

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.)

**PLAINTIFF'S REPLY TO DEFENDANT'S REPORT
AND RESPONSE TO REQUEST FOR STATUS CONFERENCE**

The BCSO's recent filings reinforce the need for a status conference. The filings affirmatively demonstrate that there is no evidence in the record that could satisfy the BCSO's burden to prove that an investigation would be prejudiced by disclosing the requested records. They raise concerns about whether the BCSO has provided the Court with incorrect information about the status of the Senate committee's investigation, even though the BCSO is demonstrably on actual notice of the true status of that investigation and the issuance of the Senate committee's report. And they indicate that the BCSO has failed to undertake timely or reasonable actions to locate records responsive to at least Requests 6, 8, and 10.

The BCSO's pattern of making assertions, while delaying access to documents that could be used to test those assertions, is something that the strict requirements of the public records statute are designed to foreclose. Plaintiff respectfully suggests that a status conference is appropriate to address whether and to what degree further judicial intervention is warranted in light of these developments.

A. Contrary to the BCSO’s assertions, the AGO’s Report and the accompanying letter are highly probative of whether the requested records can be released.

The BCSO asserts that the AGO submitted the Report “on ACLUM’s behalf” and “as an advocate for the ACLUM” because “ACLUM could not send the Report directly to [the Court].” *See* Def.’s Resp. to Request at 1-2. These statements are inaccurate.

ACLUM needed no assistance in submitting the Report; it is a publicly available document.¹ Although ACLUM agrees with the AGO’s apparent view that the Report is highly probative of the magnitude of the public interests that would be promoted by release of the records at issue in this case, the Attorney General makes her own decisions regarding what positions to take in litigation on behalf of the Commonwealth, and is empowered to take positions that are contrary to the preferences of the executive agencies. *See, e.g., Sec’y of Admin. and Fin. v. Attorney General*, 367 Mass. 154, 159 (1975). Here, the AGO chose to provide the Report directly to the Court, along with an explanation of why the AGO would “welcome and support the disclosure of these records.” December 15, 2020 AGO Letter at 1. This is exactly the type of information that the Court has been asking for since October. *See* October 27, 2020 Order at 3-4 (ordering submission of information on “the status of the three investigations [BCSO] references in asserting the investigatory exemption”). ACLUM fails to see what the BCSO is complaining about.

B. BCSO’s filings demonstrate that there no basis to conclude that the release of these records would prejudice any BCSO, AGO, or DHS investigation.

Setting aside the BCSO’s claims about ACLUM and the AGO, its recent filings in fact demonstrate why there is no basis to withhold the requested records under the investigatory

¹ <https://www.mass.gov/doc/ago-report-into-bcso-response-to-may-1-disturbance/download>

exemption. This Court’s recent Order required the BCSO, among other things, to “provide this court with the status of the three investigations it references in asserting the investigatory exemption,” noting that the status is “relevant to the court’s consideration” of whether the exemption applies. *See* October 27, 2020 Order at 3-4. Those three investigations were the AGO Investigation, the BCSO’s own internal investigation, and an investigation by the Inspector General for the Department of Homeland Security. *See* Def.’s Opp. to Req. for Inj. Relief (June 5, 2020) at 3; Def.’s Surreply re: Req. for Inj. Relief (June 12, 2020) at 1-2; Def.’s Resp. to Court Order (Aug. 4, 2020) at 2-3.

The BCSO delayed providing this information until after ACLUM requested a status conference due in part to the BCSO’s failure to comply. Now that the BCSO has finally responded, the response demonstrates that there is no basis to conclude that any of these investigations would be prejudiced by release of the requested records:

- As discussed above, the AGO’s investigation has concluded, and the AGO supports release of the records.
- The BCSO’s response to this Court’s order is entirely silent regarding its own internal investigation. ACLUM has previously submitted evidence (now un rebutted) that any internal investigation by the BCSO concluded last summer. *See* Decl. of Ira Alkalay (filed August 12, 2020). The BCSO has provided no sworn statement that this investigation is presently ongoing or that it would be impacted by the release of the requested records. The record does not support a finding that there is any internal BCSO investigation that could justify withholding records.
- Regarding the DHS OIG investigation, the affidavit of BCSO’s counsel, Lorraine Rousseau, states that the investigation “is ongoing.” Rousseau Aff’t ¶25. The affidavit provides no foundation for Attorney Rousseau’s knowledge of this purported fact, nor any explanation of why the investigation would be prejudiced in any way by the disclosure of requested records. Indeed, Attorney Rousseau also states that “no information is available regarding the status of the [DHS OIG] investigation.” *Id.* If DHS actually believed that release of these records would prejudice its investigation, it could have informed the Court itself—it has not done so.

