COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, Plaintiff v. NORTHEASTERN MASSACHUSETTS LAW ENFORCEMENT COUNCIL, INC., Defendant	Civ. A. No. 2014-02035-G

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

By this action, the plaintiff American Civil Liberties Union Foundation of Massachusetts ("ACLUM") seeks a declaration that the defendant Northeastern Massachusetts Law Enforcement Council, Inc. ("NEMLEC") is an entity whose records are subject to disclosure under the Massachusetts Public Records Law ("PRL"). Specifically, ACLUM asks the Court to declare that "NEMLEC is an 'agency,' 'department,' 'division or authority' of political subdivisions of the Commonwealth" within the meaning of the PRL.[1]

ACLUM's requested declaration is not consistent with the language and structure of the controlling statute, which must be strictly construed to effectuate the legislative intent. Under the PRL, only the records of entities that fall into one of four specified categories set forth in the

[1] Complaint, Count I, ¶ 77. Count II seeks ancillary injunctive relief to enforce a particular public records request first issued in 2012. As there is no basis for concluding that NEMLEC will not comply with the request if the Court decides that the PRL applies, the disposition of Count I will obviate the need to reach Count II. Accordingly, NEMLEC does not separately address the propriety of entering the injunctive relief requested by Count II, except to note that if the PRL applies to NEMLEC, it will have the prerogative of obtaining prepayment of estimated search, segregation, and copying fees. *See* G.L. c. 66, § 10, and 950 CMR 32.05. That exercise is premature at this time.

definition of "public record" at G.L. c. 4, § 7, *Twenty-sixth,* are subject to the mandatory disclosure provisions of G.L. c. 66, § 10. Because NEMLEC is clearly not an entity within any one of the categories specified, including a "political subdivision" of the Commonwealth (and the Complaint does not offer well-pleaded facts to the contrary), it is not subject to the PRL. Accordingly, ACLUM is not entitled as a matter of law to the relief it seeks.[2]

Facts Contained in the Complaint

The defendant briefly summarizes the relevant facts here and refers to others in the argument set forth below. Under Mass. R. Civ. P Rule 12(b)(6), non-conclusory factual allegations in the Complaint are deemed to be true for purposes of a motion to dismiss, even though the defendant may dispute their accuracy. Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 445 Mass. 745, 749 (2006). Accordingly, this summary is drawn from the facts and documentary materials set forth in the Complaint, as well as matters subject to judicial notice where indicated.

Formation. NEMLEC originated in 1963 as a group of police chiefs who began to meet to share information and discuss strategies to address common problems. Compl., Exh. C. By 1969, twenty-two police departments were participating and the group formed a non-profit corporation. *Id.*; Compl., ¶ 26 (1969 incorporation). As declared in ¶ 2 of NEMLEC's 1974 Articles of Organization, its purpose is "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 member communities." Compl. ¶ 27 & Exh. D.[3]

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[2] Dismissal of the complaint, as opposed to entry of a binding declaration that documents in the custody of NEMLEC are not subject to the public records law, is appropriate. See Harvard Crimson, Inc. v. President and Fellows of Harvard College, 445 Mass. 745, 748 n.5 (2006).

[3] NEMLEC's Articles were subsequently amended to reflect its status as a § 501(c)(3) organization under the Internal Revenue Code. Compl., Exh. D (1986 and 2008 Articles of Amendment). NEMLEC notes

Membership. The membership of NEMLEC is elastic. At the present time, 58 municipal police departments and 2 sheriff's departments in Middlesex and Essex counties have elected to join NEMLEC. Compl., ¶ 28 & Exh. E.[4] Members join NEMLEC by voluntarily entering into a mutual aid agreement ("MAA"). Compl., ¶ 38; Exh. I). Similarly, any member desiring to withdraw from NEMLEC is free to do so by notifying the other members of its withdrawal. Exh. I (MAA, p. 6). Further, in the event of a change of leadership in a member department (by retirement or otherwise), the incoming chief of police is asked to endorse his or her department's continued participation in NEMLEC by re-subscribing to the MAA. *Id.* at pp 6-7. As is characteristic of other membership organizations, the members of NEMLEC contribute dues and agree to abide by other features of the rules of the organization. Compl. ¶ ¶ 39-40.[5]

Operation and Personnel. While NEMLEC is active in coordinating requests for and the provision of mutual aid, training, and the development of programs and capabilities that would be prohibitively expensive (if not wasteful) for all individual departments to establish and maintain, all actual police operations are conducted under local auspices and control. Under the MAA, any assistance coordinated by NEMLEC is extended to a member in any given case only if requested by the member's chief of police (or designee) with jurisdiction over the situation and

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here that obtaining tax-exempt status under § 501(c)(3) would be unnecessary if it were a "political subdivision," which is not subject to federal taxation at all.

