COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 12884

SUFFOLK, ss.

RAHIMAH RAHIM, Plaintiff-Appellant

v.

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

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On Appeal From A Judgment of the Superior Court of Suffolk County

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Brief and Addendum for Rahimah Rahim

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INTRODUCTION

The Massachusetts Public Records Law ("PRL") limits the types of documents that Massachusetts agencies can keep secret from Massachusetts residents. Once a Massachusetts agency has "received" a document, Massachusetts residents are presumptively entitled to request and receive copies of it. Globe Newspaper Co. v. District Attorney for Middle District, 439 Mass. 374, 380 (2003). In this case, however, the Superior Court permitted a Massachusetts agency to decline a public records request for documents it had received from a federal agency, on the theory that the receipt had taken the form of a "loan." This ruling is contrary to the plain text of the PRL, not required by federal law, and a profound threat to the transparency that the PRL guarantees to Massachusetts residents. Accordingly, the Superior Court's ruling should be reversed.

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. The Suffolk County District Attorney issued a report (the "Findings Report") in August 2016 explaining its decision not to criminally charge the involved officers. The District Attorney based its decision, in part, on records sent by the FBI (the "Records") 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."

Several months later, Rahimah Rahim, Usaamah's mother, submitted a request under the Massachusetts PRL for the documents underlying the District Attorney's investigation of her son's death. There is no dispute that the District Attorney requested the Records from the FBI as a part of its investigation into Mr. Rahim's death or that the District Attorney physically received the Records, relied upon them to exonerate the officers, and retained them for years.

Nevertheless, citing the FBI's cover letter characterizing its receipt of the documents as a "loan," as well as the PRL's investigatory exemption, the District Attorney denied Ms. Rahim's request. The Superior Court below upheld this decision, relying on those same grounds and citing the Supremacy Clause of the United States Constitution.

This decision is incorrect for two reasons. First, it is flatly inconsistent with the Massachusetts PRL. The PRL is both simple and broad. It defines public records as documents "made or received" by a Massachusetts agency, and requires such documents to be provided to the public upon request unless subject to a specific statutory exemption. The law hinges on receipt alone; there is no "ownership" requirement and no "loan" exemption. The statutory exemptions that do exist, such as the investigatory exemption, place a heavy burden on the state agency to demonstrate their applicability with specificity and to segregate exempt and non-exempt portions when possible. Here, it is undisputed that the District

Attorney received the Records. Because the District Attorney cannot contract out of its PRL obligations and has not established that the Records are exempt from disclosure under the investigatory exemption, the records must be produced.

Second, nothing in federal law contradicts the District Attorney's obligation under the PRL to disclose the Records. Federal law controls if, but only if, there is a direct conflict with state law. Here, there is no such schism. The Federal Records Act merely controls the federal government's disposal and retention of federal records, and courts have uniformly concluded that the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), which governs federal agencies' distribution of records, does not preempt the application of state public records law to state actors. Neither the FBI nor the District Attorney have demonstrated that Congress has otherwise acted to bar the Commonwealth from distributing documents in its possession under state law. Federal law therefore leaves unaltered the District Attorney's duty to produce the Records under state law. This does not mean that the PRL ever required the District Attorney to create, request, or receive these Records. The PRL simply ensures that, once a state agency chooses to receive records, the public has the same right of access to the records as its government does, subject to narrowly defined exemptions.

Nor would enforcing the PRL in this case leave federal agencies at the mercy of state public record laws. The Massachusetts PRL cannot compel the

production of a document held by a federal agency, nor can it require a state agency to acquire a particular record from the federal government. Thus, if a federal agency wants to keep a document from the purview of the Massachusetts PRL, it can retain possession of that document and permit state agencies to view it, but not physically receive it. What a federal agency cannot do is give a document to a state agency and simultaneously extinguish that agency's obligations under the Massachusetts PRL.

Once a document is received by a Massachusetts agency, Massachusetts law dictates that it equally belongs to the residents of Massachusetts. This transparency is fundamental to our democracy and demands the production of the Records here.

STATEMENT OF THE ISSUES

1. The Massachusetts Public Records Law defines "public records" as documents "made or received" by a Massachusetts agency. Where a Massachusetts agency has received documents from a federal agency, and where the Massachusetts agency has failed either to demonstrate that the documents are exempt from disclosure or segregate and produce any non-exempt portions, does the PRL compel the disclosure of the documents even if the Massachusetts agency describes them as being on "loan" and subject to the investigatory exemption?

2. Where a federal agency has voluntarily provided documents to a Massachusetts agency, can a Massachusetts court order the disclosure of those

documents pursuant to the Massachusetts Public Records Law without violating federal law?

STATEMENT OF THE CASE

On June 2, 2015, Usaamah Rahim was fatally shot by law enforcement officers. 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 JA.I 36. After the District Attorney denied Ms. Rahim's request, Ms. Rahim filed a complaint in the Superior Court on July 24, 2017. See JA.I 13.[1] Ms. Rahim requested declaratory relief stating that the 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.[2] The

[1] Prior to Ms. Rahim's request for public records, the District Attorney had made some of the responsive records available to Ms. Rahim. In response to Ms. Rahim's request, the District Attorney provided access to other records, but denied access to a number of responsive records that are the subject of this appeal.

[2] As a result of the District Attorney's initial refusal to provide assurances that it would maintain possession of the Records until Ms. Rahim could seek judicial resolution, Ms. Rahim sought a temporary restraining order that would have required the District Attorney to maintain possession of the Records. 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. See JA.I 64.

Superior Court denied Ms. Rahim's request for preliminary injunctive relief on August 4, 2017. See JA.I 66.

Without discovery, the parties filed cross-motions for summary judgment. JA.I 77 & JA.I 192. On March 8, 2018, Ms. Rahim filed a Motion to Strike the Declaration of Nancy McNamara. JA.II 192. Pursuant to 28 U.S.C. § 517, the United States of America filed a statement of interest (the "Statement of Interest") on July 11, 2018. JA.III 4. Due to the multiple hearings on the Parties' cross-motions for summary judgment, Ms. Rahim and the District Attorney each filed supplemental briefs in support of motions for summary judgment on September 27, 2018. JA.III 133 & 193. On June 11, 2019, the Superior Court denied Ms. Rahim's motion for summary judgment and allowed the District Attorney's motion for summary judgment. JA.III 209. 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. JA.III 219.

STATEMENT OF THE FACTS

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

On June 2, 2015, BPD and FBI officers shot and killed Mr. Rahim. The District Attorney opened an investigation into Mr. Rahim's death pursuant its statutory obligation to investigate all "cases of unnatural or suspicious death" in its

jurisdiction. See G.L. c. 38, §§ 3, 4. As a part of the investigation, the District Attorney requested and received the Records from the FBI. See JA.II 97.

The FBI's cover letter to the District Attorney claimed that the Records were "loaned" to the District Attorney and "remain[ed] the property of the FBI." Id. Citing the federal Privacy Act, 5 U.S.C. § 552a, the FBI wrote that it "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." JA.II 97. However, the FBI permitted the District Attorney to use the Records "at trial" or to otherwise "advance" the investigation. See id.

The District Attorney's investigation culminated in the release of the Findings Report. See JA.I 24. Noting that the investigation included a review of the FBI documents, the Findings Report concluded that the officers would not be criminally charged for killing Mr. Rahim. See id.

II. 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. See JA.I 36.[3] The District Attorney served its first response to Ms. Rahim on

[3] Ms. Rahim's counsel mailed the initial request for the Records on June 16, 2017. JA.I 36. On July 11, 2017, Ms. Rahim's counsel mailed an amended request for the purpose of correcting a scrivener's error that misstated the year Usaamah Rahim was shot and killed. JA.I 55.

July 20, 2017, denying the request in full. See JA.I 58. In explaining the blanket denial of the portion of the request that sought the documents the District Attorney had received from the FBI, the District Attorney asserted 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. JA.I 58. Days later, the District Attorney served a supplemental letter that broadly claimed the Records were exempt under the investigatory exemption. See JA.II 101.[4] This supplemental response did not include any information describing the withheld Records or justifying the application of this exemption.

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

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

[4] Although not cited in its July 20, 2017, or July 24, 2017, response letters, the District Attorney later asserted in its Vaughn index and supplemental summary judgment brief that the privacy exemption, G.L. c. 4, § 7 (26)(c), justified withholding some of the Records in their entirety because the Records included the names of officers. See JA.III 156, 202. While this Court has previously held that public employees' names, including the names of law enforcement officers, are not presumed exempt from disclosure under the privacy exemption, (see, e.g., Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 817-818 (1978)), in an effort to assuage the District Attorney's concerns over the release of the officer's names, Ms. Rahim offered to accept the Records with redactions to conceal personally identifiable information. JA.III 188.

are "public records" as defined by Massachusetts law and (2) if so, whether the Records are nevertheless exempt from disclosure pursuant to the investigatory exemption to the PRL, G.L. c. 4, § 7(26). At a summary judgment hearing on April 26, 2018, Ms. Rahim asked the Superior Court to order the District Attorney to produce a Vaughn index[5] describing the withheld documents, produce the documents under a protective order, or produce the documents for in camera review to allow the Court and Ms. Rahim to evaluate whether the invocation of the investigatory exemption was proper. See JA.II 210. The Court asked the parties to confer and consider these three options. See id.

On June 5, 2018, the District Attorney's Office provided 56 pages of responsive documents to Ms. Rahim—none of which were part of the Records at issue in this appeal—and a Vaughn index for the remaining withheld documents. See JA.III 154. The Vaughn index broadly described both the withheld documents and justifications for the exemptions. See id. It frequently omitted the author, recipient, and date of creation of the record, provided an identical justification for

[5] As this Court has explained, a Vaughn index may be required in certain public record disputes. "When claims of exemption by an agency appear not otherwise capable of fair analysis, the agency is required, on motion, to itemize and index the records requested and give detailed justifications for its claims." Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 295 (1979) (mechanism introduced in Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973)).

the application of the exemption to dozens of separate records, and failed to identify any segregable, non-exempt portions of the Records. See id.

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

On July 11, 2018, the U.S. Attorney for the District of Massachusetts filed a Statement of Interest on behalf of the FBI. See JA.III 4. The Statement of Interest argued that the documents sent by the FBI remained federal records, that the Supremacy Clause prevented the District Attorney from disclosing the Records under the Massachusetts PRL, and that law enforcement concerns cut against disclosure.

The Superior Court issued its decision in June 2019 upholding the District Attorney's refusal to disclose the Records. The Court held that the Records "are not public records under the Massachusetts Public Records Law" because they "are on loan from the FBI." JA.III 209. To reach this conclusion, the Court interpreted the statutory language "made or received" to "indicate[] ownership to be considered a public record." JA.III 213. The Court also held that, even if the Records are subject to the PRL, they need not be produced for two reasons. First, the Court concluded the Records are exempt under the investigatory materials exemption because they "are from the FBI and regard confidential investigative techniques and procedures." JA.III 214. Second, the Court held that even if the documents are "public records" under the PRL, "the supremacy clause requires the

Documents to be disseminated, if at all, pursuant to federal law, not state law" because "the Documents are FBI records." JA.III 215

SUMMARY OF ARGUMENT

This case turns on two questions. Does Massachusetts law require the District Attorney to produce the Records, and if so, does federal law compel a different result?

The answer to the first question is yes. Under the PRL, the Records must be produced as non-exempted public records received by the District Attorney. In such circumstances, the District Attorney is not authorized to withhold such documents under Massachusetts law. Page 18 to 26.

Turning to the second question, the answer is no. Federal law does not compel a different result. The Supremacy Clause is triggered only where there is a conflict between federal and state law. Here there is no such conflict. The Federal Records Act and FOIA do not preempt the PRL. Congress has not otherwise acted to bar the Commonwealth from producing documents in its possession. As a result, this Court should order the District Attorney to comply with the PRL and disclose the Records. Page 26 to 37.

ARGUMENT

I. UNDER THE MASSACHUSETTS PUBLIC RECORDS LAW, THE DISTRICT ATTORNEY MUST PRODUCE THE RECORDS BECAUSE THEY WERE RECEIVED BY A MASSACHUSETTS AGENCY AND ARE NOT SUBJECT TO EXEMPTION.

The Records are public records subject to disclosure under the PRL. The plain language of the PRL applies where, as here, documents are "received" by a Massachusetts agency. The limited exemptions to the production of such documents do not include documents "loaned" to state agencies under a nondisclosure agreement; to the contrary, this Court has held that state agencies cannot contract out of their PRL obligations. And while there is a recognized investigatory exemption, the District Attorney has not satisfied its heavy burden to justify its application here.

A. The Records are public records under the plain language of the statute.

"A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). 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 added). Because the PRL does not define the word

"receive," it should "be construed according to [its] common and approved usage" (see G.L. c. 4, § 6), namely, to be "given, presented with, or paid (something)." See Oxford's Online Dictionary.[6] The obligation for Massachusetts agencies to produce records in their possession therefore exists even if the record originated with or was loaned from other entities.

The Superior Court's contrary ruling that the PRL requires ownership is unsupported by the plain language of the PRL and this Court's precedent. JA.III 209.[7] Ownership has no bearing on a state actor's obligations under the PRL. Through the terms "made or received", the PRL "requires access to public records in the possession of public officials." Champa v. Weston Pub. Sch., 473 Mass. 86, 90 (2015) (emphasis added); see also PETA v. Dep't of Agric. Res., 477 Mass. 280, 281 (2017) ("The definition sweeps in a wide array of documents and data made or received by employees, agencies, or other instrumentalities of the Commonwealth."). The case law uniformly reflects this focus on possession,

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[6] Oxford Online English Dictionaries, located at https://en.oxforddictionaries.com/definition/receive (last viewed on February 18, 2020). The Supreme Judicial Court may rely on standard dictionaries to supply definitions of statutory language not defined by the Legislature. See, e.g., Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 374 (2013) (use of standard dictionaries to supply definition of term at issue).

[7] Specifically, the Superior Court suggested, "the plain language of the statute, 'made or received,' indicates ownership to be considered a public record." JA.III 213.

without regard to the document's ownership or provenance. For instance, after this Court concluded that the court clerk's office must produce docket number information under the PRL because it fell within the "court record" exemption to the CORI statute, it went on to hold that such information, "may be obtained from any other government official who also happens to have a copy of that same public record." Globe Newspaper Co., 439 Mass. at 382-83.

Thus, the District Attorney's obligation to disclose the Records was triggered by its receipt of the Records. This obligation exists irrespective of ownership and origin.

B. The District Attorney cannot contract out of its Public Records Law obligations.

The District Attorney cannot, and did not, extinguish its obligations under the PRL by receiving the Records from the FBI under a cover letter purporting to reflect an understanding that they would not be produced to a "third party requester" without the FBI's permission. See JA.II 97. State agencies cannot evade their PRL obligations through contractual agreements, let alone cover letters. See Champa, 473 Mass. at 98.

In Champa, a school district claimed that confidential settlement agreements between the school district and third parties were not subject to disclosure under the PRL. See id. This Court rejected that contention and held that a confidentiality agreement "cannot, by itself, trump the public records law and the [custodian's]

obligation to comply with the law's requirements." Id. at 98. As noted in Champa, other courts facing this issue have reached the same conclusion. See, e.g., Hechler v. Casey, 175 W. Va. 434, 444 (1985) ("an agreement as to confidentiality between the public body and the supplier of the information may not override the [state's] Freedom of Information Act."); Trombley v. Bellows Falls Un. High Sch. Dist. No. 27, 160 Vt. 101, 107 (1993) (contractual confidentiality provision cannot override provisions of state's public records act); Ackerly v. Ley, 420 F.2d 1336, 1339 n.3 (D.C. Cir. 1969) ("[i]t will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature can not, in and of themselves, override the [FOIA]".)