In summary, two of the three investigations are concluded, and there is no information

available concerning the third. Without more, BCSO cannot possibly meet its burden to show that release of the requested records would be prejudicial to any investigation, or that the investigatory exemption applies. *See* G.L. ch. 66 § 10A(d)(1)(iv) (“a presumption shall exist that each record sought is public and 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.”).

C. The BCSO’s filings and attorney affidavit contain incorrect information concerning the status of the Senate investigation.

As far as ACLUM can determine, the BCSO has not previously asserted that any investigation by the Massachusetts Senate Committee on Post Audit and Oversight justifies withholding under the investigatory exemption.² The BCSO now asserts that there is a Senate investigation that is “ongoing” and has not “issued a report or finding.” Response at 3. Attorney Rousseau asserts that “[t]he Senate Investigation is ongoing and no information is available regarding the status of the investigation.” Rousseau Aff. ¶ 24. These assertions are not correct.

The Massachusetts Senate issued its report on December 18, 2020—five days before the BCSO filed its recent papers before the Court. *See* McFadden Declaration Ex. A (Senate Report). The Senate’s report does not focus on the May 1 Incident, evidently because the BCSO refused to produce records concerning the incident to the Committee, and Sheriff Hodgson refused to respond to the Committee’s interrogatories. *See* McFadden Decl. Ex. A (Senate Report) at 4, 7. However, the Senate report does conclude that on May 2, the day after the incident, a Senator attempted to visit the BCSO’s facility for an oversight visit, and the BCSO

² BCSO previously referenced this “review” in a footnote. *See* Def.’s Opp. To Req. for Inj. Relief (June 5, 2020) at 3 n.1.

unlawfully refused to admit her. *See id.* at 20.

Nothing about the Senate investigation suggests that disclosing the requested records would be prejudicial. To the contrary, it appears the Senate’s investigation was obstructed by BCSO’s refusal to produce documents and information relevant to the May 1 Incident. *See* McFadden Decl. Ex. A (Senate Report) at 4, 7. The release of the requested records would appear, if anything, to advance rather than hinder to the Senate’s oversight process.

The BCSO was on actual notice of the Senate report no later than the afternoon of December 21, when Sheriff Hodgson tweeted a response to the Senate report on BCSO letterhead. *See* McFadden Declaration Ex. B (tweet and letter). Yet, two days later, in its December 23 submission in this case, the BCSO asserted that the Senate report did not exist and that “no information [was] available regarding the status of the [Senate] investigation.” It is unclear why those incorrect statements were submitted to this Court.

D. The BCSO’s search for records responsive to requests 6, 8, and 10 is inadequate.

This Court’s Second Order also required Defendant to “provide a written response and affidavit attesting to the existence or non-existence of any materials responsive to” requests 6, 8, and 10, and that “[a]ny response materials shall be produced to the plaintiff” unless there is a claimed exemption. Second Order at 3. The Court issued this Order because the BCSO’s record index included no indication of responsive materials regarding these requests. *Id.* The BCSO’s response appears to be a tacit admission that it failed to conduct any search regarding requests 6, 8, and 10 until ACLUM filed its request for a status conference. And, beyond that, the BCSO’s response raises two additional significant concerns.

First, the BCSO states that it has located both responsive email communications and responsive documents that are not email communications. *See* Response to Second Order at 4.

Although BCSO produced two emails (presumably because they show that DHS was opening an investigation, and thus were ostensibly favorable to the BCSO's claim of an exemption), it seems to be withholding some unknown portion of these documents without apparent justification.

Second, the BCSO states that, after applying various search terms, it has now identified over 40,000 emails potentially responsive to ACLUM's requests in a "preliminary search." Response to Second Order at 3. The BCSO further complains that ACLUM has not provided a list of search terms. But the BCSO never asked. At no point did BCSO notify ACLUM that it wanted a list of search terms or any other parameters for these requests—despite ACLUM repeatedly reaching out to the BCSO for, among other things, its status in responding to the Court's Order.

ACLUM has been, and remains, prepared to work in good faith with the BCSO to discuss selecting search terms and custodians for these requests. However, given that BCSO apparently never actually searched for these records or notified ACLUM of a need for search terms until compelled by a Court order months into litigation, ACLUM respectfully suggests that a status conference would assist the parties in making timely progress.

E. A status conference is also warranted to discuss procedures for ACLUM's access to records under the protective order.

Lastly, ACLUM respectfully notes that it has not yet been able to access the records made available under the protective order. ACLUM has been in contact with the Court's staff and understands that access is currently difficult due to COVID-19 restrictions. ACLUM supports these safety measures and does not wish to undertake any activity that would put the Court's staff at risk. Consequently, to the extent the Court plans to maintain the current review and briefing procedure, ACLUM respectfully suggests that it might be helpful to discuss

modifications to the procedure so that it can commence now in a manner consistent with the current safety measures.

December 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2020, the foregoing document was filed with the Suffolk Superior Court and will be served via email on counsel for Defendant at:

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