COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, ss.

Appeals Court
No. 2019-P-1602

RAHIMAH RAHIM, Plaintiff-Appellant

v.

SUFFOLK COUNTY DISTRICT ATTORNEY, Defendant-Appellee

Application for Direct Appellate Review

On Behalf Of Rahimah Rahim

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Date: November 26, 2019

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REQUEST FOR DIRECT APPELLATE REVIEW

Appellant Rahimah Rahim respectfully asks this Court to grant direct appellate review of this case, which presents a significant question of first impression: when a Massachusetts agency receives, uses, and retains documents from a federal agency, can the two agencies shield the documents from disclosure under the Massachusetts Public Records Law by calling the receipt a "loan"?

In June 2015, Boston resident Usaamah Rahim was shot and killed during an encounter with officers from the Boston Police Department (BPD) and the Federal Bureau of Investigation (FBI). In August 2016, the Suffolk County District Attorney issued a 10-page report explaining the District Attorney's decision not to criminally charge the officers who shot Mr. Rahim.

Mr. Rahim's mother, Ms. Rahimah Rahim, sought access under the Massachusetts Public Records Law (PRL) to the records underlying the District Attorney's investigation. These records included documents sent by the FBI under a cover letter stating that they were "loaned" to the District Attorney and should not be provided in response to "any request made under the Massachusetts Freedom of Information Act." Citing this language, the District Attorney denied Ms. Rahim's request. The Superior Court below upheld this decision.

There is no dispute that the District Attorney requested records from the federal government as a part of its investigation into Mr. Rahim's death or that it

physically received these records, relied upon them to exonerate the officers, and retained them for years. But this Court's precedents do not expressly address whether, notwithstanding those facts, the District Attorney and the FBI can shield the records from disclosure by agreeing to characterize them as being on loan.

Under fundamental principles of statutory interpretation, the answer must be no. The PRL expressly applies to any records "made or received" by a Massachusetts agency. *See* G.L. c. 66 § 10 *et seq.* and G.L. c. 4 § 7(26). This Court has already held that a Massachusetts agency cannot circumvent its PRL obligations through a confidentiality agreement with a private party, noting that such a contract cannot "trump the public records law and the [state agency's] obligation to comply with the law's requirements." *Champa v. Weston Pub. Schools*, 473 Mass. 86, 98 (2015). The result should be no different when a Massachusetts agency contracts with a federal agency; Massachusetts agencies simply lack the authority to contract their PRL obligations into oblivion.

To be sure, the Massachusetts PRL cannot be used to compel a federal agency to disclose a document in *its* possession. So if a federal agency wants to keep a document from people of Massachusetts, it can retain physical possession of that document and litigate any FOIA requests it might receive. But, absent an applicable exemption under the Massachusetts PRL, it cannot provide the document to Massachusetts state *agencies* and shield it from Massachusetts state

residents. Once a document is "made or received" by a Massachusetts agency, that agency's disclosure obligations are governed by Massachusetts law.

STATEMENT OF PRIOR PROCEEDINGS[1]

Desperate to understand more about the events leading up to her son's death, Ms. Rahim filed a public records request with the District Attorney on June 16, 2017. *See* Add. 34. After the District Attorney denied Ms. Rahim's request, Ms. Rahim filed a complaint in the Superior Court on July 24, 2017. *See* Add. 28, 43, and 45. Ms. Rahim requested declaratory relief stating that the requested records ("Records") were public records under the PRL because they had been *received* by, and were in the possession of, the District Attorney and were not otherwise exempt from public disclosure pursuant to a statutory exemption. She also asked for injunctive relief ordering the production of the Records, and sought to enjoin the District Attorney from destroying or removing the Records until the dispute was resolved.[2]

[1] A certified copy of the docket entries is appended hereto. *See* Addendum ("Add.") 26.

[2] The motion for a temporary restraining order was filed as a result of the District Attorney's initial refusal to provide Ms. Rahim with assurances that it would maintain possession of the Records until Ms. Rahim could file her complaint for judicial resolution. After the Superior Court granted Ms. Rahim's request for a hearing on short notice, the District Attorney agreed to maintain possession of the Records and entered a stipulation to this effect on July 25, 2017.

On August 2, 2017, the Superior Court (Leighton J.) heard argument on the request for preliminary injunctive relief and denied Ms. Rahim's request for a preliminary injunction on August 4, 2017. *See* Add. 47.

Without discovery, both parties moved for summary judgment. On June 11, 2019, the Superior Court (Leighton, J.) denied Ms. Rahim's motion for summary judgment, and allowed the District Attorney's motion for summary judgment. *See* Add. 50. The Superior Court entered judgment for the District Attorney on June 12, 2019, and Ms. Rahim timely filed her Notice of Appeal on August 9, 2019. *See* Add. at 59.

STATEMENT OF FACTS RELEVANT TO APPEAL

A. The District Attorney's receipt of the Records and investigation into Mr. Rahim's death

On June 2, 2015, Mr. Rahim was shot and killed. The District Attorney opened an investigation into Mr. Rahim's death under its statutory obligation to investigate all "cases of unnatural or suspicious death" and to "direct and control the investigation of the death and [] coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the deaths occurred." *See* G.L. c. 38, §§ 3, 4. As a part of the investigation, the District Attorney requested records from the FBI, which the District Attorney received on June 5, 2015. *See* Add. 61.

In sending the records to the District Attorney, the FBI included a cover letter claiming that, "the FBI cannot authorize the further release of the records to any third party outside your office," including "any request made under the Massachusetts Freedom of Information Act." *See* Add. at 61. The letter then purported to establish that the Records were merely being "loaned" to the District Attorney stating:

> By accepting these records, it is specifically understood they are being loaned to your agency and remain the property of the FBI through the Department of Justice and, if any third party request is made for them, they will not be provided to such requestor without the prior written permission of the FBI.

See Add. 61. However, the FBI permitted the District Attorney to use the Records "at trial" or to otherwise "advance" the District Attorney's investigation. *See* Add. 61.

This investigation culminated in the release of a ten-page report dated August 24, 2016 (the "Findings Report"). *See* Add. 62. In concluding that the "officers' use of force was a lawful and reasonable exercise of self-defense and defense of others," and that the officers would not be criminally charged for killing Mr. Rahim, the Findings Report noted that the investigation included a review of the FBI documents "provided to [the] office on June 5, 2015." *See* Add. 63.

B. Ms. Rahim's public records request and the District Attorney's response

On June 16, 2017, Ms. Rahim mailed a public records request to the District Attorney seeking records pertaining to the fatal shooting of her son, including:

> All records relating to the events that took place on June 2, 20[15], with regard to Mr. Rahim, including video, police reports, police officer or witness statements, audio recordings, or transcripts, call logs, and any records identifying the officers involved in his attempted arrest, records shared with other federal, state, or local agencies, photographs, and autopsy reports.

See Add. 34.

The District Attorney served its first response to Ms. Rahim on July 20, 2017, denying the request in full. *See* Add. 43. Relevant to this appeal, the District Attorney supported the blanket denial of the FBI documents by explaining that these "loaned" documents were in the "temporary custody" of the District Attorney, but were "the property of the FBI" and "are not under the control" of the District Attorney. Days later, the District Attorney served a supplemental letter that broadly claimed the Records were exempt from the PRL under the investigatory exemption. *See* Add. 45. This supplemental response did not include any information describing the withheld records or justifying the application of this exemption.

C. Cross-motions for summary judgment and the District Attorney's *Vaughn* index

After Ms. Rahim filed her complaint on July 24, 2017, the parties filed cross-motions for summary judgment that primarily addressed two issues: (1)

whether the Records are "public records" as defined by Massachusetts law and (2) whether the Records, although "public records" are exempt from disclosure pursuant to the investigatory exemption to the PRL, G.L. c. 4 § 7(26)(f). At a summary judgment hearing on April 26, 2018, Ms. Rahim argued that the District Attorney needed to provide a sufficient description of both the withheld documents and the justification for their withholding to allow the Court and Ms. Rahim to evaluate whether the invocation of the investigatory exemption was proper. Accordingly, she asked the Court to order the District Attorney to produce a *Vaughn* index describing the withheld documents, produce the documents under a protective order, or produce the documents for in camera review. *See* Add. 72. The Court continued the hearing for 30 days and asked the parties to confer and consider these three options. *See* Add. 74-75.

On June 5, 2018, the District Attorney's Office provided 56 pages of responsive records to Ms. Rahim as well as a *Vaughn* index for the remaining withheld documents. The *Vaughn* index was limited to broad descriptions of the withheld documents which frequently omitted the author, recipient and date of creation of the record. It also provided an identical justification for the application of the exemption to dozens of separate records, and failed to identify any segregable, non-exempt portions for a single document. *See* Add. 76.

D. The FBI's statement of interest and the Superior Court's decision

On July 11, 2018, while the parties' cross-motions for summary judgment were pending, the United States Attorney for the District of Massachusetts filed a statement of interest on behalf of the FBI. *See* Add. 109. The Statement of Interest argued that the documents sent by the FBI remained federal records which belonged to the federal government, that the supremacy clause prevented the District Attorney from disclosing the records under the Massachusetts PRL, and that law enforcement concerns militated against disclosing the documents.[3]

The Superior Court issued its decision in June 2019 upholding the District Attorney's refusal to disclose the Records. To begin, the Court held that the Records "are not public records under the Massachusetts Public Records Law" because they "are on loan from the FBI." Add. 53. To reach this conclusion, the Court interpreted the statutory language "made or received" to "indicate[] ownership to be considered a public record." Add. 54. The Court also held that, even if the Records were subject to the Massachusetts PRL, they were exempt under the investigatory materials exemption. Relying on the *Vaughn* index, the Court was "satisfied" that this exemption applied because "the Records are from

[3] Ms. Rahim sought to strike any new facts asserted in the FBI's Statement of Interest. This was in addition to Ms. Rahim's pending motion to strike disputed facts including portions of affidavits proffered by the District Attorney in the parties' statement of facts. *See* Add. 26, Docket entry No. 15. Neither motion was decided by the Superior Court.

the FBI and regard confidential investigative techniques and procedures." Add. 55. Finally, the Court held that even if the documents were "public records" under the Massachusetts PRL, the supremacy clause of the U.S. Constitution would preclude their disclosure because it would require that any dissemination occur "pursuant to federal law, not state law." Add. 56.

STATEMENT OF ISSUES OF LAW RAISED BY APPEAL

This appeal raises the following questions, all of which were raised and properly preserved before the Superior Court.

1. Massachusetts law defines public records as documents that are "made or received" by a Massachusetts agency. There is no exemption for records "loaned" to a Massachusetts agency by the federal government. When a Massachusetts government agency requests, receives, and uses records from a federal government agency, are they "public records" within the meaning of the Massachusetts Public Records Law, notwithstanding an agreement by the Massachusetts agency and the federal agency to characterize the transfer of these records as a "loan"?
2. When a Massachusetts agency receives and possesses records it obtained from a federal agency, can a Massachusetts court order the disclosure of those records pursuant to the Public Records Law, without violating the supremacy clause?

3. In this case, were the Records unlawfully withheld under the investigatory exemption where the District Attorney provided only generalized descriptions of the documents and identical justifications for the application of the exemption to dozens of records?

BRIEF STATEMENT OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN RULING THAT THE RECORDS WERE NOT SUBJECT TO THE PRL BECAUSE THEY WERE ON LOAN FROM THE FEDERAL GOVERNMENT

The plain text of the Massachusetts Public Records Law governs documents "made or received" by a Massachusetts agency, without regard to whether such documents are supposedly on loan from somewhere else. The PRL defines "public records" to include all documents "made or *received* by any officer or employee of any agency . . . or authority of the commonwealth, or of any political subdivision thereof[.]" G.L. c. 4 § 7(26) (emphasis supplied). "The definition sweeps in a wide array of documents and data made or received by employees, agencies, or other instrumentalities of the Commonwealth." *PETA v. Dept. of Agricultural Resources*, 477 Mass. 280, 281 (2017).

Consistent with the plain text of the statute, this Court has repeatedly made clear that a Massachusetts agency's making or receipt of a document, and not the agency's property interest in the document, determines its obligations under the PRL. *See Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 593

(2005) (records sheriff characterized as "private" which were made or received by the sheriff subject to the PRL); *Globe Newspaper Co. v. District Attorney for Middle Dist.*, 439 Mass. 374, 382-83 (2003) (entity subject to PRL in possession of records must produce them, regardless of whether records originated from different governmental entity). So long as "the item sought is a [] record that could be obtained from the [custodian], it is a public record." *Globe Newspaper Co.*, 439 Mass. at 383. Indeed, this Court has already held that the law does not permit Massachusetts government entities to enter into non-disclosure agreements with private parties to avoid compliance with the PRL. *Champa*, 473 Mass. at 98.

Here, the Records were received by the District Attorney and therefore meet the PRL's definition of public records. The Superior Court ruled otherwise, based on the FBI and the District Attorney's assertion that the Records were "on loan," but that characterization has no bearing on the application of the PRL. The PRL's text contains no language that would permit a Massachusetts agency to shield from disclosure documents that it indisputably received, simply by agreeing with the provider of those documents that they are "on loan." In this case, the District Attorney requested, received, retained and relied upon the Records when performing official functions. It cannot now claim that it never "received" them for purposes of the PRL.

A contrary rule would invite substantial mischief. If Massachusetts agencies could avoid having to disclose documents they receive simply by agreeing to treat the receipt as a loan, such agreements will surely proliferate. And the public's knowledge will just as surely suffer. This would severely undermine the PRL, which does not grant Massachusetts agencies the discretion to pick and choose which records the public can access.

II. THE SUPERIOR COURT MISAPPLIED THE SUPREMACY CLAUSE

The Superior Court alternatively held that the PRL did not apply to the Records because "the supremacy clause requires [they] be disseminated, if at all, pursuant to federal law, not state law." Add. 56. That holding is also incorrect.

The supremacy clause does not control this case because there is no pertinent conflict between federal law and the Massachusetts PRL. As the Superior Court noted, the supremacy clause "ensure[s] that, in a conflict with state law, whatever Congress says goes." Add. 56. (quoting *Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of Health and Human Svcs.*, 463 Mass. 447, 461 (2012)). And here, Congress has not issued any command that conflicts with the Massachusetts Legislature's commands concerning records received by Massachusetts agencies. The FBI voluntarily gave the Records to the District Attorney, knowing that the Records would be possessed by a Massachusetts agency. Contrary to the District

Attorney's assertion, neither the federal FOIA nor any other federal law purports to bar Massachusetts agencies from being required to produce federal documents they have received under the PRL. *See Progressive Animal Welfare Soc. V. Univ. of Washington*, 125 Wash. 2d 243, 265-66 (1994) ("FOIA does not contain an express preemption provision. . . FOIA may be said to expressly decline preemptive effect.") Add. 127; *see also Missouri Prot. & Advocacy Servs. v. Allan*, 787 S.W. 2d 291, 293 (Mo. App. 1990) (declining to apply FOIA exemption to federal document received by state agency and ordering disclosure under state public records law). Add. 158.

Thus, by handing documents to a Massachusetts agency, the FBI divested itself of any ability to invoke the supremacy clause to control whether the Records would need to be disclosed under state law. In situations like this, where the federal government transfers documents to a state agency, the documents have been found subject to state public records law. *See Harper v. Missouri State Highway Patrol*, 2019 WL 5699937, *6-7 (2019) ("the FBI surrendered its control of the FBI reports and the [state agency] retained it" and therefore the records are public records subject to the state Sunshine Law) Add. 148.; *see also Missouri Prot. & Advocacy Servs.*, 787 S.W. 2d at 293-95 (Mo. App. 1990) (holding preliminary report drafted by federal Department of Education and sent to state

education department was subject to disclosure under the state Sunshine Law) Add. 158.[4]

The FBI cannot both hand over the Records to the District Attorney *and* claim that they cannot be publicly disseminated in accordance with state law. By the same token, the District Attorney cannot accept the Records and maintain possession of them for over two years (including a period of eleven months after concluding the investigation which prompted its request for the Records), and continue to claim the Records are merely on loan and not subject to the PRL.

III. THE SUPERIOR COURT INCORRECTLY RULED THAT THE INVESTIGATORY EXEMPTION APPLIES.

As a final basis for affirming the District Attorney's withholding of documents, the Superior Court held that even if the Records were subject to the PRL, they were exempt from disclosure under the investigatory exemption. That conclusion is erroneous for at least two reasons.

[4] *United States v. Napper*, 694 F. Supp. 897 (N.D. Ga 1988), *aff'd* 887 F.2d 1528 (11th Cir. 1989), cited by the Superior Court below, Add. 163, did not hold otherwise. There, the question before the Court was whether the federal government could require the city government to return documents previously provided by the FBI. *Id*. at 1529 ("We view this as a simple case involving the right of the United States to obtain its own documents loaned to a state agency[.]"). Those documents *had already* been released under the state public records law, and as *Napper* noted, the federal government "has not sought from intervenors copies of the already released documents, nor does it attempt in this litigation to suppress information already made public." *Id*. at 1530. Add. 163.

First, there is no ongoing investigation here. Mr. Rahim is deceased, and his only alleged co-conspirators have been convicted and sentenced. It is hard to imagine what prejudice will befall any ongoing or future law enforcement activity if these records are disclosed or how their disclosure would not be in the public interest. *See e.g., WBZ-TV4 v. District Attorney for Suffolk District*, 408 Mass. 595, 604 (1990) (recognizing that upon conclusion of investigation "future disclosure may be appropriate"); *Messier v. Bledsoe*, Case No. 97-6560-G, 1998 WL 140099 at *1-2 (Mass. Super. Ct. Mar. 27, 1998) (holding investigatory exemption not applicable where there is no ongoing criminal investigation, records did not contain confidential investigative techniques or names of confidential informants).

Second, the District Attorney's generalized descriptions of the withheld documents and blanket assertions that they fall under the investigatory exemption fail to satisfy the PRL's required specificity. "There is no blanket exemption" for law enforcement documents, "nor does the investigatory materials exemption extend to every document that may be placed within what may be characterized as an investigatory file." *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 65 (1976). Instead, the District Attorney must describe each withheld document, justify the application of the exemption to each individual record, and attempt to segregate and produce any non-exempt portions. *See* G.L. c. 66, § 10; *Champa*, 473 Mass. at 86 ("The fact that the [records] fall within the coverage of [an

exemption] does not end the matter. The public records law specifically contemplates redaction of material that would be exempt, to enable the release of the remaining portions of a record."). It did not do so here.

Instead, the District Attorney's *Vaughn* index lacks any detail that would permit the Court or Ms. Rahim to determine whether the exemption was properly invoked. Permitting the custodian of the records to therefore decide "unilaterally, without any oversight, what documents are subject to disclosure and what documents are exempt is wholly inconsistent with the purpose of G.L. c. 66, § 10." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester,* 436 Mass. 378, 385 (2002).

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review is appropriate where an appeal presents (1) questions of first impression or novel questions of law; (2) state or federal constitutional questions; or (3) questions of substantial public interest. *See* Mass. R. App. P. 11(a). This case presents all three types of questions.

First, this is a question of first impression. Although this Court has held that a Massachusetts agency cannot circumvent the PRL by contract with a private entity, *see Champa*, 473 Mass. at 98, it has not expressly addressed a Massachusetts agency's attempt to evade the PRL by entering a "loan" agreement with a federal agency to physically receive and retain records for months on end

and to use the records for official purposes on the promise the records will not be produced to the public.

Second, this case presents a question concerning the United States Constitution. Specifically, it asks whether the supremacy clause prevents the Massachusetts Legislature from requiring a Massachusetts agency to disclose documents it has received from a federal agency.

Third, the public interest in these questions is substantial. The PRL is grounded in the understanding that transparency is fundamental to our democracy. Under the PRL, "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." G.L. c. 66, § 10 (c). The public has a right to know whether in addition to these enumerated exemptions, a large swath of records received by Massachusetts governmental entities could be hidden from the public through loan agreements between state and federal agencies.

Respectfully submitted,

RAHIMAH RAHIM,

By her attorneys,

/s/ Kate R. Cook

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Dated: November 26, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify, under the penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 11(b) (applications for direct appellate review);
Rule 16(a)(13) (addendum);
Rule 16(e) (references to the record);
Rule 18 (appendix to the briefs);
Rule 20 (form and length of briefs, appendices, and other documents);
Rule 21 (redaction).

Specifically, this brief was written in Times New Roman, 14 point font, and created on Microsoft Word (v. 2010). The number of non-excludable words contained in this application for direct appellate review is 1773.

/s/ Tristan P. Colangelo
Tristan P. Colangelo

November 26, 2019

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on November 26, 2019, I have made service of this Application for Direct Appellate Review filed in the matter entitled *Rahimah Rahim v. Suffolk County District Attorney*, 2019-P-1602, currently pending in the Appeals Court via the Court's Electronic Filing System upon counsel for the Commonwealth:

Donna Patalano, Esq.
Assistant District Attorney for Suffolk County
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/s/ Tristan P. Colangelo
Tristan P. Colangelo

November 26, 2019

ADDENDUM

CRTR2709-CR

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

1784CV02312 Rahim, Rahimah vs. Daniel F Conley District Attorney for Suffolk County

CASE TYPE:	Equitable Remedies	**FILE DATE:**	07/24/2017
ACTION CODE:	D03	**CASE TRACK:**	F - Fast Track
DESCRIPTION:	Injunction		
CASE DISPOSITION DATE:	06/12/2019	**CASE STATUS:**	Closed
CASE DISPOSITION:	Summary Judgment	**STATUS DATE:**	06/12/2019
CASE JUDGE:		**CASE SESSION:**	Civil B

PARTIES

Plaintiff Rahim, Rahimah	**Attorney** **645369** Rahsaan D Hall ACLU of Massachusetts ACLU of Massachusetts 211 Congress St Boston, MA 02110 Work Phone (617) 482-3170 Added Date: 09/14/2017 **Attorney** **650698** Kathryn Rebecca Cook Sugarman, Rogers, Barshak & Cohen, P.C. Sugarman, Rogers, Barshak & Cohen, P.C. 101 Merrimac St Boston, MA 02114-4737 Work Phone (617) 227-3030 Added Date: 07/24/2017 **Attorney** **665247** Laura Rotolo American Civil Liberties Union of Massachusetts American Civil Liberties Union of Massachusetts 211 Congress St Boston, MA 02110 Work Phone (617) 482-3170 Added Date: 09/14/2017 **Attorney** **670685** Jessie J Rossman ACLU Massachusetts ACLU Massachusetts 211 Congress St Boston, MA 02110 Work Phone (617) 482-3170 Added Date: 09/14/2017 **Attorney** **682202** Tristan P Colangelo Sugarman, Rogers, Barshak, & Cohen P.C. Sugarman, Rogers, Barshak, & Cohen P.C. 101 Merrimac St Suite 900 Boston, MA 02114 Work Phone (617) 227-3030 Added Date: 07/24/2017

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

Defendant Daniel F Conley District Attorney for Suffolk County	**Attorney** **548767** Sarah R Wunsch Massachusetts Bar 77 Brook St Brookline, MA 02445 Work Phone (617) 872-7870 Added Date: 07/25/2017 **Attorney** **662332** Janis DiLoreto Smith Boston Water and Sewer Commission Boston Water and Sewer Commission 980 Harrison Ave Boston, MA 02119 Work Phone (617) 989-7000 Added Date: 08/01/2017
Other interested party United States of America	**Attorney** **664369** Brian LaMacchia United States Attorney's Office United States Attorney's Office Moakley US Courthouse 1 Courthouse Way Suite 9200 Boston, MA 02210 Work Phone (617) 748-3126 Added Date: 07/11/2018

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
07/24/2017		Attorney appearance On this date Kathryn Rebecca Cook, Esq. added for Plaintiff Rahmah Rahim	
07/24/2017		Case assigned to: DCM Track F - Fast Track was added on 07/24/2017	
07/24/2017	1	Original civil complaint filed.	
07/24/2017	2	Civil action cover sheet filed. n/a	
07/24/2017	4	Plaintiff Rahmah Rahim's Motion for appointment of Pollack & Associates as special process server & Allowed	Leighton
07/24/2017	5	Plaintiff Rahmah Rahim's Motion for short order of notice	
07/24/2017	6	Plaintiff Rahmah Rahim's EX PARTE Motion for a Temporary Restraining order and/or Preliminary Injunction	
07/24/2017		Attorney appearance On this date Sarah R Wunsch, Esq. added for Plaintiff Rahmah Rahim	
07/24/2017		Attorney appearance On this date Tristan P Colangelo, Esq. added for Plaintiff Rahmah Rahim	
07/25/2017		Event Result: The following event: Motion Hearing scheduled for 07/25/2017 10:00 AM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	Leighton
07/25/2017		The following form was generated: Notice to Appear Sent On: 07/25/2017 09:49:03	
07/25/2017	7	Party(s) file Stipulation Regarding Disputed Records Applies To: Rahim, Rahmah (Plaintiff); Daniel F Conley District Attorney for Suffolk County (Defendant)	
07/25/2017		Attorney appearance On this date Sarah R Wunsch, Esq. added for Defendant Daniel F Conley District Attorney for Suffolk County	
07/31/2017	8	Service Returned for Defendant Daniel F Conley District Attorney for Suffolk County: Service through person in charge / agent; Summons and Order of Notice	
08/01/2017		Attorney appearance On this date Janis DiLoreto Smith, Esq. added for Defendant Daniel F Conley District Attorney for Suffolk County	
08/01/2017	9	Opposition to a Preliminary Injunction (P#6) filed by Daniel F Conley District Attorney for Suffolk County	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

08/02/2017		Event Result: The following event: Hearing on Preliminary Injunction scheduled for 08/02/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	Leighton
08/04/2017	10	ORDER: Order on Plaintiff's Request for a Preliminary Injunction Plaintiff's Motion for Preliminary Injunction is DENIED. The court will stay the effect of this decision for seven days to give the plaintiff time to consider his options for interlocutory appeal (see P#10 for full order) (dated 8/2/17) notice sent 8/4/17	Leighton
08/14/2017	11	Received from Defendant Daniel F Conley District Attorney for Suffolk County: Answer to original complaint;	
09/13/2017		Attorney appearance On this date Laura Rotolo, Esq. added for Plaintiff Rahmah Rahim	
09/13/2017		Attorney appearance On this date Sarah R Wunsch, Esq. dismissed/withdrawn for Plaintiff Rahmah Rahim	
09/13/2017		Attorney appearance On this date Rahsaan D Hall, Esq. added for Plaintiff Rahmah Rahim	
09/13/2017		Attorney appearance On this date Jessie J Rossman, Esq. added for Plaintiff Rahmah Rahim	
03/08/2018	12	Plaintiff Rahmah Rahim's Motion for summary judgment, MRCP 56	
03/08/2018	13	Opposition to the Plaintiff's motion for summary judgment and CROSS-MOTION for Summary Judgment in his favor filed by Daniel F Conley District Attorney for Suffolk County	
03/08/2018	14	Opposition to Defendant's cross-motion for summary judgment filed by Rahmah Rahim	
03/08/2018	15	Plaintiff Rahmah Rahim's Motion to strike the Declaration of Nancy McNamara from the Summary Judgment Record	
03/08/2018	16	Opposition to the Plaintiff's motion to strike the Declaration of Nancy McNamara, Assistant Director of the Inspection Division of the Federal Bureau of Investigation filed by Daniel F Conley District Attorney for Suffolk County	
03/12/2018		The following form was generated: Notice to Appear Sent On: 03/12/2018 15:22:20	
04/19/2018		Event Result: Judge: Roach, Christine M The following event: Rule 56 Hearing scheduled for 04/25/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	Roach

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

04/19/2018		The following form was generated: Notice to Appear Sent On: 04/19/2018 14:13:54	
04/26/2018		Event Result: Judge: Roach, Christine M The following event: Rule 56 Hearing scheduled for 04/26/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled	Roach
04/26/2018		The following form was generated: Notice to Appear Sent On: 04/26/2018 14:32:57	
06/01/2018	17	Rahmah Rahim's Memorandum Status Memorandum	
06/04/2018	18	General correspondence regarding Letter received from Brian M. LaMacchia, Assistant United States Attorney requesting that the Court put the matter down for a further hearing date in July, in order to allow the United States time to seek approval for a Statement of Interest	
06/05/2018		Event Result:: Rule 56 Hearing scheduled on: 06/05/2018 09:00 AM Has been: Held as Scheduled Christine M Roach, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk	Roach
06/05/2018		The following form was generated: Notice to Appear Sent On: 06/05/2018 09:17:37	
07/11/2018		Event Result:: Rule 56 Hearing scheduled on: 07/11/2018 02:00 PM Has been: Held as Scheduled Hon. Joseph Leighton, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk	Leighton
07/11/2018		The following form was generated: Notice to Appear Sent On: 07/11/2018 14:53:33	
07/11/2018		Attorney appearance On this date Brian LaMacchia, Esq. added for Other interested party United States of America	
07/11/2018	19	Other Interested Party United States of America's Statement of Interest	
09/27/2018	20	Plaintiff Rahmah Rahim's Stipulation of Supplemental Brief in Support of Her Motion for Summary Judgment	

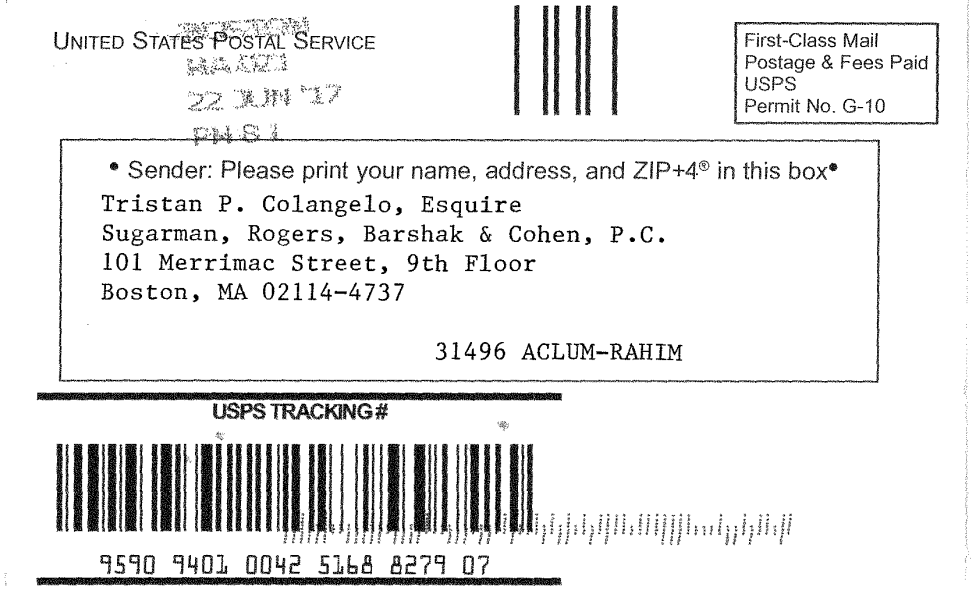
COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

09/27/2018	21	Defendant Daniel F Conley District Attorney for Suffolk County's Submission of Supplemental Summary Judgment Briefing	
10/16/2018		Matter taken under advisement: Rule 56 Hearing scheduled on: 10/16/2018 02:00 PM Has been: Held - Under advisement Hon. Joseph Leighton, Presiding Appeared: Staff: Christine M Hayes, Assistant Clerk	Leighton
06/11/2019	22	MEMORANDUM & ORDER: OF DECISION ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT:ORDER - For the aforementioned reasons, it is hereby ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED, and the Defendant's Motion for Summary Judgment is ALLOWED. Dated: June 10, 2019 Notice sent 6/11/19 Judge: Leighton, Hon. Joseph	Leighton
06/12/2019	23	SUMMARY JUDGMENT for Defendant(s), Daniel F Conley District Attorney for Suffolk County against Plaintiff(s), Rahmah Rahim, without statutory costs.It is ORDERED and ADJUDGED: that the Plaintiff's Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgment is ALLOWED. entered on docket pursuant to Mass R Civ P 58(a) as amended and notice sent to parties pursuant to Mass R Civ P 77(d)	Leighton
06/12/2019		Disp for statistical purposes	
08/09/2019	24	Notice of appeal filed. Notice sent 8/12/19 Applies To: Rahim, Rahmah (Plaintiff)	
08/19/2019	25	Certification/Copy of Letter of transcript ordered from Court Reporter 08/02/2017 02:00 PM Hearing on Preliminary Injunction, 04/26/2018 09:00 AM Rule 56 Hearing, 06/05/2018 09:00 AM Rule 56 Hearing, 07/11/2018 02:00 PM Rule 56 Hearing, 10/16/2018 02:00 PM Rule 56 Hearing	
10/02/2019	26	CD of Transcript of 08/02/2017 02:00 PM Hearing on Preliminary Injunction, 04/26/2018 09:00 AM Rule 56 Hearing, 06/05/2018 09:00 AM Rule 56 Hearing, 07/11/2018 02:00 PM Rule 56 Hearing, 10/16/2018 02:00 PM Rule 56 Hearing received from Christine D. Blankenship.	
10/02/2019		Pursuant to Mass. R. App. P. 8 (b)(3), the parties are hereby notified that all transcripts have been received by the clerk's office and that the record will be assembled pursuant to Mass. R. Civ. P. 9(e).	
10/22/2019		Notice of assembly of record sent to Counsel	
10/22/2019		Notice to Clerk of the Appeals Court of Assembly of Record	

I HEREBY ATTEST AND CERTIFY ON Nov. 6, 2019, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: First Asst. Clerk


UNITED STATES POSTAL SERVICE

22 JUN '17

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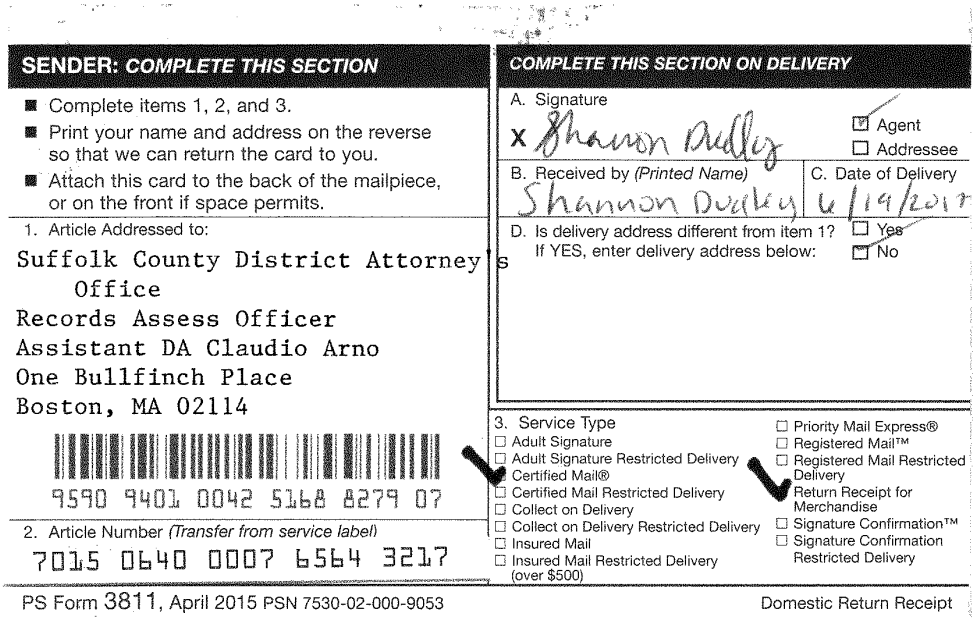
• Sender: Please print your name, address, and ZIP+4® in this box•

Tristan P. Colangelo, Esquire
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street, 9th Floor
Boston, MA 02114-4737

31496 ACLUM-RAHIM

USPS TRACKING#

9590 9401 0042 5168 8279 07



SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Suffolk County District Attorney's Office
Records Assess Officer
Assistant DA Claudio Arno
One Bullfinch Place
Boston, MA 02114

9590 9401 0042 5168 8279 07

2. Article Number *(Transfer from service label)*
7015 0640 0007 6564 3217

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Shannon Dudley
☑ Agent
☐ Addressee

B. Received by *(Printed Name)* Shannon Dudley
C. Date of Delivery 6/19/2017

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☑ No

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☑ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☑ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, April 2015 PSN 7530-02-000-9053 Domestic Return Receipt

Sugarman Rogers

Sugarman, Rogers, Barshak & Cohen, P.C.

