COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REQUEST FOR A HEARING

The American Civil Liberties Union Foundation of Massachusetts ("ACLUM") agrees with the Northeastern Massachusetts Law Enforcement Council ("NEMLEC") that "this case presents an issue of statutory interpretation." Motion to Dismiss at 5 [hereinafter "Mot."]. But NEMLEC's interpretation—that it is *never* required to disclose documents under the Massachusetts Public Records Law—is incorrect. The records at issue in this case are "public records" under Massachusetts law, and NEMLEC is legally required to disclose them.

The Public Records Law ("PRL") has two components: a provision that identifies what documents are public records, *see* G.L. c. 4, § 7, twenty-sixth ("clause 26"), and a provision that identifies which entities must disclose public records, *see* G.L. c. 66, § 10 ("section 10"); 950 CMR 32.03 & 32.05. Under the plain text of these provisions, a request for records must be accommodated if it (1) seeks public records within the meaning of clause 26 and (2) is directed to an entity subject to the disclosure obligation of section 10.

Both of those conditions are satisfied here. The requested documents are held by NEMLEC, and were made or received by either police officers and sheriffs in their official capacity or NEMLEC employees. These documents are public records under clause 26, and NEMLEC is required to disclose them under section 10.

With respect to clause 26, public records include documents made or received by officers or employees of departments of political subdivisions of the Commonwealth. It is beyond dispute that the requested records that were made or received by police officers—who are employees of departments of political subdivisions, *i.e.*, municipal police departments—are public records. Other documents made by NEMLEC employees are also public records because, under the SJC's five-factor test, NEMLEC itself is a department of political subdivisions (namely, its member municipalities) for the purposes of the PRL.

With respect to section 10, the implementing regulations indicate that any "governmental entity" is a "person" that must disclose public records. Like clause 26, the regulations implementing section 10 define governmental entities to include departments of political subdivisions of the Commonwealth. NEMLEC is therefore a "governmental entity"—or, in the alternative, a "person"—that must disclose public records in its custody.

Thus, for the reasons stated below, this Court should deny NEMLEC's motion to dismiss.

STANDARD OF REVIEW

"A motion to dismiss under Rule 12(b)(6) may be allowed only where the factual allegations, accepted as true, do not plausibly suggest an entitlement to relief." *Marabello v. Boston Bark Corp.*, 463 Mass. 394, 398 n.5 (2012). In conducting its analysis, courts "draw

every reasonable inference in favor of the plaintiff." *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

FACTS

NEMLEC is a consortium of 58 police and sheriff's departments in Middlesex and Essex Counties. Compl. ¶ 28. 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. Compl. ¶ 38. Each member department must abide by NEMLEC's rules, regulations, policies, procedures, protocols and standards of conduct; pay dues; and contribute at least 10% of its personnel to NEMLEC units. Compl. ¶¶ 39-40.

Despite being structured as a non-profit organization, NEMLEC operates as a "regional policing operation" that creates and manages tactical units, sets police policy and purchases military-style weapons and vehicles. Compl. ¶¶ 29, 32, 39, 43-49. NEMLEC allocates its resources, including funding from government grants, member dues, and the NEMLEC Police Foundation, in response to the law enforcement needs of its member departments. Compl. ¶¶ 33, 40-42. In this capacity, it has acquired a Lenco BearCat, automatic weapons and a $1 million mobile incident control center. Compl. ¶¶ 45-49.

NEMLEC is governed by an Executive Board of six member police chiefs. Compl. ¶ 34. It also has several operational units that are overseen by police chiefs of, and composed of officers from, the member police departments. Compl. ¶¶ 3, 30-31. These units, which include a Special Weapons and Tactics (SWAT) team and a Regional Response Team (RRT), function with all of the privileges and immunities afforded to law enforcement agencies and engage in field operations such as entering homes by force, making arrests, serving warrants, and using

lethal weapons. Compl. ¶¶ 3, 30-32, 50-56. For example, NEMLEC SWAT teams have served warrants, forcibly entered homes, and used armored vehicles and explosives to take individuals into custody. Compl. ¶¶ 57-60. In carrying out these operations, officers must follow the rules, procedures, and protocols established by NEMLEC. Compl. ¶32.

