

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 2084CV01035

AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS,
Plaintiff,

v.

BRISTOL COUNTY SHERIFF'S OFFICE,
Defendant

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF**

A. INTRODUCTION

The Defendant, Bristol County Sheriff's Office ("BCSO"), hereby opposes Plaintiff American Civil Liberties Union of Massachusetts' ("ACULM") request for injunctive relief ordering the immediate disclosure of records under the Massachusetts Public Records Law, G.L. c. 66, § 10, relating to an incident that occurred in the BCSO's Immigration and Customs Enforcement ("ICE") Detention Center on May 1, 2020 that resulted in property damage exceed \$25,000 and injuries to staff and ICE Detainees.

B. FACTUAL BACKGROUND

Immigration and Customs Enforcement ("ICE") detainees are federal ICE detainees held by the BCSO in the BCSO's C. Carlos Carreiro Detention Center ("CCCDC") pending deportation proceedings in federal court. On May 1, 2020, ICE detainees in the CCCDC complaining about COVID-19 (a new strain of coronavirus disease) symptoms refused to be tested for COVID-19 and staged a violent disorder in the CCCDC challenging conditions of confinement that resulted in significant property damage totaling approximately \$25,000 or more

and injury to BCSO staff and detainees (hereinafter referred to as the “Incident”). On May 7, 2020, the BCSO received a public records request from the Plaintiff through its attorneys requesting records “concerning the incident”, including all audio and visual recordings, still photographs, reports describing the incident, records collected or prepared during any investigation of the incident, findings or results of investigations, communications between BCSO employees and any federal agency, Department of Homeland Security (“DHS”) and ICE, and records provided to the DHS or ICE. On May 14, 2020, the BCSO responded to ACLUM’s request for public records informing it that the requested records were exempt from disclosure under G.L. c. 4, § 7(26)(f) and (n) of the Massachusetts Public Records Law.

G.L. c. 4, § 7(26)(f) (“investigatory exemption”) exempts from disclosure:

“investigatory materials necessarily compiled out of the 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)(n) (“public safety exemption”) exempts from disclosure:

“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.”

On May 18, 2020, Plaintiff filed the complaint against the BCSO requesting declaratory judgment and injunctive relief. The gravamen of the complaint is Plaintiff’s claims that the BCSO’s refusal to disclose any of the requested records as exempt from disclosure under G.L. c. 4, § 7(26)(f) and (n) is unlawful and that the public statements and disclosures made by the BCSO about and immediately following the May 1, 2020 Incident do not justify the “wholesale withholding of every record concerning the Incident”. (Comp. ¶ 33).

Following the Incident, the BCSO was notified by two outside law enforcement agencies/entities that they would be conducting independent investigations regarding the Incident, the Inspector General (“IG”) in the United States Department of Justice (“DOJ”) and the Massachusetts Attorney General’s Office (“AG”).¹ At the request of these agencies, the BCSO has provided copies of all records relating to the Incident, as listed in the attached Exhibits marked A and B, to the IG and AG. The disclosure of the records to law enforcement agencies for governmental investigative, prosecutorial and oversight purposes was required. The records were not disclosed to the IG and AG for public interest purposes; but rather, for investigative purposes as to whether civil and criminal actions are appropriate.

While these independent investigations are conducted, the BCSO does not have any control over, *inter alia*, the duration, scope, investigatory procedures, evidence relied upon and findings made by these outside agencies. Further, providing copies of the requested records to the IG and AG for law enforcement purposes does not entitle the Plaintiff to disclosure of the requested records as the Plaintiff, ACLUM², is not a federal and state agency/entity conducting an independent investigation. Rather, the Plaintiff states that it is a non-profit corporation that pursues government transparency and accountability and seeks information that is “[i]mportant for the public to understand”. (Comp. ¶¶ 8, 34). There can be little doubt that the disclosure of the requested records to the Plaintiff at the present time will result in the immediate release of the

¹ Further, the BCSO has been notified by the Massachusetts Senate Committee on Post Audit and Oversight that it will be conducting a review of the Incident.

