

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 OPPOSITION TO PLAINTIFF’S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

The American Civil Liberties Union of Massachusetts, Inc. (“ACLU”) sent the Bristol County Sheriff’s Office (the “BCSO”) a public records request on May 7, 2020 (the “Request”). Complaint Ex. E. The Request concerned a violent incident that occurred at the Bristol County immigration detention facility on May 1 (“Incident”), and requested ten categories of records, including videos, photographs, reports, and electronic communications concerning the Incident. *Id.* Such records are presumptively public, and the BCSO bears the burden of justifying any withholding. *See* G.L. ch. 66, § 10A(d)(1)(iv). On May 14, the BCSO sent ACLU a blanket denial of the entire request, referring generally to the investigatory materials exemption (G.L. c. 4 § 7(26)(f)) and the anti-terrorism exemption (G.L. c. 4 § 7(26)(n)). Complaint Ex. F.

In denying the Request, the BCSO provided no details concerning any of the records requested, did not explain how it had searched for records or what records it located, and did not

specify which records were subject to which exemptions or why. The BCSO's Opposition fares no better. It does not explain how it searched for records, and the list provided appears to pointedly exclude the requested electronic correspondence, among other things. Similarly, the Opposition does not link any particular record to any particular exemption, nor does it explain why any exemption would support the withholding of any particular record. By failing to provide such details, the BCSO has failed to meet its burden to justify its extraordinary withholding.

The BCSO's memorandum is also not supported by any declarations, and its unsworn assertions do not justify withholding. Despite invoking the investigatory materials exemption, the BCSO does not represent in its Opposition that it is currently conducting any investigation at all. It references investigations by other agencies, but no one from those agencies has suggested that disclosure would be a problem. And the anti-terrorism exemption carries even less salience. Although that exemption protects narrow categories of sensitive infrastructure information, the BCSO's facility is no secret: the detainees themselves obviously see it, and the BCSO recently invited members of the press to inspect it and take photographs (which are now posted on the internet).

The Public Records law is meant to provide the public transparency in the activities of government agencies. There is no question that understanding what transpired on May 1 at the Bristol County immigration detention facility is in the public interest. The BCSO has made extensive public assertions about those events. The BCSO cannot now claim that they are secret. And absent transparency, the BCSO will be free to continue making whatever characterizations it wishes (such as the representations it makes in its Opposition) about the Incident, without providing the underlying documentation that would permit true understanding and

accountability. *See* Complaint Exs. A, B. The BCSO has provided nothing more than its own say-so in refusing to comply with the Public Records law, and should be ordered to produce the documents requested immediately.¹

ARGUMENT

The BCSO, as the party claiming an exemption to producing documents under the Public Records law, carries the burden of showing that the records sought are exempt from production. *See* G.L. ch. 66, § 10A(d)(1)(iv). It has failed to meet that burden, and must produce the records requested.

I. THE INVESTIGATORY MATERIALS EXEMPTION DOES NOT SHIELD THE DOCUMENTS FROM DISCLOSURE.

The investigatory materials exemption allows public agencies to withhold from disclosure those documents that would “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 BCSO has failed to meet this bar.

The BCSO does not contend that it is currently conducting any investigation concerning the incident. Rather, it points to external investigations by the Inspector General for the Department of Justice² and the Massachusetts Attorney General’s Office, but cites no authority

¹ The Court has ordered a hearing on ACLUM’s Complaint and has noted that it is a “Hearing on Preliminary Injunction.” Notice to Appear, May 26, 2020. While expedited relief is warranted for the reasons explained in this Reply (as ACLUM requested in its prayer for relief in its Complaint), ACLUM has not moved for a preliminary injunction, but requests instead a permanent injunction.

² Although the BCSO states in its Opposition that the Department of Justice Inspector General is conducting an external investigation, publicly available information states that the federal entity investigating is instead the Inspector General for the Department of Homeland Security. *See* Sarah Betancourt, “Several Probes Launched into Violence at Bristol County Jail,” May 5, 2020,

for the proposition that a third party may invoke the investigatory exemption on behalf of an independent investigator. Nor has it provided any evidence that either investigating agency believes that disclosure of any of the requested records would “prejudice the possibility of effective law enforcement.” While the exemption might be invoked by investigating agencies, it may not be invoked by the targets of their investigations. *See, e.g., Globe Newspaper Co. v. Police Comm'r*, 419 Mass. 852, 862 (1995); *Reinstein v. Police Commr. of Boston*, 378 Mass. 281, 289-290 (1979). The BCSO, in other words, may not invoke the exemption on behalf of external investigating agencies, and has thus failed to meet its burden.

