

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
C.A. No. 2384CV01076

AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS, INC.,

Plaintiff,

v.

OFFICE OF THE STATE AUDITOR,

Defendant.

CONSOLIDATED STATEMENT OF ADDITIONAL FACTS

1. Plaintiff American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”), is a Massachusetts non-profit corporation with its principal place of business in Boston, Massachusetts. Compl. ¶ 6.

RESPONSE: Undisputed.

2. Defendant Office of the State Auditor (“OSA”) is an agency of the Commonwealth of Massachusetts and is administered by an elected Auditor of the Commonwealth. Compl. ¶ 7.

RESPONSE: Undisputed.

3. On March 15, 2023, OSA received a public records request from ACLUM for “the complete report entitled “Plymouth County Sheriff’s Department -- A Review of Healthcare and Inmate Deaths.” A redacted version of this report was distributed by the Office of the State Auditor on March 15, 2023. Exs. 1; 3.

RESPONSE: This statement characterizes a document that is in the record, *see* Joint Appendix (“JA”) Ex. C, and ACLUM refers to the document for its complete content. ACLUM

does not dispute that the quoted language appears in the cited document.

ACLUM disputes that either Exhibit “1” (A) or “3” (C) is the public version of the report entitled “Plymouth County Sheriff’s Department—A Review of Healthcare and Inmate Deaths” distributed by the Office of the State Auditor on March 15, 2023 (the “Initial PCSD Report”).¹ See JA Ex. I. ACLUM states that the full title of the report is “Plymouth County Sheriff’s Department—A Review of Healthcare and Inmate Deaths for the period July 1, 2019, through June 30, 2021.” *Id.*

Otherwise, ACLUM does not dispute that a public version of the report entitled “Plymouth County Sheriff’s Department—A Review of Healthcare and Inmate Deaths for the period July 1, 2019, through June 30, 2021” was distributed by the Office of the State Auditor on March 15, 2023, see JA Ex. I, or that the Initial PCSD Report was “redacted” insofar as it omitted text included in the complete, non-public version, compare JA Ex. I (Initial PCSD Report) to JA Ex. E (redacted version of complete PCSD Report); see *infra* ¶¶ 10-12.

4. On March 17, 2023, OSA received a public records request from ACLUM for “a complete copy of the Office of the State Auditor’s report entitled “Barnstable County Sheriff’s Office -- A Review of Healthcare and Inmate Deaths.” A redacted version of this report was released to the public on or about March 16, 2023. Exs. 2; 4.

RESPONSE: This statement characterizes a document that is in the record, see JA Ex. D, and ACLUM refers to the document for its complete content.

ACLUM disputes that either Exhibit “2” (B) or “4” (D) is the public version of the report entitled “Barnstable County Sheriff’s Office—A Review of Healthcare and Inmate Deaths”

¹ OSA’s Statement of Facts cites to numbered exhibits. However, the Appendix OSA provided to ACLUM contains lettered exhibits. ACLUM assumes that a citation to a numbered exhibit refers to the lettered exhibit at the corresponding position in the alphabet (e.g., that “Ex. 1” refers to Appendix Exhibit A, that “Ex. 2” refers to Appendix Exhibit B, etc.).

distributed by the Office of the State Auditor on March 16, 2023 (the “Initial BCSO Report”).
See JA Ex. J. ACLUM states that the full title of the report is “Barnstable County Sheriff’s
Office—A Review of Healthcare and Inmate Deaths for the period July 1, 2019, through June
30, 2021.” *Id.*

Otherwise, ACLUM does not dispute that a public version of the report entitled
“Barnstable County Sheriff’s Office—A Review of Healthcare and Inmate Deaths for the period
July 1, 2019, through June 30, 2021” was distributed by the Office of the State Auditor on or
about March 16, 2023, *see* JA Ex. J, and that the Initial BSCO Report was “redacted” insofar as
it omitted text included in the complete, non-public version, *compare* JA Ex. J (Initial BSCO
Report) *to* JA Ex. F (redacted version of complete BSCO Report); *see infra* ¶¶ 10-12.

5. On March 29, 2023, OSA sent ACLUM copy of the Plymouth County Sherriff’s
Department (“PCSD”) report which identified the location of the redactions. Ex. 5.

RESPONSE: Undisputed that OSA sent ACLUM a redacted version of the complete
PCSD Report on March 29, 2023, which revealed the location of the text omitted from the Initial
PCSD Report. JA Ex. E.

6. On March 29, 2023, OSA sent ACLUM a redacted copy of the Barnstable County
Sheriff’s Office (“BCSO”) report which identified the location of the redactions. Ex. 6.