² The American Civil Liberties Union of Massachusetts (“ACLUM”), an affiliate of the American Civil Liberties Union (“ACLU”), is a nonprofit organization that was founded to “to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States”. The ACLU works through litigation and lobbying and provides legal assistance in cases when it considers civil liberties to be at risk. Legal support from the ACLU can take the form of direct legal representation or preparation of *amicus curiae* briefs expressing legal arguments when another law firm is already providing representation. <https://www.aclum.org/en/about/about-us>; https://en.wikipedia.org/wiki/ACLU_of_Massachusetts; https://en.wikipedia.org/wiki/American_Civil_Liberties_Union.

records to the public by the Plaintiff. Such action will compromise effective law enforcement that such disclosure would not be in the public interest. See G.L. c. 4, § 7(26)(f). Further, the immediate release of the records will interfere these outside investigations, criminal prosecutions, and likely make it more difficult for prosecutors to empanel an impartial jury at trial.

Clearly, releasing the records prior to the conclusion of law enforcement investigations would seriously hamper these federal and state agencies/entities' ability to conduct this and future investigations because it would have a chilling effect on the willingness of victims and witnesses to come forward and cooperate in investigations. See Globe Newspaper Company, et al. v. Police Commissioner of Boston, 419 Mass. 852, 866-867 (1995) (interest in keeping identities of homicide hotline callers confidential and fostering an atmosphere where citizens can feel free to cooperate with police officers did not diminish where identities had not been previously disclosed).

C. ARGUMENT

1. **The Plaintiff has Failed to Carry its Burden of Demonstrating Likelihood of Success on the Merits and that it will Suffer Irreparable Harm if a Preliminary Injunction is not Granted in their Favor**

A plain reading of the complaint shows that Plaintiff has not met its burden for showing that it is entitled to the extraordinary remedy of injunctive relief, which is “never awarded as a matter of right.” Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008). Preliminary injunctions are “drastic” devices which should be used sparingly and with caution. See Knapik v. McGuire, 1999 Mass. Super LEXIS 209, * 4 (Hillman, J. 1999), citing Charles Wright & Arthur Miller, 11 Federal Practice and Procedure, 2948, at pp. 129-30 (1995).

To succeed in an action for a preliminary injunction, a plaintiff must ordinarily show (1) a likelihood of success on the merits, (2) that irreparable harm will result from denial of the

injunction, and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. Tri-Nel Mgmt, Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001); citing Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980); see also Modern Cont'l Const. Co. v. City of Lowell, 391 Mass. 829, 837 (1984) (applying Packaging Industries in a case where contractor sought an injunction against a public bidding process). Further, "[w]hen, as here, a party seeks to enjoin governmental action, the court also considers whether the relief sought will adversely affect the public." Tri-Nel Management, Inc. v. Bd. of Health of Barnstable, 433 Mass. 217, 219 (2001).

Packaging Industries established the standard of review as follows:

...when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue. [fns. 11 and 12 omitted] See generally Leubsdorf, [The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525, 541 (1978)] at 540-544; Note, Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction, 71 Colum. L. Rev. 165 (1971); 11 C.A. Wright & A.R. Miller, Federal Practice and Procedure, § 2948, at 453-454 (1973).

Packaging Indus. Group, Inc., 380 Mass. at 617.

A preliminary injunction is a "significant remedy" that "should not be granted unless the [moving party] [makes] a clear showing of entitlement thereto." Student No. 9 v. Board of Education, 440 Mass. 752, 762 (2004). Likelihood of success on the merits is the "most important" factor in deciding whether a plaintiff is entitled to a preliminary injunction. E.g., Pompei v. Fincham, No. 07-4743-BLS2, 2007 WL 4626915, at *1 (Mass. Super. Ct. Nov. 16, 2007) (Fabricant, J.). In fact, courts in Massachusetts have found it unnecessary even to consider

irreparable harm where the moving party has failed to demonstrate a likelihood of success on the merits. Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 858-59 (2004); Student No. 9,440 Mass. at 767 (2004). And even when courts consider irreparable harm, “[w]hat matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party’s chance of success on the merits.” Packaging Indus. Group, Inc., 380 Mass. at 617. Here, Plaintiff does not show, let alone assert, that it is likely to succeed on the merits. Clearly, on the ongoing federal and state independent investigations being conducted regarding the Incident, the Plaintiff cannot show that it is likely to succeed on the merits of its claim that the BCSO unlawfully refused to disclose records relating to the Incident as exempt from disclosure under the investigatory and public safety exemptions. G.L. c. 4, §§ 7(26)(f),(n).

Thus, the analysis turns to the balance of harms. Here, the Plaintiff has not demonstrated, other than by broad conclusory averments, that its inability to obtain the requested records will cause it or the public irreparable harm. At best, Plaintiff ACLUM makes tenuous assertions suggesting that “escalating tension” between ICE Detainees and the BCSO and that statements made by the BCSO are of public interest because they show animus toward some ICE Detainees. Further, Plaintiff suggests statements made by the BCSO immediately following the Incident constitutes a waiver of the exemptions cited.

