COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 2084CV01035

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

v.

BRISTOL COUNTY SHERRIFF'S OFFICE,
Defendant

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Background

On May 7, 2020, the Plaintiff American Civil Liberties Union of Massachusetts, Inc. (ACLUM) submitted a public records request pursuant to G.L. c. 66, § 10 to the Defendant, Bristol County Sheriff's Office (BCSO) requesting, in essence, all records, documentary and audiovisual, in the possession of BCSO relative to a riot by ICE Detainees on May 1, 2020. In response, the BCSO claimed exceptions to the release of these documents under subsections of G.L. c. 4, § 7(26) (c) (privacy exemption), (f) investigatory exemption and (n)(public safety). In its pleadings, the ACLUM sought a declaratory judgment/injunctive relief that the records sought were public records and that their release was required. The BCSO opposed this motion asserting that the documents should not be released for three reasons: First, because the incident was being investigated by the Office of the Inspector General of the Department of Homeland Security (DHS OIG), the Attorney General's Office of Massachusetts and the BCSO; second, because much of the information disclosed the names of both correctional officers, medical personnel and ICE

Detainees; and third, because many of the documents revealed the tactics, protocol methods employed by the BCSO and other correctional facilities to quell riots and other disturbances by prisoners and detainees.

On June 9, 2020, the superior court heard full argument from both parties and noted that "[B]oth sides have litigated the issues as if for a decision on the merits and notably neither party has questioned the procedural posture of the case." Accordingly, as both sides sought dispositive relief, the court converted the hearing into a motion for summary judgment and rendered a decision. Following settled case law which dictated that public records request differences be evaluated on a "case by case" basis, the court directed that the materials in question be submitted to the court *in camera*. In response to the court order, the BCSO filed with the court three volumes of records comprising of 719 pages and 5 USB flash drives containing videos.

Noting that court review of these records would be a time consuming job for the court, the ACLUM was allowed to review the documents under seal. After its review, the ACLUM was ordered to "prepare a memorandum identifying the specific records it argues are subject to disclosure." This memorandum was ordered to be sent to the BCSO pursuant to Superior Court Rule 9A and the BCSO was to respond to these specific records within 20 days. After the specific issues were identified by these memoranda, the court indicated that it would hold a hearing to resolve any issues that remained if necessary.

Although based on the submissions of the ACLUM, it claims to have completed its review of the documents under seal by May 2021, no memorandum was sent to the BCSO regarding the 719 pages of documents and the 5 USB video flash drives.[1] Nothing was heard from the ACLUM

[1] This filing includes the vast bulk of the documents requested. There are some emails identified as potentially subject to the document request that contain Word and/or Excel attachments. The BCSO has to purchase specific specialized software to process these requests. At the conference on December 7, 2021 the ACLUM was told that the BCSO was working to get the remaining documents processed as soon as possible.

for many months until December of 2021 when counsel requested a Zoom conference on December 17th. During the conference, the ACLUM indicated that they did not believe they had an obligation to file a memorandum identifying the specific records they believed to be subject to disclosure and serve it on the BCSO under Rule 9A. Rather they asserted that they intended to file instead, a motion for summary judgment.

The ACLUM's "memorandum" in support of its motion for summary judgment does not resemble anything like the court ordered in its order dated October 27, 2020. Instead of providing specifics on individual documents as the court had ordered, the Plaintiff has instead filed what may be fairly described as a political platform statement, expressing its political views as to immigration policy and attacking the Bristol Sheriff and his department with multiple allegations having absolutely nothing to do with the public records issue before the court. A perusal of the Plaintiff's memorandum drives home this point and makes it clear that the motive of the Plaintiff is not to disseminate information to the public but rather to use the court to try and advance its political agenda. The issues argued in the memorandum are truly not arguments but are more akin to political mudslinging. For example, the ACLUM raises in its brief:

1. Assertions that Sheriffs have no role in enforcing federal immigration law, when it well knows that under federal law the DHS is authorized to contract with states for the housing of illegal immigrants under 8 USC § 1231, implying that the Sheriff has violated the law. Nothing of which has to do with public records.

2. Citing an audit report which discovered a bookkeeping error where monies paid by DHS to the BCSO were not forwarded to the state treasury in the correct accounting year. Again, having nothing to do with public records and implying that the Sheriff was dishonest when it well knows that the monies in question were not misused.

