



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

Manza Arthur  
Supervisor of Records

August 11, 2023  
**SPR23/1739**

Kyle A. Wiley  
Records Access Officer  
Town of Marblehead  
Abbott Hall  
188 Washington Street  
Marblehead, MA 01945

Dear Ms. Wiley:

I have received the petition of Lena Robinson, of the *Marblehead Beacon*, appealing the response of the Town of Marblehead (Town) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On July 7, 2023, Ms. Robinson requested the following:

1. The interest rate that each account is earning as of June 30, 2023.
2. All fees/fee schedules associated with every account.
3. The name of every bank/financial institution as it corresponds with the above information.
4. The type of account(s) that the money is held in as it corresponds with the above information. (e.g. savings, checking, CD, etc.)
5. Which funds are being held in each account/institution.

The Town responded on July 21, 2023, and provided responsive records for Items 1, 2, and 4, but withheld records responsive to Items 3 and 5 under Exemption (n) of the Public Records Law. G. L. c. 4, § 7(26)(n). Unsatisfied with the Town's response, Ms. Robinson petitioned this office and this appeal, SPR23/1739, was opened as a result. Subsequent to the opening of this appeal, the Town provided a supplemental response on August 4, 2023.

***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. Att’y 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 her appeal petition, Ms. Robinson indicated that the Town did not meet its burden to withhold records responsive to Items 3 and 5 under Exemption (n) of the Public Records Law.

### ***The Town’s 21<sup>st</sup> and August 4<sup>th</sup> Responses***

In its July 21, 2023 response regarding Items 3 and 5, the Town stated that it was withholding records under Exemption (n). In a further response provided on August 4, 2023, the Town further claimed Exemption (a) of the Public Records Law to withhold responsive records.

### ***Exemption (n)***

Exemption (n) applies to:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

G. L. c. 4, § 7(26)(n).

Exemption (n) allows for the withholding of certain records which if released would jeopardize public safety. The first prong of Exemption (n) examines “whether, and to what degree, the record sought resembles the records listed as examples in the statute;” specifically, the “inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to

maximize damage.” PETA, 477 Mass. at 289-90.

The second prong of Exemption (n) examines “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” Id. at 289-90. The PETA decision further provides that “[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.” Id.

PETA also provides that “[t]hese two prongs of exemption (n) must be analyzed together, because there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian’s burden in demonstrating ‘reasonable judgment’ and vice versa.” PETA at 290.

Regarding Exemption (n) the Town stated the following:

Please be advised that due to cyber-security concerns, the Town is denying the portion of your request for documents with names of the financial institutions and specific dollar amounts associated with a specific financial institution. Similarly, the Town is not providing the interest rate and fees or types of accounts listed by financial institution all pursuant to exemption N of the Public Records Law. See G.L. ch. 4, § 7 cl. 26(n). As an example of this, after the initial release of documents, on May 17, 2023 a check dated 5/11/23 for \$18,970.44 was cashed at one of the financial institutions used by the Town. Another example of this, after the initial release of documents, on June 1, 2023 a check dated 5/26/23 for \$4,990.56 was cash [sic] at one of the financial institutions used by the Town. As stated in my prior email I have instituted new financial controls and policies to protect the assets of the Town and have changed banking institutions to implement positive pay.

Based on the Town’s response, I find it has not met its burden to withhold the requested records pursuant to Exemption (n). Based on the Town’s response it is unclear how the requested information resembles the types of records listed in the statute, nor how the information is one a terrorist would find useful to maximize damage. See id. at 289. Where the record bears little resemblance to the types listed in the statute, the burden on the custodian is correspondingly at its highest. See id. at 290-91. Further, I find the Town has not provided “sufficient factual heft” to conclude that a reasonable person would agree that disclosure of the records is “likely to jeopardize public safety or cyber security” as required by Exemption (n). Id. at 290-91.

Further, it is unclear how the records may be withheld in their entirety. It should be noted that any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a). See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). The Town must clarify these matters.

*Exemption (a)*

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public's right to inspect records under the Public Records Law is restricted. See Att'y Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either "shall not be a public record," "shall be kept confidential" or "shall not be subject to the disclosure provision of the Public Records Law."

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

Regarding Exemption (a) the Town stated the following:

Additionally, the Town may withhold these records pursuant to Exemption A. See G.L. ch. 4, § 7 cl. 26(a), if they are specifically or by necessary implication exempted from disclosure by statute. In this instance, the Town cites G.L. 93H Security Breaches and indicates that in order to prevent a further breach of security such as check fraud, the Town is withholding the requested information. This is because the Town maintains trust funds for both entities and individuals alike and has a duty to protect this information from being compromised. Therefore, Exemption A also applies in this instance. See G.L. ch. 4, § 7 cl. 26(a)[.]

Under the Public Records Law, the burden is on the custodian to prove with specificity the exemption which applies. G. L. c. 66, § 10(b)(iv); see also Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511. The Town's response did not contain the specificity required in a denial of access to public records. Instead, the Town's response merely cites G. L. c. 93H without sufficient explanation as to the statute's applicability to the withheld information. Based on the Town's response it is unclear how G. L. c. 93H, specifically or by necessary implication permits the Town to withhold the responsive records.

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The Town must clarify this matter.

***Conclusion***

Accordingly, the Town is ordered to provide Ms. Robinson with a response to the request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within 10 business days. 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](mailto:pre@sec.state.ma.us). Ms. Robinson may appeal the substantive nature of the Town's response within ninety (90) days. See 950 C.M.R. 32.08(1).

Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur". The signature is written in a cursive, flowing style.

Manza Arthur  
Supervisor of Records

cc: Lena Robinson