KATE R. COOK
COOK@SRBC.COM

June 16, 2017

Certified Mail – RRR

Suffolk County District Attorney's Office
Records Access Officer
Assistant District Attorney Claudia Arno
One Bulfinch Place
Boston, MA 02114

Re: Records Request for Materials Pertaining to the Investigation, Surveillance, Confrontation, and Shooting of Mr. Usaamah Abdullah Rahim

Dear Sir/Madam:

This letter constitutes a request under the Massachusetts Public Records Law G.L. c. 66, § 10 and the Fair Information Practices Act, G.L. c. 66A. For the purposes of this request and as a volunteer attorney working on behalf of the American Civil Liberties Union of Massachusetts, my firm represents Ms. Rahimah M. Rahim, the mother and Personal Representative of Mr. Usaamah Abdullah Rahim, who was fatally shot by law enforcement officers on June 2, 2015. Copies of Mr. Rahim's Certificate of Death and Letters of Authority For Personal Representative are enclosed. The following information is supplied to identify Mr. Rahim and to assist your search for pertinent records:

Full Name:	Usaamah Abdullah Rahim
Street Address:	375 Blue Ledge Drive Roslindale, MA 02131
Date of Birth:	November 18, 1988
Place of Birth:	Boston, Massachusetts
Social Security No:	019-74-2919

Ms. Rahim requests disclosure of records prepared, received, transmitted, collected, and/or maintained by the Suffolk County District Attorney's Office ("DA's Office") relating to Mr. Rahim and to certain policies of the DA's Office.

Please provide the following records:

1) All records relating to the investigation of Mr. Rahim, including but not limited to any records related to the surveillance of Mr. Rahim, authorization to surveil Mr. Rahim, warrants, suspicious activity reports, intelligence reports, audio recordings or transcripts related to the investigation of Mr. Rahim, including any records from informants, or records related to inducements given to informants related to the investigation of Mr. Rahim.

2) All records relating to the events that took place on June 2, 2016, with regard to Mr. Rahim, including video, police reports, police officer or witness statements, audio recordings, or transcripts, call logs, and any records identifying the officers involved in his attempted arrest, records shared with other federal, state, or local agencies, photographs, and autopsy reports.

3) All records of policies, procedures, guidelines, and training materials relating to the proper procedure to make an arrest, use of force, use of lethal force, de-escalation, arrest authorization, including any special considerations for terrorism related activities; any and all records regarding the training received by the officers involved in the June 2, 2015 confrontation of Mr. Rahim related to the topics mentioned above.

4) All records of policies, procedures, guidelines, and training concerning the recruitment of or inducement provided to individuals supplying information concerning the activities of followers of Islam or identifying as Muslim.

To the extent any of these records are publically available and accessible on the internet, please provide the web address for the materials; printed copies of those materials are not required to be produced.

In the event the estimated cost to obtain the requested records exceeds $500, please notify me prior to copying the records.

Massachusetts Public Records Law requires you to provide me with a written response within 10 business days. If you cannot comply with this request, you are statutorily required to provide an explanation in writing. If this request is denied in whole or in part, I request that you justify all objections or deletions by reference to specific exemptions of the Public Records Law, including citation to the specific exemption from the Law under G.L. c. 4, § 7. Please provide segregated portions of otherwise exempt material. I reserve the right to appeal a decision to withhold any information.

Please do not hesitate to contact me either by phone or email if you have any questions regarding this request. Thank you for your attention to this matter. Please send all records, as they become available, to my attention at the address below.

Regards,

Kate R. Cook
cook@srbc.com
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street, Suite 900
Boston, MA 02114
(617) 619-3480

cc: Ms. Rahimah M. Rahim
Rahsaan Hall, Esq.
Sarah Wunsch, Esq.
Anthony Doniger, Esq.

VERIFICATION OF IDENTITY AND
AUTHORIZATION TO RELEASE INFORMATION TO ANOTHER PERSON

In connection with the request for records relating to Usaamah Abdullah Rahim, I Rahimah Rahim, Mr. Rahim's mother and the duly appointed Personal Representative of his estate, hereby provide the enclosed copy of Mr. Rahim's Certificate of Death issued by the City of Boston and Letters of Authority For Personal Representative issued by the Suffolk Probate and Family Court. I also provide the following information to verify my identity as required by 6 C.F.R. § 5.21 and other similar statutes and regulations that permit my request. Pursuant to the Massachusetts Public Records Law, G.L. c. 66, § 7, I hereby certify that I am authorizing the release of any and all records to my attorney, Kate R. Cook.

Name:	Rahimah M. Rahim
Current address:	68B Regent Street Boston, MA 02119
Date of Birth:	April 27, 1946
Place of Birth:	Brooklyn, NY
Social Security No:	027-32-0481
Citizenship Status:	U.S.A.

Pursuant to 28 U.S.C. § 1746 and under penalty of perjury, I declare that the foregoing is true and correct. I understand that knowingly or willfully seeking or obtaining access to records about another person under false pretenses and/or without their consent is punishable by a fine of up to $5,000.

Executed on June 16, 2017.

Rahimah M. Rahim

4811-9575-0218, v. 2

LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE	Docket No. SU16P1756EA	Commonwealth of Massachusetts The Trial Court Probate and Family Court
Estate of: Usaamah Abdullah Rahim **Date of Death:** 06/02/2015		Suffolk Probate and Family Court 24 New Chardon Street Boston, MA 02114 (617)788-8300

To:

Rahimah M. Rahim
68B Regent Street
Boston, MA 02119

You have been appointed and qualified as Personal Representative in ☐ Supervised ☒ Unsupervised administration of this estate on June 07, 2017 (date).

These letters are proof of your authority to act pursuant to G. L. c. 190B, except for the following restrictions if any:

☐ Pursuant to G. L. c. 190B, § 3-108(4), the Personal Representative shall have no right to possess estate assets as provided in § 3-709 beyond that necessary to confirm title thereto in the successors to the estate and claims, other than expenses of administration, if any, shall not be paid.

☐ The Personal Representative was appointed before March 31, 2012 as Executor or Administrator of the estate.

(Do Not Write Below This Line-For Court Use Only)

CERTIFICATION

I certify that it appears by the records of this Court that said appointment remains in full force and effect. IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court.

Date **June 12, 2017**

Terri Klug Cafazzo, Register of Probate

MPC 751 (4/15/16)

ORDER OF INFORMAL PROBATE OF WILL AND/OR APPOINTMENT OF PERSONAL REPRESENTATIVE	Docket No. 16P1756	Commonwealth of Massachusetts The Trial Court Probate and Family Court

Estate of:

Usaamah	Abdullah	Rahim
First Name	Middle Name	Last Name

Also Known As: _____

Date of Death: June 2, 2015

Suffolk Division

1. A Petition has been filed requesting:

   ☒ The appointment of a Personal Representative.

   ☐ Informal probate of the will dated _____ (date) and codicils _____ (dates) of the above named Decedent.

2. Upon consideration of the Petition, I determine based upon the Petition that all of the following are true:

   a. The Petitioner is an interested person and has filed a complete and verified Petition.
   b. Venue is proper.
   c. The Petition was filed within the time period permitted by law.
   d. Any required notices have been given or waived.
   e. A death certificate issued by a public officer is in the Court's possession.
   f. The spouse, heirs at law and any devisees are not incapacitated or protected persons or minors; or if they are, they are represented by a conservator or a guardian who is not the Petitioner.

INFORMAL PROBATE OF WILL

3. ☐ The original, properly executed and apparently unrevoked will is in the court's possession.
   The will dated _____ (date) and any codicils dated _____ (dates) are referred to as the will. There are no known prior wills which have not been expressly revoked by a later instrument. The will is admitted to informal probate.

   ☐ An authenticated copy of the will and any codicil and documents establishing probate in the State of _____ are in the court's possession and are offered for informal probate. The will is admitted to informal probate.

   ☐ A duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of _____ is offered for informal probate. The will is admitted to informal probate.

APPOINTMENT OF PERSONAL REPRESENTATIVE

4. ☒ The person whose appointment is sought has priority for appointment, with or without appropriate nomination and/or renunciation. Any will to which the requested appointment relates has been formally or informally probated.

Estate of:	Usaamah (First Name)	Abdullah (Middle Name)	Rahim (Last Name)	Docket No. 16P1756

The following person is appointed Personal Representative:

Rahimah	M.	Rahim			
First Name	M.I.	Last Name	First Name	M.I.	Last Name
68B Regent Street					
(Address)	(Apt, Unit, No. etc.)		(Address)		(Apt, Unit, No. etc.)
Boston	MA	02119			
(City/Town)	(State)	(Zip)	(City/Town)	(State)	(Zip)

Primary Phone #: (857) 266-2298 **Primary Phone #:** _____

5. The Personal Representative shall serve in an unsupervised administration:
   - ☒ without surety on the bond.
   - ☐ with ☐ personal ☐ corporate sureties on the bond in the penal sum amount of $ _____
6. Letters of Authority shall issue.

The Personal Representative(s) shall comply with all relevant requirements under the law and the appointment is subject to termination as provided in G. L. c. 190B, §§ 3-608-612.

Date Jan 7, 2021

J. Klug
☐ Justice ☒ Magistrate

The Petition is DENIED/DECLINED because:

- ☐ This or another will of the Decedent has been the subject of a previous probate Order.
- ☐ Persons with prior or equal priority have not renounced or nominated the Petitioner or his or her nominee.
- ☐ Notice requirements have not been met.
- ☐ Other:

Date _____

☐ Justice ☐ Magistrate

NOTE: The denial of a Petition for Informal Probate cannot be appealed. A timely formal proceeding may be initiated pursuant to G. L. c. 190B, § 3-401.

If this Petition is allowed the Petitioner must publish an Informal Publication Notice (MPC 551) once in a newspaper designated by the Register. The Publication shall not be more than thirty (30) days after informal probate or appointment pursuant to G. L. c. 190B, § 3-306(b).

REGISTRY DIVISION OF THE CITY OF BOSTON

COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS, UNITED STATES OF AMERICA

Certificate Number
№ 313867

I, the undersigned, hereby certify that I hold the office of _____ City Registrar of the City of Boston and I certify the following facts appear on the records of Births, Marriages and Deaths kept in said City as required by law.

52

Commonwealth of Massachusetts
Registry of Vital Records and Statistics
CERTIFICATE OF DEATH

State File #	2015 026773
Registered #	3354

MEDICAL EXAMINER

OCME CASE # 2015-7013

DECEDENT

Place of Death BRIGHAM AND WOMEN'S HOSPITAL, BOSTON, MA

Date of Death JUNE 02, 2015 *Age* 26 YRS *Sex* MALE

Current Name RAHIM , USAAMAH ABDULLAH

Surname at Birth or Adoption RAHIM *SSN* [redacted]

AKA —

Date of Birth NOVEMBER 18, 1988 *Birthplace* BOSTON, MASSACHUSETTS

Residence 375 BLUE LEDGE DRIVE, BOSTON, MASSACHUSETTS 02131

Race AFRICAN AMERICAN

Education SOME COLLEGE CREDIT, BUT NO DEGREE

Marital Status NEVER MARRIED

Occupation/Industry SECURITY OFFICER/LOSS PREVENTION

Last Spouse – Last (Surname at Birth or Adoption), First, Middle —

U.S. Veteran NO

Mother Parent Name – Last (Surname at Birth or Adoption), First Middle RAHIM, RAHIMAH — (RAHIM)

Birthplace NEW YORK

Father Parent Name – Last (Surname at Birth or Adoption), First Middle RAHIM, ABDULLAH — (RAHIM)

Birthplace NEW JERSEY

MEDICAL CERTIFIER

Part I. Cause of Death – Sequentially list immediate cause then antecedent causes then underlying cause

Interval between onset and death

a Immediate Cause (Final condition resulting in death)
GUNSHOT WOUNDS OF TORSO AND LOWER EXTREMITY — — MIN.

b Due to or as a consequence of
— —

c Due to or as a consequence of
— —

d Due to or as a consequence of
— —

Part II. Other significant conditions contributing to death but not resulting in underlying cause
—

Manner of Death: HOMICIDE

Time of Death: 99:99

Result of Injury: YES

Certifier HENRY M. NIELDS, MD *Lic #* 78065

Addr. 720 ALBANY STREET, BOSTON, MASSACHUSETTS 02118

DISPOSITION

Funeral Licensee/Designee GEORGE A. LOPES *Lic #* 50841

Facility Addr. GEORGE LOPES FUNERAL HOME, BOSTON, MASSACHUSETTS

Immediate Disposition BURIAL

Date of Immediate Disposition JUNE 05, 2015

Place Address THE GARDENS OF GETHSEMANE, 670 BAKER STREET, BOSTON, MASSACHUSETTS 02132

Date of Record JUNE 05, 2015

Date of Amendment ---

Patricia A McMahon

REGISTRAR, CITY OF BOSTON

WITNESS my hand and the SEAL of the CITY REGISTRAR

JUN 11 2015

on this _____ Day of _____ A.D. _____

Patricia A McMahon

_____ *City Registrar*

By Chapter 314 of the Acts of 1892, "the certificates or attestations of the Assistant City Registrars shall have the same force and effect as that of City Registrar."

I further hereby certify that by annexation, the records of the following cities and towns are in the custody of the City Registrar of Boston:

	Annexed
East Boston	1637
South Boston	1804
Roxbury	1868
Dorchester	1870
Charlestown	1874
Brighton	1874
West Roxbury	1874
Hyde Park	1912

R-301 p. 2 of 2 RAHIM SFN: 2015 026773

BOSTON 3354

BOSTON

STATE VOL/PG: /

If U.S. war veteran, specify war conflict(s) [redacted]			
Branch of military (most recent) —		*Rank organization outfit (most recent)* —	
Date entered (most recent) —	*Date Discharged (most recent)* —		*Service Number (most recent)* —
Place of Death Type HOSPITAL - DOA		*Date of Pronouncement* —	*Time of Pronouncement* —
RN/NP, PA Pronouncement? NO	*Name of RN/NP, PA Pronouncing Death* —		*Lic #* —
RN/NP, PA Employing Agency or Institution —		*Name of Physician or Medical Examiner notified* —	
Was M.E. Notified? YES	*Provider in charge of patient's care, if not certifier* —		
Autopsy Performed? YES	*Findings available for Cause?* YES	*Tobacco contribute to death?* NO	*Pregnancy Status, if female* —
Date of Injury JUNE 02, 2015	*Time of Injury* UNKNOWN	*Injury at Work?* NO	*If Transportation Injury, specify:* NOT APPLICABLE
Place of Injury PARKING LOT		*Location/Address of Injury:* 4600 WASHINGTON STREET, BOSTON, MASSACHUSETTS 02131	
Describe How Injury Occurred SHOT BY POLICE			
Expanded Race: BLACK *Ethnicity:* AMERICAN			
Informant Name RAHIMAH — RAHIM *Addr.* 375 BLUE LEDGE DRIVE, BOSTON, MASSACHUSETTS 02131			*Relationship* MOTHER
Date Disposition Permit Issued: JUNE 05, 2015		*Board of Health Agent:* JAMES V. IMPRESCIA	
State Tracking No. 026773		*Local Permit No.* B15026773	

The Commonwealth of Massachusetts

DISTRICT ATTORNEY OF SUFFOLK COUNTY
DANIEL F. CONLEY

Appellate Unit
One Bulfinch Place, Suite 300
Boston, MA 02114-2921

Telephone: (617) 619-4070
Fax: (617) 619-4069

July 20, 2017

VIA EMAIL

Kate R. Cook
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street, Suite 900
Boston, MA 021114

Re: *Public Records Request* #170619B

Dear Attorney Cook:

On June 19, 2017, this Office received your public records request seeking materials related to the investigation of the death of Usaamah Abdullah Rahim on June 2, 2015. In subsequent emails, we established that you did not need copies of documents related to the investigation that have already been produced to your client, Ms. Rahim.

To the extent that your request includes autopsy materials, please be advised that such materials are not produced by this Office in response to public records requests. The appropriate procedure for obtaining them is to send a request to the Office of the Chief Medical Examiner. *See* G.L. c. 4, § 7(26)(a) and (c); G.L. c. 38, § 2; *LeBlanc v. Commonwealth, 457 Mass. 94, 96* (2010); *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132, 136 (1989).

To the extent that your request includes "records of policies, procedures, guidelines, and training materials relating to the proper procedure to make an arrest, use of force, use of lethal force, de-escalation, arrest authorization, including any special considerations for terrorism related activities; any and all records regarding the training received by the officers involved in the June 2, 2015 confrontation" and "records of policies, procedures, guidelines, and training concerning the recruitment or inducement provided to individuals supplying information concerning the activities of followers of Islam or identifying as Muslim," this Office has no responsive materials.

With respect to the remainder of your request, while this Office remains in temporary custody of certain materials pertaining to the investigation, these materials are the property of the FBI through the Department of Justice and are not under the control of this Office, in that they cannot be disseminated without the permission of the FBI. A number of the documents loaned by the FBI fall into the category of those already released to Ms. Rahim; your request as it pertains to the remainder of the loaned documents is denied. To the extent that you are seeking

copies of documents that the FBI has loaned to this Office, a Freedom of Information Act request should be directed to the FBI.

You have the right to appeal this denial to the supervisor of public records under G.L. c. 66, § 10A(a), and to seek review of an unfavorable decision through a civil action in the superior court under G.L. c. 66, § 10A(c). Should you have further questions, please feel free to contact me directly at (617) 619-4131 or claudia.arno@state.ma.us.

Sincerely,

Claudia Arno, ADA
Records Access Officer

The Commonwealth of Massachusetts

DISTRICT ATTORNEY OF SUFFOLK COUNTY
DANIEL F. CONLEY

Appellate Unit
One Bulfinch Place, Suite 300
Boston, MA 02114-2921

Telephone: (617) 619-4070
Fax: (617) 619-4069

July 24, 2017

VIA EMAIL

Kate R. Cook
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street, Suite 900
Boston, MA 02114

Re: *Public Records Request* #170619B

Dear Attorney Cook:

On July 20, 2017, this Office sent a letter in response to your public records request seeking materials related to the investigation of the death of Usaamah Abdullah Rahim on June 2, 2015. Pursuant to our telephone conversation of July 21, 2017, this letter is intended to supplement that response.

In addition to the positions stated in the July 20 letter, as we discussed, the events surrounding Mr. Rahim's death remain the subject of an ongoing investigation and prosecution at the federal level. *See United Stated of America v. Wright et al.*, 15-cr-10153-WGY. Thus, it is this office's position that any responsive materials fall within the "investigatory exemption" to the public records law. *See* G.L. c. 4, § 7 cl. 26(f). Clause 26(f) provides a basis for withholding documents where the "disclosure . . . 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 cl. 26(f). The disclosure of material responsive to your request by this office would jeopardize the ongoing investigation and any potential prosecution related to the events surrounding Mr. Rahim's death; moreover, it could jeopardize the defendant's constitutional right to a fair trial. More broadly, disclosure of these materials would be prejudicial to effective law enforcement in that it would impair the ability of this office to obtain information necessary to its investigations from federal agencies, especially in cases such as this in which matters of national security are implicated. Accordingly, it is this office's position that disclosure of these materials would "prejudice the possibility of effective law enforcement," and that disclosure is therefore not in the public interest at this time. G.L. c. 4, § 7 cl. 26(f). *See also Lafferty v. Martha's Vineyard Comm'n*, 17 Mass. L. Rep 501 (Mass. Super. Ct. 2004). Thus, your request is denied on this ground as well as those stated previously.

You have the right to appeal this denial to the supervisor of public records under G.L. c. 66, § 10A(a), and to seek review of an unfavorable decision through a civil action in the superior

court under G.L. c. 66, § 10A(c). Should you have further questions, please feel free to contact me directly at (617) 619-4131 or claudia.arno@state.ma.us.

Sincerely,

Claudia Arno, ADA
Records Access Officer

V 84

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.
17-2312-B

RAHIMAH RAHIM,

Plaintiff,

v.

DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County

Defendant.

ORDER ON PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION

The plaintiff seeks to enjoin the defendant from returning certain records in his possession to the Federal Bureau of Investigation (the "FBI' or the "Bureau"). The following facts are taken from the submissions of the parties in connection with plaintiff's motion and defendant's opposition.

Notice Sent 08.04.17 TPC ICRE SRBtc SRW JDS ADA (mo)

The records in question were provided to the District Attorney on a temporary basis by the FBI to assist in the investigation of an incident on June 2, 2015, in which members of a surveillance team of the FBI Joint Terrorism Task Force shot and killed Usaamah Abdullah Rahim in Roslindale, MA. Ultimately, the District Attorney concluded that criminal charges were not warranted against the officers and he issued a report of his findings.

On June 16, 2017, plaintiff submitted a request to the District Attorney under the public records law, G.L.c. 66, § 10, which included a request for "disclosure of records prepared, received, transmitted, collected and/or maintained by the Suffolk County

District Attorney's office" related to the shooting. The parties agreed to an extension of time for response by the defendant. Defendant produced some materials, including his report of his findings, but withheld the materials that had been provided by the FBI.

The District Attorney claims that the materials in question are not public records because they fall within the investigatory exception to the Massachusetts Public Records Law, G.L.c. 4, § 7(26)(f). Defendant also avers that the United States Attorney's Office has determined that the documents are relevant to an ongoing terrorism investigation and prosecution in the case of *United States v. David Wright, et al.*, 1:15 mj-01085-DLC, which is scheduled for trial in the United States District Court for the District of Massachusetts on September 18, 2017. Additionally in this regard, defendant avers that the US Attorney's Office has determined that the documents implicate national security concerns.

According to the District Attorney, the materials provided by the FBI were provided pursuant to the Privacy Act, Title 5, United States Code, Section 52 a(b)(7) (Law Enforcement Request). The transmittal letter from the FBI indicates that the Bureau cannot authorize further release of the materials, even in response to a request under the "Massachusetts Freedom of Information Act." The letter further states that the materials are on loan and remain the property of the FBI and may not be produced to any third party without prior written permission of the Bureau. The materials are also the subject of a stipulated protective order in the *U.S. v. David Wright* case, *supra.*

On July 24, 2017, plaintiff filed the instant action seeking declaratory and injunctive relief. At the same time, plaintiff also filed an *ex parte* motion for a preliminary

injunction and/or temporary restraining order to enjoin the District Attorney from returning the materials to the FBI. This court issued a short order of notice for a hearing the next day. The District Attorney stipulated that he would not return the materials to the FBI pending a hearing to be held, by agreement of the parties, on August 2, 2017. The hearing took place this afternoon.

After review of the plaintiff's motion and the District Attorney's opposition, and after consideration of the presentations of counsel at the hearing, the court concludes that plaintiff's motion for a preliminary injunction must be denied because he has not shown that he will suffer irreparable harm if the documents in question are returned to the FBI. There is no evidence in the record before the court to suggest that the material would be lost, compromised or destroyed in such a transfer, and the plaintiff can pursue release of the information he seeks under applicable federal law. Under the circumstances, the court finds that the plaintiff has not sustained his burden of showing that injunctive relief is warranted. For this reason, plaintiff's motion is Denied.

The court will stay the effect of this decision for seven days to give the plaintiff time to consider his options for interlocutory appeal.

Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

Dated: August 2, 2017

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2017-02312

RAHIMAH RAHIM

vs.

SUFFOLK COUNTY DISTRICT ATTORNEY[1]

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

Rahimah Rahim ("Ms. Rahim" or "plaintiff") filed the instant action against the Suffolk County District Attorney ("defendant"), seeking injunctive and declaratory relief relating to a public records request concerning certain documents relating to the death of the plaintiff's son, Usamaah Rahim ("Mr. Rahim"). This matter is before the court on the parties cross-motions for summary judgment. After hearing, and review of the parties' memoranda, the plaintiff's motion for summary judgment is **DENIED**, and the defendant's motion for summary judgment is **ALLOWED**.[2]

notice sent 06.11.19 TPC KRC SRB+c RDH SRW JDS ADA BL LR JJR mm

BACKGROUND

Local and federal authorities participating in a joint terrorism task force suspected that Mr. Rahim had to the Islamic State of Iraq and the Levant ("ISIL").[3] On June 2, 2015, authorities confronted Mr. Rahim, an altercation ensued, and Mr. Rahim sustained three shots to his torso, causing his death.

[1] The complaint and all supplemental memoranda are styled as "Daniel F. Conley, in his official capacity as the district attorney for Suffolk County." However, pursuant to SJC Style Manual 4.02(q), only the title of the office "Suffolk County District Attorney" should appear.
[2] The court acknowledges the Statement of Interest filed by the United States of America on July 11, 2018.
[3] Authorities suspected that Mr. Rahim was conspiring with Nicholas Rovinski and David Wright. Rovinski and Wright have subsequently pleaded guilty to, or been convicted of, various federal crimes.

The defendant conducted an investigation into Mr. Rahim's death. On June 5, 2015, Eric D. Welling, Inspector-in-Charge at the Federal Bureau of Investigation ("FBI"), provided FBI investigative reports and signed sworn statements concerning Mr. Rahim's death to the defendant (the "Documents"). The letter accompanying the Documents stated that the Documents were being released pursuant to the Privacy Act, 5 U.S.C. § 552a (b) (7) (Law Enforcement Request) and an exception under 5 U.S.C. § 552a (b) (3) (Routine Uses).[4] The letter provided the Documents were being released relating to the defendant's investigation into the shooting; the FBI could not authorize further release of the records to any third party other than for use at trial or otherwise advancing the defendant's investigation, including a Massachusetts Freedom of Information Act request; and no identifiable information pertaining to an FBI agent or employee could be publicly disclosed without express FBI approval. Additionally, the letter provided that the Documents were being loaned to the defendant's agency; the Documents remained FBI property; the defendant could not provide the Documents to any requestor without the FBI's prior written permission; and any requests for further dissemination should be directed to the Chief Inspector, Office of Inspections, Inspections Division.

The defendant released a ten-page Findings Report dated August 24, 2016 (the "Findings Report"). The Findings Report provided that not only did the defendant rely on various documents provided by local authorities, he also relied upon the Documents.[5] The defendant

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[4] Under the Privacy Act, "[n]o agency shall disclose any record which is contained in a system of records . . . or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . for a routine use as defined in section (a)(7) . . . [or] to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity . . . ." 5 U.S.C. §§ 552a (b)(3), (7). Routine use is defined as "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. §§ 552a (a)(7).

[5] The Findings Report provided that "[a]lthough every detail of the investigation has been memorialized and documented, some of the investigative materials remain either classified or subject to a non-disclosure agreement

concluded that authorities had probable cause to arrest Mr. Rahim, and they exhibited a lawful and reasonable use of force in self-defense and defense of others.

On June 7, 2017, Ms. Rahim received appointment as the personal representative of Mr. Rahim's estate. On June 16, 2017, Ms. Rahim mailed a public records' request pursuant to G. L. c. 66, § 10(a). The defendant received Ms. Rahim's request on June 19, 2017. After several extensions, the defendant served his first response to Ms. Rahim on July 20, 2017, denying the public records' request and providing no documents.[6] Among other items, the defendant also denied access to the Documents, providing that they "are the property of the FBI through the Department of Justice and are not under the control of [the defendant], in that they cannot be disseminated without the permission of the FBI." The defendant also provided a supplemental response, stating disclosure of the Documents would prejudice effective law enforcement because it would impair the ability of the district attorney's office to obtain information necessary to its investigations from its federal counterparts, particularly in investigations concerning matters of national security.

On June 5, 2018, the defendant provided an index pursuant to *Vaughn* v. *Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974) ("*Vaughn* index") of the Documents, along with fifty-six pages of responsive records. The *Vaughn* index indicated that "records withheld from production" were FBI statements and documents, or documents containing confidential investigatory techniques and procedures.

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with the FBI. We have reviewed all investigative materials, including those that are classified or subject to a non-disclosure agreement with the FBI."

[6] The defendant had previously provided the plaintiff with 783 pages of interview transcripts, investigative reports, and testing results; 373 still photographs; and unedited surveillance footage from the commercial establishments in the location where the incident occurred.

DISCUSSION

I. Standard of Review

Summary judgment should only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). The moving party bears the burden of demonstrating that no genuine issue of material fact exists. See *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party accomplishes this either by providing affirmative evidence negating an essential element of the non-moving party's claim, or demonstrating that the non-moving party possesses no reasonable expectation of proving an essential element at trial. See *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991). If the moving party successfully illustrates that no genuine issue of material fact exists, the non-moving party then "must set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e). "Conclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment." *Madsen* v. *Erwin*, 395 Mass. 715, 721 (1985) (internal modifier omitted).

II. Analysis

Here, the plaintiff asks the court to declare that the Documents are public records, and to order the defendant to disclose the Documents. The plaintiff argues that since the defendant currently possesses the Documents, the defendant is required to produce them under the Massachusetts Public Records Law. The court disagrees. As the defendant correctly argues, the Documents are not public records under the Massachusetts Public Records Law as the Documents are on loan from the FBI. In addition, the Documents meet the "investigatory materials" exemption pursuant to G. L. c. 4, §7(26)(f). Finally, the supremacy clause of the

United States Constitution requires that, since the Documents are FBI records, they are subject to federal law, not state law. Therefore, the plaintiff is not entitled to receipt of the documents from the defendant.

a. Massachusetts Public Records Law

The Massachusetts Public Records Law provides that "[a] records access officer . . . shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in [G. L. c. 4, § 7(26)], or any segregable portion of a public record, ..." G. L. c. 66, § 10(a). As defined, public records "shall mean all books, papers, maps, photographs . . . or other documentary materials or data . . . made or received by any officer or employee of any agency . . . ." G. L. c. 4, § 7(26). A requested record is presumptively public, and the burden is on the official refusing to allow inspection. *Globe Newspaper Co.* v. *District Attorney for the Middle Dist.*, 439 Mass. 374, 380 (2003).

Here, the defendant has met his burden to deny inspection. The Documents were not "made or received" by the defendant as that phrase is used in G. L. c. 4, § 7(26). Instead, the FBI letter to the defendant provided that the Documents were provided on loan from the FBI and they remained FBI property. Moreover, the FBI could not authorize further release of the Documents to a third party except for use at trial or advancing the defendant's investigation, and the Documents could not be provided to a third party without the FBI's prior written permission. These facts support the conclusion that the Documents were neither made, nor received, by the defendant's office, but are only in the defendant's temporary custody to be returned to the FBI.

Furthermore, the plain language of the statute, "made or received," indicates ownership to be considered a public record. See *Dorrian* v. *LVNV Funding, LLC*, 479 Mass. 265, 271 (2018) ("Where the words are plain and unambiguous in their meaning, [the court] view[s] them

as conclusive as to legislative intent.") (internal quotations omitted). Here, the defendant did not obtain ownership or full control of the Documents: the Documents were on loan, they remained FBI property and they are subject to the FBI's discretion regarding further dissemination. Cf. *Globe Newspaper Co.*, 439 Mass. at 383 (custodian of public record not determinative of whether a document is a public record). Therefore, the Documents are not public records under G. L. c. 66, §10(a), and the defendant is not required to produce the Documents to the plaintiff.

Additionally, the Documents sought by the plaintiff are exempt as public records under G. L. c. 4, §7(26) (f). Exempted from public records are "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." G. L. c. 4, § 7(26)(f). The statutory exemptions are "strictly and narrowly construed." *General Elec. Co.* v. *Department of Envtl. Prot.*, 429 Mass. 798, 802 (1999).

Here, the record reflects that the FBI provided the Documents to the defendant. The *Vaughn* index indicates that the "records withheld from production" were statements and documents from the FBI, or were documents that contain confidential investigative techniques and procedures. As the Documents are from the FBI and regard confidential investigative techniques and procedures, the court is satisfied that the Documents meet the "investigatory materials" exemption under G. L. c. 4, § 7(26)(f). See *District Attorney for the Norfolk Dist.* v. *Flatley*, 419 Mass. 507, 512 (1995) ("a case-by-case review is required to determine whether an exemption applies, and that there must be specific proof elicited that the documents sought are of a type for which an exemption has been provided.") (internal quotations, modifier, and citation

omitted). Therefore, the Documents would be exempt as public records under G. L. c. 4, § 7(26)(f).

b. Supremacy Clause

Even if the Documents were considered public records, the supremacy clause requires the Documents to be disseminated, if at all, pursuant to federal law, not state law. "Federal law trumps state law only by virtue of the [s]upremacy [c]lause, which makes the 'Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . the supreme Law of the Land.'" *Collins* v. *Virginia*, 138 S.Ct. 1663, 1678 (2018) (Thomas, J., concurring), quoting U.S. Const. art. VI, cl. 2. "The purpose of the [s]upremacy [c]lause is . . . to ensure that, in a conflict with state law, whatever Congress says goes. The supremacy clause is not a source of any federal rights; rather, it secures federal rights by according them priority whenever they conflict with state law." *Boston Med. Ctr. Corp.* v. *Secretary of the Exec. Office of Health and Human Svcs.*, 463 Mass. 447, 461 (2012) (internal quotations, modifiers, and citation omitted).

Four factors determine whether a federal agency exercises sufficient control over a document to render a document an agency record[7]: "(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which the agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files." *Burka* v. *United States Dep't of Health and Human Svcs.*, 87 F.3d 508, 515

[7] A record "includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because the informational value of data in them." 44 U.S.C. §3301(a)(1)(A).

(D.C. Cir. 1996). The burden rests on the agency to show the records are not agency records. *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 142 n.3 (1989).

Here, the Documents are FBI records. The FBI letter provided that (1) the Documents were on loan to the defendant; (2) the defendant could use the Documents in relation to the defendant's investigation into the shooting death of Mr. Rahim; (3) the documents were FBI investigative reports and sworn statements; (4) the FBI generated the Documents; and (5) the Documents could not be further disseminated to a third party, except for trial or further advancement of the investigation, and any third party dissemination required FBI written approval. These factors lead to the determination that the Documents are FBI records. See *Burka*, 87 F.3d at 515.

United States v. *Napper*, 694 F. Supp. 897 (N.D. Ga 1988), aff'd 887 F.2d 1528 (11th Cir. 1989), supports the court's determination that the Documents are FBI records. In *Napper*, the FBI assisted state and local officials in the "Atlanta Child Murder Cases." *Id.* at 899. The FBI provided documents to the City of Atlanta Police Department (the "City") with a declaration that the documents were FBI property, were on loan, and should not be distributed. *Id.* at 899. Various media outlets sued the City under state law to gain access to the documents in state court, the state court required the documents' release, and the City released the documents and placed them in a public reading room. *Id.* at 899. The United States filed suit in federal district court, contending the documents were on loan to the City, and sought the documents' return. *Id.* at 899. The court held that the documents belonged to the United States, regardless of whether they possessed a non-disclosure provision, and that the documents be returned to the FBI. *Id.* at 901.

