

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
DOCKET NO. 1984-CV-02998

AMERICAN CIVIL LIBERTIES UNION OF  
MASSACHUSETTS, INC.,  
Plaintiff,

v.

CITY OF BOSTON,  
Defendant.

**DEFENDANT’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Mass. R. Civ. P. 56 and Superior Court Rule 9A(b)(5), Defendant City of Boston (the “City”) hereby submits this Memorandum in Opposition to Plaintiff’s, American Civil Liberties Union of Massachusetts, Inc. (the “ACLUM”), Motion for Partial Summary Judgment.

The City is in the process of limiting the blurring redactions on the body-worn camera (“BWC”) footage to obscure the faces of individuals who are not public employees or agents. The BWC footage includes 10 videos totaling approximately seven hours. The City will provide all of the BWC videos with reduced redactions by July 15, 2020. As to the 18 videos from the handheld cameras, which constitute approximately 25 minutes and 35 seconds, the City became aware only upon receipt of the ACLUM’s motion for partial summary judgment that the blurring on those videos was at issue. The City has commenced the process of reducing the blurring redactions on these videos, as well, and will have that process completed by July 15, 2020. On this basis, the City argues that the ACLUM’s motion for partial summary judgment will be moot.

The City is deeply committed to serving the homeless community, as well as those persons struggling with addiction and recovery, and it maintains that disclosure of video records without at a minimum limited redaction would only cause additional harm to this already vulnerable population.

## **I. FACTS**

The City received a letter and public records request from the ACLUM on August 12, 2019, following events that began on August 1, 2019 and became known as “Operation Clean Sweep.” *See* Consolidated Statement of Material Facts (“SOF”) ¶ 1; Affidavit of Jessica Lewis (“Lewis Aff.”) ¶ 3, Joint Appendix (“J.A.”) Exhibit A. The City provided its initial response to the request on August 26, 2019 and its first substantive response including documents on September 17, 2019. *Id.* ¶¶ 4-5; Lewis Aff. ¶¶ 4-5, J.A. Exhibits B, C. On September 20, 2019, the ACLUM emailed the City’s Records Access Officer (“RAO”) indicating it did not think the City had provided all responsive records. Lewis Aff. ¶ 6, J.A. Exhibit D. That same day, the RAO emailed back indicating “I will check in with BPD but to the best of my knowledge, we have provided everything.... I will reach out again to BPD on this but I do believe we have provided everything. I will forward your email to that office for its review.” *Id.* ¶ 7, J.A. Exhibit D. Before the City could respond with any additional records, the ACLUM commenced the instant action on September 24, 2019, SOF ¶ 8.

The City provided formal supplemental responses to the records on October 25, 2019, December 12, 2019, and May 15, 2020. *Id.* ¶¶ 9, 13; Lewis Aff. ¶¶ 10, 11, 19, J.A. Exhibits E, F, H. Additionally, on November 21, 2019, the RAO provided a link to the BWC footage and handheld camera footage, which the City provided a second time in the formal December 12 response. *Id.* ¶ 9. On December 20, 2019, the ACLUM emailed counsel for the City, listing a

number of issues and requests regarding the December 12 response. *See* Affidavit of Winifred Gibbons (“Gibbons Aff.”) ¶ 2, J.A. Exhibit I. This email referenced only the 10 BWC videos in terms of eliminating the blurring redactions. *See id.* Additionally, the email requested the date and time stamps for the 10 BWC videos, as well as an explanation regarding why there was not more BWC footage given the number of officers on scene. *See id.* In its May 15 response, the City provided the date and time stamps for the BWC footage, along with an explanation regarding the amount of BWC footage. *See* Lewis Aff. ¶ 19, J.A. Exhibit H.

When the parties engaged in discussion about reducing the redactions in early 2020 and at the pre-motion conference on May 21, 2020, undersigned counsel understood those conversations to revolve around the BWC footage, and indicated that in a follow-up email. *See* Gibbons Aff. ¶ 3, J.A. Exhibit J. For the first time in its motion for partial summary judgment, the ACLUM requested that the 18 handheld camera videos also be produced without blurring or with reduced blurring to obscure only the faces of individuals who are not public employees or agents.