[4] The Court may take judicial notice that there are 54 municipalities in Middlesex County and 34 municipalities in Essex County, for a total of 88. Since the Sheriff's Departments in both counties are members, this leaves 32 municipalities that have not chosen to join NEMLEC at this time.

[5] ACLUM alleges that members "must agree to follow" the "rules, regulations, policies, procedures, protocols and standards of conduct" that NEMLEC develops and adopts (ACLUM uses the word "promulgates"). Compl. ¶ 39. NEMLEC does not read ACLUM's allegation as intended to suggest that NEMLEC has legal authority to regulate coercively the activities of the members by means of statutorily conferred, legally binding, and unilaterally imposed rule-making power. Rather, a member is bound by such "rules" only in the sense that one is bound to honor contractual commitments. Further, unlike regulated entities in the traditional sense, a member may opt out at any time by giving notice. Compl., Exh. I (MAA, p. 6).

no aid is provided by a member without the authorization of the sending member's chief (or designee). Exh. I (MAA, at pp. 3-4). Further, any personnel or other assistance that is extended by a sending member under the NEMLEC framework is placed under the sole operational control of the requesting department's chief of police. *Id.*, ¶ C. NEMLEC's "organizational structure" includes a staff attorney, an executive director, and an administrative assistant. Compl., ¶ 37.[6] All police functions and operations are conducted by police personnel employed by requesting or sending members under the supervision and control of the requesting member's chief, in accordance with the MAA. Compl., ¶¶ 31-32.[7] Under the MAA, all salary and overtime costs and other expenses incurred by a sending member are assumed by the sender, unless the receiving member offers reimbursement, in which case the senders are reimbursed on a pro rata basis. *Id.* at 4-5, ¶¶ B-C.

[6] While NEMLEC accepts the allegation in ¶ 37 as true for purposes of the motion to dismiss, in fact, NEMLEC employs only an executive director. In any event, ACLUM does not allege that NEMLEC employs any police personnel.

[7] ACLUM alleges that "NEMLEC trains, maintains and dispatches specialized units that carry out traditional law enforcement activities" (Compl., ¶ 50) and "[o]fficers participating in these units do so with full law enforcement authority"(¶ 52). These allegations must be read in conjunction with ¶ 51, which states that "[e]ach of these specialized units is run by, and entirely composed of, on-duty police officers from member jurisdictions." Accordingly, the traditional law enforcement activities of the specialized units referred to in ¶ 50 (including those alleged in ¶ 56) are conducted with "full law enforcement authority" that derives from the authority given by law to sworn police personnel duly authorized by their respective police departments to participate in a mutual aid assignment.

Argument

I. THE PRL DOES NOT APPLY TO NEMLEC BECAUSE IT IS NOT AN ENTITY OF A KIND SPECIFICALLY DELINEATED IN CLAUSE 26.

A. The Controversy Between the Parties May Be Resolved By Statutory Interpretation.

At bottom, this case presents an issue of statutory interpretation. The kinds of entities subject to the PRL are listed in the definition of "public record" as set forth at G.L. c. 4, § 7, *Twenty-sixth* (hereafter, "clause 26"). That definition provides in pertinent part as follows:

> "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 [public employee pensions]** . . . unless such materials or data fall within [one of twenty exemptions based on the nature or content of the record]. (Emphasis added).

Thus, to be a "public record" a document of some kind must be made or received by an officer or employee of one of the following kinds of entities:

1. any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth,
2. any political subdivision thereof [i.e., of the Commonwealth],
3. any authority established by the general court to serve a public purpose, or
4. any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of [public employee pensions].