Here, like in *Napper*, (1) the Documents resulted from an investigation between federal and local officials; (2) the FBI loaned the Documents to the defendant; (3) the Documents remained FBI property; and (4) the Documents could not be distributed. See *United States* v. *Napper*, 694 F. Supp. 897, 901 (N.D. Ga 1988). Since the Documents are FBI records, and thereby FBI property, if the plaintiff seeks access to them, she would need to file a Freedom of Information Act ("FOIA") request in order to gain access to the Documents. See *id.* ("[T]he documents in question belong to [the FBI] and if intervenors want the documents, they must file an official FOIA request.").[8]

Therefore, since the Documents are FBI records, the supremacy clause requires that federal law govern the dissemination of the Documents.

ORDER

For the aforementioned reasons, it is hereby **ORDERED** that the Plaintiff's Motion for Summary Judgment is **DENIED**, and the Defendant's Motion for Summary Judgment is **ALLOWED**.

Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

Dated: June 10, 2019

[8] The plaintiff has filed a FOIA request, which is being processed. An email received by the plaintiff's counsel stated that the plaintiff's FOIA request had been received and designated on a complex request medium processing track, with an estimated completion date of July 2019.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Case No: 1784-CV-02312

RAHIMAH RAHIM,

Plaintiff,

v.

DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County,

Defendant.

NOTICE OF APPEAL

Rahimah Rahim, the plaintiff in the above-entitled matter, by and through her attorneys, hereby gives notice, pursuant to Rules 3 and 4 of the Massachusetts Rules of Appellate Procedure, of her intent to appeal certain opinions, rulings, and directions of the Court, including the order allowing defendant's motion for summary judgment and denying plaintiff's motion for summary judgment dated June 10, 2019, and the judgment in defendant's favor dated June 11, 2019, and entered on the docket on June 12, 2019, in the above-entitled matter.

RAHIMAH RAHIM,

By her attorneys,

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(617) 482-3170

Dated: August 9, 2019

CERTIFICATE OF SERVICE

I, Tristan P. Colangelo, hereby certify that on the above date I served the within document by first class mail to the following counsel of record:

Donna Patalano, Esq.
Jacquelyne Foley, Esq.
William Kerrigan, Esq.
One Bulfinch Place
Boston, MA 02114

Tristan P. Colangelo

4812-9045-4431, v. 4

U.S. Department of Justice

Federal Bureau of Investigation

935 Pennsylvania Ave., N.W.
Washington, D.C. 20535

June 5, 2015

Daniel F. Conley
Suffolk County District Attorney
One Bulfinch Place
Boston, MA 02114

Dear DA Conley:

This letter serves to provide you with the Federal Bureau of Investigation (FBI) investigative reports and Signed Sworn Statements taken concerning a shooting incident which took place on June 2, 2015, at 4600 Washington Street, Roslindale, MA, 02131. The Privacy Act, Title 5, United States Code, Section 552a(b)(7) (Law Enforcement Request), Exception a(b)(3) (Routine Uses), states records gathered by a federal component may be released to a third party requestor "***for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D)***." As the records you have requested were generated by the FBI in conjunction with the investigation of the shooting incident, and your office is now requesting copies of the same in order to continue the investigation, they are being released to you for continuing use in the same.

Because these documents are being released to your office solely under the referenced statutory exemption to the Privacy Act, the FBI cannot authorize the further release of the records to any third party outside your office for any purpose other than for use at trial or otherwise advancing your investigation. This limitation specifically includes any request made under the Massachusetts Freedom of Information Act. Additionally, no personally identifiable information pertaining to an FBI Agent or employee will be publically disclosed without the express approval of the FBI.

By accepting these records, it is specifically understood they are being loaned to your agency and remain the property of the FBI through the Department of Justice and, if any third party request is made for them, they will not be provided to such requestor without the prior written permission of the FBI. Any requests for permission for further dissemination should be directed to the Chief Inspector, Office of Inspections, Inspection Division, telephone: (202) 324-5301.

Sincerely,

Eric D. Welling
Inspector-in-Charge

Report of Suffolk County District Attorney Daniel F. Conley
On Findings in the June 2, 2015, Shooting Death of Usaamah Abdullah Rahim

The Suffolk County District Attorney's Office has concluded its investigation into the June 2, 2015, shooting death of Usaamah Abdullah Rahim in the CVS parking lot at 4600 Washington Street in the Roslindale section of the City of Boston. This investigation revealed that law enforcement officers who were members of a surveillance team of the FBI Joint Terrorism Task Force (JTTF)[1] shot and killed Mr. Rahim when he aggressively advanced on them while armed with a large military-style knife as they attempted to question him. The involved task force officers had approached Mr. Rahim with their service weapons holstered after receiving information that Mr. Rahim had professed his allegiance to the Islamic State of Iraq and the Levant (ISIL)[2] and expressed his intent to attack police officers. It was during the attempt to

[1] Task force officers are local, state, or federal law enforcement officers assigned to the FBI Joint Terrorism Task Force created pursuant to 28 U.S.C. s.533, 28 C.F.R. s.085, Executive Order 12333, Presidential Decision Directive (PDD) 39, PDD 62, and pending approval of National Security Presidential Decision Directive (NSPD) 46 and Homeland Security Presidential Directive (HSPD) 15. Task force officers operate under the direction of the FBI.

[2] The Islamic State of Iraq and the Levant (ISIL) is a designated Foreign Terrorist Organization that, according to the United States Department of State, has "committed systemic abuses of human rights and violations of international law, including indiscriminate killing and deliberate targeting of civilians, mass executions and extrajudicial killings, persecution of individuals and communities on the basis of their identity, kidnapping of civilians, forced displacement of Shia communities and minority groups, killing and maiming of children, rape, and other forms of sexual violence … has recruited thousands of foreign fighters to Iraq and Syria from across the globe, and has used technology to spread its violent extremist ideology and to incite others to commit terrorist acts." *United States of America v. David Daoud Wright and Nicholas Alexander Rovinsky* No. 15-10153-WGY. Moreover, "ISIL has been distributing beheading videos to demonstrate, among other things, an acceptable method of killing people who are believed to be non-believers or infidels [and] ... using social media, members of ISIL have encouraged individuals to kill specific persons or groups of persons such as members of the military and law enforcement in the United States." *Id.*

question Mr. Rahim in connection with this information that he brandished his knife and advanced on the retreating task force officers while ignoring their repeated commands to drop his weapon. Under the circumstances, the task force officers who fired their weapons did so in a lawful and proper exercise of self-defense and defense of others. Therefore, based on a thorough investigation into the facts and circumstances surrounding the shooting death of Mr. Rahim, I have determined that criminal charges are not warranted. [3]

The Suffolk County District Attorney has the statutory duty and authority to direct all death investigations within the City of Boston, including fatalities related to the use of force by law enforcement officers. The primary goal of this investigation, therefore, was to determine whether any person bears criminal responsibility for the death of Mr. Rahim. Pursuant to my authority to direct this and all death investigations in Boston, I went to the scene that morning and ordered two of my senior prosecutors to respond as well. Subsequently, I assigned a senior prosecutor to lead the investigation in consultation with me and the most senior attorneys of my staff.

The Scope of the Investigation. The investigation included a review of the materials compiled by the Boston Police Department Firearm Discharge Investigation Team (FDIT), working with supervisory special agents designated as assistant inspectors and assigned to the Inspection Division of the FBI. The FBI Inspector's Report – Agent Involved Shooting Boston Field Office June 2, 2015, and accompanying documents were provided to my office on June 5, 2015. The final Firearm Discharge Investigation Report was delivered to my office on April 12, 2016. The evidence we considered included: sworn, written statements of the involved task force officers; audio-recorded interviews of civilian witnesses; video surveillance footage; police radio transmissions; ballistics analysis of the task force officers' weapons and ammunition; physical evidence from the scene, including a knife recovered at the scene; criminalistics testing and analysis; the autopsy report with supporting documentation and photographs; scene photographs; and recordings of cell phone communications between Mr. Rahim and identified parties known to investigators. Although every detail of the investigation has been memorialized and documented, some of the investigative materials remain either classified or subject to a non-disclosure agreement with the FBI. We have reviewed all investigative materials, including those that are classified or subject to a non-disclosure agreement with the FBI.

Surveillance of Mr. Rahim. On the morning of June 2, 2015, officers of the JTTF were conducting surveillance of Mr. Rahim. The JTTF was investigating Mr. Rahim's ties to ISIL and his preparation – in concert with others – to commit acts of terrorism in the United States. That investigation revealed that Mr. Rahim and two co-conspirators had planned to behead a specific target in New York City at the behest of Junaid Hussain, an ISIL militant.[4]

In preparation for the planned attack, Mr. Rahim purchased three military-style knives that he obtained in the last week of May 2015. One of those knives was an Ontario Knife Company

[3] The evidence developed in the course of our investigation, as well as the evidence supporting the indictment of Mr. Rahim's co-conspirators, establishes that Mr. Rahim conspired with others both in the United States and abroad to commit violent acts of terrorism against law enforcement on behalf of ISIL. I have concluded, therefore, that releasing the names of the involved law enforcement officers could seriously endanger their safety. Therefore, I will not release the names of the involved task force officers or their supervisors.

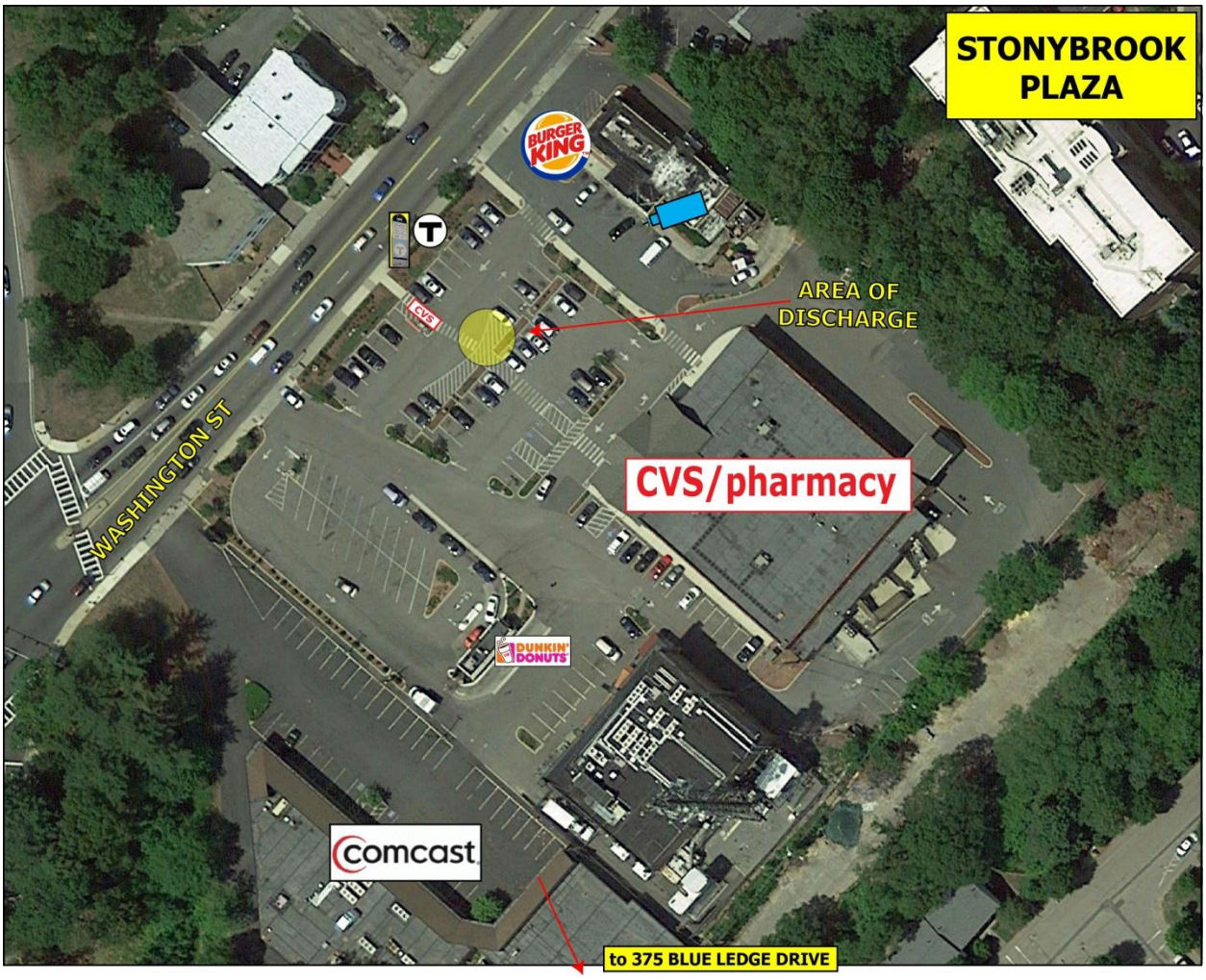
[4] On or about August 24, 2015, Hussain was killed in an airstrike in Raqqah, Syria.

Model SP-6 Fighting Knife consistent with the one recovered at the scene. That knife was 13 inches long, with an eight-inch, double-edged blade. In addition, Mr. Rahim ordered and received two Ontario Knife Company Model SP-10 Marine Raider Bowie fighting knives. Those knives were each 15 inches long, with a 9¾ inch double edged blade.

As part of their investigation, JTTF agents and officers listened to recorded cell phone conversations between Mr. Rahim and one of his co-conspirators in which the two discussed the weapons and the plan to commit an act of terrorism – the beheading of a known individual in New York City. The involved task force officers were generally aware of the terrorist conspiracy, Mr. Rahim's role in it, and his purchase and receipt of the weapons.

At approximately 5:00 AM on June 2, 2015, JTTF agents and officers listened to a recorded telephone conversation between Mr. Rahim and one of the co-conspirators in the murder/terrorism plot. In that conversation, Mr. Rahim stated his intention to abandon the plan to travel to New York City and instead expressed his intention to commit a terrorist attack immediately in Boston, where he lived. Specifically, Mr. Rahim told his co-conspirator that he intended to attack one of the "boys in blue" – a term the agents believed to be a reference to police officers – and to launch the attack that day. Mr. Rahim further told his co-conspirator that he knew that he likely would not survive the operation but that he welcomed the opportunity to "meet Allah" through "Jihad." The two then discussed how to destroy electronic evidence of their conspiracy.

After listening to the 5:00 AM conversation, a JTTF supervisor notified the surveillance team that, due to the imminent threat to law enforcement officers and the public, the surveillance team should stop Mr. Rahim for questioning and prevent him from boarding public transportation. JTTF personnel were aware that a bus that Mr. Rahim frequently rode stopped at a bus stop on Washington Street on its way to the Forest Hills MBTA Station. JTTF personnel were also aware that a number of police officers and members of the public could be potential targets inside the Forest Hills MBTA Station.



At 6:53 AM, surveillance officers watched Mr. Rahim leave his home at 375 Blue Ledge Drive in Roslindale – a short walk to the CVS parking lot at 4600 Washington Street. Mr. Rahim walked directly to the CVS store and went inside. After approximately five minutes, the surveillance officers watched Mr. Rahim walk back to his apartment. As Mr. Rahim had not tried to board an MBTA bus, the JTTF supervisor told the surveillance team not to stop him, but, instead, to continue watching him. The JTTF alerted both Boston Police Department and FBI tactical units to come to the area.

Shortly after 7:00 AM, the surveillance officers watched Mr. Rahim leave his apartment and again walk towards the CVS parking lot. He was carrying a backpack and walked toward the bus stop on Washington Street. Because of Mr. Rahim's stated intention to attack a law enforcement officer and the threat to innocent civilians, the JTTF supervisor told the surveillance team to stop Mr. Rahim for questioning and prevent him from boarding public transportation.

Mr. Rahim walked from the back of the CVS parking lot to the sidewalk on the inbound side of Washington Street, near the MBTA bus stop. As he waited there, surveillance officers approached Mr. Rahim with their weapons holstered. Mr. Rahim had placed a call on his cellular telephone, speaking first with a brother and then to his father. Mr. Rahim was speaking

to his father as the surveillance officers approached him. That conversation was recorded, and the recording captured much of the ensuing confrontation with the involved task force officers. Mr. Rahim began the conversation by stating to his brother that "unfortunately, you will not be seeing me again." Shortly thereafter, the closest task force officer (who will be referred to hereinafter as "BPD-1") walked to within a few feet of Mr. Rahim.

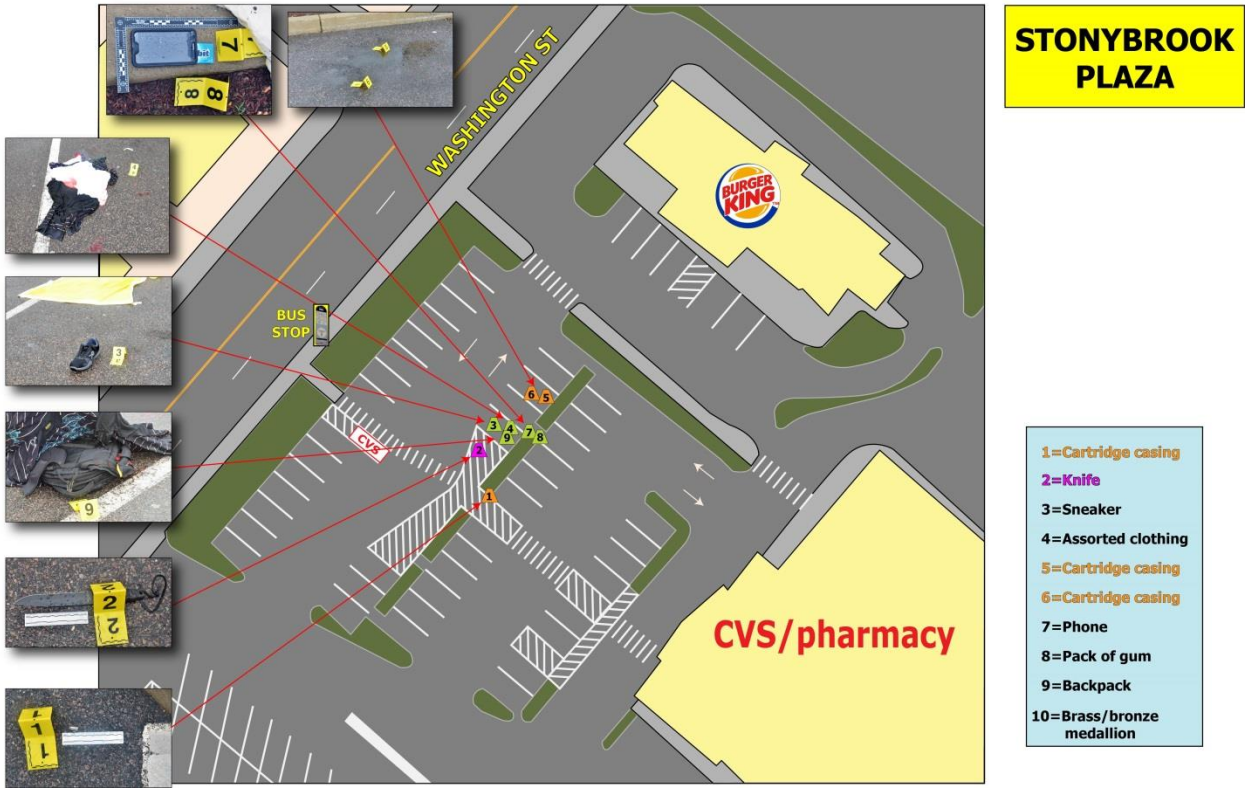
As he approached Mr. Rahim, with his weapon holstered and his hands raised above his head displaying his badge in his left hand, BPD-1 identified himself as a police officer. When BPD-1 asked Mr. Rahim to put his hands in the air, Mr. Rahim responded "do I know you?" Mr. Rahim then drew the 13-inch Ontario Knife Company Model SP6 Fighting Knife from a sheath he was carrying in his waist area. In response, BPD-1 and the other approaching task force officers drew their guns and ordered Mr. Rahim to drop the knife. Mr. Rahim refused to drop his weapon and began to advance on the officers. The task force officers continued to shout commands to Mr. Rahim, ordering him repeatedly to drop the knife. Task force officers backed away from Mr. Rahim as he advanced on them with his knife in his hand. The task force officers backed away approximately 48 feet, essentially the entire distance of the parking lot from Washington Street to the first set of raised barriers in front of the CVS pharmacy. As he advanced on the task force officers, and apparently in response to their orders to him to drop the knife he was brandishing, Mr. Rahim repeatedly shouted back "you drop yours" and finally "why don't you shoot me."

At this point, one of the task force agents was backed up against the curb. Concerned for his safety and that of members of the public in the various establishments in the vicinity, BPD-1 fired a single round towards the center of Mr. Rahim's torso. A second task force officer (who will be referred to hereinafter as "FBI-1") fired two additional rounds. All three rounds struck Mr. Rahim, who collapsed, still holding the knife in his hand. Task force agents then contacted Boston Emergency Medical Services and kicked the knife away from Mr. Rahim.

Video Evidence. Specialized personnel from the Boston Police Department responded to the scene to collect any video evidence that might be relevant to the incident. Three cameras from three locations captured portions of the events that morning. The most significant video evidence was recorded by a surveillance camera mounted outside of the Burger King restaurant on the inbound side of the CVS parking lot toward the rear. That video evidence captured the entire incident from a distance. In the video, which was released to the public on June 8, 2015, Mr. Rahim is seen walking from the rear of the CVS parking lot toward the bus stop on Washington Street. The video depicts the task force officers approaching Mr. Rahim and then backing away from him as he advances on them. As the individuals approach the middle of the lot – in the area of the first set of raised barriers – the video depicts Mr. Rahim falling to the ground. The video corroborates the accounts of task force officers and civilian witnesses of Mr. Rahim's movements and the task force officers' retreat. Due to the graininess of the video and the distance of the camera from the scene of the incident, the viewer cannot see what is in each individual's hand during these events.

Video from the Comcast building located at the rear of the parking lot depicts Mr. Rahim walking from the vicinity of Blue Ledge Drive toward Washington Street. The video then depicts Mr. Rahim waiting at the bus stop, the approach of the task force officers, and Mr. Rahim's movements toward the task force officers as they retreat. The video from the Comcast building does not capture the shooting as the Dunkin Donuts building obstructs the camera's view of the location of the shooting. Again, although the Comcast building video corroborates the accounts of the task force officers and civilian witnesses that the officers retreated from Mr. Rahim as he moved towards them, the view is too distant to discern what is in each individual's hands.

Video from surveillance cameras inside the CVS does not depict any portion of the incident. It does, however, depict Mr. Rahim entering the CVS and then leaving shortly before 7:00 AM, just prior to his return to his apartment. As Mr. Rahim passes through the camera's view at the front vestibule of the CVS, a black string or rope appears to dangle from his waist area. The string or rope appears to be consistent with the string that is attached to the knife sheath recovered from Mr. Rahim's clothing after the shooting.



The Ballistics Evidence. All of the involved task force officers surrendered their firearms to the FBI and Boston Police immediately after the incident. The firearms, along with all ammunition magazines, were turned over to the Boston Police Department Firearms Analysis Unit at the scene and analyzed by Boston Police Department firearms examiners. In addition, three spent

shell casings were recovered from the area where Mr. Rahim collapsed. Finally, three spent bullets were recovered and analyzed – two from the body of Mr. Rahim at autopsy and a third in his clothing. The Boston Police Department Firearms Analysis Unit examiners conducted a toolmark examination of the three shell casings recovered from the scene and the three spent projectiles recovered from Mr. Rahim's clothing and from his body against test fires from the service weapons carried by BPD-1 and FBI-1.

From their analysis and conclusions, I have determined that, among all the officers involved, only BPD-1 and FBI-1 fired their service weapons. Toolmark examinations of the shell casings establish that two of the shell casings recovered from the scene were fired from FBI-1's Glock Model 22 Gen4 .40 caliber service weapon, and that the third shell casing recovered from the scene was fired from BPD-1's Glock Model 22 Gen4 .40 caliber service weapon. Toolmark examination of the three spent bullets establish that the spent bullet that the medical examiner recovered from Mr. Rahim's spine at autopsy and the spent bullet recovered from his clothing were fired from FBI-1's service weapon and that the spent bullet that the medical examiner recovered from Mr. Rahim's chest at autopsy was fired from BPD-1's service weapon. The findings of the Boston Police Department Firearms Analysis Unit corroborate the accounts that the task force officers provided in their sworn statements – specifically that BPD-1 fired once and that FBI-1 fired twice.

Autopsy Findings. Boston Emergency Medical Services personnel responded quickly to the scene, treated Mr. Rahim, and transported him rapidly to the Brigham and Women's Hospital. Despite efforts to revive him, Mr. Rahim was pronounced dead at 7:53 AM. Mr. Rahim's body was transported to the Office of the Chief Medical Examiner later that day. The Chief Medical Examiner of the Commonwealth of Massachusetts performed the autopsy that day. He determined that Mr. Rahim suffered a total of three gunshot wounds. The Medical Examiner could not determine the order in which the gunshot wounds were sustained.

One bullet entered the lower mid-chest region. That bullet travelled from front to back and downward. The bullet was recovered in the lumbar spine. The entrance wound showed no evidence of either fouling or stippling. Thus, the autopsy could offer no information about the distance from which the shot was fired.

A second bullet entered the right upper back, travelling forward and leftward. This entrance wound also showed no evidence of either fouling or stippling. The bullet was recovered from the mid-chest region.

A third bullet entered the groin area and exited the back. The bullet's direction of travel was front to back and down and to the right. The bullet recovered from Mr. Rahim's clothing was most likely the bullet associated with this gunshot wound. Again, there was no evidence of stippling or fouling.

The autopsy was documented with photographs, case notes, and the "Report of Autopsy." The Medical Examiner determined the cause of death to be "Gunshot wounds of torso and lower extremity" and the manner of death to be "Homicide (Shot by Police)." The description of the three gunshot wounds is consistent with the account of the shooting that both BPD-1 and FBI-1 provided in their sworn statements.

Forensic Examination. Officers collected Mr. Rahim's clothing and submitted it to the Boston Police Department Crime Laboratory for analysis. Examination of the clothing revealed no gunshot residue surrounding the bullet holes in Mr. Rahim's clothing. Without evidence of gunshot residue, the Boston Police Crime Laboratory could not draw any conclusions as to the distance from the barrel of the two weapons to Mr. Rahim at the time he was shot.

The Boston Police Latent Print Unit processed the sheath recovered from the inside of the ambulance that transported Mr. Rahim to the hospital. Latent print analysts did not recover any latent fingerprints from the sheath. The Boston Police Department Latent Print Unit also processed the Ontario Knife Company Model SP6 Fighting Knife that was recovered at the scene. The FBI retained the knife for analysis but provided it to the Boston Police Department in June of 2016. That knife was processed for latent prints. No latent prints were recovered.

Legal Standard and Conclusions. Our legal analysis as to whether the actions of the involved task force officers could constitute criminal acts was guided by applicable case law and legal precedent on the use of force by law enforcement. To be lawful, an officer's use of deadly force must be objectively reasonable in light of all of the facts and circumstances confronting the officer. Whether such actions were reasonable is evaluated from the perspective of a reasonable officer at the scene rather than the 20/20 vision of hindsight. As the United States Supreme Court has explained, "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386,396-397 (1989). Our Supreme Judicial Court has also noted that "a police officer has an obligation to protect his fellow officers and the public at large that goes beyond that of an ordinary citizen, such that retreat or escape is not a viable option for an on-duty police officer faced with a potential threat of violence." *Commonwealth v. Asher*, 471 Mass. 580, 589 (2015).

After a careful consideration of the facts and the law, I conclude that the task force officers who shot Mr. Rahim as he aggressively moved towards them wielding a large, military-style knife while ignoring repeated commands to drop his weapon, acted reasonably and lawfully. Mr. Rahim had been engaged in a conspiracy with both foreign and domestic actors to commit violent acts of terrorism and had taken active steps toward that goal. That morning, on a recorded cell phone call with one of his co-conspirators, Mr. Rahim had announced his intention to execute a law enforcement officer that day and indicated that he was willing to die to carry out his mission. Mr. Rahim set out that morning to murder a police officer and did not expect to escape. Based on the evidence of Mr. Rahim's state of mind, the deadly confrontation was inevitable and the attempts by task force officers to deescalate the confrontation unfortunately failed.

Armed with one of the knives he had purchased in preparation for the terrorist attack that he and his co-conspirators had planned, Mr. Rahim walked to a bus stop on Washington Street on an MBTA bus route that would allow him to travel to the Forest Hills MBTA station – a facility that would have been crowded with commuters and where he would have found the law enforcement officers he had targeted. The task force officers therefore intervened appropriately.

I conclude that the task force officers had probable cause to arrest Mr. Rahim for the terrorism-related charges for which his co-conspirators were subsequently indicted in the United States District Court, as well as a variety of state charges including conspiracy to commit murder. Under the circumstances, the task force officers had the right – indeed, the duty – to at least detain Mr. Rahim, prevent him from boarding public transportation, and question him.

When the task force officers approached him with their weapons holstered and identified their office, Mr. Rahim responded aggressively and threateningly. He drew a large, military-style knife and advanced on the officers. As he moved towards them in a menacing manner, Mr. Rahim ignored their repeated requests to drop the weapon. The task force officers retreated approximately 48 feet in response to Mr. Rahim's aggressive actions and repeatedly shouted commands to him to drop the knife. In response, Mr. Rahim continued to advance on the retreating officers to a point where they could no longer safely retreat and two of the task force officers shot him. Those officers had a right to protect themselves and each other, and a duty to protect innocent civilians in the area.

Under the circumstances, the task force officers' use of force was a lawful and reasonable exercise of self-defense and defense of others. Accordingly, I have determined that criminal charges are not appropriate.

Daniel F. Conley
DISTRICT ATTORNEY

Volume: I
Pages: 1-38
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
* * * * * * * * * * * * * * * * * * *	
RAHMAH RAHIM	
v.	* Docket No. 1784CV02312
DANIEL F. CONLEY, DISTRICT ATTORNEY FOR SUFFOLK COUNTY	
* * * * * * * * * * * * * * * * * * *	

RULE 56 HEARING
BEFORE THE HONORABLE CHRISTINE ROACH

APPEARANCES:

For the plaintiff, RAHMAH RAHIM:
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BY: KATHRYN REBECCA COOK, ESQ.
TRISTAN P. COLANGELO, ESQ.

For the defendant, DANIEL F. CONLEY,
DISTRICT ATTORNEY FOR SUFFOLK COUNTY:
Suffolk County District Attorney's Office
1 Bulfinch Place
Boston, Massachusetts 02114
BY: JANIS DILORETO SMITH, ADA

Boston, Massachusetts Room 306 April 26, 2018	Christine D. Blankenship Certified Verbatim Reporter Transcriber

or terrorist plots, but rather exactly what happened that day. I don't know this for a fact, but it seems to be implicit in their affidavit and in their motion papers. And I would suggest, again, if that's the case, then it seems less likely that the concerns raised actually will stick.

THE COURT: So what are you telling the Court that the Court should be doing?

MS. COOK: I think the Court needs to enforce the public records law. I think there are three options. I think a *Vaughn* index might be very helpful here given that there has been so little conversation. You know, we don't know if these are five hundred records or five or one and start to hopefully for the Court narrow the issues here, and I'm happy to have that conversation with the Court or with counsel. If there's a preference for a protective order and for the parties to have that conversation, we would be willing to do that, too. And I don't want to put more work on your plate, but of course we would also be willing for Your Honor to perform an in camera review.

THE COURT: All right. So you're saying those are the three options, and they're all open in this case.

MS. COOK: And, Your Honor, as a threshold issue, which it appears you've already reached yourself, obviously it's critical to my client that an order be issued, that

so that's part of my order. But if you want 30 days to do what? To file something, to come back, what is?

MS. COOK: I kind of defer to my sister. You know, Ms. Rahim has already suggested these three options and even noted at the TRO, you know, well, now it's been well over six months that we would be willing to engage in any of those processes, and so I think she has other folks to talk to.

MS. SMITH: I think -- we may not need to file anything, Your Honor. I just don't know where we'll go on that.

THE COURT: Well, what I'm going to do is schedule another hearing in 30 days, and if you want file something, you need to file it a couple days ahead so I can digest it so I can be intelligent about the work that you've done. But I'm not requiring that you file anything. I am requiring that you tell me -- to be ready to tell me within 30 days what happens next.

So 30 days from today is a Saturday I believe. So how are we looking, Madame Clerk, on the 29th which is a Tuesday? Oh, I'm not going to be here that day. So it will be the first week in June then.

THE CLERK: June 5, 6 or 7th, Your Honor, which are all available.

THE COURT: Except that we might want to have you in

the morning again so that you're part of a long list. So the caveat is we might have to be on trial, but let's try for Tuesday, June 5 at 9:00 in the morning again.

THE CLERK: You have two trials, just so you know.

THE COURT: Yes, so then if we have to change we will. But my goal would be to not make you part of a long list in the afternoon because sometimes it's hard to think in the middle of those long lists, okay. But that's our next date, June 5 which is a Tuesday at 9:00.

And at that time, I want to hear that the parties have conferred and considered all the options that the law suggests they should be considering and that you have positions with respect to all of them and what that means about the remedy that you're seeking next from the Court.

MS. SMITH: Thank you, Your Honor.

MS. COOK: Thank you very much.

THE COURT: Thank you all very much. Good to see you.

(Proceeding adjourned at 9:51 a.m.)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	)	SUPERIOR COURT DEPARTMENT
	)	1784CV02312
RAHIMAH RAHIM, Plaintiff	)	
	)	
v.	)	
	)	
DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County, Defendant	)	

DISTRICT ATTORNEY DANIEL F. CONLEY'S PRIVILEGE LOG OF DOCUMENTS WITHHELD PURSUANT TO G.L. c. 4, § 7(26)(a), G.L. c. 4, § 7(26)(c) and G.L. c. 4, § 7(26)(f)

Now comes the District Attorney for Suffolk County and provides the following index, or privilege log, of records withheld from inspection pursuant to G.L. c. 4, § 7(26)(a), G.L. c. 4, § 7(26)(c), and G.L. c. 4, § 7(26)(f). Broadly, it is the District Attorney's position that certain records, which were provided to the District Attorney by the federal government, are not "public records" under the Massachusetts public records law, are protected by both the investigatory and statutory exemptions to the public records law, and should be returned to the Federal Bureau of Investigation without dissemination.

During the District Attorney's investigation into the shooting death of Usaamah Rahim, the federal government provided to him a binder of records. That binder contains a number of reports and compact discs, and includes documents that have already been produced to the Plaintiff. An index of the contents of the binder follows and includes: 1) documents withheld from production and for which an exemption is asserted; 2) documents previously produced to

the Plaintiff; and 3) documents that have not been produced to the Plaintiff for which an exemption is no longer asserted.

I. RECORDS WITHHELD FROM PRODUCTION

The District Attorney maintains that these federal records are exempt from production.

1) Signed/Sworn statement of a Special Agent[1] of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 20105, dated June 5, 2015 – 6 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3);[2] *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46

[1] Other than those already disclosed in a prior production, out of concern for the safety of the law enforcement officers, including federal agents, involved in the underlying investigation that gave rise to the instant matter, the District Attorney declines to produce their names or any information that could personally identify them.

