

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. 2084CV01035

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

**REPLY MEMORANDUM TO DEFENDANT’S MEMORANDUM AND OPPOSITION TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

The Bristol County Sheriff’s Office (BCSO) admits that, almost two years after ACLUM’s request, BCSO has not completed its search for responsive documents and therefore continues to withhold an unspecified—but apparently large—quantity of responsive records from both ACLUM and the Court. *See* SOF & Responses ¶¶32, 33, 38-42, 44-46. As to the records that BCSO did collect, BCSO admits that its categorical justifications for withholding materials under the investigatory exemption were “boilerplate assertions,” and that it made “no attempt to show” why any privacy concerns could not be addressed by redactions. *See id.* ¶30.

BCSO bears the burden to justify all withholdings. In response to this motion, BCSO has not submitted *any* affidavits or other evidence to justify its continued withholding on any grounds, to inform the Court of the status of its search, or to explain why that search is still not complete. And BCSO’s response contains admissions that, in fact, prove ACLUM’s arguments. There is no genuine dispute that all investigations of the May 1, 2020 Incident are over, except for the DHS OIG investigation. *See* SOF & Responses ¶¶20 (admitting BCSO investigation is “complete”); 14-15 (AGO investigation is over); 15 (Massachusetts Senate report issued, and citing no evidence of ongoing investigation). As to the DHS

OIG investigation, BCSO takes the express position that “only the DHS OIG can speak to what may prejudice its investigation,” *see id.* ¶19, and there is no evidence that DHS OIG has ever objected to the release of the records sought by ACLUM. *See id.* ¶18. Nor is there any reason to believe that release of the requested records would frustrate or imperil any of BCSO’s immigration detention operations, because BCSO no longer performs any immigration detention operations. *See id.* ¶7. As requested in this Motion, *see* ACLUM Mem. at 20, the Court should order BCSO to complete its search immediately, and should order the release of the responsive records.

I. BCSO HAS NOT YET COMPLETED ITS DOCUMENT SEARCH.

BCSO bears the burden to justify all withholding, including the burden to show that it undertook and completed a reasonable search for, and review of, potentially responsive records. *See* G.L. ch. 66, §10A(d)(1)(iv); *Healey v. Cruz*, 2018 Mass. Super. LEXIS 485, *15-17 (Mass. Super. 11, 27, 2018). Here, BCSO admits that its index of responsive documents “did not include any . . . communications responsive to Requests 6, 8, and 10.” *See* SOF & Responses ¶¶32-33. It offers no evidence that it ever searched for those documents prior to December 17, 2020. *See id.* ¶35-36. It does not genuinely dispute that it asked ACLUM for electronic search terms for the first time on December 23, 2020, and that ACLUM promptly provided proposed search terms. *See id.* ¶¶37-38. It admits that, after making a small production of 43 additional records on April 9, 2021, it “indicat[ed] that it had more documents to review and produce.” *See id.* ¶45. And it does not genuinely dispute that BCSO then went silent and, by December 2021—almost nine months later—still had not produced a single additional record. *See id.* ¶¶45-46. Even after meeting and conferring with ACLUM’s counsel about this very motion in December 2021, BCSO refuses to state that it has agreed to collect, review, and produce the remaining records on any particular schedule. *See id.* ¶46.

BCSO has offered no evidence that it is attempting to complete this process. Its only explanation appears to be two footnotes to its Opposition, where it asserts that it needs to purchase “specialized software” to produce “Word and/or Excel attachments.” *See* BCSO Opp. at 2 n.1 & 6 n.2. This is the

first time BCSO has mentioned a need for “specialized software.” As far as ACLUM is aware, BCSO has never had difficulty producing emails or attachments in response to other public records requests.¹ And if there were “technical challenges,” it is unclear why they were neither reported nor resolved during the 21 months since the Request was submitted. BCSO does not say. The Court should grant ACLUM’s motion for summary judgment, including by declaring that BCSO has violated the public records law, *see, e.g.*, G.L. c. 66 § 10 (a), and entering a permanent injunction ordering BCSO to locate and produce all remaining responsive materials within 14 days. *See* ACLUM Mem. at 20.

