthcoming. *See* SOF Ex.25 (April 9, 2021 email from L. Rousseau). At a meet and confer to discuss this motion for summary judgement held on December 17, 2021, counsel for

BCSO represented that it intended to “complete” its production of email as soon as possible, and no later than December 24, 2021. It further represented that it would produce any additional documents under seal, and would continue relying on all claimed exemptions. *See* Ex. 27 (Affidavit of C. Hart) ¶ 11.

G. Investigating Bodies Conduct and Largely Conclude Their Investigations.

The AGO, the Massachusetts Senate Committee on Post Audit Oversight (Senate), the Office of the Inspector General for the Department of Homeland Security (DHS), and BCSO itself each launched investigations into the Incident. With the apparent exception of the DHS investigation, each has long concluded. SOF ¶¶ 13-20.

The AGO reportedly began its investigation on May 5, 2020. SOF Ex. 1 (AGO Report) at 1. On December 15, 2020, the AGO lodged a letter with this Court stating that it had concluded its investigation, that it supported disclosure of records pertaining to the Incident, and that such disclosure would not reveal confidential investigatory methods. SOF. Ex. 4 (AGO Letter) at 1. Its letter enclosed a copy of its report, entitled *Investigation Into the Events of May 1, 2020 at the C. Carlos Carreiro Immigration Detention Center, Unit B, Bristol County Sheriff’s Office*.

The AGO Report concluded that the Incident resulted from BCSO institutional failures, and that BCSO’s planned and deliberate use of force during the Incident was excessive and disproportionate. SOF Ex. 1 (AGO Report) at 1. The AGO Report also provided a minute by minute summary of the Incident, from Sheriff Hodgson’s arrival at Unit B of the Facility, to BCSO’s removal of the detainees from the Unit. *Id.* at 25-40.

On May 8, 2020, the Massachusetts Senate Committee on Post Audit and Oversight began an investigation into the Incident, concluding with a report issued December 18, 2020.

SOF Ex. 5 (Senate Report) at 4. The Senate Report revealed that BCSO did not cooperate with the Senate’s investigation, failed to respond to the Senate’s document request and interrogatory questions, and excluded Senator Sonia Chang-Díaz from visiting its facility in violation of 36 M.G.L. 127. *Id.* The Senate thus obtained only limited information regarding the Incident. *Id.* The Senate has at no point indicated that it opposes disclosure of records responsive to ACLUM’s requests.

The Office of the Inspector General for DHS also opened an investigation into the Incident. SOF ¶ 16. DHS has not issued any report into the Incident, nor has it indicated in any way that it opposes release of any BCSO records. *Id.* ¶ 18. Finally, BCSO conducted an internal investigation of the Incident, which is over. *Id.* ¶ 20.

ARGUMENT

I. BCSO SHOULD PRODUCE ALL WITHHELD DOCUMENTS.

None of the documents that BCSO seeks to withhold falls within any claimed exemptions under the Massachusetts Public Records Law, and BCSO cannot meet its burden.

A. The Investigatory Materials Exemption Does Not Apply.

None of the documents BCSO has produced are exempted from disclosure under the investigatory materials exemption. That exemption protects from disclosure “investigatory materials necessarily compiled out of public view . . . 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.” G.L. c. 4, § 7(26)(f). Merely invoking the investigatory materials exemption is not sufficient; there must be some evidence of actual prejudice to an investigation. *See, e.g., Globe Newspaper Co. v. Police Comm’r*, 419 Mass. 852, 862 (1995); *Reinstein v.*

Police Comm'r of Boston, 378 Mass. 281, 289–90 (1979). The burden lies with the agency invoking the exemption to “prove, by a preponderance of the evidence,” that the purportedly exempt records may be withheld. *Rahim v. District Attorney for the Suffolk District*, 486 Mass. 544, 552 (2020).

There is no such actual prejudice or danger here. BCSO has never had legitimate recourse to this exemption as a means of justifying withholding documents from the public. No external investigator has indicated, explicitly or implicitly, that the documents should be withheld. To the contrary, the principal external investigator has requested that the records be released SOF. Ex. 4 at 1. Even if the exemption applied on May 7, 2020, when BCSO provided its first blanket denial of ACLUM’s requests, that purported basis has long disappeared, after multiple reports regarding the Incident have been publicized and the Facility no longer houses immigration detainees.