The BCSO has also failed to provide any specific harm that would implicate this exemption, but instead argues vaguely that disclosure of the documents could “chill” potential witnesses, Opp. at 4. Here, witnesses have no real expectation of being anonymous, given that the identities of the people in the room during the event are already known to the BCSO and other authorities. Moreover, any concern about the release of witness names could be accomplished by modest redactions. And, most importantly, the BCSO and Sheriff Hodgson have already made a series of detailed public statements describing the Incident, and even invited members of the press into the facility to see the aftermath. If the BCSO is concerned about the chilling effect of disclosure, it has already done that job itself. The BCSO cannot have its cake and eat it, too.

The BCSO’s reliance on *Globe Newspaper Co. v. Police Comm'r*, 419 Mass. 852, 862 (1995), for the proposition that public statements already made by the BCSO concerning the Incident do not waive the investigatory materials exemption, is unavailing. In *Globe Newspaper*,

available at <https://commonwealthmagazine.org/immigration/several-probes-launched-of-violence-at-bristol-county-jail/>.

the court agreed with the trial judge that due to the “extensive amount of prior disclosure . . . the incremental effect of revealing the citizen witness statements would not unduly restrain citizen participation in future criminal investigations.” *Id.* at 863. In that case, like this one, “which has generated considerable negative publicity, such disclosure may help to restore public confidence in a police department which has been highly criticized for its handling of a sensitive case.” *Id.*; *see also In re Subpoena Duces Tecum*, 445 Mass. 685, 690 (2006) (noting that, “preventing disclosure of the videotapes would not prevent disclosure of information that is, apparently, already known.”). In other words, by having disclosed an extensive amount of information already about the Incident through public statements and photographs, the BCSO’s claim that there would be any prejudice from disclosure of the requested records rings hollow.

Finally, by failing to provide any specificity regarding which documents fall under the exemption, the BCSO yet again provides neither ACLUM nor the Court with any basis to evaluate whether the exemption applies. Failing to provide evidence to this effect, or even a listing of the documents at issue, the BCSO has failed to meet its burden.

II. THERE IS NO BASIS UNDER THE ANTI-TERRORISM EXEMPTION TO WITHHOLD THE REQUESTED DOCUMENTS.

The Supreme Judicial Court has explained that the anti-terrorism exemption, G.L. c. 4, § 7(26)(n), was enacted as one of twelve sections in “[a]n Act providing protections against terrorism” and protects records “a terrorist would find useful to maximize damage,” the disclosure of which is likely to jeopardize public safety. *People for the Ethical Treatment of Animals v. Dep’t of Agric. Res.*, 477 Mass. 280, 289 (2017). Invoking this exemption, the BCSO argues that the unspecified records consist of information that would disclose camera and door locations, the design of the facility, and the tactical procedures used to respond to disturbances and emergencies. *Opp.* at 9. Further, the BCSO argues that because some ICE detainees are

gang members, the release of this information would jeopardize public safety as well as staff and inmates.

The BCSO offers nothing other than its own *ipse dixit* for these propositions. It fails to provide any evidence that the referenced documents actually meet the relevant criteria to trigger the exemption. For example, communications between the BCSO and other parties concerning the incident would not be useful to terrorists or create a public safety risk; nor would reports concerning the incident or results of any investigation. *See* Complaint Ex. E at 2-3 (requests 3, 4, 5, 6, 8, 10). Nor has it provided evidence that its staff used any secret procedures during the incident, much less secret procedures that terrorists would want to know about.

