COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS

SUPERIOR COURT
DOCKET NO. _____

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, and AMERICAN CIVIL LIBERTIES UNION,

Plaintiffs,

v.

WILLIAM EVANS, in his Official Capacity as Police Commissioner for the City of Boston, and BOSTON POLICE DEPARTMENT,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, the American Civil Liberties Union of Massachusetts ("ACLUM") and the American Civil Liberties Union ("ACLU"), respectfully move for a Preliminary Injunction against the Boston Police Department ("BPD") and William B. Evans, requiring them to produce public records under the Massachusetts Public Records Law (the "MPRL"), G.L. c. 66 § 10.

I. INTRODUCTION

Plaintiffs submitted a public records request on September 5, 2014, seeking records of the BPD's police-civilian encounters after 2010. *Eleven months* later, Defendants have failed to produce a single document in response to that request.

The release of these records is especially urgent now. A June 2015 report by academic researchers found "racially disparate treatment" of Blacks and Hispanics by the BPD in its street-level encounters from 2007 to 2010. *See* Verified Complaint for Declaratory and Injunctive Relief ("Compl.") Ex. 1. The report revealed racial disparities that could not be explained by

crime rates or other "non-race" factors, and were instead due to "processes of racial discrimination." *Id.* at 4, 20-21. In the wake of this report, the BPD has reportedly begun reforming its stop-and-frisk practices, while pledging to publish annual data about police-civilian encounters. But the report—and the BPD's responsive reforms—came roughly *four years* after ACLUM and the BPD agreed, in 2011, that ACLUM would defer a 2009 public records request for street-encounter data in exchange for the BPD's commitment to support a study of police-civilian encounters that occurred from 2007 to 2010.

The public cannot again wait years to learn whether people of color in Boston have been subjected to disparate treatment by the BPD. Instead, Plaintiffs are entitled to preliminary injunctive relief requiring the Defendants to produce the post-2010 data immediately.

Plaintiffs satisfy all three requirements for preliminary injunctive relief. First, Plaintiffs are likely to prevail on the merits of their claim because the requested documents are indisputably public records under the MPRL, and Defendants have no valid grounds to withhold them. Second, Plaintiffs and the public are being irreparably harmed as a result of Defendants' violation of the law. Defendants' withholding of these records keeps Plaintiffs and the public in the dark about potentially ongoing racial discrimination, thus impairing the ability of Plaintiffs, the public, and individual civilians to defend important constitutional protections. Third, the balance of hardships supports a preliminary injunction. While Defendants have already publically acknowledged the importance of releasing data about police-civilian encounters, Plaintiffs and the people and communities affected by racially discriminatory police practices are harmed each day that the release of this data is delayed. Preliminary injunctive relief is therefore warranted.

II. FACTUAL BACKGROUND

A. The BPD Has Known About Evidence of Racially Disparate Treatment Since at Least March 2014.

Since 2009, after receiving numerous complaints that BPD officers were targeting people of color during street encounters, ACLUM has made multiple requests for public records of the BPD's police-civilian encounters—known as "Field Interrogation, Observation, Frisk, and/or Search" reports or "FIO reports." BPD policy requires FIO reports to be generated every time an officer engages someone in a stop, observation, encounter, and/or frisk.[1]

Ultimately, after a period of negotiation, ACLUM deferred its requests for the BPD's FIO report data based upon BPD's agreement to make this data available for study by an independent researcher. ACLUM and the BPD agreed that Dr. Anthony Braga, a professor in the School of Criminal Justice at Rutgers University, and a policy advisor for the BPD at the time, would code the FIO reports, collaborate with an independent researcher concerning the coded data, and produce a report. As part of this compromise, the BPD also committed to providing periodic progress updates, information about the methodology used for the coding and analysis, and access to the coded data after Dr. Braga finished his work. One goal of the research was to study whether race had an impact on BPD stops, frisks, and searches of civilians.