The Champa holding makes sense. "The primary purpose of G.L. c. 66, § 10, is to give the public broad access to governmental records." Worcester Tel. & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 382-383 (2002) (citation omitted). The public has the right to know what its government is doing. Agreements that documents received by a Massachusetts agency are not subject to the PRL, "would create a public perception that the [state agency] had entered into a collusive end-run around the Legislature's determination that there must be disclosure of all materials 'received' by a public employee unless one of the enumerated statutory exemptions is applicable." Galvin v. Mass. Mut. Life Ins.

Co., 20 Mass. L. Rptr. 533, 2006 WL 340246 at *10 (Mass. Super. Ct. Jan. 25, 2006).

Only the Legislature can determine which records are exempt under the PRL, and it explicitly has not incorporated an exemption for nondisclosure agreements. See G.L. c. 4, § 7(26) (a-u). To nevertheless permit a records custodian to 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." See Worcester, 436 Mass. at 385. Indeed, if Massachusetts agencies could avoid complying with the PRL simply by agreeing to treat records in their possession as a loan, such agreements would surely proliferate. And the public's knowledge would 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. The District Attorney's purported agreement with the FBI therefore cannot remove its PRL obligations to produce documents in its possession.

C. The Records are not exempt from disclosure under the investigatory exemption to the Public Records Law.

The investigatory exemption, G.L. c. 4, § 7(26) (f) similarly does not relieve the District Attorney of its production duties here, as the District Attorney has not satisfied its heavy burden to demonstrate that this exemption applies to the Records. "There is no blanket exemption provided

for records kept by police departments 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, there is a narrowly construed exemption for certain investigatory materials, "the disclosure of which [] 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).

This exemption typically applies where the disclosure of information would compromise an ongoing investigation or trial. See Bougas, 371 Mass. at 62 (noting the investigatory exemption is aimed in part to avoid "premature disclosure of the Commonwealth's case prior to trial"). It is difficult to see how producing the Records would prejudice any future or ongoing law enforcement activity here, where all the targets of the investigation are either dead or have been convicted and sentenced.[8] See WBZ-TV4 v. District Attorney for Suffolk District, 408 Mass. 595, 604 (1990) (recognizing that upon conclusion of investigation "future disclosure may be appropriate").

[8] Mr. Rahim was shot and killed on June 2, 2015. JA.I 43. Through conviction or plea, the two alleged co-conspirators, David Wright and Nicholas Rovinski, have both been convicted and sentenced. JA.II 98, JA.II 189-90.

Outside of an ongoing investigation, the investigatory exemption applies narrowly to "prevent[] the disclosure of confidential investigative techniques, procedures, or sources of information," "encourage[] individual citizens to come forward and speak freely with police concerning matters under investigation," and "create[] initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions." Bougas, 371 Mass. at 62. State agencies must "prove with specificity" that this exemption applies. PETA, 477 Mass. at 282 (cleaned up)[9]; see also G.L. c. 66, § 10A(d)(1)(iv) (in petition for a determination of PRL violation, state actor must prove by a preponderance of the evidence that an exemption justifies withholding a record). To do so, 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. For two reasons, the District Attorney failed to make the necessary showing here.

First, the District Attorney's Vaughn index sheds no light on whether the Records were lawfully withheld. It is not enough for a government entity to simply label records as "investigatory." Worcester, 436 Mass. at 386. Rather, "[w]hat is

[9] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations or citations have been omitted from quotations. See Jack Metzler, Use (cleaned up) to Make Your Legal Writing Easier to Read, ABA For Law Students: Before the Bar (Oct. 3, 2017), https://perma.cc/B2JX-9JSR

critical is the nature or character of the records, not their label." Id. "To that end, a case-by-case review is required to determine whether an exemption applies." PETA, 477 Mass. at 282 (cleaned up). The District Attorney's demonstration is anything but document-specific. Instead, the Vaughn index provides sparse descriptions of the withheld documents, using bare-bones labels such as "hand drawn diagram, dated June 2, 2015," "handwritten numeric measurement scale," and "Federal Bureau of Investigation photographic logs." See JA.III 166-167. What is more, the index repeats identical justifications to withhold each of the 38 documents, stating simply "it pertains to confidential investigative techniques and procedures" and "it is specifically or by necessary implication exempted from disclosure by statute" without any further explanation. See JA.III 155-173.[10] These generic, summary entries do not enable the Court or Ms. Rahim to conduct a "case-by-case" analysis of whether the investigatory exemption properly applies.

[10] The Vaughn index also states that some of the documents were withheld because they reveal "personally identifying information concerning specifically named individuals, the disclosure of which may constitute an unwarranted invasion of personal privacy." See JA.III 156-166. Ms. Rahim does not contest that the documents can be redacted to remove any personally identifiable information. See JA.III 189. In addition, the Vaughn index claims that some of the documents were withheld under 5 U.S.C. § 552a, the federal Privacy Act. JA.III 155. However, it is the privacy interests of the deceased, Usaamah Rahim, that are protected by the Privacy Act. Since Ms. Rahim is the personal representative of her son's estate, she has a special right of access to the Records under the Privacy Act. JA.I 40. Thus, the Privacy Act cannot be invoked as a bar to disclose the Records to her. See 5 U.S.C. § 552a(d)(1).

Second, even if the exemption theoretically applies to some information in the Records, "[t]he public records law specifically contemplates redaction of material that would be exempt, to enable the release of the remaining portions of a record." See Champa, 473 Mass. at 92. The District Attorney withheld 38 documents in their entirety, totaling more than 100 pages. See JA.III 155. The PRL imposes an obligation to identify and disclose any segregable portions of these documents. See Champa, 473 Mass. at 95. The District Attorney did even attempt to meet that burden here.

II. NOTHING IN FEDERAL LAW CONTRADICTS THE DISTRICT ATTORNEY'S STATE LAW OBLIGATION TO PRODUCE THE RECORDS.

The District Attorney's obligations under state law are therefore clear. Critically, federal law does not contradict a Massachusetts district attorney's obligation, under Massachusetts law, to produce records it has received from the federal government and retained in its possession. The Supremacy Clause of course mandates that federal law governs when it conflicts with state law, but the Supremacy Clause "is not a source of any federal rights;" rather, it "accord[s] [federal rights] priority whenever they come in conflict with state law." Boston Med. Ctr. Corp. v. Secretary of Executive Office of Health and Human Servs., 463 Mass. 447, 461 (2012) (cleaned up; emphasis added); see U.S. Const., art. VI, cl. 2. The Supremacy Clause would therefore negate the District Attorney's duties under

the Massachusetts PRL only if enforcing those duties would be inconsistent with some independent source of federal law.

But there is no such federal law here. Although the FBI argued below that the Records here are "federal" for purposes of the Federal Records Act or FOIA, neither of those statutes preempts or otherwise conflicts with the District Attorney's duty to disclose the Records under the PRL. And although the FBI also suggested that the U.S. Constitution's Property Clause may prevent the disclosure of the Records under state law, that is not so where, as here, the state agency already possesses the documents and the FBI has not pointed to any federal statute that bars the state agency from distributing them. The District Attorney's state law obligation to produce the Records therefore remains undisturbed.

A. Federal law does not preempt the Massachusetts Public Records Law.

Federal law does not preempt the Massachusetts PRL. The FBI seemed to posit below that the Records are "federal records" whose disclosure is somehow barred by the Federal Records Act or FOIA. See, e.g., JA.III 9-15. But neither of those statutes includes any command that would be violated by enforcing the public records request at issue here.

The Federal Records Act defines federal agencies' record management responsibilities such as retention, destruction, and which documents go in the National Archives, with no mention of producing the records under either federal

or state law. See 44 U.S.C. 3301. It does not prevent a state legislature from compelling the disclosure of any record—"federal" or not—that has been received by a state agency.

Nor does FOIA create such a bar. The FOIA cases on which the FBI relied below analyze whether a federal agency must produce certain records in response to records requests under FOIA itself. See, e.g., JA.III 11, 13 (citing Burka v. U.S. Dep't of Health and Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996); Judicial Watch, Inc. v. Fed. Hous. Fin. Agency, 646 F.3d 924, 928 (D.C. Cir. 2011); Beveridge & Diamond, P.C. v. U.S. Dep't of Health and Human Servs., 85 F. Supp. 3d 230, 239 (D.D.C. 2015)). These cases do not mention state public records laws, let alone specify that something that is a "federal" record under federal law cannot also be a state record subject to disclosure upon request under a state public records law. Characterizing a document as a "federal record" subject to FOIA could therefore prevent the production of that same record pursuant to a state public records law only if preemption principles dictated that a document governed by FOIA cannot simultaneously be subject to a state's disclosure statute. No case stands for this proposition. And for good reason. FOIA does not preempt state public record laws.

Federal preemption takes one of three forms: (1) Congress has enacted "a statute containing an express preemption provision [;]" (2) Congress has so

exhaustively regulated a field so as to occupy it entirely, leaving no room for the states to supplement it; and, (3) direct conflict between state and federal law. Arizona v. U.S., 567 U.S. 387, 399 (2012). The first two types of preemption clearly do not apply here. FOIA does not contain express language preempting states from enacting public records laws. See Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wash.2d 243, 265-66 (1994) ("FOIA does not contain an express preemption provision. To the contrary, FOIA applies by its terms only to federal agencies.") (citation omitted). Similarly, in enacting FOIA, Congress did not regulate the public records field so as to exhaustively occupy it and preclude the states from enacting their own public records laws. See id.

Likewise, there is no preemption by conflict here. State laws that compliment without conflicting with federal law are not preempted by the Supremacy Clause Cf. Arizona, 567 U.S. at 400 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) ("[C]ourts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"). The Supreme Court has already rejected the argument that FOIA exclusively governs disclosure of agency records. See U.S. Dept. of Justice v. Tax Analysts, 492 U.S.136, 154 (1989). Recognizing that records may be subject to multiple disclosure requirements, it explained:

> That Congress knew that other statutes created overlapping disclosure requirements is evident from § 552(b)(3), which authorizes an agency

> to refuse a FOIA request when the materials sought are expressly exempted from disclosure by another statute. If Congress had intended to enact the converse proposition – that an agency may refuse to provide disclosure of materials whose disclosure is mandated by another statute – it was free to do so. Congress, however, did not take such a step.

See id. at 154.

Reflecting this holding, courts that have analyzed potential conflicts between state public records laws and FOIA have all found that they do not conflict. See, e.g., Progressive Animal Welfare Soc., 125 Wash.2d at 266 ("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."); Shakopee Mdewakanton Sioux (Dakota) Community v. Hatch, Case No. CIV011737, 2002 WL 1364113 at *6 (D. Minn. June 20, 2002) (same). Indeed, FOIA does not apply to records held by state agencies, so there cannot be a conflict with FOIA. Missouri Protection and Advocacy Servs. v. Allan, 787 S.W.2d 291, 294 (Mo. Ct. App. 1990) (state agency cannot withhold records pursuant to FOIA exemption because FOIA does not apply to the states).[11] Brooks v. Legislative Bill Room, Case No. 2:10-cv-00379, 2011 WL 333235, at *1 (E.D. Cal. Jan. 31, 2011) ("FOIA does not apply to state

[11] Like the Massachusetts PRL, Missouri law exempts "[r]ecords which are protected from disclosure by law[.]" Mo. Ann. Stat. § 610.021. In Missouri Protection, the Missouri appeals court rejected the argument that a state agency can invoke a FOIA exemption to justify withholding an otherwise public record because it would deprive Missouri residents their right to seek records from state agencies pursuant to state law. See Missouri Protection, 787 S.W.2d at 294.

agencies"); Faxon v. Maryland, Case No. JFM-10-28, 2010 WL 148707, at *1 (D. Md. Jan. 13, 2010) ("To the extent that [plaintiff] seeks the production of records from a state agency, the FOIA is inapplicable."); State ex rel. Warren v. Warner, 704 N.E.2d 1228, 1229 (Ohio 1999) ("FOIA does not apply to state agencies or officers"); see also Phillip Morris Inc. v. Harshbarger, 122 F.3d 58 (1st Cir. 1997) ("federal employees need not make publicly available the collected information under the FOIA, but the exemption would not inhibit the conduct of state agencies possessing such information, which are not governed by the FOIA in the first instance"). In sum, FOIA does not preempt the Massachusetts PRL.

B. The Property Clause does not prevent the District Attorney from producing records that it physically received from the federal government more than four years ago where Congress has not barred the operation of state public records laws on documents received from the federal government.

Although the FBI apparently regards the Records as its property, the U.S. Constitution's Property Clause also does not prevent the District Attorney from complying with its obligations to produce those Records under Massachusetts law. In the court below, the FBI suggested that, under intergovernmental immunity principles rooted in the Property Clause, the Records are federal property that state governments cannot be compelled by state law to produce. JA.III 15. This argument misapprehends the differences between the question whether Congress possesses the authority under the Property Clause to regulate records given by

federal agencies to state actors, on the one hand, with the altogether separate question whether Congress has exercised that authority in a manner that controls this case, on the other. Even assuming that the Property Clause authorizes Congress to regulate records voluntarily given by federal agencies to state agencies—which it may not—the FBI has not shown that Congress has exercised that authority by acting to bar the District Attorney from complying with its state law obligations here.

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., art. IV, § 3, cl. 2. Thus, where Congress has exercised its authority to dispose of or regulate specific items in the federal government's possession, courts have held that states cannot simply seize or otherwise make commands regarding that property.

In Armstrong v. United States, 364 U.S. 40 (1960), for example, the Supreme Court held that a state cannot enforce a lien to seize building materials and boats whose titles have been conveyed to, and which were physically possessed by, the federal government. Id. at 41, 46-49. Similarly, courts have held that a state cannot "extract" funds from the Department of Treasury's "custody" or "possession." Arizona v. Bowsher, 935 F.2d 332, 333-334 (D.C. Cir. 1991) (Supremacy Clause and Property Clause prevent states from enforcing unclaimed

property statutes to take custody of funds held by the Department of Treasury to pay federal debts to citizens of unknown whereabouts); Treasurer of New Jersey v. U.S. Dep't of Treasury, 684 F.3d 382, 386, 410-11 (3d Cir. 2012) (Supremacy Clause and Property Clause prevent states from taking unredeemed, matured savings bonds held by the Department of Treasury). But none of those cases suggest that Congress has purported to exercise its Property Clause authority to bar the operation of state public records laws on documents created by a federal agency but received and possessed by a state agency. Cf. Missouri Protection and Advocacy Serv., 787 S.W.2d at 294-295 (ordering Missouri Department of Elementary and Secondary Education to release report it received from federal Department of Education under the state public records law).