Clearly, NEMLEC is not an entity described in any of these categories. ACLUM makes no allegation or claim suggesting the NEMLEC is one of either the first, third, or fourth of the

statutory categories. It is not a Commonwealth-level entity; and even if it could be so characterized, it is not one of the specified operational units of the Commonwealth, all of which are created by statute to exercise specified powers by elected or appointed officers with respect to some specified subject matter. Nor is it an "authority established by the general court," not least for the obvious reason that it was not established by an act of the General Court. Finally, although it is a legal entity (*viz.*, a chapter 180 corporation), it is not involved in any way with pensions. Thus, applying the ordinary meanings of the terminology used in the statutory definition, NEMLEC is not any one of these entities subject to the PRL.

By default then, NEMLEC is subject to the PRL only if it is a "political subdivision [singular] of the Commonwealth." The Complaint fails to allege facts traditionally regarded as indicia of an entity's status as a "political subdivision." It does not allege, for example, that NEMLEC is established or chartered by an act of the Legislature, much less expressly designated by law a "political subdivision.[8] Nor does it allege facts showing that NEMLEC has a legislatively defined geographical jurisdiction.[9] It does not allege that NEMLEC has the power

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[8] In Simmons v. Clerk-Magistrate of Boston Div. of Hous. Court Dep't, 448 Mass. 57, 62-63 (2006), the SJC found that the Boston Housing Authority was not to be treated as a "political subdivision" of the Commonwealth, largely due to the absence of a legislative designation as such in its enabling act. "[A]bsent statutory language to that effect, we will not infer that a housing authority is a political subdivision for purposes of G.L. c. 185C, § 19." *Id.* at 63.

[9] See, e.g., Fair v. Sch. Emp. Ret. Sys. of Ohio, 44 Ohio App. 2d 115, 119 (Ohio Ct. App. 1975) ("A political subdivision of the state is a geographic or territorial division of the state rather than a functional division of the state. Almost invariably the statutory definitions of 'political subdivision' involve a geographic area of the state which has been empowered to perform certain functions of local government within such geographic area. Accordingly, a 'political subdivision of the state' is a geographic or territorial portion of the state to which there has been delegated certain local governmental functions to perform within such geographic area."); Maryland-Nat'l Capital Park & Planning Comm'n v. Montgomery Cnty., 267 Md. 82, 93 (1972) (commission "possesses none of the characteristics which mark a 'political subdivision,' there being absent the geographical territory which the term connotes, as well as the other attributes suggested by the cases such as inhabitants exercising local government for the benefit of the residents within an area and the popular election of public officials who function for a general public purpose.").

to tax[10] or the ability to take property by eminent domain.[11] In short, the Complaint fails to allege any facts sufficient to establish NEMLEC's status as a "political subdivision" of the Commonwealth or any other entity within the scope of the PRL.[12]

While ACLUM does not expressly claim that NEMLEC is itself a "political subdivision" of the Commonwealth, the nature of the declaration it seeks reflects a view that NEMLEC is a covered entity because it is either an "agency," "department," "division" or "authority" (ACLUM does not specify which) of "political subdivisions [plural] of the Commonwealth." Compl., ¶ 77. This, of course, is an invented formulation that must be disfavored for a number of reasons, not least because it does not appear in the statute itself. In any event, NEMLEC is not a "political subdivision" under any test, being neither a body politic established by the Legislature nor an entity with a legally defined geographical jurisdiction within the

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[10] *See, e.g.,* Richmond Cnty. Hosp. Auth. v. McClain, 112 Ga. App. 209, 211 (1965) (power to tax, to elect officials, and a political geographic area are "characteristics ... generally inherent in the concept of a political subdivision"); Winberg v. Univ. of Minnesota, 499 N.W.2d 799, 802 (Minn. 1993) (university not a "political subdivision" "because [it] has no direct or indirect power to cause taxes to be levied").

[11] *See* NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 608 ("[A]uthority to exercise the power of eminent domain weighs in favor of finding an entity to be a political subdivision.").

