

# NOTIFY

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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT

NO. 1784CV02087

Notice sent  
1/24/2019

K. W. B.

D. A. S.

J. T. W.

J. S. C.

**JAIDEEP CHAWLA**

v.

(sc)

**MASSACHUSETTS DEPARTMENT OF REVENUE  
and MAURA HEALY, in her official capacity as  
ATTORNEY GENERAL OF THE COMMONWEALTH**

### ORDER

This case presents in a somewhat unusual posture. There is no dispositive motion pending; yet both parties appear to have treated Judge Squires-Lee's October, 2018 Procedural Order as calling for such briefing. The Court is not prepared to render a *formal* disposition of this case today, because the record is not in the state it would need to be in to make such a ruling. That said, it is clear enough what the essential aspiration of Judge Squires-Lee's Procedural Order was – namely, to determine whether and to what extent the Plaintiff has made an appropriate request for records under the Public Records Law, and at the same time determine the extent to which the Defendants have and/or have not failed to comply with that statute by identifying what documents have been withheld and on what grounds. Fundamentally, what Judge Squires-Lee's Procedural Order sought was to stream-line the process by which the Plaintiff received documents to which he was entitled under the law, and then to terminate the litigation.

With that objective in mind, and with the benefit of the parties' helpful briefing, I am prepared to tell you what I think concerning the core issues presented in the case and about the litigation more generally. My hope is that, by the orders I will issue to day, the entire suit can be disposed of without further proceedings.

It is my view that the vocabulary the Plaintiff has adopted to present his requests -- namely, for records "pertaining to" the Department of Justice's Equitable Sharing Program and for records "pertaining to" the Department of Revenue's "Directive" regarding non-enforcement of the Controlled Substances Tax -- does *not* satisfy the statute's "reasonable description" requirement. "Pertaining to" is a piece of terminology that has come to have a defined meaning under this Court's *discovery* rules, where the search for broadly defined categories of documents that are relevant to pleaded claims and defenses is accepted practice. Relevance under our Rules

of Evidence – the mere tendency to make a fact in issue more or less true than it would be without the evidence – is a very broad concept, as is the requirement of Rules of Civil Procedure 26(b)(1) and 34 that parties to civil litigation produce documents that are "reasonably calculated" to lead to the discovery of relevant evidence. In the context of civil discovery, therefore, the presentation of requests for documents "pertaining to" this or that subject matter has long been recognized as appropriate.

The Public Records Law, by contrast, requires something very different – namely, that a requesting party "reasonably describe" the documents that are sought. The reasonable description requirement contemplates that a requesting party will identify documents or categories of documents with sufficient particularity that government employees will be able to understand exactly what they are looking for, and then make a prompt production. Requests for documents that are articulated with very broad language that calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently "related" to the category of materials requested, will *not* satisfy this statutory standard. It is my conclusion that Mr. Chawla's requests for records "pertaining to" the DOJ's ESP and to the DOR's Directive are defective for this reason.

That said, I do believe that what the Plaintiff has sought for public records in this case has become reasonably and sufficiently clear over the course of the litigation's pendency. The parties would obviously have been better served had they engaged in a dialogue at the outset to negotiate appropriate modifications and boundaries to the Plaintiff's requests. The Court believes that such parameters would have emerged easily and without the need for litigation. What happened instead is that the Defendants elected to construe the requests in the narrowest of terms, relieving themselves of extended labor but also perhaps sparing the Plaintiff the expense that a larger production would have entailed. As the Plaintiff expressed continued dissatisfaction with the scope of what had been turned over, the Defendants proceeded to produce more documents (more than 1500 in all, according to representations made at hearing) in an *iterative* fashion. I am not prepared to fault the government for adopting such a course in these circumstances, and do not ascribe to the Defendants the nefarious motivations of which they stand accused by the Plaintiff. The records requests were, after all, vague and over-broad; so the Court is strongly disinclined to assess punitive damages for "bad faith" or even award costs under the statute.