The FBI's claim that, in "nearly identical" circumstances, courts have prevented disclosures of federal records under state records laws, see JA.III 14, is inaccurate. In United States v. Napper, 887 F.2d 1528 (11th Cir. 1989) (per curiam), the FBI loaned documents to the City of Atlanta's law enforcement officials to assist in the investigation of several unsolved homicides known as the "Atlanta Child Murders." See Napper, 887 F.2d at 1529. While the documents were in the City of Atlanta's possession, the Georgia Supreme Court required the City to comply with a request under the Georgia Public Records Act to produce them. Napper v. Georgia Television Co., 257 Ga. 156 (1987). The U.S.

government subsequently sued the City for the return of the documents. It asserted that the documents had been loaned under a federal provision that expressly authorizes the federal government to exchange "identification, criminal identification, crime, and other records" with states. See Napper, 887 F.2d at 1531 (Johnson, J. concurring) (citing 28 U.S.C. § 534). Its lawsuit sought the return of those documents under 28 U.S.C. § 534(b), which provides for the "cancellation" of an exchange of records under Section 534(a)(4) if the receiving agency disseminates the records. Id.

A federal district court ordered the City to return the documents, and the Eleventh Circuit affirmed. Napper, 887 F.2d at 1530. But neither the district court nor the Eleventh Circuit ruled that federal law barred the operation of Georgia's public records laws on the documents while they had been in the City's possession. Nor did the FBI's lawsuit under Section 534(b) seek "copies of the already released documents" or seek to "suppress information already made public." Napper, 887 F.2d at 1530; see also United States v. Napper, 694 F.Supp. 897, 901 (N.D. Ga. 1988).

Multiple aspects of Napper cut against the Superior Court's decision in this case, where the government seeks to prevent the public from obtaining documents provided in a homicide investigation that exonerated several officers. Here, unlike in Napper, the federal government has not moved to intervene in the proceedings

below, nor has it purported to identify any federal provision in which Congress has authorized it to claw back the Records shared with the District Attorney or initiated a lawsuit to do so. What is more, even where documents are "loaned" from a federal agency to a state agency, even where Congress has enacted a statute that expressly authorizes the federal agency to claw back the loaned documents, and even assuming such a provision is valid under the Property Clause, Napper did not hold that federal law countermands a state agency's obligation to comply with an otherwise valid request to produce those documents under a state public records law while they remain in the state agency's possession. Thus, contrary to the Superior Court's suggestion, it is consistent with Napper to hold that the Massachusetts PRL remains fully applicable to the Records at issue here, which remain in the District Attorney's possession.[12]

[12] United States v. Story County, Iowa, 28 F. Supp. 3d 861 (S.D. Iowa 2014) similarly provides no support for the federal government's claim. See JA.III 13. There, the Sheriff received the documents in question in his capacity as a board member of a federal authority rather than as a local official. Story County, 28 F. Supp. 3d at 864-65. The court held that the documents need not be produced not as a matter of federal law, but because the documents did not fit the definition of the applicable state public records law, which applied only to documents "produced by or originated from the government" or that were "held by public officers in their official capacity." Id. at 871-872. (internal quotation marks omitted). This holding is entirely inapposite where the District Attorney received the Records in its official capacity.

This does not mean that the U.S. government is powerless to prevent the documents it creates from becoming subject to state public records requests. Far from it. The U.S. government can, for example, allow state agencies to view, but not "receive" and retain, documents that it desires to shield from state public records law. But the entire premise of the Massachusetts PRL is that Massachusetts agencies presumptively cannot keep the documents they receive secret from the people they serve. So federal agencies should not operate under the illusion that they can indefinitely share documents with Massachusetts agencies without running the risk that those agencies will be required by state law to produce them to Massachusetts residents.

CONCLUSION

Access to public records is fundamental to a functioning democracy. Allowing Massachusetts agencies to enter "loan agreements" with federal agencies to shield documents from public scrutiny would render a large swath of otherwise public records out of the citizenry's reach. Such a troubling precedent could cover documents sent from a host of federal agencies that influence almost every aspect of state and local government decision-making and operations.

For any or all of the foregoing reasons, the Court should reverse the judgment of the Superior Court and order the Records be provided to Ms. Rahim.

Ms. Rahim further respectfully requests reasonable attorney fees and costs as provided by G.L. c. 66, § 10A(d)(2).

Respectfully submitted,

RAHIMAH RAHIM,

By her attorneys,

/s/ *Kate R. Cook*

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Dated: February 20, 2020

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 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 brief is 7,305.

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CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rule of Appellate Procedure 13(e), I hereby certify under the penalties of perjury, that on February 20, 2020, I have made service of this Appellate Brief filed in the matter entitled *Rahimah Rahim v. Suffolk County District Attorney,* Case No. 12884, currently pending in the Supreme Judicial Court via the Court's Electronic Filing System upon counsel for the Commonwealth:

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February 20, 2020

ADDENDUM

4821-1710-8149, v. 3

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

[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.

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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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:

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Tristan P. Colangelo

4812-9045-4431, v. 4

United States Code Annotated
Constitution of the United States
Annotated
Article IV. States--Reciprocal Relationship Between States and with United States

U.S.C.A. Const. Art. IV § 3, cl. 2

Section 3, Clause 2. Public Lands

Currentness

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Notes of Decisions (265)

U.S.C.A. Const. Art. IV § 3, cl. 2, USCA CONST Art. IV § 3, cl. 2
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Article VI. Debts Validated--Supreme Law of Land--Oath of Office

U.S.C.A. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

Currentness

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Notes of Decisions (2142)

U.S.C.A. Const. Art. VI cl. 2, USCA CONST Art. VI cl. 2
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

KeyCite Yellow Flag - Negative Treatment
Enacted LegislationNote in PL 116-92, December 20, 2019, 133 Stat 1198,

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

Effective: June 30, 2016
Currentness

<Notes of Decisions for 5 USCA § 552 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 5 USCA § 552.>

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and

impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information 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 requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be

dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

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

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available--

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year--

(i) a listing of the number of cases arising under this section;

(ii) a listing of--

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make--

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available--

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes 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; and

(2) "record" and any other term used in this section in reference to information 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.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President--

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including--

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions

include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including--

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the "Council").

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)(A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93-502, §§ 1 to 3, Nov. 21, 1974, 88 Stat. 1561 to 1564; Pub.L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 95-454, Title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub.L. 99-570, Title I, §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub.L. 104-231, §§ 3 to 11, Oct. 2, 1996, 110 Stat. 3049 to 3054; Pub.L. 107-306, Title III, § 312, Nov. 27, 2002, 116 Stat. 2390; Pub.L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8 to 10(a), 12, Dec. 31, 2007, 121 Stat. 2525 to 2530; Pub.L. 111-83, Title V, § 564(b), Oct. 28, 2009, 123 Stat. 2184; Pub.L. 114-185, § 2, June 30, 2016, 130 Stat. 538.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EXECUTIVE ORDER NO. 12600

<June 23, 1987, 52 F.R. 23781>

Predisclosure Notification Procedures for Confidential Commercial Information

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [this section] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act [5 U.S.C.A. § 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of

a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) [subsec. (b)(4) of this section], because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C.A. § 552], and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

EXECUTIVE ORDER NO. 13110

<Jan. 11, 1999, 64 F.R. 2419>

Nazi War Criminal Records Interagency Working Group

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105-246) (the "Act") [set out as a note under this section], it is hereby ordered as follows:

Section 1. Establishment of Working Group. There is hereby established the Nazi War Criminal Records Interagency Working Group (Working Group). The function of the Group shall be to locate, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

Sec. 2. Schedule. The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

Sec. 3. Membership. (a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as the liaison to and attend the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

Sec. 4. Administration.(a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order.

WILLIAM J. CLINTON

EXECUTIVE ORDER NO. 13392

<Dec. 14, 2005, 70 F.R. 75373>

Improving Agency Disclosure of Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy.

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) [The Freedom of Information Act, is 5 U.S.C.A. § 552] has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

Sec. 2. Agency Chief FOIA Officers.

(a) Designation. The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) General Duties. The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief

legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) FOIA Requester Service Center and FOIA Public Liaisons. In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the Federal Register; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters

about the status of their requests. The Chief FOIA Officer shall also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

Sec. 3. Review, Plan, and Report.

(a) Review. Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) Plan.

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) Agency Reports to the Attorney General and OMB Director.

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order. The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the Federal Register.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

Sec. 4. Attorney General.

(a) Report. The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order [Dec. 14, 2005], a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) Guidance. The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

Sec. 5. OMB Director. The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

Sec. 6. Definitions. As used in this order:

(a) the term "agency" has the same meaning as the term "agency" under section 552(f)(1) of title 5, United States Code; and

(b) the term "record" has the same meaning as the term "record" under section 552(f)(2) of title 5, United States Code.

Sec. 7. General Provisions.

(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH

EXECUTIVE ORDER NO. 13642

<May 9, 2013, 78 F.R. 28111>

Making Open and Machine Readable the New Default for Government Information

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. General Principles. Openness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth. As one vital benefit of open government, making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation.

Decades ago, the U.S. Government made both weather data and the Global Positioning System freely available. Since that time, American entrepreneurs and innovators have utilized these resources to create navigation systems, weather newscasts and warning systems, location-based applications, precision farming tools, and much more, improving Americans' lives in countless ways and leading to economic growth and job creation. In recent years, thousands of Government data resources across fields such as health and medicine, education, energy, public safety, global development, and finance have been posted in machine-readable form for free public use on Data.gov. Entrepreneurs and innovators have continued to develop a vast range of useful new products and businesses using these public information resources, creating good jobs in the process.

To promote continued job growth, Government efficiency, and the social good that can be gained from opening Government data to the public, the default state of new and modernized Government information resources shall be open and machine readable. Government information shall be managed as an asset throughout its life cycle to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable. In making this the new default state, executive departments and agencies (agencies) shall ensure that they safeguard individual privacy, confidentiality, and national security.

Sec. 2. Open Data Policy. (a) The Director of the Office of Management and Budget (OMB), in consultation with the Chief Information Officer (CIO), Chief Technology Officer (CTO), and Administrator of the Office of Information and Regulatory Affairs (OIRA), shall issue an Open Data Policy to advance the management of Government information as an asset, consistent with my memorandum of January 21, 2009 (Transparency and Open Government), OMB Memorandum M-10-06 (Open Government Directive), OMB and National Archives and Records Administration Memorandum M-12-18 (Managing Government Records Directive), the Office of Science and Technology Policy Memorandum of February 22, 2013 (Increasing Access to the Results of Federally Funded Scientific Research), and the CIO's strategy entitled "Digital Government: Building a 21st Century Platform to Better Serve the American People." The Open Data Policy shall be updated as needed.

(b) Agencies shall implement the requirements of the Open Data Policy and shall adhere to the deadlines for specific actions specified therein. When implementing the Open Data Policy, agencies shall incorporate a full analysis of privacy, confidentiality, and security risks into each stage of the information lifecycle to identify information that should not be released. These review processes should be overseen by the senior agency official for privacy. It is vital that agencies not release information if doing so would violate any law or policy, or jeopardize privacy, confidentiality, or national security.

Sec. 3. Implementation of the Open Data Policy. To facilitate effective Government-wide implementation of the Open Data Policy, I direct the following:

(a) Within 30 days of the issuance of the Open Data Policy, the CIO and CTO shall publish an open online repository of tools and best practices to assist agencies in integrating the Open Data Policy into their operations in furtherance of their missions. The CIO and CTO shall regularly update this online repository as needed to ensure it remains a resource to facilitate the adoption of open data practices.

(b) Within 90 days of the issuance of the Open Data Policy, the Administrator for Federal Procurement Policy, Controller of the Office of Federal Financial Management, CIO, and Administrator of OIRA shall work with the Chief Acquisition Officers Council, Chief Financial Officers Council, Chief Information Officers Council, and Federal Records Council to identify and initiate implementation of measures to support the integration of the Open Data Policy requirements into Federal acquisition and grant-making processes. Such efforts may include developing sample requirements language, grant and contract language, and workforce tools for agency acquisition, grant, and information management and technology professionals.

(c) Within 90 days of the date of this order, the Chief Performance Officer (CPO) shall work with the President's Management Council to establish a Cross-Agency Priority (CAP) Goal to track implementation of the Open Data Policy. The CPO shall work with agencies to set incremental performance goals, ensuring they have metrics and milestones in place to monitor advancement toward the CAP Goal. Progress on these goals shall be analyzed and reviewed by agency leadership, pursuant to the GPRA Modernization Act of 2010 (Public Law 111-352).

(d) Within 180 days of the date of this order, agencies shall report progress on the implementation of the CAP Goal to the CPO. Thereafter, agencies shall report progress quarterly, and as appropriate.

Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Nothing in this order shall compel or authorize the disclosure of privileged information, law enforcement information, national security information, personal information, or information the disclosure of which is prohibited by law.

(e) Independent agencies are requested to adhere to this order.

BARACK OBAMA

MEMORANDA OF PRESIDENT

PRESIDENTIAL MEMORANDUM

<Jan. 21, 2009, 74 F.R. 4683>

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the Federal Register.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA

PRESIDENTIAL MEMORANDUM

<Jan. 21, 2009, 74 F.R. 4685>

Transparency and Open Government

Memorandum for the Heads of Executive Departments and Agencies

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective

expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

I direct the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum. The independent agencies should comply with the Open Government Directive.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This memorandum shall be published in the Federal Register.

BARACK OBAMA

Notes of Decisions (4217)

5 U.S.C.A. § 552, 5 USCA § 552
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services, 11th Cir.(Fla.), Aug. 12, 2011

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 552a

§ 552a. Records maintained on individuals

Effective: December 19, 2014
Currentness

(a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, 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;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse, including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014 [1] ;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals [2] entitled

to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, 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--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) 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 if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of certain disclosures.--Each agency, with respect to each system of records under its control, shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.--Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.--Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency rules.--In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.--For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties.--Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.--The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records.--Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m)(1) Government contractors.--When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority,

cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(e) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists.--An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements.--(1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and opportunity to contest findings.--(1) In order to protect any individual whose records are used in a matching program, no recipient agency, non-Federal agency, or source agency may suspend, terminate,

reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual, as a result of information produced by such matching program, until--

(A)(i) the agency has independently verified the information; or

(ii) the Data Integrity Board of the agency, or in the case of a non-Federal agency the Data Integrity Board of the source agency, determines in accordance with guidance issued by the Director of the Office of Management and Budget that--

(I) the information is limited to identification and amount of benefits paid by the source agency under a Federal benefit program; and

(II) there is a high degree of confidence that the information provided to the recipient agency is accurate;

(B) the individual receives a notice from the agency containing a statement of its findings and informing the individual of the opportunity to contest such findings; and

(C)(i) the expiration of any time period established for the program by statute or regulation for the individual to respond to that notice; or

(ii) in the case of a program for which no such period is established, the end of the 30-day period beginning on the date on which notice under subparagraph (B) is mailed or otherwise provided to the individual.

(2) Independent verification referred to in paragraph (1) requires investigation and confirmation of specific information relating to an individual that is used as a basis for an adverse action against the individual, including where applicable investigation and confirmation of--

(A) the amount of any asset or income involved;

(B) whether such individual actually has or had access to such asset or income for such individual's own use; and

(C) the period or periods when the individual actually had such asset or income.

(3) Notwithstanding paragraph (1), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during any notice period required by such paragraph.

(q) Sanctions.--(1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such

source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs.--Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report.--The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding 2 years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t)(1) Effect of other laws.--No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards.--(1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. [3]

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) In the reports required by paragraph (3)(D), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget responsibilities.--The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

(w) Applicability to Bureau of Consumer Financial Protection.--Except as provided in the Consumer Financial Protection Act of 2010, this section shall apply with respect to the Bureau of Consumer Financial Protection.