[2] Title 5, United States Code, Section 552a(b)(7), exempts from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the

(1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

2) Signed/Sworn statement of a Special Agent of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 4, 2015 – 5 pages. The statement includes a one page annotated aerial photograph. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

3) Signed/Sworn statement of a Special Agent of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 4, 2015 – 5 pages. The statement includes a one page annotated aerial photograph, two pages of handwritten notes, and a surveillance log dated June 2, 2015. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains

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law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

4) Signed/Sworn statement of a Special Agent of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 4, 2015 – 4 pages. The statement includes a one page annotated aerial photograph. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

5) Signed/Sworn statement of a Special Agent of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 4, 2015 – 5 pages. The statement includes a one page annotated aerial photograph. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

6) Signed/Sworn statement of a Special Agent of the Federal Bureau of Investigation concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 3, 2015 – 3 pages. The statement includes a one page annotated aerial photograph. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further

withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

7) Signed/Sworn statement of a Task Force Officer concerning actions taken and observations made regarding the shooting that occurred on June 2, 2015, dated June 5, 2015 – 5 pages. The statement includes a one page annotated aerial photograph. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

8) Interview of a Special Agent in Charge of the Federal Bureau of Investigation regarding the shooting that occurred on June 2, 2015, dated June 4, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy

Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

9) Interview of an Assistant Agent in Charge of the Federal Bureau of Investigation regarding the shooting that occurred on June 2, 2015, dated June 5, 2015 and labeled "Deliberative Process Privileged Document" – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

10) Interview of a Supervisory Special Agent of the Federal Bureau of Investigation regarding the shooting that occurred on June 2, 2015, dated June 5, 2015, and labeled "Deliberative Process Privileged Document" – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The

record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy. This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

11) Interview of a Joint Terrorism Task Force Officer regarding the shooting that occurred on June 2, 2015, dated June 5, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

12) Interview of a Special Agent of the Federal Bureau of Investigation regarding the shooting that occurred on June 2, 2015, dated June 5, 2015, and labeled "Deliberative Process Privileged Document" – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

13) Interview of a civilian witness regarding the shooting that occurred on June 2, 2015, by Federal Bureau of Investigation Assistant Inspector-in-Place, and members of the Boston Police Department, dated June 5, 2015 and labeled "Deliberative Process Privileged Document" – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals

personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

14) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place concerning law enforcement and witness interviews, dated June 5, 2015 – 1 page. The memorandum references 1 compact disc containing eleven audio recordings. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

15) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place listing contact information for civilian witnesses who were interviewed following the June 2, 2015, incident, dated June 5, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section

552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

16) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding a criminal history investigation and related attached documents, dated June 4, 2015 – 12 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

17) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place concerning a memorandum of understanding, deputation, and cost sharing agreements, dated June 5, 2015, and labeled "Deliberative Process Privileged Document" – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

18) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding a timeline, dated June 5, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

19) Handwritten surveillance log dated June 2, 2015 – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

20) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding evidence collection, dated June 5, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section

552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

21) Federal Bureau of Investigation Evidence Response Team Casebook, dated June 2, 2015 – 9 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

22) Hand-drawn diagram, dated June 2, 2015 – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

23) Handwritten numeric measurement scale – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

24) Federal Bureau of Investigation Crime Scene Sign-in Log, dated June 2, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977). This record is further withheld in its entirety pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

25) Federal Bureau of Investigation photographic logs, 14 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a)

because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

26) Report of a Federal Bureau of Investigation Special Agent concerning evidence retrieved from an area business and a related form, dated June 4, 2015 – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

27) Report of a Federal Bureau of Investigation Special Agent concerning compact discs received during the investigation, dated June 5, 2015 and labeled "Deliberative Process Privileged Document" – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

28) Report of a Federal Bureau of Investigation Special Agent concerning a digital video disc received during the investigation, dated June 5, 2015, and labeled "Deliberative Process Privileged Document" – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

29) Report of a Federal Bureau of Investigation Special Agent concerning a compact disc containing photographs received during the investigation, dated June 4, 2015 – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

30) Six aerial photographs. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication

exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

31) Report of a Federal Bureau of Investigation Emergency Action Specialist, dated June 4, 2015, and labeled "Deliberative Privilege Source Document" – 2 pages. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

32) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding a dispatch log, dated June 4, 2015 – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

33) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding audio files contained on a compact disc, dated June 4, 2015 – 1 page. This record is

withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

34) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place regarding medical records, dated June 4, 2015 – 1 page. The report includes eight pages of medical records. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures and G.L. c. 4, § 7(26)(c). as it relates to a medical record. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

35) Report from a Federal Bureau of Investigation Assistant Inspector-in-Place concerning copies of two surveillance video compact discs received during the investigation, dated June 4, 2015 – 1 page. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by

necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

36) 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. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

37) One compact disc labeled Federal Bureau of Investigation and containing eight aerial photographs. This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

38) One compact disc dated June 2, 2015, and labeled "second call". The compact disc contains an audio recording and is further labeled "Any use of content or information derived therefrom in any criminal proceeding requires the advance authorization of the Attorney General of the U.S. Any further dissemination requires the advance authorization of the FBI." This record is withheld in its entirety pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). The record is also withheld in its entirety pursuant to G.L. c. 4, § 7(26)(a) because it is "specifically or by necessary implication exempted from disclosure by statute". *See* Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 439, 545-46 (1977).

II. RECORDS CONTAINED IN THE BINDER THAT WERE PREVIOUSLY PRODUCED TO THE PLAINTIFF

The following documents are also contained in the binder and have already been produced to the Plaintiff. The documents were generated or gathered by the Boston Police Department.[3]

1) Boston Police Incident History log, dated June 2, 2015 – 8 pages.

2) Boston Police Department Form 26, Detective Cardona[4], dated June 2, 2015 – 2 pages.

3) Boston Police Department Form 26, Lieutenant Detective Cruz, dated June 3, 2015 – 1 page.

4) Boston Police Department Form 26, Detective Delaney, dated June 2, 2015 – 1 page.

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[3] The District Attorney will reproduce these records, if requested.

[4] As noted above, out of continued concern for their safety, the District Attorney declines to produce the names of any law enforcement officers whose identity has not previously been disclosed. To the extent an officer is named here, his or her identity has been previously released.

5) Boston Police Department Form 26, Officer Duggan, dated June 2, 2015 – 1 page.

6) Boston Police Department Form 26, Officer Hernandez, dated June 2, 2015 – 1 page.

7) Boston Police Department Form 26, Officer McDonnell, dated June 2, 2015 – 1 page.

8) Boston Police Department Form 26, Officer Parenteau, dated June 2, 2015 – 2 pages.

9) Boston Police Department Form 26, Detective Singletary, dated June 2, 2015 – 2 pages.

10) Boston Police Department Form 26, Officer Sullivan, dated June 2, 2015 – 1 page.

11) Boston Police Department Form 26, Officer Vasquez, dated June 2, 2015 – 1 page.

12) Boston Police Department Form 26, Officer Younger, dated June 2, 2015 – 2 pages.

13) Boston Police Crime Scene Entry Log, handwritten, dated June 2, 2015 – 1 page.

14) 2007 Joint Terrorism Task Force Memorandum of Understanding, 17 pages.[5]

15) One compact disc labeled "Dispatch Recording" dated June 2, 2015. The Plaintiff was provided a transcript of this recording.

16) One compact disc labeled "Witness Interviews" and containing twelve audio files, dated June 2, 2015. The Plaintiff was provided redacted transcripts of each of these recordings.

17) One compact disc labeled "Video from 4600 Washington Street", dated June 2, 2015.

18) One compact disc labeled "CVS DVR", dated June 3, 2015.

19) One DVR labeled "DVR from Burger King", dated June 2, 2015.

20) One compact disc labeled "Comcast Building Video", dated June 2, 2015.

21) One DVR disc labeled "Crime Scene Video", dated June 2, 2015.

[5] The Plaintiff included this document as an exhibit to her motion for summary judgment. *See Joint Appendix, Exhibit 4.*

III. RECORDS CONTAINED IN THE BINDER THAT WERE PREVIOUSLY PRODUCED IN PART.

The contents of the binder also include two compact discs. One, labeled "Boston BPD Reports", contains seventy three individual files, each listed here. The second contains 407 photographic images. Many of these files have already been produced to the Plaintiff and such production is noted. For those files that have not been produced, the District Attorney asserts the relevant exemption, or produces the record here.

1) Boston Police Incident Report, dated June 2, 2015, CC # 152045447 - 2 pages. Previously produced.

2) Boston Police Form 26, Detective Cardona, June 2, 2015 - 2 pages (Duplicate of #45, below). Previously produced.

3) Boston Police Form 26, Officer's name withheld, June 3, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

4) Boston Police Form 26, Detective Delaney, dated June 2, 2015 - 1 page. Previously produced.

5) Boston Police Form 26, Lieutenant Detective Cruz, dated June 3, 2015 - 1 page. Previously produced.

6) Boston Police Form 26, Officer McDonnell, dated June 2, 2015 - 1 page. Previously Produced.

7) Boston Police Form 26, Officer Oller, dated June 2, 2015 - 1 page. Previously produced.

8) Boston Police Form 26, Officer Parenteau, dated June 2, 2015 - 2 pages. Previously produced.

9) Boston Police Form 26, Officer's name withheld, dated June 2, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

10) Boston Police Form 26, Officer's name withheld, dated June 2, 2015, - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

11) Boston Police Form 26, Officer's name withheld, dated June 2, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

12) Boston Police Crime Scene Entry Log, dated June 2, 2015 - 4 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

13) Boston Police Form 26, dated June 2, 2015 - 1 page. Officer's name redacted in the previously provided production and withheld here. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

14) Boston Police Form 26, Officer Figueroa, dated June 2, 2015 - 1 page. Previously produced.

15) Boston Police Form 26, Officer Firnstein, dated June 2, 2015 - 1 page. Previously produced.

16) Boston Police Form 26, Officer Gorman, dated June 3, 2015 - 1 page. Previously produced.

17) Boston Police Form 26, Officer Hernandez, dated June 2, 2015 - 1 page. Previously produced.

18) Boston Police Form 26, Officer Ho, dated June 2, 2015 - 1 page. Previously produced.

19) Boston Police Form 26, Officer Housman, dated June 2, 2015 - 1 page. Previously produced.

20) Boston Police Form 26, Officer Jones, dated June 2, 2015 - 1 page. Previously produced.

21) Boston Police Form 26, Officer Landrum, dated June 2, 2015 - 1 page. Previously produced.

22) Boston Police Form 26, Officer Mastrorillo, dated June 3, 2015 - 1 page. Previously produced.

23) Boston Police Form 26, Officer McCarthy, dated June 2, 2015 - 1 page. Previously produced.

24) Boston Police Form 26, Officer Michaud, dated June 2, 2015 - 1 page. Previously produced.

25) Boston Police Form 26, Officer Oller, dated June 2, 2015 - 1 page (Duplicate of #7, above). Previously produced.

26) Boston Police Entry Log, Officer Parenteau, dated June 2, 2015 - 2 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

27) Boston Police Form 26, Officer Parenteau, dated June 2, 2015 - 2 pages (Duplicate of #8, above). Previously produced.

28) Boston Police Form 26, Officer Roach, dated June 3, 2015 - 1 page. Previously produced.

29) Boston Police Form 26, Officer Sullivan, dated June 2, 2015 - 1 page. Previously produced.

30) Boston Police Form 26, Officer Vasquez, dated June 2, 2015 - 1 page. Previously produced.

31) Boston Police Entry Log, Officer Vest, dated June 2, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

32) Boston Police Form 26, Officer Vest, dated June 2, 2015 - 2 pages. Previously produced.

33) Boston Police Form 26, Officer Younger, dated June 2, 2015 - 2 pages. Previously produced.

34) Boston Police Form 26, Sargent Detective Gaines, dated June 2, 2015 - 2 pages (Duplicate of #69 below). Previously produced.

35) Boston Police Form 26, Sargent Detective Strother, dated June 2, 2015 - 2 pages. Previously produced.

36) Boston Police Form 26, Sargent Detective Strother, dated June 2, 2015 - 3 pages. Previously produced.

37) Boston Police Form 26, Sargent Hoppie, dated June 2, 2015 - 3 pages. Previously produced.

38) Boston Police Form 26, Detective Singletary, dated June 2, 2015 - 2 pages. Previously produced.

39) Boston Police Evidence List. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

40) DAVCO Video Vendor Email, Detective Mason, dated June 3, 2015. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

41) Boston Police Incident Report, dated June 2, 2015. Previously produced.

42) Boston Police Form 26, Detective Charbonnier, dated June 2, 2015 – 1 page. Previously produced.

43) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Hernandez, dated June 2, 2015 - 2 pages. Previously produced.

44) Boston Police Form 26, Detective Cardona, dated June 2, 2015 - 1 page (Duplicate of #2, above). Previously produced.

45) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Morrissey, dated June 2, 2015 - 1 page. Previously produced.

46) Boston Police Form 26, Detective Marrero, dated June 4, 2015 - 2 pages. Previously produced.

47) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Boyle, dated June 2, 2015 - 3 pages. Previously produced.

48) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Cummings, June 2, 2015 - 1 page. Previously produced.

49) Special Investigation Unit Incident Report, Detective Juan Seoane, dated June 2, 2015 - 2 pages. Previously produced.

50) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Morrissey, dated June 2, 2015 - 1 page (Duplicate of #45). Previously produced.

51) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Moore, dated June 2, 2015 - 3 pages. Previously produced.

52) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Mason, dated June 2, 2015 - 1 page. Previously produced.

53) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Laham, dated June 2, 2015 - 9 pages. Previously produced.

54) Boston Police Firearm Discharge Investigation Team Investigative Report, Video Recovery, Detective Laham, dated June 3, 2015 - 1 page. Previously produced.

55) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Donovan, dated June 2, 2015 - 2 pages. Previously produced.

56) EMS Trip Sheet, dated June 2, 2015 - 8 pages. This record is withheld from production as it is a medical record. G.L. c. 4, § 7(26)(c).

57) Annotated Map, dated June 2, 2015 - 2 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further redacted pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

58) Boston Police Firearm Discharge Investigation Team On-Call Schedule, dated May 21, 2015 - 2 pages. This record contains personal contact information as well as the scenarios under which the Boston Police Firearm Discharge Investigation Team respond to incidents. This record is withheld pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further withheld pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

59) Annotated Image, dated June 6, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

60) Annotated Image, dated June 5, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

61) Annotated Image, dated June 5, 2015 - 1 page. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

62) Annotated Drawing, dated June 2, 2015 - 2 pages This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

63) Boston Police Firearm Discharge Investigation Team Investigative Report, Detective Cummings, June 4, 2015 - 1 page. Previously produced.

64) Annotated Map, dated June 2, 2015 - 2 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

65) Annotated Map, dated June 2, 2015 - 2 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

66) Annotated Map, dated June 2, 2015 - 2 pages. This record is produced in redacted form pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

67) Boston Police Form 26, Officer Figueroa, dated June 2, 2015 - 1 page (Duplicate of #14, above). Previously produced.

68) Boston Police Firearm Discharge Investigation Team Investigative Report, Crime Scene Processing, Detective Stratton, dated June 2, 2015 - 3 pages. Previously produced.

69) Boston Police Firearm Discharge Investigation Team Investigative Report, Initial Response, Detective Gaines, dated June 2, 2015 - 2 pages (Duplicate of #34, above). Previously produced.

70) Boston Police Incident Report, Sargent Broderick, dated June 2, 2015 - 3 pages. Previously produced.

71) Boston Police Incident Report, Sargent Detective Webb, dated June 2, 2015 - 2 pages. Previously produced.

72) Boston Police Firearm Discharge Investigation Team Investigative Report, Sargent Teehan, dated June 2, 2015 - 2 pages. Previously produced.

73) Boston Police Regional Intelligence report, dated June 2, 2015 - 4 pages. This record contains summary information concerning various background and database checks conducted. This record is withheld pursuant to G.L. c. 4, § 7(26)(f) as it pertains to confidential investigative techniques and procedures. *District Attorney v. Flatley*, 419 Mass. 507, 512 (1995). This record is further withheld pursuant to G.L. c. 4, § 7(26)(c) as it reveals personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy.

74) One compact disc labeled "Crime Scene Photos (6/2/2015), Autopsy (6/2/2015), and BPD follow up photos (6/4/2015)", containing 407 images and dated June 2, 2015.

a. 320 crime scene photos, 297 of which have been produced to the Plaintiff. The remaining 23 photos are produced here.
b. 77 autopsy photos. These records are withheld pursuant to G.L. c. 4, § 7(26)(a) because they are "specifically or by necessary implication exempted from disclosure by statute". *See* G.L. c. 38, § 2; *LeBlanc v. Commonwealth, 457 Mass. 94, 96* (2010); *Globe Newspaper Co. v. Chief Medical Examiner*, 404 Mass. 132, 136 (1989).
c. 10 "BPD follow up photos", all of which have been produced to the Plaintiff.

For the Defendant:

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June 5, 2018

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the plaintiff by directing that a copy of this privilege log be delivered in hand to his counsel:

With attachments:

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June 5, 2018

COMMONWEATLH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT

RAHIMAH RAHIM,

Plaintiff,

v.

DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County,

Defendant.

Case No. 1784-cv-02312

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Through the Massachusetts Public Records Law, G.L. 4, § 7(26) ("Public Records Law"), Plaintiff seeks to obtain a confidential federal record belonging to the Federal Bureau of Investigation ("FBI"). The FBI loaned the record at issue—a report of an internal investigation into a national security-related matter—to the Suffolk County District Attorney's Office ("District Attorney"). But for the FBI lending the report to a fellow law enforcement agency, Plaintiff could only seek disclosure of the report from the FBI through federal records laws.

The report is, without question, a federal record and remains federal property, even in the District Attorney's temporary custody. The report was created by the FBI, for the FBI, about an FBI matter. The FBI has at all times retained control over the report through an agreement with the District Attorney and has never consented to the report's disclosure to Plaintiff.

The Supremacy Clause of the United States Constitution requires that this federal record be produced, as appropriate, under federal law. Plaintiff cannot, consistent with the Supremacy Clause, use a state records law to take the federal government's confidential report or enjoin the federal government from retrieving its report. The Supremacy Clause also prevents Plaintiff

from using a state records law to, in effect, circumvent the federal records laws enacted by Congress. Accordingly, in nearly identical circumstances, courts have prevented disclosure of federal records under state records laws and ordered state actors to return them to the federal government.

Moreover, even assuming that Massachusetts law permits the Court to disclose this federal report, the report is exempt from disclosure under Massachusetts law because it would reveal law enforcement tactics used by the FBI in investigating matters of national security, and equally if not more important, subject the lives of agents and officers involved to potential violent retaliation by an international terrorist group that recently has targeted law enforcement and their families with "kill lists."

Simply put, the report belongs to the FBI, and the Court should see it returned to the FBI—both as a matter of law and to protect vital law enforcement interests. Plaintiff may seek production of the report, as appropriate, under federal law.

BACKGROUND

Because the Court is familiar with the facts of this case through the parties' summary judgment briefing, the United States only highlights those facts most relevant to this Statement:

The Shooting. On June 2, 2015, FBI special agents and Boston Police Department officers, working as part of a federal Joint Terrorist Task Force, shot and killed Usaamah Rahim ("Rahim"), Plaintiff's son, in "a lawful and proper exercise of self-defense and defense of others." Joint App'x ("JA") Ex. 1 (Report of the District Attorney) at 2. Law enforcement believed, based on an ongoing national security investigation, that Rahim was planning on imminently murdering law enforcement or members of the public in the Boston-area in the name

of the Islamic State in Iraq and ash-Sham, aka, "ISIS" (formerly known as the "Islamic State of Iraq and the Levant), a well-known and violent international terrorist organization. *Id.* at 3.

The INSD Report. The FBI's Inspection Division, Office of Inspection, conducted an investigation into whether law enforcement was justified in using deadly force. As part of that investigation, the Inspection Division created a report concerning the use of deadly force against Rahim. JA Ex. 20 (Decl. of Nancy McNamara, FBI, Asst. Dir. of Inspection Division) (hereafter "McNamara Decl.") at 2-3. The report memorializes an in-depth federal internal investigation and consists of various attachments and supporting documentation memorializing the facts gathered during the shooting inquiry. JA Ex. 20 (McNamara Decl.) at 3. The report is contained in a three-ring binder with a cover bearing the FBI's seal and clearly identifying the record as the "Inspector's Report" from the "Inspection Division, Office of Inspections" and being a "Deliberative Process Privileged Document." *See id.* at 3.

Loaning the Report to the District Attorney. The District Attorney conducted a separate investigation into the shooting, which occurred in his jurisdiction. JA, Ex. 1 (June 2, 2015 Report of the District Attorney) at 1. The FBI's Inspector-in-Charge provided a version[1] of the Inspector's Report (hereafter "INSD Report or Report") to the District Attorney pursuant to the law enforcement exception of the Privacy Act, 5 U.S.C. § 552a(b)(7), and under an agreement that the contents "are being loaned to [the District Attorney] and remain the property of the FBI through the Department of Justice." JA, Ex. 8 (June 5, 2015 Ltr. fr. FBI Inspector-in-Charge to the District Attorney (hereafter "Inspector Letter")) at 1. The FBI made clear in the cover letter accompanying the binder that "the FBI cannot authorize the further release of the

[1] The version loaned to the District Attorney was incomplete.

records to any third party outside your office for any purpose other than for use a trial or otherwise advancing your investigation" or pursuant to "any request made under the Massachusetts Freedom of Information Act [that is, the Public Records Law]," and "no personally identifiable information pertaining to an FBI Agent or employee will be publically disclosed without the express approval of the FBI." *Id.* In addition, the letter provided that, "if any third party request is made for the [records], they will not be provided to such a requestor without the prior written permission of the FBI" and that "[a]ny requests for permission for further dissemination should be directed to the Chief Inspector, Office of Inspections, Inspection Division" of the FBI in Washington, D.C. *Id.* The FBI has never consented to disclosure of the Report to Plaintiff, and the District Attorney would have returned the Report to the FBI but for a stipulation between Plaintiff and the District Attorney in which the District Attorney agreed not to return the records until the conclusion of this litigation. *See* JA, Ex. 8 (Inspector Letter) at 1; Ex. 20 (McNamara Decl.) at 4; Ex. 7 (Stipulation Regarding Disputed Records).

Plaintiff's FOIA Requests and Federal Lawsuit. Since the shooting, Plaintiff has submitted records requests to the FBI and the United States Attorney's Office under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). *See, e.g.*, Ex. A (Pl.'s June 16, 2017 FOIA Request to FBI) at 9-17; and Ex. B (Pl.'s June 16, 2017 FOIA Request to DOJ), both attached hereto.[2] Plaintiff's FOIA requests sought numerous categories of documents, including "[a]ll records relating to the events that took place on June 2, 2016, with regard to Mr. Rahim" (that is, the shooting). *See, e.g.,* Ex. A (Pl.'s June 16, 2017 FOIA Request to FBI) at 10 ¶¶ 1-2. The United States has denied those requests. *See, e.g.*, Ex. A (FBI's September 27, 2017 Reply to

[2] Plaintiff also submitted a FOIA request to the Department of Homeland Security. *See* Ex. C (Pl.'s June 16, 2017 Ltr. to DHS), attached hereto.

Plaintiff's FOIA Request) at 18; and Ex. D (DOJ's Nov. 28, 2017 Reply to Pl.'s FOIA Request), both attached hereto. Plaintiff has sought to appeal these administratively. *See* Ex. A (Pl.'s December 22, 2017 Ltr. to the FBI) at 1, 2.

In addition, Plaintiff has filed a federal lawsuit against the United States under the Federal Tort Claims Act related to the shooting. *See* Compl. (May 31, 2018), *Rahim v. United States*, Case No. 1:18-cv-11152-IT (D. Mass.). Presumably, Plaintiff will seek the Report in civil discovery in that lawsuit.

CONSIDERATION OF THIS STATEMENT OF INTEREST

The Court can, and should, consider this Statement of Interest pursuant to 28 U.S.C. § 517, which provides:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

State courts routinely consider such Statements in reaching their determinations. *See, e.g.*, *McGeehan v. McGeehan*, No. 2445, 2016 WL 6299681, at *3 (Md. Ct. Spec. App. Oct. 26, 2016) (considering United States' Statement of Interest and noting that "[t]he Attorney General [of the United States] 'has general powers to safeguard the interests of the United States in any case, and in any court of the United States, whenever in his [or her] opinion those interests may be jeopardized'") (quoting *Booth v. Fletcher,* 101 F.2d 676, 681–82 (D.C. Cir. 1938)), attached as Ex. F; *Ren-Guey v. Lake Placid 1980 Olympic Games, Inc.*, 403 N.E.2d 178, 179 (N.Y. Ct. App. 1980) (considering United States' Statement of Interest in refraining from exercising jurisdiction over a matter).

Here, the Statement is appropriate for consideration because this lawsuit implicates the FBI's property interest in the INSD Report. The Court should have the benefit of the United States' position, as set forth below, in reaching its decision.

Consideration of this Statement also favors judicial economy. Rather than filing a separate federal action seeking return of the Report, which might delay appropriate resolution of this issue, the United States has sought to file this Statement in this already-pending litigation.

POSITION OF THE UNITED STATES

The Court should consider the following points in ruling on the parties' motions for summary judgment.

I. THE REPORT IS A FEDERAL RECORD, AND THE DISTRICT ATTORNEY SHOULD BE ABLE TO RETURN IT TO THE FBI.

As discussed below, the INSD Report is, without question, a federal record in the temporary custody of the District Attorney. The FBI created and always has retained control over the Report, and the Court should allow the District Attorney to return it to the FBI. The Massachusetts Public Records Law does not compel a different result because the statutory exemption to the Law exempts the Report from disclosure. In any event, under the Supremacy Clause of the United States Constitution, this Court cannot compel the United States to part with its property or enjoin the FBI from reclaiming its property.

A. The Report Is a Federal Record.

Plaintiff principally argues that the INSD Report is subject to the Massachusetts Public Records Law and not exempt from disclosure under one of the Law's exceptions. These arguments, however, miss an essential preliminary inquiry: whether the INSD Report is a federal record of the FBI, even in the hands of the District Attorney.

The Court must look to federal law to determine whether the Report is and remains an FBI record. *See, e.g.*, *Manning v. Fanning*, 211 F. Supp. 3d 129, 137 (D.D.C. 2016) (federal law "control[s]" case about "a federal record, which affects the application of a federal program . . . created by federal statute"); *U.S. v. Story County, Iowa*, 28 F. Supp. 3d 861, 873, 877 (S.D. Iowa 2014) (same). The Federal Records Act defines federal "records" to include,

> all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law . . . and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government . . . .

44 U.S.C. § 3301.

The Report falls within this broad definition. The FBI "made" the Report to memorialize "evidence of the organization, functions, policies, decisions, procedures, operations . . . of the Government," namely the FBI's internal investigation of the shooting. *See* JA Ex. 20 (McNamara Decl.) at 2-3. Such records, which are developed "at the [federal] government['s] expense, *i.e.*, with government materials and on government time," are "indisputably the property of the [federal g]overnment." *Pfeiffer v. CIA,* 60 F.3d 861, 864 (D.C. Cir. 1995).

B. The Report Remained a Federal Record, Even in the District Attorney's Temporary Custody.

A federal record, like the INSD Report, can remain a federal record, even in the custody of a third party. As the Supreme Court has held, the physical location of a document is not determinative of whether a record is a federal agency record: The "mere physical location of papers" does not "confer status as 'an agency record.'" *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980) (examining nature of document, not location, to determine owner). Similarly, the Supreme Judicial Court has recognized that

whether a record is subject to the Public Records Law depends on the nature of the record itself—not "on the identity of the custodian from whom that public record is sought." *Globe Newspaper Co. v. District Attorney for Middle Dist.*, 788 N.E.2d 513, 520, 439 Mass. 374, 383 (2003) (court records were still "public records" under the Law, even though they were possessed by another).

Whether a record in the custody of a third party remains a federal agency record turns on whether the federal agency retained "control" over the record. *See, e.g., Burka v. Dept. of Health and Human Svcs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). Federal courts have determined "control" by applying the four factors applied in *Burka*, 87 F.3d 508 (D.C. Cir. 1996). *See, e.g., Beveridge & Diamond, P.C. v. U.S. Dept. of Health and Human Svcs.*, 85 F. Supp. 3d 230, 239 (D.D.C. 2015). Applying those factors here shows that the Report remains a federal record, even in the District Attorney's temporary custody:

- **FBI's Control Over the Report.** The first *Burka* factor looks to "the intent of the document's creator to retain or relinquish control over the records." 87 F.3d at 515. Here, the transmittal letter from the FBI to the District Attorney made clear that the FBI sought to maintain control over the records. Ex. 8 (Inspector Letter) at 1 ("By accepting these records, it is specifically understood that they are being loaned to your agency and remain the property of the FBI through the Department of Justice . . . ."). The FBI has never given permission for the District Attorney to disclose the report, and the District Attorney would return it but for this litigation.

- **Limitations on the District Attorney's Use of the Report.** The second *Burka* factor examines "the ability of the agency to use and dispose of the record as it sees fit." 87 F.3d at 515. The FBI refused to allow the District Attorney to disseminate the Report without the FBI's express written permission. *E.g.*, Ex. 8 (Inspector Letter) at 1 ("[If] any third party request is made for [these records], they will not be provided to such requestor without the prior written permission of the FBI."). The District Attorney, in refusing to produce the record, has acted consistent with the FBI's directive. *See id.*

- **FBI's Creation of and Reliance on the Report.** The third and fourth *Burka* factors examine "the extent to which agency personnel [that is, the FBI's personnel] have read or relied upon the document," and "the degree to which the document was integrated into the agency's record system or files." 87 F.3d at 515. The FBI not only relied on the Report in conducting its own internal investigation into the matter, but it created the Report to memorialize that investigation. The Report was created by the INSD's Office of Inspection, which "is responsible for ensuring compliance and facilitating the improvement of performance by providing independent oversight of all FBI investigative, intelligence, and administrative programs and to ensure their economic value and effective compliance with objectives, governing laws, rules, regulations and policies." *E.g.*, JA Ex. 20 (McNamara Decl.) at 2. The Report "document[s] the INSD's Agent Involved Shooting Incident administrative inquiry into the use of deadly force on 06/02/2015 . . . ." *Id.* The inquiry "ensure[s] FBI personnel conduct the organization's activities in a proper and professional manner." *Id.* Conversely, the District Attorney has not integrated the Report into its files and could promptly and easily return the

Report to the FBI at a moment's notice (the binder sits in the office of counsel for the District Attorney in this action).[3]

Where the facts demonstrate a federal agency's control over a record even when possessed by a third party, as they do here, courts routinely conclude that the record belongs to the federal agency. *See, e.g.*, *Story County, Iowa*, 28 F. Supp. 3d at 876-77 (county forced to return emails located on county server but sent and received by county sheriff in his capacity as a member of a federal board because emails were federal records); *United States v. Napper*, 694 F. Supp. 897 (N.D. Ga. 1988), *aff'd*, 887 F.2d 1528 (11th Cir. 1989) (City of Atlanta enjoined from disclosing FBI investigative files because such files were federal property not subject to disclosure under state public records act).[4]

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[3] Some courts have also applied a totality of the circumstances test which may include examining additional factors not enumerated in the *Burka* test. *See, e.g., Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 287 (D.C. Cir. 2006). For example, courts have looked at whether the documents provide meaningful insight into agency-decisionmaking, and whether the agency has a possessory interest in the documents. *See, e.g.*, *Kissinger*, 445 U.S. at 157 (personal documents belonging to employee were not "agency records"); *Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011) ("a document that could not reveal anything about agency decision-making is not an 'agency record'"). These factors further support a finding that the Report is a federal record belonging to the FBI because the Report distills the FBI's internal investigation and the FBI has retained a possessory interest in the Report, even in the District Attorney's custody.

[4] *Accord United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382-83 (8th Cir. 1987) (tribal court records stored in tribal archives were federal records possessed by tribal government); *Hercules, Inc. v. Marsh*, 839 F.2d 1028-29 (4th Cir. 1988) (directory prepared by contractor at government expense, bearing "property of the U.S." legend, was a federal record); *In Def. of Animals v. Nat'l Inst. of Health*, 543 F. Supp. 2d 83, 100-01 (D.D.C. 2008) (records located at contractor-operated facility were federal records where agency owned files, and contract provided for federal agency access to records); *Chi. Tribune Co. v. Dep't Health and Human Svcs.*, No. 95-C-3917, 1997 WL 1137641, at *15-16 (N.D. Ill. Mar. 28, 1997) (files created by independent contractor were federal records because created on behalf of (and at request of) agency and agency "effectively control[ed]" them), attached as Ex. G.

The Court's decision in *Napper* is particularly instructive because the facts are nearly identical. There, the FBI loaned investigative records to the City of Atlanta's police department. 694 F. Supp. at 899. Similar to the INSD Report, most of the records furnished to the city were marked as follows: "It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency." *Id.* When a state court ordered the records released pursuant to Georgia's public records law without the FBI's consent, the United States filed a federal action, and the district court found that the United States had a property interest in the documents and ordered the City to return the documents. *Id.* at 900-02. Furthermore, the district court indicated that the party seeking the records "must file an official FOIA request." *Id.* at 901. As the Eleventh Circuit stated in affirming the district court's decision, "This is simply a case in which the [federal] Government seeks to retrieve documents which it owns, and which the City of Atlanta possesses, has no right to disseminate, and refuses to return to the FBI." 887 F.2d at 1530.

Here, too, "the [federal] Government seeks to retrieve documents which it owns." The Court should see that those documents are, in fact, returned to the FBI and not disseminated other than through federal law.

C. Massachusetts Law Cannot Compel the FBI to Part With Its Records.

As argued above, the Report is a federal record that should be produced, as appropriate, under federal law, not under a state public records statute. But assuming for argument's sake that the Massachusetts Public Records Law applied to a federal record in the temporary custody of the District Attorney, the Report cannot be produced under that Law for three reasons.

First, the Massachusetts Public Records Law itself exempts the Report from production. Beyond the exceptions properly raised by the District Attorney in his briefing, the so-called

statutory exemption to the Law exempts from production all records "specifically or by necessary implication exempted from disclosure by statute," G.L. c. 4, § 7(26)(a), including federal statutes, *see Champa v. Weston Pub. Sch.*, 473 Mass. 86, 92-93 (2015) (federal educational records statute exempted disclosure under the Public Records Law).

Here, Plaintiff seeks federal records without first complying with federal statutes and regulations, in particular either FOIA or the so-called *Touhy* regulations. FOIA governs the production of federal records outside of litigation and to what extent the records are produced. The FBI and the United States Attorney's Office have denied, at present, Plaintiff's FOIA requests. Similarly, the Department of Justice's *Touhy* regulations, *see* 28 C.F.R. §§ 16.21 to 16.28,[5] prevent FBI employees from disclosing to non-law enforcement any federal records in litigation in which the United States is not a party, such as this case, without preapproval by the appropriate Department of Justice official. Plaintiff has never sought nor received approval under *Touhy*, and instead seeks to compel the FBI and its employees, in effect, to produce federal records under state law by suing the FBI's temporary records custodian, the District Attorney. Given federal law presently prohibits dissemination of the Report, the District Attorney properly withheld it under the Public Records Law's statutory exemption.

Second, even if the statutory exemption to the Public Records Law is inapplicable, the Supremacy Clause prevents Plaintiff from using a state law, like the Public Records Law, to take the FBI's Report. "Under the intergovernmental immunity component of Supremacy Clause jurisprudence, the states may not directly regulate the federal government's operations or property." *State of Ariz. v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991). This prohibition is

[5] Congress granted the Department of Justice the authority to create the *Touhy* regulations through the Housekeeping Statute, 5 U.S.C. § 301.

rooted in the Constitution's Property Clause, which provides that "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl. 2; *Bowsher*, 935 F.2d at 334. Under the Property Clause, property rightfully belonging to the United States "cannot be seized by authority of another sovereignty against the consent of the [federal g]overnment." *Armstrong v. United States*, 364 U.S. 40, 43 (1960). Accordingly, courts prevent state laws from infringing on the federal government's property rights. *See, e.g.*, *Treasurer of New Jersey v. U.S. Dept. of Treasury*, 684 F.3d. 382, 410 (3d Cir. 2012) (states' law cannot interfere with Congress's ability to dispose of unclaimed property); *Sec. of Hous. and Urb. Dev. v. Sky Meadow Assoc.,* 117 F. Supp. 2d 970, 977-79 (C.D. Cal. 2000) (state foreclosure law cannot infringe the property interest of federal agency).