[12] In the National Labor Relations Act, the definition of "employer" excludes "any State or political subdivision thereof." 29 U.S.C. § 152(2). In NLRB v. Natural Gas Util. Dist. of Hawkins Cnty, 402 U.S. 600, 605-09 (1971), the Supreme Court determined that a natural gas utility district was an exempt "political subdivision" where it was (a) established pursuant to a state statute and granted "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature" (including the power of eminent domain): (b) declared by the statute to be "a 'municipality' ... and ... a body politic and corporate:" (c) authorized to issue bonds exempted from all federal, state, county, and municipal taxes: (d) specifically required by its enabling act to make its records open to public inspection; (e) required by law to publish its annual statement showing its financial condition, and other information; (f) empowered to hear any protest to its rates (g) required to make and to publish written findings as to the reasonableness of its rates, subject to judicial review; (h) governed by commissioners initially appointed by an elected public official to serve four-year terms subject to removal initiated by the Governor, the state attorney general, the county prosecutor, or ten citizens; and (i) empowered to subpoena witnesses and to administer oaths in investigating District affairs. The Complaint alleges no facts attributing any of these characteristics to NEMLEC.

Commonwealth within which it exercises powers traditionally associated with status as a political subdivision. Its legal existence and authority stems from its status as a G.L. c. 180 corporation, a type of entity that the SJC has not previously confused with "political subdivisions." *See* Helmes v. Commonwealth, 406 Mass. 873, 876 (1990) ("The committee, of course, is not a political subdivision of the Commonwealth. It is a charitable corporation organized under the General Laws of the Commonwealth.").[13]

B. The Governing Interpretive Principles Give Primacy to the Statutory Text, Which Must Be Strictly Construed.

Before addressing ACLUM's reading of clause 26 in greater detail, it is worth stating at the outset the special analytical principles that the SJC has adopted for the proper construction of statutory definitions in general, as well as for the very language at issue here identifying entities subject to the PRL. Together, these principles emphasize the primacy that is to be given to the statutory language, which is to be read strictly, leaving policy judgments (or the correction of suspected inadvertent omissions) to the Legislature.

First, the general rule concerning the construction of definitional statutes is that "[a] definition which declares what a term means ... *excludes any meaning that is not stated.*" Perez v. Bay State Ambulance & Hosp. Rental Serv., Inc., 413 Mass. 670, 675 (1992) (emphasis added), *quoting* Colautti v. Franklin, 439 U.S. 379, 392-393 n. 10 (1979), *citing* 2A C. Sands, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp.1978). In Perez, the SJC considered the application of G.L. c. 231, § 60B (requiring medical malpractice tribunals in actions against health care providers) to an EMT. The statute's definition of "provider of health

[13] The committee the Court referred to in Helmes is the "U.S.S. Massachusetts Memorial Committee, Incorporated, a charitable corporation established under chapter one hundred and eighty," as described in G.L. c. 6, § 124A.

care" was not based on a statement of the defining characteristics of such a provider (other than to require that it be licensed by the Commonwealth), but instead defined the term by means of a list including most kinds of licensed health care professionals, but without specific reference to EMTs.[14] Nonetheless, the Superior Court judge found that EMTs were "licensed by the Commonwealth" and were "within the spirit" of the law and that therefore a medical malpractice claim against an ambulance company and its EMT employees was subject to review by a medical tribunal before it could proceed. Perez, *supra* at 675. The SJC reversed, holding that the omission of EMTs from the long list of other licensed health care professionals must be deemed to be intended by the Legislature and therefore given effect, notwithstanding the lower court's assessment of the "spirit" of the law.[15]

Like the definition at issue in Perez, clause 26 does not state the essential defining characteristics of an entity subject to the PRL, but rather lists categories of entities (such as "political subdivisions" or "authorities created by the general court"), using words describing variations of sub-units ("agency, executive office, department, board, commission, bureau, division or authority") only where intended. The drafters of clause 26 omitted in the original three categories other kinds of entities (e.g., instrumentality, corporation, contractor, partnership,

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[14] The seventh unnumbered paragraph of § 60B states: "For the purposes of this section, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment."

[15] Perez was expressly reaffirmed in Carter v. Bowie, 432 Mass. 563, 566 (2000), on the grounds that giving a general meaning to the definition would run afoul of the principle that no statutory words are to be rendered superfluous, and a general meaning would render the list itself superfluous. *See also* Bulger v. Contributory Ret. Appeal Bd., 447 Mass. 651, 660 (2006) (the need to be "differentially precise in according discrete, and not identical, meanings to separate, yet related, standards reflected in statutory language . . . has additional force when dealing with statutory definitions" [citing Perez; interior quotation marks omitted]).

consortium, subsidiary, membership organization) that are more suggestive of the kinds of entities through which a covered entity might perform its functions or from which it might find assistance in performing its functions. Under the Perez principle, these latter kinds of entities must be deemed to be excluded.