RESPONSE: Undisputed that OSA sent ACLM a redacted version of the complete
BCSO Report on March 29, 2023, which revealed the location of the text omitted from the Initial
BCSO Report.

7. In the email which attached each redacted report provided to ACLUM, OSA
stated that “OSA has applied redactions in reliance on exemption (n) of the Commonwealth’s
Public Records Law, Section 7(26) of Chapter 4 of the General Laws, which allows for the

withholding of certain records, such as confidential and sensitive information, if their disclosure is likely to jeopardize public safety.” Exs. 5 and 6.

RESPONSE: This statement characterizes documents that are in the record, *see* JA Exs. E and F, and ACLUM refers to the documents for their complete content. ACLUM does not dispute that the quoted language appears in the cited documents. ACLUM disputes the substance of the quoted language, namely that “exemption (n) of the Commonwealth’s Public Records Law, Section 7(26) of Chapter 4 of the General Laws, . . . allows for the withholding of certain records, such as confidential and sensitive information, if their disclosure is likely to jeopardize public safety.” ACLUM states that exemption (n) of the Commonwealth’s public records law exempts “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.” G.L. c. 4, § 7(26).

8. The redacted material includes content relating to cyber security at PCSD and BCSO. Affidavit of Joseph C. Arguijo. Ex. 7.

RESPONSE: Not disputed, but not material for purposes of the Commonwealth’s public records law where OSA has not demonstrated both that (i) the redacted material is material which “a terrorist would find useful to maximize damage” and (ii) a reasonable person would agree that disclosure of the redacted material is likely to jeopardize public safety or cyber

security.

ACLUM'S STATEMENT OF ADDITIONAL MATERIAL FACTS

9. The Massachusetts Legislature amended exemption (n) of the public records law in 2016. St. 2016, c. 121, §§ 1-3.

RESPONSE: Not disputed.

10. A summary prepared by the Senate Committee on Ways and Means of S. 2120, the draft bill that added the phrase “cyber security” to exemption (n), stated that the bill “[c]larifies that records relating to the cyber-security of systems in the commonwealth may be exempted from classification as public records.” *See* JA Ex. K, available at <https://willbrownsberger.com/wp-content/uploads/2016/01/swm-summary-of-public-records-law-changes.pdf>.

RESPONSE: Not disputed.

11. On January 28, 2016, at a presentation on S. 2120 held in the Senate Reading Room, Senator Karen E. Spilka, then Chair of the Senate Committee on Ways and Means, made the following statement concerning the addition of “cyber security” to exemption (n): “It’s new – cyber security is so new, and there were some folks and state agencies that asked to make it clearer. Probably without it, it would have included it, when you talk about security, but just to make sure for cyber security reasons that, that would be a part of it, as well.” JA Ex. L at 16:30 (audio file submitted to the Court via email); JA Ex. M.

RESPONSE: Not disputed.

12. The Initial PCSD Report and the Initial BCSO Report each contained a cover letter from the Auditor of the Commonwealth (the “Auditor”) which stated, in relevant part, that “[t]his version of the report is the limited version we are issuing publicly; it excludes an issue

that includes confidential information.” JA Exs. I and J. The cover letters did not indicate what the excluded “issue” was or what (if anything) was being done to address it. *Id.*

RESPONSE: Not disputed.

13. The Initial PCSD Report and the Initial BCSO Report each contained an executive summary which stated, in relevant part, “Our audit of [facility] identified one other issue, which has been omitted from this report in accordance with Exemption (n) of the Commonwealth’s public records law, Section 7(26)(n) of Chapter 4 of the General Laws, which allows for the withholding of certain records, such as confidential and sensitive information, if their disclosure is likely to jeopardize public safety.” JA Exs. I and J. Neither report gave any indication of what the excluded “issue” was or what (if anything) was being done to address it. *Id.*

RESPONSE: Not disputed.

14. The OSA’s Initial PCSD Report seemingly gave PCSD a clean bill of health, including in critical areas such as responses to prisoner deaths (there had been two deaths in the audit period), providing adequate medical screenings, and providing medical care in response to Sick Call requests. JA Ex. I.

RESPONSE: Disputed with respect to the editorial characterization of the report as “seemingly” giving PCSD a clean bill of health. The report speaks for itself and is part of the record.

15. The OSA’s Initial BCSO Report reached similar findings as the PCSD Report but faulted that facility for delays and documentation failures in its admission medical screenings. JA Ex. J.

RESPONSE: Not disputed.

