

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: 2285CV00971

JOAO DEPINA,

Plaintiff,

v.

WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE; JOSEPH D. EARLY, JR., in his personal and official capacities; ANTHONY MELIA in his personal and official capacities; BOSTON POLICE DEPARTMENT; DANTE WILLIAMS in his personal and official capacities; and RACHAEL ROLLINS, in her personal capacity,

Defendants.

**PLAINTIFF'S OPPOSITION TO
COMMONWEALTH DEFENDANTS'
MOTION TO STAY DISCOVERY AND FOR
A PROTECTIVE ORDER**

Plaintiff Joao DePina hereby files his Opposition to Motion to Stay Discovery and for a Protective Order.

1.0 BACKGROUND

On November 9, 2021, DePina heckled Defendant Rachael Rollins while she was giving a press conference on a public street. (Plaintiff's Verified Complaint and Demand for Jury Trial "Complaint" at ¶¶ 12-16) At the time of the incident, Defendant Rollins was the Suffolk County District Attorney. (*Id.* at ¶ 13) For heckling Defendant Rollins, three days later, on November 12, 2021, a felony charge for attorney intimidation in violation of G.L. c.268, § 13B was filed against DePina. (*Id.* at ¶ 17) In the words of Defendant Assistant District Attorney Anthony Melia, DePina was prosecuted for merely "questioning [Defendant Rachael Rollins] ability to be the district attorney...." (*Id.* at ¶ 43)

After the Commonwealth filed criminal charges against DePina, the Suffolk County District Attorney's Office recused itself from prosecution and farmed the case out. (*Id.* at ¶¶ 26)

Norfolk County District Attorney's Office, mindful of its obligations under the Massachusetts Rule of Professional Conduct Rule 3.8(a), declined to take the case. (*Id.* at ¶ 27) On the other hand, Worcester County District Attorney's Office accepted the case. (*Id.* at ¶¶ 29-37)

On May 25, 2022, the criminal charge against DePina was dismissed for lack of probable cause. (Complaint at ¶ 46) The trial court held that “[t]here exists no probable cause or references, direct or indirect, to [DePina’s] pending criminal cases. [DePina’s] speech is within the First Amendment’s protective reach.” (*Id.*)

There was a three-day window between the filing of criminal charges against DePina and his encounter with Defendant Rollins. There was also time between the filing of criminal charges and Worcester County District Attorney's Office accepting the case. Neither of these timeframes involved split-second decisions. There were communications and discussions between the Defendants. It is inequitable for the Commonwealth Defendants to have put DePina through the hell of a criminal prosecution for the obvious exercise of his right to speak freely and petition his government, and then for the Commonwealth Defendants to turn around and slam the door shut on discovery of exactly how that all transpired.

2.0 LEGAL AUTHORITY

Pursuant to Mass. R. Civ. P. 26(c), the Court may enter a protective order only for good cause shown “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

3.0 LEGAL ARGUMENT

There is no good cause to grant the Commonwealth Defendants motion to stay discovery and for a protective order. The Commonwealth Defendants argue that no discovery can be had until this Court rules on a motion to dismiss because they will raise defenses of qualified and absolute immunity. (Motion to Stay Discovery and For a Protective Order “Motion” at ¶ 3) The caselaw does not support their position. At its essence, the Commonwealth Defendants argue that

there is a standard operating procedure that this Court is duty bound to follow. There is no such thing.

The SJC has stated in dictum that the Massachusetts Civil Rights Act claims adopt “the standard of immunity for public officials developed under § 1983.” *Duarte v. Healy*, 405 Mass. 43, 46 (Mass. 1989); *see also Dinsdale v. Commonwealth*, 424 Mass. 176, 182 (Mass. 1997). Qualified immunity is a judicially-created doctrine that shields public officials from liability for performing discretionary functions “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Rodrigues v. Furtado*, 410 Mass. 878, 882 (Mass. 1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

The bulk of caselaw cited by the Commonwealth Defendants relates to qualified immunity. (See Motion at ¶ 6) The only binding precedent on qualified immunity cited by the Commonwealth Defendants is *Hudson v. Comm’r of Correction*, 46 Mass. App. Ct. 538 (1999), *aff’d* 431 Mass. 1 (2000). In *Hudson*, the Appeals Court held the trial court did not abuse its discretion in granting a motion for protective order and to stay discovery where a *pro se* litigant’s “entire argument” on appeal was premised on procedural indulgences granted to *pro se* litigants. *Id.* at 549. Finding it was not an abuse of discretion to grant a stay does not mean that a stay must always be granted. The Commonwealth argues to strip the Court of that very discretion.

Here, the Commonwealth Defendants provides no argument under Mass. Civ. P. 26(c) to support staying discovery, and the Commonwealth Defendants are not likely to succeed on a qualified immunity defense. The encounter between DePina and Defendant Rollins occurred on an open street, the pinnacle of an open forum, where the right to speak freely and petition the government is at its apex. *Cornelius v. Naacp Legal Defense Ed. Fund*, 473 U.S. 788, 817 (1985) (“[T]he quintessential public forums, includes those places which by long tradition or by government fiat have been devoted to assembly and debate, such as parks, streets, and sidewalks.”) (quotation marks and citations omitted). For exercising his constitutionally protected right to speak

freely and petition his government, the Commonwealth Defendants retaliated against DePina through an unjust abuse of the criminal justice system. The criminal charge against DePina was dismissed for lack of probable cause. (Complaint at ¶ 46) There is no reasonable argument that the defense of qualified immunity applies to all of the Commonwealth Defendants. *Houston v. Hill*, 482 U.S. 451, 462-63 (1987) (“The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”).