Alternatively, as illustrated by the fourth category added to clause 26 in 2013,[16] the Legislature could have structured the definition in terms of function. That category includes "any person, corporation, association, partnership or other legal entity *which receives or expends public funds for the payment or administration of [public employee pensions].*" (Emphasis added). Clearly, if the Legislature had intended that the PRL apply to "any person, corporation ... or other legal entity" that is involved in some specified governmental activity (such as municipal functions generally or law enforcement in particular), it knew how to express that intent.

Second, as applied to clause 26, the Perez principle is reinforced by the SJC's holdings that the statutory language defining the application of the PRL must be strictly construed. In Harvard Crimson, the SJC emphasized that it "has construed strictly the scope of G.L. c. 4, § 7, Twenty-sixth, to preclude the public disclosure of documents held by entities *other than those specifically delineated in the statute.*" 445 Mass. at 750 (emphasis added).[17] As the italicized

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[16] *See* St. 2013, c. 38, § 4.

[17] The Court cited cases which it characterized as relying on a restrictive, not expansive, reading of clause 26. *See id.* at 750-751, citing the following cases and summarizing their holdings as follows: "Lambert v. Executive Director of the Judicial Nominating Council, 425 Mass. 406, 409 (1997) (records of judicial nominating council not "public records" subject to disclosure where Governor is not "agency, executive office, department, board, commission, bureau, division or authority" of Commonwealth within explicit meaning of G.L. c. 4, § 7, Twenty-sixth); Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd., 416 Mass. 1007 (1993) (records of retirement board not subject to public disclosure under G.L. c. 66, § 10, where the entity is not a "board" of the Commonwealth under G.L. c. 4, § 7, Twenty-sixth); Westinghouse Broadcasting Co. v. Sergeant–at–Arms of the Gen. Court, 375 Mass. 179, 184 (telephone billing records of Legislature not "public records" subject to disclosure where Legislature

language in the quote from the Harvard Crimson case indicates, for the PRL to apply to an entity, the entity must be of a kind "specifically delineated" in clause 26. Given the significant impact that the PRL has on those entities to which it applies, the Court's requirement that a legislative intention to include a category of entity be stated only in clear and unambiguous language is understandable. Here, no such language can be found in clause 26 to capture a non-profit membership organization whose purpose is to support and enhance the law enforcement capabilities of its members through mutual aid arrangements. Because organizations like NEMLEC are not entities specifically delineated as being subject to the mandatory disclosure obligations of its records under the PRL, the complaint should be dismissed.

II. ACLUM'S CLAIM THAT THE PUBLIC RECORDS LAW APPLIES TO NEMLEC IS BASED ON A FLAWED ANALYSIS.

Except what may be gleaned from a reading of its Complaint, ACLUM has not heretofore set out a theory of interpretation in support of its claim that it has a right under the PRL to obtain NEMLEC's records.[18] It appears from its pleading that ACLUM relies on an interpretation less faithful to the words of the statute than the case law demands. First, it seeks a declaration that NEMLEC is a covered entity because it is "an 'agency,' 'department,' 'division or authority' of political subdivisions of the Commonwealth." Compl., ¶ 77. Second, ACLUM appears to take the position that if an entity may be characterized as performing or facilitating "public" or

not "agency, executive office, department, board, commission, bureau, division or authority" of Commonwealth within meaning of G.L. c. 4, § 7, Twenty-sixth)."

[18] Since NEMLEC has no definitive articulation of ACLUM's position to review, it may be necessary to reply to ACLUM's opposition to the motion to dismiss.

"governmental" functions, then its records must be "public" and subject to mandatory disclosure under the PRL. NEMLEC addresses each theory in turn.

A. ACLUM's Requested Declaration Is Inconsistent with the Language, Structure, and Intent of the Public Records Law.

ACLUM advances the view that NEMLEC is subject to the PRL because it is "an 'agency,' 'department,' 'division or authority' of political subdivisions of the Commonwealth." Compl., ¶ 77. This view is fundamentally incorrect for a variety of reasons.

