

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT

AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS, INC. and TAYLOR R.
CAMPBELL,

Plaintiffs,

v.

CITY OF BOSTON, BOSTON POLICE
DEPARTMENT, and REBECCA S. MURRAY, in her
official Capacity as the Supervisor of Records of the
Public Records Division of the Commonwealth of
Massachusetts,

Defendants.

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANTS CITY OF
BOSTON AND BOSTON POLICE
DEPARTMENT**

Docket No. 2084-cv-01802-H

Plaintiffs The American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) and Taylor R. Campbell (together, “Plaintiffs”) respectfully submit this memorandum of law in support of their motion for partial summary judgment as to Counts I and III of their Complaint seeking (1) a declaration that Defendants City of Boston (the “City”) and the Boston Police Department (“BPD,” and together with the City, the “City Defendants”) violated the Massachusetts Public Records Law (“PRL,” M.G.L. c. 66, § 10) and (2) requiring the immediate production of all public records responsive to the Public Demonstrations Requests and Teargas Request described herein.¹

INTRODUCTION

Democracy cannot function without accountability, and the public’s ability to hold government actors responsible flows directly from its ability to obtain timely information about the conduct of its elected officials. The PRL reflects the Commonwealth’s commitment to transparency by requiring public bodies, including the City Defendants, to provide a comprehensive response to public records requests and to make requested public records in their possession available within 10 business days. The turnaround time is short and intentionally so: accountability deferred is accountability denied.

Timely production of public records regarding police behavior became especially critical in the wake of nationwide unrest following the police killings of George Floyd and Breonna

¹ Plaintiffs do not presently move for summary judgment on the remaining public records requests that are at issue in this case, namely: ACLUM’s and Mr. Campbell’s June 9 & 18, 2020 requests regarding federal agency deployment (Ex. D & E to Complaint); ACLUM’s and Mr. Campbell’s September 1 & 8, 2019 requests regarding the so-called “Straight Pride Parade” (Ex. F & G to Complaint); ACLUM’s September 30, 2019 request regarding surveillance camera location (Ex. H to Complaint); and ACLUM’s November 6, 2019 request regarding the City Defendant’s collaboration with ICE (Ex. J to Complaint). Plaintiffs reserve their right to move for summary judgment or seek any other relief on those remaining public records requests.

Taylor. In Massachusetts, those killings not only sparked conversations and public demonstrations about police practices, but the police response to public demonstrations in May and June 2020 about those practices raised new concerns about police officers' use of force, the use of chemical weapons against the public, and the degree of federal intervention in those demonstrations.

Plaintiffs submitted requests to the City Defendants seeking public records on those specific issues in June and July 2020—shortly after the public demonstrations in May 2020, and well in advance of the November election, to ensure the public had access to critical information concerning police use of force in Boston. The City Defendants did not and have not produced a single responsive public record—not in ten business days as the law requires, not in the *eight months* since Plaintiffs made those requests, and not even in the six months since Plaintiffs filed this civil action. The City Defendants' conduct violates the PRL and undermines the strong public interests the PRL serves when they are at their apex—namely, as they concern the conduct of public officials, particularly armed police officers, performing their official duties.

Plaintiffs seek partial summary judgment relating to these requests, seeking a declaration the City Defendants violated the PRL and an order requiring them to produce responsive public records immediately. It is clear Plaintiffs are entitled to this relief. There is no dispute the City Defendants received and understood those requests. The City Defendants admit they have failed to respond to those requests, that they possess public records responsive to those requests, and that they intend to produce “all” responsive public records without qualification. Plaintiffs, and the public, have waited long enough. As the public cannot count on the City Defendants to comply with the PRL absent compulsion, the Court should grant the motion.

NATURE AND STAGE OF THE PROCEEDINGS

On August 12, 2020, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief and Action in the Nature of Certiorari (the “Complaint”) in this Court. On October 15, 2020, the City Defendants filed their Answer (the “Answer”). Counsel to the Parties conferred concerning the City Defendants’ willingness to produce documents responsive to Plaintiffs’ public records requests on October 7, 2020, and conferred specifically concerning the relief sought herein by telephone on February 18, 2021. Plaintiffs now seek partial summary judgment concerning two sets of long overdue public records requests to the City Defendants.