The central issue for the Commonwealth Defendants is whether absolute prosecutorial immunity applies. There is no presumption that the Commonwealth Defendants are entitled to absolute immunity. The Commonwealth Defendants “bear the burden of showing that such immunity is justified for the function in question.” *C.M. v. Comm’r of Dep’t of Children & Families*, 487 Mass. 639, 646 (Mass. 2021) (quotation marks and citations omitted). Determining the scope of prosecutorial immunity requires a functional analysis, a fact-specific inquiry, that “must thus focus not merely on the status or title of the officer, but also on the nature of the official behavior challenged.” *Chicopee Lions Club v. Dist. Attorney for Hampden Dist*, 396 Mass. 244, 248 (Mass. 1985). “Where the activity in question is closely related to the judicial phase of a criminal proceeding, or involves the skills or judgment of an advocate, the activity will be subject to absolute immunity.” *Id.* “A prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). “[A]ctions taken as an investigator enjoy only qualified immunity.” *Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000).

Only two cases the Commonwealth Defendants cite pertain to absolute immunity. (*See* Motion at ¶ 6) Neither case is dispositive.

First, the Commonwealth Defendants cites *Dinsdale*, 424 Mass. at 181 n.10 to support their argument that discovery cannot be had until the issue of absolute immunity is resolved. (Motion at 4) In *Dinsdale*, the SJC expanded absolute immunity to government litigators for their conduct in civil litigation. *Id.* at 182. In a footnote, the SJC acknowledged a “strong Federal policy” to resolve immunity claims in the early stages of litigation. *Id.* at n.10. However, *Dinsdale* does not address discovery. Therefore, this case does not support the Commonwealth Defendants’ assertion that discovery can not be had until a motion to dismiss is decided.

Next, the Commonwealth Defendants cites *Hornibrook v. Richardi* for the proposition that discovery cannot be had in cases involving absolute immunity until a motion to dismiss is resolved. 488 Mass. 74, 83-84 (2021). In *Hornibrook*, the SJC held a conservator is entitled to absolute immunity for conduct that is ordered by a probate court. *Id.* at 75. In *dicta*, the SJC addressed the lower court regarding discovery. *Id.* at 83-34. The lower court had ordered narrowly tailored discovery to aid the court in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded the defendant. *Id.* at 83 (“We briefly address the Superior Court judge's ruling ordering "narrowly tailored discovery" to *aid the court* in determining whether the complaint alleged conduct that falls outside the quasi-judicial immunity afforded to the defendant.”) (emphasis added). The SJC noted that “whether a defendant is entitled to absolute immunity is not one that should be determined through “narrowly tailored discovery” based on what the judge described as “paper-thin” allegations in the complaint . . . it is incumbent on the plaintiff to set forth factual allegations plausibly suggesting that the defendant acted outside her jurisdiction.” *Id.* at 83-84. The problem in *Hornibrook* was that the plaintiff failed to plead allegations “that plausibly suggeste[ed]” the defendant acted outside her role as a conservator. *Id.*

Here, DePina’s allegations are not paper-thin. The Commonwealth Defendants consist of three prosecutors spanning two separate district attorney’s offices that have varying roles as outlined in the Complaint. Only one of the prosecutors, Defendant Melia, actively prosecuted DePina. (Complaint at ¶ 38-46) Meanwhile, all of the Commonwealth Defendants presumably

seek to stay discovery. At the same time, administrative and investigative duties are not protected by absolute immunity and DePina has plausibly pled that the Defendants performed these duties in his Complaint.

Even if there were no jurisdiction over some defendants, DePina is entitled to third-party discovery from those defendants as third-parties to Plaintiff's case against the remaining defendants. *See* Mass. R. P. 34(c)(2).¹

Three days lapsed between DePina's altercation with Defendant Rollins and the filing of criminal charges. During that time, the Defendants engaged in conversations and communications regarding DePina. Communication between the Defendants was also necessary to transfer DePina's case to the Worcester County District Attorney's Office. These communications served the common goal of using government authority to silence DePina for exercising his constitutionally protected rights. None of that activity enjoys absolute immunity.

Perhaps some of the Defendants conduct can avail itself to absolute prosecutorial immunity, but qualified immunity absolutely does not apply to the Commonwealth Defendants. DePina respectfully request this Court to allow discovery to continue in the normal course, allowing him to gain a full and complete picture of the behind-the-scenes communications between the Defendants to understand their roles more fully. Moreover, robust discovery will allow the Supreme Judicial Court a wider lens if this case is taken on appeal. *See* Plaintiff's Rule 11 Certification.

¹ Separately, Plaintiff has requested information from the Worcester County District Attorney's Office through a public records request. **Exhibit A**. Unfortunately, Worcester County District Attorney's Office refused to provide the requested documents by citing to a non-existent litigation exception. **Exhibit B**. The denial of DePina's public records request was appealed to the Secretary of the Commonwealth. **Exhibit C**. The Secretary of the Commonwealth "decline[d] to opine" on Plaintiff's appeal. **Exhibit D**. Worcester County District Attorney's Office has caused undue burden on DePina. Denying the Commonwealth Defendants' motion here would be in the interest of judicial economy as it would potentially render separate litigation unnecessary.

4.0 Conclusion

For the foregoing reasons, Plaintiff respectfully request this Court deny the Commonwealth Defendants Motion to Stay Discovery and For a Protective Order.