Here, through the Massachusetts Public Records Law, Plaintiff seeks to circumvent federal law governing the disposition of federal records. In enacting FOIA and the Privacy Act and giving agencies the authority to implement regulations, such as the *Touhy* regulations, Congress has created a federal regulatory framework to facilitate consistent, efficient, and centralized disclosure of federal public records, while affording federal agencies the opportunity to exercise their discretion and expertise.[6] Allowing Plaintiff to circumvent this framework

[6] *See, e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious."); *Ebling v. Dep't of Justice,* 796 F. Supp. 2d 52, 66 (D.D.C. 2011) (FOIA "create[s] a uniform and streamlined process to ensure that appeals are received and processed"); *U.S. ex rel. Howard v. Caddell Constr. Co., Inc.*, 7:11-CV-270-H-KS, 2018 WL 2291300, at *1 (E.D.N.C. Feb. 23, 2018) (*Touhy* regulations promote "executive control" and "agency efficiency"), attached as Ex. H.

through a state public records law would directly undermine that framework, usurp the FBI's ability to control its records and exercise its discretion, and create the "disparity, confusion and conflict" that "the Supremacy Clause seeks to avoid." *See United States v. Allegheny County*, 322 U.S. 174, 183 (1944). Indeed, the potential consequence, and risk, of Plaintiff's lawsuit is that the Report is treated differently in different forums—produced by Massachusetts but withheld by the federal government. The Supremacy Clause prohibits such a result. *See, e.g.*, *Story County, Iowa*, 28 F. Supp. 3d at 877 ("Even assuming, arguendo, there is conflict between the Iowa Public Records Act and federal law, it is the state statute that must give way.").

Finally, Plaintiff, through this lawsuit, cannot prevent the FBI from reclaiming its federal property because "[s]tate courts are without jurisdiction to . . . enjoin the acts of federal officers." *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 852 (M.D. Ala. 1960), *aff'd*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961) (state court injunction preventing federal government from obtaining voting records was invalid).[7] Here, the FBI has the right to repossess the Report and would repossess it, but pending the outcome of this litigation, has respected the parties' stipulation concerning returning the Report to the FBI. In seeking the Court to order the District Attorney to produce the Report to her, Plaintiff, in effect, asks the Court to enjoin permanently the FBI from repossessing the Report and sever the FBI's property interest in the Report. The Supremacy Clause forbids this result. *See id.*

[7] *Accord Kennedy v. Bruce*, 298 F.2d 860, 862 (D. Ala. 1962) ("Alabama had no power to entertain a suit seeking to review the discretion of or enjoin the acts of the Attorney General of the United States."); *Pennsylvania Turnpike Comm'n v. McGinnes*, 179 F. Supp. 578, 583 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330, 330-31 (3d Cir. 1960), *cert. denied* 364 U.S. 820 (1960) (case dismissed because state court from which case was removed had no jurisdiction to enjoin federal officer).

II. Disclosure of the Report and Its Exhibits Jeopardizes and Undermines Law Enforcement.

Not only does the law require that the Report be returned to the FBI, but practical considerations do as well. Disclosure of the Report threatens to undermine law enforcement tactics of the FBI and its partners investigating terrorism-related activity, and threatens the safety of law enforcement involved in the incident and their families from retaliation by ISIS.

A. Disclosure Jeopardizes Law Enforcement and Their Families.

Disclosure of the INSD Report could be used to identify and target law enforcement involved in the operation, as well as witnesses to the incident. Ex. E (Decl. of Peter Kowenhoven ("Kowenhoven Decl.)) ¶¶ 8, 10, attached hereto. It is well documented that "Usaamah Rahim was himself attempting to carry out an ISIS-inspired attack on June 2, 2015," and that ISIS and its followers have targeted law enforcement with violent attacks, including as recently as June 2017. *Id.* ISIS has encouraged its followers to execute these attacks with inflammatory literature and publishing "kill lists" with the names of law enforcement personnel. *Id.* ¶ 10b. As the United States argued in successfully getting the identities of Rahim's shooters excluded from co-conspirator David Wright's trial,

> Since late 2014, using social media, ISIS has issued kill lists to their followers. For example, in March 2015, ISIS posted the names and addresses of 100 U.S. military service members on the internet and instructed their supporters to "kill them in their own lands, behead them in their own homes, stab them to death as they walk their streets thinking they are safe . . . ." Most recently, on April 6, 2017, a group of hackers supporting ISIS known as the United Cyber Caliphate ("UCC") released a "kill list" with the names of 8,786 people, primarily from the United States and the United Kingdom, and ordered ISIS supporters to murder the people on the list. *Id.* This chilling message was delivered using a video posted on Telegram, a private messaging application. In June 2016, UCC used Telegram to post a similar kill list of 8,318 individuals from around the world and a message urging ISIS supporters to kill those on the list in order to avenge "Muslims."

Gov.'s Mot. in Limine to Exclude Questioning by Def. Regarding the Names of Law Enforcement Involved in Shooting Usaamah Rahim at 1-2, Dkt. No. 212, 1:15-cr-10153-WGY (D. Mass.).[8] ISIS's kill lists included "nearly three dozen Minnesota- and Dakotas-based police officers; a 39-page list of past and present New Jersey police officers, primarily NJ Transit officers; several hundred military personnel; and US Government employees, particularly identifying State Department personnel." Ex. E (Kowenhoven Decl.) ¶ 10.b.

Given the highly sensitive nature of the Report and its contents, including the potential life threatening implications posed by the Report's release, no basis exists for its disclosure. Both FOIA and the Massachusetts Public Records Law exempt the release of public records that would endanger the safety of others. *See, e.g.*, *People for the Ethical Treatment of Animals, Inc. v. Department of Agricultural Resources*, 477 Mass. 280, 288 (2017) (exceptions to Public Records Law designed to protect private information and public safety from "terrorist attacks"); *Blanton v. DOJ*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (precluding disclosure of identities of FBI special agents and those cooperating with law enforcement that could endanger their safety), *aff'd*, 64 F. App'x 787 (D.C. Cir. 2003); *Jimenez v. FBI*, 938 F. Supp. 21, 30-31 (D.D.C. 1996) (same).

B. Disclosure Will Undermine the FBI's Law Enforcement Efforts.

In addition to threatening law enforcement safety, disclosure of information in the INSD Report undermines law enforcement effectiveness in future encounters in national security matters because information in the Report describes how, why, and under what circumstances,

[8] The federal district court (Young, J.) granted the United States' motion, and as a result, the identities of law enforcement involved in shooting Rahim were not disclosed during the trial and are not publicly known.

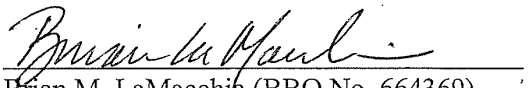
law enforcement officers used deadly force against Rahim. For example, documents included in the Report—such as sworn witness statements, FD-302s, annotated aerial photographs, and ERT documentation and scene logs—individually or collectively reveal FBI surveillance and encounter tactics, agent decision-making and communications, and interagency communication and cooperation. Ex. E (Kowenhoven Decl.) ¶ 9. Releasing this information "may aid terrorists in avoiding detection" and "increase risks to law enforcement." *Id.* ¶¶ 6, 7. Both FOIA and Massachusetts law prohibit disclosure of public records that would disclose such tactical information. *See, e.g.*, *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 61-62 (1976) ("entirely appropriate" not to reveal investigatory techniques because "disclosure would not be in the public interest"); *Pub. Emps. For Envt'l Resp. v. U.S. Sect. Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304 (D.D.C. 2012) (withholding inundation maps because terrorists could use them to cause flooding and destruction in populated areas); *Living Rivers v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1322 (D. Utah 2003) (same).

CONCLUSION

For these reasons, the United States asks the Court to consider the Report a federal record that belongs to, and should be returned to, the FBI.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: 

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CERTIFICATE OF SERVICE

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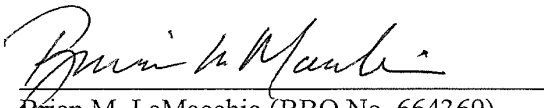

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Hoffman v. Kittitas County, Wash.App. Div. 3, July 24, 2018

125 Wash.2d 243
Supreme Court of Washington,
En Banc.

PROGRESSIVE ANIMAL WELFARE SOCIETY, a Washington nonprofit corporation, Respondent,
v.
UNIVERSITY OF WASHINGTON, an agency of the State of Washington, Appellant.

No. 59714-6.
|
Nov. 22, 1994.
|
Reconsideration Denied Feb. 1, 1995.

Synopsis

Animal rights group brought action against university under Public Records Act seeking access to unfunded grant proposal. The Superior Court, King County, Robert H. Alsdorf, J., held that with excision of certain exempt information contained in proposal, proposal was subject to disclosure. On appeal, the Supreme Court, Durham, J., held that: (1) while records requested by group were in large part protected from disclosure, grant proposal did not come within exemption that authorizes withholding proposal in its entirety; (2) there was material issue of fact as to whether any other relevant records were silently withheld; and (3) group was entitled to award of attorney fees incurred on appeal.

Affirmed and remanded.

Andersen, C.J., concurred and filed opinion in which Johnson, J., joined.

Brachtenbach, J., dissented and filed opinion in which Dolliver and Utter, JJ., joined.

West Headnotes (31)

[1] Records
In General; Freedom of Information Laws in General

Stated purpose of Public Records Act is nothing less than preservation of most central tenets of representative government, namely, sovereignty of people and accountability to people of public officials and institutions. West's RCWA 42.17.251.

12 Cases that cite this headnote

[2] Records
Matters Subject to Disclosure; Exemptions

Public Records Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed. West's RCWA 42.17.010(11), 42.17.251, 42.17.290.

21 Cases that cite this headnote

[3] Records
Judicial Enforcement in General

On appeal of grant of summary judgment to animal rights group requiring production of unfunded university grant proposal under Public Records Act, university was not limited to arguing only those basis for nondisclosure cited by university president in his letter denying disclosure, where, although letter constituted final agency action under section of Act encouraging prompt agency review of actions taken by agency's public records officer, Act did not alter fact that court was to review agency action de novo. West's RCWA 42.17.320.

40 Cases that cite this headnote

[4] Records
Personal Privacy Considerations in General; Personnel Matters

Personal information exemption to Public Records Act did not apply to unfunded university grant proposal, where nothing resembling protected personal information appeared in unfunded grant proposal. West's RCWA 42.17.310(1)(b).

3 Cases that cite this headnote

[5] **Records**
Trade Secrets and Commercial or Financial Information

Clear purpose of "valuable formulae" or "research data" exemption to Public Records Act is to prevent private persons from using Act to appropriate potentially valuable intellectual property for private gain. West's RCWA 42.17.310(1)(h).

8 Cases that cite this headnote

[6] **Records**
Trade Secrets and Commercial or Financial Information

While material in unfunded university grant proposal regarding "valuable formulae" or "research data" did not have to be disclosed under Public Records Act, those portions of proposal which did not come within exemption, and which were not covered by any other exemption or other statute, had to be disclosed. West's RCWA 42.17.310(1)(h), (2), 42.17.260(1).

12 Cases that cite this headnote

[7] **Records**
Trade Secrets and Commercial or Financial Information

Valuable "research data" under research data exemption to Public Records Act include not only raw data, but also guiding hypotheses that structure data. West's RCWA 42.17.310(1)(h).

6 Cases that cite this headnote

[8] **Records**
In Camera Inspection; Excision or Deletion

Data and hypotheses contained in unfunded university grant proposal were properly excised from portions of proposal disclosed under Public Records Act. West's RCWA 42.17.310(1)(h).

[9] **Records**
Internal Memoranda or Letters; Executive Privilege

Purpose of "deliberative process" exemption to Public Records Act is to protect give and take of deliberations necessary to formulation of agency policy; for that reason, exemption only protects documents which are part of deliberative or policy-making process. West's RCWA 42.17.310(1)(i).

13 Cases that cite this headnote

[10] **Records**
Internal Memoranda or Letters; Executive Privilege

Unless disclosure of information regarding agency policy would reveal and expose deliberative process, as distinct from facts upon which decision is based, "deliberative process" exemption to Public Records Act does not apply. West's RCWA 42.17.310(1)(i).

5 Cases that cite this headnote

[11] **Records**
Internal Memoranda or Letters; Executive Privilege

In order to rely on "deliberative process" exemption to Public Records Act, agency must show that records contain predecisional opinions or recommendations of subordinates expressed as part of deliberative process; that disclosure would be injurious to deliberative or consultative function of process; that disclosure would inhibit flow of recommendations, observations and opinions; and that materials covered by exemption reflect policy recommendations and opinions and not raw factual data on which decision is based. West's RCWA 42.17.310(1)(i).

4 Cases that cite this headnote

[12] **Records**

Internal Memoranda or Letters; Executive Privilege

Subjective evaluations are not exempt under "deliberative process" exemption to Public Records Act if they are treated as raw factual data and are not subject to further deliberation and consideration; once policies or recommendations are implemented, records cease to be protected under this exemption. West's RCWA 42.17.310(1)(i).

3 Cases that cite this headnote

[13] Records

Internal Memoranda or Letters; Executive Privilege

Scientists' evaluation of unfunded university grant proposals known as "pink sheets" are covered by "deliberative process" exemption to Public Records Act, but only while they pertain to unfunded grant proposal; once proposal becomes funded, it becomes "implemented" for purposes of exemption, and pink sheets thereby become disclosable. West's RCWA 42.17.310(1)(i).

8 Cases that cite this headnote

[14] Records

In General; Freedom of Information Laws in General

Records

Matters Subject to Disclosure; Exemptions

Section of Public Records Act providing that examination of any specific public record may be enjoined in certain circumstances is simply injunction statute; it is not source of broad exemptions for personal privacy and governmental interests. West's RCWA 42.17.330.

17 Cases that cite this headnote

[15] Records

Matters Subject to Disclosure; Exemptions

Public Records Act contains only limited and specific disclosure exemptions. West's RCWA 42.17.250-42.17.348.

17 Cases that cite this headnote

[16] Records

Exemptions or Prohibitions Under Other Laws

If another statute does not conflict with Public Records Act, and either exempts or prohibits disclosure of specific public records in their entirety, then information may be withheld in its entirety notwithstanding Act's requirement that agencies disclose portions of records which do not come under specific exemption. West's RCWA 42.17.260(1).

49 Cases that cite this headnote

[17] Records

Exemptions or Prohibitions Under Other Laws

State Uniform Trade Secrets Act (UTSA) operated as limit independent from Public Records Act on disclosure of portions of unfunded university grant proposal that had potential economic value. West's RCWA 19.108.010(4), 42.17.260(1).

12 Cases that cite this headnote

[18] Records

Judicial Enforcement in General

Researchers may seek to enjoin release of certain portions of public records if nondisclosure of those portions is necessary to prevent harassment as defined under antiharassment statute. West's RCWA 4.24.580(2).

2 Cases that cite this headnote

[19] Records

Matters Subject to Disclosure; Exemptions

Neither people nor legislature created general exemption from Public Records Act for public

universities or for academics. West's RCWA 42.17.250-42.17.348.

2 Cases that cite this headnote

[20] States

Preemption in General

Congress may preempt state law in three basic manners: express preemption, field preemption, and conflict preemption.

6 Cases that cite this headnote

[21] Records

In General; Freedom of Information Laws in General

States

Particular Cases, Preemption or Supersession

Federal Freedom of Information Act (FOIA) did not expressly preempt Washington's Public Records Act so that unfunded university grant proposals did not have to be disclosed in their entirety, as FOIA applied by its terms only to federal agencies. 5 U.S.C.A. §§ 551(1), 552(e); West's RCWA 42.17.250-42.17.348.

4 Cases that cite this headnote

[22] Records

In General; Freedom of Information Laws in General

States

Particular Cases, Preemption or Supersession

Since Federal Freedom of Information Act (FOIA) does not apply to state agencies, there can be no federal-state conflict between FOIA and Washington's Public Records Act of kind that gives rise to conflict preemption.

7 Cases that cite this headnote

[23] Records

Exemptions or Prohibitions Under Other Laws

Bayh-Dole Act which authorizes agencies to withhold from disclosure any information disclosing any invention in which federal government owns or may own interest did not apply to animal rights group's action seeking access to unfunded university grant proposal, where no information described in Act was subject to disclosure. 35 U.S.C.A. §§ 200, 205.

1 Cases that cite this headnote

[24] Records

Exemptions or Prohibitions Under Other Laws

States

Particular Cases, Preemption or Supersession

There was no conflict for federal preemption purposes between Bayh-Dole Act which authorizes withholding from disclosure any information regarding invention in which federal government owns interest and Washington's Public Records Act, as type of information which may be withheld under Bayh-Dole Act fell within valuable formula of research data exemption to Public Records Act. 35 U.S.C.A. §§ 200, 205; West's RCWA 42.17.250-42.17.348.

5 Cases that cite this headnote

[25] Records

Regulations Limiting Access; Offenses

Confidentiality provisions of Bayh-Dole Act which authorizes withholding from disclosure any information regarding invention in which federal government owns interest applies only to federal agencies, and they merely authorize rather than mandate nondisclosure of information which would reveal invention in which federal government has right, title, or interest. 35 U.S.C.A. § 205.

[26] Copyrights and Intellectual Property

Nature of Statutory Copyright

Copyright protection does not ensure confidentiality but, rather, it only protects against unauthorized copying, performance, or creation of derivative works. 17 U.S.C.A. § 106.

1 Cases that cite this headnote

[27] **Copyrights and Intellectual Property**

Scope of Exclusive Rights; Limitations

Copyright protection does not preclude inspection of copyrighted material. 17 U.S.C.A. § 106.

1 Cases that cite this headnote

[28] **Judgment**

Evidence and Affidavits in Particular Cases

Material issue of fact as to whether coauthor of unfunded university grant proposal silently withheld comments that should have been disclosed under Public Records Act, precluding summary judgment in action by animal rights group seeking access to grant proposal, was presented by evidence of letter by coauthor wherein he stated that he would not respond to request for information pursuant to Act. West's RCWA 42.17.250-42.17.348.

1 Cases that cite this headnote

[29] **Records**

In General; Request and Compliance

Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to public records request. West's RCWA 42.17.250-42.17.348.

17 Cases that cite this headnote

[30] **Records**

In General; Request and Compliance

In order to ensure compliance with Public Records Act and to create adequate record for reviewing court, agency's response to request for documents must include specific means of identifying any individual records which are being withheld in their entirety. West's RCWA 42.17.250-42.17.348.

16 Cases that cite this headnote

[31] **Records**

Costs and Fees

Attorney fees provided to party who prevails in action against agency to inspect public record includes attorney fees incurred on appeal. West's RCWA 42.17.340(4).

8 Cases that cite this headnote

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David F. Stobaugh, Seattle, amicus curiae for respondent on Behalf of the American Civil Liberties Union.

Opinion

DURHAM, Justice.

At issue is whether information in a university researcher's unfunded grant proposal involving use of animals in scientific research must be disclosed under the laws governing disclosure of public records. The trial court held that with excision of certain exempt information contained in the proposal, the proposal is subject to disclosure. We affirm in part and reverse in part. We affirm the trial court's decision that the proposal is not exempt from disclosure in its entirety and hold that the exempt material was properly excised. However, because a genuine issue of fact exists as to whether all relevant public records were properly divulged, we remand for further consideration.

In January 1991, Progressive Animal Welfare Society (PAWS) requested a copy of an unfunded grant proposal from the University of Washington (University) pursuant to the public records portion of the public disclosure act, RCW 42.17. The grant proposal, titled "Effects of Socialization on Forebrain Development", concerns research proposed by Dr. Gene Sackett in collaboration with Dr. Linda Cork from The Johns Hopkins University. The proposed project involves the study of brain development in asocially raised rhesus monkeys ***248** in an effort to understand and ultimately treat humans engaging in self-injurious behavior.

Pursuant to University procedure, the grant proposal was reviewed at several levels, including submission to the University's grant and contract services for approval. Because the project involves the use of vertebrate animals, it was also reviewed by the University's animal care committee to ensure compliance with federal requirements. As part of the latter review, a "project review form" was prepared identifying the project title, the number and type of animals to be used, whether alternatives to animal use are available, the relevance of the project to human or animal health or biology, the reasoning for using animals, the appropriateness of use of the species and number of animals used, and the care and treatment they will receive. As the University noted at oral argument, the animal care committee meets pursuant to the Open Public Meetings Act of 1971, RCW 42.30, and the project review forms are designed to be generally disclosable, ensuring a degree of public oversight of animal care and treatment. *Cf. Progressive Animal Welfare Soc'y v. UW,* 114 Wash.2d 677, 680, 684, 790 P.2d 604 (1990) (describing status of project review forms).

Once the grant proposal was approved at the various University levels, it was submitted to the National Institutes of Health (NIH) for funding. There, unfunded grant proposals go through a confidential peer review process. A group of scientists with expertise in the area of the proposed research reviews the grant proposal. The scientists' comments are incorporated into a ****596** formal written evaluation known as a "pink sheet". Clerk's Papers (CP), at 62. This pink sheet recommends approval or disapproval and contains a funding rank, which is important because only about 20 percent of approved proposals are actually funded. The pink sheet is given to the applicant. Projects which are not funded are often revised and resubmitted, sometimes to a different funding agency.

If funding is granted, the award is made to the University on behalf of the investigator. The University obtains considerable ***249** external funding, consistently ranking as one of the leading universities in terms of dollars obtained.

Once a proposal is funded by the NIH, the grant application is made available to the public; thus, the project title, grantee institution, identity of principal investigator and amount of the award are disclosed. Also, a summary of the proposal and a budget breakdown is sent to the National Technical Information Service, United States Department of Commerce, and is available to the public. However, "[c]onfidential financial material and material that would affect patent or other valuable rights are deleted" from funded grant proposals which are requested under the Federal Freedom of Information Act. CP, at 213.

The NIH does not disclose any information about unfunded grant proposals and the "pink sheets". CP, at 203-05. The United States Department of Health and Human Services, Public Health Service grant application form instructions state that new grant applications for which awards have not been made are generally not available for release to the public, nor are the "pink sheets". CP, at 213. The peer review process is highly confidential, and breach of the standards applicable to that review and its participants may result in scientific misconduct charges being filed. CP, at 60. Moreover, the scientific community as a whole, and other universities, private and public, do not disclose information contained in unfunded grant proposals. [1]

***250** The University public records officer denied PAWS' request for disclosure. PAWS appealed to University President Gerberding, who denied the appeal by letter dated March 7, 1991. On April 3, 1991, PAWS filed suit under the public records portion of the public disclosure act seeking access to the unfunded grant proposal. *See* RCW

42.17.340(1). The University moved for summary judgment, maintaining that as a matter of law the unfunded grant proposal was exempt from disclosure in its entirety.

PAWS conceded that it was not entitled to material which might reveal valuable formulae, designs, drawings and research data, trade secrets, or other confidential data. The trial court examined the unfunded grant proposal in camera, excised such material, and ruled the rest of the document was not protected from disclosure. The trial court granted summary judgment in favor of PAWS, requiring production of the unfunded grant proposal except for the excised material. Upon a motion for clarification by PAWS, the trial court explained it had excised material from the document which, in the court's view, an educated reader could use to reveal research hypotheses or data, valuable formulae and the like.

The trial court awarded attorney fees to PAWS as the prevailing party, but declined to award a penalty under RCW 42.17.340(3). The trial court also denied PAWS' request **597 for production of certain internal University memoranda and correspondence on the ground that they were not relevant to the subject matter of the suit.

The University appealed to the Court of Appeals. PAWS cross-appealed to this court, and the University's appeal was transferred to this court.

THE PUBLIC RECORDS ACT

The public records portion of the public disclosure act, RCW 42.17.250-.348 (hereafter, the Public Records Act or the Act), requires all state and local agencies to disclose any public record upon request, unless the record falls within certain very specific exemptions. The public disclosure act *251 was passed by popular initiative, Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972), and stands for the proposition that,

> *full access* to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

(Italics ours.) RCW 42.17.010(11). [2]

[1] The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

[2] The Public Records Act "is a strongly worded mandate for broad disclosure of public records". *Hearst Corp. v. Hoppe,* 90 Wash.2d 123, 127, 580 P.2d 246 (1978). The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed. RCW 42.17.010(11); . 251; .920. Courts are to take into account the Act's policy "that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others". RCW 42.17.340(3). The agency bears the burden of proving that refusing to disclose "is in accordance *252 with a statute that exempts or prohibits disclosure in whole or in part of specific information or records". RCW 42.17.340(1). Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information". RCW 42.17.290. Finally, agencies "shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" except under very limited circumstances. RCW 42.17.270; *see also* RCW 42.17.260(6).

The University relies upon several statutory exemptions, a constitutional argument concerning academic freedom, and a claim that certain federal statutes mandating nondisclosure preempt state statutes to the contrary. We begin by clarifying certain procedural matters.

PROCEDURAL MATTERS

Turning first to the nature of appellate review under the Public Records Act, the statute specifies that "[j]udicial review of all agency actions taken or challenged under RCW 42.17.250 through 42.17.320 shall be de novo." RCW 42.17.340(3). In *Spokane Police Guild v. Liquor Control Bd.,* 112 Wash.2d 30, 35-36, 769 P.2d 283 (1989), we noted that the appellate court stands in the same position as the trial court where the record consists only of affidavits, memoranda ****598** of law, and other documentary evidence. This principle was drawn from the general rule that

> where the record both at trial and on appeal consists entirely of written and graphic material-documents, reports, maps, charts, official data and the like-and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.

Smith v. Skagit Cy., 75 Wash.2d 715, 718, 453 P.2d 832 (1969), *cited in* *Spokane Police Guild,* 112 Wash.2d at 36, 769 P.2d 283; *see also* *Brouillet v. Cowles Pub'g Co.,* 114 Wash.2d 788, 791 P.2d 526 (1990); *Dawson v. Daly,* 120 Wash.2d 782, 788, 845 P.2d 995 (1993); ***253** RCW 42.17.340(3) ("The court may conduct a hearing based solely on affidavits."). Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues. *Smith,* 75 Wash.2d at 718-19, 453 P.2d 832.

Unlike *Spokane Police Guild, Brouillet,* and *Dawson,* however, this case was decided as a matter of summary judgment. The trial court ruled that there were no disputed issues of material fact and that, as a matter of law, PAWS was entitled to disclosure of material not covered by a specific exemption or other statute. While we affirm the trial court's excisions of the records before it, we find there is a genuine issue of fact whether the University has disclosed all pertinent material. Since resolution of this issue requires an evidentiary hearing, the appropriate course under summary judgment rules is to remand this case for resolution of that factual question.

[3] PAWS contends that the University should be limited to arguing only those bases for nondisclosure cited by President Gerberding in his letter denying disclosure, since the letter constitutes final agency action under RCW 42.17.320. That section requires agencies to:

> establish mechanisms for the most prompt possible [internal] review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action for the purposes of judicial review.

RCW 42.17.320. Section .320 encourages prompt internal agency review of actions taken by an agency's public records officer. It also provides that, regardless of internal review, initial decisions become final for purposes of judicial review after 2 business days. The section does not, however, alter the fact that courts are to review agency actions de novo. Moreover, if agencies were forced to argue exhaustively all possible bases under pain of waiving the argument on review, the goal of prompt agency response might well be subverted. We therefore decline to consider only those bases cited by the University in its letter denying disclosure.

***254** SPECIFIC EXEMPTIONS

[4] We now examine the exemptions claimed by the University under the Public Records Act. The University first argues that unfunded grant proposals are protected from disclosure pursuant to RCW 42.17.310(1)(b), since compelled disclosure would be highly offensive to a reasonable person and lacks legitimate public concern. However, this exemption states only that: "Personal information in files maintained for employees ... of any public agency to the extent that disclosure would violate their right to privacy" shall be exempt from public inspection and copying.

RCW 42.17.310(1)(b). The right to privacy is, in turn, violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public". RCW 42.17.255. Unfortunately, the University does not specify the "personal information" it believes to be exempt. It is true that the disclosure of a public employee's social security number would be highly offensive to a reasonable person and not of legitimate concern to the public. Also, residential addresses and telephone numbers of employees of public agencies are independently exempt from disclosure under RCW 42.17.310(1)(u). Finally, under certain conditions the names **599 of animal researchers may be withheld. *See* RCW 4.24.580. [3] Apart from these items of information, two of which do not come under RCW 42.17.310(1)(b) in any event, nothing resembling protected "personal information" appears in the unfunded grant proposal.

[5] The University next contends that much of the unfunded grant proposal is covered by the "valuable formulae" or "research data" exemption to the Public Records Act. That exemption excludes from public inspection and copying:

> Valuable formulae, designs, drawings, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.

*255 RCW 42.17.310(1)(h). The clear purpose of the exemption is to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain. It limits this exemption to information that has been obtained by an agency within 5 years of the request for disclosure. In effect, the Public Records Act protects recently acquired intellectual property from being converted to private gain.

[6] We agree that much of the material at issue is covered by this exemption. However, the University's argument is vitiated by the fact that PAWS has waived any claim to material which comes under this exemption. While such material may be properly excised by the University, those portions which do not come within the exemption and which are not covered by any other exemption or other statute must be disclosed. *See* RCW 42.17.310(2); . 260(1).

[7] **[8]** PAWS disputes the precise scope of this exemption, and argues that the trial court excised too much material under it. However, in science, data and hypotheses are inextricably intertwined. Valuable "research data" include not only raw data but also the guiding hypotheses that structure the data. Accordingly, the trial court properly excised hypotheses and other information from which an informed reader might deduce relevant data or hypotheses. [4] Moreover, the valuable research data implicit in unfunded grant proposals is precisely the kind of information or record envisaged by this exemption. If the data or hypotheses contained in the unfunded grant proposal were prematurely released, the disclosure would produce both the private gain constituted by potential intellectual property piracy and the public loss of patent or other rights. See CP, at 204-05. We conclude the trial court properly interpreted the scope of this exemption.

[9] **[10]** *256 The University next suggests that the grant proposal is exempt under the "deliberative process" exemption, which precludes disclosure of:

> Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.

RCW 42.17.310(1)(i). The purpose of this exemption "severely limits its scope". *Hearst Corp. v. Hoppe,* 90 Wash.2d 123, 133, 580 P.2d 246 (1978). Its purpose is to "protect the give and take of deliberations necessary to formulation of agency policy." (Citation omitted.) *Hoppe,* at 133, 580 P.2d 246. For that reason, the exemption "only protects documents which are part of 'a *deliberative or policy-making* process' ". *Brouillet v. Cowles Pub'g Co.,* 114 Wash.2d 788, 799, 791 P.2d 526 (1990) (quoting *Hoppe,* 90 Wash.2d at 133, 580 P.2d 246). We have

specifically rejected the contention that this exemption applies to all documents in which **600 opinions are expressed regardless of whether the opinions pertain to the formulation of policy. *Hoppe,* at 132-33, 580 P.2d 246. *See also* *Brouillet,* 114 Wash.2d at 799-800, 791 P.2d 526 (overruling *Hafermehl v. UW,* 29 Wash.App. 366, 628 P.2d 846 (1981)). Moreover, unless disclosure would reveal and expose the deliberative process, as distinct from the facts upon which a decision is based, the exemption does not apply. *Hoppe,* 90 Wash.2d at 133, 580 P.2d 246.

[11] [12] In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based. *Columbia Pub'g Co. v. Vancouver,* 36 Wash.App. 25, 31-32, 671 P.2d 280 (1983) (citing *Hoppe,* 90 Wash.2d at 132-33, 580 P.2d 246). Subjective evaluations are not exempt under this provision if they are treated as raw factual data and are not subject to further *257 deliberation and consideration. *Hoppe,* 90 Wash.2d at 134, 580 P.2d 246. Once the policies or recommendations are implemented, the records cease to be protected under this exemption. *Brouillet,* 114 Wash.2d at 799-800, 791 P.2d 526.

[13] While the unfunded grant proposal itself does not reveal or expose the kind of deliberative or policy-making process contemplated by the exemption, the so-called "pink sheets" do. Because the pink sheets foster a quintessentially deliberative process, we hold they are exempt from disclosure under this provision, but only while they pertain to an unfunded grant proposal.[5] Once the proposal becomes funded, it clearly becomes "implemented" for purposes of this exemption, and the pink sheets thereby become disclosable.

The University next contends that unfunded grant proposals are exempt in their entirety under RCW 42.17.330, which provides in relevant part:

> The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court ... finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

The University argues that research is a vital governmental function which would be substantially and irreparably damaged by even partial disclosure of unfunded grant proposals. The University's argument misconstrues the nature of RCW 42.17.330. As its language reveals, that section merely creates an injunctive remedy, and is not a separate substantive exemption.

[14] RCW 42.17.330 is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they fall within *specific* exemptions found elsewhere in the Act. *Spokane* *258 *Police Guild v. Liquor Control Bd.,* 112 Wash.2d 30, 35-37, 769 P.2d 283 (1989). Stated another way, section .330 governs access to a remedy, not the substantive basis for that remedy.

In fact, the Public Records Act contains no general exemptions. It provides only:

> specific *statutory exemptions* from disclosure for those particular categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government if they are disclosed. These statutory exemptions were carefully drawn and have subsequently been changed and added to by the Legislature as it deemed necessary.

In re Rosier, 105 Wash.2d 606, 621, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part).

****601** The Public Records Act begins with a mandate of full disclosure of public records; that mandate is then limited only by the precise, specific, and limited exemptions which the Act provides. [6] As we noted in *Spokane Police Guild:*

[W]e start with the proposition that the act establishes an affirmative duty to disclose public records unless the records fall within *specific statutory exemptions or prohibitions.* It follows that in an action brought pursuant to the injunction statute (RCW 42.17.330), the initial determination will ordinarily be whether the information involved is in fact within one of the act's exemptions or within some other statute which exempts or prohibits disclosure of specific information or records.

(Footnote omitted. Italics ours.) 112 Wash.2d at 36, 769 P.2d 283.

Indeed, the Legislature's response to our decision in *In re Rosier, supra,* establishes that the Public Records Act contains no general "vital governmental functions" exemption. In *Rosier,* this court interpreted general language in a procedural section of the Act concerning personal privacy to create a general personal privacy exemption. ***259** 105 Wash.2d at 611-14, 717 P.2d 1353. The Legislature specifically overturned that holding. Laws of 1987, ch. 403, § 1, p. 1546. By doing so, the Legislature explicitly restored:

> the law relating to the release of public records largely *to that which existed prior to the Washington Supreme Court decision in 'In re Rosier,'* ... The intent of this legislation is to make clear that ... agencies having public records should rely *only upon statutory exemptions or prohibitions* for refusal to provide public records.

(Italics ours.) Laws of 1987, ch. 403, § 1, pp. 1546-47. Moreover, the actual changes the Legislature made reveal that section .330 is not one of the permissible statutory exemptions or prohibitions. In rejecting our holding in *Rosier,* the Legislature added the following underlined language to the Public Records Act.

> (1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, *unless the record falls within the specific exemptions of subsection (5) of this section, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records.* To the extent required to prevent an unreasonable invasion of personal privacy *interests protected by RCW 42.17.310 and 42.17.315,* an agency shall delete identifying details *in a manner consistent with RCW 42.17.310 and 42.17.315* when it makes available or publishes any public record....

