

Ms. Kelly:

As you know, I responded initially to your records request for a tape recording, created by Chief Eaton, by citing to exemption (e) as the recording was created by the Chief for his personal use and not as part of any governmental file. I was contacted by Patricia Rastellini of the Public Records Division, however, and she advised me that since the Chief had shared a copy of the recording with others, exemption (e) was no longer applicable and that I should reevaluate the record and determine if there are any other applicable exemptions or whether the recording is public, in whole or in part.

Please be advised that due to the nature of the discussions with Chief Eaton on this recording, there are three other exemptions that apply; I did not cite to them initially based on my assumption that exemption (e) applied to the entire recording. As these exemptions apply to the vast majority of the entire recording, I am again asserting that the recording is exempt from disclosure in its entirety, as detailed below.

A portion of the recording involves discussions of ongoing investigatory matters that either involve the Police Department or investigations performed by the Police Department. Exemption (f) of the Public Records Law applies to:

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.

One purpose of this exemption is to avoid premature disclosure of investigatory information prior to trial or other process for resolving the matters being investigated, and the prevention of disclosure of confidential investigative techniques, procedures or sources of information. WBZ-TV4 v. District Attorney for the Suffolk District, 408 Mass. 595, 601 (1990); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). In addition, exemption (f) allows the names and identifying details of any voluntary witness and complainant to be redacted and withheld from disclosure. The purpose of such exemption is to allow investigatory officials to provide an assurance of confidentiality to persons so that they will speak openly about matters under investigation. Bougas, 371 Mass. at 62; Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 290 (1979). Because portions of the recording involve discussion of ongoing investigations by police and other officials, and disclosure at this time would prejudice the investigations, exemption (f) applies to those portions.

Portions of the recording involve discussion on policies and procedures involving the Police Department, such as chain of command and deployment of personnel, which policies continue to be worked on. These portions of the recording are subject to exemption (d). This exemption is intended to avoid release of materials which could taint the deliberative process if prematurely disclosed. The application of the exemption is limited to recommendations on legal and policy matters found within an ongoing deliberative process. Babets v. Secretary of the Executive Office of Human Services, 403 Mass. 230 (1988). In considering exemption (d), the court in General Electric Company v. Department of Environmental Protection, 429 Mass. 798 (1999) stated, "The purpose of exemption (d) is to foster independent discussions between those responsible for a governmental decision in order to secure the quality of the decision." Id. Thus, any records or portions thereof that relate to ongoing deliberative matters, including matters of a policy nature, may be withheld under exemption (d).

Finally, a portion of the recording involves matters that are considered “personnel ...files or information” concerning Chief Eaton, and as such, are exempt from disclosure under exemption (c), the so-called “privacy exemption”:

Personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy. G.L. c.4, §7, cl.26(c)

Records constituting “personnel” records, i.e., information with regard to a particular candidate or employee that would be “useful in making employment decisions,” may be withheld as “personnel information” under the first clause of exemption (c) of the Public Records Law. Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792 (2000). Please note, however, that the discussions on the recording were not part of a formal Police Department internal affairs proceeding. The courts have determined that internal affairs records are not necessarily covered by exemption (c) and not considered to be personnel records. However, no part of the recording at issue is connected to an internal affairs proceeding.

When the three exemptions cited above are applied to the requested record, virtually the entire recording is exempt and redaction would not result in any intelligible record. As such, I am asserting that the requested record is exempt in its entirety and will not be produced.

Pursuant to 950 CMR 32.08, you may appeal this response to the Supervisor of Public Records within 90 calendar days.

Regards,

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