As part of an effort to document regional policing operations, ACLUM requested documents concerning NEMLEC's SWAT Team and RRT in July 2012. Compl. ¶¶ 5, 62-63. 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. Compl. ¶¶ 5, 62-63. NEMLEC refused this request, claiming that it was not subject to the PRL. Compl. ¶¶ 6, 65-67.

ARGUMENT

A public records request triggers two related but separate questions: is the document a public record as defined by clause 26, and if so, is it in the custody of an entity subject to the disclosure requirement of section 10. *Cf. Brogan v. School Comm. of Westport*, 401 Mass. 306, 307 (1987) (affirming the lower court's ruling "that the records were public records" under clause 26 and that "they were subject to the mandatory disclosure provisions" of section 10). Although NEMLEC collapses these two inquiries, they are distinct. After all, some public records are held by people who are likely not subject to the disclosure obligation (*e.g.*, a private citizen's possession of his or her own birth certificate), while some entities that are subject to the disclosure obligation hold records that are not public (*e.g.*, a police department's possession of an exempted record). Here the requested records are *both* public records *and* held by an entity subject to the disclosure requirement.

I. The requested records are public records under clause 26.

The documents at issue here are public records. Clause 26 defines public record to include all documents:

> **made or received by any officer or employee of an 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 purposes, 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 [one of twenty] exemptions.

G.L. c. 4, § 7, twenty-sixth (emphasis added). As explained below, clause 26 defines public records to include documents made or received by employees or officers of "department[s] . . . of any political subdivision" of the Commonwealth. Here, the requested records were made or received by employees or officers of police departments or NEMLEC itself. In turn, police departments and NEMLEC are each "departments" of "political subdivisions" of the Commonwealth under clause 26.

A. The text and purpose of clause 26 establish that public records include documents made or received by an employee of a department of a political subdivision of the Commonwealth.

Clause 26's list of Delineated Entities—"any agency, executive office, department, board, commission, bureau, division or authority"—modifies *both* "the Commonwealth" *and* "any political subdivision thereof."

The SJC has held that public records include documents "'made or received by any . . . board . . . of any political subdivision.'" *Attorney General v. Bd. of Assessors of Woburn*, 375 Mass. 430, 431 (1978) (quoting clause 26) (alterations in original). It follows that public records also include documents made or received by employees or officers of any other Delineated

Entity of a political subdivision. *See Daveiga v. Boston Public Health Comm.*, 449 Mass. 434, 442 n.13 (2007) (explaining that the "public records statute applies to 'any agency, executive office, department, board, commission, bureau, division or authority *of the [C]ommonwealth, or of any political subdivision thereof*'") (emphasis and alterations in original).

The SJC's rulings therefore establish that documents made or received by employees or officers of departments of political subdivisions are public records. Indeed, documents made or received by employees of departments of cities and towns—which are political subdivisions—are consistently held to be public records. *See, e.g., Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976) (Lexington's Police Department's documents are generally public records, subject to some exemptions, under PRL); *Pottle v. School Committee of Braintree*, 395 Mass. 861 (1985) (Braintree's School Department's documents are public records under PRL). Those cases leave no room to argue that departments of political subdivisions—or, for that matter, other Delineated Entities of political subdivisions—fall outside the reach of clause 26.

Yet that is precisely what NEMLEC argues. It insists that clause 26 defines public records to include documents made or received by employees or officers of departments of the Commonwealth itself, but *not* those made or received by employees or officers of departments of political subdivisions of the Commonwealth. Mot. at 5. That interpretation is squarely foreclosed by *Board of Assessors of Woburn*, *Daveiga*, *Bougas*, and *Pottle*.

Even if it were not precluded by precedent, NEMLEC's interpretation would be wrong for three reasons.

First, NEMLEC's argument lacks support in the text of clause 26. Clause 26 includes departments of political subdivisions by defining public records to include documents "made or

received by any officer or employee of [a department or other Delineated Entity] of the commonwealth, or of any political subdivision thereof." NEMLEC's contrary view assumes that the "or of" before "any political subdivision" must refer back to the words "any officer or employee." To support this assumption, NEMLEC claims that there is a "rule of grammatical construction" that compels the view that documents relating to political subdivisions are public records only if they were made or received by "any officer or employee . . . of any political subdivision" itself. *See* Mot. at 5, 13 (quoting *Yont v. Sec'y of the Commonwealth*, 275 Mass. 365, 368 (1931). But neither grammar nor logic requires that result. In fact, the "or of" preceding "any political subdivision" could just as easily refer back to the list of Delineated Entities. It is fully within the bounds of proper grammar to interpret clause 26—*as the SJC has already done*—to include documents created by employees or officers of Delineated Entities of both "the commonwealth" and "political subdivisions thereof." *See Daveiga*, 449 Mass. at 442 n.13; *Bd. of Assessors*, 375 Mass. at 431.

