COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

_____

NO. SJC-12884

_____

RAHIMAH RAHIM,
Plaintiff-Appellant
V.

RACHAEL ROLLINS,
IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY,
Defendant-Appellant

_____

DISTRICT ATTORNEY'S AMENDED BRIEF ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

_____

SUFFOLK COUNTY

_____

RACHAEL ROLLINS
District Attorney
For the Suffolk District

DONNA JALBERT PATALNO
Assistant District Attorney
For the Suffolk District
BBO# 651223
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
donna.patalano@state.ma.us

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ISSUES PRESENTED

I. Whether the District Attorney correctly declined to produce Federal Bureau of Investigation ("FBI") documents requested under the Massachusetts Public Records Law ("MPRL") because the documents are not public records.

II. Whether, in any event, the FBI materials are protected from production under the "investigatory materials" exemption.

III. Whether the materials that implicate national security should be returned to the FBI without further dissemination by the District Attorney both as a matter of law and to protect vital law enforcement interests.

STATEMENT OF THE CASE

This case is before the Court on the plaintiff/appellant's petition for direct appellate review from the allowance of the Commonwealth's motion for summary judgment in Suffolk Superior Court (Docket No. 1784CV02312; 2019-P-1602; DAR-27198).

On June 2, 2015, a Joint Terrorism Task Force ("JTTF") comprised of special agents from the FBI and members of the Boston Police Department were

investigating the plaintiff's son, Usammah Rahim, and two other men, Nicholas Rovinski and David Wright, for suspected terrorist activity (CSOF ¶¶ A.2-3).[1] Mr. Rahim was under surveillance by JTTF members who were investigating Mr. Rahim's ties to the Islamic State of Iraq and the Levant ("ISIL") and his preparation with co-conspirators to commit acts of terrorism in the United States (CSOF ¶¶ A-2, -5).

Specifically, the investigation revealed that Mr. Rahim and his co-conspirators planned to behead a specific target in New York City, and that Mr. Rahim had obtained several military style knives (CSOF ¶ A-2; JA.I.26). During phone calls monitored by the JTTF, Mr. Rahim expressed an intention to abandon the plan to travel to New York to engage in beheading and instead expressed his intention to commit a terrorist attack in Boston immediately (CSOF ¶ A-3; JA.I.27; JA.III.229). Mr. Rahim further indicated that he intended to attack law enforcement officers (CSOF ¶ A-3; JA.II.27).

[1] The District Attorney refers to her addendum as (Add. [page]). The parties' "Consolidated Statement of Undisputed Material Facts" ("CSOF"), referred to in the brief by specific ¶ number, are provided by the District Attorney at Add. 38-60. The parties' joint record appendix shall be referenced as (JA.[volume].[page]).

As a result of this imminent threat to law enforcement and to the public, JTTF members mobilized in an effort to question Mr. Rahim (JA.I.28). When they approached him in a Roslindale parking lot, Mr. Rahim aggressively advanced on them while armed with a large military-style knife (JA.I.28). During that confrontation, Mr. Rahim repeatedly ignored officer requests to drop the weapon, expressed his intent to attack the police, and professed his allegiance to ISIL (JA.I.29). As a result of Mr. Rahim's refusal to obey repeated commands to drop the knife and his continued advance on the officers, officers fired their weapons in self-defense and in the defense of others (JA.I.29). Following a thorough investigation into the shooting and its attendant circumstances, the District Attorney concluded that the officers acted lawfully and reasonably and that criminal charges against the officers were not warranted (CSOF ¶ B.11-14; JA.I.25-34).

On June 16, 2017, Rahimah Rahim, the plaintiff and Mr. Rahim's mother, submitted a request to the District Attorney[2] under the Massachusetts Public Records Law

[2] In 2017 when the plaintiff filed her suit in the trial court, she sued District Attorney Daniel F. Conley in his

("MPRL"), G.L. c. 66, § 10, for documents related to the investigation of her son's death (JA.I.36).

On July 20, 2017, the District Attorney denied the plaintiff's request, explaining that to the extent there may be responsive documents, the materials were "the property of the FBI through the Department of Justice and are not under the control of this Office, in that they cannot be disseminated without the permission of the FBI"[3] (CSOF ¶ C.21, -25; JA.I.58-59).

On July 24, 2017, the plaintiff filed an *ex parte* motion seeking injunctive relief in the Superior Court to maintain the status quo, specifically to enjoin the District Attorney from returning any of the materials at issue to the FBI (JA.I.13-23; Docket No. 1884CR02312).

On that same day, the District Attorney provided a second letter to the plaintiff that supplemented the original response and explained that the materials

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official capacity. On Jan. 2, 2019, following her election, Rachael Rollins became the Suffolk County District Attorney. Pursuant to Mass. R.A.P. 30(c)(1), this Court granted the motion to substitute the District Attorney in her official capacity as a party in the appeal.

[3] On July 21, 2017, the plaintiff sent a letter to the District Attorney requesting that he "hold and maintain the originals of any relevant records that were in [his] Office's possession, custody, or control at the time" he received the plaintiff's original request (JA.I.62).

provided to the District Attorney by the FBI fell within the "investigatory exemption" to the public records law, citing G.L. c. 4, § 7 cl.(26)(f) (JA.II.101-102). Ultimately, the District Attorney produced over a thousand pages of documents, photographs, and unedited surveillance video (JA.III.211 n.6). The only materials not produced were the autopsy report for Mr. Rahim and the FBI materials (CSOF ¶ 37).

On July 25, 2017, the parties entered a stipulation regarding the disputed records,[4] agreeing that the District Attorney would maintain materials that had been on loan to the office from the FBI until resolution of the dispute (JA.I.101).

On August 4, 2017, the Hon. Joseph F. Leighton, Jr. denied the plaintiff's motion for preliminary injunction (JA.I.66-68).

On August 14, 2017, the District Attorney filed the answer to the plaintiff's complaint (JA.I.69-75).

Without discovery, the parties filed cross-motions for summary judgment (JA.I.77, 92). On July 11, 2018, the United States of America filed a Statement of Interest

[4] The plaintiff conceded the District Attorney's non-disclosure of the autopsy report and photographs was correct (JA.I.61).

pursuant to 28 U.S.C. § 517 (JA.III.4). On September 27, 2018, the parties filed supplemental briefs in support of their respective motions for summary judgment (JA.III.133, 193).

On June 11, 2019, Judge Leighton denied the plaintiff's motion for summary judgment and allowed the District Attorney's motion for summary judgment (JA.III.209-217). Ms. Rahim filed a notice of appeal on August 9, 2019 (JA.III.219-220). On November 26, 2019, Ms. Rahim filed a petition for direct appellate review in this Court (Docket No. DAR-27198). Her petition was allowed and the case was entered in this Court on January 22, 2020.

STATEMENT OF FACTS

It is undisputed that federal and local law enforcement authorities were engaged in a joint investigation of the plaintiff's son for suspected terrorist activity, his ties to ISIL, and his preparation with co-conspirators to commit imminent acts of terrorism in the United States, including the beheading of specific targets in New York City (CSOF ¶¶ 1-5). On June 2, 2015, law enforcement authorities confronted Mr. Rahim, an altercation ensued, and Mr. Rahim sustained three shots

to his torso, causing his death (JA.III.209) In a report released to the public, the District Attorney determined that the officers involved in the death of Mr. Rahim acted lawfully and reasonably in doing so (CSOF ¶ 13, 20; JA.I.25-34). To assist the District Attorney in her investigation into this shooting the FBI provided the records at issue to the District Attorney, and did so under the express agreement that the District Attorney not distribute the records to any third party (JA.II.97; CSOF ¶¶ 14-16, 21, 25). Finally, it is undisputed that the District Attorney has provided the plaintiff with well-over a thousand pages of records, including reports, transcripts, and photographs, along with unedited surveillance videos (JA.III.211 n.6).