3. Misrepresents the federal court's finding in the *Savino v. Souza*, C.A. No. 20-10617 (D. Mass), where the court on preliminary injunction motion, with no testimony, that DHS and BCSO "likely" were deliberately indifferent relative to COVID issues based primarily on ICE's refusal to release detainees to

decrease the population in the Facility. Again, such allegations having nothing to do with any issue relating to public records.

4. Cites a Massachusetts Senate Committee's report on the refusal by the BCSO to admit a state senator for a tour of the Facility on the day after a riot who offered no identification that she was in fact a legislator. Again, this allegation is not related to any public records issue and clearly intended to vilify the BCSO.

5. Cites the AGO's report on the May 1st riot, which was not done by correction professionals and which finding has nothing to do with whether a document is subject to disclosure under public records law.

The issues raised by the claimed investigatory, privacy and law enforcement exemptions require careful consideration and examination by the court given the present temper of the times and the well documented dangers facing law enforcement. Almost each day law enforcement personnel have become the targets of violent attacks and even assassination around the country. Even the mere revelation of names of officers in the day of the "Google search" is enough to pose a significant danger. Along with privacy concerns, the disclosure of law enforcement tactics, especially those used to approach and quell riots, can become training aids for those intent on causing disruptions. It is the position of the BCSO that the court, in following appellate case law was absolutely correct in ordering the ACLUM to serve the BCSO with a memorandum specifying the specific records under Rule 9A. Further, as the case law instructs, these public records must be evaluated on a case by case basis with individual consideration given to potential disclosure. As such, absent the specificity ordered by the court in its October 20th order, essentially, all material facts are in dispute making it, if not impossible, then clearly unsound for the court to consider the case at summary judgment. Therefore, the ACLUM's motion for summary judgment, if not already duplicative, is violative of the court's order as to how this matter should proceed. Accordingly, now that the ACLUM has viewed the documents under seal and can speak to

specifics, it is only after the ACLUM complies with the court's order and serves the BCSO with its memorandum of specifics and the BCSO responds, can the court properly make an informed judgment on the matter.

Argument

A. Settled law dictates that decisions relative to exemptions to disclosure under G.L. c. 66, § 10 are to done on a "case by case" basis employing a balancing test and thus such matters are not properly the subject of motions for summary judgment.

The Supreme Judicial Court has made it clear that a "case by case" review is required to determine whether an exemption applies in public records cases. *Attorney General v. District Atty Plymouth,* 484 Mass.260, 274 (2020); *Matter of a Subpoena Duces Tecum,* 445 Mass. 685, 688 (2006). Accordingly, process requires the court to employ a "balancing test" relative to each request contrasting the public's right to know with an agency's legitimate interest in keeping information confidential. *PETA v. Dept. of Agri. Resources,* 477 Mass. 280, 291 (2017). Given the often copious amount of data to be reviewed and the court's limited resources, the preferred method of proceeding in such cases is to direct that an "itemized and indexed" compilation be created for an *in camera* view by the court. *Rahim v. D.A. of Suffolk County,* 486 Mass. 544, 553 (2020). Additionally, given the circumstances of the *in camera* process, the court may properly place the burden on the requester to show the public interest in disclosure. *PETA, supra,* at 292.

Here, the court scrupulously followed the recommended approaches outlined in public records cases and ordered the BCSO to produce, first *in camera* and then under seal, copies of the requested records. It then permitted the ACLUM to view these records to formulate a position relative to the disclosure of each document. According to the submissions of the ACLUM, they in fact reviewed the documents under seal and are arguably familiar with their contents. The court,

then ordered the ACLUM, after their review of the documents under seal, to serve the BCSO under Superior Court Rule 9A with a "memorandum identifying the specific records it argues are subject to disclosure." (Court Order 10-27-2020 at 3). Upon receipt of this memorandum, the BCSO was to respond and serve any opposition on the ACLUM within 20 days. *Id.* Moreover, the court offered to hold a hearing after this process if necessary. *Id.* The court properly followed appellate direction in ordering this mechanism as the courts have noted that:

> ***Because in camera review of materials claimed to be exempt from disclosure under public records occurs in the absence of an advocate's eye, and judges are all too often unable to recognize the significance, of a particular document, the technique should be used only in the last resort.*** *Rahim*, *supra*, at 556, fn. 15.