The City is in the process of providing the BWC videos and the handheld camera videos with the reduced blurring redactions, which the ACLUM has indicated is acceptable. *See* Gibbons Aff. ¶ 4. The City is making every effort to produce the reduced redaction videos promptly given the circumstances, and will provide all the footage with reduced redaction by July 15, 2020.

## **II. STANDARD OF REVIEW**

Summary judgment is granted whether there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; *Community Nat’l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). For issues that the moving party does not have the burden of proof at trial, the absence of a triable issue

may be shown by the submission of affirmative evidence that negates an essential element of the opposition's case, or materials showing "that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts that would establish the existence of a genuine issue of material fact. *Id.* Parties may not rely upon bare assertions and conclusions to create a dispute necessary to defeat summary judgment. *Benson v. Massachusetts Gen. Hosp.*, 49 Mass. App. Ct. 530, 532 (2000); quoting *Polaroid Corp. v. Rollins Envtl Servs., Inc.*, 416 Mass. 684, 696 (1993). The court views the evidence in the light most favorable to the non-moving party, but does not weigh the evidence, assess credibility, or find facts. *Attorney Gen. v. Bailey*, 386 Mass. 367, 370-71 (1982).

### III. LEGAL ARGUMENT

The public records law, M.G.L. c. 66, § 10 (a) "requires the government to release upon request materials that fall under the definition of 'public records.' G.L. c. 4, § 7, Twenty-sixth." *Boston Globe Media Partners, LLC v. Dept. of Public Health*, 482 Mass. 427, 432, 124 N.E.3d 127 (2019) (*Dept. of Public Health*). The presumption is that records are public and must be disclosed, but there are statutory exemptions that permit the withholding or redaction of records or portions of records. M.G.L. c. 66, § 10A(d)(1)(iv). At issue here is exemption (c), specifically the second category of records, which refers to "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." M.G.L. c. 4, § 7, Twenty-sixth (c).

"Where the second category under exemption (c) is implicated, a court should first determine whether there is a privacy interest in the requested records. If there is not, then the

requested material does not fall under exemption (c). If there is a privacy interest, then “[e]xemption (c) requires a balancing test: where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield.” *Dept. of Public Health*, 482 Mass. at 439, 124 N.E.3d 127, citing *PETA v. Dept. of Agricultural Resources*, 477 Mass. 280, 291-92, 76 N.E.3d 227 (2017).

In determining whether there is a privacy interest, courts look to three factors: “(1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources” (footnote omitted). *PETA*, 477 Mass. at 292, 76 N.E.3d 227, citing *Globe Newspaper Co. v. Police Comm’r of Boston*, 419 Mass. 852, 858, 648 N.E.2d 419 (1995) (*Police Comm’r of Boston*). Furthermore, “‘other case-specific relevant factors’ may [also] influence the calculus.” *Id.*

If the court finds there to be a privacy interest, the court must then weigh the “privacy interest in nondisclosure against any public interest in disclosure....” *Dept. of Public Health*, 482 Mass. 448, 125 N.E.3d 127. Generally, the public interest must relate to government operations, although the Supreme Judicial Court has found that it is not limited to that. *See Dept. of Public Health*, 482 Mass. at 450-51, 124 N.E.3d 127.

Here what is at issue is the identity of individuals who may be homeless, as well as those persons struggling with addiction and recovery. The City’s position remains that the privacy of these individuals must be protected. If it was a list of their names and other identifying information, that information would be redacted, and the same theory underlies redaction of their faces. Identifying the individuals in this particular situation would satisfy the first and second factors as to whether there is a privacy interest—it would result in personal embarrassment to persons of

normal sensibilities to be identified, for example, as an individual struggling with addiction, and it risks disclosure of information of a highly personal nature, *i.e.* possible addiction and/or current drug use at the time of the incident. Additionally, this is not information available from other sources. Thus, there is a privacy interest.

As to balancing the privacy interest against the public interest in disclosure, the City asserts that the privacy of these individuals should prevail. The City maintains that disclosure would cause further harm to an already vulnerable population that could result in negative consequences. An individual could be identified from the video while perhaps being under the influence of drugs or an individual could be identified and determined to be or have been part of the homeless community, and such information could cause harm to that individual's ability to recover or obtain employment, among other things.