This case centers on whether the District Attorney properly withheld a limited category of materials created independently by the FBI during its investigation of the plaintiff's son, the shooting, and its aftermath. In his decision and order finding that the District Attorney properly withheld these limited materials, Judge Leighton ruled:

> The defendant conducted an investigation into Mr. Rahim's death. On June 5, 2015, Eric D. Welling, Inspector-in-Charge at the Federal

> Bureau of Investigation ('FBI'), provided FBI investigative reports and signed sworn statements concerning Mr. Rahim's death to the defendant (the 'Documents'). The letter accompanying the Documents stated that the Documents were being released pursuant to the Privacy Act, 5 U.S.C. § 552a(b)(7) (Law Enforcement Request) and an exception under 5 U.S.C. § 552a(b)(3) (Routine Uses).[5]
>
> The letter provided the Documents were being released relating to the defendant's investigation into the shooting; the FBI could not authorize further release of the records to any third party other than for use at trial or otherwise advancing the defendant's investigation, including a Massachusetts Freedom of Information Act request; and no identifiable information pertaining to an FBI agent or employee could be publicly disclosed without express FBI approval.
>
> Additionally, the letter provided that the Documents were being loaned to the defendant's agency; the Documents remained FBI property; the defendant could not provide the Documents to any requestor without the FBI's prior written permission; and any further requests for dissemination should be directed to the

[5] Under the Privacy Act, '[n]o agency shall disclose any record which is contained in a system of records. . . or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . for a routine use as defined in section (a)(7) . . . [or] to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity. . . .' 5 U.S.C. § 552a(b)(3), (7). Routine use is defined as 'with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.' 5 U.S.C. § 552a(a)(7) [footnote in original].

Chief Inspector, Office of Inspections, Inspections Division.

The defendant released a ten-page Findings Report dated August 24, 2016 (the 'Findings Report'). The Findings Report provided that not only did the defendant rely on various documents provided by local authorities, he also relied upon the Documents.[6] The defendant concluded that authorities had probable cause to arrest Mr. Rahim, and they exhibited a lawful and reasonable use of force in self-defense and defense of others.

On June 7, 2017, Ms. Rahim received appointment as the personal representative of Mr. Rahim's estate. On June 16, 2017, Ms. Rahim mailed a public records' request pursuant to G.L. c. 66, § 10(a). The defendant received Ms. Rahim's request on June 19, 2017. After several extensions, the defendant served his first response to Ms. Rahim on July 20, 2017, denying the public records' request and providing no documents.[7] Among other items, the defendant also denied access to the Documents, providing that they 'are the property of the FBI through the Department of Justice and are not under the control of [the defendant], in that they cannot be disseminated without the permission of the FBI.' The defendant also provided a

[6] The Findings Report provided that '[a]lthough every detail of the investigation has been memorialized and documented, some of the investigative materials remain either classified or subject to a non-disclosure agreement with the FBI. We have reviewed all investigative materials, including those that are classified or subject to a nondisclosure agreement with the FBI.' [footnote in the original].

[7] The defendant had previously provided the plaintiff with 783 pages of interview transcripts, investigative reports, and testing results; 373 still photographs; and unedited surveillance footage from the commercial establishments in the location where the incident occurred [footnote in original].

> supplemental response, ·stating disclosure of the Documents would prejudice effective law enforcement because it would impair the ability of the district attorney's office to obtain information necessary to its investigations from its federal counterparts, particularly in investigations concerning matters of national security.
>
> On June 5, 2018, the defendant provided an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974) (‘*Vaughn* index’) of the Documents, along with fifty-six pages of responsive records. The *Vaughn* index indicated that ‘records withheld from production’ were FBI statements and documents, or documents containing confidential investigatory techniques and procedures.

(JA.III.210-211). In denying the plaintiff’s motion for summary judgment and allowing the District Attorney’s motion for summary judgement, Judge Leighton held that the FBI materials were not public records under the Public Records Law because they were not “made or received” by the District Attorney as that phrase is defined by G.L. c. 4, §7(26):

> Instead, the FBI letter to the defendant provided that the Documents were provided on loan from the FBI and they remained FBI property. Moreover, the FBI could not authorize further release of the Documents to a third party except for use at trial or advancing the defendant’s investigation and the Documents could not be provided to a third party without the FBI's prior written permission. These facts support the conclusion that the Documents were neither made, nor received, by the defendant’s

> office, but are only in the defendant's temporary custody to be returned to the FBI.

(JA.III.212-213). The judge reasoned that, by "the plain language of the statute, 'made or received,' indicates ownership" and the District Attorney never "obtain[ed] ownership or full control" of the documents because they "were on loan, they remained FBI property and they are subject to the FBI's discretion regarding further dissemination" (JA.III.213).

In addition, Judge Leighton held that the "records withheld from production" were exempt under the "investigatory materials" exemption pursuant to G.L. c. 4, § 7 cl.(26)(f), because they contained statements and documents from the FBI, or were documents that contain confidential investigative techniques and procedures. Finally, Judge Leighton ruled that even if the documents constituted public records, under the Supremacy Clause of the United States Constitution they are subject to federal law, not state law because the documents are FBI records, U.S. Const. art. VI, cl. 2 (JA.III.215). The purpose of the Supremacy Clause, Judge Leighton reasoned, is "'to ensure that, in a conflict with state law, whatever Congress says goes. The Supremacy Clause is not

a source of any federal rights; rather, it secures federal rights by according them priority whenever they conflict with state law." (JA.III.215, citing Boston Med. Ctr. Corp. v. Secretary of the Exec. Office of Health and Human Svcs., 463 Mass. 447, 461 (2012)).

After holding that the materials were "FBI property", the judge held that the Supremacy Clause of the United States Constitution required that federal law govern the dissemination of the FBI materials, thus obligating the plaintiff to file a Freedom of Information Act ("FOIA") request in order to gain access to the FBI documents (JA.III.217).

ARGUMENT

I. UNDER THE MASSACHUSETTS PUBLIC RECORDS LAW THE DISTRICT ATTORNEY CORRECTLY DENIED THE PLAINTIFF'S REQUEST FOR THE PRODUCTION OF FBI MATERIALS BECAUSE THEY DO NOT CONSTITUTE PUBLIC RECORDS.

This Court reviews *de novo* a judge's order allowing a motion for summary judgment on the pleadings. See Kiribati Seafood Co. v. Dechert LLP, 478 Mass. 111, 116 (2017). As an initial matter, the motion judge correctly ruled that the documents requested by the plaintiff are not subject to disclosure under the Massachusetts Public Records Law ("MPRL") for the reason, if no other, that

the documents sought are not public records. The statutory basis for the plaintiff's claim for production is the MPRL which governs the maintenance of public records and provides the public a right to inspect such records. See G.L. c. 66, § 10. The definition of public record encompasses records "made or received" by the District Attorney. See G.L. c. 4, § 7, Twenty-sixth. The threshold question that governs the plaintiff's request is whether FBI materials loaned to the District Attorney in the aftermath of the shooting death of the plaintiff's son——documents, photographs, and video recordings that implicate national security——are at all "public records" within the ambit of the MPRL.

The Superior Court judge correctly determined that the materials provided by the FBI to the Suffolk County District Attorney are not "public records" as defined by the MPRL. Contrary to lay assumptions, the mere fact that the District Attorney now holds the documents does not mean they were "received" within the meaning of the MPRL. The judge correctly ruled that the term "received" is more restrictive for purposes of the MPRL. First, while the materials were physically (though temporarily) in the District Attorney's possession pursuant to the express

terms and conditions of an agreement with the FBI,[8] they remained the property of the FBI at all times (JA.III.210). The materials were created by the FBI alone and temporarily loaned to the District Attorney upon the express condition that they would not be disseminated to any third party other than as provided in the agreement (JA.II.97; SOF ¶¶ 37), and the agreement expressly excludes dissemination under the MPRL as one of the bases for dissemination to a third party. See Globe Newspaper Co. v. District Attorney for the Middle District, 439 Mass. 374, 383 (2003)(the "status" of materials as a public record was not determined by the custodian who held it); See, e.g., Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 157 (1980)(examining nature of document, not location, to determine owner). Because the FBI provided the materials to the District Attorney for a limited purpose and expressly reserved the right to limit dissemination of those materials, those materials remained the exclusive property of the federal

[8] The FBI materials remain in the District Attorney's possession pending resolution of the instant matter under a stipulation entered into by the parties July 25, 2017 (JA.I.101).

government, and they do not constitute materials made or "received" as contemplated by G.L. c. 4, § 7 cl.(26).

Employing the four factors first adopted in Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996), the Superior Court judge correctly determined, that the FBI retained "control" over its materials provided to the District Attorney. The four factors that determine whether materials remain those of a federal agency look to:

1) the intent of the document's creator to retain or relinquish control over the records;
2) the ability of the agency to use and dispose of the record as it sees fit;
3) the extent to which the agency personnel have read or relied upon the document; and
4) the degree to which the document was integrated into the agency's record system or files.

Burka, 87 F.3d at 515. All four criteria are satisfied here. First, the FBI intended for their materials to be on loan to the District Attorney, an intent that was explicit in the letter with which they provided the materials (JA.II.97). Second, the FBI provided the materials to the District Attorney for the sole purpose of assisting the District Attorney in the state's investigation into the shooting death of Mr. Rahim. Third, the materials are FBI investigative reports and

sworn statements that were created for Federal investigative purposes independently of the District Attorney's investigation and are understood as so within the FBI. And fourth, the materials are part of the FBI's records and exclusively remain so regardless of their temporary loan to the District Attorney. Id. All of these factors support the Superior Court's determination that the materials are FBI materials and thus not "public records" subject to the MPRL.