STATEMENT OF FACTS²

I. The Public Demonstrations Requests³

A. The Campbell Demonstrations Requests

On June 8, 2020, Mr. Campbell submitted a public records request seeking records from the BPD related to its response to the racial justice demonstrations in May and June (the “Campbell Demonstrations Requests”). Statement of Facts (“SOF”) ¶ 3.

Items 1-5 of the Campbell Demonstrations Requests sought documents about the BPD’s operational responses to and reporting during the May 25, 2020 through June 8, 2020, demonstrations, including threat assessments, documentation of the actions taken by BPD officers related to public gatherings, staffing directives, complaints to the BPD, use-of-force reports, COBRA activations, and equipment, vehicle, and munitions compilations. SOF ¶ 4.

Items 6-9 sought communications between the BPD and other governmental agencies, including

² Pursuant to Super. Ct. R. 9A(b)(5)(i), the material facts as to which Plaintiffs contend there is no genuine issue to be tried are set forth in the Statement of Facts (“SOF”) filed herewith.

³ “Public Demonstration Requests” refers collectively to the Campbell Demonstrations Requests and the ACLUM Demonstrations Requests defined herein.

the National Guard, the Massachusetts Bay Transit Authority, the Mayor's office, and the Governor's office. *Id.*

Shawn Williams, the Director of Public Records and Records Access Officer (RAO) for the City of Boston, which includes the BPD, acknowledged receipt of the request that same day. SOF ¶ 5. To date, the BPD has not provided any of the other information required by the PRL or produced a single responsive record. SOF ¶¶ 6-7. The City Defendants do not assert any justifications to withhold the Campbell Demonstrations Requests, and instead state they “intend[] to provide all responsive public records” in response to them. SOF ¶¶ 8, 32.

B. The ACLUM Demonstrations Requests

On June 9, 2020, ACLUM submitted a public records request seeking records from the BPD related to its response to the racial justice demonstrations in May and June (“ACLUM Demonstrations Request”). SOF ¶ 9 .

The ACLUM Demonstrations Requests generally sought documents related to the Department's use of force and its communications with state and federal agencies during those demonstrations. More specifically, Items 1-4 sought documents related to the BPD's policies regarding use of force, including dogs, chemical agents, riot gear, and rubber bullets in response to past or anticipated demonstrations; Item 5 sought documents relating to any video footage taken by BPD officers between May 25, 2020 and June 8, 2020; Item 6 sought documents relating to the use of surveillance technologies in connection with any demonstration since May 25, 2020; Item 7 sought documents relating to the use of long range acoustic devices, sound canons, or any other related equipment in connection with any demonstration since May 25, 2020; and Items 8-9 sought documents relating to the potential deployment or involvement of federal agents in demonstrations in Massachusetts since May 24, 2020. SOF ¶ 10.

The BPD acknowledged receipt of the request on June 9, 2020 via automated response. SOF ¶ 11. To date, the BPD has not provided any of the other information required by the PRL or produced a single responsive record. SOF ¶¶ 15-16. After the statutory deadline for production or submission of the information required under G.L. c. 66, § 10(b) had passed without any further response from the BPD, ACLUM twice emailed Mr. Williams offering to discuss the scope of the request and asking when the documents would be produced. SOF ¶ 12. Mr. Williams did not respond to ACLUM's communications. SOF ¶ 13.

The City Defendants do not assert any justifications to withhold the ACLUM Demonstrations Requests, and instead state they “intend[] to provide all responsive public records” in response to them. SOF ¶¶ 17, 32.

C. BPD Identifies and Produces Responsive Records in Other Proceedings

Despite not producing records in response to the Campbell Demonstrations Request and the ACLUM Demonstrations Request, BPD has identified and produced documents that would be responsive to those requests in other proceedings. On December 18, 2020, an attorney representing demonstrators arrested during the June 1, 2020 demonstrations released body camera footage from that demonstration showing officers shoving and pepper-spraying protestors, as well as officers discussing actions they had taken against protestors. SOF ¶ 29; Exhibit K (December 18, 2020 THE APPEAL Article). The body camera footage was provided to the attorney as part of a discovery file. *Id.*

This footage is directly responsive to items 4-5 of the ACLUM Demonstrations Requests, items 2 and 4 of the Campbell Demonstrations Requests, and the Teargas Request. Yet, six months after the Plaintiffs submitted these requests, and nearly two months after these videos were produced to the other attorney, none of these videos had been provided to Mr. Campbell or ACLUM. SOF ¶ 30.