Dated: October 21, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

Marc J. Randazza, BBO# 651477

mjr@randazza.com, ecf@randazza.com

Jay M. Wolman, BBO# 666053

jmw@randazza.com

RANAZZA LEGAL GROUP, PLLC

30 Western Avenue

Gloucester, MA 01930

Tel: (978) 801-1776

Attorneys for Plaintiff,

Joao DePina

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all parties through the Court's electronic filing system on this 21st day of October, 2022, or otherwise caused for service via U.S. Mail, as follows:

Thomas E. Bocian
Assistant Attorney General
Criminal Bureau/Appeals
Division
One Ashburton Place
18th Floor
Boston, MA 02108
thomas.bocian@mass.gov

Jesse M. Boodoo
Assistant Attorney General
Government Bureau/Trial
Division
One Ashburton Place
18th Floor
Boston, MA 02108
Jesse.Boodooc@mass.gov

Hannah C. Vail
Assistant Attorney General
Government Bureau/Trial
Division
One Ashburton Place
18th Floor
Boston, MA 02108
Hannah.Vail@mass.gov

Counsel for Defendants Worcester County Prosecutor's Office, Joseph D. Early, Jr., Anthony Melia, and Rachael Rollins. Served via the Court's electronic filing system.

Additionally, I caused Defendants Dante Williams and Boston Police Department to be served by U.S. Mail as follows:

Dante Williams
31 Blake Street
Hyde Park, MA 02136

Boston Police Department
c/o Boston Law Department
1 City Hall Square
Room 615
Boston, MA 02201

/s/ Marc J. Randazza
Marc J. Randazza

EXHIBIT A

Public Records Request
To Worcester County District Attorney's Office

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

PUBLIC RECORDS REQUEST FORM

**BEFORE MAKING YOUR REQUEST, PLEASE CONSULT
THE DISTRICT ATTORNEY'S GUIDELINES FOR PUBLIC RECORDS REQUESTS**

To: Records Access Officer
District Attorney's Office

From: Name Robert Morris
Street Address 30 Western Avenue
City/Town, State, Zip Code Gloucester MA 01915
Email rjm@randazza.com
Telephone number (optional) 978-801-1776

This is a request under the Massachusetts Public Records Law (G. L. c. 66, § 10) for copies of records pertaining to:

Commonwealth v. _____

Docket # _____ OR

Investigation and date of incident _____ OR

Other: Public Complaints filed against prosecutors of the Worcester DA's Office.

I request the following specific record(s):
Public Complaints filed against prosecutors in the Worcester DA's Office
between January 1, 2018 to the present.

I prefer to receive any released records (check one):
By mail (you may be charged for postage)
By email (if the records are available in electronic form) at the above address
Call the above phone number and I will pick up the records

I recognize that you may charge reasonable costs for copies, photographs, computer disks, or personnel time needed to comply with this request in accordance with G.L. c. 66, § 10(d), and that I may be required to pay in advance. If you cannot comply with my request, please provide an explanation in writing.

Sincerely,
Robert J. Morris, II

For office use only:
Records request # _____
Date received: _____
ADA assigned: _____

EXHIBIT B

Response to Public Records Request
Worcester County District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

Worcester County
(Middle District)
(508)-755-8601



September 21, 2022

Robert Morris
Via email: rjm@randazza.com

Re: Public Records Request

Dear Mr. Morris,

The District Attorney's Office has received your request dated September 7, 2022 in which you request complaints filed against prosecutors in our office.

The District Attorney's Office is unable to provide the requested documents at this time as public records because the requested records constitute discovery materials in the open and pending civil case regarding this matter. When public record requests are made during the course of open and ongoing cases, "discovery should follow normal procedures." Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976); see G.L. c. 4, § 7(26)(a).

If you are unsatisfied with the response I have provided and wish pursue this matter further, you may do so by contacting the Massachusetts Supervisor of Public Records.

Very truly yours,

A handwritten signature in black ink that reads "Mark Relation".

Mark Relation
Records Access Officer

EXHIBIT C

Public Records Request
Appeal to the Secretary of the Commonwealth

03 October 2022

Via Email Only

Massachusetts Supervisor of Public Records
pre@sec.state.ma.us

Re: Appeal Denial of Public Records Request re: Worcester County District Attorney's Office

Dear Supervisor of Public Records:

I am writing to appeal the decision made by the Worcester District Attorney's Office to deny my request for public records. Specifically, on September 7, 2022, I requested "Public Complaints filed against prosecutors in the Worcester County DA's Office between January 1, 2018 to the present." See **Exhibit A**.

On September 22, 2022, the Worcester District Attorney's Office denied my request based on *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64 (1976) stating that "[w]hen public records requests are made during the course of open and going cases, 'discovery should follow normal procedures.'" See **Exhibit B**.

While it is true that my law firm has filed a case that involves Worcester District Attorney's Office, see **Exhibit C**, the justification they have cited is inapplicable. *Bougas* does not stand for the proposition that documents that might be obtained in discovery are exempt from public records request disclosure. The exemption in *Bougas* was a separate issue, and the statement about discovery was dicta, merely addressing other theoretical avenues the plaintiffs had to obtain the documents. In fact, the court in *Bougas* noted that the plaintiffs there (criminal defendants) had the same rights as any member of the public, and it is preposterous to suggest that any other Massachusetts citizen, who is not currently suing them, could somehow obtain them in formal litigation discovery.

The applicable case law supports disclosure under the Freedom of Information law. See **Exhibit C** – *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020) ("[T]he District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff."). Because there is no litigation exception to providing the request documents, I request that you overrule their decision and order Worcester District Attorney's Office to provide me the request for documents.

On letter dated September 22, 2022, I sent a letter to Worcester County District Attorney's Office explaining the aforementioned and did not receive a response. **Exhibit D.**

Sincerely,

A handwritten signature in black ink that reads "Robert J. Morris II". The signature is written in a cursive, slightly slanted style.