The City is in the process of producing all the BWC and handheld video footage with the limited blurring redactions, so that the faces of all public employees or agents and their actions are visible. *See Gibbons Aff.* ¶ 4.

#### **IV. CONCLUSION**

WHEREFORE, the City respectfully submits that the ACLUM's motion for partial summary judgment be denied.

Respectfully submitted,

DEFENDANT,  
CITY OF BOSTON

Eugene L. O'Flaherty  
Corporation Counsel

By its attorney:

  
Winifred B. Gibbons, BBO # 692724  
Assistant Corporation Counsel  
[Winifred.Gibbons@pd.boston.gov](mailto:Winifred.Gibbons@pd.boston.gov)  
Office of the Legal Advisor  
Boston Police Department  
One Schroeder Plaza  
Boston, MA 02120  
P: 617-343-5771  
F: 617-343-4609


Date: June 22, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on this day a true copy of the above document was served, by mail and electronic mail, upon:

Ruth A. Bourquin (BBO #552985)  
Jessica Lewis (BBO #704229)  
American Civil Liberties Union  
Foundation of Massachusetts, Inc.  
211 Congress Street  
Boston, MA 02110  
(617) 482-3170  
[rbourquin@aclum.org](mailto:rbourquin@aclum.org)  
[jlewis@aclum.org](mailto:jlewis@aclum.org)

Date: June 22, 2020

  
Winifred B. Gibbons

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
DOCKET NO. 1984-CV-02998

AMERICAN CIVIL LIBERTIES UNION OF  
MASSACHUSETTS, INC.,  
Plaintiff,

v.

CITY OF BOSTON,  
Defendant.

**AFFIDAVIT OF WINIFRED B. GIBBONS IN SUPPORT OF DEFENDANT’S  
OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

---

I, Winifred B. Gibbons, hereby depose and state as follows:

1. I am assistant corporation counsel with the City of Boston assigned to the Office of the Legal Advisor at the Boston Police Department. I have held this position since March 2019. I represent the City of Boston (the “City”) in this matter, and I submit this affidavit in support of its opposition to the American Civil Liberties Union Foundation of Massachusetts, Inc.’s (the “ACLUM”) motion for partial summary judgment.
2. On December 20, 2019, the ACLUM sent an email outlining its issues with and questions about the City’s December 12, 2019 letter and document production. *See* Joint Appendix (“J.A.”) Exhibit I.
3. The reduced redactions previously discussed between the parties was, to the understanding of undersigned counsel, limited to the body-worn camera (“BWC”) footage.



In follow-up to the pre-motion conference on May 21, 2020, I sent an email indicating the City was looking into reduced redactions of the BWC footage. *See* J.A. Exhibit J.

4. The City is in the process of providing the BWC videos and the handheld camera videos with reduced blurring redaction so that the faces of public employees or agents and their actions are visible, which the ACLUM had indicated is acceptable. The City will provide all of the videos by July 15, 2020.

Signed under the pains and penalties of perjury on this 22<sup>nd</sup> Day of June, 2020.

  
\_\_\_\_\_  
Winifred B. Gibbons

# **EXHIBIT I**



Winifred Gibbons &lt;winifred.gibbons@pd.boston.gov&gt;

---

**RE: ACLU v. COB, 1984-CV-02998 - Notices of Deposition**

---

Ruth Bourquin &lt;RBourquin@aclum.org&gt;

Fri, Dec 20, 2019 at 3:41 PM

To: Winifred Gibbons &lt;winifred.gibbons@pd.boston.gov&gt;

Cc: Jessica Lewis &lt;jlewis@aclum.org&gt;, Erika Reis &lt;erika.reis@boston.gov&gt;, Susan Weise &lt;susan.weise@boston.gov&gt;

Dear Winifred, Erika and Susan,

We are writing again with respect to records that still seem to be missing, incomplete, or unclear even after the December 12, 2019 supplemental production. These are in addition to the matters we brought to your attention on Monday and the email sent yesterday about the fact that the audio log numbers do not match up with the numbers on the audio actually produced.

