

COMMONWEALTH OF MASSACHUSETTS

[SUFFOLK, ss.]

SUPERIOR COURT
Civil Action No. _____

AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION OF MASSACHUSETTS,)
))
Plaintiff,)
v.)
))
NORTHEASTERN MASSACHUSETTS)
LAW ENFORCEMENT COUNCIL, INC.,)
))
Defendant.)

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Massachusetts Public Records Law, G.L. c. 66, § 10 and c. 4, § 7, Twenty-sixth, and the Declaratory Judgment Act, G.L. c. 231A, §1, seeking records from a law enforcement entity—the Northeastern Massachusetts Law Enforcement Council (“NEMLEC”)¹—which claims to be completely outside the reach of public records requests.
2. NEMLEC is a consortium of 58 police and sheriff’s departments that operates as a regional law enforcement unit. Exclusively governed by local police chiefs, NEMLEC owns armored vehicles, automatic weapons and high-tech law enforcement equipment.
3. NEMLEC’s operational units, including a Special Weapons and Tactics (“SWAT”) Team and a Regional Response Team (“RRT”), comprise local police officers

¹ The Defendant is registered with the Massachusetts Secretary of State as “Northeastern Massachusetts Law Enforcement Council, Inc.”. On its website and other public communications, it is referred to as “North Eastern Massachusetts Law Enforcement Council.”

who train together, conduct criminal investigations together, and collectively conduct law enforcement operations under color of law.

4. NEMLEC's resources are purchased at least in part with taxpayer dollars, and officers assigned to NEMLEC's SWAT team and RRT participate in these operations while on-duty with their local jurisdictions.

5. As part of an effort to document regional policing operations, the American Civil Liberties Union Foundation of Massachusetts ("ACLUM") requested documents concerning NEMLEC's SWAT Team and RRT in July 2012. The request sought NEMLEC's training materials, incident reports, deployment statistics, guidelines, procurement records, budgets, agreements with other agencies and documents relating to the structure of the SWAT team and RRT. See July 27, 2012 Letter from Laura Rótolo, ACLUM, to Chief James Cornier, NEMLEC. (Exhibit A).

6. NEMLEC refused to disclose the requested public records, claiming that to be a private entity that is not subject to the Public Records Law.

7. That claim is wrong. Controlled by an Executive Board of police chiefs and substantially funded by taxpayer dollars, NEMLEC possesses equipment and conducts operations that are lawful only when possessed or conducted by public entities. The police officers who participate in NEMLEC operations do so under the color of law, with the full privileges and immunities of a law enforcement agency. Moreover, public law enforcement officials create NEMLEC records while carrying out their public duties.

8. The requested documents are therefore public records under the Public Records Law because they are "made or received" by "officer[s] or employee[s]" of an "agency,"

“department,” “division or authority” of a political subdivision of the Commonwealth.
G.L. c. 4, § 7, Twenty-sixth.

9. ACLUM seeks a declaration that NEMLEC and its documents are subject to the Public Records Law. ACLUM also seeks an order requiring the timely release of the requested records, which will educate the public about law enforcement operations that are taking place in their communities with their money and in their name.

Parties

10. Plaintiff the American Civil Liberties Union Foundation of Massachusetts is a non-profit membership organization of over 20,000 members and supporters. It is the state affiliate of the American Civil Liberties Union. Its mission is to protect civil rights and civil liberties in the Commonwealth. One of ACLUM’s goals is to document the growing use of military-style weapons and tactics in local policing. To inform the public debate, ACLUM regularly uses public records laws to obtain government documents that it analyzes and distributes widely. ACLUM’s headquarters is in Boston, Massachusetts.

11. Defendant the North Eastern Massachusetts Law Enforcement Council is a consortium of law enforcement agencies that carries out police operations in the northeastern part of the Commonwealth. Its principal office is in Wilmington, Massachusetts.

Jurisdiction and Venue

12. This Court has jurisdiction over this action under G.L. c. 66, § 10(b), which states, “[i]f a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this

section, the supreme judicial or superior court shall have jurisdiction to order compliance.”