Robert J. Morris II

encl: Exhibit A – Public Records Request September 7, 2022
Exhibit B – Denial of Public Records Request September 21, 2022
Exhibit C – Complaint *DePina v. Worcester County District Attorney's Office, et. al.*
with attached case *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-
1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020)
Exhibit D – Follow Up on Public Records Request Letter September 22, 2022

Exhibit A

Office of

District Attorney Joseph D. Early, Jr.

Worcester County
(Middle District)
(508)-755-8601



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

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THE DISTRICT ATTORNEY'S GUIDELINES FOR PUBLIC RECORDS REQUESTS**

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District Attorney's Office

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I recognize that you may charge reasonable costs for copies, photographs, computer disks, or personnel time needed to comply with this request in accordance with G.L. c. 66, § 10(d), and that I may be required to pay in advance. If you cannot comply with my request, please provide an explanation in writing.

Sincerely,
Robert J. Morris, II

For office use only:
Records request # _____
Date received: _____
ADA assigned: _____

Exhibit B

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.

Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
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Very truly yours,

A handwritten signature in black ink that reads "Mark Relation".

Mark Relation
Records Access Officer

Exhibit C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO.: _____

JOAO DEPINA,

Plaintiff,

v.

WORCESTER COUNTY DISTRICT
ATTORNEY'S OFFICE; JOSEPH D.
EARLY, JR., in his personal and official
capacities; ANTHONY MELIA in his
personal and official capacities;
BOSTON POLICE DEPARTMENT;
DANTE WILLIAMS in his personal
and official capacities; and RACHAEL
ROLLINS, in her personal capacity,

Defendants.

**VERIFIED COMPLAINT AND
DEMAND FOR JURY TRIAL**

This is a Civil Action brought by Plaintiff Joao DePina against Defendants Worcester County District Attorney's Office, Joseph D. Early, Jr., Anthony Melia, Boston Police Department, Dante Williams, and Rachael Rollins. DePina brings a claim under G.L. c. 12, § 11 for Defendants' malicious prosecution, abuse of process, and violation of DePina's freedom of speech rights under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, as well as for Negligent Infliction of Emotional Distress and Intentional or Reckless Infliction of Emotional Distress, and alleges as follows:

THE PARTIES

1. Plaintiff Joao DePina is an individual who resides in Dorchester, Massachusetts.
2. Defendant Rachael Rollins is currently the U.S. Attorney for the District of Massachusetts, however this complaint is not relevant to her conduct as U.S. Attorney. At the time of her abuse of power and tortious activity, she was the District Attorney for Suffolk County, Massachusetts. Upon information and belief, she resides in Middlesex County, Massachusetts.

3. Defendant Worcester County District Attorney's Office is located in Worcester, Massachusetts and has the power to prosecute for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

4. Defendant Joseph D. Early, Jr., is the Worcester County District Attorney, whose office is located in Worcester, Massachusetts. District Attorney Early has the power to prosecute (or to decline to prosecute) for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

5. Defendant Anthony Melia was, at all relevant times herein, an Assistant District Attorney with the Worcester County District Attorney's Office, and has the power to prosecute (or to decline to prosecute) for Intimidation of Witnesses, Jurors and Persons Furnishing Information in Connection with Criminal Proceedings under G.L. c. 268, § 13B.

6. Defendant Boston Police Department is located in Boston, Massachusetts.

7. Defendant Detective Dante Williams, at all relevant times herein, was employed with the Boston Police Department in Boston, Massachusetts.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this civil action per G.L. c. 212, sec. 3, as there is no reasonable likelihood that recovery will be less than or equal to \$25,000.

9. This Court has personal jurisdiction over Defendants generally, as they are domiciled in the Commonwealth of Massachusetts, and specifically, per G.L. c. 223A, sec. 3(a), (b), and (c), as this matter arises from Defendants' transaction of business in the Commonwealth, contracting to supply legal services in the Commonwealth, and causing tortious injury by act and omission in the Commonwealth.

10. Venue is proper in Worcester County per G.L. c. 223, sec. 1, as Defendants Worcester District Attorney's Office, Early, and Melia have their usual place of business therein.

FACTUAL BACKGROUND

11. Joao DePina is a community activist and past candidate for the Boston City Council.

12. On Tuesday, November 9, 2021, there was a shooting in Dorchester, Massachusetts.¹ Three police officers were injured during a standoff with a person with a gun. Officers returned fire, killing the person, and the three police officers were injured.

13. That evening, Defendant Rachael Rollins, the Suffolk County District Attorney at the time, held a televised press conference regarding the shooting incident.

14. DePina attended the press conference and questioned Rollins over the continued gun violence in Boston and government incompetency, including the incompetency of the District Attorney's Office to respond to his brother's murder.²

15. At the time, Rollins was a nominee for the office of United States Attorney, having been nominated on or about July 26, 2021.

16. DePina exercised his right to criticize Rollins for abusing her power as a public official, opportunistically seeking higher office without caring for the people of Boston, and failing to take adequate care of Boston police officers.³

¹ Julia Taliesin, *3 officers shot, suspect killed in Dorchester standoff*, Boston.com, (Nov. 9, 2021), available at <https://www.boston.com/news/crime/2021/11/09/dorchester-standoff-officers-civilian-shot/>.

² See, e.g., Antonio Planas, "Activist's family is hit by violence," Boston Herald (Jun. 8, 2014) (discussing Defendant's call for ending violence in the wake of his brother Michael's homicide on June 6, 2014), available at <https://www.bostonherald.com/2014/06/08/activistsfamily-is-hit-by-violence/>.

