

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.

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

Defendant, Office of the State Auditor (“OSA”), respectfully submits this Memorandum in Support of its Motion for Summary Judgment. The parties have submitted herewith a Statement of Material Facts (“J. Stmt.”) and a Joint Appendix (“J.A.”).

INTRODUCTION

Plaintiff American Civil Liberties Union of Massachusetts, Inc. (“ACLU”) seeks, in this action for declaratory and injunctive relief, to compel responses to public records requests (the “Requests”), which sought the unredacted reports on healthcare and inmate deaths issued by OSA to the Plymouth County Sherriff’s Department (“PCSD”) and the Bristol County Sherriff’s Office (“BCSO”). OSA provided both reports, omitting in each report only one section and references to that section in other parts of the report.

This Court should enter summary judgment and a declaration in favor of OSA because disclosure of the disputed records is prohibited under the public safety and cyber security exemption encoded in the Massachusetts public records law under G.L. c. 4, § 7, twenty-

sixth (n). The public safety and cyber security exemption applies because the redacted sections discuss the cyber security systems at the county jails [or houses of correction, or both] operated by PCSD and BCSO, and disclosure of those redactions is likely to jeopardize public safety and cyber security. Because a discussion of the content of the redacted portions of the report would reveal the very information that is exempt from disclosure, OSA, as part of this motion, requests that this Court conduct an *in camera* review of the responsive documents.

For these and other reasons discussed below, this Court should, after conducting the requested *in camera* review, grant this motion, and enter a declaration that the requested records are exempt from disclosure under the public records law.

STATUTORY FRAMEWORK

This action arises from the Massachusetts public records statute, which permits any person to request inspection or copies of public records, as defined in G.L. c. 4, § 7, twenty-sixth. *See* G.L. c. 66, § 10(a). If a custodian refuses or fails to comply with such a request, the requester may petition the State Supervisor of Records for a determination of “whether a violation [of the public records law] has occurred.” *Id.* § 10A(a). “Notwithstanding” the option to seek review by the Supervisor, however, a requester may file an action in this Court, to seek enforcement of the requirements of the public records law. *Id.* § 10A(c). In an action in this Court, the Court reviews the propriety of the record custodian’s actions de novo, and may conduct an *in camera* review of the withheld documents, which review does not effect a waiver of any applicable privilege. *Id.* § 10A(d)(1)(ii).

The public records statute creates a presumption of public access, unless the custodian proves that an exemption applies. G.L. c. 66, § 10A(d)(1)(iv). However, courts “must bear in mind that the [] statute ‘should not be used as a means of disregarding the considered judgment

of the Legislature that the public right of access should be restricted in certain circumstances.”
Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 383
(2002), quoting *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 436 (1983);
accord Georgiou v. Comm’r of Dep’t of Indus. Accidents, 67 Mass. App. Ct. 428, 434 (2006).

FACTUAL AND PROCEDURAL BACKGROUND

A. Public Records Requests

On March 15, 2023, OSA issued a report concerning PCSD, entitled “Plymouth County Sherriff’s Department – A Review of Healthcare and Inmate Deaths for the period July 11, 2019, through June 30, 2021”. See Jt. Stmt., ¶ []; Compl., ¶ 9 and Ex. 1 (J.A. at 1-17). On March 16, 2023, OSA issued a report concerning BCSO, entitled “Bristol County Sherriff’s Office – A Review of Healthcare and Inmate Deaths for the period July 11, 2019, through June 30, 2021”. See Jt. Stmt., ¶ []; Compl., ¶ 10 & Ex. 2 (J.A. at 18-38). Both reports included a cover letter from OSA stating 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.” *See* Jt. Stmt., ¶ []; Compl., ¶ 12 and Exs 1 & 2 (J.A. at 2; 19).

In March 2023, ACLUM submitted public records requests for the complete PCSD Report and the complete BCSO Report. Exs. 3 & 4 (J.A. at 39; 41). Later that month, the OSA sent ACLUM the complete reports with redactions. Exs. 5; 6 (J.A. at 43; 62). The redacted reports each contain an additional section—which was not present in the public reports—that is entirely redacted, due to findings related to cyber security issues, as well as references to that section. Ex. 7 (J.A. at 85). The redacted reports were accompanied by an email from the Records Access Officer of OSA explaining that OSA applied the 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; 6 (J.A. at 43, 62).

In response to an appeal from another requestor seeking the same unredacted documents, the Supervisor of Records, following an *in camera* review of the complete, unredacted reports, found that OSA had met its burden to redact the records pursuant to Exemption (n) of the Public Records Law. Ex. 7 (J.A. at 87)

ACLUM subsequently filed this civil action.