13. Venue is proper in Suffolk County because Plaintiff’s usual place of business is in Boston.

STATEMENT OF FACTS

The Massachusetts Public Records Law

14. Under the Massachusetts Public Records Law, G.L. c. 66, § 10, “every person having custody of any public record . . . shall, at reasonable times and without unreasonable delay, permit it . . . to be inspected and examined by any person” upon request.

15. “Public records” are documents and records “made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or any political subdivision thereof, or of any authority established by the general court to serve a public purpose . . . [.]” G.L. c. 4, § 7, Twenty-sixth.

16. The corresponding regulations underscore that the public must be provided “prompt access to all public records in the custody of state governmental entities and in the custody of governmental entities of political subdivisions of the Commonwealth.” Mass. Regs. Code tit. 950, § 32.02.

17. Records made or received by public officials in their official capacity are subject to the Public Records Law. Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 593-94 (2005).

18. The Massachusetts Supreme Judicial Court has applied a five-prong test to determine whether an entity's documents are subject to the Public Records Law. The factors are: (1) the means by which the entity was created, (2) whether the entity performs some essentially governmental function, (3) whether the entity receives or expends public funds, (4) the involvement of private interests and (5) the extent of control and supervision by government actors over the entity. Globe Newspaper Company v. Massachusetts Bay Transportation Authority Retirement Board, 416 Mass. 1007, 1007 (1993) (citing Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission, 414 Mass. 582 (1993)).

Law Enforcement Councils

19. For over 50 years, local police departments in Massachusetts have formed regional law enforcement councils ("LECs") to share information and resources for public safety purposes.

20. In 2010, the Massachusetts Legislature identified LECs as a "governmental unit" in a bill establishing a statewide public safety mutual aid agreement.

21. This bill set forth a framework for the provision of mutual aid in the case of a public safety incident, and designated particular "governmental units" that could join this agreement. G.L. c. 40, § 4J(a) & (c).

22. Identifying LECs as one such governmental unit that could join the agreement, the Legislature described LECs as "nonprofit corporation[s] comprised of municipal police chiefs and other law enforcement agencies established to provide: (i) mutual aid to its members pursuant to mutual aid agreements; (ii) mutual aid or requisitions for aid to non-members consistent with section 8G of this chapter or section 99 of chapter 41; and

(iii) enhanced public safety by otherwise sharing resources and personnel.” Id. § 4J(a) & (c).

23. The only other governmental units authorized to join the statewide agreement were cities, towns, counties, regional transit authorities, water & sewer commissions, fire districts, regional health districts and regional school districts. Id.

24. LECs pool the resources of neighboring police agencies to procure and provide services and equipment that the agencies could not afford on their own. These resources are then applied to joint policing efforts, such as SWAT teams and investigative units.

See NEMLEC: Law Enforcement Council, <http://www.nemlec.com/councils.htm>

(Exhibit B).

25. LECs share manpower as well as physical resources. Officers from the member communities join together to form specialized units, such as SWAT teams and RRTs, which would be impossible for each police department to maintain on its own. These officers train together and carry out joint operations at the request of the member police departments. See id.

NEMLEC’s Structure

26. NEMLEC formally incorporated in 1969 as a consortium of 22 police and sheriff’s departments. See NEMLEC: History, <http://www.nemlec.com/history.htm> (Exhibit C).

27. NEMLEC’s self-described purpose was, and is, “the furtherance of the propagation of mutual aid and assistance, cooperation and the comprehensive coordination of effort and service in the interest of public safety within and among the member communities.” Articles of Organization, Northeastern Massachusetts Law

Enforcement (Oct. 2, 1974); see also Articles of Amendment, Northeastern Massachusetts Law Enforcement (Feb. 12, 1986), Articles of Amendment, Northeastern Massachusetts Law Enforcement (Nov. 14, 2007). (Exhibit D).²

28. NEMLEC is still exclusively a consortium of police and sheriff's departments. Currently, NEMLEC is made up of approximately 58 member police and sheriff's departments in Middlesex and Essex Counties. This includes more than 3,000 sworn police officers and 700 sworn sheriffs, serving more than 1.6 million people. See NEMLEC: Who We Are, <http://www.nemlec.com/who.htm>. (Exhibit E).