In arguing that for purposes of determining whether the documents are "public records" this Court should disregard the limitations under which the FBI loaned the documents to the District Attorney for a specific purpose and with express reservations, the plaintiff relies on Champa v. Weston Public Schools, 473 Mass. 86, 98-99 (2015). The plaintiff's reliance on Champa is misplaced. There, this Court concluded that a confidentiality agreement between a civil plaintiff and a school district *by itself* did not shield disclosure under the public records law. 473 Mass. at 98 (holding nonetheless that exemptions to the public records law applied to the records and that they were subject to redaction); see also Galvin v. Mass. Mut. Life Ins. Co., 20 Mass. L. Rep.

533 at *33 (2006)(it would not be unreasonable to regard an insurance company report that was viewed but not retained as "received" when contrary to public policy). Here, both the parties, the materials, and the conditions under which the District Attorney holds the materials in question are in stark contrast to those at issue in Champa. The FBI materials are confidential, classified, investigatory records that reveal law enforcement investigative techniques and implicate national security (JA.I.26). They are not records concerning a civil settlement between a school district and a family, Champa, 473 Mass. at 98, or potential fraud at an insurance company, Galvin, 20 Mass. L. Rep. 533 at *7-9, 11, and simply cannot be put into the same category and treated as such. The FBI materials were not "received" as contemplated by the public records law, and the Superior Court judge correctly determined they are not public records subject to disclosure within the meaning of the MPRL.

II. EVEN IF THE FBI DOCUMENTS CONSTITUTED PUBLIC RECORDS, THE SUPERIOR COURT JUDGE CORRECTLY DETERMINED THE MATERIALS ARE PROTECTED FROM PRODUCTION BY THE "INVESTIGATORY MATERIALS" EXEMPTION UNDER THE MASSACHUSETTS PUBLIC RECORDS LAW.

Even were they public records for purposes of the MPRL, the FBI materials would be exempt from disclosure under G.L. c. 4, § 7, Twenty-sixth (f), which protects "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." While the statute does not provide a blanket exemption for investigatory materials assembled by law enforcement agencies, the Superior Court judge correctly determined that the District Attorney met her burden of demonstrating the existence of the exemption as to these FBI materials. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 61 (1976). Despite the general presumption favoring disclosure, see G.L. c. 66, § 10(c), the application of the investigatory exemption "requires careful case-by-case consideration." Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289 (1979). "That

decision turns on whether, because of its possible effect on effective law enforcement, such a disclosure would not be in the public interest." WBZ-TV4 v. District Attorney for Suffolk Dist., 408 Mass. 595, 603 (1990). Here, the relevant public policy includes "the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, [and] the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation." Bougas, 371 Mass. at 62. Those concerns justifying non-disclosure cannot be outweighed by the plaintiff's desire for the FBI documents in "hopes the requested records will provide her some modicum of closure."[9] (JA.I.77). Simply put, the FBI materials were compiled out of public view by the FBI for a Federal purpose and were loaned to the District Attorney for a limited purpose and upon express conditions against public disclosure without the consent of the FBI. To the

[9] Moreover, this is not a case where the District Attorney declined to provide all materials associated with Mr. Rahim's death. On the contrary, along with a comprehensive report detailing the death investigation, the District Attorney provided the plaintiff with 783 pages of interview transcripts, investigative reports, and testing results; 373 still photographs; and unedited surveillance footage from the commercial establishments in the area of the incident (JA.III.211 n.6).

extent this court were to conclude that notwithstanding these limitations the materials are to be deemed public records subject to dissemination upon request and without the consent of the FBI, there is serious doubt whether the FBI would provide such materials in the future. In consequence, effective law enforcement and the public interest would be seriously impacted. The Superior Court judge, thus, correctly determined the FBI materials fell within the statutory exemption protecting investigator materials.

Even beyond the "investigatory materials" exemption of G.L. c. 4, § 7(26)(a), Federal law militates against providing the plaintiff the FBI materials that she seeks under the MPRL. Both the Privacy Act, Title 5, United States Code, § 552a(b)(7), and FOIA would protect the materials. Given that the release would endanger the safety of individuals involved in the investigation,[10] (JA.I.26 n.3), that the materials were provided by the

[10] The ISIL remains an active terrorist organization that employs the tactic, as was used in this case, of targeting individuals in law enforcement and their families. See United Nations Security Council Meeting, "Islamic State in Iraq and Levant Still Global Threat Boasting Affiliated Networks, Residual Wealth, Top Counter-Terrorism Officials Tell Security Council" (August 29, 2019) https://www.un.org/press/en/2019/sc13931.doc.htm.

FBI under explicit provisions against non-consensual dissemination (JA.II.96), it is clear that that the Privacy Act triggers the application of the MPRL investigatory exemption and further supports the non-disclosure of these records. See Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 439, 545-546 (1977) (documents properly withheld pursuant to statutory exemption). Indeed, the FBI provided the records to the District Attorney under the provisions of the Law Enforcement and Routine Use Exceptions to the Privacy Act, Title 5, United States Code, Section 552a(b)(7), a(b)(3) (JA.II.96). These provisions allow for the limited release of otherwise exempt records to law enforcement for "routine use." Title 5, United States Code, § 552a(b)(7), a(b)(3). Dissemination of these exempt materials under the MPRL without the consent of the FBI conflicts with the limited release of these otherwise exempt materials under the Law Enforcement and Routine Use Exception to the Privacy Act. Accordingly, for this reason too, the Superior Court judge properly ruled that the District Attorney's denial of the plaintiff's requests was proper, and the judge's order granting her summary judgement should be affirmed.

The same conclusion is further buttressed by sound public policy. Effective law enforcement efforts require that the District Attorney be able to work cooperatively with the FBI and other state and federal agencies. Production of the FBI materials without the consent of the FBI in contravention of the agreement under which the FBI furnished these materials would seriously impair the District Attorney's ability to obtain information necessary to its investigations from its federal counterparts, particularly in investigations such as this that concern matters of national security (JA.III.211). The disclosure of the FBI materials would "prejudice the possibility of effective law enforcement," G.L. c. 4, § 7(26)(f), not just because it would chill future sharing of information but also because it would reveal investigative techniques used by agents during investigations implicating national security.[11] "[O]ne of the underpinnings of the exemption is the encouragement

[11] For example, the District Attorney specifically declined to release the names of the involved agents and officers out of fear for their safety (JA.I.26 n.3)). Under these circumstances, the release of records that could compromise the safety of law enforcement agents and expose their investigative techniques would severely hinder effective law enforcement efforts and cooperation between the District Attorney and the federal government. G.L. c. 4, § 7(26)(f). WBZ-TV4, 408 Mass. at 822.

of individual citizens to come forward and speak freely with police concerning matters under investigation." Rafuse v. Stryker, 61 Mass. App. Ct. 595, 600-601 (2004) (noting that the exemption is not necessarily destroyed even when an investigation concludes given citizen confidentiality concerns). In fact, the federal government has advised that the public disclosure of these documents could compromise the national security interests of the United States (JA.III.18-19).

For over a century, the Commonwealth has also recognized the necessity of protecting witnesses who come forward and offer information to police:

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government . . . .

District Attorney for the Norfolk District v. Flately, 419 Mass. 507 (1995), quoting Worthington v. Scribner, 109 Mass. 487, 488 (1872). That need for protection extends to materials that disclose the identity of cooperating citizens and does not necessarily end with

the investigation, particularly in matters related to terrorism investigations. See Michael C. McGarrity, Assistant Director, FBI Counterterrorism Division Federal Bureau of Investigation, Statement Before Congress's Homeland Security Committee, www.fbi.gov/news/testimony/confronting-the-rise-of-domestic-terrorism-in-the-homeland (last visited Apr. 7, 2020). For this reason too, even were this Court to conclude, that the materials requested were "received" by the District Attorney within the meaning of the MPRL, they are nonetheless "investigatory materials" that are exempt from disclosure within the ambit of the MPRL. Moreover, even were these materials to be deemed public records and even were they deemed not be "investigatory materials" exempt from disclosure, given their nature it is the Federal Government that should decide what redactions, if any, would be proper to protect this longstanding policy of protecting informants and witnesses.