Although Dr. Braga estimated that the study would take a year to complete, it was not completed until 2015, and the data underlying it has still not been disclosed. But Dr. Braga did notify Plaintiffs and the BPD in June 2012 that his initial analysis revealed significant racial disparities in the numbers of FIOs.

[1] In 2011, these reports were renamed "Field Interaction/Observation/Encounter" reports. For convenience, Plaintiffs will refer to them as "FIO reports" and use the term "FIO encounter" to mean a stop, observation, encounter and/or frisk that is documented in an FIO report.

In March 2014, Dr. Braga provided Plaintiffs and the BPD the initial results of a more detailed statistical analysis. He reported that, not only were Blacks subject to disparate numbers of FIOs, but that there were racial disparities that could *not* be explained by crime, gang membership, or other "non-race" factors. Dr. Braga said that the percentages of Black and Hispanic residents in Boston's neighborhoods were significant predictors of the number of FIO reports, even after controlling for crime and other factors. Race also influenced the likelihood that an individual subjected to a FIO encounter would also be subjected to a frisk, a search, or another FIO encounter.

Following Dr. Braga's March 2014 presentation about racially disparate treatment by the BPD, Plaintiffs repeatedly urged the BPD to consider specific policy reforms, including body-worn cameras, civilian receipts for police encounters, and the regular publication of data.

Plaintiffs also repeatedly discussed with the BPD the urgency of releasing Dr. Braga's findings. Subsequent to those discussions, on October 8, 2014, Plaintiffs released their own report summarizing the March 2014 preliminary analysis and explaining how that analysis provides troubling evidence of racially discriminatory policing from 2007 to 2010. *See* Compl. Ex. 2. In response, Defendants acknowledged "some racial disparities that must be addressed," *see Boston Police Department, Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, Oct. 8, 2014, available at bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results*, but otherwise discounted Plaintiffs' report on the ground that the underlying FIO data was years old. The BPD also stated that, "[a]s a result of" the BPD's meetings with the ACLU, "the Department agrees that publishing FIO statistics going forward is necessary." *Id.*

B. A 2015 Report Confirms Evidence of Racially Disparate Treatment.

The final report that the BPD and Plaintiffs had requested in 2011 was completed and published on or about June 15, 2015 and entitled "Final Report[:] An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports" (the "2015 Report"). Its authors are listed as Jeffrey Fagan, Anthony A. Braga, Rod K. Brunson, and April Pattavina. Compl. Ex. 2.

The 2015 Report confirms what researchers told the BPD in March 2014 and what Plaintiffs reported in October 2014—that the BPD's FIO practices from 2007 to 2010 reflected "racially disparate treatment." *See* Compl. Ex. 1 at ii. As a threshold matter, the 2015 Report confirmed that Blacks were disproportionally subjected to street-level encounters. Only 25.1% of Boston's population was Black, yet Blacks were subjected to 63.3% of FIO encounters from 2007 to 2010. *See id.* at 2. The 2015 Report also relied on statistical analysis, demographics, police force deployment data, and other information to ascertain the degree to which race, as opposed to other factors, influenced police-civilian encounters in Boston. *Id.* at 3-4, 24.

The 2015 Report found that the proportion of Black or Hispanic residents in a neighborhood influenced the overall number of FIO encounters that the neighborhood could expect. Specifically, even controlling for neighborhood crime and other factors, for every 1 percentage point increase in a neighborhood's Black population, the 2015 Report found an approximate 2.2% rise in the expected number of FIO encounters. *See id.* at 9, Table 4 ("Percent Black" cross-tabbed with "Residents"). The effects of this seemingly small rise are dramatic. As the researchers explained, a *single* Boston census tract—typically an area of just 20 to 30 blocks—would experience *over six hundred additional FIOs each year* that are attributable to race, not to crime or other "non-race" factors, if its population were 85% Black. *See id.* at 9-10.

The 2015 Report found that a neighborhood's concentration of Hispanic residents had an even greater impact on FIO activity. For every 1 percentage point increase in a neighborhood's Hispanic population, the 2015 Report described a 4.1% rise in the expected number of FIO encounters, even when controlling for neighborhood crime and other factors. *See id.* at 9, Table 4 ("Percent Hispanic" cross-tabbed with "Residents").