First, while the Plaintiff suggests that “escalating tensions” between ICE detainees and the BCSO was a contributing factor leading up to the violent disorder, it should be noted that the BCSO has housed federal ICE detainees for over approximately 15 years and no prior incident of this nature has ever occurred. Clearly, the fears and uncertainly presently being experienced by ICE detainees with respect to the recent and ongoing COVID-19 pandemic, and that threatens the health and wellbeing of all persons, including ICE detainees and their families, is a unique

and extraordinary global event that did not impact ICE detainees until recently. Further, the fear and stress to ICE detainees brought on by this extraordinary global pandemic is a new element never experienced in the approximate 15 years the BCSO has housed ICE detainees, from which a reasonable person could conclude was a significant contributing factor in staging the Incident on May 1, 2020.

Further, in late March 2020, in Savino v. Souza, C.A. No. 20-10617-WGY (D. Mass.) (“Savino”), a federal habeas class action case pending in the United States District Court for the District of Massachusetts, ICE detainees sought release based on the COVID-19 pandemic. While some ICE detainees have been granted release and others have not, this has also frustrated ICE detainees who have been denied release and may be another contributing factor to the staging of the violent disorder. The fear and stress brought on by the COVID-19 pandemic and the denial of their requests for release, as contributing factors in staging the Incident, are issues to be considered in the investigations of the Incident.

Second, since the May 1, 2020 Incident, there have been no other demonstrations or riots by ICE Detainees or in BCSO ICE detention units. Third, prior publicity and public statements made by the BCSO immediately following the Incident do not necessarily destroy the investigatory exemption claimed. Globe Newspaper Company, et al., 419 Mass. at 862-863. The public statements by the BCSO immediately after the Incident essentially summarize the events that transpired during the Incident did not disclose or make public the documents sought and do not constitute a waiver of the reports, statements, video and audio records, and other evidence covered by the investigatory exemption. Id. at 863.

Here, Plaintiff requests the immediate release of the information that would doubtless cause the BCSO and the outside federal and state agencies conducting independent investigations irreparable harm, and once freed, the genie cannot be returned to the bottle. Thus, the Court

must first determine that the Plaintiff has made a clear showing that the balancing of harms justifies the entry of an injunction. The purpose of a preliminary injunction is to preserve rights “that cannot be vindicated should [the moving party] prevail after a full hearing on the merits.” Packaging Industries, 380 Mass. at 616. Judges should be mindful, however, that entering an injunction could cause “the enjoined party [to] suffer precisely the same type of irreparable harm.” Id. Thus, because an “assessment of the parties’ lawful rights at the preliminary stage of the proceedings may not correspond to the final judgment, the judge should seek to minimize the harm that final relief cannot redress, by creating or preserving, in so far as possible, a state of affairs *such that after the full trial, a meaningful decision may be rendered for either party.*” Id. (emphasis added; quotations omitted); see also Weston, 461 Mass. at 164. Ordinarily, a preliminary injunction is issued to preserve the status quo pending the outcome of litigation. Id.

The reason for the investigatory exemption is to prevent impairment to “the possibility of effective law enforcement that such disclosure would not be in the public interest.” Globe Newspaper Company, 419 Mass. at 858. The investigatory exemption also serves to prevent “the disclosure of confidential investigative techniques, procedures or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.” Bougas v. Police Chief of Lexington, 371 Mass. 59, 62 (1976). “ ‘The encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation’ is a principal objective of the investigatory exemption.” Globe Newspaper Company, et al., 419 Mass. at 862, quoting Bougas, 371 Mass. at 62.

Here, the injunctive relief sought by Plaintiff will change the status quo and will grant it the ultimate relief Plaintiff seeks in its complaint. Were the Court to grant Plaintiff’s request for

them and their families.

Moreover, as some ICE detainees are gang members with histories of committing violent crimes, such as MS-13³ (a violent international criminal organization), they are incarcerated pending prosecution and/or pending deportation. Correctional officials are keenly aware that the imminent prospect of deportation provides ICE detainees with motivation to create disturbances in the hope of effectuating an escape or of delaying their deportation proceedings in order to remain in the United States. Knowledge of unit and prison layouts, security protocols and response measures, if disclosed to the public, would likely jeopardize public safety as well as staff and inmates. G.L. c. 4, § (7)(26)(n).