III. THE FBI'S MATERIALS THAT IMPLICATE NATIONAL SECURITY SHOULD BE RETURNED TO THE FBI WITHOUT FURTHER DISSEMINATION BY THE DISTRICT ATTORNEY BOTH AS A MATTER OF CONSTITUTIONAL LAW AND TO PROTECT VITAL LAW ENFORCEMENT INTERESTS.

The Supremacy Clause of the United States Constitution requires that, if the FBI materials are to be produced to the plaintiff, any production be dictated by the FIOA, 5 U.S.C. § 552.[12] The plaintiff cannot use the MPRL law to circumvent FOIA in an effort to obtain the FBI's confidential materials. The plaintiff, in fact, recognizes the FBI materials are federal records; she submitted FOIA requests for these materials to the FBI, the United States Attorney's Office, and the Department of Homeland Security (JA.III.31-33). The request was denied (JA.III.40-43). Nor can she exploit the MPRL to escape federal discovery practice in her federal lawsuit

[12] This requirement is rooted in the Constitution's Property Clause, which provides that "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ." U.S. Const. art. IV, § 3, cl.2. Under the Property Clause, property rightfully belonging to the United States "cannot be seized by authority of another sovereignty against the consent of the Government." Armstrong v. United States, 364 U.S. 40, 43 (1960). Accordingly, courts prevent state laws from infringing on the federal government's property rights. See, e.g., Sec. of Hous. and Urb. Dev. v. Sky Meadow Assoc.,117 F. Supp. 2d 970, 977-979 (C.D. Cal. 2000)(state foreclosure law cannot infringe the property interest of federal agency).

against the United States under the Federal Tort Claims Act related to the shooting. Rahim v. United States, Case No. 1:18-cv-11152-IT (D. Mass.).

In nearly identical circumstances, courts have prevented disclosure of federal records under state records laws and ordered state actors to return them to the federal government. In United States v. Napper, 694 F. Supp. 897 (N.D. Ga. 1988), aff'd, 887 F.2d 1528 (11th Cir. 1989), the FBI loaned investigative records to the City of Atlanta's police department. Similar to the FBI documents here, most of the records furnished to the city were marked as follows: "It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency." Id.; see JA.II.97. When the state court ordered the records released pursuant to Georgia's public records law without the FBI's consent, the United States filed a federal action, and the District Court concluded that the United States had a property interest in the documents and ordered the City to return the documents. Id. at 900-902. Furthermore, the District Court indicated that the party seeking the records "must file an official FOIA request." Id. at 901. As the Eleventh Circuit stated in affirming

the District Court's decision, "This is simply a case in which the [federal] Government seeks to retrieve documents which it owns, and which the City of Atlanta possesses, has no right to disseminate, and refuses to return to the FBI." 887 F.2d at 1530. Here, too, "the [federal] Government seeks to retrieve documents which it owns." For substantially the same reason, Judge Leighton correctly held that the FBI documents can only be disseminated (if at all) through Federal law.

This determination has practical implications as well. Given the exceptionally sensitive nature of the records, it is the FBI that should determine what, if anything can be disclosed without compromising national security. The District Attorney should not be put in the position of having to decide which records can be released, or what redactions are needed, in order to adequately protect the investigative techniques of the FBI or the lives and safety of its agents (JA.III.5, 18-20). Simply put, the report belongs to the FBI, should only be subject to FOIA, and should be returned to the FBI—both as a matter of law and to protect vital law enforcement interests.

CONCLUSION

For the foregoing reasons, the District Attorney respectfully requests that this Honorable Court affirm the Superior Court's judge's order granting the District Attorney's motion for summary judgment and order the materials loaned to the District Attorney be returned to the FBI.

Respectfully submitted
FOR THE COMMONWEALTH,

RACHAEL ROLLINS
District Attorney
For the Suffolk District

/s/Donna J. Patalano
DONNA JALBERT PATALANO
Assistant District Attorney
BBO# 651223
One Bulfinch Place
Boston, MA 02114
(617) 619-4202
donna.patalano@state.ma.us

April 14, 2020

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ADDENDUM

5 U.S.C. § 552a. Records maintained on individuals.

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(b) Conditions of Disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

****

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

****

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

****

G.L. c. 4, § 7 cl.(26). Definitions of statutory terms; statutory construction.

In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

****

Twenty-sixth, ''Public records'' shall mean 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, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political

subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

****

(f) 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. 66, § 10. Inspection and copies of public records; requests; written responses; extension of time; fees.

(a) A records access officer appointed pursuant to section 6A, or a designee, shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-sixth of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request, provided that:

(i) the request reasonably describes the public record sought;

(ii) the public record is within the possession, custody or control of the agency or municipality that the records access officer serves; and

(iii) the records access officer receives payment of a reasonable fee as set forth in subsection (d).

A request for public records may be delivered to the records access officer by hand or via first class mail at the record officer's business address, or via electronic mail to the address posted by the agency or municipality that the records access officer serves.

****

(c) If the magnitude or difficulty of a request, or the receipt of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that an agency or municipality is

unable to complete the request within the time provided in clause (vi) of subsection (b), a records access officer may, as soon as practical and within 20 business days after initial receipt of the request, or within 10 business days after receipt of a determination by the supervisor of public records that the requested record constitutes a public record, petition the supervisor of records for an extension of the time for the agency or municipality to furnish copies of the requested record, or any portion of the requested record, that the agency or municipality has within its possession, custody or control and intends to furnish. The records access officer shall, upon submitting the petition to the supervisor of records, furnish a copy of the petition to the requestor. Upon a showing of good cause, the supervisor of records may grant a single extension to an agency not to exceed 20 business days and a single extension to a municipality not to exceed 30 business days. In determining whether the agency or municipality has established good cause, the supervisor of records shall consider, but shall not be limited to considering:

(i) the need to search for, collect, segregate or examine records;

(ii) the scope of redaction required to prevent unlawful disclosure;

(iii) the capacity or the normal business hours of operation of the agency or municipality to produce the request without the extension;

(iv) efforts undertaken by the agency or municipality in fulfilling the current request and previous requests;

(v) whether the request, either individually or as part of a series of requests from the same requestor, is frivolous or intended to harass or intimidate the agency or municipality; and

(vi) the public interest served by expeditious disclosure.

If the supervisor of records determines that the request is part of a series of contemporaneous requests that are

frivolous or designed to intimidate or harass, and the requests are not intended for the broad dissemination of information to the public about actual or alleged government activity, the supervisor of records may grant a longer extension or relieve the agency or municipality of its obligation to provide copies of the records sought. The supervisor of records shall issue a written decision regarding a petition submitted by a records access officer under this subsection within 5 business days following receipt of the petition. The supervisor of records shall provide the decision to the agency or municipality and the requestor and shall inform the requestor of the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.

****

U.S. Const. art. VI, cl. 2.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT

RAHIMAH RAHIM,

Plaintiff,

v.

DANIEL F. CONLEY, in his official capacity as the District Attorney for Suffolk County,

Defendant.

Case No: 1784-CV-02312

CONSOLIDATED STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Superior Court Rule 9A(b)(5), the parties submit to the following facts and responses for the Court's consideration in ruling on Ms. Rahim's Motion for Summary Judgment and Daniel F. Conley's Cross-Motion for Summary Judgment.

Ms. Rahim's Statement of Undisputed Material Facts And District Attorney Conley's Responses

A. The Fatal Shooting of Mr. Rahim.

1. Leading up to and including June 2, 2015, law enforcement officers were conducting surveillance of Mr. Usamaah Rahim. See Report of Suffolk County District Attorney Daniel J. Conley on Findings in the June 2, 2015, Shooting Death of Usaamah Abdullah Rahim, (the "Findings Report"), JA Ex. 1 at 2-3.

Defendant's Response: Admitted.

2. Authorities suspected Rahim, Mr. Nicholas Rovinski, and Mr. David Wright of conspiring to engage in criminal activity. See Findings Report, JA Ex. 1, at 2; Criminal Complaint against Wright and Rovinski, JA Ex. 2 at 1; Grand Jury Indictment, JA Ex. 3.

Defendant's Response: Admitted. The District Attorney adds that authorities were investigating Rahim's ties to the Islamic State of Iraq and the Levant (ISIL) and his preparation with co-conspirators to commit acts of terrorism in the United States. Specifically, the investigation revealed that Rahim and co-conspirators had planned to behead a specific target in New York City. The investigation also revealed that Rahim had purchased three military-style knives. See Findings Report, JA Ex. 1, at 2-3.

Plaintiff's Response: Admitted.