Second, the text as a whole confirms that the legislature almost certainly did not intend the interpretation now advanced by NEMLEC. If the legislature had aimed to exclude departments of political subdivisions, it could have done so more simply by placing the phrase "political subdivisions" *within* the list of Delineated Entities. That is, it could have defined public records as documents made or received "by any officer or employee of any agency, executive, office, department, board, commission, bureau, division, authority, *or political subdivision* of the commonwealth." But the legislature did not do that; it chose instead to set off the phrase "or of any political subdivision thereof." The reason for that approach is clear: it provides that public

records include documents made or received "by any officer or employee of any [Delineated Entity] . . . of any political subdivision" of the Commonwealth.

Third, NEMLEC's interpretation contradicts the statutory canon requiring courts to "avoid[] absurd results." *Com. v. Moran*, 80 Mass. App. Ct. 8, 12 (2011) (citing *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375-76 (2000)); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). If NEMLEC were correct that the statutory definition of public records did not include documents made or received by employees or officers of "department[s], board[s], commission[s], [etc.] . . . of any political subdivision," then a host of quintessentially public documents would escape the PRL's reach. These would include, for example, all documents made or received by employees or officers of town police departments, school boards, and parks and recreational commissions. That cannot be right. Such an outcome would upend decades of case law holding that these documents are public records, *see, e.g., Bougas*, 371 Mass. 59; *Pottle*, 395 Mass. 861, and would disrupt "the legislative intent to provide broad public access to government documents," *Cape Cod Times v. Sheriff of Barnstable Cnty.*, 443 Mass. 587, 592 (2005).

NEMLEC claims that its reading would not yield this absurd result, but its attempt to avoid this absurdity fails. NEMLEC reasons that documents created by police departments are public records *not* because police departments are departments of political subdivisions, but *instead* because they are "constituent parts" that are "automatically subsume[d]" "within a political subdivision." Mot. 14 & n.21. This argument has no support in clause 26 or in the case law. NEMLEC does not point to a single statute, regulation or case that uses a "constituent-part", "subsuming", or "within" standard for applying any part of the PRL. The only citation that

NEMLEC provides, 950 CMR 32.03, supports ACLUM's interpretation. Reiterating the statuary language, regulation 32.03 defines entities that are subject to the disclosure obligation as "any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth." [1] More fundamentally, it would be passing strange for clause 26 to apply to police departments not because they are "departments . . . of any political subdivision"—language that actually appears in the text of clause 26—but instead because they fit some NEMLEC-invented test for what qualifies as a "constituent part" that is "automatically subsumed" within a political subdivision.

Thus, if NEMLEC were right that clause 26 does not reach departments of political subdivisions, then all police departments would be exempt from that clause. But NEMLEC is not right. As the SJC has held and the plain text of clause 26 confirms, the definition of public records includes documents made or received by employees or officers of any department—police or otherwise— of any political subdivision of the Commonwealth.

B. The requested records are public records under clause 26.

ACLUM seeks documents made or received by sheriffs[2], police officers[3] or NEMLEC employees. Sheriffs are employees of the Commonwealth itself; it is undisputed that documents

[1] This provision also undercuts NEMLEC's suggestion that the phrase "agency, executive office, department, board, commission, bureau, division or authority" is "something of a term of art" reserved exclusively for use at the state level. Mot. at 13-14. As 950 CMR 32.03 demonstrates, this phrase is also used to modify political subdivisions of the Commonwealth. *See also* G.L. c. 268A, § 1 (defining municipal agency for the purposes of the conflict of interests statute as "any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder").

[2] We use the term "sheriffs" to describe sheriffs and their employees.

created by such employees are public records.[4] The remaining documents—made or received by police officers and NEMLEC employees—are public because both are employees or officers of departments of political subdivisions of the Commonwealth.