³ Her nomination was unfavorably reported out of the Senate Judiciary Committee. On December 8, 2021, a month after DePina was coerced into silence through threat of prosecution, Rollins was, ultimately, confirmed by the Senate following the historic need for the Vice President to cast a tie-breaking vote, twice. *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress, 1st Session* www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00485.htm, (accessed Aug. 23, 2022); *U.S. Senate: U.S. Senate Roll Call Votes 117th Congress, 1st Session* www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00486.htm, (accessed Aug. 23, 2022)

17. Three days after the November 9, 2021, press conference, to retaliate for DePina's public criticism, Rollins caused a criminal complaint to be filed against DePina accusing him of Attorney Intimidation in violation of G.L. c. 268, § 13B. The complaint alleged that DePina intended to intimidate Rollins because the Suffolk District Attorney's Office, which Rollins was overseeing at the time, had three active pending criminal cases against DePina.

18. Defendant Detective Dante Williams was present during the press conference and was able to observe all of the events, yet he filed a knowingly false police report.

19. Upon information and belief, Williams did so at Rollins's behest, for Rollins's benefit.

20. Rollins has previously threatened journalists and other citizens with false charges for engaging in their constitutionally protected rights.

21. Rollins and Williams conspired to violate DePina's civil rights and civil liberties by jointly creating the knowingly false narrative in the police report.

22. The Intimidation statute states in relevant part that "whoever willfully, either directly or indirectly threatens, attempts or causes ... emotional ... or economic injury or property damage to ... or misleads, intimidates or harasses another person who is a[n] ... attorney ... with the intent to or with reckless disregard for that fact that it may interfere with ... [a] criminal proceeding of any type." G.L. c. 268, § 13B(b).

23. A violation of the Intimidation statute is subject to "imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment." G.L. c. 268, § 13B(b)(E)(2).

24. At no time did DePina engage in unlawful intimidation within the meaning of G.L. c. 268, § 13B.

25. DePina was placed in emotional distress by facing such penalties and the process of defending himself, in a case that should never have been brought in the first place.

26. The Suffolk County District Attorney's office recused itself from the prosecution.

27. The file was transferred to Norfolk County, but the Norfolk County District Attorney was mindful of his obligations under the Massachusetts Rules of Professional Conduct Rule 3.8(a) and, thus, he showed the ethics and good sense to decline to take the case.

28. On information and belief, the file bounced to other District Attorneys who showed the same good judgment and declined to prosecute DePina in a clearly frivolous case.

29. The Worcester District Attorney's office took leave of its ethics and good judgment, instead choosing to prosecute DePina, presumably out of a desire to curry political favor with Rollins, without regard to their ethical obligations nor the constitutional rights it was trampling for no good cause whatsoever.

30. The prosecutors who pressed the case should have had the ethics of the prosecutors who declined to take the case. *See* Massachusetts Rules of Professional Conduct Rule 3.8(a).

31. Their failure to exercise such ethics and their abuse of their power and their abuse of the process was the direct and proximate cause of DePina's emotional distress.

32. The complaint was issued against Plaintiff DePina without probable cause and in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

33. On or about January 6, 2022, DePina, through counsel, moved to dismiss the prosecution for lack of probable cause.

34. This Motion to Dismiss was in the file when Defendants Worcester County District Attorney's Office, District Attorney Early, and District Attorney Melia (hereinafter, "The Worcester DA Defendants") decided to take the case, either in order to silence DePina or to try to curry favor with Rollins, without any regard for DePina's constitutional rights, and without any regard to their ethical obligations.

35. The Worcester DA Defendants knew or should have known, with the exercise of reasonable diligence, at the time they agreed to prosecute the case that the matter was ripe for dismissal for lack of probable cause.

36. At all relevant times herein, Melia acted on behalf of Defendants Worcester County District Attorney's Office and District Attorney Early.

37. The Worcester DA Defendants had access to the recording of the incident, and yet they knowingly prosecuted charges that they knew were unsupportable under the law.

38. Notwithstanding the lack of merit, on March 22, 2022, Melia audaciously filed an opposition to the motion to dismiss.

39. At an April 25, 2022, hearing on the motion to dismiss, Defendant Melia stated the following:

MR. ADA: So, Judge, I think with witness intimidation you're allowed to take what was said and taken within the context of how it's said. When you have a man being prosecuted by DA Rollins's office and he appears seven days prior to his next court date, indirectly referencing the cases for which he's being prosecuted, I think there's at least probable cause to show that his statements were designed to interfere with the justice process.

Transcript 7: 10-18.

40. Twisting constitutionally protected speech and attempting to shoehorn it into the Intimidation Statute through mere conjecture would chill the speech of any person who would dare criticize a prosecutor.

41. One does not lose the right to criticize a prosecutor merely because they are themselves facing charges, else it creates a perverse incentive to charge all detractors so that any criticism is silenced under the threat of purported intimidation.

42. DePina did not directly or indirectly reference the cases for which he was being prosecuted for by Defendant Rollins nor did DePina commit any act that could plausibly constitute a violation of the Attorney Intimidation statute.

43. When pressed for evidence by the trial court judge, Defendant Melia admitted there was no evidence of intimidation.

THE COURT: So when you say "indirectly references," is there any reference to those cases, any of those cases?

MR. ADA: No, Judge.

THE COURT: What's the veiled reference to those cases? Is there any veiled reference? So he questions her authority. I think everybody in the room would agree, he questions her authority, he questions her ability to do her job well?

MR. ADA: Yes.

THE COURT: So what's the veiled reference to those cases if it's not a direct reference?