II. ACLUM's Teargas Request

On June 18, 2020, ACLUM submitted a public records request seeking records from the BPD regarding its use of chemical agents, including pepper spray and teargas, since 2016 ("Teargas Request"). SOF ¶ 18. The BPD acknowledged receipt that same day through an automated response. *Id.* at ¶ 20.

On July 2, 2020, Mr. Williams sent ACLUM the BPD's petition for an extension of time to produce responsive records and for permission to charge fees which it had submitted to the Supervisor. SOF ¶ 21. This was the first communication ACLUM had received from the BPD regarding this request since its automated acknowledgement of receipt (*Id.*), as the BPD had not contacted ACLUM to discuss the content or the scope of the request or to offer an alternative production schedule. *Id.* Nor had ACLUM received a written response providing the information pursuant to M.G.L. c. 66, § 10(b). *Id.*

In response to the petition, ACLUM emailed Mr. Williams and offered to discuss the scope of the request, but he did not respond. SOF ¶¶ 22-23. On July 8, 2020, ACLUM submitted an opposition to the BPD's petition. *Id.* at ¶ 24. That same day, the Supervisor granted an extension of time to produce the records until August 14, 2020, but stated she could not opine on the BPD's petition to charge fees because it had not demonstrated that the petition was timely. *Id.* at ¶ 25.

To date, the BPD still has not produced a single responsive record in response to the Teargas Request. SOF ¶ 26. The City Defendants do not assert any justifications to withhold the Teargas Request, and instead state they "intend[] to provide all responsive public records" in response to them. *Id.* at ¶¶ 28, 32.

LEGAL STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(d); *see also Healey v.*

Cruz, No. SUCV201603619, 2018 WL 6722424, at *4 (Mass. Super. Nov. 27, 2018). In public records litigation, “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.” *Boston Globe Media Partners, LLC v. Dep’t of Crim. Justice Info. Servs.*, 484 Mass. 279, 282 (Mass. 2020) (quoting G.L. c. 10A(d)(1)iv)).

The PRL’s purpose is to advance the public’s strong interests in transparency, accountability, and public confidence, which “are at their apex if the conduct at issue occurred in the performance of the official's professional duties or materially bears on the official's ability to perform those duties honestly or capably.” *Boston Globe Media Partners, LLC*, 484 Mass. at 293. As the Supreme Judicial Court recently reaffirmed, public officials “occupy positions ‘of special public trust,’” and therefore misconduct by public officials that does not result in prosecution is a matter of “substantial public interest.” *Id.* at 292–93. The strong public interest “in knowing whether their public servants are carrying out their duties in an efficient and law abiding manner” therefore “permits the public to shine a light on the daily workings and operations of public offices and their employees through access to public records and data.” *Healey v. Cruz*, No. SUCV201603619, 2018 WL 6722424, at *5 (Mass. Super. Nov. 27, 2018) (quoting *Attorney Gen. v. Collector of Lynn*, 377 Mass. 151, 158 (1979)).

To serve this goal, the PRL strongly favors disclosure. The PRL defines “public record” broadly,⁴ creates a presumption that all government records are “public records” subject to disclosure, and places the burden on the government to establish any portion of a record may be

⁴ See M.G.L. c. 4, § 7, cl. 26. (defining public records to include “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth . . .”).

withheld. M.G.L. c. 66, § 10A(d)(1)(iv); *see also* *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993); *Healey*, 2018 WL 6722424, at *8 (“The public records law instructs that all records are presumed public, and to rebut that presumption the defendants must demonstrate that an exemption applies to excuse their production.”).

The PRL also requires public records officers to provide access to public records promptly. Specifically, the PRL provides that records access officers or their designees must “without unreasonable delay permit inspection or furnish a copy of any public record as defined in [M.G.L. c. 4, § 7, cl. 26] or any segregable portion of a public record, not later than 10 business days following the receipt of the request,” so long as the request (i) reasonably describe the public record sought, (ii) the municipality or agency has the documents requested, and (iii) in certain circumstances payment of a reasonable fee. M.G.L. c. 66, § 10(a). While municipalities may request an extension of time beyond the statutory 10 days, “a records access officer *shall* provide a written response under M.G.L. c. 66, § 10(b) to a request for public records no later than the tenth business day following the receipt of a request *notwithstanding the applicability of any petition [for extension of time].*” 950 C.M.R. 32.06(2)(b) (emphasis added). If a records access officer does not provide a written response to a requestor within 10 business days after the request is submitted, they are prohibited from charging any fee for production of the records sought. M.G.L. c. 66, §§ 10(e).