With respect to the analysis of individual encounters, the 2015 Report found that Blacks and Hispanics who were subject to FIO encounters were more likely to be subject to repeat encounters, even controlling for gang membership and prior arrest history. *Id.* at 20. Blacks and Hispanics were also more likely than otherwise identical whites to be frisked and/or searched during an FIO encounter. *See id.* at 17.

C. The BPD Has Failed to Provide Requested Public Records.

After reviewing Dr. Braga's initial assessment of the FIO Report data from 2007-2010, Plaintiffs sought records of recent police-civilian encounters in order to determine whether the racial disparities in police-civilian encounters persisted after 2010. The BPD has itself acknowledged the importance of releasing this information. Most recently, on July 3, 2015, the *Boston Globe* reported that the BPD intends to review FIO data from 2014, and that the BPD intends to report future FIO data annually. *See* Evan Allen, *Boston police to step up antibias measures*, The Boston Globe, July 4, 2015, *available at* bostonglobe.com/metro/2015/07/03/boston-police-institute-new-antibias-policies-after-critical-report-policing-minority-communities/7PxecpL5o5qCWDEQ5x0HzL/story.html.

Yet the BPD has failed to respond to a request for post-2010 FIO reports and data. Plaintiffs' September 5, 2014 request sought :

- Any and all records documenting the number of Boston Police Department ("BPD"):

- stops of civilians conducted since January, 1, 2011;

- frisks of civilians conducted since January, 1, 2011, and the number of such frisks that resulted in the recovery of contraband, disaggregated by contraband type *(e.g.*, weapon, type of suspected stolen property, type of controlled substance);

- searches of civilians conducted since January, 1, 2011, and the number of such searches that resulted in the recovery of contraband disaggregated by contraband type;

- consent searches of civilians conducted since January, 1, 2011, the number of such consent searches that resulted in the recovery of contraband disaggregated by contraband type;

- arrests of civilians conducted since January, 1, 2011, disaggregated by age, race, gender, and the offense(s) for which each arrest was made.

- Any and all records created since January 1, 2011, including Field Interrogation, Observation, Frisk, and/or Search ("FIOFS") Reports and Field Interaction/Observation/Encounter ("FIOE") Reports, collecting information about each observation, stop, frisk, and search conducted by BPD, including records identifying the following information about each incident:

    - the location or address of the stop, frisk, and/or search;

    - the date of the stop, frisk, and/or search;

    - the duration of the stop, frisk, and/or search, or in the alternative, the time that the stop, frisk, and/or search was initiated and the time that it concluded;

    - the race, ethnicity, gender, national origin, and/or age of the individual(s) stopped;

    - the basis for the stop, including any description of the circumstances leading to the stop;

    - whether any frisk was conducted and the basis for the frisk, including any description of the circumstances leading to the frisk;

    - whether any frisk resulted in the recovery of contraband, and the nature of any contraband recovered (*e.g.*, weapon, type and amount of suspected stolen property, type and approximate quantity of controlled substance, money seized for forfeiture);

    - whether any search was conducted and the basis for the search, including any description of the circumstances leading to the search;

- whether any search resulted in the recovery of contraband, and the nature of any contraband recovered;
- whether the stop resulted in an arrest, citation, or no further action, and the basis for any resulting arrest or citation;
- the badge number (or other unique identifier) and jurisdiction of the law enforcement officer(s) who completed the form.

Compl. Ex. 3 at 1-2. Plaintiffs expressly excluded from the requested records "any individually identifiable information, or other private individual information, including the name of the person subjected to an FIOFS/FIOE encounter." *Id.* at 2.