Laws of 1987, ch. 403, § 3, p. 1547 (amending RCW 42.17.260). Three times the changes mention the sources of specific exemptions or prohibitions on which alone nondisclosure may be predicated. Each time the changes fail to mention RCW 42.17.330 as a source of such exemptions or prohibitions. We do not believe that the Legislature meant to include section .330 as an independent statutory source of exemptions, yet somehow neglected to specifically mention it along with sections .310 and .315-its nearest statutory neighbors at the time.

Nor does it make sense to imagine the Legislature believed judges would be better custodians of open-ended exemptions because they lack the self-interest of agencies. The Legislature's response to our opinion in *Rosier* makes ***260** clear that it does not want judges any more than agencies to be wielding broad and malleable exemptions. The Legislature did not intend to entrust to either agencies or judges the extremely broad and protean exemptions that would be created by treating section .330 as a source of substantive exemptions.

The University's interpretation of section .330 is mistaken for another reason. If section **602 .330 were a source of broad exemptions for personal privacy and vital governmental interests, it would render the carefully crafted exemptions of RCW 42.17.310 superfluous. A trial court or appellate court reviewing de novo could simply declare records covered by personal privacy or vital governmental interests without ever having to invoke or construe the exemptions of RCW 42.17.310. We will not interpret statutes in a manner that renders portions of the statute superfluous. *Lutheran Day Care v. Snohomish Cy.*, 119 Wash.2d 91, 829 P.2d 746 (1992) (statutes should not be interpreted in such a way as to render any portion meaningless, superfluous, or questionable), *cert. denied,* 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). The University's interpretation of section .330 relegates the specific exemptions in RCW 42.17.310 to the status of optional guidelines.

Finally, the Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly. RCW 42.17.010(11); .251; .920. The Legislature leaves no room for doubt about its intent:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.17.251.

[15] In sum, the Public Records Act contains only limited and specific exemptions. Treating section .330 as an exemption, *261 that is, as a method of withholding otherwise disclosable public records, is the exact functional equivalent of the error underlying *Rosier.* It also contradicts the Legislature's command to construe the exemptions narrowly and would render portions of the Act superfluous. We conclude that RCW 42.17.330 does not require withholding the unfunded grant proposals in their entirety. [7]

"OTHER STATUTES" EXEMPTION

In general, the Public Records Act does not allow withholding of records in their entirety. Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions of records which do not come under a specific exemption must be disclosed. RCW 42.17.310(2). [8]

[16] There is an exception to this redaction requirement. The "other statutes" exemption incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records. RCW 42.17.260(1). [9] In other words, if such other statutes mesh with the Act, they operate *262 to supplement it. However, in the event of a **603 conflict between the Act and other statutes, the provisions of the Act govern. RCW 42.17.920. Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. [10] The rule applies only to those exemptions explicitly identified in other statutes; its language does not allow a court "to imply exemptions but only allows specific exemptions to stand". *Brouillet v. Cowles Pub'g Co.*, 114 Wash.2d 788, 800, 791 P.2d 526 (1990).

[17] Two state statutes qualify as "other statutes" in the present context, although neither justifies withholding the grant proposal in its entirety. First, the State Uniform Trade Secrets Act (UTSA) defines a trade secret expansively as,

> information, including a formula, pattern, compilation, program, device, method, technique, or process that:
>
> (a) Derives independent economic value, *actual or potential,* from not being generally known ... and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Italics ours.) RCW 19.108.010(4). The UTSA also provides that "[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order", RCW 19.108.020(3), and provides broad means for courts to preserve the secrecy of trade secrets. RCW 19.108.050. Actual or even threatened misappropriation may be enjoined. RCW 19.108.020(1). Given the *potential* for unfunded biomedical grant proposals to eventuate in trade secrets as broadly defined by the statute, this "other statute" operates as an independent limit on disclosure of portions of the records at issue here that have even potential economic value. The Public Records Act is simply an improper means to acquire knowledge of a trade secret. The Legislature recently emphasized this in a slightly different context:

***263** The legislature ... recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it *a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.*

(Italics ours.) Laws of 1994, ch. 42, § 1, p. 130.

[18] Second, the Legislature has passed an anti-harassment statute specifically geared to animal researchers. RCW 4.24.580. That section provides that:

> Any individual having reason to believe that he or she may be injured by the commission of an intentional tort under RCW 4.24.570 or 4.24.575 may apply for injunctive relief to prevent the occurrence of the tort. Any individual who owns or is employed at a research or educational facility or an agricultural production facility where animals are used for research, educational, or agricultural purposes who is harassed, or believes he or she is about to be harassed, by an organization, person, or persons whose intent is to stop or modify the facility's use or uses of an animal or animals, may apply for injunctive relief to prevent the harassment.

"Harassment" is, in turn, defined as:

> any threat, without lawful authority, that the recipient has good reason to fear will be carried out, that is knowingly made for the purpose of stopping or modifying the use of animals, and that either (a) would cause injury to the person or property of the recipient, or result in the recipient's physical confinement or restraint, or (b) is a malicious threat to do any other act intended to substantially cause harm to the recipient's mental health or safety.

RCW 4.24.580(2). Quite clearly, the Legislature intended to forestall the kinds of threats, harassment, and intimidation that have become all too familiar to those attempting to carry out legitimate biomedical ****604** research. We hold that researchers may seek to enjoin the release of certain portions of public records if the nondisclosure of those portions is necessary to prevent harassment as defined under the anti-harassment statute. Though the names of the researchers in the present case have already been divulged, the names of researchers or certain other information in future grant proposals need not be divulged under the Public ***264** Records Act, provided the anti-harassment statute is properly invoked and its criteria met.

ACADEMIC FREEDOM

The University argues that the grant proposal should be exempt in its entirety because disclosure of a researcher's preliminary ideas violates a putative constitutional privilege of academic freedom. First, to the extent the preliminary ideas are covered by the valuable research data, trade secrets, or deliberative process exemptions, this argument does not apply. Second, even if it did apply, we are not convinced the extension of freedom of speech doctrine advocated by the University is either required or advisable. As the United States Supreme Court remarked in its only case on point:

> In our view, petitioner's reliance on the so-called academic-freedom cases

> is somewhat misplaced. In those cases government was attempting to control or direct the *content* of the speech engaged in by the university or those affiliated with it.

University of Pa. v. EEOC, 493 U.S. 182, 197, 110 S.Ct. 577, 586, 107 L.Ed.2d 571 (1990). The Public Records Act does not impose any content-based restrictions on speech. We cannot but agree with the Supreme Court when it stated:

> In essence, petitioner asks us to recognize an *expanded* right of academic freedom to protect confidential peer review materials from disclosure. Although we are sensitive to the effects that content-neutral government action may have on speech, and believe that burdens that are less than direct may sometimes pose First Amendment concerns, we think the First Amendment cannot be extended to embrace petitioner's claim.

(Citations omitted.) 493 U.S. at 199, 110 S.Ct. at 587.

[19] Moreover, from the point of view of the First Amendment, the speech of employees of the University is not somehow superior to the speech of other agency employees. Even assuming there were plausible grounds for doing so, it would be difficult to grant special First Amendment protection to public university employees while denying it to other state employees. It is true that courts traditionally have been reluctant to interfere unnecessarily in the internal functioning ***265** of universities. *University of Pa.,* at 199, 110 S.Ct. at 587. However, the present situation is different. The Public Records Act was enacted by popular initiative and has been amended numerous times by the Legislature. Neither the people nor the Legislature created a general exemption from the Act for public universities or for academics. We see no constitutionally compelling reason to do so.

FEDERAL PREEMPTION

[20] The University argues that various federal laws preempt the Public Records Act. Congress may preempt state law in three basic manners: express preemption, field preemption, and conflict preemption. *See Department of Ecology v. PUD 1,* 121 Wash.2d 179, 192-99, 849 P.2d 646 (1993), *aff'd,* 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). We have recently summarized preemption principles:

> Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 326, 858 P.2d 1054 (1993) (citing *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991)). We have also repeatedly emphasized that

> ****605** [T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.... State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.

(Footnotes and citations omitted.) *Fisons,* 122 Wash.2d at 327, 858 P.2d 1054.

[21] The University first claims that the Federal Freedom of Information Act (FOIA) preempts state law to the contrary, and mandates nondisclosure of the grant proposals in their

entirety. FOIA does not contain an express preemption provision. To the contrary, FOIA applies by its terms only to federal agencies. *See* 5 U.S.C. §§ 552(e); 551(1) (defining ***266** agency). Indeed, given its explicit definition of "agency", FOIA may be said to expressly decline preemptive effect. In any event, the University fails to explain why FOIA's provisions, applicable on their face only to federal agencies, should apply to a state university.

[22] Nor does FOIA so comprehensively or pervasively occupy the field of public disclosure as to raise a colorable claim of field preemption or conflict preemption.
A university which receives federal grants is not federal and is not covered [by FOIA]....

The FOIA is a *federal* statutory enactment imposing federal burdens on federal agencies. State and local governmental bodies are not covered, as they are not federal agencies.

(Footnotes omitted.) James T. O'Reilly, *Federal Information Disclosure* § 4.02, at 4-7 (2d ed. 1994); *see also* § 4.02, at 4-4 through 4-5 (listing state agencies in list of "typical exclusions" of entities from FOIA jurisdiction). As we have previously noted, while the Public Records Act closely parallels the Federal Freedom of Information Act, nevertheless the "state act is more severe than the federal act in many areas". *Hearst Corp. v. Hoppe,* 90 Wash.2d 123, 129, 580 P.2d 246 (1978). Moreover, because FOIA simply does not apply to state agencies, there can be no federal-state conflict of the kind that gives rise to conflict preemption. [11]

[23] **[24]** **[25]** The University next relies on the Bayh-Dole Act. The Bayh-Dole Act addresses ownership of federally funded inventions, and authorizes federal agencies to withhold from disclosure any information disclosing any invention in which the federal government owns or may own right, title, or ***267** interest for a reasonable time for a patent application to be filed. 35 U.S.C. §§ 200, 205. For three reasons this does not apply. First, no information described in the Bayh-Dole Act is subject to disclosure under the trial court's order. Second, the type of information which may be withheld under that act falls within the state valuable formulae or research data exemption, so there is no conflict between the federal and state acts. Both scrupulously protect information pertaining to valuable intellectual property, and, without a direct clash between federal and state law, the preemption doctrine is not relevant. Third, the confidentiality provisions of the Bayh-Dole Act apply only to federal agencies, and they merely authorize rather than mandate nondisclosure of information which would reveal any invention in which the federal government has a right, title, or interest. 35 U.S.C. § 205.

The University also appeals to federal patent law. As we indicated above, trade secrets and valuable formulae or research data are protected from disclosure under the State Public Records Act. Moreover, PAWS has waived any access to proprietary or patent-related information. Because the trial ****606** court excised anything resembling patentable information or ideas, and because PAWS waived access to the applicability of patent law to the Public Records Act, the issue is not properly before us.

[26] **[27]** Finally, the University argues that federal copyright law forbids even partial disclosure. Unfortunately, the University fails to explain if the material remaining after the trial court's redaction may be copyrighted at all. Moreover, copyright protection does not ensure confidentiality. Instead, it only protects against unauthorized copying, performance, or creation of derivative works. 17 U.S.C. § 106. To put the matter concisely, copyright protection does not preclude inspection of copyrighted material.

REQUESTS FOR PRODUCTION

PAWS appeals the trial court's ruling regarding three documents in addition to the unfunded grant proposal. [12] ***268** These documents, together with the proposal, were sealed by the trial court under a protective order.

During pretrial discovery, PAWS sought to obtain any documents exchanged between Dr. Sackett, who is the co-author of the grant proposal, and various other University employees concerning the release to PAWS of the grant proposal at issue. The University eventually produced three documents it considered responsive to PAWS' requests for production, and the trial court reviewed these documents in camera. The University contended, and the trial court agreed, that the documents were not relevant to PAWS' public records request because the three documents were created several months after the initial request.

[28] To the contrary, the documents cast a backward light on the University's response to the January 9, 1991, request. The documents include a letter from Dr. Sackett in which

he clearly states that he will not respond to requests for information pursuant to the Public Records Act. [13] Refusal to comply with the Public Records Act, however well intended, is not an appropriate response to legislative mandate.

We acknowledge that some "animal rights" activists have acted improperly and, on occasion, illegally. However, the protective measures of the anti-harassment statute provide a powerful shield against harassment as well as a sword against harassers. RCW 4.24.580 (providing for injunctive relief from harassment); RCW 4.24.570 (providing for joint and several liability on the part of persons or organizations planning or assisting in acts against animals in research or educational facilities). The anti-harassment statute sends a ***269** clear message that threats, harassment and intimidation will not be tolerated. [14]

An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal. [15] ****607** There is, then, at least a question of fact whether Dr. Sackett silently withheld documents that should have been disclosed pursuant to PAWS' January 9, 1991, records request.

There appears to be an additional question of fact. For reasons that are not apparent from the record, portions of the grant proposal were not submitted to the trial court. An affidavit in the record refers to "the data in the Preliminary Studies and Materials and Methods portions of this [grant] application", CP, at 254, yet no such section appears in the 23-page sealed proposal before us. Indeed, a comparison of the table of contents of the grant with the sealed proposal reveals that only section one was submitted. See CP, at 482. The whole of section two, titled "Research Plan", is missing from the record. Finally, though only 23 pages of the grant proposal are in the record, the grant proposal had at least 55 pages. [16] See CP, at 529.

[29] ***270** The Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request. [17] The statute explicitly mandates that:

> Agency responses refusing, *in whole or in part,* inspection of *any* public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to *the record withheld.*

(Italics ours.) RCW 42.17.310(4). Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. *See* *Fisons,* 122 Wash.2d at 350-55, 858 P.2d 1054. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

[30] ***271** The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency's response to a requester must include specific means of identifying any individual records which are being ****608** withheld in their entirety. [18] Not only does this requirement ensure compliance with the statute and provide an adequate record on review, it also dovetails with the recently enacted ethics act.

ATTORNEY FEES AND PENALTIES

[31] The Public Records Act provides, in part:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record ... shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.17.340(4). Attorney fees incurred on appeal are included. *Progressive Animal Welfare Soc'y v. UW,* 114

Wash.2d 677, 690, 790 P.2d 604 (1990). Because we affirm the excisions made by the trial court, we remand to the trial court for a determination of the attorney fees due PAWS. The trial court may determine PAWS' attorney fees and allowable costs both at the trial court and on appeal. *See* 114 Wash.2d at 690-91, 790 P.2d 604; RAP 18.1(i).

As to penalties, the statute specifies that "it shall be within the discretion of the court" to award to a requester who prevails against an agency not less than $5 and not more than $100 for each day the requester was denied the right to inspect or copy the public record. RCW 42.17.340(4). Both parties invite this court to create a standard governing imposition of penalties in public records cases. Because this case is before us on summary judgment, and because we ***272** remand, we decline to create a standard at this time. We note only that, as we have previously observed, " 'strict enforcement' of fees and fines will discourage improper denial of access to public records." 114 Wash.2d at 686, 790 P.2d 604 (*quoting Hearst,* 90 Wash.2d at 140, 580 P.2d 246).

CONCLUSION

While the records requested by PAWS are in large part protected from disclosure, the grant proposal at issue here does not come within an exemption that authorizes withholding it in its entirety. Therefore, we affirm the trial court's decision to disclose appropriate portions of the grant proposal. We remand to the trial court for a factual determination of whether any other relevant records were silently withheld, and for a determination of attorney fees.

GUY and MADSEN, JJ., concur.

ANDERSEN, Chief Justice (concurring with the majority).
No organization should be able to use the state public disclosure act [1] (Act) to interfere with legitimate, potentially life-saving, medical research and I abhor such action. I find compelling the University's position that premature revelation of information about potential research projects could chill future research efforts.

That said, I also concede that the law as the majority declares it is correct. It is the duty of this court to uphold the law as enacted by the people of this state unless it is unconstitutional. We have no right to substitute our judgment for the judgment of either the duly elected legislators of this state or that of the people when exercised through the initiative process. [2] As much as I would like to agree with the result reached in Justice Brachtenbach's dissent, I find no principled way to do so. I fear that the creation of a broad and general exception to the Act, as envisioned by the dissent, ***273** would eviscerate the Act. Although the dissent's construction of the Act might result in a wise outcome in this present case, it is too broad and I believe it would go far toward destroying the very heart of the public records portion of the ****609** public disclosure act. Any response to the problem presented by this case must come from the Legislature. The proper solution lies not in a strained construction of the statute by this court, but in narrow exceptions to disclosure carefully crafted by the legislature to curb the misuse of the Act. As I explained some years ago in my dissenting decision in *In re Rosier,* 105 Wash.2d 606, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part):

The state freedom of information act provides specific *statutory exemptions* from disclosure for those particular categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government if they are disclosed. These statutory exemptions were carefully drawn and have subsequently been changed and added to by the Legislature as it deemed necessary.

Rosier, 105 Wash.2d at 621, 717 P.2d 1353.

If the Legislature finds that the disclosure of parts of unfunded grant proposals will seriously hamper legitimate medical research, then the Legislature has every right to enact protective exemptions from disclosure. As I also noted some years ago in another setting, suffice it to say the Legislature is the appropriate forum in which to do battle on this issue. *See Caminiti v. Boyle,* 107 Wash.2d 662, 675, 732 P.2d 989 (1987).

I therefore concur with the law as explained by the majority.

JOHNSON, J., concurs.

BRACHTENBACH, Justice (dissenting).
The majority overrules our 1993 unanimous holding in *Dawson v. Daly,* 120 Wash.2d 782, 845 P.2d 995 (1993).

To avoid a direct clash and inconsistency with the holding of *Dawson,* the majority simply characterizes the *Dawson* holding as dicta. Majority, at 602, n. 7.

***274** The majority makes no analysis of what *Dawson* actually said and held. It asserts that the *Dawson* "dicta" found an independent source of an *exemption* in RCW 42.17.330. *Dawson* made no such holding.

The majority's cavalier dismissal of *Dawson* reveals the fundamental confusion and error in the majority's analysis. RCW 42.17.330 does not create an *exemption* in addition to those set forth in other sections of the statute.

First, looking at the majority's characterization of the *Dawson* holding as "dicta", the language of the *Dawson* opinion disproves the majority's conclusion which is made without any pretense at analysis of the issues and holding in *Dawson.* That opinion states: "We *hold* that RCW 42.17.330 *does create* an independent *basis* upon which a *court may* find that disclosure is not required". (Some italics mine.) *Dawson,* at 794, 845 P.2d 995. In fact, *Dawson* went on to provide that if the trial court on remand found the requirements of RCW 42.17.330 to be met, it should enter an appropriate injunction. That hardly smacks of dicta.

Second, the majority's analysis collapses when RCW 42.17.330 is viewed, as it must be, not as an *exemption,* but as an independent basis for a court to enjoin the disclosure of *specific* documents or parts thereof. That is precisely what *Dawson* held and what the statute itself provides.

By searching RCW 42.17.330 for a separate *exemption* the majority misses the point entirely. Looking at the various statutory exemptions, one finds they relate to categories, *e.g.,* RCW 42.17.315-.31902. On the other hand, by its language, section .330 relates only to "any specific public record". We unanimously recognized this difference which the majority now ignores. We said: "However, the protection provided by RCW 42.17.330 differs from that provided by the exemptions in RCW 42.17.310(1) [the exemption there urged]." *Dawson,* at 794, 845 P.2d 995.

When the distinction is drawn, as the statute mandates, between statutory exemptions and the court's authority under section .330, the majority's citation of legislative amendments of *exemptions* becomes irrelevant.

***275** If section .330 means only what the majority concludes, the statute would be unnecessary because exemptions would exist in other sections of the statute. If section .330 ****610** is to have any meaning, it must grant, not an exemption, but an independent *basis,* as clearly held in *Dawson,* to enjoin disclosure as to specific records when its demanding conditions are met. An exemption is absolute; section .330 is a grant of individualized discretionary authority.

This critical distinction can be easily shown. RCW 42.17.310(1)(s) *exempts* from disclosure membership lists of camping resorts, condominiums, etc., when in the possession of the Department of Licensing. That is a true exemption which can be asserted by the agency. There is no balancing of interests and no requirement for nondisclosure except that the document be that described in the exemption.

In stark contrast, section .330 relates not to a category of documents, but to a *specific* document. The court cannot withhold disclosure unless it finds "such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." RCW 42.17.330.

It makes no sense at all to give the court the authority provided in section .330 if a document is provided an *exemption* by another section of the statute.

There are no disputed facts and our review is *de novo.* I would hold the obvious: biomedical research, including the use of animals under the rigid conditions present, is a vital governmental research function of the University. The Legislature has recognized that fact. RCW 9.08.080. The record shows that animal research is heavily regulated at the federal level to ensure humane treatment of animals and their use only in limited circumstances.

The record also satisfies the requirement that this vital governmental function would be substantially and irreparably damaged through disclosure of unfunded grant proposals. The record is replete with uncontradicted proof that disclosure will have a profound chilling effect on biomedicalresearch ***276** at the University. Particularly damaging is the effect of

disclosure upon collaborative efforts with researchers outside the University. The record is uncontradicted that there will be a similar loss of collaboration with industry.

Finally, disclosure is not in the public interest. The disclosure mandated by the majority will severely disadvantage the University in its funding efforts, and therefore its research efforts-a result clearly contrary to the public interest and human beings who have benefited greatly from such research.

The propriety of use of animals in research is not before the court. I recognize the deeply felt opposition of some persons to such research, but the Legislature and Congress have recognized that animal research is of great value to the people and must be protected. Plaintiff seeks information not for the sake of knowledge, but to impede and if possible destroy a method of vital research. I do not quarrel with the right of Plaintiff to use every resource to accomplish its purpose, but this court need not blindly assist by misreading the statute and overruling *Dawson.* If *Dawson* does not represent a proper interpretation of RCW 42.17.330, why did the Legislature not amend section .330 in its 1993 or 1994 sessions? *Dawson* clearly held contrary to what the majority now holds, but for two sessions the Legislature acquiesced. The lack of legislative repudiation is highly significant.

I would apply RCW 42.17.330, as unanimously interpreted in *Dawson* in February 1993, and reverse.

DOLLIVER and UTTER, JJ., concur.

All Citations

125 Wash.2d 243, 884 P.2d 592, 95 Ed. Law Rep. 711

Footnotes

1 See CP, at 203-05 (Declaration of Joanne Belk, Acting Freedom of Information Officer of the National Institutes of Health, Department of Health and Human Services); CP, at 214-15 (Declaration of C. Frederick Bentley II, Director, Sponsored Projects Office, Stanford University); CP, at 216-18 (Declaration of David A. Blake, Senior Associate Dean, The Johns Hopkins University School of Medicine); CP, at 246-47 (Declaration of George H. Dummer, Director, Office of Sponsored Programs at the Massachusetts Institute of Technology); CP, at 267-68 (Declaration of Karl Hittelman, Associate Vice Chancellor, Academic Affairs, University of California at San Francisco); CP, at 269-70 (Declaration of Jack Lowe, Director, Grant and Contracts Office, Cornell University); CP, at 292-93 (Declaration of Henry Pfischner, Associate Director, Sponsored Programs and Contracts Office, Pennsylvania State University); CP, at 456-57 (Declaration of Richard P. Seligman, Associate Director, Office of Grant and Contract Administration, University of California, Los Angeles); CP, at 461-62 (Declaration of Alan Steiss, Director, Division of Research Development and Administration, University of Michigan).

2 In order to implement its policy of full access to public records, the Public Records Act mandates that:
Each agency, in accordance with published rules, *shall make available* for public inspection and copying *all public records,* unless the record falls within the specific exemptions of subsection (6) of this section, RCW 42.17.310, 42.17.315, or other statute which exempts or prohibits disclosure of specific information or records.
(Italics ours.) RCW 42.17.260(1).

3 The protections afforded researchers under RCW 4.24.580 are discussed in detail, *infra* at 603-604.

4 The exemption creates a 5-year window in which valuable research data may be used exclusively by the agency, without the threat of forced disclosure under the Act. Because the value of biomedical research data inheres in the hypotheses that ultimately generate the research data, it makes little sense to say that the data may be withheld but the hypotheses must be disclosed. Moreover, in the intensely competitive atmosphere of modern biomedical research, budget breakdowns, in combination with information disclosed in the project review forms, might be used to glean valuable information about the proposed research.

5 Of course, merely raw factual data contained in the pink sheets and not covered by any other exemption (such as the valuable research data exemption) is disclosable even where the grant proposal remains unfunded. *See Brouillet,* 114 Wash.2d at 800, 791 P.2d 526.

6 While generally mandating full disclosure, the Act is not without exemptions from disclosure. Since its adoption, the number of exemptions has increased from 10 in the original initiative to 40-odd exemptions today. *Compare* Laws of 1973,

ch. 1 *with* RCW 42.17.310-.31902. Notwithstanding the increasing number of specific exemptions, the Legislature has never adopted an all-purpose or open-ended exemption. To the contrary, the Act's exemptions are highly specific, limited and carefully crafted. *See* RCW 42.17.310(1)(a)-(ee); .312-.31902.

7 We decline to endorse our dicta in *Dawson v. Daly,* 120 Wash.2d 782, 845 P.2d 995 (1993) that section .330 creates an independent source of exemptions. *Dawson,* at 793-94, 845 P.2d 995. *Dawson* involved a number of different kinds of records and a number of specific exemptions. We held that the majority of requested documents were covered by the work product exemption or the employee privacy exemption. *Dawson,* at 792, 794-99, 845 P.2d 995; RCW 42.17.310(1)(j), (1)(b). Our brief and peripheral discussion of section .330 was contingent on the trial court finding on remand that some of the documents did not fall within the scope of the work product exemption. In any event, any implication that section .330 creates an independent exemption for vital governmental interests is directly at odds with the Legislature's thrice-repeated demand that exemptions be narrowly construed. RCW 42.17.010(11); .251; . 920. Further, such an interpretation, whether in dicta or not, replicates precisely the error of *Rosier* and ignores the legislative response to *Rosier.*

8 This requirement applies by its terms only to those exemptions at RCW 42.17.310. The 10 exemptions listed in RCW 42.17.312-.31902 are therefore not subject to the redaction requirement of RCW 42.17.310(2).

9 RCW 42.17.260(1) provides, in relevant part:

"Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, RCW 42.17.310, 42.17.315, *or other statute* which exempts or prohibits disclosure of specific information or records." (Italics ours.)

10 We do not now decide whether a statute outside of RCW 42.17 "conflicts" with the Public Records Act if the other statute merely overlaps with or encompasses an exemption within the Act.

11 The University argues that federal "policy" exempts unfunded grant proposals in their entirety, and that this policy somehow has preemptive effect. The University's support for this assertion is testimony from the acting FOIA officer at the National Institutes of Health. CP, 203-13. The FOIA officer in turn relies on 45 C.F.R. §§ 5.65 and 5.67, which regard FOIA's commercial and personal privacy information exemptions. While we have recognized some cases where federal regulations preempt state statutes, those cases involve express preemption. *See* *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wash.2d 299, 327 n. 41, 858 P.2d 1054 (1993). The regulations cited by the FOIA officer contain no express preemption provisions. Moreover, given FOIA's definition of "agency", any federal agency which promulgated regulations purporting to bind state agencies would be acting ultra vires.

12 PAWS made its public records request on January 9, 1991. The three documents were created in June 1991. The request asked for "any and all documents constituting, associated with, and related to" the unfunded grant proposal. CP, at 8.

13 The letter from Dr. Sackett describes the continuing harassment to which he has been subjected as an animal researcher. It goes on to describe the fear engendered in researchers by attacks on research facilities and personal attacks. However, the letter also states in part, "I will not reply to requests such as this regardless of any court decisions, fines, or possibilities of imprisonment for not complying with our state's public disclosure laws."

14 As indicated above, the anti-harassment statute qualifies as an "other statute" for purposes of the Public Records Act. Under it, the names of researchers may be withheld in appropriate circumstances. Here, the University has already disclosed the identity of the letter's author. However, the nature of the letter is such that its nondisclosure may be warranted under the anti-harassment statute. As this involves a factual inquiry, it is best reserved for the trial court on remand. The two other sealed documents (CP, at 628-30) are not covered by any exemption, and should be disclosed on remand.

15 The Legislature recently enacted a comprehensive act relating to ethics in public service which implicitly recognizes this very fact by making silent withholding an ethical violation.

(4) No state officer or state employee may intentionally conceal a record if the officer or employee knew the record was required to be released under chapter 42.17 RCW, was under a personal obligation to release the record, and failed to do so. This subsection does not apply where the decision to withhold the record was made in good faith.

Laws of 1994, ch. 154, § 105, p. 742. The provision takes effect January 1, 1995. Laws of 1994, ch. 154, § 319, p. 769.

16 The missing material may be the result of some agreement between the University and PAWS that has not been made part of the record. This would appear to be unlikely, however. See CP, at 336. In any event, this presents an issue of fact to be resolved by the trial court on remand.

17 The University suggests that an agency's decisionmaking process concerning whether to release a public record is generically insulated from pretrial discovery. We need not address this in depth. As we have previously noted, "leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." *Hearst Corp. v. Hoppe,* 90 Wash.2d 123, 131, 580 P.2d 246 (1978). The agency's decision not to disclose records, and the grounds for that decision, are precisely the subject matter of a suit brought under the Public Records Act. *See* RCW 42.17.340(1). Absent a showing that a given record is covered by a specific exemption or other statute, the record is disclosable. Specific limitations on pretrial discovery, such as the attorney work product privilege, are covered by RCW 42.17.310(1)(j). Of course, the court may decide to conduct a hearing on disputed public records based solely on affidavits. RCW 42.17.340(3). This may include affidavits of decisionmakers that they have not silently withheld relevant records. *See* *Citizens To Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971) (court may require administrative officials to give testimony where there are no formal findings and examining decisionmakers may be only way to ensure effective judicial review.)

18 The identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content. Where use of any identifying features whatever would reveal protected content, the agency may designate the records by a numbered sequence.

1 RCW 42.17.250-.348.

2 *In re Rosier,* 105 Wash.2d 606, 619, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part).

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2019 WL 5699937
Only the Westlaw citation is currently available.

Missouri Court of Appeals, Western District.

Kimberly HARPER and Sharon Kay Harper, Appellants,
v.
MISSOURI STATE HIGHWAY PATROL, et al., Respondents.

WD 82465
|
OPINION FILED: November 5, 2019

Synopsis

Background: Family of deceased law enforcement officer, who was shot in his home, brought action seeking an injunction under the Missouri Sunshine Law against the state patrol after it refused to disclose records relating to the shooting that were in part derived from FBI records from the same incident. Following a bench trial, the Circuit Court, Cole County, Jon E. Beetem, J., determined that the records were protected from disclosure under the Federal Freedom of Information Act (FOIA). Family appealed.

Holdings: The Court of Appeals, Special Division, Thomas H. Newton, P.J., held that:

[1] state highway patrol's written-narratives based on FBI records did not fall within FOIA's purview;

[2] copy of FBI report in state patrol's records was not federal agency record exempt from disclosure under FOIA; and

[3] state patrol's records relating to investigation were public records subject to disclosure under Missouri Sunshine Law.

Reversed.

Procedural Posture(s): On Appeal; Motion for Permanent Injunction.

West Headnotes (25)

[1] **Appeal and Error**
Declarations of law
Appeal and Error
Judge as factfinder below
Appeal and Error
Against Weight of Evidence

Appellate court will affirm the trial court's judgment in a bench trial unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law.

[2] **Appeal and Error**
Statutory or legislative law

In a bench trial, the trial court's application of statutory requirements is a question of law rather than fact; therefore, the appellate court reviews the trial court's application of statutory requirements de novo.

[3] **States**
Conflicting or conforming laws or regulations

Under the Supremacy Clause, state laws and constitutional provisions are preempted and have no effect to the extent they conflict with federal laws. U.S. Const. art. 6, cl. 2.

[4] **States**
Conflicting or conforming laws or regulations
States
Occupation of field

Federal law can preempt state law expressly, by implication through field preemption, or when a state law conflicts with federal law. U.S. Const. art. 6, cl. 2.

[5] **States**
Congressional intent

A state law is expressly preempted by federal law when Congress enacts a statute containing an express preemption provision. U.S. Const. art. 6, cl. 2.

[6] **States**
Occupation of field

"Field preemption" occurs when a state regulates conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. U.S. Const. art. 6, cl. 2.

[7] **States**
Occupation of field

In the context of field preemption, the intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. U.S. Const. art. 6, cl. 2.

[8] **States**
State police power

A court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find federal law preemption. U.S. Const. art. 6, cl. 2.

[9] **States**
Congressional intent

States
State police power

When applying federal law preemption analysis, courts should assume that the historic police powers of the states are not superseded, unless that was the clear and manifest purpose of Congress. U.S. Const. art. 6, cl. 2.

[10] **States**
Congressional intent

To determine whether state law is preempted by a federal statute, the court will examine the text and structure of the federal statute. U.S. Const. art. 6, cl. 2.

[11] **Records**
Matters Subject to Disclosure; Exemptions

For materials requested under the Freedom of Information Act (FOIA) to qualify as agency records two requirements must be satisfied; first an agency must either create or obtain the requested materials as a prerequisite and second the agency must be in control of the requested materials at the time of the FOIA request is made. 5 U.S.C.A. §§ 552, 552(f)(2).

[12] **Records**
Matters Subject to Disclosure; Exemptions

The Freedom of Information Act (FOIA) applies to records which have been in fact obtained, and not to records which merely could be obtained. 5 U.S.C.A. § 552.

[13] **Records**
Matters Subject to Disclosure; Exemptions

For materials requested under the Freedom of Information Act (FOIA) to be protected from disclosure, a federal agency must be in control of the requested materials at the time a FOIA request is made because FOIA does not cover information in the abstract. 5 U.S.C.A. § 552.

[14] **Records**
Matters Subject to Disclosure; Exemptions

For purposes of applying the Freedom of Information Act (FOIA), a federal agency has "control" over records when the materials have come into the agency's possession in the

legitimate conduct of its official duties. 5 U.S.C.A. § 552.

[15] Records

Investigatory or law enforcement records

State highway patrol's written-narratives of investigation related to shooting of law enforcement officer did not fall within the Freedom of Information Act's (FOIA) purview, although written-narratives were based on FBI reports, where the records were not created or obtained by the FBI and were never in the FBI's possession. 5 U.S.C.A. § 552.

[16] Records

Matters Subject to Disclosure; Exemptions

Copy of FBI report in state highway patrol's records, which related to shooting of law enforcement officer, was not a federal agency record exempt from disclosure under Freedom of Information Act (FOIA), even if report was created by federal agency and came into agency's possession in legitimate conduct of official duties, where there was no dispute that report was retained by state patrol. 5 U.S.C.A. § 552.

[17] Records

In general; freedom of information laws in general

States

Particular cases, preemption or supersession

The Freedom of Information Act (FOIA) does not preempt the Missouri Sunshine Law, which governs disclosure of state public records. 5 U.S.C.A. § 552; Mo. Ann. Stat. § 610.010 et seq.

[18] Records

Matters Subject to Disclosure; Exemptions

The Freedom of Information Act (FOIA) is designed to insure virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the statutory exemptions. 5 U.S.C.A. § 552.

[19] Records

In general; freedom of information laws in general

The Missouri Sunshine Law, which governs state public records production requests, embodies Missouri's commitment to open government and is to be strictly construed liberally in favor of open government to promote this public policy.

Mo. Ann. Stat. § 610.010 et seq.

[20] Records

In general; freedom of information laws in general

Under the Missouri Sunshine Law, which governs public records production requests, a "public record" is defined as any record, whether written or electronically stored, retained by or of any public governmental body; meetings, records, votes, actions, and deliberations of public governmental bodies are accessible to the public except when otherwise provided by law.

Mo. Ann. Stat. §§ 610.011, 610.100.