Accordingly, the process ordered by the court would have likely narrowed the areas of dispute or at least have "joined the common issues" for the court to decide. Moreover, had the ACLUM abided by the court order, the parties would have been obligated by the Rules of Civil Procedure to confer and see if the issues could be further narrowed or agreed upon. Accordingly, judicial resources would have been conserved and the parties would have been able to frame any dispute concisely to allow the court to make a reasoned decision.[2]

Flaunting the clear order of the court to produce a specific memorandum, the ACLUM now files a motion for summary judgment arguing in non-specific and broad terms that all the documents requested are disclosable. It is axiomatic, however, that given that such a determination must be made on a case by case basis, that without specificity, literally hundreds of "material facts" exist in this case making the matter not ripe for summary judgment.

[2] Although as stated, there are some materials requested of the BCSO that have not been produced as they involve technical challenges requiring specialized software, the bulk of the request has been produced and there is no reason that the ACLUM could not have filed their required memorandum after they completed their review of the sealed material and dealt with the small amount outstanding at a later time.

B. The fact that one of the investigations is complete or that the Sheriff gave a press conference on the matter is immaterial to the issue of disclosure.

Section 7(26)(f) of Chapter 66 exempts from the definition of public records:

(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;

The courts have noted the necessity of maintaining such material outside of public view and has stated:

> ***Exemption (f) exempts from disclosure "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, Twenty-sixth (f). Among the reasons for exemption (f) are "the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions." Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62, 354 N.E.2d 872 (1976). Rahim v. D.A. for Suffolk District,* 486 Mass. 544, 551 (2020).

Additionally, another reason for this exemption is to encourage individuals to come forward and speak freely with law enforcement. Globe Newspapers Co. v. Police Com'r of Boston, 419 Mass. 852, 862 (1995). Moreover, contrary to the ACLUM's argument, the end of an investigation does not automatically terminate the exemption. Id. The courts have held that:

> ***We also agree with the judge that the disclosure of the police reports to a limited group of persons does not destroy the exemption to be found in G.L. c. 4, s 7, Twenty-sixth. Nor does the fact that the investigation to which these materials related had been concluded destroy the exemption. As was pointed out in Aspin v. Department of Defense, 160 U.S.App.D.C. 231, 491 F.2d 24, 25 (1973), if an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. Even materials relating to an inactive investigation may require confidentiality in order to convince citizens that they may safely confide in law enforcement officials.*** Bougas v. Chief of Police Lexington, 371 Mass. 59, 63 (1976)

Here, there were four investigations undertaken by different entities relative to the May 1, 2020 riot at the ICE Detention Center. The first, of course was the internal investigation of the BCSO which interviewed both staff and detainees involved. The second, and longest running investigation, is being performed by the Inspector General of the Department of Homeland Security, commenced immediately following the riot, who interviewed all staff involved in the incident. [3] The third investigation was the one undertaken by the Massachusetts Attorney General who only interviewed selected participants in the incident (for example, unlike the federal investigation, the AGO did not interview the Sheriff, who was present and in command of the operation, was never asked to be interviewed). That report was completed in a relatively short time. The last investigation was one performed by the Massachusetts Senate Committee on Post Audit and Oversight. The committee undertook two investigations, one as to the riot and one as the denial by the BCSO to allow a state senator to tour the Facility. The only investigation completed was the one involving the state senator.

Although the BCSO fully cooperated with all of the investigations and produced all the materials requested, the only documents made public by those investigative bodies who completed their investigations were their final reports. These reports are public records and have already been disseminated to the public. The underlying documents, however, [redacted] For example, [redacted] Such information can serve as a blue print for prisoners to ready themselves and counter law enforcements' actions in maintaining

[3] Although supposedly this investigation was completed some time ago and submitted for final approval and release, with the change of Presidential administrations, the DHS has recently asked for additional materials and has not indicated that it has completed its investigation.

civil order. As such, each document must be individually evaluated in this light and not "lumped together" in a motion for summary judgment. Again, had the ACLUM complied with the court's order, these individual issues could have been discussed by the parties and either resolved or greatly truncated for judicial review.