Accordingly, the Plaintiff has failed to meet its burden of showing its likelihood of success on the merits and that it will suffer irreparable harm if a preliminary injunction is not granted in their favor. Clearly, the balance of harms weighs in favor of the Defendant BCSO and maintaining the status quo exempting the disclosure of the records until law enforcement and governmental oversight investigations are concluded. At such time as investigations have concluded, including the possible prosecution of offenders, a subsequent review of the propriety of disclosing the records may be conducted. Clearly, the Plaintiff has not shown that the matter is of urgent public interest. ACLU v. Dept. of Justice, 321 F.Supp.2d 24, 32 n. 11 (D.D.C. 2004); EPIC v. Dept. of Justice, 322 F. Supp. 2d 1, 5 (D.D.C. 2003) (the appearance of 31 newspaper articles does not make a story a matter of ‘current exigency’). Plaintiff cites 7 articles (Comp., fns. 6-12) published immediately following and concerning the Incident and makes reference to 2 articles and 4 pleadings or ruling in Savino v. Souza, C.A. No. 20-10617-WGY (D. Mass.) (“Savino”) (Comp., fns. 1-5, 13). Clearly, 13 references to articles and pleadings related to

³ <https://en.wikipedia.org/wiki/MS-13>.

Savino does not make the disclosure of the records at issue in the instant action a matter of ‘urgent’ public interest. Id.

While the records are exempt from disclosure under the investigatory and public safety exemptions, the identification and depiction of ICE detainees and responding officers in reports and video recordings are exempt from disclosure as material relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy (“privacy exemption”). G.L. c. 4, § 7(26)(c). Brogan v. Sch. Comm. of Westport, 401 Mass. 306, 308 (1987); Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983). The records contain information and depictions of ICE detainees of a highly personal nature, such as their involvement and un-involvement in the disturbance, that the privacy exemption would protect. See Rural Hous. Alliance v. United States Dep’t of Agric., 498 F.2d 73, 77 (D.C.Cir.1974).

For example, ICE detainees observed in video recordings or reports as being involved in the Incident could now become targets of gangs that seek to recruit him into their gang or strong-arming him into joining their gang by means of threat against the ICE detainee or his family. ICE detainees observed in video recordings or reports as not being involved in the Incident could now become targets of gangs or other ICE detainees involved in the Incident based on their suspicion or belief that the uninvolved ICE detainee is a “snitch” and reporting information about other ICE detainees to the BCSO or other law enforcement agencies. The BCSO, as the custodian of records, must make determinations regarding requests to disclose records that could endanger persons named in reports or observed in video records that constitute an unwarranted invasion of personal privacy or that would likely jeopardize public safety as well as staff and inmates. G.L. c. 4, § (7)(26)(c),(n).

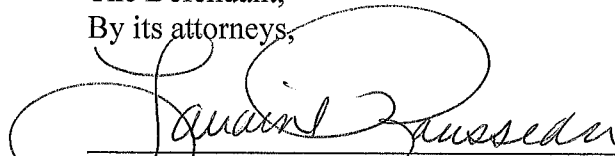
“The revelation by a citizen witness that another person is a drug addict, for example, is

precisely the type of “intimate” and “highly personal” information that the privacy exemption would protect.” See Rural Hous. Alliance v. United States Dep’t of Agric., 498 F.2d 73, 77 (D.C.Cir.1974) (comparable Federal exemption protects information concerning “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights [and] reputation”). Furthermore, disclosure of these facts does not enhance to any significant degree the public insight into the propriety of police conduct during the criminal investigation.” Id.

WHEREFORE, the Defendant respectfully request that the Court deny Plaintiff’s request for a preliminary injunction be denied and for such other relief as the Court deems just and proper.

Date: June 5, 2020

Respectfully submitted,
The Defendant,
By its attorneys,



Lorraine J. Rousseau, Esq., BBO# 561989

Robert C. Heroux, Esq., BBO# 553904

Special Assistant Attorneys General

Bristol County Sheriff’s Office

400 Faunce Corner Road

North Dartmouth, MA 02747

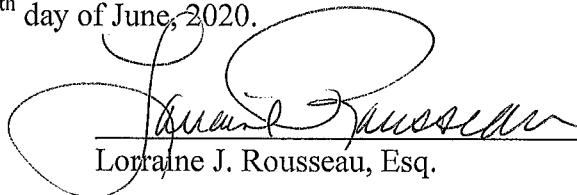
Tel. (508) 995-1311; Fax (508) 995-7835

LorraineRousseau@bcso-ma.org

RobertHeroux@bcso-ma.org

CERTIFICATE OF SERVICE

I, Lorraine J. Rousseau, Esq., hereby certify that I have caused a copy of this opposition to be served by email transmission to Christopher Hart, Esq., Foley Hoag, LLP, Seaport West, 155 Seaport Boulevard, Boston, MA 02210-2600 at CHart@foleyhoag.com, and to Nicholas Anastasi, Esq., Foley Hoag, LLP, Seaport West, 155 Seaport Boulevard, Boston, MA 02210-2600 at NAnastasi@foleyhoag.com on this 5th day of June, 2020.