CREDIT(S)

(Added Pub.L. 93-579, § 3, Dec. 31, 1974, 88 Stat. 1897; amended Pub.L. 94-183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Pub.L. 97-365, § 2, Oct. 25, 1982, 96 Stat. 1749; Pub.L. 97-375, Title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub.L. 97-452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Pub.L. 98-477, § 2(c), Oct. 15, 1984, 98 Stat. 2211; Pub.L. 98-497, Title I, § 107(g), Oct. 19, 1984, 98 Stat. 2292; Pub.L. 100-503, §§ 2 to 6(a), 7, 8, Oct. 18, 1988, 102 Stat. 2507 to 2514; Pub.L. 101-508, Title VII, § 7201(b)(1), Nov. 5, 1990, 104 Stat. 1388-334; Pub.L. 103-66, Title XIII, § 13581(c), Aug. 10, 1993, 107 Stat. 611; Pub.L. 104-193, Title I, § 110(w), Aug. 22, 1996, 110 Stat. 2175; Pub.L. 104-226, § 1(b)(3), Oct. 2, 1996, 110 Stat. 3033; Pub.L. 104-316, Title I, § 115(g)(2)(B), Oct. 19, 1996, 110 Stat. 3835; Pub.L. 105-34, Title X, § 1026(b)(2), Aug. 5, 1997, 111 Stat. 925; Pub.L. 105-362, Title XIII, § 1301(d), Nov. 10, 1998, 112 Stat. 3293; Pub.L. 106-170, Title IV, § 402(a)(2), Dec. 17, 1999, 113 Stat. 1908; Pub.L. 108-271, § 8(b), July 7, 2004, 118 Stat. 814; Pub.L. 111-148, Title VI, § 6402(b)(2), Mar. 23, 2010, 124 Stat. 756; Pub.L. 111-203, Title X, § 1082, July 21, 2010, 124 Stat. 2080; Pub.L. 113-295, Div. B, Title I, § 102(d), Dec. 19, 2014, 128 Stat. 4062.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 9397

<Nov. 22, 1943, 8 F.R. 16095, as amended Ex. Ord. No. 13478, Nov. 18, 2008, 73 F.R. 70239>

Numbering System for Federal Accounts Relating to Individual Persons

WHEREAS certain Federal agencies from time to time require in the administration of their activities a system of numerical identification of accounts of individual persons; and

WHEREAS some seventy million persons have heretofore been assigned account numbers pursuant to the Social Security Act; and

WHEREAS a large percentage of Federal employees have already been assigned account numbers pursuant to the Social Security Act; and

WHEREAS it is desirable in the interest of economy and orderly administration that the Federal Government move towards the use of a single, unduplicated numerical identification system of accounts and avoid the unnecessary establishment of additional systems:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

1. Hereafter any Federal department, establishment, or agency may, whenever the head thereof finds it advisable to establish a new system of permanent account numbers pertaining to individual persons, utilize the Social Security Act account numbers assigned pursuant to Title 20, section 422.103 of the Code of Federal Regulations and pursuant to paragraph 2 of this order.

2. The Social Security Administration shall provide for the assignment of an account number to each person who is required by any Federal agency to have such a number but who has not previously been assigned such number by the Administration. The Administration may accomplish this purpose by (a) assigning such numbers to individual persons, (b) assigning blocks of numbers to Federal agencies for reassignment to individual persons, or (c) making such other arrangements for the assignment as it may deem appropriate.

3. The Social Security Administration shall furnish, upon request of any Federal agency utilizing the numerical identification system of accounts provided for in this order, the account number pertaining to any person with whom such agency has an account or the name and other identifying data pertaining to any account number of any such person.

4. The Social Security Administration and each Federal agency shall maintain the confidential character of information relating to individual persons obtained pursuant to the provisions of this order.

5. There shall be transferred to the Social Security Administration, from time to time, such amounts as the Director of the Office of Management and Budget shall determine to be required for reimbursement by any Federal agency for the services rendered by the Administration pursuant to the provisions of this order.

6. This order shall be implemented in accordance with applicable law and subject to the availability of appropriations.

7. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers, employees, or agents, or any other person.

8. This order shall be published in the FEDERAL REGISTER.

FRANKLIN D. ROOSEVELT

Notes of Decisions (1451)

Footnotes

1 So in original. The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014, which is Division B of Pub.L. 113-295, did not include a section 3.

2 So in original. Probably should be “and individuals”.

3 So in original. Probably should be “cost-effective”.

5 U.S.C.A. § 552a, 5 USCA § 552a

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part II. Department of Justice (Refs & Annos)
Chapter 31. The Attorney General (Refs & Annos)

28 U.S.C.A. § 517

§ 517. Interests of United States in pending suits

Currentness

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.

CREDIT(S)

(Added Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

Notes of Decisions (23)

28 U.S.C.A. § 517, 28 USCA § 517
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part II. Department of Justice (Refs & Annos)
Chapter 33. Federal Bureau of Investigation (Refs & Annos)

28 U.S.C.A. § 534

§ 534. Acquisition, preservation, and exchange of identification records and information; appointment of officials

Effective: January 4, 2011
Currentness

(a) The Attorney General shall--

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;

(2) acquire, collect, classify, and preserve any information which would assist in the identification of any deceased individual who has not been identified after the discovery of such deceased individual;

(3) acquire, collect, classify, and preserve any information which would assist in the location of any missing person (including an unemancipated person as defined by the laws of the place of residence of such person) and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person (and the Attorney General may acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin); and

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, including the United States Sentencing Commission, the States, including State sentencing commissions, Indian tribes, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

(d) Indian law enforcement agencies.--The Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies--

(1) to access and enter information into Federal criminal information databases; and

(2) to obtain information from the databases.

(e) For purposes of this section, the term "other institutions" includes--

(1) railroad police departments which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers; and

(2) police departments of private colleges or universities which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers.

(f)(1) Information from national crime information databases consisting of identification records, criminal history records, protection orders, and wanted person records may be disseminated to civil or criminal courts for use in domestic violence or stalking cases. Nothing in this subsection shall be construed to permit access to such records for any other purpose.

(2) Federal, tribal, and State criminal justice agencies authorized to enter information into criminal information databases may include--

(A) arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and

(B) protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification.

(3) As used in this subsection--

(A) the term "national crime information databases" means the National Crime Information Center and its incorporated criminal history databases, including the Interstate Identification Index; and

(B) the term "protection order" includes--

(i) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence or contact or communication with or physical proximity to, another person, including any temporary or final orders issued by civil or criminal courts whether obtained by filing an independent action or as a pendente lite order in another

proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(ii) any support, child custody or visitation provisions, orders, remedies, or relief issued as part of a protection order, restraining order, or stay away injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, dating violence, sexual assault, or stalking.

CREDIT(S)

(Added Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616; amended Pub.L. 97-292, §§ 2, 3(a), Oct. 12, 1982, 96 Stat. 1259; Pub.L. 100-690, Title VII, § 7333, Nov. 18, 1988, 102 Stat. 4469; Pub.L. 103-322, Title IV, § 40601(a), Sept. 13, 1994, 108 Stat. 1950; Pub.L. 107-273, Div. A, Title II, § 204(c), Div. B, Title IV, § 4003(b)(4), Div. C, Title I, § 11004, Nov. 2, 2002, 116 Stat. 1776, 1811, 1816; Pub.L. 109-162, Title I, § 118, Title IX, § 905(a), Jan. 5, 2006, 119 Stat. 2989, 3079; Pub.L. 109-248, Title I, § 153(i), July 27, 2006, 120 Stat. 611; Pub.L. 111-211, Title II, § 233(a), July 29, 2010, 124 Stat. 2279; Pub.L. 111-369, § 2, Jan. 4, 2011, 124 Stat. 4068.)

Notes of Decisions (99)

28 U.S.C.A. § 534, 28 USCA § 534
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 44. Public Printing and Documents (Refs & Annos)
Chapter 33. Disposal of Records (Refs & Annos)

44 U.S.C.A. § 3301

§ 3301. Definition of records

Effective: November 26, 2014
Currentness

(a) Records defined.--

(1) In general.--As used in this chapter, the term "records"--

(A) 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 of the informational value of data in them; and

(B) does not include--

(i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

(ii) duplicate copies of records preserved only for convenience.

(2) Recorded information defined.--For purposes of paragraph (1), the term "recorded information" includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

(b) Determination of definition.--The Archivist's determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record as defined in subsection (a) shall be binding on all Federal agencies.

CREDIT(S)

(Pub.L. 90-620, Oct. 22, 1968, 82 Stat. 1299; Pub.L. 94-575, § 4(c)(2), Oct. 21, 1976, 90 Stat. 2727; Pub.L. 113-187, § 5(a), Nov. 26, 2014, 128 Stat. 2009.)

Notes of Decisions (11)

44 U.S.C.A. § 3301, 44 USCA § 3301
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

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 § 6

§ 6. Rules for construction of statutes

Currentness

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in which the city council consists of two branches, or action by the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general

circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

Credits

Added by St.1967, c. 867, § 1. Amended by St.1983, c. 210; St.1989, c. 216; St.1998, c. 170.

Notes of Decisions (157)

M.G.L.A. 4 § 6, MA ST 4 § 6
Current through Chapter 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

End of Document

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 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

End of Document

KeyCite Yellow Flag - Negative Treatment
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 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

KeyCite Yellow Flag - Negative Treatment
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 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

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Proposed Legislation

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 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

End of Document

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Proposed Legislation

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 § 10A

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

Effective: January 1, 2017
Currentness

<[Text of section applicable as provided by 2016, 121, Sec. 18.]>

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

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

(c) Notwithstanding the procedure in subsections (a) or (b), a requestor may initiate a civil action to enforce the requirements of this chapter. Any action under this subsection shall be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located. The superior court shall have available all remedies at law or in equity; provided, however, that any damages awarded shall be consistent with subsection (d).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits
Added by St.2016, c. 121, § 10, eff. Jan. 1, 2017.

Notes of Decisions (1)

M.G.L.A. 66 § 10A, MA ST 66 § 10A
Current through Chapter 153 of the 2019 1st Annual Session and Chapter 16 of the 2020 2nd Annual Session

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Proposed Legislation

Vernon's Annotated Missouri Statutes
Title XXXIX. Conduct of Public Business [Ch. 610]
Chapter 610. Governmental Bodies and Records (Refs & Annos)

V.A.M.S. 610.021

610.021. Closed meetings and closed records authorized when, exceptions

Effective: August 28, 2018
Currentness

Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(1) Legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys. However, any minutes, vote or settlement agreement relating to legal actions, causes of action or litigation involving a public governmental body or any agent or entity representing its interests or acting on its behalf or with its authority, including any insurance company acting on behalf of a public government body as its insured, shall be made public upon final disposition of the matter voted upon or upon the signing by the parties of the settlement agreement, unless, prior to final disposition, the settlement agreement is ordered closed by a court after a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011, however, the amount of any moneys paid by, or on behalf of, the public governmental body shall be disclosed; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

(2) Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes, vote or public record approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;

(3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body shall be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term **"personal information"** means information relating to the performance or merit of individual employees;

(4) The state militia or national guard or any part thereof;

(5) Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

(6) Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores; however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

(8) Welfare cases of identifiable individuals;

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

(10) Software codes for electronic data processing and documentation thereof;

(11) Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid;

(12) Sealed bids and related documents, until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;

(13) Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such, and the names of private sources donating or contributing money to the salary of a chancellor or president at all public colleges and universities in the state of Missouri and the amount of money contributed by the source;

(14) Records which are protected from disclosure by law;

(15) Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest;

(16) Records relating to municipal hotlines established for the reporting of abuse and wrongdoing;

(17) Confidential or privileged communications between a public governmental body and its auditor, including all auditor work product; however, all final audit reports issued by the auditor are to be considered open records pursuant to this chapter;

(18) Operational guidelines, policies and specific response plans developed, adopted, or maintained by any public agency responsible for law enforcement, public safety, first response, or public health for use in responding to or preventing any critical incident which is or appears to be terrorist in nature and which has the potential to endanger individual or public safety or health. Financial records related to the procurement of or expenditures relating to operational guidelines, policies or plans purchased with public funds shall be open. When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(19) Existing or proposed security systems and structural plans of real property owned or leased by a public governmental body, and information that is voluntarily submitted by a nonpublic entity owning or operating an infrastructure to any public governmental body for use by that body to devise plans for protection of that infrastructure, the public disclosure of which would threaten public safety:

(a) Records related to the procurement of or expenditures relating to security systems purchased with public funds shall be open;

(b) When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(c) Records that are voluntarily submitted by a nonpublic entity shall be reviewed by the receiving agency within ninety days of submission to determine if retention of the document is necessary in furtherance of a state security interest. If retention is not necessary, the documents shall be returned to the nonpublic governmental body or destroyed;

(20) The portion of a record that identifies security systems or access codes or authorization codes for security systems of real property;

(21) Records that identify the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network, and would allow unauthorized access to or unlawful disruption of a computer, computer system, computer network, or telecommunications network of a public governmental body. This exception shall not be used to limit or deny access to otherwise public records in a file, document, data file or database containing public records. Records related to the procurement of or expenditures relating to such computer, computer system, computer network, or telecommunications network, including the amount of moneys paid by, or on behalf of, a public governmental body for such computer, computer system, computer network, or telecommunications network shall be open;

(22) Credit card numbers, personal identification numbers, digital certificates, physical and virtual keys, access codes or authorization codes that are used to protect the security of electronic transactions between a public governmental body and a person or entity doing business with a public governmental body. Nothing in this section shall be deemed to close the record of a person or entity using a credit card held in the name of a public governmental body or any record of a transaction made by a person using a credit card or other method of payment for which reimbursement is made by a public governmental body;

(23) Records submitted by an individual, corporation, or other business entity to a public institution of higher education in connection with a proposal to license intellectual property or perform sponsored research and which contains sales projections or other business plan information the disclosure of which may endanger the competitiveness of a business; and

(24) Records relating to foster home or kinship placements of children in foster care under section 210.498.

Credits

(L.1987, S.B. No. 2, § A. Amended by L.1993, H.B. No. 170, § A; L.1995, H.B. No. 562, § A; L.1998, H.B. No. 1095, § A; L.2002, S.B. No. 712, § A; L.2004, S.B. Nos. 1020, 889 & 869, § A; L.2008, H.B. No. 1450, § A; L.2009, H.B. No. 191, § A; L.2013, H.B. Nos. 256, 33 & 305, § A, eff. May 31, 2013; L.2018, S.B. No. 819, § A, eff. Aug. 28, 2018.)

Notes of Decisions (111)

V. A. M. S. 610.021, MO ST 610.021

Statutes are current through the end of the 2019 First Regular and First Extraordinary Sessions of the 100th General Assembly. Constitution is current through the November 6, 2018 General Election.

End of Document

2011 WL 333235
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. California.

Charlie BROOKS, Plaintiff,
v.
LEGISLATIVE BILL ROOM, Defendant.

No. 2:10–cv–00379 FCD KJN PS.
|
Jan. 31, 2011.

Attorneys and Law Firms

Charlie E. Brooks, Crescent City, CA, pro se.

FINDINGS AND RECOMMENDATIONS

KENDALL J. NEWMAN, United States Magistrate Judge.

***1** Plaintiff, a California state prisoner, is proceeding in forma pauperis and without counsel. Plaintiff filed a complaint in the Northern District of California on February 9, 2009, alleging a violation of the Freedom of Information Act based upon the California Legislative Bill Room's alleged failure to send him copies of certain senate and assembly bills upon request. (Dkt. No. 1.) For the reasons stated below and pursuant to the court's screening obligation stated in 28 U.S.C. § 1915(e)(2), the undersigned recommends that plaintiff's amended complaint be dismissed with prejudice for failure to allege a proper basis for this court's subject matter jurisdiction.