Upon information and belief, post-2010 FIO reports are stored in electronic form. As the BPD acknowledged in an April 2010 letter to ACLUM, because they are electronically stored in a database, FIO records can be "easily redacted for investigatory information." Moreover, under the BPD's retention policies, FIO reports shall be maintained in the BPD's database for no longer than 5 years after an individual was last referenced in an FIO report. Thus, some of the requested records soon risk being deleted by the BPD.

On January 30, 2015, after receiving no response to its September 2014 request for post-2010 FIO reports and data, Plaintiffs wrote to the BPD's counsel. Plaintiffs' letter addressed their September 2014 request for FIO reports and data, as well as other outstanding public records requests for production of training, policies, and other materials. *See* Compl. Ex. 4. Because several months had passed since they had made their public records requests, Plaintiffs asked the BPD to explain by February 13, 2015, how it intended to handle the pending requests. *Id.* at 2.

In a February 13, 2015 voicemail, a BPD attorney stated that the BPD would be gathering more "substantive information" responsive to Plaintiffs' outstanding public records requests in the coming weeks. Subsequently, on February 24, 2015, BPD's counsel wrote Matthew Segal of the ACLU of Massachusetts concerning the outstanding public records requests. Compl. Ex. 5.

This February 24 letter included some documents responsive to Plaintiffs' requests for policy, training and other materials.

But it disclosed no documents in response to Plaintiffs' September 2014 request for FIO data. Instead, the letter stated that Plaintiffs' request had been "forwarded . . . to [the BPD's] Information Services Group," and that the BPD would "provide further updates." *Id.* at 2.

But the BPD has provided no further updates responsive to Plaintiffs' September 2014 request for post-2010 FIO reports and data. Defendants have never contested that the requested documents are public records. Despite public commitments to produce FIO data, Defendants have failed to provide a good faith estimate of any anticipated fees or to produce any documents responsive to Plaintiffs' request.

III. ARGUMENT

Issues arising under the MPRL are "best addressed" in a motion for a preliminary injunction. *Patriot Ledger v. Masterson*, 2009 WL 928796, *2 (Mass. Super. 2009) ("Because the issue before the Court is strictly a legal question…there is no benefit to waiting…Moreover, the Public Records Statute itself requires that records not exempt from disclosure be produced without unreasonable delay and that, where the custodian of public records fails to comply with a request, the Superior Court has jurisdiction to order compliance."); *see also* G. L. c. 66, § 10 (superior court has jurisdiction to order compliance with MPRL). Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits of their claim; (2) "irreparable harm will result from the denial of the injunction;" and (3) plaintiffs' risk of irreparable harm "outweighs any similar risk of harm to the opposing party" if the injunction is granted. *See Doe v. Superintendent of Sch. of Weston*, 461 Mass. 159, 164 (2011).

A. Plaintiffs are Likely to Succeed on the Merits.

Plaintiffs are likely to succeed on the merits of their claim because Defendants' failure to produce a single document in response to Plaintiffs' public records request is plainly a violation of the MPRL. The MPRL provides that "[e]very 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." G. L. c. 66, § 10(a). "Public records" are broadly defined as records and documents in possession of public officials. *See* G. L. c. 66, § 10; G. L. c. 4, § 7; *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 430-31 (1983). The MPRL carries a "presumption in favor of disclosure" of public records that is "in keeping with [the statute's] fundamental purpose to ensure public access to government documents." *General Electric Co. v. Dep't. of Envt'l. Protection*, 429 Mass. 798, 801-02 (1999). In fact, the MPRL expressly provides "a presumption that [any] record sought is public." G. L. c. 66, § 10(c). Thus, to justify withholding records subject to a public records request, the custodian carries the burden of proving "with specificity" that the documents fall within one of the statutory exemptions found in G. L. c. 4, § 7 cl. 26. See G. L. c. 66, § 10(c); *In re Subpoena Duces Tecum*, 445 Mass. 685, 688 (2006) ("the custodian of the record has the burden 'to prove with specificity' that an exemption applies").