Nevertheless, the records the Plaintiff seeks *are* now sufficiently described; and, to whatever extent the Defendants have not done so as of today's date, the Court today **ORDERS** that such documents be turned over within the next 20 days. This production shall include both documents concerning the Equitable Sharing Program (as I will define them momentarily), and documents concerning the Department of Revenue's alleged "Directive" regarding enforcement or non-enforcement of the Controlled Substances Tax (which documents the Court believes may be properly sought by the Plaintiff under the Public Records Law, notwithstanding the pendency of other litigation to which those documents relate). For the sake of clarity, I define the required production herein ordered to include the following:

(A) All documents in the possession of the Defendants that either constitute or expressly reference the Equitable Sharing Program and/or the payments and expenditures made



thereunder, including all documents reflecting or evidencing *either* the receipt of ESP payments by the Attorney General's Office *or* the expenditure or use of shared cash, proceeds or other property received under this program. For the avoidance of doubt, the documents to be produced (including, without limitation, Forms DAG-71, accounting and bookkeeping logs, audit reports and other records) shall be those created in Fiscal Years 2012-2016, and shall be coextensive with the retention requirements of the Guide to Equitable Sharing for State and Local Law Enforcement Agencies.

(B) All documents in the possession of the Defendants that either constitute or expressly reference the Department of Revenue's alleged 1998 "Directive" (defined to include any policy, practice, understanding or the like) concerning enforcement or non-enforcement of the Controlled Substances Tax, G.L. c. 64K.

(C) The Defendants shall *not* be required to produce any of the requested documents unless and until the Plaintiff shall have first pre-paid a reasonable fee to compensate them for the time expended in connection with such production. The fees so paid will be computed by multiplying the total hours expended (such hours to be certified by sworn affidavit) times a rate of \$25 per hour, and excluding the first four hours of production. See G.L. c. 66, 10(4)(d)(ii)(B). The Defendants may, however, include in the required fee the 20 hours they report to have expended to date.

(D) The Defendants may precede all efforts to comply with this Order with a communication that requires the Plaintiff to confirm both his continued interest in receiving the requested documents, and his commitment to pay the ordered fee. Should the Plaintiff (who declined to appear at the noticed hearing in this matter) fail to respond to such a request for confirmation, or should he declare his unwillingness to satisfy the above pre-condition to receiving a records production, the Court invites the Defendants to move for dismissal for failure to prosecute.

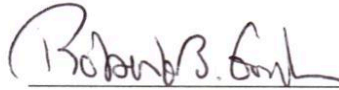
(E) The Defendants shall include in any document production an affidavit certifying that all documents responsive to this Order have been turned over, and setting forth with reasonable particularity any documents that have either been withheld from production or redacted. Such particularity shall include the name and date of the document, its author and recipient(s), its general subject matter, and the precise legal ground for the withholding or redaction.

The Court will stay this case pending compliance with this Order. Assuming that production goes forward satisfactorily, the Court expects the litigation to terminate promptly. The Court sees no likelihood that it will award either costs or punitive damages, for the reasons stated above, although the Court is not going to formally bar any party from seeking them. The Court is likewise not prepared, on the current state of the record, to endorse the Commonwealth's contention that the Plaintiff's invocation of the Public Records Law is improper, because Mr.

Chawla's requests were "made for a commercial purpose" and are "not in the public interest". The Defendants make this assertion for the first time, having already produced some 1500 documents without objection. I note, too, that the Plaintiff has not addressed this contention at all in his Brief to the Court, no doubt because the subject falls outside the scope of Judge Squires-Lee's Procedural Order. Once again, I am hopeful that the Defendants will comply with the terms of production I am ordering today, and that the Plaintiff will find such production satisfactory. For either side to prolong the litigation with arguments for relief that will necessarily call for more extensive factual development would appear to be needlessly time-consuming and costly.

The Court stands prepared to assist the parties further if they believe this would facilitate a timely resolution to this litigation.

**SO ORDERED.**



Robert B. Gordon

Justice of the Superior Court

Dated: January 23, 2019