1. Any requested records made or received by police officers are public records under clause 26.

Many or all of the records at issue in this case were made or received by police officers acting in their official capacities. These documents were made by employees of departments of political subdivisions of the Commonwealth, *i.e.*, the municipal police departments. As discussed above—and as NEMLEC concedes—it is well-settled that such documents are public records under clause 26. *Bougas*, 371 Mass. 59; *Pottle*, 395 Mass. 861; Mot. at 14.

ACLUM requested incident reports, training materials, procurement records, inter-agency mutual aid agreements, and documents pertaining to the deployment, procedures, and protocols of SWAT teams. Compl. ¶ 63. Those documents could have been created only by police officers acting in their official capacities. Private individuals cannot create such documents: they cannot write police reports, create police policy, purchase weapons available only to law enforcement agencies, or bind municipalities by signing mutual aid agreements.

"When a public officer's actions are possible only by virtue of the public office he or she holds, they are official acts" and the documents they create are public records. *Cape Cod Times*, 443 Mass. at 592; *cf. Harvard Crimson, Inc. v. President And Fellows Of Harvard Coll.*, 445

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[3] We use the term "police officers" to describe sworn officers of police departments, superintendents and chiefs of police, and staff members of the police departments.

[4] Since the Legislature abolished Middlesex and Essex counties in 1997 and 1999, respectively, the sheriffs of those counties have become employees of the Commonwealth. G.L. c. 34B §§1 *et seq.*; *Regan v. United States*, 421 F. Supp. 2d 319, 323 (D. Mass. 2006) (holding that the sheriffs and the sheriffs' employees of the abolished counties are employees of the Commonwealth).

Mass. 745, 751-55 (2006) (holding that private university police officers did not create public records where they operated with statutorily limited powers as compared to those exercised by public police officers). Because the police officers were "acting at all times as [] public official[s]" when they made the documents, the documents are public records under clause 26. *Cape Cod Times*, 443 Mass. at 593.

2. Any requested records made or received by NEMLEC employees are public records under clause 26.

NEMLEC's organizational chart includes a staff attorney, an executive director and an administrative assistant. Compl. ¶ 37. Even if these employees are not police officers—without discovery it is impossible to know— the documents they make or receive are still public records because NEMLEC is a department[5] of a political subdivision under Clause 26.

While the text of clause 26 establishes that documents made or received by employees of "any agency, executive office, department, board, commission, bureau, division or authority" of a political subdivision are public records, it does not define terms like "agency" or "department." Nor does any other statute or regulation. This determination cannot turn on title alone; otherwise, unquestionably public entities, such as police departments and school boards, could evade the PRL by renaming themselves "police widgets" or "school doodads." Thus, not surprisingly, the SJC adopted a functional test for determining what constitutes a Delineated Entity under clause 26. *See Massachusetts Bay Transp. Auth. Ret. Bd. v. State Ethics Comm.*, 414 Mass. 582, 589-93 (1993); *Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Ret. Bd.*, 416 Mass. 1007, 1007 (1993). Under that test, NEMLEC is a department of political subdivisions of the

[5] For ease of reference, we use the statutory term "department" to describe NEMLEC, but Plaintiff alleges that the statutory terms "agency", "division" and "authority" equally apply.

Commonwealth for the purposes of clause 26. Specifically, as a regional entity, NEMLEC is a department of each of its member municipalities. *Cf.* 1978-79 Mass. Op. Att'y Gen. 164 n.9 (1979) (noting that "regional housing authorities operate within all the cities and towns joining in the authorities' creation").

The SJC initially announced its five-factor test in *MBTA*, where it construed the term "independent state instrumentality" in the state's Conflict of Interest Law. 414 Mass. at 587-92. But the Court has since applied the same test in *Globe Newspaper* to help construe the Designated Entities listed in clause 26. 416 Mass. at 1007. Both cases considered the following five factors, none of which is dispositive: (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 exercised by government officials, agencies, or authorities over the entity. *See MBTA*, 414 Mass. at 589-593; *Globe Newspaper*, 416 Mass. at 1007.

In this case, each of those factors indicates that NEMLEC is a department of its member municipalities.