First, ACLUM's position requires conflating two distinct categories of covered entities: (a) "any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth" described in the first sub-clause and (b) "any political subdivision thereof," which is the second sub-clause. The first sub-clause is intended — and has been so held — to limit the reach of the PRL to state executive branch agencies below and not including the Office of the Governor. Specifically relying on the language of this sub-clause, the SJC has ruled that the PRL does not apply to the General Court, the Judiciary, and the Governor.[19] In drafting the second sub-clause ("or of any political subdivision thereof"), the Legislature had no cognate need — and therefore no intention — to exempt the chief executive or the legislative body of "any political subdivision thereof," neither of which enjoy the constitutional dignity of the Governor, the General Court, and the Judiciary, nor the protection that Article 30 affords each branch of state government from the interference by the others.

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[19] See, respectively, Westinghouse Broadcasting, 375 Mass. at 184 ("Legislature is not one of the instrumentalities enumerated in G.L. c. 4, s 7, Twenty-sixth, whose records are subject to public disclosure. It is not an "agency, executive office, department, board, commission, bureau, division or authority" within the meaning of s 7, Twenty-sixth."); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 546 (1977) (exclusion of courts from PRL "is fairly clear from the text of c. 4, s 7, *Twenty-sixth*, itself"); Lambert, 425 Mass. at 409 (like the Legislature and the courts, "the Governor also is *not explicitly included* in clause Twenty-sixth" [emphasis added]).

Second, ACLUM's position fails the test of grammar. Each sub-clause after the first is separated by a comma, followed by the phrase "or of." ACLUM's interpretation of the statute thus requires the reader to ignore the significance of the way the Legislature chose to construct the statute. By introducing each sub-clause by the words, "or of," the drafters intended to set off the entities in each sub-clause as a separate category.[20] This style of construction has been relied upon by the SJC to interpret significant texts. For example, in Yont v. Secretary of the Commonwealth, 275 Mass. 365 (1931), the Court was called upon to construe a clause in amendment article 48: "No law ... that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition." The Court parsed the clause as follows:

> The established and recognized rules of grammatical construction require that the words 'current or ordinary expenses' in the quoted clause of article 48 refer to and modify the words 'of the commonwealth' immediately following, and do not extend to appropriations 'for any of its departments, boards, commissions or institutions.' **The word 'for' precedes each division of the quoted clause and marks the difference between the two branches of that clause.** Appropriations 'for the current or ordinary expenses of the commonwealth' alone are excluded from the operation of the referendum by the quoted clause, while appropriations 'for any of its departments, boards, commissions or institutions,' whether for current or ordinary expenses, or for exceptional or momentous expenses, are excluded from the operation of the referendum. *Id.* at 368 (emphasis added).

Just as the "established and recognized rules of grammatical construction" were given decisive significance in Yont, so too should they guide the interpretation of the PRL.

Third, the interpretation offered by ACLUM is inconsistent with common legislative usage. The phrase specifically delineating the entities in the first sub-clause ("agency, executive

[20] ACLUM's reading would thus require the re-writing of the statute to merge the first two sub-clauses into a single category by deleting the comma and inserting new words as follows: "any agency, executive office, department, board, commission, bureau, division or authority of either the commonwealth or any political subdivision thereof, ...".

office, department, board, commission, bureau, division or authority of the commonwealth") is something of a term of art used repeatedly by the Legislature to refer to state-level executive branch agencies. Examples of general laws that use that exact phrase verbatim in contexts clearly limited only to state-level entities include G. L. c. 9, § 26B (defining "state body" for statutes relating to archeological resources and historic places), G. L. c. 21A, § 21 (competitive procurement of electric generation by state agencies), and G. L. c. 30, § 42 (disposal of records held by state agencies). By contrast, however, there are no general laws referring to an "agency, executive office, department, board, commission, bureau, division or authority of *a political subdivision*," even in contexts that are clearly limited to municipal- or county-level entities.[21] This is not to say that the constituent parts of a political subdivision (such as a police "department" or a conservation "commission") are not subject to the PRL; of course they are. But such municipal units are included because, in the words of the Supervisor of Public Records regulation, 950 CMR § 32.03, they are "*within* a political subdivision of the Commonwealth." (Emphasis added). NEMLEC, by contrast, has a separate legal existence and, though it may have working relationships and contractual arrangements with many (but not all) political subdivisions, it cannot be properly said that it is "within" one or more political subdivisions.