29. "NEMLEC functions in many respects as a specialized, regional policing operation." See NEMLEC: What We Do, <http://www.nemlec.com/do.htm> (Exhibit F).

30. NEMLEC has at least six units that engage in field operations: the SWAT and RRT unit, the Computer Crime Unit, the Motorcycle Unit, the School Threat Assessment/Response System, and the Regional Communications and Incident Management Assistance Team. See NEMLEC: Operational Units, <http://www.nemlec.com/units.htm>. (Exhibit G).

31. The operational units are overseen by police chiefs of, and composed of officers from, the member police departments. These officers train together and respond when needed. See id.; NEMLEC: RRT/SWAT, <http://www.nemlec.com/swat.htm> (Exhibit H).

32. Officers are on duty for their respective departments when acting in one of these units, but they answer to the police chief who is in charge of the operation, and follow the rules, procedures and protocols established by NEMLEC. See North Eastern

² In its 2007 Articles of Amendment, NEMLEC added that it "is also formed for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954, as from time to time amended, and within the meaning of G.L. c. 180, §4, as amended." (Exhibit D).

Massachusetts Law Enforcement Council Interagency Mutual Aid/Assistance

Agreement: Lowell (April 9, 2008). (Exhibit I).

33. NEMLEC's governance is directly responsive to the needs of the member law enforcement agencies.

34. NEMLEC is governed by an Executive Board, which oversees the operational units and administrative committees. The Executive Board, composed of six member police chiefs, conducts NEMLEC's primary organizational decision-making. See NEMLEC: Org Chart, <http://www.nemlec.com/org.htm>. (Exhibit J).

35. Operational units submit quarterly reports to the Executive Board regarding their activities. See Exhibit I.

36. Teams of police chiefs oversee NEMLEC's four administrative and management committees: technology, training, finance and standards. See Exhibit J.

37. NEMLEC's organizational structure also includes a staff attorney, executive director and administrative assistant. See id.

38. NEMLEC purports to operate by interagency agreements made in accord with G.L. c. 40, § 8G, and G.L. c. 41, § 99, which authorize cities and towns to enter into mutual aid agreements for police services. See Exhibit I.

39. NEMLEC promulgates rules, regulations, policies, procedures, protocols and standards of conduct, which each member police department must agree to follow. See id.

40. In addition, each police department that joins NEMLEC must commit membership dues and at least 10% of its police force to a NEMLEC operational unit. See Luke Steere, NEMLEC – Help Where it's Needed, NASHOBA PUBLISHING, Sept. 23, 2011. (Exhibit K).

41. NEMLEC obtains money from government grants. See <http://twitter.com/NEMLEC/status/318534916008726528/photo/1>. (Exhibit L).

42. NEMLEC also receives funds raised by the NEMLEC Police Foundation, a separate 501(c)(3) organization.

NEMLEC's Resources & Activities

43. NEMLEC possesses the power to enter into contracts, receive and spend money, and create and manage tactical units.

44. NEMLEC's resources include (a) specialized systems and technologies that facilitate police practices and (b) organized teams with specialized law enforcement skills.

45. Thus, NEMLEC purchases and provides access to resources that individual agencies cannot always afford on their own.

46. For example, NEMLEC has purchased or otherwise acquired a Lenco BearCat, an armored personnel carrier that is designed for military or law enforcement use. See <https://twitter.com/NEMLEC/status/463189845062725634/photo/1> & <https://twitter.com/NEMLEC/status/233199353395830785/photo/1> (Exhibit M).

47. NEMLEC has also purchased or otherwise acquired automatic weapons. See id.; <https://twitter.com/JonHill45/status/208173374768287744>. (Exhibit N).

48. NEMLEC has also purchased or otherwise acquired a mobile incident control center valued at approximately \$1 million. See Exhibit L.