[21] Records

In general; freedom of information laws in general

When interpreting Missouri Sunshine Law, which governs public records production requests, the plain ordinary meaning of the word "retain" is to hold or continue to hold in possession or use, continue to have, use, recognize, or accept maintain in one's keeping is used. Mo. Ann. Stat. § 610.010 et seq.

[22] Records

Matters Subject to Disclosure; Exemptions

State highway patrol's records relating to investigation of shooting of law enforcement

officer were public records subject to disclosure under Missouri Sunshine Law, even if records contained FBI report and narratives derived from other FBI reports, where FBI transmitted record to state patrol and there was no dispute that state patrol retained record. Mo. Ann. Stat. §§ 610.010, 610.011.

[23] Records

Matters Subject to Disclosure; Exemptions

For purposes of public access to government records under Missouri Sunshine Law, a record may be held by multiple government agencies at the same time. Mo. Ann. Stat. §§ 610.010, 610.011.

[24] Records

Matters Subject to Disclosure; Exemptions

For purposes of public access to government records under Missouri Sunshine Law, the agency that transmits a record surrenders its sole custody of the record to the government agency that receives and retains the record. Mo. Ann. Stat. §§ 610.010, 610.011.

[25] Records

Matters Subject to Disclosure; Exemptions

Merely receiving another agency's employment information to convert it into a form that can be processed by a computer for payroll purposes does not constitute legal control over said data as contemplated by the General Assembly, for purposes of retaining the information under the Missouri Sunshine Law, which governs state public records production requests. Mo. Ann. Stat. § 610.010 et seq.

Appeal from the Circuit Court of Cole County, Missouri, Honorable Jon Edward Beetem, Judge

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Before Special Division: Thomas H. Newton, Presiding Judge, Alok Ahuja and Thomas N. Chapman, Judges

Thomas H. Newton, Presiding Judge

Summary

***1** Ms. Kimberly Harper and Ms. Sharon Kay Harper (Harpers), Appellants, seek an injunction under the Missouri Sunshine Law (Sunshine Law) section 610.010 [1] against the Missouri State Highway Patrol (MSHP), after it refused to disclose information relating to the shooting of now deceased Cpl. Bob Harper. The circuit court determined that the records are protected from disclosure under the Freedom of Information Act (FOIA), by way of 5 U.S.C. §§ 552(b)(7)(A) and 552(c)(1). Appellants challenge as error the circuit court's declaration and application of the federal law and not state law. We reverse.

Kimberly and Sharon Kay Harper are the daughter and widow, respectively, of a former MSHP Patrolman, Cpl. Harper. MSHP is a public governmental body subject to the requirements of the Sunshine Law. Corporal Harper was shot at his home in 1994, and, both the MSHP and the Federal Bureau of Investigation (FBI) opened separate investigations into the shooting. The FBI policy in 1994 permitted attaching a copy of the FBI report to the narratives of state agencies; in 2001, however, a policy change limited the state agency to only reference the FBI report number in its own narrative. The MSHP investigators with FBI clearance to review FBI reports would write a narrative report referring to the FBI report information. In 1996, the MSHP created lead report #151, a narrative of an FBI interview, with the attached FBI report.

Q. Okay. The next exhibit I've marked is 16. It's Lead Report 151, plus it looks like some attachments that are all redacted.

A. This is one of the FBI reports I was talking about that we get the report, we refer to the report. This is how we referred to the FBI report and then the FBI report that was in this file was redacted.

Q. Okay. And I'm sorry if I'm asking questions you feel like you've already answered.

A. Yeah.

Q. So these full redacted pages, this is a report -- this is pages that the FBI–

A. This is an FBI report.

Q. Okay.

A. Right.

Q. But is it retained by the Missouri State Highway Patrol if it's in the FBI report?

A. This FBI report -- a copy of this FBI report was with this narrative.

Q. Okay. And it was used by your investigative team during this investigation?

A. They may have used it, correct.

Q. But it was in their possession?

A. It was in their -- the copy was in their possession.

In 2016, the MSHP created lead report #305, a narrative referencing information from a different FBI report, without the FBI report attached.

Q. Yes. We have a copy of Lead 305.

MR. RESCHLY: But not the attachments.

MS. WILCOX: Right.

BY MS. WILCOX:

Q. But it looks like the attachments that would have been the FBI's report that it references –

A. Right. This -- this -- this report refers to a lead that we received reference the Harper investigation. That lead was forwarded to the FBI office in Raleigh, North Carolina, and they followed up on it. Then they wrote a report. It is the – but it's not included in the Harper case file, no.

***2** Q. Okay. Did Missouri State Highway Patrol ever see or have possession of the FBI report?

A. I have never seen or had possession of that FBI report.

Q. Okay. Unlike in the other exhibit we have where it was actually attached?

A. Correct.

Ms. Kimberly Harper submitted an online Sunshine Law request in July 2015 to MSHP's Custodian of Records, requesting the disclosure of all records pertaining to Cpl. Harper's June 1994 arrest of Mr. Robert Joos ("Joos request"). [2] In the Joos request, Ms. Kimberly Harper stated:

> I would like all reports (arrest, incident, etc.) written by my father MSHP Cpl. Bob Harper, MSHP Sgt. Steve Dorsey, MSHP Sgt. Miles Parks, and MSHP Sgt. Michael Rogers related to the arrest of Robert Joos on June 29, 1994, in McDonald County, Missouri. My father and Steve Dorsey were the arresting officers, but Parks and Rogers were there. During the arrest my father was injured and former MSHP Superintendent Ron Replogle told me that my father should have written and filed a report for his injuries. If there is such an injury report, I would like that as well, in addition to any reports and paperwork related to the arrest.

On September 14 and 28, 2015, Ms. Kimberly Harper emailed Lt. McCollum to follow up the Joos request as she had not yet received the records. On September 29, 2015, Ms. Sharon Kay Harper submitted an online Sunshine Law request to MSHP's Custodian of Records, in which she stated:

> "I would like all records, as defined by Section 610.010(6) pertaining to the shooting of husband MSHP Cpl. Bobbie J. Harper on September 16, 1994, and the subsequent investigation" ("Cpl. Harper request").

MSHP disclosed records related to the Joos request in October 2015 and informed Ms. Sharon Kay Harper that the records responsive to the Cpl. Harper request were closed and would not be disclosed. On October 28, 2015, MSHP's general counsel emailed appellants and stated, "Pursuant to Missouri Revised Statutes section 610.100, the records you requested are closed records since the investigation into this matter remains an active investigation." In response to this email, the Harpers emailed general counsel and requested that the records be produced with redactions. The MSHP did not disclose the records.

In April 2016, the Harpers filed a petition naming the MSHP and the McDonald County prosecuting attorney as defendants. The circuit court denied the MSHP's motion to dismiss the action finding that, by operation of section 610.100.1(3)(b), the passage of ten years after Cpl. Harper's shooting rendered inactive the ongoing criminal investigation and made the file a public record. In May 2016, the MSHP gave the Harpers most of the 2200 documents pursuant to the Cpl. Harper request and provided a log of records that it claims to be exempt from disclosure under section 610.100.3, and for lack of jurisdiction. Among documents logged for redaction, the MSHP redacted lead report #151 and lead report #305 ("records at issue").[3] The reason stated in the privilege description for lead report #151 is as follows:

> ***3** This report was prepared by the FBI as is not within the State's jurisdiction to release. Additionally, this report was prepared by an undercover officer. Revealing the officer's name would jeopardize the safety of that officer and his or her family.

The reason stated in the privilege description for lead report #305 is as follows:

> This report was prepared by the FBI as is not within the State's jurisdiction to release.[4]

The circuit court held a bench trial and conducted an in camera review of the records at issue; the Harpers were given an opportunity to cross examine the MSHP witness regarding the basis for those redactions.[5] The circuit court dismissed the McDonald County prosecuting attorney for lack of prosecution and found in favor of the MHSP, concluding that the records at issue retained or referenced in the MSHP investigative file are closed records under section 610.021(14) and the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552(b)(7)(A) and 552(c)(1). (L.F. Doc. 20). The Harpers timely appeal the circuit court's order.

Legal Analysis

[1] **[2]** As this is a court-tried case, our review is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "Accordingly, we will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law." *W.C.H. v. State*, 546 S.W.3d 612, 614 (Mo. App. E.D. 2018). "The trial court's application of statutory requirements is a question of law rather than fact; therefore, we review the trial court's application of statutory requirements *de novo*." *Doe v. St. Louis Cty. Police Dep't*, 505 S.W.3d 450, 453 (Mo. App. E.D. 2016) (citation omitted).

In the sole point relied on, the Harpers claim that the circuit court erred by applying FOIA to close records retained by the MSHP because the Sunshine Law governs the status of the records at issue. According to the Harpers, "FOIA neither preempts nor is incorporated into the Sunshine Law," and the circuit court's decision to close the records at issue was erroneous and should be reversed. *Id.*

I.

[3] **[4]** The circuit court found that the records at issue are subject to FOIA and that FOIA preempts the Sunshine Law because, "Under the Supremacy Clause, state laws and constitutional provisions are 'preempted and have no effect' to the extent they conflict with federal laws." *Johnson v. State*, 366 S.W.3d 11, 26-27 (Mo. banc 2012). Federal law can preempt state law expressly, by implication through "field preemption," or when a state law conflicts with federal law. *Arizona v. United States*, 567 U.S. 387, 132 S. Ct 2492, 2500-01, 183 L.Ed.2d 351 (2012).

***4** **[5]** **[6]** **[7]** A state law is expressly preempted by federal law when Congress enacts a statute containing an express preemption provision. *Id.* at 2500–01. Field preemption occurs when a state regulates conduct "in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.*

> "The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive ... that Congress left no room for the States to supplement it' or where there is a 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Id.* at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

[8] **[9]** **[10]** "A court interpreting a federal statute pertaining to areas traditionally controlled by state law should be reluctant to find preemption." *State v. Diaz-Rey*, 397 S.W.3d 5, 8–9 (Mo. App. E.D. 2013) (citation omitted). "In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.' " *Arizona*, 132 S.Ct. at 2501 (quoting *Rice*, 331 U.S. at 230, 67 S.Ct. 1146); *see* *Connelly v. Iolab corp.*, 927 S.W.2d 848, 851 (Mo. Banc 1996). To determine whether state law is preempted by a federal statute, we examine the text and structure of the federal statute. *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 148 (Mo. banc 2010).

FOIA, at section 552(a)(3) states: "[E]ach agency, upon request for records ... shall make the records promptly available to any person." Since FOIA's enforcement provision, § 552(a)(4)(B), refers only to "agency records,"[6] it is clear that the disclosure obligations imposed by section 552(a)(3) were intended to apply only to federal agencies. Congress did not set forth a clear and manifest purpose to supersede state laws traditionally governing the public records of state agencies.

II.

We must first determine whether the records at issue retained by the MSHP are "agency records" governed by FOIA. Originally, FOIA did not define the term "record." For light on its interpretation, the U.S. Supreme Court looked to the definition of "record" in the Records Disposal Act,[7] the Securities Exchange Act of 1934,[8] the Presidential Records Act of 1978, and the Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965). *Forsham v. Harris*, 445 U.S. 169, 183, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980).

***5** **[11]** **[12]** **[13]** **[14]** "Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as 'agency records'."[9] *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989). "First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an "agency record" within the meaning of the FOIA.' " *Id.* (citing *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 150, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980)). In *Forsham*, the Supreme Court noted that the fact that the agency has a right of access to data and a right if it so chooses to obtain permanent custody of the records, does not provide protection under FOIA. *Forsham*, 445 U.S. at 185–86, 100 S.Ct. 977. "[T]he FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.* at 186, 100 S.Ct. 977. "To construe the FOIA to embrace the latter class of documents would be to extend the reach of the Act beyond what we believe Congress intended." *Id.* "Second, the agency must be in control of the requested materials at the time the FOIA request

is made." *Tax Analysts, 492 U.S. at 145, 109 S.Ct. 2841* (citing *Kissinger*, 445 U.S. at 156, 100 S.Ct. 960). [10] The requirement that the materials be in the agency's control at the time the request is made accords with the statement in *Forsham*, that FOIA does not cover "information in the abstract." *Forsham*, 445 U.S. at 185, 100 S.Ct. 977. [11] The circuit court erroneously applied the definition of "records" from 44 U.S.C. § 3301(a)(1)(A) to determine that the records at issue are agency records for the purpose of FOIA.

The FBI and MSHP opened separate investigations into the shooting of Cpl. Harper in 1994. MSHP archived its investigative file at the Secretary of State's office. The lead investigator for the MSHP testified that the MSHP retains the records at issue.

> Q. So these full redacted pages, this is a report -- this is pages that the FBI –
>
> A. This is an FBI report.
>
> Q. Okay.
>
> A. Right.
>
> Q. But is it retained by the Missouri State Highway Patrol if it's in the FBI report?
>
> A. This FBI report -- a copy of this FBI report was with this narrative.
>
> Q. Okay. And it was used by your investigative team during this investigation?
>
> A. They may have used it, correct.
>
> Q. But it was in their possession?
>
> A. It was in their -- the copy was in their possession.

As explained by the MSHP lead investigator, the MSHP writes its own narratives referring to the FBI reports and retains the information in the MSHP file.

> "[I]f the FBI did a report ... whoever got the report from the FBI would write a report referring to the FBI's report. The physical FBI report is probably not in those (MSHP) files. ... [W]e had a narrative. We had a Missouri State Highway Patrol report that refers to the FBI. So an FBI agent wrote a report, we would write a report on such and such day, we received a report from Special Agent so and so that states this. And then we would put that in our file ..."

[15] **[16]** **[17]** The MSHP written-narratives in lead reports #151 and #305 do not fall within FOIA's purview because those records were not created or obtained by the FBI and were certainly not in the FBI's possession at any time. *Forsham*, 445 U.S. at 185-86, 100 S.Ct. 977. In contrast, the copy of the attached FBI report in lead report #151 was created by the FBI and had come into the agency's possession in the legitimate conduct of its official duties. *Tax Analysts*, 492 U.S. at 145, 109 S.Ct. 2841. Even so, FOIA does not cover "information in the abstract." *Forsham*, 445 U.S. at 185, 100 S.Ct. 977. There is no dispute these records were retained by the MSHP and requested under the Sunshine Law. FOIA does not preempt the Sunshine Law and to construe FOIA to embrace state agency retained records, requested under state law, would be to extend the reach of FOIA beyond what we believe Congress intended. We find that the records at issue are not "agency records" for the purposes of FOIA.

***6** **[18]** **[19]** To this extent, the circuit court erred in finding that the records at issue fall under FOIA exemptions and thus are "[r]ecords which are protected from disclosure by law. Section 610.021(14) RSMo." The misapplication of a FOIA exemption to circumvent the Missouri Sunshine Law is to disregard the basic principles of the supremacy clause and preemption doctrine. The records at issue do not fall under a FOIA disclosure exemption. [12]

III.

[20] **[21]** The Harpers argue that the MSHP is a public governmental body [13] and retains the records at issue, and, thus, they are "public records" subject to disclosure under the state open meetings and records statute. A public record is defined as "any record, whether written or electronically stored, *retained* by or of any public governmental body." § 610.010 (emphasis added). Under the Sunshine Law, "meetings, records, votes, actions, and deliberations of public governmental bodies" are accessible to the public except when "otherwise provided by law." Mo. Ann. Stat. § 610.011. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy. "The ordinary meaning of the word *retain* is 'to hold or continue to hold in possession or use: continue to have, use,

recognize, or accept: maintain in one's keeping....' " *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881-82 (Mo. banc 1999) (citing *Webster's Third New International Dictionary* 1938 (1976)); *Missouri Prot. & Advocacy Servs. v. Allan*, 787 S.W.2d 291, 293 (Mo. App. W.D. 1990).

> It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible. Courts look elsewhere for interpretation only when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature.

Spradlin v. City of Fulton, 982 S.W.2d 255, 258 (Mo. 1998) (citation omitted).

[22] [23] [24] [25] We reject the MSHP's argument that the records at issue are property of the FBI as a way to shoehorn the records into the category of "agency records." MSHP argues that the FBI did not intend to relinquish control over its disseminated information, but allowed the MSHP to retain, analyze, and process the records while maintaining its legal control under the *Daly* analysis. The MSHP argues that "[t]he primary rule of statutory construction is to ascertain the intent of the Legislature from the language used, to give effect to that intent if possible, and *consider* the words used in their ordinary meaning." *State ex rel. Daly v. Info. Tech. Servs. Agency of City of St. Louis*, 417 S.W.3d 804, 808 (Mo. App. E.D. 2013) (emphasis added) (citing *Anderson v. Vill' of Jacksonville*, 103 S.W. 3d 190, 195 (Mo. App. W.D. 2003)). We do not find this argument apt or persuasive. The Missouri Supreme Court's application of the plain and ordinary meaning of the word "retained" under section 610 in *Hemeyer,* 6 S.W.3d at 881, is binding on this Court. Moreover, the current cause is distinguished from *Daly* because the Sunshine request for records at issue in *Daly* was made to "merely" a data processor for the public agency. [14] *Daly*, 417 S.W.3d at 810. In the present case, the MSHP did not merely receive the FBI report attached the lead report #151 for the purpose of data processing. As indicated in dicta from *Daly*, the FBI surrendered its control of the FBI reports and the MSHP retained it:

> ***7** Governmental agencies often communicate with each other and we acknowledge that a document could be held as a record of more than one governmental agency. But in those circumstances, the agency that transmitted the record surrendered its sole custody of the record and the receiving entity *retained* it.

(emphasis added). *Id.*

We conclude that the records at issue are retained by the MSHP and are public records subject to the Sunshine Law.

Conclusion

We reverse the circuit court's judgment applying the Freedom of Information Act to records that are subject to the Missouri Sunshine Laws.

Alok Ahuja, and Thomas N. Chapman, JJ. concur.

All Citations

--- S.W.3d ----, 2019 WL 5699937

Footnotes

1 Statutory references are to RSMo (2016), unless otherwise indicated.

2 Allegedly, Timothy Coombs shot Cpl. Harper because he arrested Mr. Joos.

3 As indicated above, lead report #151 consists of a MSHP narrative of the attached FBI report. Lead report #305 is a MSHP narrative that references a different FBI report not retained by the MSHP.

4 Based on the testimony, it appears the log incorrectly referred to lead report #305 as an FBI report. It is actually an MSHP report that referenced an FBI report, which is not attached.

5 The Court is perplexed at Respondent's claimant oral argument that the MSHP never had the records at issue in its possession. The record does not support that argument and it was not briefed so we do not consider it further.

6 "Agency" as defined in section 551(1) of this title includes "Each authority of the government of the United States," with some exceptions. For purposes of section 552, "agency" means "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C.A. § 552 (f)(1).

7 "The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23–24 (1967), S.Doc.No.93–82, pp. 222–223 (1974), concludes that Congress intended this aspect of the Records Act definition to apply to the Freedom of Information Act. *Forsham v. Harris,* 445 U.S. 169, 183, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980).

8 "For purposes of [FOIA] the term 'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise *obtained by* the Commission pursuant to this chapter or otherwise." (Emphasis added.) 15 U.S.C. § 78x. *Id.* at 185, 100 S.Ct. 977.

9 The definition for agency and record that now appears in § 552(f)(2) includes (A) "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format"; and (B) "any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management." 5 U.S.C.A. § 552.

10 "By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *See U.S. Sep't of justice v. Tax Analysts, 492 U.S. 136, 145, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989).*

11 The Eighth Circuit follows the two-prong analysis for qualification of an "agency record." *State of Missouri ex rel. Garstang v. U.S. Dep't of Interior, 297 F.3d 745, 749–50 (8th Cir. 2002).*

12 *See Missouri Prot. & Advocacy Servs. v. Allan*, 787 S.W.2d 291, 293 (Mo. App. W.D. 1990).

> The even larger flaw in the appellants' theory relying on the FOIA as "the law" to protect disclosure under the Missouri act is the transfer of the document by the federal agency to a state agency. Like the state law, the FOIA is designed to insure "virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the ... exemptions." NLRB v. Sears Roebuck & Co., supra, [421 U.S. 132] at 136, 95 S.Ct. [1504] at 1509 [44 L.Ed.2d 29 (1975)] ... In the same vein, Chapter 610 embodies Missouri's commitment to open government and is to be construed liberally in favor of open government." Missouri Prot. & Advocacy Servs. v. Allan, 787 S.W.2d 291, 295 (Mo. App. W.D. 1990).

13 The Missouri Sunshine Law defines a public governmental body as "any legislative, administrative, or governmental entity created by the Constitution or statutes of this state." § 610.010. MSHP was created by state statute. § 43.020 the parties stipulate that MSHP is a public governmental body under the Sunshine Law.

14 "We do not believe that merely receiving another agency's employee information to convert into a form that can be processed by a computer to generate a payroll for that agency constitutes 'legal control' over said data as contemplated by the General Assembly, for purposes of 'retaining' the information under the Sunshine Act." *State ex rel. Daly v. Info. Tech. Servs. Agency of City of St. Louis*, 417 S.W.3d 804, 810 (Mo. App. E.D. 2013).

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787 S.W.2d 291
Missouri Court of Appeals,
Western District.

MISSOURI PROTECTION AND ADVOCACY SERVICES, Respondent,
v.
John F. ALLAN and the Department of Elementary and Secondary Education, Appellants.

No. WD 42204.
|
Jan. 30, 1990.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied March 27, 1990.
|
Application to Transfer Denied May 15, 1990.

Synopsis

Nonprofit corporation sought writ of mandamus ordering State Department of Elementary and Secondary Education to disclose draft of report provided by Federal Department of Education, Office of Special Education Programs. The Circuit Court, Cole County, Byron L. Kinder, J., issued writ of mandamus, and State Education Department appealed. The Court of Appeals, Lowenstein, J., held that: (1) preliminary draft of report was public record subject to disclosure, even if it was not in final form; (2) Federal Freedom of Information Act exemptions from disclosure for interagency or intraagency memorandums did not apply to report; and (3) writ of mandamus was available as remedy, even if legitimate dispute existed concerning proper interpretation of statute providing basis for disclosure.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] Records
Matters Subject to Disclosure; Exemptions

Preliminary draft of report by the Federal Department of Education, Office of Special Education Programs as part of review to determine if educational programs for handicapped children are being administered properly was "public record" within meaning of State Open Meetings Act and was thus subject to public disclosure when sent to state governmental body for review. V.A.M.S. §§ 610.010–610.030.

5 Cases that cite this headnote

[2] Records
Matters Subject to Disclosure; Exemptions

Public record in possession of State Department of Elementary and Secondary Education did not have to be in final form before it would be subject to disclosure under State Open Meetings Act. V.A.M.S. § 610.010(4).

2 Cases that cite this headnote

[3] Records
Agencies or custodians affected

Records
Matters Subject to Disclosure; Exemptions

Federal Freedom of Information Act exemptions to disclosure did not apply to State Department of Elementary and Secondary Education (DESE), and, thus, federal agency document received by DESE was subject to disclosure under State Open Meetings Act; disclosure was sought for preliminary draft of report sent to DESE by Federal Department of Education, Office of Special Education Programs. 5 U.S.C.A. § 552(b)(5).

1 Cases that cite this headnote

[4] Mandamus
Public records

Mandamus was available to enforce disclosure of preliminary draft of report which was public record sent to State Department of Elementary and Secondary Education by the Office of Special Education Programs, even though legitimate dispute existed concerning proper interpretation of statute providing basis for duty to disclose report. V.A.M.S. § 610.011, subd. 2.

1 Cases that cite this headnote

Attorneys and Law Firms

***292** William L. Webster, Atty. Gen., Patricia D. Perkins, Asst. Atty. Gen., Jefferson City, for appellants.

Kenneth M. Chackes, St. Louis, for respondent.

Before KENNEDY, P.J., and LOWENSTEIN and BERREY, JJ.

Opinion

LOWENSTEIN, Judge.

This is an appeal from a writ of mandamus ordering the appellants to provide to respondent the draft of a report provided to appellants by the United States Department of Education, Office of Special Education Programs. The question involves whether a preliminary draft of a federal report becomes subject to the Missouri Open Meetings Act, §§ 610.010–.030, RSMo Supp.1988, and subject to public disclosure when it is sent to a Missouri governmental body for review. The judgment is affirmed.

Respondent Missouri Protection and Advocacy Services is a nonprofit corporation. Appellant Missouri Department of Elementary and Secondary Education (DESE) is a department in the executive branch of the State of Missouri. Appellant John F. Allan is an Assistant Commissioner over DESE, and as such implements and supervises programs for handicapped children. DESE is responsible for insuring that the requirements of Part B of the Education of the Handicapped Act are carried out and that each educational program for handicapped children administered in the state meets the educational standards of DESE. In this capacity, DESE receives a large amount of federal funds.

[1] Within the Office of Special Education and Rehabilitative Services in the United States Department of Education is the Office of Special Education Programs (OSEP) which is the principal agency administering and carrying out the federal Education of the Handicapped Act. As ***293** part of its duties, OSEP performs a review of the state DESE to determine whether educational programs for handicapped children in Missouri are being administered in a manner consistent with Part B of the Education of the Handicapped Act, and then issues a report of its review. Before such a report becomes final, and as part of its review process, OSEP sends a preliminary draft of the report to the state educational agency that it is monitoring in order for the agency to respond to the accuracy and completeness of the report. OSEP reviews any new information and when appropriate, amends the report which in final form is then issued to the public.

Here, OSEP had performed its review of DESE and provided DESE with a preliminary draft of its report. Respondent, seeking a copy of this draft, filed for injunctive relief, but amended to seek a writ of mandamus. The writ was granted ordering appellants to make available to respondent the preliminary draft of the report in question. This appeal followed.

Appellants' first point seeks a reversal stating there is no duty on their behalf to provide respondent with a draft of the OSEP report because the report is not a public record under § 610.010(4), RSMo Supp.1988. This section reads in part:

> (4) "Public record," any record retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole, or in part by public funds ... *Id.*

Simply stated, the appellants argue the draft of the OSEP report is not a record retained by or of itself. They espouse two major reasons for this conclusion: 1) it is implicit in § 610.010(4) that the record in question be a record *created by* or *caused to be created by* the public governmental body or is a record that the public government or body was *responsible for maintaining* because of some statutory or departmentally-mandated duty; and 2) the record possessed must be *final* in form. This court disagrees with these contentions.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used and to give effect to that intent if possible. *Wolff Shoe Co. v. Director of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988). Words must

be accorded their plain and ordinary meaning, *Id.,* and, if the wording of a statute is plain, simple, and straightforward, it is appropriate to assume that the ordinary meaning of those words accurately expresses the legislative purpose. *United States v. Jones,* 811 F.2d 444, 447 (8th Cir.1987).

A perusal of the statute in question thwarts any attempt to narrow the legislative intent. Appellants wish to limit the clear meaning of the word "retain" by surrounding it with additional factors to be met—1) the record be created by or caused to be created by the public governmental body, or 2) there is a formal directive which mandates the retention of the record. The statute reads "any record retained by or of any public governmental body," there are no further requirements. The plain and ordinary meaning of the word retain is "to hold or continue to hold in possession or use; continue to have ...; maintain, in one's keeping." Webster's Third New International Dictionary, 1938 (1981). There can be no doubt DESE has retained, in the layman's sense of the word, the draft of the OSEP report. The appellants have in their possession the report in question and, according to the plain meaning of § 610.010(4), the requirement of retention has been fulfilled.

[2] Appellants' contention that the record possessed must be in final form before it is subject to disclosure must also fail. Once again, the plain meaning of the language used by the legislature does not support this reading. The language is "*any* record retained," not just those records viewed as final in form. This court will not give new meaning to what is clear and unambiguous. *Missouri Division of Employment Security v. Labor and Industrial Relations Commission of Missouri,* ***294** 699 S.W.2d 788, 791 (Mo.App.1985). Point one is denied.

[3] The next point goes something like this: If the draft report is a public record, it is not subject to disclosure because of § 610.021 which reads;

> Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to closed meetings, records and votes, to the extent they relate to the following:
>
> ....
>
> (14) Records which are protected from disclosure by law; and,

under the federal Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5) which exempts:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency.

Their theory is that even though the appellants are covered by the Missouri law and not the federal law, the draft report itself retained the FOIA exemption and is exempt from disclosure "by law" under § 610.021(14). To follow this argument would allow a state agency not covered by the federal FOIA to argue an exception under the FOIA, which applies only to federal agencies. *Berry v. State Department of Corrections,* 145 Ariz. 12, 699 P.2d 387, 388 (App.1985). This would ultimately defeat a request of a state agency pursuant to state open records legislation.

No case authority has been presented in this appeal which would allow the state agency recipient of a federal agency document to claim a FOIA exemption for the document in a state open records case. Assuming without deciding the standing of the appellants to assert a FOIA exemption, the argument must be rejected because there has been no proof in the record the draft report in question was of such a character as would make it exempt under FOIA language if the document had been transmitted between two federal agencies. In other words, the appellants have put before the court a record which fails to support their initial hypothesis of the report qualifying for (b)(5) exemption status. Without this pivotal element of proof, and if the theory presented by appellants was adopted, a document not exempt from disclosure under the FOIA law as transmitted between federal agencies could, nonetheless, be shielded from public view by a state agency which held the document.

For a (b)(5) exemption a showing must be made of the character of the material to be protected, "for materials which reflect any deliberative or policy making processes in the one hand, and purely factual, investigative matters

on the other." *EPA v. Mink,* 410 U.S. 73, 89, 93 S.Ct. 827, 837, 35 L.Ed.2d 119, 133 (1973). Not all summaries are *ipso facto* exempt, and disclosure of objective facts in some reports would not threaten the deliberative process. *Lead Industries Association, Inc. v. OSHA,* 610 F.2d 70, 83 (2d Cir.1979). Broadly stated, purely factual material is not protected under the (b)(5) FOIA exemption, but advice, conclusions and recommendations are protected from disclosure. *Playboy Enterprises, Inc. v. Department of Justice,* 219 U.S.App.D.C. 343, 677 F.2d 931, 935 (1982). When presenting a FOIA claim the agency must provide a "detailed analysis of the reason for invoking an exemption, with a realization of exemptions being narrowly construed to in accordance with a legislative purpose that disclosure rather than secrecy is the dominant objective of the FOIA." *Parton v. U.S. Department of Justice,* 727 F.2d 774, 776 (8th Cir.1984). Without a concession as to the character of the document here in question, nor an *in camera* inspection by the trial court, and with the burden on the agency to show an exemption, the point must fail on this basis. *See e.g. Wilson v. Freedom of Information Comm.,* 181 Conn. 324, 435 A.2d 353, 26 ALR4th 624 (1980); *Milford v. Gilb,* 148 Mich.App. 778, 384 N.W.2d 786 (1985).

As was said in *Hoch v. C.I.A.,* 593 F.Supp. 675, 678 (D.D.C.1984), the § 552(b)(5) exemption "... protects inter-agency or intra-agency memoranda that are not available through civil discovery to a private party in litigation with the agency," and "... incorporates two privileges available to the government in civil litigation: ***295** (1) the deliberative process privilege, which protects advice, recommendations, and opinions that are part of the decision making process of the government; and (2) the attorney-client privilege and attorney work-product privilege, which is generally available to all litigants." Citing *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

The even larger flaw in the appellants' theory relying on the FOIA as "the law" to protect disclosure under the Missouri act is the transfer of the document by the federal agency to a state agency. Like the state law, the FOIA is designed to insure "virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the ... exemptions." *NLRB v. Sears Roebuck & Company, supra,* at 136, 95 S.Ct. at 1509.

In the same vein, Chapter 610 embodies Missouri's commitment to open government and is to be construed liberally in favor of open government. *Tipton v. Barton,* 747 S.W.2d 325, 330 (Mo.App.1988); *MacLachlan v. McNary,* 684 S.W.2d 534, 537 (Mo.App.1984). The exceptions to the Missouri law are to be strictly construed. Section 610.011.1; *Golden Rule Insurance Company v. Crist,* 766 S.W.2d 637, 638 (Mo. banc 1989); *Kansas City Star Company v. Shields,* 771 S.W.2d 101, 104 (Mo.App.1989).

Bearing in mind the applicability of both acts, the argument here is further eroded in that cases interpreting the FOIA would foreclose the appellants' reliance on the (b)(5) exemption:

> That section does not cover papers exchanged between a government agency and an outside adverse party. The exemption by its terms covers only 'inter' or 'intra' agency documents.

M/A–COM Information Systems v. United States Department of Health and Human Services, 656 F.Supp. 691 (D.C.C.1986).

> Moreover, the FOIA and the Privacy Act apply only to 'agencies' as that term is defined under 5 U.S.C. § 551(1) and 5 U.S.C. § 552(e). Under these definitions, 'agency' does not encompass state agencies or bodies;

St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373 (9th Cir.1981); *Shields v. Shetler,* 682 F.Supp. 1172, 1176 (D.Colo.1988).

> The transmission from the Bureau of Customs to a state or local law

> enforcement entity would not be an 'inter-agency' memorandum for purposes of the Act, and the exemption could not apply to material which was so distributed.

City of Concord v. Ambrose, 333 F.Supp. 958, 961 (N.D.Cal.1971); *Kerr v. United States Dis. Ct. for North. Dist. of Cal.,* 511 F.2d 192, 197 (9th Cir.1975).

The attenuated theory of an exception does not pass muster under the Missouri Law and is therefore denied. *Librach v. Cooper,* 778 S.W.2d 351, 356 (Mo.App.1989).

[4] The appellants' third and final point is that issuance of the writ of mandamus is in error because this is not a proper case for mandamus. They contend there is no clearly established ministerial duty on their part to release the draft of the OSEP report, so mandamus is improper.

Mandamus is a remedy designed to enforce, not establish, a right or claim and will lie only where there is an existing, clear, unconditional, legal right in relator and a corresponding present, imperative, unconditional duty upon the part of the respondent. *State ex rel. Power Process Piping, Inc. v. Dalton,* 681 S.W.2d 514, 516 (Mo.App.1984). This definition does not preclude the use of mandamus in this case. Respondent has a legal right to the report and appellant has an unconditional duty to supply the report due to § 610.011.2, which reads in part "all public records of public governmental bodies shall be open to the public for inspection and copying...." Although it may be argued some uncertainty might exist as to a statutory duty due to the facts here involved, mandamus is still available even though a legitimate dispute exists concerning the proper interpretation of the statute providing the basis for the duty. *See, Dalton, supra;* ***296** *State ex rel. City of Kahoka v. Webber,* 618 S.W.2d 267 (Mo.App.1981). Point three is denied.

Taken with the case was a motion to dismiss and a request by the respondent for attorney fees. All motions and requests are denied. The judgment is affirmed.

All Citations

787 S.W.2d 291, 59 Ed. Law Rep. 1208

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694 F.Supp. 897
United States District Court,
N.D. Georgia,
Atlanta Division.

UNITED STATES of America, Plaintiff,
v.
George NAPPER, et al. Defendants,
The Atlanta Journal & the Atlanta Constitution, et al., Intervenors.

No. 1:87–cv–2776–RCF.
|
Aug. 31, 1988.

Synopsis

United States brought suit against city seeking return of documents it had loaned law enforcement officials during investigation into Atlanta child murder cases. News media intervened in suit and moved to dismiss action. United States moved for summary judgment. The District Court, Richard C. Freeman, J., held that: (1) Article III case or controversy existed; (2) United States had standing to seek return of documents, notwithstanding fact that disclosure of documents had already occurred as result of state court order requiring dissemination of documents generated during homicide investigation; (3) abstention was not proper; (4) court had subject matter jurisdiction; (5) United States was entitled to return of documents; and (6) to extent that return would require city to violate state court order requiring public dissemination of documents, supremacy clause mandated that federal district court order supersede requirements of state court.

Ordered accordingly.