3. The law enforcement officials monitoring Rahim, Wright, and Rovinski comprised of local and federal law enforcement agents. See Findings Report, JA Ex. 1 at 1, 5, 8; Affidavit of J. Joseph Galietta, Special Agent with the FBI ("Galietta Aff.") JA Ex. 2 ¶¶ 3, 8-10; Grand Jury Indictment, JA Ex. 3 ¶ 12.

Defendant's Response: Admitted. The District Attorney adds that, following the investigation, he concluded that the release of the names of the involved law enforcement officers could "seriously endanger their safety." Therefore, he declined to release these names. See Findings Report, JA Ex. 1 at2, n.3.

Plaintiff's Response: Admitted that Defendant made that finding.

4. Specifically, the surveillance team consisted of Special Agents of the Federal Bureau of Investigation ("FBI") and officers of the Boston Police Department ("BPD"). See id.; Galietta Aff., JA Ex. 2 ¶ 10 (Rahim "was approached by Boston Police Officers and FBI Special Agents.").

Defendant's Response: Admitted.

5. These officers were participating in a collaborative, resource pooling initiative between local and federal authorities pursuant to a Memorandum of Understanding entered into

by the City of Boston and the FBI – commonly known as a Joint Terrorism Task Force ("JTTF"). Findings Report, JA Ex. 1 at 1; Gallietta Aff. JA Ex. 2 ¶¶ 1-3; Grand Jury Indictment, JA Ex. 3 ¶ 12; Joint Terrorism Task Force Memorandum of Understanding Between Federal Bureau of Investigation and The City of Boston Police Department ("JTTF MOU"), JA Ex. 4.

Defendant's Response: Admitted.

6. On June 2, 2015, members of the JTTF were monitoring Rahim's telephone calls. See Galietta Aff., JA Ex. 2 ¶ 9; Exhibit and Witness List of David Wright's Trial, JA Ex. 5 (Government Exhibit Number 005, "Call on June 2, 2015 at 5:18 a.m. between Rahim and Wright"); Findings Report, JA Ex. 1 at 3.

Defendant's Response: Admitted.

7. While monitoring Mr. Rahim's telephone, JTTF members formed the opinion that Rahim posed a threat to law enforcement officers and mobilized to take him into immediate custody. Findings Report, JA Ex. 1 at 3 ("a JTTF supervisor notified the surveillance team that, due to the imminent threat to law enforcement officers and the public, the surveillance team should stop Rahim for questioning and prevent him from boarding public transportation."); Galietta Aff., JA Ex. 2 ¶ 10.

Defendant's Response: Admitted. The District Attorney adds that, in that conversation, Rahim expressed intent to abandon the plan to travel to New York and instead expressed his intention to commit a terrorist attack in Boston immediately. Rahim further indicated that he intended to attack "boys in blue" that day. Agents believed that this term referred to law enforcement agents. Findings Report, JA Ex. 1 at 3.

Plaintiff's Response: Disputed. Defendant fails to cite admissible evidence in support of the factual contention that Rahim stated "he intended to attack 'boys in blue' that day." Defendant

cites the Findings Report, which in turn cites an intercepted telephone conversation during which Rahim purportedly makes the statement. Findings Report, JA Ex. 1 at 3. While the Findings Report may constitute admissible evidence for some purposes, double hearsay statements, such as the one attributed to Rahim here, are not admissible under any rule of evidence. See Commonwealth v. Kenneally, 10 Mass. App. C.t 162, 178, aff'd, 383 Mass. 269 (1981) (police report containing multi-level hearsay inadmissible); Kelly v. O'Neil, 1 Mass. App. Ct. 313, 316 (1973) (same). The fact should be stricken due to Defendant's failure to support it with admissible evidence.

8. Members of the JTTF approached Rahim in an open, public parking lot in the Roslindale neighborhood of Boston as he exited a CVS and waited to board an MBTA bus. See Findings Report, JA Ex. 1 at 3; Galietta Aff., JA Ex. 2 ¶ 10; Grand Jury Indictment, JA Ex. 3 ¶ 11.

Defendant's Response: Admitted. The District Attorney adds that officers were attempting to question Rahim. See Findings Report, JA Ex. 1 at 1.

Plaintiff's Response: Disputed. The officers were attempting to arrest Rahim, by force if necessary, to prevent him from boarding a public transit bus. Findings Report, JA Ex. 1 at 3, 10.

9. According to the subsequent statements of the officers on the scene, an altercation ensued during which they allege that Rahim failed to comply with the officers' commands and eventually brandished a knife. Findings Report, JA Ex. 1 at 4-5; Galietta Aff., JA Ex. 2 ¶ 10.

Defendant's Response: Admitted. The District Attorney adds that Rahim repeatedly ignored law enforcement requests to drop the knife, aggressively advanced on the officers with the knife in his hand, and expressed his allegiance to ISIL. Findings Report, JA Ex. 1 at 1, 5, 10.

Plaintiff's Response: Disputed. Defendant fails to cite admissible evidence in support of the factual contention that Rahim expressed his allegiance to ISIL when the officers attempted to arrest him. The Findings Report, cited in support of this factual assertion, does not support this contention. Moreover, the only disclosed excerpt from Rahim's interaction with the police that morning demonstrates that he did not profess an allegiance to ISIL when the officer's attempted to arrest him. See Transcribed Excerpt from Phone Call between Rahim and Another Party, JA Ex. 21.

10. This altercation ended when officers opened fire on Rahim, who sustained three shots to his torso, causing his death shortly thereafter. Findings Report, JA Ex. 1 at 5; Galietta Aff., JA Ex. 2 ¶ 10.

Defendant's Response: Admitted insofar as the statement indicates Rahim's injuries and subsequent death. The District Attorney objects to the characterization that the officers' "opened fire." The District Attorney adds that the officers fired their weapons in the exercise of self-defense and the defense of others. Findings Report, JA Ex. 1 at 2.

Plaintiff's Response: Disputed. Whether the officers fired their weapons in an exercise of self-defense or in the defense of others is a legal conclusion and not a factual contention to be asserted as a fact for purposes of a motion for summary judgment. See Russo's Marine Mart, Inc. v. Harris, 85 Mass. App. Ct. 1107 (2014) (Rule 1:28 Order) (holding "factual allegations" not necessarily factual, materials, or admissible may be disregarded by court). The assertion should be stricken.

B. Defendant's Investigation Pursuant to G.L. c. 38, § 4.

11. Pursuant to G.L. c. 38, § 4, Defendant is statutorily required to investigate all "cases of unnatural or suspicious death" and to "direct and control the investigation of the death

and [] coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the deaths occurred." Findings Report, JA Ex. 1 at 2.

Defendant's Response: Admitted.

12. This statutory duty to investigate unnatural deaths includes deaths caused by law enforcement officers, such as the fatal shooting of Rahim. Findings Report, JA Ex. 1 at 2.

Defendant's Response: Admitted.

13. Defendant's investigation culminated in the public release of a ten-page Findings Report dated August 24, 2016. Findings Report, JA Ex. 1.

Defendant's Response: Admitted.

14. At the time, Defendant produced a portion of the materials relied on in making the Findings Report, produced some in redacted form, and entirely withheld others. See Affidavit of Janis DiLoreto Smith, JA Ex. 16 ¶¶ 4-5.

Defendant's Response: Admitted. The District Attorney adds that, as part of this production, he provided the Plaintiff with 783 pages of interview transcripts, investigative reports, and testing results; 373 still photographs; and unedited surveillance footage from the commercial establishments in the area where the incident had occurred. See Affidavit of Janis DiLoreto Smith, JA Ex. 16 ¶¶ 4, 5.

Plaintiff's Response: Admitted.

15. In his Findings Report, Defendant states that he reviewed "the materials compiled by the Boston Police Department Firearm Discharge Investigation Team[,]" which is comprised of "sworn written statements of the involved task force officers; audio-recorded interviews of civilian witnesses; video surveillance footage; police radio transmissions; ballistics analysis of the task force officers' weapons and ammunition; physical evidence from the scene, including a

knife recovered at the scene; criminalistics testing and analysis; the autopsy report with supporting documentation and photographs; scene photographs; and recordings of cell phone communications between Rahim and identified parties known to investigators." Findings Report, JA Ex. 1 at 2.

Defendant's Response: Admitted.

16. The Findings Report also states that Defendant received the "FBI Inspector's Report – Agent Involved Shooting Boston Field Office June 2, 2015, and accompanying documents" that were provided to Defendant on June 5, 2015. Findings Report, JA Ex. 1 at 2; June 5, 2015 FBI Letter, JA Ex. 8.

Defendant's Response: Admitted.

17. Defendant confirms that "every detail of the investigation has been memorialized and documented" and that he "reviewed all investigative materials, including those that are classified or subject to a non-disclosure agreement with the FBI." Findings Report, JA Ex. 1 at 2.