49. NEMLEC has also purchased or otherwise acquired electronic fingerprint gathering and transmission tools, night vision and remote viewing equipment, self-

contained breathing apparatuses, and DNA testing mechanisms. See Collected NEMLEC News Stories. (Exhibit O).³

50. NEMLEC trains, maintains and dispatches specialized units that carry out traditional law enforcement activities.

51. Each of these specialized units is run by, and entirely composed of, on-duty police officers from member jurisdictions. See Exhibit I.

52. Officers participating in these units do so with full law enforcement authority. See id.

53. One of these operational units houses the Regional Response Team, which NEMLEC defines as “a tactical unit comprised of sworn police officers that consistently train to provide NEMLEC members and communities with a highly trained and well-equipped tactical unit that can be deployed in the event of an emergency or major event” such as civil disturbances, natural or man-made disasters, and search and rescue missions. See Exhibit H.

54. The same unit includes the SWAT Team, a “highly trained and well-equipped unit” that is “specifically equipped and trained for forced entries.” The SWAT Team assists in a wide range of law enforcement activities, which include serving warrants for drug offenses and dealing with active shooters or armed barricaded subjects. NEMLEC’s SWAT Team members dress in military-style gear labeled “NEMLEC SWAT.” Exhibit H; Exhibit N.

³ Tom Spoth, Psych Tests for Standoff Suspect, LOWELL SUN (April 14, 2005); Lisa Redmond, Pepperell Man Charged in Standoff, LOWELL SUN (Aug. 6, 2005); Jack Minch and Dennis Shaughnessey, SWAT Raid Nabs Three in Lowell Cocaine Seized as Police Continue Gang Campaign, LOWELL SUN (Feb. 3, 2005); Harlyn Aizley, Technology No Match for Cop on the Beat, THE EAGLE-TRIBUNE, <http://www.nemlec.com/articles/technology.pdf>.

55. RRT and SWAT Team members train together on a regular basis and are on call to conduct certain law enforcement operations.

56. Although NEMLEC is structured as a non-profit corporation, its units function with all the privileges and immunities afforded to law enforcement agencies, such as entering homes by force and without consent, investigating and arresting individuals, serving warrants, and using lethal weapons.

57. For example, within the past month the NEMLEC SWAT Team has assisted in the service of search warrants for narcotics in Lowell and Stoneham. NEMLEC's BearCat was deployed on at least one of those occasions. See <https://twitter.com/NEMLEC/status/477066637963976704/photo/1> & <https://twitter.com/NEMLEC/status/289747187460608002/photo/1>. (Exhibit P).

58. The NEMLEC SWAT Team also took part in the manhunt following the Boston Marathon bombing in May, 2013. Its officers conducted door-to-door searches of Watertown homes wearing combat gear and carrying automatic weapons.

59. In February 2005, the NEMLEC SWAT Team broke through a door and ignited flash-bang devices in a gun raid. In April of that same year, the NEMLEC SWAT Team used armored vehicles and detonated explosives to take into custody an individual who had barricaded himself in his home. Later that year, the NEMLEC SWAT Team responded to a five-hour hostage situation with automatic weapons, tear gas and night goggles. See Exhibit O.

60. As these examples illustrate, NEMLEC is a "specialized, regional policing operation," that routinely carries out traditional law enforcement functions.

61. NEMLEC is able to conduct such activities only because it operates under the color of law.

ACLUM's Public Records Requests

62. To document and inform the public about regional policing operations, ACLUM sent letters to LECs throughout the Commonwealth in July 2012.

63. One of these letters was sent to then NEMLEC president Chief James Cornier, requesting records made or received by NEMLEC concerning the RRT and SWAT Team. See Exhibit A. The letter included a request for training materials, incident reports, deployment statistics, guidelines, regulations, equipment procurement records, budgets, agreements with other agencies and documents relating to the structure of the RRT/SWAT units. See id.

64. To date, neither Chief Cornier nor NEMLEC has responded.

65. Instead, purporting to respond on behalf of the LECs, Chief Counsel of the Massachusetts Chiefs of Police Association Jack Collins contacted ACLUM in January 2013. Mr. Collins informed ACLUM that the LECs would not release any documents based on their belief that they are private, non-profit organizations, exempt from the Massachusetts public records laws.