First, NEMLEC's creation has "legislative underpinning[s]." *MBTA*, 414 Mass. at 589-90. The Legislature expressly identified Law Enforcement Councils as "governmental unit[s]" in a statute authorizing them to enter into a statewide public safety mutual aid agreement. G.L. ch. 40 § 4J(a) & (c). The other statutorily-defined governmental units are cities, town, counties, regional transit authorities, water and sewer commissions, fire districts, regional health districts and regional school districts. *Id.* Although NEMLEC is also organized as a non-profit organization, its tax-exempt status does not authorize it to make official police policy, conduct

law enforcement operations, or purchase military-style vehicles and weapons. Instead, NEMLEC purports to derive those powers from agreements made under G.L. c. 40, § 8G and G.L. c. 41, § 99. Compl. ¶ 38. On their face, these statutory provisions authorize cities and towns to enter into local mutual aid agreements with each other. Nevertheless, NEMLEC's president signs these agreements— which are "implemented" "under the direction of the NEMLEC"—suggesting that NEMLEC is also a party. Compl. ¶ 38; Exhibit I. These statutorily-rooted agreements are the sole plausible source of NEMLEC's authority to conduct law enforcement activities that other non-profit organizations cannot perform. Compl. ¶ 38; Exhibit I; *cf. MBTA*, 414 Mass. at 590 (holding retirement board did not create public records where the court "c[ould]not discern any legislative underpinning, even indirect, for the creation of the board").

Second, NEMLEC's stated purpose—law enforcement—is a quintessential "governmental function." *MBTA*, 414 Mass. at 590; *see Foley v. Connelie*, 435 U.S. 291, 297 (1978); *Salusti v. Town of Watertown*, 418 Mass. 202, 204 (1994). NEMLEC claims that it "functions in many respects as a regional policing operation." Compl. ¶ 29. Its operational units are run by, and entirely composed of, on-duty police officers who operate with the full range of police authorities and immunities. Compl. ¶¶ 31, 50-52; *cf. Harvard Crimson*, 445 Mass. at 751-54 (holding private university police did not create public records where their powers were "by statute, far less extensive than the powers of regular police officers"). In this capacity, they carry out traditional law enforcement functions including serving warrants, entering homes by force, and investigating and arresting individuals. Compl. ¶ 56-59. A private entity could not perform such activities. *Cf. Globe Newspaper*, 416 Mass. at 1007; *MBTA*, 414 Mass. at 590 (holding

retirement board did not create public records where its function "to administer the pension plan and manage the fund assets" was "performed most often by private entities").

Third, NEMLEC both "receives [and] expends public funds" for public purposes. *MBTA*, 414 Mass. at 587. NEMLEC's resources and personnel are largely paid for by taxpayer dollars: NEMLEC receives government grants, its member police departments pay annual dues and officers assigned to NEMLEC units are paid by their respective municipal police departments. Compl. ¶¶ 4, 40-41. These "public funds" do not "become private in nature" once they are received. *Cf. Globe Newspaper*, 416 Mass. at 1007; *MBTA*, 414 Mass. at 590-91 (holding retirement board did not create public records where public funds became like private wages once they were placed in the pension fund). To the contrary, these resources are used for the exclusively public purpose of providing law enforcement operations.

Fourth, and relatedly, *fifth*, NEMLEC is "control[led] . . .by government officials," *MBTA*, 414 Mass. at 587, whose authority far outweighs any possible "private interests," *id.* at 589. NEMLEC's governance is directly responsive to the needs of its member law enforcement agencies. Compl. ¶ 33. Its Executive Board, which conducts its primary decision-making, comprises six police chiefs; teams of police chiefs oversee each of its four administrative and management committees; and each operational unit is overseen by police chiefs of, and composed of officers from, the member police departments. Compl. ¶¶ 31, 34, 36. There is no evidence that NEMLEC responds to any private interests that offset this government control. *Cf. Globe Newspaper*, 416 Mass. at 1007; *MBTA*, 414 Mass. at 591 (holding retirement board did not create public records where the "significant private interests of the pension fund members . . . outweigh the any public or governmental interest in the [public] funds"). As indicated by its

stated purpose to provide "mutual aid and assistance . . . in the interest of public safety within and among the member communities," Compl. ¶ 27, NEMLEC owes its "primary loyalty" to the government entities controlling its activities, *MBTA*, 414 Mass. at 592.