Defendant's Response: The District Attorney objects to this statement as written because it takes the statement out of context. The full statement, as published in the report is: "Although every detail of the investigation has been memorialized and documented, some of the investigative materials remain either classified or subject to a non-disclosure agreement with the FBI. We have reviewed all investigative materials, including those that are classified or subject to a non-disclosure agreement with the FBI." Findings Report, JA Ex. 1 at 2.

Plaintiff's Response: Admitted that the quoted text accurately reflects the language contained in the Findings Report.

18. Since the filing of this Complaint, Defendant has admitted that he received and maintained copies of these records. See Defendant's July 20, 2017, response letter to Ms.

Rahim's Request (the "July 20, 2017 Response Letter"), JA Ex. 6 ("With respect to the remainder of your request, while this Office remains in temporary custody of certain materials pertaining to the investigation [of Rahim]. . . ."); Stipulation Regarding Disputed Records, JA Ex. 7 ¶ 1 ("The Defendant District Attorney for the Suffolk District affirms that his Office has maintained possession of the disputed records that are the subject of the plaintiff's June 16, 2017, public records request, and has not altered, destroyed, or returned said disputed records to the Federal Bureau of Investigation since receipt of the request."); June 5, 2015, letter to Defendant from FBI, JA Ex. 8 ("This letter serves to provide you with the Federal Bureau of Investigation (FBI) investigative reports and Signed Sworn Statements taken concerning a shooting incident which took place on June 2, 2015[.]").

Defendant's Response: The District Attorney objects to this statement as incomplete. The District Attorney adds that the records were released under the law enforcement exception to The Privacy Act, Title 5 U.S.C. § 552a(b)(7), Exception (b)(3), that the documents were released with the express understanding that they were being loaned to the District Attorney, and that the FBI did not authorize release to any third party outside the Office of the District Attorney without express permission, including release pursuant to any request under either the Massachusetts public records law. June 5, 2015, letter to Defendant from FBI, JA Ex. 8.

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence). Whether any agreement or federal law prohibits the disclosure of the records held by Defendant are subject to any restrictions is a legal question and not a factual contention to be asserted as a fact for purposes of summary judgment. See Russo's Marine Mart, Inc. v. Harris, 85 Mass. App.

Ct. 1107 (2014) (Rule 1:28 Order) (holding "factual allegations" not necessarily factual, materials, or admissible may be disregarded by court). Assertion should be stricken.

19. In reliance, at least in part, on his review of these records, Defendant concluded that "the task force officers had probable cause to arrest Mr. Rahim" and that "the task force officers' use of force was a lawful and reasonable exercise of self-defense and defense of others." Findings Report, JA Ex. 1 at 2, 10.

Defendant's Response: Admitted.

20. Accordingly, Defendant found that the officers who shot Mr. Rahim acted lawfully and reasonably under the circumstances and he recommend that they not be charged criminally for their fatal shooting of Mr. Rahim. Findings Report, JA Ex. 1 at 9-10.

Defendant's Response: Admitted.

C. Defendant's Unlawful Deal Attempts to Circumvent The PRL.

Defendant's Response: The District Attorney objects to the subheading as it contains a legal conclusion and wrongly characterizes the District Attorney's actions as an "attempt[] to circumvent" the law, and his agreement with the FBI as an "unlawful deal."

21. On June 5, 2015, Mr. Eric Welling of the FBI sent Defendant a cover letter that accompanied the FBI's "investigative reports and Signed Sworn Statements taken concerning a shooting incident which took place on June 2, 2015[.]". June 5, 2015 Letter, JA Ex. 8.

Defendant's Response: Admitted.

22. The letter demonstrates that the FBI produced records to Defendant and that those records were physically received by Defendant. June 5, 2015 Letter, JA Ex. 8.

Defendant's Response: Admitted.

23. The letter claims that Defendant is barred from further disseminating the records provided by the FBI, claiming that the federal Privacy Act restricts the further dissemination of the records. June 5, 2015 Letter, JA Ex. 8 ("Because these documents are being released to your office solely under the referenced statutory exemption to the Privacy Act, the FBI cannot authorize the further release of the records to any third party outside your office for any purpose other than for use at trial or otherwise advancing your investigation.").

Defendant's Response: Admitted.

24. Specifically, the letter attempts to forbid Defendant from producing the records in response to a "Massachusetts Freedom of Information Act" request. June 5, 2015 Letter, JA Ex. 8 ("This limitation specifically includes any request made under the Massachusetts Freedom of Information Act.").

Defendant's Response: Admitted insofar as the letter states that that the District Attorney is prohibited from disseminating the records in response to a request made under the "Massachusetts Public Records Law." The District Attorney objects to the use of the word "attempt."

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence).

25. The letter characterizes the records as "being loaned to [Defendant's] agency" and states that they remain property of the FBI and cannot be produced to third-parties without the FBI's consent. June 5, 2015 Letter, JA Ex. 8.

Defendant's Response: Admitted.

D. Ms. Rahim's Records Request Pursuant To The PRL And Defendant's Denial.

26. On June 7, 2017, Ms. Rahim was appointed the Personal Representative of Mr. Rahim's estate by the Massachusetts Probate and Family Court. See Request, JA 12 at 5-7.

Defendant's Response: Admitted.

27. On June 16, 2017, Ms. Rahim mailed her Request under the PRL, seeking four categories of records from Defendant. See Affidavit of Attorney Cook ("Cook Aff."), JA Ex. 11 ¶ 3; Request, JA Ex. 12.

Defendant's Response: Admitted.

28. Defendant received the Ms. Rahim's Request on June 19, 2017. See Cook Aff., JA Ex. 11 ¶ 4; Request, JA Ex. 12 at 10.

Defendant's Response: Admitted.

29. On July 3, 2017, the legal deadline to respond, Defendant emailed Ms. Rahim's counsel, acknowledging receipt of Ms. Rahim's Request and seeking a week's extension until July 12, 2017 to respond to the request "because one of the people [Defendant] will need to consult in order to determine exactly what we have is currently out of the office." See Cook Aff., JA Ex. 11, ¶ 9; Cook/Arno Emails, JA Ex. 13 at 2-3.

Defendant's Response: Admitted. The District Attorney adds that the correspondence included information that the Plaintiff had already been provided with records at the time of her request. Cook/Arno Emails, JA Ex. 13 at 2-3.

Plaintiff's Response: Admitted.

30. On July 5, 2017, Ms. Rahim's counsel agreed to the extension, but sought confirmation that the Defendant "did not intend to withhold any responsive records pursuant to an exemption in the Public Records Law." See Cook Aff., JA Ex. 11 ¶ 11; Letter to Arno, JA

Ex. 14.

Defendant's Response: Admitted. The District Attorney adds that Plaintiff's counsel acknowledged receipt of the previously provided documents. Letter to Arno, JA Ex. 14.

Plaintiff's Response: Admitted.

31. On July 12, 2017, Defendant again sought an extension of time to respond to the Request. See Cook Aff., JA Ex. 11 ¶ 12; Cook/Arno Emails, JA Ex. 13 at 2.

Defendant's Response: Admitted.

32. As part of this request for an extension of time, Defendant indicated that some of the records may be exempt from the PRL. See Cook Aff., JA Ex. 11 ¶ 13; Cook/Arno Emails, JA Ex. 13 at 2.

Defendant's Response: Admitted. The District Attorney adds that he indicated that he would not redact any information from documents already produced, and that the issue at hand was whether the nature of the remaining documents rendered them exempt from the public records law. Cook/Arno Emails, JA Ex. 13 at 2.

Plaintiff's Response: Admitted.

33. In a continued effort to accommodate Defendant's schedule and out of professional courtesy, Ms. Rahim's counsel again agreed to Defendant's request for additional time, but also requested Defendant comply with the mandates contained in G.L. c. 66, § 10(b) and provide the statutorily required information concerning the public records at issue. See Cook Aff., JA Ex. 11 ¶ 15; Cook/Arno Emails, JA Ex. 13 at 1.

Defendant's Response: Admitted, in so far as counsel for Ms. Rahim agreed to the extension of time and requested that the Defendant comply with the mandates of G.L. c. 66, § 10(b).

34. Defendant did not supply Ms. Rahim's counsel with the requested information,

information required to be supplied by law. See Cook Aff., JA Ex. 11 ¶ 16.

Defendant's Response: The District Attorney objects to this statement to the extent that it inappropriately characterizes the District Attorney's actions and implies that there was no response whatsoever and adds that, on July 19, 2017, the District Attorney responded and requested an extension of time to July 20, 2017. Cook/Arno Emails, JA Ex. 13 at 1.