Because plaintiff is a prisoner seeking relief against a governmental entity or officer or employee of a governmental entity, the court screened plaintiff's original complaint pursuant to 28 U.S .C. § 1915A(a). In the court's order of May 24, 2010 (the "Order"), the court dismissed the complaint with leave to amend after finding that it failed to assert any basis for subject matter jurisdiction. (Order, Dkt. No. 7.)

As to the existence of subject matter jurisdiction based upon a "federal question," the Order explained that the Freedom of Information Act ("FOIA") is a federal law requiring federal agencies to disclose information upon request unless such information is exempt from disclosure. (Order, Dkt. No. 7 (citing 5 U.S.C. § 552; *Oregon Natural Desert Ass'n v. Locke,* 572 F.3d 610, 614 (9th Cir.2009).) The Order explained that plaintiff did not properly allege a FOIA violation because the FOIA does not apply to state agencies such as California's Legislative Bill Room. (*Id.* (citing *Grand Cent. Partnership, Inc. v. Cuomo,* 166 F.3d 473, 484 (2nd Cir.1999); *Mamarella v. County of Westchester,* 898 F.Supp. 236, 237 (S.D.N.Y.1995)).) Thus, as the Order explained, plaintiff did not plead the basis for federal question jurisdiction, and the court concluded that subject matter jurisdiction could not be premised on that ground. (*Id.*)

As to the existence of diversity jurisdiction, the Order explained that a federal court's authority to hear cases in "diversity" is established by 28 U.S.C. § 1332. (*Id.*) The Order explained that, to properly assert diversity jurisdiction, the plaintiff must allege "complete diversity" between the plaintiff and the Legislative Bill Room. (*Id.* at 5–6.) The Order noted that, on the facts pleaded within the complaint, both plaintiff and the Legislative Bill Room appear to be California residents. (*Id.*) The Order explained that, therefore, plaintiff had failed to plead the basis for diversity jurisdiction and thus that subject matter jurisdiction could not be premised on that ground. (*Id.*)

The Order gave plaintiff the opportunity to file an amended complaint to properly allege a basis for either federal question or diversity jurisdiction. (*Id.*) In response to the Order, the plaintiff filed a document captioned "AMENDED COMPLAINT." (Dkt. No. 10.) However, the plaintiff failed to make any material changes to the substance of his pleading. (*Compare* Dkt. No. 1 *with* Dkt. No. 10.) Indeed, the documents are substantively identical. Because plaintiff's amended complaint is substantively identical to his original complaint, it too fails to state a basis for subject matter jurisdiction.

***2** As Plaintiff has received the opportunity to amend his pleading but has been unable to remedy the shortcomings described above, the undersigned remains unable to determine a jurisdictional basis for this action.[1] (*Compare* Dkt. Nos. 1 & 10.) Accordingly, the undersigned recommends that plaintiff's amended complaint be dismissed with prejudice, pursuant to the court's screening obligation stated in 28 U.S.C. § 1915(e)(2), for failure to allege a proper basis for this court's subject matter jurisdiction.

[1] As noted in the prior Order, plaintiff may be able to assert a state law claim under the California Public Records Act. *See* Cal. Govt.Code §§ 6253 et seq. (permitting inspection under certain conditions of California state or local agency record). However, such claim is a state law rather than federal law claim, and plaintiff would have to allege it in state court.

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. Plaintiff's complaint be dismissed with prejudice for failure to allege a proper basis for this court's federal subject matter jurisdiction; and

2. The Clerk of the Court be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. *Id.; see also* E. Dist. Local Rule 304(b). Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed with the court and served on all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir.1998); *Martinez v. Ylst,* 951 F.2d 1153, 1156–57 (9th Cir.1991).

All Citations

Not Reported in F.Supp.2d, 2011 WL 333235

2010 WL 148707
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Jerry FAXON, Plaintiff,
v.
State of MARYLAND, Defendants.

Civil Action No. JFM–10–28.
|
Jan. 13, 2010.

Attorneys and Law Firms

Jerry Lee Faxon, Baltimore, MD, pro se.

MEMORANDUM

J. FREDERICK MOTZ, District Judge.

***1** On or about January 6, 2010, the court received a copy of plaintiff's letter complaint seeking unspecified papers under the Freedom of Information Act ("FOIA"). Plaintiff, who is currently in state custody at the Maryland Reception Diagnostic & Classification Center in Baltimore, requests to be provided "any papers pertaining to me." Paper No. 1. No civil filing fee or indigency application accompanied the letter. Plaintiff shall not be required to cure this deficiency as, for reasons to follow, his complaint shall be dismissed.

The FOIA provides a mechanism for citizens to obtain documents from *federal* agencies, and grants the federal district courts jurisdiction to review agency compliance with citizens' requests. From a review of plaintiff's vague request and his state custodial situation, it is not clear if he is requesting state or federal records. To the extent that he seeks the production of records from a state agency, the FOIA is inapplicable. Statute and relevant case law precludes application of the FOIA to a state agency. *See* 5 U .S.C. § 551(1) ("Agency means each authority of the government of the United States...."); *St. Michael's Convalescent Hospital v. California,* 643 F.2d 1369, 1372 (9th Cir.1981) (refusing to apply FOIA or Privacy Act to state agencies receiving federal funding or subject to federal regulation); *Ferguson v. Alabama Criminal Justice Center,* 962 F.Supp. 1446 (M.D.Ala.1997); *Mamarella v. County of Westchester,* 898 F.Supp. 236, 237 (S.D.N.Y.1995) (holding that FOIA and Privacy Act do not apply to states agencies or individual officials). Plaintiff is not without recourse. Under Maryland law, a petitioner may file a complaint with the appropriate State circuit court, as set forth under Md.Code Ann., State Government, § 10–623, after first attempting state administrative review of the official refusal to provide the requested information. *Id.,* § 10–622.

Further, insofar as plaintiff is seeking documents from this court, his complaint fares no better. Federal courts, along with the clerks offices that receive court pleadings, are not "agencies" covered under the FOIA. *See* *Smith v. United States Dist. Ct.,* 956 F.2d 647, 649 n. 1 (7th Cir.1992); *see also* *Cook v. Willingham,* 400 F.2d 885, 885–86 (10th Cir.1968); *Harris v. United States,* 121 F.R.D. 652, 654 (W.D.N.C.1988). Federal courts, are expressly excluded from the definition of "agency" for purposes of FOIA disclosure requirements. *See* 5 U.S.C. § 551(1)(B); *Gayle v. Johnson,* 275 F. App'x 211, 212 n. 1 (4th Cir.2008). Therefore, plaintiff's FOIA request shall be dismissed by separate order. [1]

1 The court civil docket reveals no other cases filed here by Faxon.

All Citations

Not Reported in F.Supp.2d, 2010 WL 148707

End of Document

20 Mass.L.Rptr. 533
Superior Court of Massachusetts,
Suffolk County.

William Francis GALVIN,
Secretary of the Commonwealth
v.
MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY

No. Civ.A. 05-4602 BLS.
|
Jan. 25, 2006.

MEMORANDUM AND ORDER ON PLAINTIFF'S REQUEST FOR AN ORDER COMPELLING COMPLIANCE WITH A SUBPOENA AND CROSS-MOTION TO DISMISS COMPLAINT

GARSH, J.

***1** This matter is before the court on a request by William Francis Galvin, Secretary of the Commonwealth of Massachusetts (the "Secretary"), pursuant to G.L.c. 110A, § 407(c), for an order requiring Massachusetts Mutual Life Insurance Co. ("Mass Mutual") to comply with a subpoena *duces tecum* issued on June 15, 2005 (the "Subpoena"), as narrowed by a letter from the Secretary [1] dated July 28, 2005. More specifically, the Secretary requests that Mass Mutual be ordered to produce portions of a report prepared in connection with an investigation by a Special Committee of Mass Mutual's Board of Directors (the "Report") into alleged misconduct at Mass Mutual by its then president. [2] Mass Mutual opposes the request and seeks dismissal of the complaint on the grounds that the Secretary lacks jurisdiction to enforce the Subpoena because the Report does not relate to any alleged fraud in connection with the purchase or sale of a security or fraud in connection with the provision of investment advice and because the Secretary issued the Subpoena for the illegitimate purpose of harassing Mass Mutual. [3] For the reasons set forth below, the Secretary's request is allowed, and the cross-motion to dismiss the complaint is denied.

[1] The court uses the term "Secretary" to refer to William F. Galvin himself as well as to persons in the Massachusetts Securities Division, such as the Securities Division's Enforcement Attorney, who are acting under his authority.

[2] Mass Mutual has represented that it has produced all documents requested in the July 28, 2005 letter except for the investigatory report and documents evidencing the performance of its former president's SRA account from August 5, 2002 through July 16, 2004. The Secretary is not, at this time, seeking to compel production of the SRA records and, at the hearing on the request to enforce, the parties confirmed that no issue concerning the SRA records was before the court.

[3] Mass Mutual does not oppose the request for enforcement on the grounds that the Report is privileged.

BACKGROUND

On June 2, 2005, the Board of Directors of Mass Mutual sent to Robert J. O'Connell, who was its president (the "President"), a notice of intention to terminate his employment for cause and to remove him from the Board of Directors (the "Notice"). The Notice followed receipt by the Board of Directors of the Report. Mass Mutual concedes that the June 2nd action of its Board of Directors was based in part on "the findings" contained in the Report. The Notice stated that the Board of Directors had determined that the President had engaged in a systematic and pervasive pattern of willful abuse of authority. Specifically, the Board found that the President had engaged in five independent types of misconduct that individually and in the aggregate resulted in material harm to Mass Mutual, the third of which was:

> Interfering with the investigation and reprimand of your son-in-law and son

> relating to improper disclosure by your son Jared O'Connell, an employee of Oppenheimer Funds, to your son-in-law Rex Hampton, an employee of the Company, of confidential and proprietary information relating to Oppenheimer's portfolio trading strategies. In particular, you failed to direct that there be an investigation of the facts and circumstances surrounding the improper disclosures of Oppenheimer's confidential information and whether this information was used to engage in improper and/or illegal securities trading when such facts became known to you. Furthermore, you improperly caused the records relating to the underlying facts and circumstances and to the formal reprimand of your son and son-in-law to be removed from their personnel files and destroyed.

None of the other reasons in the Notice mentioned either Jared O'Connell ("O'Connell"), Rex Hampton ("Hampton") or the Oppenheimer Funds and, with the possible exception of the basis for termination relating to shadow investments, none of the other reasons had any relationship to the purchase or sale of securities or to any possible misconduct by O'Connell or Oppenheimer Funds. For example, the second grounds for termination set forth in the Notice related to the President's having caused Mass Mutual to sell a condominium unit in Florida to himself for a price substantially below what Mass Mutual could have obtained in an arms-length transaction.

***2** The Secretary's Securities Division commenced an investigation on June 7, 2005. Oppenheimer refers to a group of affiliated entities, including Oppenheimer Funds Distributor, Inc., that, according to the Secretary, offer mutual fund securities for sale in Massachusetts and elsewhere and provide investment advice. Oppenheimer is owned by Mass Mutual. Oppenheimer Funds, Inc. is a registered investment adviser. Oppenheimer Funds Distributor, Inc. is a registered broker-dealer. O'Connell is listed on the Central Registration Depository, a securities industry record-keeping database owned and maintained by the National Association of Securities Dealers, as having had general securities representative status with Oppenheimer Funds Distributor, Inc. from August 2002 until July of 2004.

In connection with an investigation, on June 10, 2005, the Secretary requested, in a letter of inquiry, that certain records voluntarily be produced by Oppenheimer Funds Distributor, Inc. relating to the investigation and/or discplining of O'Connell.[4] On that same date, in another letter of inquiry, the Secretary requested that Mass Mutual voluntarily produce voluminous files, including the entire fifty-nine page Report. The Secretary's request was not limited to records relating to Oppenheimer Funds Distributor, Inc. or O'Connell.

[4] There is no suggestion that Oppenheimer Funds Distributor, Inc. has not fully complied with the Secretary's request.

Mass Mutual responded on June 15, 2005 that it had already voluntarily produced documents relating to the President's termination to the Massachusetts Insurance Commissioner and to the Attorney General of Massachusetts and that while it did "not understand the basis for the Securities Division's jurisdiction over this matter," it would not object to the Secretary's obtaining copies of material provided or to be provided to the Attorney General. Mass Mutual also pointed out that it could not comply with the production request within the short time frame set out in the Secretary's letter and represented that, if the Secretary identified particular documents relating to subjects within his jurisdiction that had not been provided to the Attorney General, Mass Mutual would promptly provide them on reasonable notice.

On June 15, 2005, the Secretary served the Subpoena upon Mass Mutual. The Subpoena required production, by the following day, of the entire Report and all documents relating to the President's termination, as well as documents evidencing

communications between O'Connell and Hampton and documents evidencing communications between the President and Oppenheimer concerning O'Connell and/or Hampton.

In an article that appeared in the *Wall Street Journal* on June 15, 2005, the Secretary is said to have stated that "he has requested documents related to the Mass Mutual board probe's allegations that [the President] had suppressed efforts to discipline relatives, one of whom was employed at Oppenheimer Funds."[5] In the same article, Attorney General Thomas Reilly is quoted as having said that his office is "reviewing serious allegations of wrongdoing uncovered by the company," following a preliminary review of documents submitted by Mass Mutual. In an article that appeared about the Subpoena in the *Boston Globe* on June 16, 2005, Galvin is said to have accused Mass Mutual of "stonewalling his office's investigation of the circumstances behind the abrupt firing of [its President] on June 2." With reference to Mass Mutual's having provided records to state insurance regulators and to the Massachusetts Attorney General, the Secretary is quoted in that article as having said that "[this] is not a situation where they get to choose [with whom they cooperate on investigations because Mass Mutual has brokerage operations] licensed by my office, and therefore are obligated to respond to our legitimate inquiries." In an Associated Press story that appeared in *The Republican* on June 18, 2005, a spokesman for the Secretary is said to have indicated that the Secretary was "looking into his legal options which could include asking a judge to intervene."

5 Mass Mutual has submitted copies of various newspaper articles in support of its argument that the Secretary issued the Subpoena for an improper purpose.

***3** Mass Mutual contested the Secretary's statutory authority to pursue his investigation. It filed a complaint in Superior Court for Hampden County on June 17, 2005, seeking to quash the Subpoena.

In an article about the suit that appeared in the *Boston Herald* on June 21, 2005, the Secretary is said to have stated that he was only seeking information relating to Mass Mutual's Oppenheimer mutual fund unit, which unit, according to the Secretary, has faced several reported high-level executive departures as well as allegations that the President's son was involved in a trade-tip controversy while at the firm. The article quotes the Secretary as having said about Mass Mutual's suit, "[t]his demonstrates a degree of arrogance on their part. They just don't want to answer questions." On the same day, an Associated Press story that appeared on TheBostonChannel.com quoted the Secretary as having said the following about the action filed by Mass Mutual: "It's evidence of their arrogance that they would bring this action. I'm eager to determine what has occurred, and they don't want regulators to look at the information." The Secretary is also quoted in that article as having stated that Mass Mutual is in "significant turbulence," and that he was "simply trying to verify that the investors' interests are being protected."