Moreover, the MPRL requires that the subject of a records request must produce responsive documents (or explain its specific basis for withholding the documents) within 10 days. See G. L. c. 66 § 10(b); *Globe Newspaper Co. v. Commissioner of Educ.*, 439 Mass. 124, 131 (Mass. 2003) ("Public records must be released for inspection and copying without unreasonable delay, that is, within ten days of the receipt of a request for them."). Agencies must also provide a good faith estimate of any costs whenever fees are expected to exceed 10 dollars. 950 C.M.R. 32.06(2).

Defendants have failed to meet any of these requirements. Despite the statutory requirement to respond within 10 days of any request, defendants have for 11 months withheld records that are indisputably public and not subject to any exemption under the public records law. Their failure to produce responsive documents violates the MPRL.

B. Irreparable Harm Will Result From the Denial of an Injunction.

Defendants' failure to provide access to public records in violation of the MPRL causes irreparable harm as a matter of law. *See Globe Newspaper Co. v. Evans*, 1997 WL 448182, *4 (Mass. Super., 1997) (finding violation of G. L. c. 66, § 10 was irreparable harm "as a matter of law"); *see also Davis v. Cape Cod Hosp.*, 2008 WL 1820642, *2 (Mass. App. Ct., 2008) ("For litigation in which a . . . private party purports to fulfill the objectives of legislation enacted for the public health, safety, or welfare, . . . it need not show specific irreparable harm in order to achieve preliminary injunctive relief. The probable violation of the legislatively defined public interest will be sufficient."). Even if it did not, however, Plaintiffs can readily demonstrate irreparable harm.

Defendants' failure to comply with the MPRL has deprived Plaintiffs and the public of information that is critical to the protection of basic constitutional rights. Plaintiffs intend to use these records to inform the public about BPD policing practices that implicate the constitutional rights of a large number of Boston residents and to advocate for reforms that may be necessary to ensure the protection of these rights. While the BPD has acknowledged racial disparities in its policing, it has also discounted—as out of date—the data studied in the 2015 Report. But by taking so long to make the data available, and by declining to this day to release the 2007-2010 FIO reports, the BPD has prevented Plaintiffs and the public from timely learning about that data. Denying preliminary injunctive relief for the post-2010 data would almost certainly relegate that information to the same fate.

Prompt disclosure is also necessary to enable Plaintiffs and the public to evaluate the BPD's unproven claim that it has overhauled its practices since 2010, and that this purported overhaul has addressed the racially disparate treatment that existed from 2007 to 2010. Simply, without preliminary injunctive relief, Plaintiffs and the public will not be able to engage in informed debate about the scope of needed reforms, or effectively vindicate constitutional rights.

C. The Balance of Hardships Supports a Preliminary Injunction.

The balance of hardships tips strongly in Plaintiffs' favor. Indeed, defendants have not only failed to identify any specific harm they would suffer in responding to Plaintiffs' request, but they have *acknowledged* the importance of publicizing the very FIO information that Plaintiffs' request. At the same time, Plaintiffs are investigating a subject of strong public concern—whether the unconstitutional, racially discriminatory stop-and-frisk practices revealed by the 2007-2010 FIO data remain in place. Because the requested records could reveal whether the BPD has taken sufficient steps to eliminate unlawful practices of which it was aware, the immediate disclosure of these records is of vital importance to both Plaintiffs and the public. *Antell v. Attorney Gen.*, 52 Mass. App. Ct. 244, 247 (acknowledging public interest in disclosing allegations of official misconduct).

IV. CONCLUSION

Defendants are withholding public records that will reveal whether BPD officers illegally single out a subset of civilians for stops and searches based on their race. Despite the MPRL's requirement to respond to public requests within 10 days, defendants have failed to produce responsive documents or provide a basis for withholding them for more than 11 months. This unexcused delay has harmed Plaintiffs in their attempt to investigate the BPD's policing of Boston's residents and vindicate important constitutional rights. Accordingly, Plaintiffs

respectfully ask this to Court issue a Preliminary Injunction ordering disclosure of the FIO reports and data Plaintiffs requested in September 2014.

August 6, 2015

Respectfully submitted,

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