BCSO has relied on three external investigations to justify invoking the investigatory materials exemption: those of the AGO, the Massachusetts Senate, and the DHS OIG. BCSO has also previously relied on its own internal investigation, though references to that investigation are conspicuously absent from BCSO’s most recent filings. Crucially, both the AGO and Senate Investigations concluded in December 2020. The AGO has explicitly informed the Court that it welcomes disclosure of any materials connected to its investigation. SOF Ex. 4 at 1. Similarly, the Senate has never indicated that it opposes disclosure of any material, or that public disclosure would prejudice its work. To the contrary, the Senate lamented that BCSO failed to cooperate with the Senate’s Investigation. SOF Ex. 5 at 4. Given BCSO’s failure to cooperate, it has never had a basis to claim that the Senate Investigation offered any justification to invoke the investigatory materials exemption.

DHS OIG's investigation has been open during this litigation, but the agency has never indicated that it opposes disclosure of any materials sought through the Requests. Importantly, on May 20, DHS announced that it would terminate its contract with the Bristol County Sheriff's Office and transfer what few detainees remain at BCSO's facility to other locations. SOF ¶ 7. Echoing the AGO Report, Homeland Security Secretary Alejandro Mayorkas stated that DHS's ongoing investigation of BCSO had revealed "ample evidence that the Detention Center's treatment of detained individuals and the conditions of detention are unacceptable." *Id.* DHS's public announcement suggests that BCSO's withholding of records is perhaps an attempt to avoid embarrassment and accountability, but it also indicates that DHS has no interests at the facility that could be prejudiced by a release of records.

BCSO has further argued that disclosure of the impounded records could prejudice potential prosecutions against detainees involved in the Incident by having a chilling effect on detainees that may otherwise serve as witnesses, or by allowing suspects to "divert attention away from themselves." Dkt. 8 (BCSO's Response to Court's Order to Produce Records under Seal to Court) at 3–4. But more than a year has passed since the Incident. At the time of the Incident, ICE Unit B housed approximately twenty five detainees. SOF ¶ 8. There is no evidence that BCSO continues to investigate these detainees, or that any prosecutor is pursuing charges against them. And according to one attorney who regularly represented immigration detainees held by BCSO, and who visited such detainees after the Incident, "interrogations [of detainees] were substantially completed by the end of May [2020]." *See* SOF Ex. 21 (Declaration of Ira Alkalay) at ¶ 1. Disciplinary charges were brought in May and June of 2020, shortly after

disciplinary proceedings were concluded. *Id.* at ¶ 3. The detainees' disciplinary confinement concluded well over a year ago. *Id.*

Even if BCSO had a colorable argument that the exemption applies, disclosure is nevertheless in the public interest. "The public interests furthered by the public records law—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 Globe Media Partners LLC v. Dep't of Criminal Justice Information Servs.*, 484 Mass. 279, 293 (2020). Here, as reflected by actions of other branches of government, the Incident was a significant event in the recent history of Commonwealth correctional facilities, and the public is entitled to understand the full scope and nature of associated official conduct. Moreover, the AGO Report indicates that the requested records are likely to reveal not only egregious uses of force, but also other highly questionable conduct deserving of public scrutiny, such as civil detainees being questioned without counsel or after invoking their right to remain silent. SOF Ex. 1 (AGO Report) at 45.

Not a single one of the impounded documents can be withheld from the public under the investigatory materials exemption. As BCSO's index makes clear, each of these documents is responsive to the Requests, and none would prejudice any investigation. *See* SOF Ex. 7 (Index). These include transcripts of call records; photos of the facility during and after the Incident; incident reports; administrative paperwork regarding medical or other sequestration; and videos of the event itself and its aftermath, either through surveillance videos or from personal videos taken by BCSO officers and staff. *See* SOF *id.* Undersigned counsel's review makes clear that all of the impounded information is directly responsive to ACLUM's requests: the photographs,

incident reports, call transcripts, sequestration orders, and videos are all contemporaneous or nearly contemporaneous descriptions of the Incident by the participants and eyewitnesses to the incident, providing valuable evidence to the public about what actually happened.

For their part, the April 9 Emails are no different, and it is unclear why BCSO is afraid of disclosure. The majority of the emails BCSO produced are either routine internal communications or communications from lawyers representing detainees within BCSO's facility. *See* SOF Ex. 13. To the extent that these emails mention the DHS investigation into the Incident, they do nothing more than [REDACTED]

[REDACTED] *See id.* at. 79.

Though three emails [REDACTED] the emails do not contain any substantive information about these materials. *See id.* at 84–87. The emails do not identify any information provided by confidential informants or reveal investigatory procedures. There is no basis to exclude them from public disclosure.