By Order dated July 12, 2005, the Superior Court (Sweeney, J.) dismissed the action filed by Mass Mutual without prejudice, stating that it could be renewed in the event that the Secretary should move to enforce the Subpoena. *Massachusetts Mutual Life Insurance Company v. Galvin,* Civil No. 05-613 (Hampden Super. Ct. July 12, 2005), slip op. at 8. In the course of the opinion, the court recognized that the Secretary has the right to proceed independently of the Attorney General and the Commissioner of Insurance to the extent provided by law. *Id.* at 2 n. 1. The court also noted that Mass Mutual is a mutual life insurance company, owned by its policy-holder members, and that public oversight of the company is the responsibility of the Commissioner of Insurance and the Attorney General because Mass Mutual does not issue securities. *Id.* at 2-3. Given the breadth of the Subpoena, the court indicated that it appeared to extend well beyond the power granted to the Secretary by the Massachusetts Uniform Securities Act, G.L. c. 110A, § 101 *et seq.,* while at the same time indicating that it appeared that the Subpoena sought "relevant information regarding the Oppenheimer aspect of [the President's] firing." *Id.* at 5. In the context of discussing whether Mass Mutual had standing to seek to quash the subpoena before the Secretary moved to enforce it, the court referred to the "potentially destabilizing effect the Secretary's reported and seemingly unsupported [public] comments that the plaintiff Mass Mutual is in 'significant turbulence' and he must 'protect' its 'investors' (even though he has no statutory authority

to provide such protection) may have on the plaintiff." *Id.* at 5.

***4** After the court issued its decision opining that the Secretary seemed to misunderstand the reach of his powers under chapter 110A, the Secretary issued a letter to Mass Mutual on July 28, 2005, that narrowed significantly the scope of the Subpoena. The narrowed request required, *inter alia,* production by Mass Mutual, on or before August 4, 2005, of those sections of the Report that were the basis for Mass Mutual's decision to terminate the President relating to O'Connell and the Oppenheimer funds.

Mass Mutual has refused to produce any portion of the Report to the Secretary in the absence of the Secretary agreeing to execution of an "appropriate confidentiality agreement." The Secretary has advised Mass Mutual that the Public Records Act, G.L. 66, § 10,[6] precludes him from entering into such an agreement, but that, while his investigation is ongoing, he would assert the exemption in that statute for investigatory materials, G.L. c. 4, § 7, Twenty-sixth (f).[7] The Secretary also agreed that, upon completion of the investigation, should the Report be the subject of a public record request, he would provide Mass Mutual with ten days' notification prior to releasing it. The Secretary has taken the reasonable position that he can offer Mass Mutual "no more assurances than the public records law allows" and that its "insistence on requiring an iron-clad confidentiality agreement is unreasonable under the circumstances." The Secretary has also advised Mass Mutual of his willingness to review any legal authority applicable in Massachusetts pertaining to the confidentiality of the Report.

6 G.L. 66, § 10(a) provides, in relevant part, that "[e]very person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee."

7 "Investigatory materials" are those that are "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, Twenty-sixth (f).

The instant action was filed on October 27, 2005. In a *Boston Globe* article about the suit, dated November 23, 2005, the Secretary is quoted as having stated in an interview that Mass Mutual "continue[s] to stonewall us at every turn when we try to get information," and that "Mass Mutual has decided that they didn't have to produce the documents, but there is no question that we have jurisdiction over mutual funds."

By letter dated December 5, 2005, Mass Mutual reiterated that it was willing to produce the relevant pages of the Report if the Secretary "agrees to maintain their confidentiality." At a deposition of Mass Mutual's Head of Compliance taken by the Secretary, Mass Mutual also agreed to permit the Secretary to review a copy of the relevant pages of the Report and to question the witness regarding the Report provided that the pages were returned to Mass Mutual and did not, thereby, became part of the Secretary's files or otherwise become part of the record. The Secretary rejected that proposal. Alternatively, Mass Mutual requested the Secretary to permit his outside counsel to review the Report so that they could determine if there is any basis to continue to seek to enforce the Subpoena. That offer also was rejected.

Mass Mutual has provided the Report to the Attorney General for the Commonwealth of Massachusetts, the Massachusetts Commissioner of Insurance, and the Attorney General for the State of Connecticut.

***5** Mass Mutual represented to the Secretary that the Office of the Massachusetts Attorney General entered into a confidentiality agreement with Mass Mutual regarding the Report, but did not, in response to the Secretary's written request, produce any writings that memorialized such an agreement. The agreement with the Massachusetts Attorney General was not, in fact, reduced to writing. The Secretary requested Mass Mutual to provide, if no such written documentation

exists, the name of the person who granted the confidentiality status so that the Secretary could contact such person to discuss the confidentiality agreement entered into and its efficacy under the Massachusetts Public Records Law. There is no indication that this information was provided by Mass Mutual. At the hearing on the Secretary's request to enforce the Subpoena and the cross-motion to dismiss, counsel for Mass Mutual represented that the Report was provided to the Massachusetts Attorney General on an "understanding" that it would be covered by a "common work product privilege." Counsel further represented that the Attorney General acknowledged that the Report would constitute common work product and agreed that it would not be subject to disclosure.

There also is no written agreement with the Attorney General of Connecticut. Mass Mutual advised the court that when it produced the Report to the Connecticut Attorney General, it was the company's understanding that the production was pursuant to an ongoing anti-trust investigation and would not become part of the public record. In response to a suit by Mass Mutual seeking to prevent the Connecticut Attorney General from disclosing the Report to the *Hartford Courant,* a Connecticut Superior Court judge rejected Mass Mutual's contention that the Report had been provided in response to and under the authority of an anti-trust subpoena that had been served upon it on November 2, 2004. *MassMutual Life v. State of Connecticut,* Civil No. 05 4014549 (J.D of Hartford August 25, 2005), slip op. at 4-5 (Connecticut General Statutes § 35-42(c), which provides that documents furnished to Attorney General are not available to the public and must be returned to the provider at the termination of the Attorney General's investigation, does not apply to the Report because it was not provided to the Attorney General because of the anti-trust subpoena). The court also rejected all the other arguments raised by Mass Mutual, holding that release of the Report would not constitute a tortious invasion of privacy, *id.* at 5-6, that its status as an attorney-client privileged document would not prevent its disclosure, *id.* at 6-7, that, in any event, Mass Mutual likely waived that privilege by voluntarily submitting the Report to the Attorney General, *id.* at 7, that the evidence was insufficient to support a finding of an explicit agreement between Mass Mutual and the Connecticut Attorney General because "at best, MassMutual made a reqeust for confidentiality to which the Attorney General declined to give explicit assurance," *id.* at 8, that the common interest doctrine would not preserve Mass Mutual's attorney-client privilege, *id.* at 9, that the common law privileges for law enforcement and work product are not incorporated into the exemptions from compelled disclosure under the Connecticut Freedom of Information Act, *id.,* and that Mass Mutual was not entitled to a writ of mandamus to compel the Attorney General to use his discretion to determine whether the Report is exempt because the exemptions in the Connecticut Freedom of Information Act are permissive. *Id.* at 9-10. The court declined to grant the injunctive relief requested by Mass Mutual. Disclosure of the Report by the Connecticut Attorney General has been stayed pending Mass Mutual's appeal of the Superior Court's decision.

DISCUSSION

***6** This court should enforce the Subpoena as narrowed by the Secretary provided that it has a legitimate purpose within the Secretary's statutory authority; the information sought by the Subpoena may be relevant to the Secretary's inquiry; the information sought is not already within the Secretary's possession, and the Subpoena has not been issued for an improper purpose, such as harassment of Mass Mutual. See *United States v. Powell,* 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (Commissioner of Internal Revenue need not meet standard of probable cause to obtain enforcement of his summons).

General Laws c. 110A, § 101 makes it unlawful for any person to engage in any act or fraud or deceit in connection with the offer, sale or purchase of any security.[8] Section 102 makes it unlawful for any person who receives any consideration from another person to engage in fraud or deceit in connection with the provision of investment advice.[9] Mass Mutual's contention that the Report has nothing to do with the purchase or sale of any security by the President, O'Connell or Hampton ignores the fact that the Report deals, in part, with the President's having arranged for the destruction of records relating to an investigation into whether Oppenheimer's confidential

information "was used to engage in improper and/or illegal securities trading."

8 G.L. c. 110A, § 101 provides that "[i]t is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact ..., or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

9 G.L. c. 110A, § 102 makes it "unlawful for any person who receives, directly or indirectly, any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise (1) to employ any device, scheme, or artifice to defraud the other person, or (2) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon the other person."

Furthermore, Mass Mutual's arguments concerning the scope of the Secretary's jurisdiction is mistakenly premised on sections 101 and 102 of chapter 110A being the only provisions conceivably relevant to the Secretary's jurisdiction to issue the Subpoena. Section 201 of chapter 110A, however, requires any person who transacts business in the Commonwealth as a broker-dealer, agent of a broker-dealer, investment adviser, or investment adviser representative to be registered under chapter 110A. Oppenheimer Funds, Inc. is a registered investment adviser and Oppenheimer Funds Distributor, Inc. is a registered broker-dealer. O'Connell was registered as having general securities representative status with Oppenheimer Funds Distributor, Inc. Section 204 of the Act gives the Secretary broad oversight authority over registered persons. The Secretary may, for example, discipline a registrant who "has willfully violated or willfully failed to comply with any provision of" chapter 110A or any rule or order promulgated thereunder, G.L. c. 110A, § 204(a)(2)(B), or who "has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business." G.L. c. 110A, § 204(a)(2)(G). [10] A document that makes findings with respect to a non-registered individual's interference into an investigation as to whether a registered entity misused proprietary information relating to that registered entity's portfolio trading strategies may, at a minimum, be relevant to whether that registered entity has engaged in unethical or dishonest conduct or practices in the securities business.

10 G.L. c. 110A, § 204(a) provides that the "secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant, or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser" has engaged in any one of several enumerated acts.

Chapter 110A, § 407(a)(1) broadly provides that the "secretary in his discretion may make such public or private investigations ... as he deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder." In connection with the exercise of his investigatory powers, the Secretary is authorized to subpoena witnesses and compel their attendance and to require the production of any papers, documents or records "which the secretary deems relevant or material to the inquiry." G.L. c. 110A, § 407(b). In the event of a refusal to obey a subpoena, the Superior Court, upon application by the Secretary, may order a person to appear before the Secretary and to produce documentary evidence touching upon the matter under investigation. G.L. c. 110A, § 407(c).

***7** The Public Records Act requires the disclosure, upon request, of any "public record" without unreasonable delay. G.L. c. 66, § 10(a). The term "public records" includes all documents "made or received" by any officer or employee of any agency,

executive office, department, division or authority of the Commonwealth unless it falls within one of several enumerated exemptions. G.L. c. 4, § 7, Twenty-sixth (a)-(p). There is a presumption that any record sought is public with the burden upon the custodian to prove with specificity the exemption which applies. G.L. c. 66, § 10(c).

That the Report may be open to public inspection at some point after it has been received by the Secretary is not a reason to refuse enforcement of the Subpoena. See *Boston Police Superior Officers Federation v. City of Boston,* 414 Mass. 458, 465-466, 608 N.E.2d 1023 (1993) (the public records law and its exceptions do not restrict a commission's power to subpoena documents). Whether or not the Report is exempt from public disclosure has no bearing upon whether the Secretary has jurisdiction to require it to be produced. See *Town Crier, Inc. v. Chief of Police of Weston,* 361 Mass. 682, 691, 282 N.E.2d 379 (1972) ("All police records ... whether or not they are public records, are subject to being summoned before a proper tribunal in accordance with established rules of law.").

The court's role in a proceeding to enforce an administrative subpoena issued by the Secretary is a limited one. Like the federal Securities Act, chapter 110A gives the Secretary authority to require the production of records in the course of conducting an investigation, "and in [the] absence of a basis for saying that its demand exceeds lawful limits ... [the Secretary] is entitled to the aid of the court in obtaining them." *Penfield Co. v. Securities & Exchange Commission,* 330 U.S. 585, 591, 67 S.Ct. 918, 91 L.Ed. 1117 (1947). Decisions construing federal securities law are applicable to the Massachusetts Uniform Securities Act, G.L. c. 110A, § 101 *et seq.* *Marram v. Kobrick Offshore Fund, Ltd.,* 442 Mass. 43, 50-51, 809 N.E.2d 1017 (2004). See also G.L. c. 110A, § 415.

The Secretary's demand, as narrowed, does not exceed the lawful limits of his authority. To the extent that, as set forth in the Notice, the Report deals with the President's interference with an investigation into "improper disclosure by ... an employee of Oppenheimer Funds ... of confidential and proprietary information relating to Oppenheimer's portfolio trading strategies" and to the extent that it relates to "improper disclosure of Oppenheimer's confidential information" and to the President's having caused records "relating to the underlying facts and circumstances" to be destroyed, which underlying facts and circumstances include whether such proprietary information "was used to engage in improper and/or illegal securities trading," the Report unquestionably relates to matters within the broad oversight authority of the Secretary. The Secretary's interpretation of his statutory mandate in connection with issuance of the Subpoena as narrowed is not "patently wrong, unreasonably, arbitrary, whimsical, or capricious" and thus is entitled to some deference. *Box Pond Association v. Energy Facilities Siting Board,* 435 Mass. 408, 416, 758 N.E.2d 604 (2001). "This is particularly so with respect to internal agency matters such as the issuance of subpoenas directed at the gathering of evidence for an agency proceeding...." *Boston Police Superior Officers Federation,* 414 Mass. at 462, 608 N.E.2d 1023.

***8** The fact that the Subpoena was overly broad before it was narrowed does not mean that the Secretary is seeking limited portions of the Report in order to investigate a breach of fiduciary duty, nepotism, or favoritism at, or mismanagement of, a Massachusetts based mutual insurer. It does not follow from the fact that information concerning a registered entity subject to chapter 110A, § 201 may appear in the context of a report detailing mismanagement of a non-registered entity that the demand for the report's production necessarily implies that the Secretary is investigating acts of mismanagement that may be detailed in that report. Nothing precludes the Secretary from subpoenaing information he deems relevant or material to his investigation of the actions of the Oppenheimer Funds merely because such information may be found in an assessment of whether the President breached his fiduciary duty. Thus cases such as *Menides v. The Colonial Group, Inc.,* 681 F.Supp. 965, 972 (D.Mass.1987) (securities fraud claims are not "intended to bring within their ambit simple corporate mismanagement or every imaginable breach of fiduciary duty ....") are irrelevant. The Secretary does not seek the Report in order to investigate Mass Mutual; he does so to aid in his investigation of the Oppenheimer Funds. For purposes of that investigation Mass Mutual may be required to produce any record

that the Secretary "deems relevant or material to the inquiry." G.L. 110A, § 407(b).

Mass Mutual alternatively contends that the Subpoena should not be enforced because it is designed to harrass Mass Mutual. It maintains that the Report is being demanded by the Secretary solely to enable him to achieve a public relations coup by releasing it to the media. See *Powell,* 379 U.S. at 58 (court should not enforce a summons that has been issued for an improper purpose, such as to harass or put pressure on subpoenaed party to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation); *United States v. Gertner,* 65 F.3d 963, 971 (1st Cir.1995) (upholding finding that administrative agency's sole purpose for summons was to gain information about lawyer's unnamed client and that stated purpose for issuing the summons was merely a pretext for its real purpose). The record, however, warrants no reasonable inference that, in seeking limited portions of the Report relating to possible improper disclosures of confidential and proprietary information concerning Oppenheimer's portfolio trading strategies, the Secretary is motivated by an improper purpose, namely to ensure that portions of the Report will enter into the public domain.