16. The redacted complete reports each contain an entire additional section—which was not present in the public reports—that is completely redacted, including the title of the section, any general statements about its subject matter, and its impact on the OSA’s audit results. JA Ex. E and F. The title of the additional section is also redacted in the table of contents. *Id.*

RESPONSE: Not disputed.

17. The redacted complete reports also each contain redactions interspersed throughout other sections in the report. *Id.* These redactions appear to indicate the presence of additional text that was excised from the public report, without any way for the public to discern that it was missing. *Id.*

RESPONSE: Not disputed.

18. As shown in the example below, the redacted text appears to qualify the reports’ overall conclusions, even though the same conclusions were presented to the public without any indication of this qualification.

Ex. I (Initial PCSD Report), Conclusion 3:

3. Did PCSD provide medical receiving screenings to its inmates upon admission, and intake physical examinations, in accordance with Sections IV and VII of PCSD’s Policy 630 (Medical Services) and Sections IV and VII of PCSD’s Procedure 630 (Medical Services)?	Yes
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Ex. E (redacted version of complete PCSD Report), Conclusion 3:

3. Did PCSD provide medical receiving screenings to its inmates upon admission, and intake physical examinations, in accordance with Sections IV and VII of PCSD’s Policy 630 (Medical Services) and Sections IV and VII of PCSD’s Procedure 630 (Medical Services)?	Yes; [REDACTED]
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RESPONSE: Disputed. The assertion that the redacted text “appears to qualify the reports’ overall conclusions” is an editorial comment and not a statement of fact. As

described in OSA's Statement of Facts, the redacted portions refer to matters involving cyber security and not the quality of healthcare provided for inmates.

19. In the cover emails which attached the redacted complete reports provided to ACLUM, OSA justified all its redactions with a conclusory reference to exemption (n) of the public records law. JA Exs. E and F. OSA did not provide any further explanation as to how exemption (n) would apply. *See id.*

RESPONSE: Not disputed.

20. Neither the redacted PCSD Report, the redacted BSCO Report, the cover letters to the reports, or the cover emails from OSA to ACLUM state if the cyber security "issue" redacted from the reports had been resolved or is still an active problem. *See* JA Ex. E and F.

RESPONSE: Not disputed.

21. On May 10, 2023, after this lawsuit was filed, the Boston Globe published an article titled "ACLU sues state auditor for access to redacted information in prisoner health reports" (the "Globe Article"). JA Ex. N.

RESPONSE: Not disputed.

22. On May 17, 2023, the Cape Cod Times published an article titled "Safety of Barnstable inmates in question as ACLU sues the state. Here's what we know." (the "Cape Cod Times Article"). JA Ex. O.

RESPONSE: Not disputed.

23. According to the Globe Article, the Auditor said in a statement provided to the Globe that the redacted information "was withheld because it relates to cybersecurity." *Id.*

RESPONSE: Not disputed.

24. The Globe Article and the Cape Cod Times Article quote the Auditor as stating

that OSA “has a new IT audit unit dedicated to auditing information technology with a focus on cybersecurity in state agencies.” *Id.*

RESPONSE: Not disputed.

25. The Globe Article and the Cape Code Times Article further quote the Auditor as stating, “Carelessly publicizing identified cybersecurity challenges found within state systems puts those systems at risk.” *Id.*

RESPONSE: Not disputed.

26. There is no evidence that the PCSD Report or the BSCO Report contain any specific technical information on identified cyber security vulnerabilities.

RESPONSE: Disputed. The Affidavit of Joseph C. Arguijo discloses that redactions were made in order to protect information about cyber security whose disclosure, in the reasonable judgment of the records access officer, would jeopardize public safety and cyber security. Moreover, OSA has requested an *in camera* review of the reports which will identify to the Court the cyber security vulnerabilities.

27. There is no evidence that the PCSD Report or the BSCO Report contain any specific technical information for current cyber security vulnerabilities.

RESPONSE: Disputed. The Affidavit of Joseph C. Arguijo discloses that redactions were made in order to protect information about cyber security whose disclosure, in the reasonable judgment of the records access officer, would jeopardize public safety and cyber security. Moreover, OSA has requested an *in camera* review of the reports which will identify to the Court the cyber security vulnerabilities.

Respectfully submitted,

OFFICE OF THE STATE AUDITOR,

By its attorney,

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CERTIFICATE OF SERVICE

I, Samuel Furgang, hereby certify that, on December 11, 2023, a true and accurate copy of the foregoing Consolidated Statement of Facts was served by email on the following:

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