66. In February 2014, ACLUM sent a letter to the current NEMLEC president, Chief Michael Begonis, following up on the July 2012 request to NEMLEC. See February 20, 2014 Letter from Laura Rótolo, ACLUM, to Chief Michael Begonis, NEMLEC (Exhibit Q). The letter asked whether Chief Begonis maintained this articulated position, and indicated that ACLUM would assume NEMLEC's position remained the same if there was no response by the end of February. See id.

67. To date, Chief Begonis has not responded.
68. ACLUM also sent requests to five NEMLEC member police departments for their Memoranda of Understanding with NEMLEC, as well as budgets showing financial contributions to, and funds and equipment received from, NEMLEC. See 2014 Letters from Laura Rótolo, ACLUM, to Chief Femino, Chief Molis, Chief Lavallee, and Chief Romero, respectively, Somerville PD, Malden PD, Lowell PD and Lawrence PD and February 20, 2014. Letter from Laura Rótolo, ACLUM, to Chief Deveau, Watertown PD (Exhibit R).
69. The Lowell Police Department responded by releasing a NEMLEC interagency/mutual aid agreement and financial documents. See Exhibit I; February 26, 2014 Letter from Michael Carlson, Lowell, to Laura Rótolo, ACLUM. (Exhibit S).
70. The Lawrence Police Department responded with records showing annual membership fees paid to NEMLEC. See February 19, 2014 Letter from Amanda Wall, Lawrence PD, to Laura Rotolo, ACLUM. (Exhibit T).
71. Two other police departments—Somerville and Watertown—did not release any documents.
72. A captain from the Malden Police Department denied the requested documents, responding that he had “spoken with a representative from NEMLEC” who informed him “that the position of NEMLEC is that it is a ‘Non-Profit’ and therefore exempt from the F.O.I.A.” February 13, 2014 Letter from Captain Glenn Cronin, Malden PD, to Laura Rótolo, ACLUM. (Exhibit U).

STATEMENT OF CLAIMS

Count I

(Declaratory Judgment, G.L. c. 231A, §1)

73. ACLUM realleges and incorporates by reference the allegations above.
74. An actual controversy has arisen between ACLUM and NEMLEC as to whether NEMLEC and its records are subject to the Public Records Law.
75. Although NEMLEC is structured as a tax-exempt non-profit corporation, its sole purpose is to carry out a traditional government function—law enforcement—while operating with all of the privileges and immunities of a government entity.
76. NEMLEC has a statutory designation as a “governmental unit,” acts under governmental supervision and receives public funding. In addition, its records are created by police officers and sheriffs acting in their official capacities.
77. For these reasons, this Court should declare that, for purposes of the Massachusetts Public Records Law: (a) NEMLEC is an “agency,” “department,” “division or authority” of political subdivisions of the Commonwealth; and (b) NEMLEC’s records are “public records” subject to disclosure under G.L. c. 66, § 10, and G.L. c. 4, § 7, Twenty-sixth.

Count II

(Violation of G.L. c. 66 § 10 and c. 4, § 7, Twenty-sixth)

78. ACLUM realleges and incorporates by reference allegations contained above.
79. Under G.L. c. 66 § 10, “every person having custody of any public record . . . shall, at reasonable times and without unreasonable delay, permit it . . . to be inspected and examined by any person” upon request.
80. By refusing to provide the documents requested by ACLUM, NEMLEC has violated the Massachusetts Public Records Law.
81. ACLUM is entitled to injunctive relief ordering compliance with its requests.

Prayer for Relief

WHEREFORE, Plaintiff prays that the Court:

1. Issue the requested declaratory relief;
2. Order the Defendant (a) to conduct a good faith review of its records and to identify all records and data that are responsive to Plaintiff's Request; and (b) to disclose promptly all public records to the Plaintiff; and
3. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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June 24, 2014

VERIFICATION

I, Laura Rótolo, hereby declare under the pains and penalties of perjury that the factual allegations contained in this Verified Complaint for Injunctive Relief are true and accurate to the best of my knowledge, information, and belief, on this 24th day of June, 2014.