B. The Privacy Exemption Does Not Apply.

No documents produced by BCSO fall under the privacy exemption. That exemption protects only “materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy.” G.L. c. 4, § 7 (26)(c). Information that does not permit the identification of an individual is not exempt. *Champa v. Weston Public Schools*, 473 Mass. 86, 97 (2015). The exemption is “not absolute.” *Boston Globe Media Partners, LLC*, 484 Mass at 291. The “public interest in disclosure” prevails when it substantially outweighs “the prospective invasion of individual privacy.” *Id.*

There is no colorable claim to individual privacy in any of the withheld documents. The identities of many detainees involved in the Incident are already publicly available through the *Savino* settlement. The investigations are all concluded or nearly so. Detainees are no longer at the facility. BCSO has not specified what privacy interest is at stake in any document. Even if there were a privacy interest at stake, it is “substantially outweighed” by the public’s interest in understanding how BCSO officers and staff conducted themselves. As the AGO has already concluded, BCSO used excessive force during the Incident and may have mistreated detainees as a matter of course. Some videos [REDACTED] [REDACTED] Purported privacy interests do not provide a reasonable basis to withhold this information from public disclosure.

Even documents otherwise covered by the privacy exemption must be disclosed if redaction of individually identifying information will render that document a public record. *See Champa*, 473 Mass. at 97. BCSO is well aware of this: it has already redacted detainee names and A numbers from the April 9 Emails. The remaining information in those emails is far too vague to identify any individual. Even if the privacy exemption applies here—and it does not—that exemption is not a sufficient basis to justify blanket withholding of documents.

C. No Other Exemption Applies.

None of the documents BCSO has produced under seal are protected by any other exemption, including the public safety exemption (otherwise known as the anti-terrorism exemption), which BCSO has invoked inconsistently. The anti-terrorism exemption is exceedingly narrow: it protects only “blueprints, plans, policies, procedures, and schematic drawings, which relate to internal layout and structural elements, security measures, emergency

preparedness, threat or vulnerability assessments or similar documents relating to the security of persons or structures in the commonwealth the disclosure of which, in the reasonable judgment of the record custodian, would be likely to jeopardize public safety.” G.L. c. § 7(26)(n); *Dep’t of Agric. Res.*, 477 Mass. at 282. This exemption does not apply to photos of broken phones, bathroom door damage, or litter.

The AGO Report also shatters any suggestion that the public safety exemption applies. BCSO previously claimed that disclosure will “reveal the BCSO procedures in responding to violent disturbances and investigating such matters.” Dkt. at 7. But the AGO Report already asserts the exact methods BCSO deploys in response to such situations, describing the law enforcement teams that responded to the Incident (including the Sheriff’s Response Team and K-9 Division), and stating exactly what equipment (gas masks, batons, etc.) each team deploys, how each is organized into squads, and the training that each must complete. SOF Ex. 1 at 5–6.

The AGO Report also describes BCSO’s disturbance response policy and use of force policy, which allows “calculated” use of force in certain enumerated circumstances. *Id.* at 16. The AGO Report describes under what circumstances certain measures, like baton strikes or the use of chemical or flash bang grenades, are allowed, making clear that this policy applies to disturbances like the Incident. *Id.* at 17. As for the Incident itself, the AGO Report effectively asserts a minute-by-minute narration of what occurred. Documents responsive to ACLUM’s Requests will not reveal lawful law enforcement techniques not already publicly available.

Finally, the documents do not implicate the antiterrorism exemption. Because this exemption was specifically enacted to combat terrorism, the key question is whether a record is “of the type that terrorists would find useful to maximize damage, such as threat assessments,

security plans, and structural documents depicting critical infrastructure.” *People for the Ethical Treatment of Animals v. Dep’t of Agric. Res.*, 477 Mass. 280, 282 (2017). None of the emails implicate this exemption. They contain no blueprints, plans or physical descriptions of BCSO’s facility at all. They do not include any indication of plans, policies, or threat assessments. In short, these Emails do not contain any information that “a terrorist would find useful.” *See id.*

II. ACLUM SHOULD BE GRANTED SUMMARY JUDGMENT.

As a matter of law, BCSO has failed to demonstrate that any exemption to the Public Records Law applies to documents responsive the Requests. As discussed in Section I, which argument is incorporated herein by reference, there is no genuine dispute of material fact regarding these documents. The Court should grant summary judgment to ACLUM, and order that BCSO complete its search forthwith and produce all responsive records, and that any impoundment order be lifted.²

