COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

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

Plaintiffs,

v.

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

Defendants.

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

Docket No. 2084-cv-01802-H

ORAL ARGUMENT REQUESTED

INTRODUCTION

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

These Requests have been languishing for over 10 months and yet many—indeed, likely most—responsive documents still have not been produced. Worse, the City Defendants have repeatedly delayed production and given no definitive time frame for when the remaining responsive records will be provided. Given these clear violations of the PRL, a ruling by this Court, including an order directing the Defendants to produce all the remaining records by a prompt date certain, is both warranted and necessary based on the undisputed facts and the law.

ARGUMENT

The City Defendants do not contest any material facts or Plaintiffs' legal entitlement to the public records they seek. Despite that, the City Defendants ask the Court to deny or delay ruling on the Motion and claim they need another 3 to 6 months to comply with the law. Opp. at 5.[2] They rely on three reasons for this extraordinary request, none of which has merit.

---

[1] Terms not otherwise defined herein have the meaning ascribed to them in Plaintiffs' opening merits brief.

[2] References to "Opp." are to *Defendants' Memorandum in Opposition to Plaintiffs Motion for Partial Summary Judgment*.

First, the City Defendants claim to have produced the "majority" of responsive records at issue (Opp. at 2). This assertion is both irrelevant and incorrect. It is irrelevant because the City Defendants do not contest Plaintiffs were legally entitled to receive appropriate responses and/or responsive records months ago, but after more than 10 months are still waiting to obtain many of the documents. The law as to summary judgment is clear that "[t]he judgment sought *shall be rendered* forthwith if the pleadings" and facts in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c) (emphasis added). Thus, even if the City Defendants had produced the "majority" of responsive records, Plaintiffs would still be entitled to summary judgment.

But the City Defendants plainly have not produced the "majority" of responsive records based on their own statements and concessions. For one thing, they say nothing about the Teargas Request—which is also the subject of this Motion—to which the City Defendants admittedly have produced no responsive documents at all. *See* SOF ¶ 26; Opp. at 2.[3] And even as to the Demonstrations Request, the City Defendants admit they have not produced, and represent they are still internally reviewing, 10,000 emails amounting to 42,000 pages (Opp. at 4).[4] In view of the City Defendants' continuing failure to produce both *any* records in response to the Teargas Request and large swaths of records responsive to the Demonstrations Requests, their statement that they have produced the "majority" of responsive records must be incorrect.[5]

---

[3] References to the SOF are to the *Rule 9A(b)(5) Statement of Facts in Support of ACLUM and Taylor R. Campbell's Motion for Partial Summary Judgment Against Defendants City of Boston and Boston Police Department* served with Plaintiffs' opening brief.

[4] The search criteria yielding these results have not been disclosed to or discussed with Plaintiffs, so Plaintiffs are not currently in a position to evaluate whether Defendants' asserted search results seem either under- or over-inclusive.

[5] The City Defendants also suggest they produced something within the 10 business days required by the PRL by stating they were "unable to produce all of the records" they identified as

Second, the City Defendants argue that summary judgment on the Requests should not enter because they need even more time to evaluate and apply exemptions to any responsive records (Opp. at 2). This is not the law. Even where exemptions can validly be asserted, they do not justify the failure to timely produce the responsive documents; they simply authorize timely production with specific documents withheld or, as is often required, with appropriate redactions. *Del Rosario v. Nashoba Reg'l Sch. Dist.,* 2020 WL 8919067, at *2–3 (Mass. Sup. Ct. 2020); *Reinstein v. Police Comm'r of Boston,* 378 Mass. 281, 294-95 (1979).[6]

Third, the City Defendants ask the Court for special dispensation to avoid summary judgment due to the total number of PRL requests they receive and because of "recent social unrest" (Opp. at 2). The City Defendants' request is baseless, and essentially asks this Court to usurp the role of the Legislature and rewrite the PRL for large municipalities.

The PRL does not provide for special timeframes for the City Defendants—or other large municipalities—who of course receive a large number of requests because they are engaged in a large amount of activity about which the public has a right to be informed. The Legislature chose

---

responsive to Plaintiffs requests in the 10-day limit, Opp. at 2 (emphasis in original). That suggestion is misleading. As the City Defendants elsewhere concede, they failed to produce *any records responsive to the requests at issue in this Motion*, not just within the 10-day limit, but at any time within 8 months of the Requests. SOF ¶¶ 6, 15, 26.

[6] Weeks after Plaintiffs served their opening brief in support of this Motion, the City Defendants first started to produce some of the records responsive to the requests at issue in the Motion, and, in doing so, asserted certain exemptions over certain documents and related materials. *See* Opp. at 2 n.1; *see also* Opp. Ex 1, 2 (asserting in various responses exemptions M.G.L c. 4 § 7(26) (d), (f) and (n)). Consequently, the propriety of the City Defendants' assertion of any exemptions is not—and could not be—the subject of this Motion, which seeks a declaration as to the City Defendants' duties and an order compelling the City Defendants to comply with the Requests in full by a date certain, and is irrelevant to whether the Motion should be granted. Plaintiffs note, however, that there is serious reason to doubt the appropriateness of some of the assertions of exemptions, and Plaintiffs reserve all rights to challenge the assertion of any exemptions in any respect, including by seeking appropriate detail as to the information redacted or otherwise withheld and the basis for such withholdings.

to apply the same PRL time standards to large municipalities as it did to small ones, presumably because it expected them to dedicate a sufficient portion of their larger pool of resources to meet their statutory obligations. Regardless, it is not for this Court to read into the PRL exceptions that the Legislature did not create. *See Commonwealth v. Newbury*, 483 Mass. 186, 195 (2019) ("[W]e may not rewrite the … statute to contain language the Legislature did not see fit to include."); *Comm'r of Corr. v. Superior Court Dep't of the Trial Court for the Cnty. of Worcester*, 446 Mass. 123, 126 (2006) ("We do not read into [a] statute a provision which the Legislature did not see fit to put there…."); *Rambert v. Commonwealth*, 389 Mass. 771, 773 (1983) (providing that statutory language "is not to be enlarged or limited by construction unless its object and plain meaning require it").

Moreover, the need for public transparency in the face of recent, so-called "social unrest," actually supports Plaintiffs' entitlement to relief. It is precisely because of recent "social unrest"—occasioned in large part by police use of excessive force, particularly against Black and Brown people or other people advocating for racial justice—and the City Defendants' responses to such public protest, that they needed to respond to the Requests *months ago* so as to inform the public about the conduct of its public officials, and inform discussions about how the City Defendants' behavior should be reformed. Accountability deferred is accountability denied.

CONCLUSION

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

Dated: April 29, 2021

/s/ Jessie J. Rossman
Jessie J. Rossman (BBO No. 670685)
Jessica Lewis (BBO No. 704229)
Ruth A. Bourquin (BBO No. 552985)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
(617) 482-3170
jrossman@aclum.org
jlewis@aclum.org
rbourquin@aclum.org

/s/ William D. Dalsen
William D. Dalsen (BBO No. 689334)
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
Telephone: (617) 526-9600
Facsimile: (617) 526-9899
wdalsen@proskauer.com

Colin G. Cabral (BBO No. 670234)
PROSKAUER ROSE LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
Telephone: (310) 557-2900
Facsimile: (310) 557-2193
ccabral@proskauer.com

Attorneys for Plaintiffs
American Civil Liberties Union of Massachusetts, Inc. and Taylor R. Campbell

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I caused a copy of the foregoing document to be served by U.S. Mail and electronic mail upon counsel to Defendants.

/s/ William D. Dalsen
William D. Dalsen