MR. ADA: I don't think there's veiled references directly to his cases, Judge. My only argument would be that with Mr. DePina questioning her ability to be the district attorney, he's indirectly referencing her ability to fairly prosecute him as a defendant.

THE COURT: So does that mean that when anybody who has a case appears at a press conference questions the ability of the prosecutor to do their job, that is witness intimidation?

MR. ADA: If they're under prosecution by that district attorney, yes.

THE COURT: Is there anything else you want me to know before [sic] any other argument that you want me to make [sic] before I take this into consideration or under consideration?

MR. ADA: No, Judge.

Transcript 12:7- 13:9.

44. In essence, Melia, for all Defendants, was using the Intimidation Statute as an unconstitutional gag.

45. On May 25, 2022, the trial court correctly (and courageously) dismissed the charges against DePina for lack of probable cause.

46. Specifically, Justice Fraser, in dismissing the matter, ruled as follows:

After hearing, the motion is ALLOWED. The defendant was charged with witness intimidation, in violation of G.L. c. 268, s. 13B. According to a report of Boston Police, the defendant made statements to then Suffolk County D.A. Rachael Rollins during a press conference that appear as an intent to interfere with the defendant's criminal cases, being prosecuted by DA Rollins' office. The report author posits that the defendant made several indirect references to his criminal cases. The parties agreed to allow the Court to review the electronic recording of the press conference. There exists no probable cause or references, direct or

indirect, to the defendant's pending criminal cases. The defendant's speech is within the First Amendment's protective reach.

47. DePina made no threats. DePina engaged in no form of harassment, nor anything that could possibly be construed as intimidation of someone connected to a pending criminal proceeding. DePina exercised his constitutionally protected right to criticize a public official. This was all clear from the video that Williams and the Worcester DA Defendants claimed to have reviewed. This was all clear from press coverage of the event. This was all clear to any eyewitness. Nevertheless, Rollins, Williams and the Worcester DA Defendants conspired to violate DePina's civil rights.

48. Rollins and Williams knew that DePina was no threat, as did the Worcester DA Defendants.

49. A little more than a year earlier, in September 2020, DePina was heckling Police Chief William Gross. In that situation, Rollins intervened and deescalated the situation, including handing DePina her badge and cell phone.

50. Rollins explained in 2020 that she intervened on behalf of DePina to protect his constitutionally protected right to freedom of speech by stating that "there were about five to ten white police officers standing off camera that were about to 'remove' Joao from the scene for yelling. As I am sure you are aware, *yelling your opinion is free speech. It may be annoying but it is protected.*" (emphasis added).



Brellis, Matthew (DAA) <matthew.brellis@state.ma.us>
to me ▾

Sep 21, 2020, 4:04 PM ☆ ↩ ⋮

"The reason I tried to de-escalate that situation was two-fold. First, three people had just been shot and one of them had died. I believed that Joao's behavior was disrespectful to those families and the community that had a right to know details about the violence that had happened earlier that evening in their neighborhood. He was upset because he said the Commissioner had given him the finger and made a derogatory comment to him. All I was saying to Joao was that this very moment was not the time or place to erupt. That he needed to calm down or he was going to potentially get arrested. Second, there were about five to ten white police officers standing off camera that were about to "remove" Joao from the scene for yelling. As I am sure you are aware, yelling your opinion is free speech. It may be annoying, but it is protected. Had those officers gone over to remove Joao and that situation potentially escalated into a struggle with five to ten white police officers restraining and arresting a Black man in front of multiple news media outlets, how is that helpful? If we are truly trying to mend relationships between the communities that experience the majority of violence and crime and the members of law enforcement that protect us and solve those crimes, how does that potentially violent restraint and arrest help us get there? I went over and spoke to Joao to ask him to relax. I did that for the families of the three shooting victims (one of whom that had died) and the community, and I did it for the police officers that as a result didn't have to be subjected to potential ridicule and accusations had the situation potentially escalated. And I would do it again."

Rachael Rollins

51. This demonstrates that Rollins was well aware of the rights she was violating when, a year later, she engaged in her retaliatory abuse of power.

52. Apparently, for Rollins, it is only free speech if she is not the one being criticized.

53. DePina experienced severe emotional distress and physical harm manifested by objective symptomatology from the lawless actions by Defendants, including insomnia and inability to concentrate, and fear of engaging in other constitutionally protected activity that resulted from fear of imprisonment.

CAUSES OF ACTION

Count I

(G.L. c. 12, § 11I – Malicious Prosecution)

54. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

55. Defendants initiated and/or continued criminal prosecution against DePina for violation of the Attorney Intimidation Law.

56. Defendants initiated and/or continued criminal prosecution against DePina with malice.

57. There was no probable cause for criminal prosecution of DePina for violation of the Intimidation Law.

58. The termination of the criminal proceeding was in favor of DePina.

59. The prosecution against DePina was dismissed for lack of probable cause with the trial court noting that DePina's speech was "within the First Amendment's protective reach."

60. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina's exercise of rights supported by the Massachusetts Constitution.

61. No reasonable attorney nor police officer could have believed that the prosecution was valid and was anything other than a retaliatory act against DePina for his speech protected by

art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

62. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, was content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

63. As a direct and proximate result of Defendants' violations, through malicious prosecution, of DePina's constitutional and common law rights, DePina suffered harm including emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

Count II
(G.L. c. 12, § 11I – Malicious Abuse of Process)

64. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

65. Defendants initiated criminal process against DePina for violation of the Attorney Intimidation Law.

66. Defendants initiated criminal prosecution against DePina for an ulterior purpose and for an illegitimate purpose.

67. The criminal prosecution against DePina was dismissed for lack of probable cause with the trial court noting that DePina's speech was "within the First Amendment's protective reach."

68. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina's exercise of rights supported by the Massachusetts Constitutions.

69. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, is content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

70. As a direct and proximate result of Defendants' violation, through malicious abuse of process, of DePina's constitutional and common law rights, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

Count III
(G.L. c. 12, § 11I –Retaliation)

71. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

72. DePina was engaged in activity protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Declaration of Rights when he attended Defendant Rachael Rollin's televised press conference and spoke his mind. His actions constitute speech on an important matter of public concern and therefore are afforded a high level of protection from government interference.

73. Defendants retaliated against DePina's protected speech by criminally prosecuting him for violation of the Attorney Intimidation Law despite having no probable cause and no reasonable person could possibly think DePina violated the law.

74. Defendants prosecuted DePina for the specific purpose of silencing his protected speech and prohibit DePina from speaking out in the future.

75. It is clearly established that there is a constitutional right to openly speak on a public sidewalk.

76. DePina has the right, pursuant to G.L. c. 12, § 11I, to institute and prosecute a civil action against Defendants for their interference with, and attempts thereof, DePina's exercise of rights supported by the Massachusetts Constitution.

77. Defendants' prosecution for DePina's speech protected by art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, is content-based and viewpoint-based and is in violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

78. As a direct and proximate result of Defendants' retaliatory violation of art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, emotional distress, physical harm, and pecuniary loss entitling DePina to declaratory relief and compensatory damages.

Count IV
(Intentional or Reckless Infliction of Emotional Distress)

79. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

80. Defendants intended to inflict emotion distress or should have known that emotional distress was the likely result of their conduct.

81. Defendants' conduct was extreme and outrageous.

82. Defendants' actions were the cause of DePina's distress.

83. DePina's sustained severe distress as a result of Defendants' conspiracy of threatening felonious charges against him without probable cause as an unconstitutional means to muzzle him.

84. As a direct and proximate result of Defendants' conduct, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss entitling DePina to compensatory and punitive damages.

Count V
(Negligent Infliction of Emotional Distress)

85. Plaintiff hereby repeats and realleges the preceding paragraphs of the Complaint as if set out in full herein.

86. Defendants owed a duty of care in that a police officer and a prosecutor should not pursue charges against a citizen where it is obvious that there was no probable cause and that DePina was lawfully exercising his constitutionally protected rights under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution.

87. DePina experienced severe emotional distress and physical harm manifested by objective symptomatology from the lawless actions by Defendants, including insomnia and inability to concentrate, and fear of engaging in other constitutionally protected activity that resulted from fear of imprisonment.

88. A reasonable person would have suffered emotional distress under the circumstances of this case.

89. The Worcester DA Defendants, Rollins, and the Boston Police Department are liable to Plaintiff for their negligent infliction of emotional distress.

90. As a direct and proximate result of Defendants' conduct, Plaintiff suffered irreparable harm, including potential loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss entitling DePina to compensatory and punitive damages.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury on each claim asserted or hereafter asserted in the Complaint, and on each defense asserted or hereafter asserted by the Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff asks this Court:

A. To declare that Defendants' prosecution of Plaintiff violated art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments of the Massachusetts Constitution as set forth in this Complaint;

B. To award Plaintiff compensatory and punitive damages for the past loss of his constitutional rights, severe emotional distress, physical harm, and pecuniary loss;

C. To award Plaintiff his reasonable attorneys' fees, costs, and expenses pursuant G.L. c. 12, § 11I, and any other applicable law; and,

D. To award such other relief as this Honorable Court may deem just and proper.

Dated: August 24, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

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Attorneys for Plaintiff,
Joao DePina

VERIFICATION OF COMPLAINT

I, Joao DePina, am the Plaintiff in the above-captioned matter. I have reviewed the foregoing allegations in this Verified Complaint, and I hereby declare under the penalty of perjury that the foregoing allegations are true and correct to the best of my knowledge and understanding.

Dated: 08 / 24 / 2022.

By: 
Joao DePina

Exhibit D

22 September 2022

Via Email Only
Mark Relation
mark.relation@state.ma.us

Re: Follow Up on Public Records Request

Dear Relation:

It appears you have cited *Bougas v. Chief of Police of Lexington*, 471 Mass. 59 (Mass. 1976) for a civil litigation exemption to deny the public records request. Such an exemption does not exist.

In fact, the Court in *Bougas* noted that the plaintiffs there (criminal defendants) had the same rights as any member of the public, and it is preposterous to suggest that any other Massachusetts citizen, who is not currently suing them, could somehow obtain them in formal litigation discovery. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64 (Mass. 1976) ("It appears that the statute does not provide a "standing" requirement but extends the right to examine public records to "any person" whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity. Nor do we read the exemption in § 7, Twenty-sixth (f), for certain investigatory materials as discriminating among persons seeking disclosure.").

The applicable case law supports disclosure under the Freedom of Information law. See **Attachment** – *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020) ("[T]he District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff.").

Because there is no litigation exception to providing the request documents, I request that you reconsider denying our request and provide the requested for documents. Thank you for your time and review. We will give you an additional 48 hours to respond to the request before appealing your office's denial.

Sincerely,



Robert J. Morris II

encl: *Del Rosario v. Nashoba Regional Sch. Dist.*, Nos. 145840, MICV2018-1899D, 2020 Mass. Super. LEXIS 192, at *6 (Feb. 11, 2020)

Rosario v. Nashoba Reg'l Sch. Dist.