Finally, the fact that NEMLEC may have a contractual relationship with one or more political subdivisions that relates to a political subdivision's discharge of its governmental

[21] The reason for the different usage probably stems in part from the considerations described above in part II.A., and also because state-level agencies are typically established by their own separate enabling acts. By contrast, municipal-level administrative units are typically established by blanket authorizing legislation, such as G. L. c. 41, § 97A (police departments; chief of police; powers and duties) or in the charters establishing the municipalities themselves. Thus, a reference to "political subdivisions" automatically subsumes all constituent parts, including their chief executives, legislative bodies, and operating units, such as a police department. The exceptions — specific municipal agencies that are separately established by the Legislature — tend to prove the rule. *See, e.g.,* Lafayette Place Assocs. v. Boston Redevelopment Auth., 427 Mass. 509, 532 (1998) ("The BRA is unique among redevelopment authorities and enjoys a special statutory basis.").

functions does not mean that materials in the custody of NEMLEC are given the same status as the political subdivision's records. The issue of the status of records held by an entity contracting with a covered governmental body has been definitively decided under the Federal analogue of the PRL, the Freedom of Information Act (FOIA). In Forsham v. Harris, 445 U.S. 169 (1980), the Supreme Court held that materials generated, owned and possessed by a company under contract with a government agency to assist in the agency's mission are not "agency records" within the meaning of FOIA when those materials are not in the custody of the federal agency. 445 U.S. at 171. Even where, as in Forsham, the governmental body has reserved a right to access the materials under a provision of the contract, the documents are not subject to mandatory disclosure unless the right of access is in fact utilized and the documents are received into the custody of the agency. 445 U.S. at 182.

There are good reasons for supposing that the same result would be obtained under the PRL. First, the Forsham Court drew support for its conclusion by reference to the contemporaneous definition of "records" in the Records Disposal Act, 44 U.S.C. §3301, quoting that definition as "... all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, *made or received* by an agency of the United States ... ." 414 U.S. at 183 (emphasis supplied by the Court). This definition is obviously the model for the definition of "public records" in the PRL, as every word in the Records Disposal Act definition up to and including the "made or received" language emphasized by the Supreme Court appears in the text of clause 26. That is not an accident. When the current PRL was in its formative stage prior to its enactment in St. 1973, c. 1050, the Attorney General of the United States had already concluded that Congress intended the same language that appears in both the Records Disposal Act and the PRL to be controlling under the

Federal Freedom of Information Act. *See* ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT at 23-24 (1967), reprinted as S. Doc. 93-82, pp. 222-223 (1974). Thus, it is logical to conclude that the drafters of clause 26 intended the "made or received" language to be afforded the same construction that the Supreme Court applied to the cognate federal law in Forsham. *See* Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 815-818 (1978) (discussing the history of the PRL and interpreting the privacy exemption in light of the comparable federal clause in FOIA).

Second, in Globe Newspaper Co. v. Comm'r of Educ., 439 Mass. 124 (2003), the Globe sought MCAS results that the Department of Education had not yet received from its outside contractor. The premature timing of the request prompted the SJC to observe as follows:

> In this case, the Globe filed its request on November 8, six days before the department had possession of the records in question, in other words, *before there were any public records in existence*. In this respect, the request was not effective under the public records law *until the department received the records* on November 14: the ten-day statutory period began to run from that date." *Id.* at 133 n. 6 (emphasis added).

Because the MCAS records were eventually received by the Department, the Court was not required to reach the question whether the MCAS results would be public records if they had never been received by the Department. However, the Court's view that they were not public records *unless and until* they were received by the Department is strongly indicative of the Forsham analysis concluding that a contracting party's materials are not public records *unless* they are made or received by an officer or employee of a covered entity.