1. With regard to the 10 videos that have been produced, as noted previously, they are so blurred that it is hard to decipher much of what is happening. This blurring of them all is not justified by any exception to the Public Records Law. Pending receiving non-blurred copies of them all, we would ask for you to:

a). Immediately provide the date and time stamps for all 10 videos. Even these are blurred and unreadable.

b). Expedite production of non-blurred copies of the 5<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> videos you produced, which are respectively entitled Extraction \_1\_1\_ Station Assignment – [1010 Massachusetts Avenue](#); Extraction \_\_1\_\_ [1010\\_Mass\\_Ave](#); and Extraction \_1\_1\_ Operation\_ [1010\\_Mass\\_Ave](#).

2. Also with regard to videos, given the large number of police officers on the scene over several nights and the BPD body worn camera policy, we would like an explanation, or records revealing body worn policy or protocol sufficient to explain, why there is not more body worn camera or other video footage. We also seek non-blurred copies of what seem to be missing recordings.

3. We would like any unproduced complaints or reports about the City seizing people's property during the Operation. We know more must exist because in the document numbered 1003, on August 15, Kristin McCosh refers to disability advocates having expressed concerns and her efforts to craft a response. We would request these records, along with any complaints filed by affected persons with anyone affiliated with the City, including but not limited to BPD and DPW.

4. In document 900, Buddy Christopher asks multiple people/departments for a response with regard to resources they can bring to the ongoing project. Yet, the documents produced contain no responses. We would ask for them.

5. The produced records reveal that the City purported to employ powers under Section 35 to force individuals caught in the Sweep to obtain treatment for addiction. This is revealed in an

August 23, 2019 email from Mr. Stratton to Mr. Boyle numbered 1035. In the 7<sup>th</sup> video referenced above at around 52.36, a woman is told that she either has to go to the hospital or be arrested. We would ask for all records showing use of Section 35 in the context of Operation Clean Sweep (seemingly also referred to as Mass and Cass) follow up directed patrols and all policies, protocols and/or training materials related to BPDs use of Section 35.

6. To the extent they played any role in the decision to conduct Operation Clean Sweep and related actions, we would ask for any and all complaints from the public about crime or other conduct in the area of the Sweep filed or logged between June 1 and July 31, 2019, such as 311 complaints/messages.

7. Document 802 refers to a “class” that was attended and power point being shared from Buddy Christopher. We seek the power point, records identifying the “class” and any materials received by City personnel at or in connection with the “class.”

8. The produced records (e.g. document 798) reveal that City officials told the press that BPD had offered to find new wheelchairs for anyone who needs them. We seek documents discussing, showing or revealing how and when this alleged offer was made and to whom. In addition, we seek records showing whether, to whom, when and how any replacement wheelchairs were provided.

In addition to the above, please note that, with regard to the earlier request for all CJIS records, and not just the one officer’s report that has been produced, document 97 says that more than 100 warrant checks were done on August 1 alone. So we know there are many documents missing that show warrant checks done on in the area during the Operation and/or continued directed patrols during the months of August and September.

Thank you for your attention to these matters. Please let us know when you think additional materials will be provided.

Ruth and Jessica

Ruth A. Bourquin

Senior and Managing Attorney

American Civil Liberties Union Foundation of Massachusetts, Inc.

211 Congress Street, Boston, MA 02110

617.482.3170 ext. 348 | [rbourquin@aclum.org](mailto:rbourquin@aclum.org)

[aclum.org](http://aclum.org)



*This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.*

---

**From:** Ruth Bourquin  
**Sent:** Wednesday, December 18, 2019 2:49 PM  
**To:** 'Winifred Gibbons' <winifred.gibbons@pd.boston.gov>  
**Cc:** Jessica Lewis <jlewis@aclum.org>; Erika Reis <erika.reis@boston.gov>; Susan Weise <susan.weise@boston.gov>  
**Subject:** RE: ACLU v. COB, 1984-CV-02998 - Notices of Deposition

Hi, again,

As we continue to review the items produced last Thursday evening, we have noticed that the numbers in the first column of the log, which Shawn said was a log of the produced audios, do not match up with the numbers assigned to the actual audios. All the audios begin with 41, while all the numbers on the log begin with 42.