Particularly when all inferences are drawn against NEMLEC, as is required for a motion to dismiss, "[t]he balancing of the[se] factors indicates" that NEMLEC is a department of political subdivisions under clause 26. *MBTA*, 414 Mass. at 589. In fact, NEMLEC does not dispute that, under the *MBTA* test, it would qualify as a Designated Entity for purposes of clause 26. Instead, it asserts that this Court should ignore that test altogether. NEMLECs arguments in support of this assertion are unpersuasive.

NEMLEC places significant weight on *Harvard Crimson*'s statement that the "court has construed strictly the scope of [clause 26] to preclude the public disclosure of documents held by entities other than those specifically delineated in the statute." 445 Mass. at 750; *see* Mot. at 10-11, 17-19. But NEMLEC reads too much into this quote. This language means only that courts should not *add* completely new types of entities, such as the Legislature and the Judiciary, to the "boards," "departments," "commissions," and other entities specifically delineated in clause 26. *See, e.g., Kettenbach v. Bd. of Bar Overseers*, 448 Mass. 1019, 1020 (2007) (relying on *Harvard Crimson* and *Lambert v. Exec. Dir. of the Judicial Nominating Council*, 425 Mass. 406, 409 (1997), to explain that the Legislature and the Judiciary are not included within the PRL because they are not listed entities).[6] It does not preclude courts from *interpreting* what constitutes a

[6] The so-called "*Perez* principle," Mot. at 8-9, does not suggest otherwise. The statute at issue in *Perez* defined a health care provider as "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,

"board," "department," "commission" or other specifically Delineated Entity. Nor could it. Clause 26 simply enumerates undefined categories of entities that require further interpretation. Given that no statute or regulation defines those terms, the *MBTA* test's functional approach to interpretation makes sense. *See Globe Newspaper*, 416 Mass. at 1007; *cf. Memphis Publishing Co. v. Cherokee Children & Family Serv., Inc.*, 87 S.W.3d 67, 71-79 (Tenn. 2002) (adopting a functional approach where the public records statute provided "little guidance . . .in defining precisely which records are 'state, county and municipal records' under [the Act]").

NEMLEC also suggests that the *MBTA* test should not control here because it was not used in either *Globe Newspaper* or *Harvard Crimson*. Mot. at 18-19. This argument fails because the Court did, in fact, apply the test in both cases.

In *Globe Newspaper*, the SJC considered whether the MBTA retirement board's ("MBTARB") documents were public records. Adopting the functional five-factor *MBTA* test—instead of resolving the case based on the presence of the word "board" in the MBTARB's title—the SJC held that the MBTARB was not the kind of "board" specifically delineated in clause 26. *Globe Newspaper*, 416 Mass. at 1007. Attempting to avoid this straightforward reading of the case, NEMLEC suggests that *Globe Newspaper* turned instead on a determination that the MBTARB had a "separate existence" from, and was not a "constituent part" of, the MBTA. Mot. at 18. These terms do not appear in the court's decision. At best, NEMLEC's

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physical therapist, psychologist, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment." *Perez v. Bay State Ambulance and Hospital Rental Service, Inc.*, 413 Mass. 670, 675 (1992) (quoting G.L. c. 231, § 60B). The SJC refused to include EMTs in this definition because to do so would *add* a new term to the statutory list. *Id.* ("Plaintiff correctly notes that the EMTs were not included in the Legislature's list of 'provider[s] of health care.'").

"alternative" reading is nothing more than a paraphrase of the Court's application of the *MBTA* test.

Harvard Crimson also applied the kind of functional test announced in *MBTA* and adopted by *Globe Newspaper*. The question at issue was whether records created by the Harvard University Police Department (HUPD) were public records subject to disclosure. *Harvard Crimson*, 445 Mass. at 746-47. To answer this question, the Court looked at the structure and function of the HUPD, and in particular how its officers' authority was "far less extensive than the powers of regular police officers." *Id.* at 753. For that reason, the Court held that the HUPD was not transformed "into an agency of the Commonwealth such that it becomes subject to the mandates of the public records law." *Id.* Despite not citing the *MBTA* test, the Court still took a functional approach that looked to whether HUPD performed an "essentially governmental function." *MBTA*, 414 Mass. at 587.

These are concrete examples where the SJC has applied a functional approach to define a Delineated Entity under clause 26. In contrast, the Court has never mentioned, let alone applied, NEMLEC's suggested "constituent part" alternative. Mot. at 18-19. This Court should reject NEMLEC's unsupported analysis, apply the *MBTA* test, and hold that documents made or received by NEMLEC's officers or employees are public records under clause 26.

