



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

February 5, 2025
SPR25/0231

Carol Ann Desiderio
City Clerk
City of Malden
215 Pleasant Street, Room 220
Malden, MA 02148

Dear Ms. Desiderio:

I have received the petition of Brian DeLacey, of *Malden News Network*, appealing the response of the City of Malden (City) and the Malden School Committee (Committee) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On December 11, 2024, Mr. DeLacey requested the following:

[R]ecords of School Committee Meeting Minutes from Executive Sessions held on 11/13/23, 12/4/23, and 1/18/24. Please include all PUBLIC RECORDS related to these meetings which were made or received by any public official during any “STAGE” of the minutes creation and approval process: including DRAFT, REVIEW, REVISED, FINAL, APPROVED and AMENDED forms of minutes, whether posted publicly prior to this or not. This requests more than just “FINAL” or “DRAFT” minutes, and extends to any COMMENTS made on any iteration of the minutes associated with these three meetings.

Please provide for this request each distinct revision of any record seen by any MEMBER of the SCHOOL COMMITTEE, extending to the MAYOR and the SUPERINTENDENT, including any and all versions of any records which are no longer allowed to be withheld or redacted.

Previous Appeal

This request was the subject of a previous appeal. See SPR24/3427 Determination of the Supervisor of Records (January 9, 2025). In my January 9th determination, I ordered the City to clarify its claims under Exemptions (c) and (e) of the Public Records Law and under the attorney-client privilege for redacting responsive records. Subsequently, the City responded on January 22, 2025. Unsatisfied with the City’s response, Mr. DeLacey petitioned this office, and

this appeal, SPR25/0231, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(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 agency or municipality 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(b)(iv); 950 C.M.R. 32.06(3); 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). 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.

If there are any fees associated with a response, a written good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

Current Appeal

In his appeal petition, Mr. DeLacey contends that the City’s “response fails to demonstrate the application of any exemption for withholding records and portions of records in accord with the specificity requirement. Additionally, the response fails to provide a privilege log as ordered.”

The City’s Responses

In its January 22, 2025 response, an attorney for the City states the following:

The [School] Committee maintains that the redacted portions of the executive session minutes dated November 13, 2023; December 4, 2023; and January 18, 2024 and other requested materials at issue are protected from disclosure under attorney-client privilege, and/or the relied upon exemptions under the Public Records Law, G.L c. 4, § 7(26).

...

In this case, the Committee elects to provide all extant requested records to the Supervisor of Public Records for *in camera* inspection and is prepared to provide such unredacted copies to the Supervisor upon request. The Committee further confirms that it has waived no exemptions or privileges with regard to the requested records.

In its previous December 23, 2024 response, the City directed Mr. Lacey to websites where numerous responsive records are available in redacted form. The City explained the following concerning the responsive records:

1. The executive session minutes from November 13, 2023, December 4, 2023, and January 18, 2024 are public in their approved form, and are available and accessible on the Committee's website, as are the executive session minutes for prior and subsequent meetings. ...
2. The Committee relies on the exemption under G.L. c. 4, § 7(26)(c) and the attorney-client privilege to support the redactions contained in the executive session minutes from November 13, 2023, December 4, 2023, and January 18, 2024 and the continued withholding of the redacted portions.
3. The Committee relies on the exemption under G.L. c. 4, § 7(26)(c) and the attorney-client privilege to deny requests for draft, review, revised, approved and amended executive session minutes and other materials regarding the executive sessions for November 13, 2023, December 4, 2023, and January 18, 2024 beyond those publicly released.
4. The Committee relies on the exemption under G.L. c. 4, § 7(26)(a) to support redactions contained in the executive session minutes from November 13, 2023 related to Unit B discussions.
5. The Committee relies on the exemption under G.L. c. 4, § 7(26)(e) to deny requests for notes, notebooks, drafts, comments and other materials to the extent that they are personal to the Committee members and are not maintained as part of the files of the governmental unit.
6. To the extent that the requests seek records that currently do not exist, the Committee states that the Public Records Law does not require the Committee to create records.

Exemption (c)

Exemption (c) applies to:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation

G. L. c. 4, § 7(26)(c).

Massachusetts courts have found that “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’” may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee,” may be withheld pursuant to Exemption (c). Wakefield Teachers Ass’n v. Sch. Comm., 431 Mass. 792, 798 (2000). The courts have also discussed specific categories of

records that may be redacted under Exemption (c). See Globe Newspaper Co. v. Exec. Office of Admin. and Fin., Suffolk Sup. No. 11-01184-A (June 14, 2013).

Analysis under Exemption (c) is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Torres v. Att'y Gen., 391 Mass. 1, 9 (1984); Att'y Gen. v. Assistant Comm'r of Real Prop. Dep't, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case-by-case basis.

This exemption does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources. See People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. Res., 477 Mass. 280, 292 (2017).

When analyzing a privacy claim, there is a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield. PETA, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law abiding and efficient manner. Id. at 292.

