

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.

MOTION FOR LEAVE TO FILE RESPONSE TO DEFENDANT’S SUR-REPLY

The American Civil Liberties Union of Massachusetts, Inc. (“ACLU”) respectfully requests leave to file a response to Defendant the Bristol County Sheriff’s Office’s (the “BCSO”) Sur-reply to Plaintiff’s Reply to Defendants’ Opposition to Plaintiff’s Request for Injunctive Relief, filed on June 12, 2020, in order to respond to new information introduced by the BCSO in that filing.

June 12, 2020

Respectfully submitted,

/s/ Christopher E. Hart
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PLAINTIFF’S RESPONSE TO DEFENDANT’S SUR-REPLY

In its sur-reply, the Bristol County Sheriff’s Office (the “BCSO”) asserts the existence of an internal investigation into the May 1, 2020 incident at the BCSO immigration detention center (the “Incident”). But neither the memorandum nor the affidavit resolves the BCSO’s continuing problem: it has not met its burden to prove that any exemption to disclosure under the Public Records law applies.

The investigatory materials exemption does not allow for blanket withholding of all records related to an event merely because the event is under investigation. *See, e.g., Reinstein v. Police Comm’r of Bos.*, 378 Mass. 281, 289 (1979) (noting that there is no blanket exemption provided for investigatory materials). Rather, that exemption only permits the withholding of a narrow class of records that are “investigatory materials necessarily compiled out of 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 (26)(f). The BCSO carries the burden of proving this exemption applies. G.L. c. 66 § 10A(d)(1)(iv).

There is nothing in Ms. Rousseau’s Affidavit that even attempts to meet this standard: There is no discussion of the scope or status of any internal investigation (let alone the scope or status of any other investigation); no description of how any prejudice might result from the disclosure of information about the Incident; no explanation of how records were gathered in response to ACLUM’s Request; no list of documents that BCSO believes would be exempt in whole or in part; and no explanation of the reasons an exemption would apply to any particular document.

If a mere conclusory assertion that an investigation *exists* is sufficient to justify blanket withholding of *every* record relating to a particular event, then the exemption would swallow the rule and subvert the Legislature’s carefully crafted presumption in favor of disclosure. *See People for the Ethical Treatment of Animals v. Dep’t of Agric. Res.*, 477 Mass. 280, 282, 76 N.E.3d 227, 231 (2017) (noting that G.L. c. 66, § 10, and c. 4, § 7, twenty-sixth, and the cases interpreting them, favor disclosure of public records by imposing a presumption that the record sought is public and placing the burden on the records custodian to prove with specificity that an exemption applies); *Reinstein*, 378 Mass. at 289 (noting that there is no blanket exemption provided for investigatory materials).

Notably, the BCSO’s original opposition did not assert that any internal investigation exists or would be disrupted by the release of the requested records. At the hearing on June 9 in this matter, the BCSO’s counsel seemed to suggest that BCSO was largely “investigating” for the purpose of responding to external document requests by the AGO and DHS. Neither of those

agencies has intervened to oppose ACLUM's Request, which perhaps explains the BCSO's new attempts to emphasize its internal operations as a basis for withholding.

But in all events, given the extensive selective disclosures made by the BCSO and Sheriff Hodgson regarding this matter, *see* Reply Br. at 4-7, there is little reason to think that the BCSO will be prejudiced in any way by full disclosure of the documents in ACLUM's request. The BCSO's repeated selective disclosures unfortunately invites the public to consider the incident based only on incomplete facts selected and curated by one of the participants. The public records law exists to ensure the public receives the *complete* facts about the government's activities, not merely those facts which the government selects for their consumption. *Bos. Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 292 (2020) (noting that the public has a vital interest in ensuring transparency where the behavior of public officials allegedly fails to comport with the heightened standards attendant to their office).

June 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2020, the foregoing document will be 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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