B. NEMLEC Is Not Subject to the Public Records Law Simply Because Its Activities Relate to Law Enforcement Functions.

ACLUM appears to suggest that because law enforcement is ordinarily a public or governmental function performed by entities subject to the PRL, and because NEMLEC's activities involve the support of its members' law enforcement functions, it follows that NEMLEC is subject to PRL. The validity of this "government function" approach is undermined by the fact that the SJC has long held (despite the absence of express exclusionary language) that the PRL does not apply to either the General Court or to the Judiciary, each of which performs quintessentially governmental functions.[22] Further, with respect to police functions in particular, the SJC has held that the fact that an entity (Harvard University) that employed individuals to perform police functions under authority of law did not render it subject to the PRL, where it did not fit within the categories of covered entities expressly set forth in clause 26. Harvard Crimson, 445 Mass. at 746 (some officers of the HUPD were appointed special State police officers pursuant to G.L. c. 22C, § 63, and some HUPD officers served as deputy sheriffs).[23] If the employer of persons specifically authorized by law and the designation of the State Police to perform law enforcement functions at the direction of the employer is not subject to the PRL, then *a fortiori* an organization that does not itself employ law enforcement personnel does not thereby fall within the PRL. ACLUM's functional approach does not yield the result it seeks.

ACLUM erroneously seeks to draw support for its functional approach from two 1993 cases, MBTA Ret. Bd. v. State Ethics Commission, 414 Mass. 582 (1993), and Globe

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[22] *See* Westinghouse Broadcasting, 375 Mass. at 184 (Legislature is not an entity within the meaning of PRL); Ottaway Newspapers, Inc., 372 Mass. at 546 (courts not subject to the PRL).

[23] Under G.L. c. 22C, § 63, the State police may appoint employees of an educational institution as special State police officers, conferring "the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied" by such institution.

Newspaper Co. v. MBTA Ret. Bd., 416 Mass. 1007 (1993) (rescript opinion). *See* Compl, ¶ 18. These cases have limited application here. The five-factor analysis in State Ethics Commission, was adopted to construe the undefined term "independent state ... instrumentality" as it is appears the Conflict of Interest Law, G.L. c. 268A, § 1(p). *See id.* at 587-588, 592-593. The term "instrumentality" does not appear in clause 26 and so there is no occasion here to apply factors designed to test for that kind of entity.

The Globe Newspaper case is not to the contrary. In that case the Globe claimed, and the Superior Court judge agreed, that the MBTA Retirement Board was subject to the PRL because it was a creature of the MBTA, serving an MBTA purpose, using funds contributed by the MBTA. In short, the Globe claimed it was an entity (a "board") of the MBTA. 416 Mass. at 1007. The Retirement Board appealed, countering that it was an entity with a legal existence wholly apart from the MBTA, and that its separateness from the MBTA was established by the Court's findings and conclusions about the characteristics of the Retirement Board and its relationship to the MBTA set forth in the State Ethics Commission case, which had been decided a few months after the Superior Court's decision.[24] The SJC reversed. Reprising its findings from the earlier case, the Court concluded that because the Retirement Board had a separate existence and was not a constituent part (*viz.*, a "board") of the MBTA, it was therefore not subject to the PRL.

That the five-factor test in MBTA Ret. Bd. v. State Ethics Commission does not supply the controlling analysis for present purposes is further demonstrated by Harvard Crimson. In considering whether the records of the Harvard University Police Department, which employed

[24] In fact, the Superior Court decision in the Globe Newspaper case was dated January 5, 1993, the same day the State Ethics Commission case was argued in the SJC. The decision was supplied to the SJC soon thereafter while the case was under advisement. See http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-06086.

personnel exercising state-granted police authority, were subject to disclosure under the PRL, the Court did not mention, much less apply, anything akin to the five-factor analysis from the State Ethics Commission case. Indeed, the Court's only citation to the Globe Newspaper case appears in a series of other PRL cases supporting the proposition that "[t]his court has *construed strictly* the scope of G.L. c. 4, § 7, Twenty-sixth, to preclude the public disclosure of documents held by entities *other than those specifically delineated in the statute*." 445 Mass. at 750 (emphasis added).

The "specifically delineated" rule is the Court's last word on how to determine which kinds of entities are subject to the PRL. Because an entity such as NEMLEC is not "specifically delineated" in clause 26, it is not subject to the PRL. Accordingly, the Complaint fails to state a claim upon which the requested relief can be granted and should be dismissed.

Respectfully submitted,

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Dated: Oct. 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by First-Class Mail.

Date: 10/1/14 C Valvo
Carl Valvo