Where a custodian of public records fails to comply with the PRL, the requestor may file a civil action to seek any remedies at law or in equity—including the issuance of an injunction—to enforce it. M.G.L. c. 66, §§ 10A(c), 10A(d). In that event, the Superior Court may award

reasonable attorney fees and costs,⁵ and order the municipality or agency to waive any fee assessed for production of documents. M.G.L. c. 66, §§ 10A(c)-(d).

ARGUMENT

I. The City Defendants Must Produce All Public Records in Response to the Public Demonstrations Requests.

The City Defendants have not produced a single public record in response to the Public Demonstrations Requests in the *eight months* since they received them, which is especially egregious because the City Defendants have produced records responsive to this request in a pending criminal proceeding. The Court should grant summary judgment because, as described below, this lack of production plainly violates the PRL.

First, the Public Demonstrations Requests reasonably describe the records sought. *See* M.G.L. c. 66, § 10(a). Each item in those requests is clear by its plain language (*see* SOF ¶¶ 4, 10) and the City Defendants' Answer does not suggest otherwise.

Second, the Public Demonstrations Requests seek public records. Items 1-5 of the Campbell Demonstrations Requests and Items 5-7 of the ACLUM Demonstrations Requests seek public records relating to BPD's response to the May and June demonstrations after the death of George Floyd, including the use of surveillance technologies against the demonstrators. *See* SOF ¶¶ 4, 10. Items 6-9 of the Campbell Demonstrations Requests and items 8-9 of the ACLUM Demonstrations Requests seek public records relating to the coordination of governmental

⁵ There is a presumption in favor of an award of fees and costs except under circumstances not applicable here. *See* M.G.L. c. 66, §§ 10A(d)(2). Plaintiffs reserve their right to seek fees and costs, and to seek the imposition of punitive damages, at an appropriate time.

agencies, including coordination with the federal government, in response to the demonstrations. *See id.* ¶¶ 4, 10.

Each of those items seek public records. The broad definition of public records plainly encompasses the records sought. *See* M.G.L. c. 66, § 10(a); *id.* c. 4, § 7, cl. 26). Reflecting this understanding, courts have already found that the types of records Plaintiffs requested are public records under the PRL. *See Healey*, 2018 WL 6722424, at *10 (noting that police daily logs, arrest registers, or other similar records compiled chronologically are considered public records); *Reinstein v. Police Comm’r of Boston*, 378 Mass. 281, 288-90 (1979). This makes sense: the records Plaintiffs seek concern the conduct of public officials performing their official duties, where the public interest in disclosure is at its “apex” to further transparency, accountability, and public trust. *See Boston Globe*, 484 Mass. at 293. The City Defendants’ failure to produce the requested records undermines those significant public interests.

Third, the City Defendants have public records responsive to the Public Demonstrations Requests that they have failed to produce. SOF ¶ 31. The City Defendants admit they have not responded to the Public Demonstrations Requests at all—let alone within the statutorily mandated 10-day period—and that they intend to produce responsive records. *Id.* at ¶¶ 32-33 . Further, the City Defendants have already produced some responsive records in pending criminal proceedings, but have not provided those same records to Plaintiffs. SOF ¶¶ 29-30. The body-camera footage the City Defendants produced in unrelated proceedings are plainly responsive at least to Item 2 of the Campbell Demonstrations Requests and Item 5 of the ACLUM Demonstrations Requests.

To this day, the City Defendants have neither justified their failure to respond to the Public Demonstrations Requests they received *last June* nor asserted any exemption as to any

responsive record. Instead, they state that they “intend[] to provide *all* responsive records” without qualification. *See* Answer ¶¶ 5, 7, 8, 9, 15, 51, 55, 61, 66, 71, 74, 80, 83, 88, 97, 119, 121 (emphasis added).