ARGUMENT

The Supreme Judicial Court has sanctioned three mechanisms for resolving public-records disputes: (i) an *in camera* review of records by the trial judge; (ii) review by the judge of an “itemized and indexed log of the material in which the specific claims of exemption are set forth”; and (iii) review by the judge after “counsel for the parties have reviewed the documents (subject to an appropriate protective order).” *Rafuse v. Stryker*, 61 Mass. App. Ct. 595, 597-98 (2004), citing *Worcester Telegram*, 436 Mass. at 384-85. Where “there is no genuine issue as to any material fact,” a court may resolve a public-records action on motions for summary judgment. Mass. R. Civ. P. 56(c); *see also Globe Newspaper Co. v. District Attorney for the Middle District*, 439 Mass. 374, 377-78 (2003) (public-records action resolved on motion for summary judgment); *Boston Retirement*, 388 Mass. at 429, 442 (same).

I. EXEMPTION (n) BARS DISCLOSURE OF THE REQUESTED RECORDS BECAUSE IT WAS REASONABLE FOR THE RECORD CUSTODIAN TO CONCLUDE THAT SUCH DISCLOSURE IS LIKELY TO JEOPARDIZE PUBLIC SAFETY OR CYBER SECURITY.

The broad policy of disclosure of public records is subject to several exemptions. *See* G.L. c. 4, § 7, Twenty-sixth. Specifically in this case, Exemption (n) applies to:

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, twenty-sixth (n). Thus, Exemption (n) allows for the withholding of documents which, in the reasonable judgment of the record custodian—here, OSA—is likely to jeopardize public safety or cyber security. The Supreme Judicial Court has previously held that the inquiry is a two-prong test: The first prong is “whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage’ ... and in that sense jeopardize public safety”, while the second prong “probes the factual and contextual support for the proposition that disclosure of the record is “likely to jeopardize public safety.” *People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res.*, 477 Mass. 280, 289-90 (2017). Moreover, “the more the record sought resembles the records enumerated in exemption (n), the lower the custodian’s burden in demonstrating ‘reasonable judgment.’” *Id.* at 290.

However, the Court’s analysis was based upon an earlier iteration of Exemption (n) which did not include the additional category of cyber security. *Id.* at 281 & n.3; *see also* St. 2016, c. 121, §§ 1-3 (amending exemption (n) to add “cyber security”). Thus, while terrorism is a useful frame within which to analyze potential harm to public safety, the risk posed by disclosure of documents relating to cyber security was not at issue in that case, and it requires consideration through a different lens in light of the unique issues/challenges related to technological/cyber security. Indeed, the very addition of cyber security as an exempt category

of public records, points to the Legislature’s concern that the exemption for documents jeopardizing public safety did not provide sufficient protection for that category of documents.¹

While, for the very reason that the reports were redacted, OSA cannot disclose the specific subject matter of the redactions, in the course of a related Supervisor of Records appeal, it has disclosed that the redactions include discussions of policies and procedures which relate to security measures, emergency preparedness and threat or vulnerability assessments. (J.A. at). OSA also affirmed that even under the *PETA* analysis, the redactions are of a nature that a terrorist would find useful to maximize damage to public safety.

Because there is no way to demonstrate the reasonableness of the record custodian’s decision without disclosure of the redactions themselves, OSA respectfully requests that the Court conduct an *in camera* review of the entire unredacted version of the reports, with the redactions highlighted for the benefit of the Court’s review.

¹ Although the SJC in *PETA* stated, in dicta, that the post-decision changes to the public records law—including the amendment of exemption (n) to add “cyber security”—would “appear[]” not to “significantly alter” the Court’s approach to the public records law or exemption (n), the Court also acknowledged that the issue of the amendments was not raised by the parties, and “need not be settled today.” 477 Mass. at 281 n.3. Here, OSA asserts that the amendment to exemption (n) is significant, and should at least cause this Court to defer to the agency’s decision that the exemption applies where the material in question falls squarely within the exemption’s protection for “records ... which relate to ... cyber security or other infrastructure located within the commonwealth.” G.L. c. 4, § 7, twenty-sixth (n), as amended by St. 2016, c. 121, §§ 1-3.

CONCLUSION

For the foregoing reasons, OSA respectfully requests that the Court conduct an *in camera* review of the documents in question, and that the Court thereafter grant OSA's motion for summary judgment.

Respectfully submitted,

OFFICE OF THE STATE AUDITOR,

By its attorney,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/Samuel Furgang
Samuel Furgang, BBO No. 559062
Assistant Attorney General
Const. and Admin. Law Div.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2678
Samuel.furgang@mass.gov

CERTIFICATE OF SERVICE

I, Samuel Furgang, hereby certify that, on October 13, 2023, a true and accurate copy of the foregoing Memorandum in Support of Summary Judgment was served by email on the following:

Daniel McFadden, Esq.
DmcFadden@aclum.org

Natalie F. Panariello
npanariello@foleyhoag.com

/s/Samuel Furgang
Samuel Furgang, BBO No. 559062
Assistant Attorney General