Mass Mutual sees something nefarious in the Secretary refusing to agree to hold the Report confidential should it be produced. This court does not. The Secretary's refusal warrants no reasonable inference that his demand for limited portions of the Report is motivated by an improper purpose because a public employee has no authority to override, by means of a promise of confidentiality, the General Court's determination that any document "made or received" by a public employee shall be available to the public unless one of the legislatively enacted exemptions applies.

***9** Mass Mutual's purported ability to arrive at "mutually acceptable ground rules" with other agencies, if true, may suggest that not every state employee is as careful as the Secretary to safeguard the public's right of access to public records; it most certainly does not suggest that the Secretary is motivated by an improper purpose. Mass Mutual, for example, contrasts the Secretary's behavior with that of the Attorney General, and argues that the Attorney General's willingness to be accommodating demonstrates the Secretary's bad faith. Mass Mutual represents that the Report provided to the Massachusetts Attorney General will not become public at the conclusion of his ongoing criminal investigation because it was "provided to the Attorney General on an understanding that there was a common work product privilege, and that therefore it would be privileged, and the Attorney General did acknowledge that and did agree that it would not be subject to disclosure." There is, however, no exemption in the Public Records Act for work product. A Massachusetts state employee may not, by characterization of records as "work product," withhold documents whose production is otherwise mandated under the terms of the Act. *General Electric Co. v. Department of Environmental Protection,* 429 Mass. 798, 801-807, 711 N.E.2d 589 (1999). Indeed, the Supreme Judicial Court has acknowledged the Attorney General's failure to obtain legislative approval of measures providing an exemption for "documents, information, and tangible things prepared in anticipation of litigation." *Id.* at 803 n. 6, 711 N.E.2d 589. There may, indeed, be compelling policy reasons to maintain from public view a company's internal investigation in order to safeguard the confidentiality of employees who were interviewed, prevent the chilling of future investigations, and foster appropriate corporate self-governance, but it is the Legislature, and not the Secretary (or the Attorney General), which determines whether to create an exemption. The Secretary's refusal to commit himself never to produce any portions of the Report if requested to do so by a member of the public does not support the proposition that his demand for limited portions of the Report to be produced by Mass Mutual is pretextual.

Furthermore, the Secretary has not stated that he will release the Report immediately upon the conclusion of his investigation. In addition to offering to provide Mass Mutual with notice should there be a request for the Report after the conclusion of his investigation, the Secretary has assured Mass Mutual that he "would be happy to review any legal authority applicable in Massachusetts which [Mass Mutual] believe[s] would be inconsistent with the decision in Connecticut." Mass Mutual's response provides no authority whatsoever in support of the applicability

of any of the legislatively enacted exemptions. Moreover, neither in its Memorandum in Support of its Opposition to the Request to Enforce or in Support of its Motion to Dismiss nor at the hearing did Mass Mutual identify any exemption in the Public Records Act which it believed would render the Report exempt from release if provided to the Secretary. Instead, counsel for Mass Mutual stated that Mass Mutual was quite concerned that it would not be successful in arguing that any exemption applied. Mass Mutual's primary concern is that the Report, if produced to the Secretary, may not be exempt and, therefore, its production inevitably would lead to its becoming public.

***10** Mass Mutual rather optimistically assumes that the same fate will not befall the copies of the Report that already have been provided to the Commissioner of Insurance[11] and to the Attorneys General of Massachusetts and Connecticut. Given the reasoning and findings contained in the Connecticut Superior Court's decision and Mass Mutual's failure to point to any valid confidentiality agreement with the Attorney General of Massachusetts, it hardly would be unreasonable for the Secretary to assume that the Report eventually will become public whether or not he obtains it.

11 No confidentiality agreement was entered into with the Commissioner of Insurance because Mass Mutual believes that the Report produced to the Commissioner of Insurance will be protected from public disclosure by a statute granting confidentiality to records produced to the Commissioner of Insurance as part of the annual financial inspection of insurance companies and thus need not be made public under the Public Records Act. Gen. Laws c. 4, § 7, Twenty-sixth (a) exempts from mandatory disclosure a record "specifically or by necessary implication exempted from disclosure by statute."

In addition to the Secretary's refusal to agree to maintain the confidentiality of any portion of the Report provided by Mass Mutual, his refusal to review the Report without retaining a copy or to permit his outside counsel to do so is offered as further evidence that the Secretary's sole motivation is to make the Report public. However, having determined that portions of the Report are or may be relevant to his lawful investigation, the Secretary understandably refuses to allow a witness to control the manner and means in which his investigation is to be carried out. That the Secretary may not share Mass Mutual's concern about portions of the Report becoming public does not mean that he is seeking to enforce the Subpoena for the express purpose of making the Report public. There is no credible evidence in the record that the Secretary is so motivated. Further, it would not be unreasonable for the Secretary to regard the suggestion that the Report be viewed but not retained and accordingly not be deemed "received" as contrary to public policy. "[A] record in public hands is presumed to be public within the Public Records Act." *Coleman v. Boston Redevelopment Authority,* 61 Mass.App.Ct. 239, 243, 809 N.E.2d 538 (2004). At a minimum, Mass Mutual's "look but do not file" stratagem is one that likely would create a public perception that the Secretary and Mass Mutual had entered into a collusive end-run around the Legislature's determination that there must be disclosure of all materials "received" by a public employee unless one of the enumerated statutory exemptions is applicable.

Although the Subpoena, when initially served, unquestionably was overly broad, the letter to Mass Mutual narrowing it appears to have been a genuine attempt to confine the Subpoena to "information regarding the Oppenheimer aspect of [the President's] firing," which a judge of this court had characterized as relevant. Nothing in the ruling in the action in Hampden County Superior Court brought by Mass Mutual suggests that the Secretary acted in bad faith when, after the decision in that case was rendered, he demanded those sections of the Report that were the basis for Mass Mutual's decision to terminate the President relating to O'Connell and Oppenheimer Funds.

The investigation being conducted by the Secretary is a matter of legitimate public interest. Neither the Secretary's willingness to be interviewed by the media concerning that investigation nor the statements he is reported to have made demonstrate that his narrowed demand for select portions of the Report is pretextual. Mass Mutual may not believe that its opposition

to production of any portion of the Report can be fairly characterized as "stonewalling," but that the Secretary would hold that opinion is not surprising. The Secretary's willingness to vent his frustration in the media does not support the presence of *Gertner*-type pretext here.

***11** The court has denied Mass Mutual's request, which was opposed by the Secretary, that the court examine portions of the Report *in camera.* The Secretary need not establish at this stage that chapter 110A definitely has been violated or that the Report definitely will provide evidence of such a violation. Where, as here, the narrow request for those portions of the Report that deal with the termination of the President for reasons related to improper disclosure of confidential Oppenheimer Fund information seeks records so clearly within the Secretary's jurisdiction to investigate potential violations, an *in camera* review to determine if such portions of the Report, in fact, would establish or tend to prove some particular violation would impermissibly invade the authority granted to the Secretary by the Legislature under G.L. c. 110A, § 407(b) to examine those documents "which the secretary deems relevant or material to the inquiry." Although the Secretary may not act arbitrarily or in excess of his statutory authority in exercising his investigative function, "this does not mean that his inquiry must be 'limited ... by forecasts of the probable result of the investigation'...." *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 216, 66 S.Ct. 494, 90 L.Ed. 614 (1946). The Secretary "must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission's regulatory authority." *Securities & Exchange Commission v. Brigadoon Scotch Distributing Co.,* 480 F.2d 1047, 1053 (2d Cir.1973).

In sum, the Secretary is entitled to an order compelling the production of those portions of the Report that pertain to the third reason given by the Board of Directors of Mass Mutual for terminating the President's employment.

ORDER

For the foregoing reasons, it is hereby ***ORDERED*** that the Secretary of the Commonwealth's request for an order compelling compliance with the subpoena *duces tecum* served upon Massachusetts Mutual Life Insurance Company as modified by letter dated July 28, 2005 be and hereby is ***ALLOWED.*** Massachusetts Mutual Life Insurance Company is hereby ***ORDERED*** to appear before the Secretary, or the officer designated by him, on or before February 4, 2006, and to produce those "sections of the fifty-nine page report that was the basis of" Massachusetts Mutual Life Insurance Company's decision to terminate Robert J. O'Connell relating to Jared O'Connell and the Oppenheimer Funds. It is further ***ORDERED*** that the cross-motion of Massachusetts Mutual Life Insurance Company to dismiss the complaint be and hereby is ***DENIED***.

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United States District Court, D. Minnesota.

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY and Grand Portage Band of Chippewa Indians, federally recognized Indian Tribes, Plaintiffs,
v.
Mike HATCH, Minnesota Attorney General, David F. Fisher, Commissioner of the Minnesota Department of Administration, and Charles R. Weaver, Jr., Commissioner of the Minnesota Department of Public Safety, Defendants.

No. CIV011737ADMAJB.
|
June 20, 2002.

Attorneys and Law Firms

Steven F. Olson, and Greg S. Paulson, Bluedog, Olson & Small, P.L . L.P., Bloomington, Minnesota, appeared for and on behalf of the Plaintiffs.

John S. Garry, Assistant Attorney General, St. Paul, Minnesota, appeared for and on behalf of the Defendants.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, J.

I. INTRODUCTION

***1** On March 7, 2002, the undersigned United States District Judge heard Cross–Motions for Summary Judgment by Plaintiffs Shakopee Mdewakanton Sioux (Dakota) Community and Grand Portage Band of Chippewa Indians (the "Tribes") [Doc. No. 25], and Defendants Mike Hatch, Minnesota Attorney General, David F. Fisher, Commissioner of the Minnesota Department of Administration, and Charles R. Weaver, Jr., Commissioner of the Minnesota Department of Public Safety (the "State") [Doc. No. 17]. Also before the Court is the Tribes' Appeal [Doc. No. 42] of Magistrate Judge Arthur J. Boylan's Order of February 21, 2002 [Doc. No. 38], denying the Tribes' Motion to appoint independent legal counsel for Defendant Weaver. For the reasons set forth below, the State's motion is granted and the Tribes' motion is denied.

II. BACKGROUND

The genesis of this dispute is a request by news organizations for copies of tribal-gaming audits the Tribes submitted to the Minnesota Department of Public Safety ("DPS"). The audit reports are required to be filed with the DPS pursuant to the Minnesota Tribal–State Compacts for Video–Gaming and Blackjack (the "Compacts"). The State argues that the open public records law, the Minnesota Government Data Practices Act ("MGDPA"), requires it to release such information to the public upon request. The Tribes, opposing any release of the audits to the public, argue that (1) releasing the audits would constitute a breach of the Compacts, (2) the MGDPA violates their due process rights, (3) federal law preempts the MGDPA, and (4) the State should be estopped from releasing the audits to the public.

The Tribes and the State entered the Video–Gaming Compacts in 1989 and the Blackjack Compacts in 1991. *See* Garry Aff. Exs. A & C (Video–Gaming Compacts), Exs. B & D (Blackjack Compacts). Both the Video–Gaming and Blackjack Compacts provide that the Tribes shall engage an independent certified public accountant to audit the books and records of tribal casino gaming action pursuant to the Compacts and that the Tribes "shall make copies of the audit and all current internal accounting and audit procedures available to the State upon written request." Garry Aff. Exs. A & C (Video–Gaming Compacts, § 6 .11), Exs. B & D (Blackjack Compacts, § 6). For a number of years, the Tribes have submitted copies of gaming audits to the State under the Compacts. *See* Garry Aff. Exs. G & H.

In February, 2001, the publisher of the Native American Press/Ojibwe News, William J. Lawrence, submitted a request to the DPS for copies of recent tribal-gaming audits received by the State from the Red Lake Band of Chippewa Indians. Two months later, the DPS denied the request

on the ground that such audits contain nonpublic "trade secret information" and nonpublic "security information" under Minn.Stat. § 13.37. Lawrence then requested an advisory opinion from the Commissioner of the Minnesota Department of Administration ("Commissioner of Administration") concerning whether the DPS appropriately denied his request.

***2** On June 6, 2001, the Commissioner of Administration issued Advisory Opinion 01–501, concluding that the DPS improperly denied the request for the Red Lake tribal-gaming audits because the public is entitled to access such data under the MGDPA. *See* Garry Aff. Ex. M. In Advisory Opinion 01–501, the Commissioner of Administration determined that the language of the tribal-state gaming compact was insufficient to satisfy the requirement of reasonable efforts to maintain secrecy of the audits to qualify as "trade secret information" under Minn.Stat. § 13.37. *Id.* at 3–4. Following the issuance of Advisory Opinion 01–501, other news organizations submitted requests to the DPS for copies of all tribal-gaming audits received by the State. On June 19, 2001, the DPS sent notice that copies of all previous audits would be released on June 28, 2001, unless there was a temporary classification of the audits as nonpublic or a court order barring the release.

On June 19, 2001, the DPS also sent notice to the Tribes, informing the Tribes that copies of their audits would be released on June 28, 2001, based on Advisory Opinion 01–501. *See* Garry Aff. Exs. P & Q. Shortly thereafter, the Tribes submitted letters to the DPS, setting forth the Tribes' legal arguments contesting public release of the audits. *See* Garry Aff. Exs. S & T.

The DPS then applied to the Commissioner of Administration for a temporary classification of the audits as nonpublic pursuant to Minn.Stat. § 13.06. The DPS notified the Tribes of this application for temporary classification and informed the Tribes that the audits would not be released pending a decision on the application. On August 3, 2001, the Tribes submitted their arguments to the Commissioner of Administration that Advisory Opinion 01–501 should be reversed and that the application for temporary classification of the audits as nonpublic should be granted. *See* Garry Aff. Ex. X, at 00190–00194.

On August 28, 2001, the Commissioner of Administration issued a decision approving the application for a temporary classification of the audits as nonpublic pursuant to Minn.Stat. § 13.06. *See* Garry Aff. Ex. X, at 00135–00142. The Tribes received notice of this temporary classification as nonpublic. As required by Minn.Stat. 13 .06, subd. 5, the Commissioner of Administration submitted the record, including arguments submitted by the Tribes, and the decision to the Attorney General for review.

On September 14, 2001, the Attorney General issued a decision disapproving the temporary classification of the audits as nonpublic. *See* Garry Aff. Ex. Y. The Tribes received a copy of this adverse decision. The Tribes filed this action on September 20, 2001, seeking an order to prohibit the State from releasing the audits to the public. The State and the Tribes agreed to a temporary restraining order barring release of the audits pending further court order.

III. DISCUSSION

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see* *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

A. Breach of the Compacts

***3** The Tribes claim the Tribal–State Compacts prohibit the State from applying the MGDPA to the gaming audits the Tribes submitted to the State. The Tribes contend that they did not expressly agree in the Compacts that the MGDPA would apply to the audits in the State's possession. To allow public access to such audits, the Tribes argue, would constitute a breach of the Compacts.