II. Public records held by NEMLEC must be disclosed under section 10.

In addition to possessing public records within the meaning of clause 26, NEMLEC is subject to the obligation to disclose those public records under section 10.

Under section 10, "every person having custody of any public record" must provide public access to that document. Supplementing this statutory language, the Supervisor of Public

Records promulgated regulations that "implement the provisions" of the PRL and ensure that public records are kept "in the custody and condition required by law." G.L. c. 66, § 1. These regulations mandate that "every governmental entity shall maintain procedures that will allow at reasonable times and without unreasonable delay access to public records in its custody to all persons requesting public records." 950 CMR 32.05(2). They define "governmental entit[ies]" as "any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth." 950 CMR 32.03.

In defining those entities that must *disclose* public records, the Supervisor of Public Records replicates nearly verbatim the Legislature's definition of entities whose employees *create* public records.[7] It follows that entities creating public records under clause 26 are governmental entities under regulation 32.03, and must therefore disclose those records under section 10. And for good reason. If an entity is the kind of entity whose employees make or receive public records under clause 26, it would be bizarre for the legislature to exclude that entity from the obligation to disclose public records under section 10. The purpose of the PRL is to "open[] records made or kept by a broad array of governmental entities to public view,"

[7] In relevant part, the difference is that while the statute states "*or of any* political subdivision thereof," the regulation states "*or within a* political subdivision of the Commonwealth." The Supervisor of Public Record's use of the word "within," which clearly incorporates departments of political subdivisions, reflects its understanding of the meaning of clause 26. The Court must "afford considerable deference" to these regulations, *J.M. Hollister, LLC v. Architectural Accesss Bd.,* 469 Mass. 49, 55 (2014). The agency's interpretation of the statutory language thus further strengthens the conclusion, already supported by the SJC's authoritative holdings, that clause 26 applies to employees and officers of departments of *both* the Commonwealth *and* political subdivisions thereof.

Suffolk Const. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 452-53 (2007), limited only by the parameters set forth in clause 26. To nevertheless read 32.03 more narrowly than clause 26 would allow for entities that create public records but are not required to disclose them. To avoid this absurd result, the definition of "governmental entities" under 32.03 must at least include any entity whose employees create public records within the meaning of clause 26.

For the reasons stated above, NEMLEC is an entity whose employees create public records under clause 26. It is therefore also a "governmental entity," under regulation 32.03, which must disclose those public records.

In the alternative, even if NEMLEC somehow were not a "governmental entity" under regulation 32.03, it would still have to disclose the public records in its custody as a "person" under section 10. The statute's broad mandate compels every "person" having custody of a public record to allow public access. G.L. c. 66, § 10. To be sure, it is possible to conceive of a purely private "person" who has custody of a public record but is not required to disclose it, such as an individual who holds a copy of his own birth certificate. But NEMLEC is not such a "person." A contrary holding would invite mischief, since police officers could then arguably shield their public records from disclosure by storing them with organizations such as NEMLEC. This would frustrate the legislative intent to "give the public broad access to government documents." *Harvard Crimson*, 445 Mass. at 750.

Legislative intent cannot be "undermined by nominal appellations which obscure functional realities." *Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n*, 181 Conn. 544, 555-56 (1980). Thus, even if this Court found that NEMLEC was not a "governmental

entity," it should still hold that NEMLEC is a "person" that must disclose public records in its custody under section10.

CONCLUSION

For the reasons stated above, this Court should deny the motion to dismiss.

REQUEST FOR HEARING

Plaintiff respectfully requests a hearing on this motion under Mass. Sup. Ct. Rule 9A(c)(3) and Mass. R. Civ. P. 12(d), which requires a hearing on a Motion to Dismiss when the defense raised is under Mass. R. Civ. P. 12(b)(6) and when any party requests a hearing.

Respectfully submitted,

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November 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that I, Jessie J. Rossman, have caused a true and accurate copy of the attached Plaintiff's Opposition to Defendant's Motion to Dismiss and Request for Hearing to be served on all counsel of record by e-mail and by hand delivery on this 14th day of November, 2014.

DATE: November 14, 2014

Jessie J. Rossman