The court has already noted that the interviews and public statements made by the Sheriff do not waive the investigatory privilege. (Court Order 6-25-2020, fn. 2). It is not only common, but expected that police officials will hold news conferences and disseminate information to the public. This serves not only to provide information but also to assure the public that an event is over and there is no risk to the public safety. Otherwise, exempted material does not lose its exemption by having been at one time in the public domain. *Globe Newspaper Co., supra,* at 860. At no time did the Sheriff divulge any confidential or sensitive investigatory information or law enforcement tactics in his talks. To restrain a public official from assuring the public upon peril of sensitive policing materials becoming public is clearly not the intent of the public records law.

C. **The exemption under subsection (n), the "law enforcement exemption", requires an individualistic examination and the resolution of these issues is not proper for summary judgment in the present posture.**

Enacted as part of the anti-terrorist legislation following the 9-11 terrorist attack, subsection (n) exempts:

> ***(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.***

The legislative history of this subsection makes it clear that among its specific intents was to keep from public disclosure any documents that would jeopardize public safety in any way. Accordingly, in *PETA, supra,* the court explained the purpose of the statute:

> ***The preenactment history behind exemption (n) corroborates the notion that protecting the public from terrorist attacks in a post-September 11, 2001, world was the animating principle underlying its adoption. Exemption (n) was proposed by Acting Governor Swift. See Letter from Acting Governor Swift to Senate and House of Representatives, June 26, 2002. The letter makes clear that the acting Governor believed that such an exemption was necessary following the events of September 11, 2001. Id. She described the legislation as "carv[ing] out a very narrow exemption to the definition of public records for those materials pertaining to public safety including threat assessments, security plans and certain records depicting critical infrastructure." Id. The letter indicates that the acting Governor had in mind "certain records pertaining to state and local government's ability to protect its resources as well as other sensitive infrastructure" and hoped to "encourage private industries to share sensitive information regarding their respective security plans with law enforcement without the risk of automatic public disclosure." Id. Similarly, the Executive Office of Public Safety described exemption (n) as encompassing records of "the type that terrorists would find useful to maximize damage, such as threat assessments, security plans and structural documents depicting critical infrastructure."10 Memorandum, Executive Office of Public Safety, September 5, 2002 (EOPS Memorandum).*** *PETA, supra,* at 236.

Clearly the legislative intent was to exempt any materials from public disclosure which in anyway reveal "threat assessment, security plans and records depicting critical infrastructure." *Id.*

Here, the documents requested fall squarely within exemption (n) as they clearly reveal how the BCSO assessed the riot threat, the security plans deployed and critical infrastructure information, including the locations of security cameras. Each requested record must be examined individually as to the danger presented with public disclosure. Revealing how threat assessments are made and security measures employed to the public domain endangers the lives of correction officers who must face such emergencies on a daily basis. As such, the peril cannot be overemphasized and clearly, the issues involved cannot be decided without careful individual consideration. Had the ACLUM complied with the court's order, these specific issues would have

been flushed out and narrowed should there be disputes remaining for the court to decide. In any event, these considerations are not ripe for adjudication by the court.

Conclusion

The court has already decided the motion on summary judgment and has ordered the procedure to be followed in the case. The ACLUM has willfully ignored this order and has instead filed a "second" motion for summary judgment. The court should strike the motion for summary judgment as violative of the court order and direct the ACLUM to comply with its order dated October 27, 2020. Once the ACLUM has complied, the BCSO will respond and converse with the intent to narrow and highlight those issues that remain, if any, for the court's attention.

Date: January 31, 2022

Respectfully submitted,
The Defendant,
By its attorney,

/s/ Bruce A. Assad
Bruce A. Assad, Esq., BBO# 022980
Special Assistant Attorney General
Bristol County Sheriff's Office
400 Faunce Corner Road
Dartmouth, MA 02747
Tel. (508) 995-1311
bruceassad@bcso-ma.org

CERTIFICATE OF SERVICE

I, Bruce A. Assad, Esq., hereby certify that I have caused a copy of the foregoing document to be served by first class prepaid postage to Christopher Hart, Esq., Foley Hoag, LLP, Seaport West, 155 Seaport Boulevard, Boston, MA 02210-2600 and Stephen Garvey, Esq., Foley Hoag, LLP, Seaport West, 155 Seaport Boulevard, Boston, MA 02210-2600, and by email transmission to CHart@foleyhoag.com and SGarvey@foleyhoag.com on this 31st day of January, 2022.

/s/ Bruce A. Assad
Bruce A. Assad, Esq.