The MGDPA provides a regulatory framework for the collection, creation, storage, maintenance, dissemination and access to the government data maintained by state agencies and political subdivisions. *See* Minn.Stat. §§ 13.01–13.99. The purpose of the MGDPA is to balance the rights of individuals to protect personal information from indiscriminate disclosure with the right of the public to know what the government is doing. *Montgomery Ward v. County of Hennepin,* 450 N.W.2d 299, 307 (Minn.1990) (citing Gemberling & Weissman, *Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act—From "A" to "Z",* 8 Wm. Mitchell L.Rev. 573, 575 (1982)). The MGDPA establishes a presumption that all government data are public and are accessible to the public, unless otherwise classified by statute, by temporary classification under the MGDPA, or by federal law. *Id.* § 13.01, subd. 3. The MGDPA defines "government data" as "all data collected ... received [or] maintained ... by any state agency...." *Id.* § 13.02, subd. 7.

The Compacts contemplate that gaming audit reports will be "collected" or "received" by the State, thus triggering application of the MGDPA. Both the Video–Gaming and Blackjack Compacts explicitly provide that the Tribes shall engage an independent certified public accountant to audit the books and records of gaming action pursuant to the Compacts and that the Tribes "shall make copies of the audit and all current internal accounting and audit procedures available to the State upon written request." Garry Aff. Exs. A & C (Video–Gaming Compacts, § 6.11), Exs. B & D (Blackjack Compacts, § 6). Pursuant to these provisions, the Tribes have submitted the gaming audits to the State. *See* Garry Aff. Exs. G & H. Under the MGDPA, such documents received by the State are "government data," and thus accessible to the public unless otherwise classified by law.

The Compacts contain no language expressly prohibiting the application of the MGDPA to the gaming audits received by the State from the Tribes. The Blackjack Compacts implicitly recognize that state laws, such as the MGDPA, might be applicable, stating: "To the extent possible under state law, the State shall not disclose any information obtained pursuant to [a written request for audit copies]." Garry Aff. Exs. B & D (Blackjack Compacts, § 6). The Video–Gaming Compacts do not address, either explicitly or implicitly, the application of the MGDPA. *See* Garry Aff. Exs. A & C (Video–Gaming Compacts, § 6.11). Thus, one Compact implicitly acknowledges the application of the MGDPA, while the other Compact is silent on the application of the MGDPA. No Compact terms forbid application of the MGDPA or exempt the audits from the scope of the MGDPA.

***4** The Tribes argue the Compacts are ambiguous with respect to the application of the MGDPA. The Tribes contend that when the Compacts use the terms "make available," they mean the audits do not become the property of the entity to which the audits are made available. *See* Pl. Mem. in Supp., at 11. However, the applicability of MGDPA disclosure is activated by the State's receipt or possession of documents, without regard to the source or ownership of the documents. *See* Minn.Stat. § 13.02, subd. 7; § 13.03, subd. 1. The Tribes' proprietary argument thus misses the mark. The Tribes fail to identify any terms of the Compacts containing ambiguity with respect to the application of the MGDPA.

The question of whether the contract is ambiguous is a matter of law for the court. *Porous Media Corp. v. Midland Brake, Inc.,* 220 F.3d 954, 959 (8th Cir.2000); *Green Tree Acceptance, Inc. v. Wheeler,* 832 F.2d 116, 117 (8th Cir.1987). "A contract term is ambiguous if it is reasonably susceptible to more than one interpretation." *Porous,* 220 F.3d at 959. When two reasonable arguments can be made for either of two contrary positions as to the meaning of a contract provision, an ambiguity exists. *See Home Ins. Co. v. Aetna Ins. Co.,* 236 F.3d 927, 929 (8th Cir.2001). However, that each party asserts the Compacts support its position does not require a finding of ambiguity. *See McCormack v. Citibank, N.A.,* 100 F.3d 532, 538 (8th Cir.1996).

There is no language in the Compacts prohibiting the application of the MGDPA to the gaming audits received by the State from the Tribes. Silence alone does not create an ambiguity. *See Ins. & Consulting Assocs., LLC v. ITT Hartford Ins. Group,* 48 F.Supp.2d

1181, 1192 (W.D.Mo.1999) (finding no ambiguity where the only argument presented was the absence of a provision); *Jacobs v. Carsey–Werner Distrib., Inc.*, No. 93–6825, 1994 WL 116077, at *2 (S.D.N.Y. Mar. 30, 1994) ("There is little authority for the proposition that silence *per se* constitutes ambiguity."); *Aetna Life Ins. Co. v. American Nat'l Bank & Trust Co.*, 956 F.Supp. 814, 819–20 (holding that contract's silence on a subject did not render the contract ambiguous on that subject); *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F.Supp. 1504, 1515 (S.D.N.Y.1989) (holding the absence of a provision prohibiting or allowing leveraged buy-outs could not, by itself, create an ambiguity); *Lewis v. Finetex, Inc.*, 488 F.Supp. 12, 14 (D.S.C.1977) (finding silence insufficient to overcome statutory presumption directly bearing on the issue). The Compacts are unambiguous regarding the application of the MGDPA disclosure requirement: they do not exempt the audits from its scope.

The MGDPA is a neutral state law of general applicability. The U.S. Supreme Court has stated that "[a]bsent express federal law to the contrary," outside the reservations the Tribes are "subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973). Even within the reservations, "state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero*, 411 U.S. at 148. Two appellate courts have held that application of a state's public-records law to information obtained from a tribe pursuant to a tribal-state gaming compact does not violate the compact where the compact either permits such application or is silent on the issue. *See* *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 485 (9th Cir.1998) ("To the extent the Compact specifically permits or prohibits the release of the Report, the parties are bound by it. Where the Compact is silent, however, neither IGRA, the Indian Commerce Clause, nor any other federal law prevents Oregon from releasing the report."); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 958 P.2d 260, 267–69 (Wash.1998) (holding that gambling records obtained by state pursuant to tribal-state compacts were not exempt from disclosure under the terms of compacts or under public records act). The Tribes' breach of contract claim fails as a matter of law.

B. Due Process

***5** The Fourteenth Amendment prohibits state action that deprives "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The possession of a protected life, liberty, or property interest is a condition precedent to the government's obligation to provide due process of law. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 718 (8th Cir.1995). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The property interest must consist of "more than a unilateral expectation." *Id.* It must derive from "a legitimate claim of entitlement to it." *Id.* Property interests "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

The Tribes argue that Minn.Stat. § 13.06, which permits an agency to apply for temporary classification of government data as nonpublic, violates procedural due process. A state statute or policy can create a constitutionally protected property interest when it both contains particularized substantive standards that guide a decision maker and limits the decision maker's discretion by using mandatory language. *See* *Jennings v. Lombardi*, 70 F.3d 994, 995–96 (8th Cir.1995). A statute or policy that is merely procedural, or that grants discretionary authority to a decision maker, does not create a protected property interest. *Id.* at 996. Because the decision on the public nature of submitted documents is discretionary, Minn.Stat. § 13.06 does not grant the Tribes a property interest in a temporary classification of the audits as nonpublic. Section 13.06 provides that only "the responsible authority of a state agency, political subdivision, or statewide system may apply" to the Commissioner of the Department of Administration for a temporary classification of data as nonpublic. Minn.Stat. § 13.06, subd. 1. The statute grants the Tribes no right to apply

for the temporary classification. Moreover, section 13.06 gives the Commissioner of Administration discretionary authority to grant or deny the application, and gives the Attorney General discretionary authority to approve or disapprove the temporary classification as to form and legality. *Id.,* subd. 5. The statute does not give the Tribes a legitimate claim of entitlement to a temporary classification of the audits as nonpublic.

Even if the Tribes had an identifiable, protected interest, the State has not denied them the fundamental requirement of due process to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). The Tribes received notice of Advisory Opinion 01–501. After requests for the Tribes' audits became known, the Tribes were afforded the opportunity to submit written arguments to the DPS and the Commissioner of Administration in opposition to the public release of the Tribes' audits. The Commissioner of Administration included the Tribes' written arguments when sending its decision to the Attorney General for review. The Tribes received sufficient notice and opportunity to be heard prior to any deprivation of their alleged rights.

***6** The "ordinary judicial process" of a state court action also may constitute sufficient procedure consistent with due process. *See Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 195 (2000). Minnesota law authorizes an action in state district court for an order preventing the State from violating the MGDPA. Minn.Stat. § 13.08, subd. 2; *see Doe v. Minnesota State Bd. of Med. Exam'rs,* 435 N.W.2d 45, 47 (Minn.1989). The Tribes received written notice that the temporary classification was denied and that the audits would be released pursuant to Advisory Opinion 01–051 absent a court order. The Tribes have had sufficient time to bring a state court action under § 13.08 to prevent the release of the audits and to seek a determination of whether the audits constitute nonpublic "trade secret information" under Minn.Stat. § 13.37. [1] Other similarly aggrieved tribes have elected to and pursued their rights in state district court. *See Prairie Island Indian Cmty. v. Minnesota Dept. of Public Safety,* No. C5–01–8766, slip op. at 19–24 (Ramsey County Ct. Apr. 16, 2002). The MGDPA affords the Tribes a sufficient opportunity to heard in state court. No due process violation has occurred.

1 This Court does not reach the question of whether the audits constitute nonpublic "trade secret information" and the merits of the Attorney General's advisory opinion under state law, as explained *infra,* § E.

C. Preemption by IGRA

The doctrine of preemption is based on the Supremacy Clause of Article VI of the United States Constitution. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."). The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 604 (1991); *Hillsborough County v. Automated Medical Labs, Inc.,* 471 U.S. 707, 712 (1985); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). The question, as argued by the Tribes, is whether any federal law preempts application of the MGDPA.

The Indian Gaming Regulatory Act ("IGRA") requires the National Indian Gaming Commission ("NIGC") to treat tribal-gaming audits as nonpublic, for purposes of the Freedom of Information Act ("FOIA"). *See* 25 U.S.C. § 2716(a); 5 U.S.C. § 552(b)(4), (7). However, neither the IGRA nor the FOIA preempt application of the MGDPA. Section 2716(a) applies only to data received by the NIGC. The FOIA applies only to records held by a federal government agency. 5 U.S.C. § 551(1), 552(a), (f). Indeed, "the plain language of the FOIA precludes its application to state or local agencies." *Mamarella v. County of Westchester,* 898 F.Supp. 236, 237 (S.D.N.Y.1995). The IGRA and the FOIA do not prohibit application of the MGDPA to the audits because the federal classification applies only to data in the possession of the federal government, while the MGDPA governs

data in the hands of any state agency. *See* Minn.Stat. § 13.02, subd. 7. There is no conflict between these two public records regimes. Courts have concluded that federal law does not preempt state public records statutes. *See* *Siletz Indians,* 143 F.3d at 485–87; *Chehalis,* 958 P.2d at 270. In holding that federal preemption does not apply to the state public records law, the *Siletz Indians* court observed that "if the Report contained damaging information on the operation of [the casino] and the release of that Report [could] cause a decline in business, [such a possibility] is fully consistent with IGRA's goal of fair and honest gaming." *Siletz Indians,* 143 F.3d at 487. As in *Siletz Indians* and *Chehalis,* the application of the MGDPA is not contrary to the goals of tribal self-government or tribal self-sufficiency. Federal law does not preempt application of the MGDPA in the instant case.

D. Estoppel

***7** The public interest in the rule of law is undermined when the government is unable to enforce the law because of the conduct of its agents. *See* *Heckler v. Community Health Services of Crawford,* 467 U.S. 51, 60 (1984). "[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler,* 467 U.S. at 63. Based on these principles, the government may not be estopped on the same terms as any other party. *Id.* In seeking to estop the State, the Tribes must establish the traditional elements of estoppel and that the government conduct in question amounts to "affirmative misconduct." *Chien–Shih Wang v. Attorney General of United States,* 823 F.2d 1273, 1276 (8th Cir.1987).

The Tribes have presented no evidence of affirmative misconduct by the State. Instead, the Tribes argue that, as sovereigns, they should not be required to demonstrate affirmative misconduct to succeed on their estoppel claim against the State. The Tribes cite no authority for such a proposition. There are, however, cases holding that other sovereigns, such as the states, must show affirmative conduct when bringing an estoppel claim against the federal government. *See* *State of Washington v. Heckler,* 722 F.2d 1451, 1455 (9th Cir.1984); *State of New Jersey v. Dept. of Health & Human Servs.,* 670 F.2d 1284, 1297–98 (3d Cir.1982); *State of Michigan v. Schweiker,* 563 F.Supp. 797, 801 (D.C.Mich.1983); *see also* *Pueblo of Santa Anna v. Kelly,* 932 F.Supp. 1284, 1299 (D.N.M.1996) (rejecting argument that tribes were not required to show affirmative misconduct to state an estoppel claim against the federal government). Based on the aforementioned principles limiting estoppel claims against the government, the Tribes' estoppel claim against the State should be held to the same standard as a state's estoppel claim against the federal government.

Absent a demonstration of "affirmative misconduct" by the State, the Tribes' estoppel claim fails. *See* *Conforti v. United States,* 74 F.3d 838, 841 (8th Cir.1996). Evidence of negligence and bad faith do not rise to the level of affirmative misconduct. *See Wang,* at 1277. Because the Tribes have made no showing of affirmative misconduct, whether or not the traditional elements of equitable estoppel are present need not be considered. *See id.*

E. The Eleventh Amendment and Trade Secrets

The Eleventh Amendment's guarantee of sovereign immunity to the states bars federal court adjudication of pendent state law claims against a non-consenting state defendant. *See* *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 120 (1984). In suits by Indian tribes, the states also enjoy Eleventh Amendment immunity. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779–782 (1991); *see also* *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 268–69 (1997); *Seminole Tribe v. Florida,* 517 U.S. 44, 60–61 (1996). Because of this Eleventh Amendment bar, this Court may not decide the question of whether or to what extent the Tribes' gaming audits received by the State are nonpublic trade secret information under § 13.37 of the MGDPA. *See* *Santee Sioux Tribe v. State of Nebraska,* 121 F.3d 427, 432 (8th Cir.1997); *5757 North Sheridan Rd. Condo Ass'n v. Local 727 of Intern. Broth. of Teamsters,* 864 F.Supp. 74, 76 (N.D.Ill.1994) (holding that Eleventh Amendment barred claim in federal court

against state official for alleged violations of state public records law).

***8** Whether the audit reports are nonpublic trade secret information, and whether the State may release the audits under the MGDPA, are issues for the state district courts. In similar litigation, Ramsey County Judge Louise Dovre Bjorkman ruled that another tribe's financial audit data constitutes trade secret information under § 13 .37 of the MGDPA and, as such, may not be released to the public. *See Prairie Island Indian Cmty. v. Minnesota Dept. of Public Safety,* No. C5–01–8766, slip op. at 19–24 (Ramsey County Ct. Apr. 16, 2002). As explained *supra,* § B, the MGDPA affords the Tribes a sufficient opportunity to pursue their rights in state district court.

Because the State's summary judgment motion is granted, no case remains in federal court. Therefore, the Tribe's Appeal of Judge Boylan's Order of February 21, 2002, is not reached.

IV. CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that:

(1) the Tribes' Motion for Summary Judgment [Doc. No. 25] is DENIED;

(2) the State's Motion for Summary Judgment [Doc. No. 17] is GRANTED;

(3) the Tribes' Appeal of the Order of February 21, 2002 [Doc. No. 42] is DENIED as moot;

(4) the entry of judgment will be stayed to allow the Tribes an opportunity to file an action in state court prior to public disclosure of the audit reports.

LET JUDGMENT BE ENTERED ACCORDINGLY on July 1, 2002.

All Citations

Not Reported in F.Supp.2d, 2002 WL 1364113

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