II. BCSO HAS NOT MET ITS BURDEN OF PROVING THAT ANY EXEMPTION APPLIES TO THE IMPOUNDED RECORDS.

A party opposing the release of public records bears the burden to establish that an exemption applies to *each* record that it wishes to withhold. *Attorney General v. District Atty. for the Plymouth District*, 484 Mass. 260, 274 (2020); *In re Subpoena Duces Tecum*, 445 Mass. 685, 688 (2006). Here, BCSO has never provided any information sufficient to meet its burden, relying instead on “boilerplate” categorical assertions in its Index that the investigatory, anti-terrorism, and/or privacy exemptions apply to all of the documents for the same generic reasons. *See* SOF ¶30. SOF Ex. 7. The May 1 Incident implicates questions of enormous public importance, *see* SOF ¶8-12, and involves the conduct of an agency with a documented history of breaking the law. *See* SOF ¶¶2-7. Yet, notwithstanding those facts and its own ongoing publicity about the incident, *see* SOF ¶¶10-12, BCSO continues to claim that *every* record of that incident should be kept secret from the public, except for two: DHS OIG’s statement

¹ *See, e.g.*, Yvonne Abraham, “*Sheriff’s Emails Show Level of White House Loyalty*,” Boston Globe (Dec. 4, 2019) (“Hundreds of e-mails obtained by the ACLU and reviewed by the Globe reveal a sheriff in near-constant contact with [Stephen] Miller and other White House officials.”), *available at* <https://www.bostonglobe.com/metro/2019/12/04/sheriff-mails-show-level-white-house-loyalty/n0cpN80Ro7dIhDxkKdFJVk/story.html>. The emails referenced in that article are publicly available at ACLUM’s Data for Justice Project website: <https://data.aclum.org/public-records/state-audit-of-bristol-sheriff/>

that it was “opening an investigation,” and BCSO’s request to DHS OIG for instructions to withhold documents from other requestors (which DHS OIG evidently ignored). *See* SOF ¶27.

In its recent Opposition, BCSO offers no evidence to support its withholding, but merely continues to make vague assertions that each exemption generally applies to responsive records. BCSO Opp. at 8. These assertions fall far short of BCSO’s burden to prove *with specificity* that *each* document it seeks to withhold is exempt from disclosure. *See Healey v. Cruz*, 2018 Mass. Super. LEXIS 485, *15-16 (Mass. Super 11, 27, 2018). And whether BCSO has met this burden is a question appropriate for summary judgement. *Id.* at 43. BCSO argues the opposite however: that somehow the Court’s October 27 Order shifted the burden to ACLUM, such that ACLUM can only succeed by producing a document-by-document rebuttal of BCSO’s blanket assertions. *See* BCSO Opp. at 3. But nothing in this Court’s Order turns the law on its head.

ACLUM filed a memorandum explicitly responsive to the Court’s order, in combined format with a summary judgment motion and memo.² Nothing in the Court’s Order forbade that approach, nor does any rule. Indeed, this approach was particularly appropriate because one key issue—the inadequacy of BCSO’s search—did not arise from the impounded records that were the subject of the October 27 Order, and relates in part to BCSO’s actions after the last hearing.

An index of documents may be used to examine the validity of a claimed exemption; but it remains the burden of the party opposing disclosure to prove with specificity that an exemption applies to each withheld record. *See Rahim v. District Attorney for the Suffolk District*, 486 Mass. 544, 553 (2020). BCSO’s argument that ACLUM—and not BCSO—must provide a document-by-document index describing why each record that ACLUM seeks to disclose is a public record would lead to absurd results, forcing ACLUM to file a multitude of redundant descriptions that would not be helpful to the

² BCSO claims that “ACLUM indicated that they did not believe they had an obligation to file a memorandum” ordered by the Court. *See* Opp. at 3. This is not accurate. *See* SOF Ex. 27.

Court. For example, BCSO's Index lists approximately 300 photographs of the Bristol County's ICE detention center taken after the May 1 Incident. SOF Ex. 7 (Index) at 5–31. BCSO describes the bulk of these photographs as depicting damage to the ICE facility, such as “overturned or damaged property,” and withholds them under the investigatory materials exemption. *Id.* at 8. According to BCSO's interpretation of the October 27 Order, ACLUM bears the burden of describing specifically why each photograph is not exempt from disclosure—even though BCSO has never shown why withholding a photograph of “overturned or damaged property” would prejudice an investigation. *See PETA v. Dep't of Ag.*, 477 Mass. 280, 289 (2017). Regardless, ACLUM reviewed these documents and argued in its Memorandum that all documents BCSO has withheld, with insufficient categorical explanations, should be public records; undersigned counsel was unable to identify any document that should not be disclosed. *See Memo.* at 11-18.

CONCLUSION

For the foregoing reasons, the ACLUM respectfully requests that the court grant its motion for summary judgement.

February 9, 2022

Respectfully submitted,

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