Plaintiffs are therefore entitled to summary judgment declaring the City Defendants violated the PRL and requiring the immediate production of all public records responsive to the Public Demonstrations Requests. There can be no dispute the City Defendants violated the PRL by failing to respond to the Public Demonstrations Requests within 10 business days, and thereafter failing to produce any public records responsive to them. *See* M.G.L. c. 66, §§ 10(a), 10(b).⁶

II. The BPD Must Produce All Public Records in Response to the Teargas Request.

In the eight months since it received the Teargas Request, BPD has not produced a single responsive public record. Here, too, the Court should declare the BPD violated the PRL and order the immediate production of all responsive public documents.

First, the Teargas Request reasonably describes the records sought. *See* M.G.L. c. 66, § 10(a). The Teargas Request is clear by its plain language, and the BPD has not asserted that the Teargas Request is ambiguous or that it otherwise fails to reasonably describe the records Plaintiffs seek.

Second, the Teargas Request seeks public records. The broad statutory definition of public records encompasses documents reflecting a police department’s actual use of chemical agents, including pepper spray and teargas, which bears directly on the assessment of the police officers’ conduct as officials in positions of public trust. *See Reinstein*, 378 Mass. at 288 (“One

⁶ The City Defendants are not entitled to a reasonable fee as a condition precedent to producing responsive records because they failed to respond to either of the Plaintiffs within 10 business days as required by Section 10(b). *See* M.G.L. c. 66, § 10(e); SOF ¶¶ 6-7, 15-16, 33.

can surmise by reference to rules 35 and 303 that the firearms records probably contain other information whose disclosure would be of considerable public interest and would offend no legitimate interest on the part of the government or private citizens.”).

Third, the BPD has public records responsive to the Teargas Request they have failed to produce. BPD admits it has responsive records. SOF ¶ 31. Likewise, BPD admits it failed to respond to the Teargas Request. *Id.* at ¶¶ 21, 33.

Instead of providing responsive records as the PRL requires, the BPD petitioned the Supervisor of Records for an extension of time without fulfilling any of the requirements in Section 10(b) aside from confirming receipt of the request.⁷ The Supervisor granted BPD’s request for an extension to August 14, 2020, but the BPD has failed to produce any responsive records by that date or since. BPD has never asserted any exemptions that would apply to the items in the Teargas Request, and instead states it “intends to provide *all* responsive records” without qualification. *See* Answer ¶¶ 5, 7, 8, 9, 15, 51, 55, 61, 66, 71, 74, 80, 83, 88, 97, 119, 121.

Plaintiff ACLUM is therefore entitled to summary judgment declaring BPD violated the PRL and requiring the immediate production of all public records responsive to the Teargas Request. There can be no question BPD violated the PRL by failing to respond to the Teargas Request within 10 business days and by petitioning the Supervisor of Records in lieu of complying with Section 10(b), and thereafter failing to produce any public records responsive to the Teargas Request. *See* M.G.L. c. 66, §§ 10(a), 10(b).

⁷ As BPD failed to respond in accordance with Section 10(b), it is not entitled to a reasonable fee as a condition precedent to producing responsive records. *See* M.G.L. c. 66, § 10(e); SOF ¶¶ 21, 26-27, 33.

III. Conclusion

For at least the foregoing reasons, the Court should grant Plaintiffs’ motion for summary judgment, declare the City Defendants in violation of the PRL, and order the immediate production of all public records responsive to the Public Demonstrations Requests and the Teargas Request.

Dated: February 26, 2021

/s/ Jessie J. Rossman

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CERTIFICATE OF CONFERENCE PURSUANT TO RULE 9(C)

Pursuant to Mass. Super. Ct. R. 9C, I hereby certify that the conference required by this Rule was held on February 18, 2021 at approximately 10:00 a.m. Eastern Time by teleconference between counsel to Plaintiffs (Jessie J. Rossman, Ruth A. Bourquin, William D. Dalsen, and Christina Maria Assi) and counsel to the City Defendants (Winifred Gibbons and Erika Reis). The parties were unable to resolve their dispute.


Dated: February 26, 2021

/s/ Jessie J. Rossman

Jessie J. Rossman

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I caused a copy of the foregoing document to be served by U.S. Mail and electronic mail upon counsel to Defendants.



William D. Dalsen