And, even for those documents that show the layout of portions of the facility, the BCSO fails to note that thousands of detainees have seen and are familiar with the interior of the detention facility. Further, this information is already also largely in the public domain. After the press conference given on May 2, 2020, Sheriff Hodgson invited members of the press into the facility and allowed them to take pictures, which were subsequently published online.³ Abundant information about the layout of the facility is also already on public record as a result of a litigation pending before the U.S. District Court for the District of Massachusetts. *See Maria Alejandra Celimen Savino and Julio Cesar Medeiros Neves v. Thomas Hodgson, et al.*, Case No. 20-cv-10617 WGY, Dkt. Nos. 83, 91-6, 151. Through a series of memorandums, discovery responses, and declarations, the defendants in that matter have outlined the layout at the Bristol County detention facility in response to concerns about adequate social distancing in light of COVID-19. *Id.* One memorandum filed in that case describes, in granular detail, the

³ Mary Serreze, “Photos: Ice Lockup at Bristol County Jail Trashed by Detainees,” May 3, 2010, available at <https://wbsm.com/photos-ice-lockup-at-bristol-county-jail-trashed-by-detainees/>.

layout of the facility, down to the number, location, and size of cells and communal areas. *Id.* at Dkt. No. 83. An expert declaration includes as an exhibit a detailed blueprint of the facility, outlining the location of cells, communal areas, and restrooms. *Id.* at Dkt. No. 91-6.

BCSO has not set forth any authority or guidance supporting its contention that information about the facility and BCSO's tactical responses are exempt from production, when they are already available to the public. That is because no such authority exists.

III. THE PUBLIC'S INTEREST IN TRANSPARENCY OUTWEIGHS THE BCSO'S CONCERNS ABOUT EMBARRASSMENT.

The BCSO claimed only the anti-terrorism and investigatory materials exemptions when it provided its blanket denial to ACLUM's request. In its Opposition, it invokes a new exemption, arguing that the records (again, unspecified), or at least certain identifying information therein, are exempt from disclosure as material relating to a specifically named individuals, pursuant to G.L. c. 4, §§ 7(26)(c). This exemption is inapplicable

The so-called "privacy exemption" is meant to protect information "of a personal nature [relating] to a particular individual." *Brogan v. Sch. Comm. of Westport*, 401 Mass. 306, 308, 516 N.E.2d 159, 160 (1987) (citing *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 438 (1983)). The SJC has set forth three factors to assess the weight of the privacy interest at stake: (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. *Globe Newspaper Co.*, 419 Mass. at 858. In addition, the exemption requires a balancing of the claimed invasion of privacy against the public interest in the disclosure. *See Globe Newspaper Co.*, 419 Mass. at 852.

The privacy exemption is not meant to protect names and addresses of public employees. *See Hastings & Sons Publ. Co.*, 374 Mass. at 817-818 (holding that municipal police officers' names and addresses are not protected by exemption (c)); *Pottle v. Sch. Comm. of Braintree*, 395 Mass. 861, 866 (1985) (reversing the lower court and requiring that the names and addresses of employees be released, and noting that public employees, by virtue of their public employment, have diminished expectations of privacy). In addition, the materials sought are not likely to contain information about BCSO staff or ICE detainees of a highly personal nature, such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcohol consumption, family fights, and reputation. *Georgiou v. Comm'r of the Dep't of Indus. Accidents*, 67 Mass. App. Ct. 428, 433 (2006).

The potential for embarrassment is thus the only avenue for BCSO to claim this exemption, but that argument carries no weight. Any potential embarrassment resulting from unlawful activity related to the Incident by either BCSO or a detainee would be outweighed by the public interest of maintaining government transparency. *See Attorney General v. Collector of Lynn*, 377 Mass. 151, 157 (1979) (holding that public disclosure of lists of tax delinquents may result in personal embarrassment, but disclosure does not amount to intimate details that are highly personal in nature, and so any potential embarrassment is outweighed by the public's right to know whether public servants are carrying out their duties in a law-abiding manner).

Even if the Court were to find that the names of the ICE detainees and/or BCSO staff involved in the Incident protected by the privacy exemption, such a finding would not operate as a blanket exemption of the records sought, and any private information could be redacted prior to disclosure. *See Reinstein v. Police Comm'r of Bos.*, 378 Mass. 281, 293 (1979).

CONCLUSION

For the foregoing reasons, ACLUM respectfully requests that the Court grant its request for declaratory relief and permanent injunction.

June 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2020, the foregoing document filed with the Suffolk Superior Court via certified mail will be served via certified mail and email on counsel for Defendant at:

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