In its December 23rd response, under Exemption (c), the City argued the following:

Here, the redactions regarding [the] Superintendent ... relate to the portions of the executive session meetings on November 13, 2023 and December 4, 2023 in which the contract for/of the Superintendent was discussed and involve personnel information relating to a specific named individual, [the] Superintendent ... which is not subject to disclosure under the Public Records law.

Exemption (e)

Exemption (e) permits the withholding of:

notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit

G. L. c. 4, § 7(26)(e).

The exemption may not be applied by custodians of records to withhold materials intended for communication or preservation. Records are protected from mandatory disclosure by Exemption (e) only if they meet the two criteria of the exemption.

The first criterion of Exemption (e) limits its application to work-related records that can be characterized as "personal" to the employee, such as personal reflections on work-related

activities and notes created by an employee to assist him/her in preparing reports for other employees or for the files of the governmental entity. Notes that have been shared by the employee may not be considered to be “personal” pursuant to Exemption (e).

The second criterion of Exemption (e) requires that the notes not be kept in a government file. Under the exemption, “files of the governmental unit” excludes working files that are transitory in nature. Such files lack the permanent nature of a government file. Therefore, the retention of materials in such a working file would not bar the application of Exemption (e) and the records custodian may withhold from disclosure any personal notes that were not shared with others and were not part of such a governmental file.

In its December 23rd response, under Exemption (e), the City argues that “the Committee further relies on the exemption under G.L. c. 4, § 7(26)(e) which allows withholding of notebooks and other materials prepared by an employee which are personal and not maintained as part of the files of the governmental unit.”

Common Law Attorney-Client Privilege

A records custodian claiming the attorney-client privilege under the Public Records Law has the burden of not only proving the existence of an attorney-client relationship, but also (1) that the communications were received from a client during the course of the client’s search for legal advice from the attorney in his or her capacity as such; (2) that the communications were made in confidence; and (3) that the privilege as to these communications has not been waived. See Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 449 Mass. 444, 450 n.9 (2007); see also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., 449 Mass. 609, 619 (2007) (stating that the party seeking the attorney-client privilege has the burden to show the privilege applies). Records custodians seeking to invoke the common law attorney-client privilege “are required to produce detailed indices to support their claims of privilege.” Suffolk, 449 Mass. at 460.

Pursuant to the Public Records Law, in assessing whether a records custodian has properly withheld records based on the claim of attorney-client privilege, the Supervisor of Records “shall not inspect the record but shall require, as part of the decision making process, that the agency or municipality provide a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.” G. L. c. 66, § 10A(a).

In its December 23rd response, the City argued the following under the attorney-client privilege:

In this case, Town Counsel attended the executive session meetings on November 13, 2023, December 4, 2023, and January 18, 2024 and upon request at several points provided confidential legal advice and assistance to the Committee and Committee members on the issues presented. Accordingly, these exchanges have been redacted from the executive session minutes to preserve the attorney-client privilege.

Additionally, the City argues the following:

For the reasons stated above, the Committee also relies on the exemption under G.L. c. 4, § 7(26)(c) and the attorney-client privilege to deny requests for notes, notebooks, drafts, comments and other materials regarding executive session discussions and minutes for November 13, 2023, December 4, 2023, and January 18, 2024 beyond those already publicly released.

In Camera Inspection

In order to facilitate a determination as to the applicability of the Exemptions (c) and (e) claims made by the City to redact responsive records, the City must provide this office with un-redacted copies of the responsive records for *in camera* inspection. See 950 C.M.R. 32.08(4). After I complete my review of the records, I will return the records to the City's custody and issue an opinion on the public or exempt nature of the records.

The authority to require the submission of records for an *in camera* inspection emanates from the Code of Massachusetts Regulations. 950 C.M.R. 32.08(4); see also G. L. c. 66, § 1. This office interprets the *in camera* inspection process to be analogous to that utilized by the judicial system. See Rock v. Mass. Comm'n Against Discrimination, 384 Mass. 198, 206 (1981) (administrative agency entitled deference in the interpretation of its own regulations). Records are not voluntarily submitted, but rather are submitted pursuant to an order by this office that an *in camera* inspection is necessary to make a proper finding.

Records are submitted for the limited purpose of review. This office is not the custodian of records examined *in camera*, therefore, any request made to this office for records being reviewed *in camera* will be denied. See 950 C.M.R. 32.08(4)(c).

This office has a long history of cooperation with governmental agencies with respect to *in camera* inspection. Custodians submit copies of the relevant records to this office upon a promise of confidentiality. This office does not release records reviewed *in camera* to anyone under any circumstances. Upon a determination of the public record status, records reviewed *in camera* are promptly returned to the custodian. To operate in any other fashion would seriously impede our ability to function and would certainly affect our credibility within the legal community. Please be aware, any cover letter submitted to accompany the relevant records may be subject to disclosure.

Order

Accordingly, the City is ordered to provide this office with un-redacted copies of the responsive records for *in camera* inspection without delay.

Carol A. Desiderio
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Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur". The signature is fluid and cursive, with the first name "Manza" being more prominent and the last name "Arthur" following in a similar style.

Manza Arthur
Supervisor of Records

cc: Brian DeLacey
Ariana Langston
Howard L. Greenspan, Esq.