Lorraine J. Rousseau, Esq.



THE COMMONWEALTH OF MASSACHUSETTS

Ex.A

OFFICE OF THE
BRISTOL COUNTY SHERIFF

INVESTIGATIONS

THOMAS M. HODGSON
SHERIFF

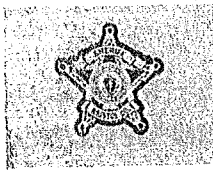
400 Faunce Corner Road
North Dartmouth, MA 02747
TEL: (508) 995-6400
FAX: (508) 995-3507

Special Investigations Unit

ICE B DISTURBANCE
05/01/2020

FOLDER CONTENTS

- Watch Commander and Correctional Officer Incident Reports
- Sheriff's Response Team Incident Reports
- Detainee Restrictive Housing Transfer Order Reports
- Detainee Strip Search Reports
- Medical Incident Reports
- Notice of Placement into Administrative Segregation Order Status Forms
- K-9 Division Reports
- Watch Commander Incident E-mail
- Sheriff Thomas Hodgson Injury Photos
- ICE B Bunk Set Up Form
- Officer Tracey Perez Notes
- Officer Jonathan Baroody Notes
- ICE B Unit Log Book 05/01/2020 (1500-2300)
- ICE Control Log Book 05/01/2020 (1500-2300)
- Schedule/Shift Reports
- Photo Lineup
- Thirty (30) DVD-R Disks
- One (1) DVD-R containing ICE B Phone Calls 04/30/2020 - 05/01/2020



Ex. B

**DOCUMENTS REQUESTED BY THE MASSACHUSETTS OFFICE OF THE ATTORNEY
GENERAL BY LETTER DATED MAY 5, 2020
RELATIVE TO THE ICE-B DISTURBANCE OF MAY 1, 2020**

1. All video or audio recordings of the interior or exterior spaces of Unit B of the Detention Center between the hours of 12:00 p.m. and 11:59 p.m. on May 2, 2020. This request includes any recordings captured by surveillance cameras or by any recording device, including camcorders or cell phone footage, in the possession, custody, or control of any Bristol County Sheriff's Office ("BCSO") officer or employee.

Response: Video Footage (CD) ICE-B – May 1, 2020; (12:00 p.m. – 11:59 p.m.)

2. Recordings of all telephone calls by any detainee housed in Unit B of the Detention Center between 12:00 p.m. on May 2, 202 and 11:59 p.m. on May 3, 2020.

**Response: Recordings of Detainee Telephone Calls from ICE-B ---
Beginning: 12:00 p.m. May 1, 2020 to 11:59 p.m. May 3, 2020**

3. The name and title for each BCSO staff member or employee who was on duty in Unit B on May 2, 2020 or who responded to, participated in, provided support or consultation for, or was present for any part of the Incident.

Response: ICE-B Disturbance Employee Roster

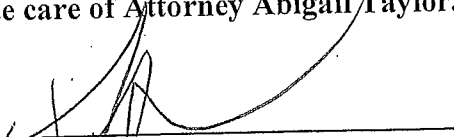
4. The names of all detainees or other individuals who were present in the Detention Center on May 2, 2020, and specification as to which of those individuals were present in Unit B on that day.

Response: Flash Drive: Incident Reports & Video Recordings

5. All incident reports or other documentation pertaining to the Incident.

Response: The incident reports are contained in the flash drive at number 4 above. Additionally, as the investigation is still ongoing, the documents provided are current to date. Further, the Inspector General of Homeland Security may be in possession of other materials generated by it that we are not privy to.

I certify that I have received the above documents and materials from the Bristol County Sheriff's Office response to the Attorney General's request dated May 5, 2020 and agree to transport these documents directly to her office care of Attorney Abigail Taylor.


Stephen Marshelak
Assistant Attorney General

Dated: 6-2-2020