Procedural Posture(s): Motion to Dismiss; Motion for Summary Judgment.

West Headnotes (7)

[1] Federal Courts
Criminal Justice

Dispute over ownership and possession of documents which FBI had provided to city during murder investigation satisfied constitutional requirement of case or controversy, notwithstanding fact that city defendants had opposed dissemination of documents in earlier state court litigation with media and FBI sought to prevent further dissemination of same documents through its suit. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] United States
Standing

United States had standing to bring suit seeking declaration that it owned and was entitled to physical return of documents provided to city of Atlanta during murder investigation, regardless of lack of specific statutory authorization for such suit.

[3] United States
Standing

United States had standing to seek return of documents which FBI had provided to city of Atlanta during homicide investigation, notwithstanding fact that some documents had been released to public as result of litigation between media and city, where United States never waived confidentiality of documents and consistently objected to their disclosure.

[4] Federal Courts
Governments and political subdivisions

Abstention was not proper in suit brought by United States to recover FBI documents provided to city during murder investigation, notwithstanding fact that state court had ordered public disclosure of murder investigation files in action in which United States was not permitted to intervene, where United States had no forum other than federal court in which to seek relief and city's representation of FBI's interests in state court litigation had been inadequate.

[5] Federal Courts
Public records or information

Federal district court did not lack subject matter jurisdiction over suit by United States seeking

return of FBI documents loaned to city by reason of judicial doctrine holding that district court may not review final judgments of state court, simply because state court had ordered public disclosure of documents, where United States was not a party to action in state court and state court had not addressed questions concerning ownership of documents and entitlement to their possession.

2 Cases that cite this headnote

[6] Records

Access to records or files in general

After city released documents to public in response to court order, FBI was entitled to return of 2,300 pages of documents loaned to city law enforcement officials during homicide investigation, pursuant to policy that loan was subject to cancellation if unauthorized dissemination of documents occurred.

2 Cases that cite this headnote

[7] Records

Access to records or files in general

States

Particular cases, preemption or supersession

To extent that federal district court order requiring return to FBI of documents loaned to city of Atlanta during homicide investigation violated state court order requiring public dissemination of documents, supremacy clause mandated that federal district court order supersede requirements imposed by state court.

U.S.C.A. Const. Art. 6, cl. 2; 5 U.S.C.A. § 552(b)(7)(D).

1 Cases that cite this headnote

Attorneys and Law Firms

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Terrence B. Adamson, James Alexander Demetry, Peter Crane Canfield, Dow Lohnes & Albertson, Atlanta, Ga., for Atlanta Journal, and the Atlanta Constitution, Glenn McCutchen, Georgia Television Co. dba WSB–TV, and David Lippoff.

ORDER

RICHARD C. FREEMAN, District Judge.

This action is before the court on plaintiff's motion for summary judgment and on intervenor's motion to dismiss.

The material facts in the case are not in dispute. Between 1979 and 1981, the Federal Bureau of Investigation (FBI) assisted state and local law enforcement agencies in the investigation of the "Atlanta Child Murder Cases." During this time the FBI provided the City of Atlanta Police Department with documentary information that related to the investigation. Most of the documents provided to the City police contained the following declaration:

> This document contains neither recommendations nor conclusions of the F.B.I. It is the property of the F.B.I. and is loaned to your agency; it and its contents are not to be distributed outside your agency.

In January 1987, several members of the media, including intervenors in the present case, sued the City under state law to obtain access to some of the files generated during the Atlanta Child Murder investigation. *Georgia Television Co. v. Napper,* No. D–40209 (Super.Ct. Fulton Cty. filed Jan. 15, 1987). As a result of that action, the City was required to release to the media plaintiffs many of the Atlanta Child Murder investigative files. *See Napper v. Georgia Television Co.,* 257 Ga. 156, 356 S.E.2d 640 (1987). After releasing the files to the media, the City placed the documents in the City's public reading room. Many of the files released contained documents that the FBI had developed and had given to the Atlanta police.

In August 1987, the Atlanta *Journal and Constitution* began to run a series of articles about the Atlanta Child Murders investigation. Through this series of articles plaintiff United States learned that some of its documents had been released to the media and the public. [1] Plaintiff then filed a motion to intervene in the state court action. The media plaintiffs voiced strong opposition to the intervention of the United States, and the motion to intervene was denied. In November 1987, plaintiff formally requested the return of its documents from the City and from the media. After the City and the Atlanta papers refused to return the documents, plaintiff instituted the present suit.

Plaintiff contends that many of the released documents are FBI documents that were loaned to the City pursuant to a sharing policy that has been in existence throughout the history of the FBI. Plaintiff further contends that the FBI documents would be exempt from disclosure under Freedom of Information Act (FOIA) exemption 7D, 5 U.S.C. § 552(b)(7)(D). Plaintiff objects to the continued disclosure of the FBI documents and, by this suit, seeks their return.

[1] Intervenors contend that the action must be dismissed because no case or controversy exists. *See* U.S. Const. art. III. Intervenors assert that plaintiff and defendants desire the same result—prevention of disclosure of the documents. Plaintiff admits that it is seeking to prevent further dissemination of documents it considers confidential. The court takes judicial notice of the state court litigation in which defendants fought long and hard to prevent dissemination of the same documents. Thus, the court agrees that at first blush, it appears that the present suit is a friendly one.

***900** A dispute, however, exists over ownership and possession of the documents because defendants refuse to return the documents that plaintiff claims. The court believes that this dispute over ownership and possession of the documents satisfies the requirement of a case or controversy. In *Kentucky v. Indiana,* 281 U.S. 163, 50 S.Ct. 275, 74 L.Ed. 784 (1930), the Supreme Court held that a case or controversy existed when both Kentucky and Indiana agreed that a contract between them was valid, but Indiana refused to comply with the contract while a state court action challenging the contract was pending. The instant case demands the same result. Regardless of the motivation of defendants in refusing to return documents, a valid case or controversy exists.

[2] Intervenors also contend that plaintiff has no standing to bring suit. The court disagrees. Plaintiff claims to be the owner of the documents in question and seeks the physical return of its property. Courts have long recognized the authority of the United States to bring suit to enforce its contractual and property rights. *See United States v. California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1946); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231 13 L.Ed. 675 (1850). The court here is not concerned with whether the investigatory documents should be released to the public. The question before the court is who owns, and is entitled to possession of, the documents. Plaintiff certainly has standing to bring suit to recover property alleged to belong to the United States regardless of a lack of specific statutory authorization for such a suit.

[3] Intervenors also contend that plaintiff lacks standing to object to disclosure because disclosure has occurred already. The court is not persuaded that plaintiff cannot retrieve the documents merely because some of the documents have been released to the public. Plaintiff has never waived the confidentiality of the documents and objected consistently in its objections to the disclosure of the documents. Under these circumstances plaintiff may continue to raise its objections to disclosure. *See United States v. Sells Engineering,* 463 U.S. 418, 422, n. 6, 103 S.Ct. 3133, 3137 n. 6, 77 L.Ed.2d 743 (1983) (rejecting contention that case to allow disclosure was moot because disclosure had already occurred); *Lesar v. Department of Justice,* 636 F.2d 472, 491 (D.C.Cir.1980) (agency may still seek to prevent disclosure of confidential documents that have been released through other sources).

[4] Intervenors also urge the court to abstain from exercising jurisdiction in this action because of the presence of important state interests. The underlying consideration of abstention is comity between state and federal government. *See Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, ——, 107 S.Ct. 1519, 1525, 95 L.Ed.2d 1 (1987) (quoting *Younger v. Harris,* 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971)). Abstention by a federal court is appropriate when "[s]tate interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Id.* at ——, 107 S.Ct. at 1526. Intervenors argue that a decision favorable to plaintiff will affect negatively the decisions of the state court and will render them null and void.

The court, however, views as a more serious consequence that plaintiff has no other forum in which to seek relief.

Plaintiff attempted to intervene in the state court action and was not permitted to do so. Intervenors argue here that intervention was not necessary because defendants in the state court action adequately represented the interests of the United States. The court recognizes, however, that the City and the United States may have had different interests and motivations in opposing disclosure of the files. It is, therefore, not surprising that the City did not adequately represent the interests of the United States in the state court action. Specifically, the City failed to assert the FOIA exemption upon which the United States relies to demonstrate that the documents in question would be exempt from disclosure. In addition, counsel for the City admitted that he did not understand ***901** until August 1987 that FBI documents were not to be released and that he did not have knowledge of the sharing agreement until December 1987. *See* TRO Hearing before Judge Freeman, December 22, 1987 (TRO Hearing), tr. at 23–24.[2] Having failed to assert a critical argument that affects over 2000 pages of documents, the City cannot be said to have provided adequate representation of plaintiff's interests. Because plaintiff claims to own documents in defendants' possession and plaintiff has no other forum in which to claim its interest in the documents, the court finds that abstention is not proper.

[5] Finally, intervenors contend that the court lacks subject matter jurisdiction under the so-called *Feldman–Rooker* doctrine. Generally, this doctrine holds that a district court may not review final judgments of a state court because such review is assigned to the Supreme Court pursuant to 28 U.S.C. § 1257. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Reliance on the *Feldman–Rooker* doctrine is inapposite. The doctrine is applicable only when a party to the state court action seeks to appeal a final order of the state court to a district court. *See Feldman,* 460 U.S. at 482, 103 S.Ct. at 1315, *Rooker,* 263 U.S. at 416, 44 S.Ct. at 150. As noted above, plaintiff in this action was not a party to the state court action. Additionally, the state court did not address the question presently before this court—that is, who owns the documents in question and who is entitled to their possssion. Thus, the court finds that the *Feldman-Rooker* doctrine does not bar the court's consideration of plaintiff's claims.

Having disposed of intervenors' claims regarding jurisdictional issues, the court will address plaintiff's motion for summary judgment.

[6] The parties do not dispute that approximately 2300 pages of the released documents were created and maintained by the FBI and were loaned to the City by the FBI. The court finds that these documents belong to plaintiff, regardless of whether they are marked with the non-disclosure provision. These documents were loaned pursuant to a policy that is subject to cancellation if unauthorized dissemination takes place. *See* 28 U.S.C. § 534(b). The City released the documents to the public, in violation of the agreement. Defendants contend that cancellation of the sharing policy and return of the documents is not warranted because defendants' violation of the sharing agreement was not willful, but only in response to court order.

[7] The court is sympathetic to the City's position. Sympathy, however, cannot change the facts. The City is in possession of documents that belong to plaintiff and the City refuses to return those documents. The City has violated the terms of the loan agreement and, therefore, plaintiff is entitled to cancel the agreement and retrieve its documents. With respect to the 35 documents not ruled upon by the state court, the court notes that these documents were returned to the City pending a determination of ownership by this court. To the extent that this order will require the City to violate the state court order, the supremacy clause mandates that this order supersedes any requirements imposed by the state court. *See* U.S. Const. art. VI, cl. 2.

The court notes that it is not ruling upon the merits of plaintiff's contention that the documents would be exempt from mandatory disclosure under FOIA exemption 7D. The court simply holds that the documents in question belong to plaintiff and if intervenors want the documents, they must file an official FOIA request.[3]

***902** Accordingly, intervenor's motion to dismiss is DENIED. Plaintiff's motion for summary judgment is GRANTED. Defendants are DIRECTED to return to plaintiff within thirty (30) days of the entry of this order the disputed documents.

All Citations

694 F.Supp. 897

Footnotes

1 Intervenors contend that plaintiff should have known prior to August 1987 that FBI documents were the subject of the state court action.

2 Counsel stated, however, that despite the lack of specific knowledge, the City's position in the state court suit was that FBI documents were not to be released. TRO Hearing, tr. at 26.

3 The court notes that plaintiff has released approximately 2825 pages of documents relating to the Atlanta Child Murder cases pursuant to FOIA requests filed by *The Washington Post* and WAGA television in atlanta.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title I. Jurisdiction and Emblems of the Commonwealth, the General Court, Statutes and Public Documents (Ch. 1-5)
Chapter 4. Statutes (Refs & Annos)

M.G.L.A. 4 § 7

§ 7. Definitions of statutory terms; statutory construction

Effective: July 1, 2019
Currentness

In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

First, “Aldermen”, “board of aldermen”, “mayor and aldermen”, “city council” or “mayor” shall, in a city which has no such body or officer, mean the board or officer having like powers or duties.

Second, “Annual meeting”, when applied to towns, shall mean the annual meeting required by law to be held in the month of February, March or April.

Second A, “Appointing authority”, when used in connection with the operation of municipal governments shall include the mayor of a city and the board of selectmen of a town unless some other local office is designated as the appointing authority under the provisions of a local charter.

Third, “Assessor” shall include any person chosen or appointed in accordance with law to perform the duties of an assessor.

Third A, “Board of selectmen”, when used in connection with the operation of municipal governments shall include any other local office which is performing the duties of a board of selectmen, in whole or in part, under the provisions of a local charter.

<[There is no clause Fourth.]>

Fifth, “Charter”, when used in connection with the operation of city and town government shall include a written instrument adopted, amended or revised pursuant to the provisions of chapter forty-three B which establishes and defines the structure of city and town government for a particular community and which may create local offices, and distribute powers, duties and responsibilities among local offices and which may establish and define certain procedures to be followed by the city or town government. Special laws enacted by the general court applicable only to one city or town shall be deemed to have the force of a charter and may be amended, repealed and revised in accordance with the provisions of chapter forty-three B unless any such special law contains a specific prohibition against such action.

Fifth A, "Chief administrative officer", when used in connection with the operation of municipal governments, shall include the mayor of a city and the board of selectmen in a town unless some other local office is designated to be the chief administrative officer under the provisions of a local charter.

Fifth B, "Chief executive officer", when used in connection with the operation of municipal governments shall include the mayor in a city and the board of selectmen in a town unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter.

Sixth, "City solicitor" shall include the head of the legal department of a city or town.

Sixth A, "Coterminous", shall mean, when applied to the term of office of a person appointed by the governor, the period from the date of appointment and qualification to the end of the term of said governor; provided that such person shall serve until his successor is appointed and qualified; and provided, further, that the governor may remove such person at any time, subject however to the condition that if such person receives notice of the termination of his appointment he shall have the right, at his request, to a hearing within thirty days from receipt of such notice at which hearing the governor shall show cause for such removal, and that during the period following receipt of such notice and until final determination said person shall receive his usual compensation but shall be deemed suspended from his office.

Seventh, "District", when applied to courts or the justices or other officials thereof, shall include municipal.

Eighth, "Dukes", "Dukes county" or "county of Dukes" shall mean the county of Dukes county.

Ninth, "Fiscal year", when used with reference to any of the offices, departments, boards, commissions, institutions or undertakings of the commonwealth, shall mean the year beginning with July first and ending with the following June thirtieth.

Tenth, "Illegal gaming," a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) a game conducted under chapter 23K; (iii) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (iv) a game of bingo conducted under chapter 271; and (v) charitable gaming conducted under said chapter 271.

Eleventh, "Grantor" may include every person from or by whom a freehold estate or interest passes in or by any deed; and "grantee" may include every person to whom such estate or interest so passes.

Twelfth, "Highway", "townway", "public way" or "way" shall include a bridge which is a part thereof.

Thirteenth, "In books", when used relative to the records of cities and towns, shall not prohibit the making of such records on separate leaves, if such leaves are bound in a permanent book upon the completion of a sufficient number of them to make an ordinary volume.

Fourteenth, "Inhabitant" may mean a resident in any city or town.

<[There is no clause Fifteenth.]>

Sixteenth, "Issue", as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor.

Seventeenth, "Land", "lands" and "real estate" shall include lands, tenements and hereditaments, and all rights thereto and interests therein; and "recorded", as applied to plans, deeds or other instruments affecting land, shall, as affecting registered land, mean filed and registered.

Eighteenth, "Legal holiday" shall include January first, July fourth, November eleventh, and Christmas Day, or the day following when any of said days occurs on Sunday, and the third Monday in January, the third Monday in February, the third Monday in April, the last Monday in May, the first Monday in September, the second Monday in October, and Thanksgiving Day. "Legal holiday" shall also include, with respect to Suffolk county only, Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday; provided, however, that all state and municipal agencies, authorities, quasi-public entities or other offices located in Suffolk county shall be open for business and appropriately staffed on Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, and that section forty-five of chapter one hundred and forty-nine shall not apply to Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday.

Eighteenth A, "Commemoration day" shall include March fifteenth, in honor of Peter Francisco day, May twentieth, in honor of General Marquis de Lafayette and May twenty-ninth, in honor of the birthday of President John F. Kennedy. The governor shall issue a proclamation in connection with each such commemoration day.

Eighteenth B, "Legislative body", when used in connection with the operation of municipal governments shall include that agency of the municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled a city council, board of aldermen, town council, town meeting or by any other title.

Nineteenth, "Month" shall mean a calendar month, except that, when used in a statute providing for punishment by imprisonment, one "month" or a multiple thereof shall mean a period of thirty days or the corresponding multiple thereof; and "year", a calendar year.

Nineteenth A, "Municipality" shall mean a city or town.

Twentieth, "Net indebtedness" shall mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included.

Twenty-first, "Oath" shall include affirmation in cases where by law an affirmation may be substituted for an oath.

Twenty-second, "Ordinance", as applied to cities, shall be synonymous with by-law.

Twenty-third, "Person" or "whoever" shall include corporations, societies, associations and partnerships.

Twenty-fourth, "Place" may mean a city or town.

Twenty-fifth, "Preceding" or "following", used with reference to any section of the statutes, shall mean the section last preceding or next following, unless some other section is expressly designated in such reference.

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;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(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;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(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;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

<[There is no subclause (k).]>

(*l*) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

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

(*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).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

<[Subclause (v) of first paragraph of clause Twenty-sixth added by 2019, 41, Sec. 4 effective July 1, 2019. See 2019, 41, Sec. 111.]>

(v) records disclosed to the health policy commission under subsections (b) and (e) of section 8A of chapter 6D.

Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

Twenty-seventh, "Salary" shall mean annual salary.

Twenty-eighth, "Savings banks" shall include institutions for savings.

<[There is no clause Twenty-ninth.]>

Thirtieth, "Spendthrift" shall mean a person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery.

Thirty-first, "State", when applied to the different parts of the United States, shall extend to and include the District of Columbia and the several territories; and the words "United States" shall include said district and territories.

Thirty-second, "State auditor" and "state secretary" shall mean respectively the auditor of the commonwealth and the secretary of the commonwealth. "State treasurer" or "treasurer of the commonwealth" shall mean the treasurer and receiver general as used in the constitution of the commonwealth, and shall have the same meaning in all contracts, instruments, securities and other documents.

Thirty-third, "Swear" shall include affirm in cases in which an affirmation may be substituted for an oath. When applied to public officers who are required by the constitution to take oaths therein prescribed, it shall refer to those oaths; and when applied to any other officer it shall mean sworn to the faithful performance of his official duties.

Thirty-fourth, "Town", when applied to towns or officers or employees thereof, shall include city.

Thirty-fifth, "Valuation", as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax.

Thirty-sixth, "Water district" shall include water supply district.

Thirty-seventh, "Will" shall include codicils.

Thirty-eighth, "Written" and "in writing" shall include printing, engraving, lithographing and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall always be his own handwriting or, if he is unable to write, his mark.

Thirty-ninth, "Annual election", as applied to municipal elections in cities holding such elections biennially, shall mean biennial election.

Fortieth, "Surety" or "Sureties", when used with reference to a fidelity bond of an officer or employee of a county, city, town or district, shall mean a surety company authorized to transact business in the commonwealth.

Forty-first, "Population", when used in connection with the number of inhabitants of a county, city, town or district, shall mean the population as determined by the last preceding national census.

<[There is no clause Forty-second.]>

Forty-third, "Veteran" shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, than any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service; (2) a member of the American Merchant Marine who served in armed conflict between December 7, 1941 and December 31, 1946, and who has received honorable discharges from the United States Coast Guard, Army, or Navy; (3) any person (a) whose last discharge from active service was under honorable conditions, and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than 180 days active service; provided, however, that any person who so served and was awarded a service-connected disability or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 180 days of active service.

"Wartime service" shall mean service performed by a "Spanish War veteran", a "World War I veteran", a "World War II veteran", a "Korean veteran", a "Vietnam veteran", a "Lebanese peace keeping force veteran", a "Grenada rescue mission veteran", a "Panamanian intervention force veteran", a "Persian Gulf veteran", or a member of the "WAAC" as defined in this clause during any of the periods of time described herein or for which such medals described below are awarded.

"Spanish War veteran" shall mean any veteran who performed such wartime service between February fifteenth, eighteen hundred and ninety-eight and July fourth, nineteen hundred and two.

"World War I veteran" shall mean any veteran who (a) performed such wartime service between April sixth, nineteen hundred and seventeen and November eleventh, nineteen hundred and eighteen, or (b) has been awarded the World War I Victory Medal, or (c) performed such service between March twenty-fifth, nineteen hundred and seventeen and August fifth, nineteen hundred and seventeen, as a Massachusetts National Guardsman.

"World War II veteran" shall mean any veteran who performed such wartime service between September 16, 1940 and July 25, 1947, and was awarded a World War II Victory Medal, except that for the purposes of chapter 31 it shall mean all active service between the dates of September 16, 1940 and June 25, 1950.

"Korean veteran" shall mean any veteran who performed such wartime service between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive, and any person who has received the Korea Defense Service Medal as established in the Bob Stump National Defense Authorization Act for fiscal year 2003.

"Korean emergency" shall mean the period between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive.

"Vietnam veteran" shall mean (1) any person who performed such wartime service during the period commencing August fifth, nineteen hundred and sixty-four and ending on May seventh, nineteen hundred and seventy-five, both dates inclusive, or (2) any person who served at least one hundred and eighty days of active service in the

armed forces of the United States during the period between February first, nineteen hundred and fifty-five and August fourth, nineteen hundred and sixty-four; provided, however, that for the purposes of the application of the provisions of chapter thirty-one, it shall also include all active service between the dates May seventh, nineteen hundred and seventy-five and June fourth, nineteen hundred and seventy-six; and provided, further, that any such person who served in said armed forces during said period and was awarded a service-connected disability or a Purple Heart, or who died in said service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete one hundred and eighty days of active service.

"Lebanese peace keeping force veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing August twenty-fifth, nineteen hundred and eighty-two and ending when the President of the United States shall have withdrawn armed forces from the country of Lebanon.

"Grenada rescue mission veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing October twenty-fifth, nineteen hundred and eighty-three to December fifteenth, nineteen hundred and eighty-three, inclusive.

"Panamanian intervention force veteran" shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing December twentieth, nineteen hundred and eighty-nine and ending January thirty-first, nineteen hundred and ninety.

"Persian Gulf veteran" shall mean any person who performed such wartime service during the period commencing August second, nineteen hundred and ninety and ending on a date to be determined by presidential proclamation or executive order and concurrent resolution of the Congress of the United States.

"WAAC" shall mean any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran.

None of the following shall be deemed to be a "veteran":

(a) Any person who at the time of entering into the armed forces of the United States had declared his intention to become a subject or citizen of the United States and withdrew his intention under the provisions of the act of Congress approved July ninth, nineteen hundred and eighteen.

(b) Any person who was discharged from the said armed forces on his own application or solicitation by reason of his being an enemy alien.

(c) Any person who has been proved guilty of wilful desertion.

(d) Any person whose only service in the armed forces of the United States consists of his service as a member of the coast guard auxiliary or as a temporary member of the coast guard reserve, or both.

(e) Any person whose last discharge or release from the armed forces is dishonorable.

"Armed forces" shall include army, navy, marine corps, air force and coast guard.

"Active service in the armed forces", as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

Forty-fourth, “Registered mail”, when used with reference to the sending of notice or of any article having no intrinsic value shall include certified mail.

Forty-fifth, “Pledge”, “Mortgage”, “Conditional Sale”, “Lien”, “Assignment” and like terms, when used in referring to a security interest in personal property shall include a corresponding type of security interest under chapter one hundred and six of the General Laws, the Uniform Commercial Code.

Forty-sixth, “Forester”, “state forester” and “state fire warden” shall mean the commissioner of environmental management or his designee.

Forty-seventh, “Fire fighter”, “fireman” or “permanent member of a fire department”, shall include the chief or other uniformed officer performing similar duties, however entitled, and all other fire officers of a fire department, including, without limitation, any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department.

Forty-eighth, “Minor” shall mean any person under eighteen years of age.

Forty-ninth, “Full age” shall mean eighteen years of age or older.

Fiftieth, “Adult” shall mean any person who has attained the age of eighteen.

Fifty-first, “Age of majority” shall mean eighteen years of age.

Fifty-second, “Superior court” shall mean the superior court department of the trial court, or a session thereof for holding court.

Fifty-third, “Land court” shall mean the land court department of the trial court, or a session thereof for holding court.

Fifty-fourth, “Probate court”, “court of insolvency” or “probate and insolvency court” shall mean a division of the probate and family court department of the trial court, or a session thereof for holding court.

Fifty-fifth, “Housing court” shall mean a division of the housing court department of the trial court, or a session thereof for holding court.

Fifty-sixth, “District court” or “municipal court” shall mean a division of the district court department of the trial court, or a session thereof for holding court, except that when the context means something to the contrary, said words shall include the Boston municipal court department.

Fifty-seventh, “Municipal court of the city of Boston” shall mean the Boston municipal court department of the trial court, or a session thereof for holding court.

Fifty-eighth, “Juvenile court” shall mean a division of the juvenile court department of the trial court, or a session thereof for holding court.

Fifty-ninth, "Gender identity" shall mean a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.

Sixtieth, "Age of criminal majority" shall mean the age of 18.

Sixty-first, "Offense-based tracking number" shall mean a unique number assigned by a criminal justice agency, as defined in section 167 of chapter 6, for an arrest or charge; provided, however, that any such designation shall conform to the policies of the department of state police and the department of criminal justice information services.

Credits

Amended by St.1934, c. 283; St.1935, c. 26; St.1936, c. 180; St.1937, c. 38; St.1938, c. 245; St.1941, c. 91, § 1; St.1941, c. 509, § 1; St.1945, c. 242, § 1; St.1945, c. 637, § 1; St.1946, c. 190; St.1948, c. 241; St.1951, c. 215, § 1; St.1953, c. 319, § 2; St.1954, c. 128, § 1; St.1954, c. 627, § 1; St.1955, c. 99, §§ 1, 2; St.1955, c. 403, § 1; St.1955, c. 683; St.1956, c. 281, §§ 1, 2; St.1957, c. 164, § 1; St.1957, c. 765, § 3; St.1958, c. 140; St.1958, c. 626, § 1; St.1960, c. 299; St.1960, c. 544, § 1; St.1960, c. 812, § 1; St.1962, c. 427, § 1; St.1962, c. 616, § 1; St.1964, c. 322; St.1965, c. 875, §§ 1, 2; St.1966, c. 716; St.1967, c. 437; St.1967, c. 844, § 23; St.1968, c. 24, § 1; St.1968, c. 531, § 1; St.1969, c. 544, § 1; St.1969, c. 831, § 2; St.1970, c. 215, § 1; St.1973, c. 925, § 1; St.1973, c. 1050, § 1; St.1974, c. 205, § 1; St.1974, c. 493, § 1; St.1975, c. 706, § 2; St.1976, c. 112, § 1; St.1976, c. 156; St.1977, c. 130; St.1977, c. 691, § 1; St.1977, c. 977; St.1978, c. 12; St.1978, c. 247; St.1978, c. 478, § 2; St.1979, c. 230; St.1982, c. 189, § 2; St.1983, c. 113; St.1984, c. 363, §§ 1 to 4; St.1985, c. 114; St.1985, c. 220; St.1985, c. 451, § 1; St.1986, c. 534, §§ 1, 2; St.1987, c. 465, §§ 1, 1A; St.1987, c. 522, § 1; St.1987, c. 587, § 1; St.1988, c. 180, § 1; St.1989, c. 665, § 1; St.1991, c. 109, §§ 1, 2; St.1992, c. 133, § 169; St.1992, c. 286, § 1; St.1992, c. 403, § 1; St.1996, c. 204, § 3; St.1996, c. 450, §§ 1 to 4; St.2002, c. 313, § 1; St.2004, c. 116, § 1, eff. Aug. 26, 2004; St.2004, c. 122, § 2, eff. Sept. 1, 2004; St.2004, c. 149, § 8, eff. July 1, 2004; St.2004, c. 349, eff. Dec. 15, 2004; St.2005, c. 130, § 1, eff. Nov. 11, 2005; St.2007, c. 109, § 1, eff. Dec. 5, 2007; St.2008, c. 176, § 2, eff. July 8, 2008; St.2008, c. 308, § 1, eff. Sept. 1, 2008; St.2008, c. 445, § 1, eff. Mar. 30, 2009; St.2010, c. 131, § 5, eff. July 1, 2010; St.2011, c. 176, § 1, eff. Feb. 16, 2012; St.2011, c. 194, § 3, eff. Nov. 22, 2011; St.2011, c. 199, § 1, eff. July 1, 2012; St.2012, c. 139, § 5, eff. July 1, 2012; St.2013, c. 38, § 4, eff. July 1, 2013; St.2014, c. 313, § 1, eff. Sept. 9, 2014; St.2016, c. 121, §§ 1 to 5, eff. Jan. 1, 2017; St.2017, c. 161, § 1, eff. Oct. 15, 2017; St.2018, c. 69, § 1, eff. April 13, 2018; St.2019, c. 41, § 4, eff. July 1, 2019.

Notes of Decisions (172)

M.G.L.A. 4 § 7, MA ST 4 § 7
Current through Chapter 88 of the 2019 1st Annual Session

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VI. Counties and County Officers (Ch. 34-38)
Chapter 38. Medical Examiners and Inquests (Refs & Annos)

M.G.L.A. 38 § 3

§ 3. Duty to report deaths; failure to report

Effective: March 17, 2014
Currentness

It shall be the duty of any person having knowledge of a death which occurs under the circumstances enumerated in this paragraph immediately to notify the office of the chief medical examiner, or the medical examiner designated to the location where the death has occurred, of the known facts concerning the time, place, manner, circumstances and cause of such death:

(1) death where criminal violence appears to have taken place, regardless of the time interval between the incident and death, and regardless of whether such violence appears to have been the immediate cause of death, or a contributory factor thereto;

(2) death by accident or unintentional injury, regardless of time interval between the incident and death, and regardless of whether such injury appears to have been the immediate cause of death, or a contributory factor thereto;

(3) suicide, regardless of the time interval between the incident and death;

(4) death under suspicious or unusual circumstances;

(5) death following an unlawful abortion;

(6) death related to occupational illness or injury;

(7) death in custody, in any jail or correctional facility, or in any mental health or mental retardation institution;

(8) death where suspicion of abuse of a child, family or household member, elder person or disabled person exists;

(9) death due to poison or acute or chronic use of drugs or alcohol;

(10) skeletal remains;

(11) death associated with diagnostic or therapeutic procedures;

(12) sudden death when the decedent was in apparent good health;

(13) death in any public or private conveyance;

(14) fetal death, as defined in section 202 of chapter 111, where the period of gestation has been 20 weeks or more or where fetal weight is 350 grams or more;

(15) death of children under the age of 18 years from any cause;

(16) any person found dead;

(17) death in an emergency treatment facility, medical walk-in center, child care center or under foster care; or

(18) deaths occurring under such other circumstances as the chief medical examiner shall prescribe in regulations promulgated pursuant to chapter 30A.

A physician, police officer, hospital administrator, licensed nurse, department of children and families social worker, or licensed funeral director, within the commonwealth, who, having knowledge of such an unreported death, fails to notify the office of the chief medical examiner of such death shall be punished by a fine of not more than five hundred dollars. Such failure shall also be reported to the appropriate board of registration, where applicable.

Credits
Added by St.1992, c. 368, § 2. Amended by St.2000, c. 247, §§ 2, 3; St.2008, c. 176, § 55, eff. July 8, 2008; St.2008, c. 215, § 45, eff. July 31, 2008; St.2014, c. 52, § 3, eff. Mar. 17, 2014.

Notes of Decisions (1)

M.G.L.A. 38 § 3, MA ST 38 § 3
Current through Chapter 88 of the 2019 1st Annual Session

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VI. Counties and County Officers (Ch. 34-38)
Chapter 38. Medical Examiners and Inquests (Refs & Annos)

M.G.L.A. 38 § 4

§ 4. Investigation; transportation of bodies

Effective: November 8, 2000
Currentness

Upon notification of a death in the circumstances enumerated in section three, the chief medical examiner or his designee shall carefully inquire into the cause and circumstances of the death. If, as a result of such inquiry, the chief medical examiner or such designee is of the opinion that the death was due to violence or other unnatural means or to natural causes that require further investigation, he shall take jurisdiction. The body of the deceased shall not be moved, and the scene where the body is located shall not be disturbed, until either the medical examiner or the district attorney or his representative either arrives at the scene or gives directions as to what shall be done at the scene. In such cases of unnatural or suspicious death where the district attorney's office is to be notified, the medical examiner shall not disturb the body or the scene without permission from the district attorney or his representative.

The medical examiner shall be responsible for making arrangements for transport of the body. The district attorney or his law enforcement representative shall direct and control the investigation of the death and shall coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the death occurred. Either the medical examiner or the district attorney in the jurisdiction where death occurred may order an autopsy. Cases requiring autopsy shall be subject to the jurisdiction of the office for such purpose. As part of his investigation, the chief medical examiner or his designee may, in his discretion, notwithstanding any other provision of law, cause the body to be tested by the department of public health for the presence of any virus, disease, infection, or syndrome which might pose a public health risk.

If the medical examiner is unable to respond and take charge of the body of the deceased in an expeditious manner, the chief of police of the city or town wherein the body lies, or his representative, may, after conferring with the appropriate district attorney, move the body to another location until a medical examiner is able to respond. Before moving the body the police shall document all facts relevant to the appearance, condition and position of the body and every fact and circumstance tending to show the cause and circumstances of death.

In carrying out the duties prescribed by this section, the chief medical examiner or his designee shall be entitled to review and receive copies of medical records, hospital records, or information which he deems relevant to establishing the cause and manner of death. No person or hospital shall be subject to liability of any nature for providing such records or information in good faith at the request of the office. The chief medical examiner shall notify the local district attorney of the death of a child immediately following receipt of a report that such a death occurred.

Credits
Added by St.1992, c. 368, § 2. Amended by St.2000, c. 247, § 4.

Notes of Decisions (32)

M.G.L.A. 38 § 4, MA ST 38 § 4
Current through Chapter 88 of the 2019 1st Annual Session

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Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title X. Public Records (Ch. 66-66a)
Chapter 66. Public Records (Refs & Annos)

M.G.L.A. 66 § 10

§ 10. Inspection and copies of public records; requests; written responses; extension of time; fees

Effective: January 1, 2017
Currentness

<[Text of section applicable as provided by 2016, 121, Sec. 18.]>

(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

(e) 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.

Credits

Amended by St.1948, c. 550, § 5; St.1973, c. 1050, § 3; St.1976, c. 438, § 2; St.1978, c. 294; St.1982, c. 189, § 1; St.1982, c. 477; St.1983, c. 15; St.1991, c. 412, § 55; St.1992, c. 286, § 146; St.1996, c. 39, § 1; St.1996, c. 151, § 210; St.1998, c. 238; St.2000, c. 159, § 133; St.2004, c. 149, § 124, eff. July 1, 2004; St.2008, c. 176, § 61, eff. July 8, 2008; St.2010, c. 256, §§ 58, 59, eff. Nov. 4, 2010. Recodified by St.2016, c. 121, § 10, eff. Jan. 1, 2017.

Notes of Decisions (183)

M.G.L.A. 66 § 10, MA ST 66 § 10
Current through Chapter 88 of the 2019 1st Annual Session

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