Plaintiff's Response: Admitted that Defendant sought an extension of time on July 19, 2017 and transmitted a written response to Ms. Rahim's counsel on July 20, 2017.

35. On July 19, 2017, the second-extended deadline, Defendant again requested an extension of time through July 20, 2017. See Cook Aff., JA Ex. 11 ¶ 18; Cook/Arno Emails, JA Ex. 13 at 1.

Defendant's Response: Admitted.

36. Defendant served his first response to Ms. Rahim on July 20, 2017, denying the public records request and providing no documents. See Cook Aff., JA Ex. 11 ¶ 19; July 20, 2017 Response Letter, JA Ex. 6.

Defendant's Response: Admitted. The District Attorney adds that the letter denying this request included citations to the statutory exemptions that served as the basis for the Defendant's denial of the Plaintiff's requests.

Plaintiff's Response: Admitted as pertaining to autopsy records. The July 20, 2017 Response Letter cited the statutory exemption for withholding autopsy records, G.L. c. 4, §7(26)(a) and (c) as well as G.L. c. 38, § 2. See July 2017 Response Letter, JA Ex. 6. However, the July 20, 2017 Response Letter did not contain any statutory citations to support Defendant's denial of Ms. Rahim's request or permitting Defendant's withholding of the records currently in dispute. See id.

37. Defendant supported his denial of Ms. Rahim's Request on three basis, claiming that: (1) autopsy materials are exempt from the PRL; (2) responsive records relating to the policies or procedures of law enforcement officers were not in his possession, custody, or control; and, (3) "while [Defendant] remains in temporary custody of certain materials pertaining to the investigation, these materials are the property of the FBI through the Department of Justice and are not under the control of [Defendant], in that they cannot be disseminated without the permission of the FBI." July 20, 2017 Response Letter, JA Ex. 6; Cook Aff., Ex. 11 ¶ 20.

Defendant's Response: Admitted.

38. Days after serving this response, Defendant served a supplemental letter that broadly claimed the records were exempt from the PRL because they were subject to the investigatory exemption, specifically federal prosecution of Wright. See Cook Aff., JA Ex. 11 ¶¶ 22-23; July 24, 2017 Response Letter, JA Ex. 10.

Defendant's Response: The District Attorney admits the statement insofar as he served a supplemental letter citing the investigatory exemption and the federal prosecution of Wright. The District Attorney adds that the letter also claimed that the disclosure of the material would prejudice effective law enforcement because it would impair the District Attorney's Office's ability to obtain information necessary to its investigations from its federal counterparts, particularly in investigations concerning matters of national security. The District Attorney further adds that he had informed Plaintiff's counsel that he would be supplementing his initial response in a telephone call. July 24, 2017 Response Letter, JA Ex. 10

Plaintiff's Response: Admitted.

39. This supplemental response was not accompanied by any additional information concerning the records, Defendant's determination of the applicability of the investigatory

exemption, or any kind of index identifying the records being withheld. See Cook Aff., JA Ex. 11 ¶ 23; July 24, 2017 Response Letter, JA Ex. 10.

Defendant's Response: The District Attorney admits that the supplemental response did not contain any index or information about the specific records, but denies that the letter did not contain any information about the District Attorney's determination of the applicability of the investigatory exemption. The District Attorney adds that the letter also claimed that the disclosure of the material would prejudice effective law enforcement because it would impair the District Attorney's Office's ability to obtain information necessary to its investigations from its federal counterparts, particularly in investigations concerning matters of national security. July 24, 2017 Response Letter, JA Ex. 10.

Plaintiff's Response: Admitted that Defendant's July 24, 2017 Response Letter raised the above-mentioned topics.

40. To date, Defendant has made no showing that each specific record is subject to the exemption, that the investigatory exemption cannot be segregated from the information that is not subject to the exemption, or supplied an index that would even allow Ms. Rahim to evaluate the efficacy of applying the exemption to these specific records. See July 24, 2017 Response Letter, JA Ex. 10; Cook Aff., JA 11 ¶¶ 23-24.

Defendant's Response: The District Attorney objects to this statement as it calls for a legal conclusion of the application of the public records law to the records in question.

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence). The factual assertions that Defendant has not made a showing that each withheld record is

subject to an exemption to the PRL, that each record cannot be segregated, or that Defendant has not supplied Ms. Rahim with a record index remain undisputed. Defendant appears to dispute whether the records are subject to the PRL, which is a question of law, but does not relieve Defendant from disputing the factual assertion with record evidence.

E. The Prosecutions Of David Wright And Nicholas Rovinski Are Complete.

Defendant's Response: The District Attorney objects to this subheading because it asserts that the prosecutions of Wright and Rovinksi are complete. See Wright Docket, JA Ex. 17.

41. The JTTF was investigating the potential ties between Rahim, Wright, and Rovinski, and the Islamic State of Iraq ("ISIL"), an organization deemed a Foreign Terrorist Organization by the United States Department of State. Findings Report, JA Ex. 1 at 1, n.1; Galietta Aff., JA Ex. 2 ¶ 5.

Defendant's Response: Admitted.

42. Specifically, Wright and Rovinski were investigated for conspiring with Rahim to commit a domestic attack in the state of New York. See Galietta Aff., JA Ex. 2 ¶¶ 5, 8-10; Grand Jury Indictment, JA Ex. 3 ¶¶ 5-9.

Defendant's Response: Admitted.

43. On June 2, 2015, law enforcement officials purportedly intercepted a telephone call between Rahim and Wright, during which Rahim allegedly stated an intention to forgo the planned attack in New York and commit a local act of violence. Findings Report, JA Ex. 1 at 2-3; Galietta Aff., JA Ex. 2 ¶¶ 8-10, 38-40; Grand Jury Indictment, JA Ex. 3 ¶¶ 9-10; Wright Exhibit List, JA Ex. 5 (Government Exhibit Nos. 005, 5A, 006, 6A, 007).

Defendant's Response: Admitted. The District Attorney adds that the local act of violence was a specific threat against law enforcement. JA Ex. 1 at 2-3.

Plaintiff's Response: For the purposes of summary judgment only, Ms. Rahim does not dispute these additional facts because they are not material to the legal question of whether Defendant must produce the disputed records.

44. After Rahim was shot on June 2, 2015, a criminal complaint was filed against Wright and Rovinski and warrants were issued for their arrest. Criminal Complaint, JA Ex. 2.

Defendant's Response: Admitted.

45. Subsequent to their arrest, Wright and Rovinski were indicted for conspiracy to provide material support to a designated foreign terrorist organization under 18 U.S.C. § 2339B(a)(1) and aiding and abetting the same under 18 U.S.C. § 2. Grand Jury Indictment, JA Ex. 3.

Defendant's Response: Admitted.

46. Wright faced additional counts of conspiracy to obstruct justice (18 U.S.C. § 371), obstruction of justice (18 U.S.C. § 1519) and aiding and abetting (18 U.S.C. § 2). Grand Jury Indictment, JA Ex. 3.

Defendant's Response: Admitted.

47. On October 11, 2016, Rovinski pleaded guilty to the charge of conspiring to provide material support to a foreign terrorist organization, became a cooperating government witness, and is currently scheduled to be sentenced on December 5, 2017. See Wright Exhibit List, JA Ex. 5 at 1 (listing Nicholas Rovinski as the second government witness), 8 (Government Exhibit 069 "Rovinski Plea Agreement" and Exhibit 070 "Rovinski Cooperation Agreement").

Defendant's Response: Admitted insofar as Rovinski pleaded guilty. The sentencing hearing, however, is not scheduled for December 5, 2017; it is scheduled for December 20, 2017. See Wright Docket, JA Ex. 18.

Plaintiff's Response: Admitted. Both Wright and Rovinski were sentenced on December 20, 2017. See Updated Federal Docket, JA Ex. 22.

48. On October 28, 2017, the federal jury returned a verdict finding Wright guilty of all the counts charged in his indictment. Wright Jury Verdict, JA Ex. 9.

Defendant's Response: Admitted.

49. Throughout the course of the Wright trial, the government entered a number of records into the public docket that have not been released to Ms. Rahim. See Wright Exhibit List, JA Ex. 5.

Defendant's Response: The District Attorney objects to this statement as it has no knowledge of what documents the Plaintiff may have received from other sources. The District Attorney also objects to this statement because it insinuates that the District Attorney possesses the documents that are listed in the public docket, or is aware of their contents.

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence).

