

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT**

SUFFOLK, SS

SUPERIOR COURT  
DOCKET NO. 1984CV02998

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

Plaintiff, )

v. )

CITY OF BOSTON, )

Defendant. )  
\_\_\_\_\_

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFF’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Plaintiff American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) respectfully submits this Reply in support of its motion for partial summary judgment (the “Motion”).

After more than nine months of back and forth in which Defendant City of Boston (“the City”) stated first that its production was complete, then – after insistence by ACLUM – found additional documents on now three separate occasions, including the videos here at issue, and in which the City promised to produce to ACLUM unredacted copies of the videos then changed its mind, the City now responds to ACLUM’s Motion for Partial Summary Judgment with a statement that the issue is moot because the City claims it finally will produce the videos with some reduced level of redaction by July 15, but otherwise makes no legal arguments why the Motion should not be granted.

ACLUM respectfully opposes the City’s claim of mootness and requests the Court enter an order requiring the City promptly to produce the 10 body-worn camera videos and 18 handheld-device videos without any redactions or blurring or, at most, with only the faces of private individuals obscured.

## BACKGROUND

Through its Motion, ACLUM seeks an order requiring the City to produce its videos of so-called Operation Clean Sweep (the “Sweep”) without blurring or other redaction that prevents ACLUM and the public from being able to see what actions were taken against persons experiencing homelessness and substance use issues by public employees on the public streets of Boston in early August 2019, and by which public employees those actions were taken.

The City’s sole response to the Motion is an avowed and belated commitment to produce the videos by July 15, 2020, with only private individuals’ faces blurred.

This City’s latest promise is made:

- ten long months since the Sweep occurred and the records were requested, Consolidated Statement of Material Facts (“CSMF”), ¶ 1;
- nine months after the City asserted it believed all responsive records had been produced, but no videos were, CSMF, ¶¶ 6 and 9;
- almost 4 months after the City belatedly promised to produce the videos without any redaction, CSMF, ¶ 12;
- more than 2 months after the City reneged on that promise, CSMF, ¶ 13; and
- more than 3 weeks after the City failed to timely respond to ACLUM’s offer to compromise based on blurring only of faces of private individuals captured in the videos, CSMF, ¶ 14.<sup>1</sup>

## ARGUMENT

### **I. The City does not contest its obligation to produce the videos unredacted, except for private individuals’ faces.**

Notably, the City does not defend its failure earlier to produce the videos without redaction or blurring other than of private individuals’ faces. *See* G.L. c. 66, § 10A(d)(1)(iv)

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<sup>1</sup> ACLUM notes that the City disputed only one statement of material fact in ACLUM’s original version of the Statement of Material Facts, and, as noted in the Consolidated Statement of Material Facts, Plaintiff accepts, for the purposes of the Motion only, the City’s revised statement of that fact. Thus, there are no disputed issues of material fact.

(“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.”).

The Motion must therefore be granted, unless it becomes moot prior to the time of the Court’s decision.<sup>2</sup>

## II. The Motion is not currently moot.

The City’s latest commitment is welcome. But, contrary to the City’s suggestion, without citation to any legal authority, its current promise does not render this motion moot.

If the videos are in fact produced without more blurring than necessary to protect the privacy interests of the people who the City apparently victimized during the Sweep but now is purporting to want to protect, then an order from this Court ordering production may not be necessary. To that end, ACLUM commits to informing the Court whether it believes the City’s promise to produce has been kept at the earliest opportunity after July 15 and a review of any production. After all, it is only “(o)nce the records are produced [that] the substance of the controversy disappears and becomes moot.” *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982) (quoting *Crooker v. United States State Department*, 628 F.2d 9, 10 (D.C.Cir.1980)).

ACLUM has reason to be skeptical that this latest promise will be fully honored, given the City’s track record in this case.<sup>3</sup> The City’s long delays and inconsistent statements in regards

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<sup>2</sup> With regard to the underlying request, ACLUM continues to believe that not all responsive records have been produced. The City’s failure to produce records from the Department of Public works is a glaring example. Moreover, ACLUM continues to believe that, consistent with City policies, more videos must exist which have not been produced in any form. *See* Memo in Support of Pl. Motion for Summary Judgment, 4 n.2. Thus, further requests for relief may be necessary.

<sup>3</sup> ACLUM notes that the City re-produced to ACLUM four of the videos with less blurring on June 23, 2020. ACLUM has received no further information as to whether or when the City intends to produce the remainder, other than the City’s statements in its opposition to the Motion.

to the production of responsive records keeps this controversy from being declared moot at this stage. *See Lybarger v. Cardwell*, 577 F.2d 764, 767 (1st Cir. 1978) (under FOIA, “prolonged delay in making information available or unacceptably onerous opportunities for viewing disclosed information [may] require judicial intervention”). Having this Motion pending will help avert further delay in case the City fails to comply with its latest representation.<sup>4</sup>

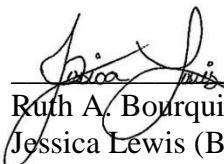
To preserve judicial resources, ACLUM would not oppose the Court scheduling any hearing on the Motion only on or after July 20, 2020, so that at the time of the hearing (if any) the fact and extent of the City’s actual July 15, 2020 production will be known.

### CONCLUSION

For the reasons set forth in the Memorandum in support of the Motion and this Reply, ACLUM’s Motion should be granted, absent full compliance on or before July 15, 2020, with the City’s newly promised production.

June 30, 2020

Respectfully submitted,

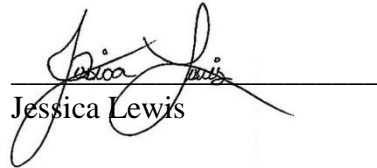
  
Ruth A. Bourquin (BBO #552985)  
Jessica Lewis (BBO #704229)  
American Civil Liberties Union  
Foundation of Massachusetts, Inc.  
211 Congress Street  
Boston, MA 02110  
(617) 482-3170  
rbourquin@aclum.org  
jlewis@aclum.org

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<sup>4</sup> Even if the City’s latest promise is honored, ACLUM will want to preserve its claim pursuant to G.L. c. 66, §10A(d)(2), for reasonable costs and attorney’s fees, related to having to prepare the Motion, without which it is clear – to ACLUM at least – that this new commitment would not have been made.

**Certificate of Service**

I, Jessica Lewis, hereby certify that on this 30th day of June, 2020, I caused to be served by U.S. mail, first class postage prepaid, and by email, copies of this Reply Memorandum in support of Plaintiff's Motion for Summary Judgment on counsel for the defendant, Winifred B. Gibbons, Association Corporation Counsel, Office of the Legal Advisor, Boston Police Department, 1 Schroeder Plaza, Boston, MA 02120, [winifred.gibbons@pd.boston.gov](mailto:winifred.gibbons@pd.boston.gov).

  
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Jessica Lewis