December 23, 2015

SPR15/787

Ms. Katherine Hoffman
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Dear Ms. Hoffman:

I have received the petition of Shawn Musgrave, on behalf of Muckrock, appealing the response of the Boston Police Department (Department) to his request for public records. G. L. c. 66 § 10(b); see also 950 C.M.R. 32.08(2). Specifically, Mr. Musgrave requested records relating to two specifically named companies and cell cite simulators.

This request was the subject of a previous appeal. See SPR 15/488 Determination of the Supervisor of Records (September 22, 2015). This appeal was based on the Department’s failure to respond to his request. I ordered the Department to provide Mr. Musgrave with the requested records or a written explanation, with specificity, how a particular exemption applies to each record.

In response to the September 22 Determination, the Department provided Mr. Musgrave with letter dated September 30, 2015 in which you state the responsive records are exempt from disclosure under Exemption (f) of the Public Records Law. G. L. c. 4, § 7(26)(f). Mr. Musgrave appealed this September 30 response.

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10(c); 950 C.M.R. 32.08(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any town of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(c); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption).
Exemption (f)

In your letter dated September 30, you claim the responsive records are exempt from disclosure under Exemption (f).

Exemption (f), the “investigatory” exemption, permits the withholding of:

investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

G. L. c. 4, §7 (26)

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). An investigative agency is not required to demonstrate prejudice to withhold the identities of voluntary witnesses, informants, or complainants. Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 290 n.18 (1979).

You claim the responsive records may be withheld under Exemption (f) because disclosure would not be in the public interest and would prejudice the possibility of effective law enforcement. You also state that withholding such information is essential to ensure that the Department can continue to effectively monitor criminal activity.

You further claim that disclosing the requested records would “reveal sensitive technological capabilities possessed by the Department” and “may allow individuals who are the subject of investigation wherein this equipment/technology is used to employ countermeasures to avoid detection by law enforcement.”

In addition, you claim the information within the requested documents “could be used to construct a map or directory of jurisdictions that possess the investigative capabilities” which could lead to evasion of detection. As a result, you claim that disclosure of the responsive records would adversely impact future criminal investigations.

However, this response does not explain with specificity how the responsive records, in their entirety, pertain to an ongoing investigation, confidential investigative techniques, or witness statements. In his request dated April 7, 2015, Mr. Musgrave requested six (6) categories of records. The Department fails to explain how the entirety of the responsive records, for example, “all memos or emails between the [Department] and the Harris Corporation” and “all memos or emails between the [Department] and the Boeing company”
would reveal “sensitive technological capabilities” or “adversely impact criminal investigations.”

Therefore, the Department has failed to satisfy its burden of proving with specificity how the responsive records may be withheld in their entirety under Exemption (f). The statutory exemptions are narrowly construed and are not blanket in nature. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(s).

Conclusion

Accordingly, whereas the Department has not overcome the presumption that the requested records are public, the Department is hereby ordered, within ten (10) days of this order, to provide Mr. Musgrave with the requested records. If the Department maintains that any portion of the responsive records are exempt from disclosure it must, within ten (10) days provide to Mr. Musgrave a written explanation, with specificity, how a particular exemption applies to each record. To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

If there are any fees associated with this response a written, good faith estimate must be provided. G. L. c. 66, § 10(a); see also 950 C.M.R. 32.06(2) (where cost of complying with a request for public records is expected to exceed ten dollars ($10.00), custodian of records shall provide written good faith estimate). Once the fees are paid, you must provide the responsive records.

Very truly yours,

Shawn A. Williams
Supervisor of Records

cc: Mr. Shawn Musgrave