50. The evidence relied upon by the government in the Wright trial included: telephone records of Rahim, subscriber records of Rahim's email accounts, recorded telephone conversations and associated transcripts, photos and surveillance footage of scene where Rahim was fatally shot, items retrieved during the subsequent search of Rahim's residence, conversations over social media, text messages, prison letters, internet activity records, video conferencing records and excerpts, and various other documents and electronic records. See Wright Exhibit and Witness List, JA Ex. 5.

Defendant's Response: Admitted insofar as the exhibit list lists the documents outlined in the above statement. The District Attorney objects to the statement insofar as it assumes knowledge of the contents of those broad categories of records listed in the statement. See Wright Exhibit and Witness List, JA Ex. 5.

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence).

51. It is believed that some of these records are responsive to Ms. Rahim's Request and are in Defendant's possession, but are being improperly withheld. See July 20, 2017, Response Letter, JA Ex. 6 ("[W]hile this Office remains in temporary custody of certain materials pertaining to the investigation, these materials are the property of the FBI through the Department of Justice and re not under the control of this Office, in that they cannot be disseminated without the permission of the FBI."); July 24, 2017 Response Letter, JA Ex. 10 ("[T]he events surrounding Mr. Rahim's death remain the subject of an ongoing investigation and prosecution at the federal level . . [t]hus, it is this office's position that any responsive materials fall within the 'investigatory exemption' to the public records law.").

Defendant's Response: The District Attorney denies that the records are being improperly withheld. The District Attorney further objects to the statement because it presupposes that the District Attorney knows the contents of the records listed in Paragraph 50. See Wright Exhibit and Witness List, JA Ex. 5.

Plaintiff's Response: Ms. Rahim's factual assertion should be deemed admitted as it is uncontroverted. See Kiribati Seafood Co., LLC v. Dechert LLP, 2016 WL 1426297 at *2 (Mass. Super. Ct. 2016) (admitting statements of fact that are not disputed by cited record evidence).

District Attorney Conley's Further Statement of Undisputed Material Facts And Ms. Rahim's Responses

52. On July 21, 2017, Plaintiff's counsel sent a letter to the District Attorney's Records Access Officer conceding that autopsy materials were not public records and accepting that the District Attorney did not possess any materials concerning use of force policies and procedures. See July 21, 2017, Cook letter, JA Ex. 17.

Plaintiff's Response: Admitted that Ms. Rahim's counsel conceded that autopsy reports do not fall within the Public Records Law's definition of public records. Only under a reservation of rights did Ms. Rahim conditionally accept Defendant's representation that he did not possess materials concerning use of force policies or procedures that apply to law enforcement officials. See July 21, 2017, Cook Letter, JA Ex. 17.

53. Litigation in the matter of the United States of America v. Wright, 1:15cr10153, remains ongoing because a motion for a new trial was filed by Wright and is pending in the Federal District Court. See Wright Docket, JA Ex. 18.

Plaintiff's Response: Admitted that Wright filed a motion for a new trial on November 2, 2017. Ms. Rahim disputes that the litigation remains ongoing in the trial court as the Court denied Wright's motion for a new trial on December 18, 2017 and sentenced Wright on December 20, 2017. See Updated Federal Docket, Ex 22, Docket Entries 393, 407, and 410.

54. A protective order governing discovery has been issued in the Wright case. The order requires that all materials remain the property of the federal government and that defense counsel is required to either destroy materials received or return them to the United States. See Protective Order, JA Ex. 19.

Plaintiff's Response: Admitted that Exhibit 18 constitutes the Stipulated Protective Order governing the Wright and Rovinski criminal matters. The effect of the order is a matter of law to be determined by the court.

55. The protective order specifically includes appeals. See Protective Order, JA Ex. 19.

Plaintiff's Response: Admitted that the Stipulated Protective Order states that it applies to an appeal, but it is disputed that the protective order has any effect on the present litigation.

56. After having being convicted of conspiracy to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2239B(a)(1), aiding and abetting, in violation of 18 U.S.C. § 2, conspiracy to obstruct justice, in violation of 18 U.S.C. § 371, and obstruction of justice, in violation of 18 U.S.C. § 1519, Wright has yet to be sentenced and is scheduled for sentencing on December 19, 2017. See Wright Docket, JA Ex. 18.

Plaintiff's Response: Disputed. As reflected on the Updated Federal Docket, Wright was sentenced on December 20, 2017. See Updated Federal Docket, Ex. 22 at Docket Entry 410.

57. After having pleaded guilty to the charge of conspiracy to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2239B(a)(1), Rovinski has yet to be sentenced and his sentencing is scheduled for December 20, 2017. See Wright Docket, JA Ex. 18.

Plaintiff's Response: Disputed. As reflected on the Updated Federal Docket, Rovinski was sentenced on December 20, 2017. See Updated Federal Docket, Ex. 22 at Docket Entry 413.

58. The United States Attorney's Office position is that the records in question involve national security. See Affidavit of Janis DiLoreto Smith, JA Ex. 16 ¶¶ 9.

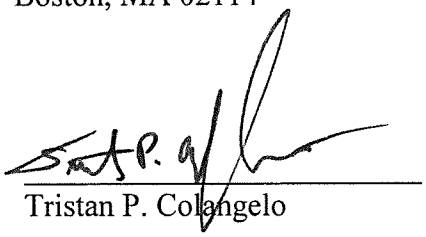
Plaintiff's Response: Disputed. Defendant fails to cite admissible evidence in support of the factual contention that the United States Attorney's Office has determined that the records in question involve national security. Defendant's counsel's affidavit in support of this contention relies on the hearsay statement of Assistant United States Attorney Siegmann and is not based on the affiant's personal knowledge. See DiLoreto Smith Aff., JA Ex. 16 ¶ 9. Hearsay statements contained within an affidavit are insufficient to avoid summary judgment. See Madsen v. Erwin, 395 Mass. 715, 721 (1985). Therefore, the fact should be stricken.

For the Plaintiff:	For the Defendant:
RAHIMAH RAHIM By her attorneys, Kate R. Cook (BBO# 650698) cook@sugarmanrogers.com Tristan P. Colangelo (BBO #682202) colangelo@sugarmanrogers.com SUGARMAN, ROGERS, BARSHAK & COHEN, P.C. 101 Merrimac Street, Suite 900 Boston, MA 02114 (617) 227-3030 Rahsaan D. Hall (BBO #645369) Jessie J. Rossman (BBO# 670685) Laura Rótolo (BBO# 665247) ACLU Foundation of Massachusetts 211 Congress Street Boston, MA 02110 jrossman@aclum.org	DANIEL F. CONLEY, District Attorney for the Suffolk District Janis DiLoreto Smith, BBO #662332 Assistant District Attorney Deputy Legal Counsel One Bulfinch Place Boston, MA 02114 (617)619-4000 Janis.d.smith@massmail.state.ma.us

CERTIFICATE OF SERVICE

I, Tristan P. Colangelo, hereby certify that on the above date I served the within document by first class mail to the following counsel of record:

Janis DiLoreto Smith, Esq.
Assistant District Attorney
Deputy Legal Counsel
One Bulfinch Place
Boston, MA 02114



Tristan P. Colangelo

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is in 12-point Courier New with 10 CPI and has a length of 28 pages.

/s/Donna J. Patalano
DONNA JALBERT PATALANO
Assistant District Attorney

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix and sending it to:

Kate R. Cook, Esq. (cook@sugarmanrogerscom)
Tristan P. Colangelo, Esq. (Colangelo@sugarmanrogers.com)
Sugarman, Rogers, Barshak, and Cohen, P.C.
101 Merrimac Street, Suite 900, Boston, MA 02114

Rahsaan D. Hall (BBO #645369)
Jessie J. Rossman (BBO# 670685)
Laura Rótolo (BBO# 665247)
Matthew R. Segal (BBO #654489)
ACLU Foundation of Massachusetts
211 Congress St., Boston, MA 02110
jrossman@aclum.org

Brian LaMacchia, Assistant United States Attorney
United States Attorney's Office, District of Massachusetts
One Courthouse Way, Suite 9200
Boston, MA 02110
brian.lamacchia@usdoj.gov

Respectfully submitted
For the Commonwealth,
RACHAEL ROLLINS
District Attorney
For the Suffolk District

/s/Donna J. Patalano
DONNA JALBERT PATALANO
Assistant District Attorney
BBO# 651223
One Bulfinch Place
Boston, Massachusetts 02114

April 14, 2020

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

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NO. SJC-12884

_____

RAHIMAH RAHIM,
Plaintiff-Appellant
V.

RACHAEL ROLLINS,
IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY,
Defendant-Appellee

_____

DISTRICT ATTORNEY'S AMENDED BRIEF ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

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SUFFOLK COUNTY

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