Even assuming the numbers in the log were supposed to begin with 41 instead of 42 (or vice versa) , they do not seem to line up.

Can you get us an explanation? It would also help if you could explain if all the audios provided on 12-12 are related to Operation Clean Sweep or are of all calls on the days in question.

Thank you.

Ruth

**From:** Winifred Gibbons <winifred.gibbons@pd.boston.gov>  
**Sent:** Tuesday, December 17, 2019 5:07 PM  
**To:** Ruth Bourquin <RBourquin@aclum.org>  
**Cc:** Jessica Lewis <jlewis@aclum.org>; Erika Reis <erika.reis@boston.gov>; Susan Weise <susan.weise@boston.gov>  
**Subject:** Re: ACLU v. COB, 1984-CV-02998 - Notices of Deposition

Hi, Ruth,

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

*This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.*

**From:** Winifred Gibbons <[winifred.gibbons@pd.boston.gov](mailto:winifred.gibbons@pd.boston.gov)>

**Sent:** Wednesday, December 11, 2019 2:26 PM

**To:** Ruth Bourquin <[RBourquin@aclum.org](mailto:RBourquin@aclum.org)>

**Cc:** Jessica Lewis <[jlewis@aclum.org](mailto:jlewis@aclum.org)>; Erika Reis <[erika.reis@boston.gov](mailto:erika.reis@boston.gov)>; Susan Weise <[susan.weise@boston.gov](mailto:susan.weise@boston.gov)>

**Subject:** Re: ACLU v. COB, 1984-CV-02998 - Notices of Deposition

Dear Ruth and Jessica,

When next week do you have time for a 9C conference?

In terms of scheduling, realistically we're looking at late January or early February at the earliest. Please provide us with some new proposed dates in that timeframe and we will circle back with you on what works for us.

All the best,

Winifred

On Mon, Dec 9, 2019 at 2:53 PM Ruth Bourquin <[RBourquin@aclum.org](mailto:RBourquin@aclum.org)> wrote:

Dear Winifred and colleagues,

We offered to discuss adjusting the scheduling of the depositions provided such rescheduling did not result in material delay.

Please let us know promptly what alternative dates you are proposing if not during the week for which the depositions are already noticed.

Also, can you please let us know when you intend to serve/file a motion to quash and when you propose to have the conference required by Superior Court Rule 9C?

Thank you.

Ruth

Ruth A. Bourquin

Senior and Managing Attorney

American Civil Liberties Union Foundation of Massachusetts, Inc.

211 Congress Street, Boston, MA 02110

617.482.3170 ext. 348 | [rbourquin@aclum.org](mailto:rbourquin@aclum.org)

[aclum.org](http://aclum.org)

*This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.*

[Quoted text hidden]

**Hi Jessica,**

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

*This message may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply email that this message has been inadvertently transmitted to you and delete this email from your system.*

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

# **EXHIBIT J**





Winifred Gibbons <winifred.gibbons@pd.boston.gov>

---

## ACLUM v COB - BWC Video

---

**Winifred Gibbons** <winifred.gibbons@pd.boston.gov>

Wed, May 27, 2020 at 1:09 PM

To: Ruth Bourquin <RBourquin@aclum.org>, Jessica Lewis <jlewis@aclum.org>

Cc: Erika Reis <erika.reis@boston.gov>

Hi, Ruth and Jessica,

Per our conversation last week, I have inquired about whether the City would agree to limited redaction of the faces of non-City employees in the BWC footage related to what is now known as "operation cleansweep." We are consulting with our video evidence unit to determine what the redaction capabilities are, and, if they can do those redactions, how long it would take. We hope to have a final answer for you by the end of the week.

All the best,  
Winifred



**Winifred B. Gibbons**

Assistant Corporation Counsel

Office of the Legal Advisor

Boston Police Department

1 Schroeder Plaza

Boston, MA 02120

617.343.5771

[Winifred.Gibbons@pd.boston.gov](mailto:Winifred.Gibbons@pd.boston.gov)