Summary judgment may be granted when, “viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.” *Alba v. Raytheon Co.*, 441 Mass. 836, 840 (2004). ACLUM meets that standard here. Under the Public Records Law, all government records are presumed public unless a custodian proves by a preponderance of the evidence that an exemption shields those records from disclosure. G.L.c. 66 § 10(A); *Rahim* 486 Mass. at 553. Even where

² Although the Court in its June 25, 2020 Order converted ACLUM’s motion for judgment on the pleadings to a motion for summary judgment, *see* June 25, 2020 Order at 3, ACLUM moves here for summary judgment because at the time of the June 25, 2020 Order, the deficiencies in the BCSO’s production of email was not a ripe issue.

the investigatory exemption may apply to some documents, a defendant may not take the position that *all* responsive documents are exempt simply because it has conducted an investigation. *Bradley v. Records Access Officer, Department of State Police*, 100 Mass. App. Ct. 46, 50 (Mass. App. Ct. 2021); *see also Healey v. Cruz*, 2018 Mass Super. LEXIS 485, *36 (Mass. Super 11, 27, 2018). Whether a party has met this burden is a question of law susceptible to resolution by summary judgment. *Cruz*, 2018 Mass. Super LEXIS 485, at 43.

A custodian may prove that documents are exempt from disclosure by providing an itemized and indexed document log setting forth detailed justifications for its claims of exemption. *Rahim*, 486 Mass. at 553. Such document logs, however, must “provide insight” into the confidential nature of the contents of each document. *Id.* Simply stating the title of a document without adequately describing why its contents must remain confidential does not meet this burden. *See id.* at 555 (holding that the document description “Report from a Federal Bureau of Investigation Assistant Inspector-in-Place concerning copies of reports received, dated June 5, 2015 and labeled ‘Deliberative Process Privilege Document’ — 3 pages” did not provide sufficient insight to claim an exemption under the Public Records Law).

BSCO fails to meet its burden. It has no basis to invoke any exemption as to the documents it provided *in camera* to the Court, for the reasons already stated. It has further failed even to complete its search for responsive documents, providing ACLUM and this Court with no basis for withholding documents it has not even reviewed. With regard to Requests 6, 8, and 10—the Requests to which the April 9 Emails are responsive—BCSO has not identified which exemptions it believes apply to any of them. The only supporting document that BCSO provided with its emails was an index containing each email’s sender, subject, and the date and time that it

was sent. SOF Ex. 13 at 1. The index does not contain any substantive description as to why each email is exempt from disclosure. *Id.* BCSO has not met its burden of demonstrating with specificity that any exemption to the Public Records Law applies to the documents it has sought to impound. *See Healey*, 2018 Mass Super. LEXIS 485 at *15–16.

BCSO’s delay in producing any documents responsive to Requests 6, 8, and 10, and their further delay in completing the search for and production of those documents despite promises to do so, *see* SOF Ex. 14, provide a further basis for granting summary judgment. BCSO did not conduct any search for documents responsive to Requests 6, 8, and 10 until on or about March 10, 2021—over 10 months after the original Request was submitted. *See* SOF Ex. 15. This inexcusable delay casts doubt on whether BCSO conducted an adequate search on the remaining Requests. The Public Records Law requires government entities to produce public records on demand “without unreasonable delay.” *Healey*, 2018 Mass Super. LEXIS 485, at 12.

CONCLUSION

For the forgoing reasons, ACLUM respectfully requests that the Court (1) order public disclosure of the documents BCSO provided to this Court *in camera*, (2) grant ACLUM’s Motion for Summary Judgment and find that all of the records ACLUM requested are public records subject to disclosure under the Massachusetts Public Records Law, (3) issue a permanent injunction against BCSO directing it to locate and produce all remaining responsive materials directly to ACLUM without charge within 14 days of the Court’s order, and (4) lift any pending impoundment order on BCSO documents. ACLUM also respectfully requests the Court set a briefing schedule on the question of whether BCSO should be ordered to pay punitive damages of up to \$5,000 into the Public Records Assistance Fund pursuant to G.L. ch. 66, §10A(d)(4).

December 22, 2021

Respectfully submitted,

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CERTIFICATE PURUANT TO SUPERIOR COURT RULE 9C

I hereby certify that, on December 17, 2021, I conferred with counsel for the Defendant, Lorraine Rousseau and Robert Novack, in by telephone and over email in an effort to resolve or narrow the issues in this dispute. The parties were unable to resolve or narrow the dispute during those communications.

/s/ Christopher E. Hart
Christopher E. Hart

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2021, the foregoing document was served on counsel for Defendant at:

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/s/ Stephen K. Garvey
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