Superior Court of Massachusetts, At Middlesex

February 11, 2020, Decided

Civil No. 18-1899D

Reporter

2020 Mass. Super. LEXIS 416 *

MARIA DEL ROSARIO¹, Plaintiff vs. NASHOBA REGIONAL SCHOOL DISTRICT, Defendant

Judges: [*1] Peter B. Krupp, Justice of the Superior Court.

Opinion by: Peter B. Krupp

Opinion

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT HI OF THE SECOND AMENDED COMPLAINT

Among other claims, plaintiff Maria del Rosario's Second Amended Complaint (Docket #31) alleges that Nashoba Regional School District ("the District") failed to comply with the Massachusetts Public Records Law, [G.L. c. 66, § 10A](#), when it declined to produce any records in response to plaintiff's public records request dated April 23, 2019. While plaintiff seeks a jury trial on her other claims, the case is before me on plaintiff's motion for judgment on the pleadings on her public records claim (Count III). After review, the motion is allowed in large part and the matter is remanded to the District.

BACKGROUND

Plaintiff filed this case on December 12, 2018 to enforce an alleged agreement by the District to pay for an out-of-district special education placement for her daughter. On April 23, 2019, plaintiff served her first request for production of documents ("the RFP"). The RFP sought eight categories of documents.

At the same time she served her RFP, plaintiff sent the District a public records request in the form of a letter under [*2] [G.L. c. 66, § 10](#), seeking ten categories of documents. Although there was some overlap between the RFP and the public records request, the latter was considerably broader and sought documents different from those sought in the RFP. In response to the public records request, on May 7, 2019, counsel for the District sent a response to plaintiff's counsel, declining to produce any responsive documents. Specifically, the District cited *950 C.M.R. §§ 32.08(2)(b)(l)* and [\(2\)](#), and claimed that the documents sought are the subject of disputes in

¹ As guardian and parent of Gwendolyn Burke.

active litigation, many of the requests have already been made or the documents have already been produced, and the District's attorneys "do not believe that it is our client's obligation to continue to produce the same documents or to respond to the same document requests over and over again." The District also indicated that "some of the categories of records sought... are likely subject to one or more of the exemptions to the Public Record Law that are set forth at G.L. c. 4, § 7(26) et. seq.," but it provided little detail and cited only one such provision: G.L. c. 4, § 7(26)(c) ("personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute [*3] an unwarranted invasion of personal privacy").

With this action pending, after receipt of the District's response, plaintiff successfully moved to amend her complaint to add a count for review under the Public Record Law, G.L. c. 66, § 10 A. Plaintiff now moves for judgment on the pleadings on that count.

DISCUSSION

I. The Public Records Act

"The primary purpose of G.L. c. 66, § 10, is to give the public broad access to government documents." Harvard Crimson. Inc. v. President and Fellows of Harvard College, 445 Mass. 745, 749 (2006) (and cases cited). While "disclosure is favored by a presumption that the record sought is public," the legislature has exercised its "considered judgment" and determined "that the public right of access should be restricted in certain circumstances." Id. at 749-750 (internal quotations and citations omitted). See generally G.L. c. 4, § 26 (itemizing exceptions to the definition of "public records"). The existence of litigation, however, does not eliminate the obligation of a public agency to comply with the Public Records Law, nor are records relevant to pending litigation exempted from the definition of "public records."

Under G.L. c. 66, § 10 (eff. Jan. 1, 2017), upon receipt of a request for public records, the agency or municipality must respond in writing. If the agency "does not intend to permit inspection or furnish [*4] a copy of a requested record," or if "the magnitude or difficulty of the request... unduly burdens the other responsibilities of the agency" such that it cannot provide the record within 10 business days, the agency must say so in writing. Among other things, the agency's written response must (1) identify any requested records that are not in the agency's possession custody or control; (2) identify the agency that may be in possession of such records; (3) identify any records the agency "intends to withhold" with "the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based;" (4) identify any records the agency intends to produce but requires additional time to do so; (5) identify the reasonable timeframe for the agency to produce the record sought; (6) suggest a reasonable modification to the scope of the request to facilitate the production of documents "more efficiently and affordably;" and (7) provide an itemized estimate of the fees to produce the records. G.L. c. 66, § 10(b). Nothing in G.L. c. 66, § 10, authorizes the agency to withhold public records during the pendency of related litigation.

A party aggrieved by an agency's decision to withhold [*5] public records may seek redress through a petition to the Supervisor of Records under [G.L. c. 66, § 10A\(a\)](#) and [\(b\)](#), and/or, as here, to the Superior Court in the county in which the municipality is located under [G.L. c. 66, § 10A\(c\)](#) and [\(d\)](#). Certain regulations govern review by the Supervisor of Records, see generally 950 [C.M.R. § 32.01](#), *et seq.*, including authorization for the Supervisor of Records to deny an appeal "if, in the opinion of the Supervisor: 1. the public records in question are the subjects of disputes in active litigation." 950 [C.M.R. § 32.08\(2\)\(b\)](#).

No such limit cabins a Superior Court's review of a public records dispute. If review is sought in the Superior Court, the court is required to "determine the propriety of any agency or municipal action de novo," must, "when feasible, expedite the proceeding," and must apply "a presumption ... that each record sought is public," with the burden on the agency "to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law." [G.L. c. 66, § 10A\(d\)\(l\)](#). If the requester is successful in the Superior Court, the court "may award reasonable attorney fees and costs," with "a presumption in favor of an award of fees and costs unless the agency or municipality establishes," [*6] among other things, that it "reasonably relied upon" a published opinion of a Massachusetts appellate court or of the Attorney General based on substantially similar facts, or "the request was designed or intended to harass or intimidate." The court may also waive any fee that would otherwise be assessed under [G.L. c. 66, § 10\(d\)](#), or award punitive damages. [G.L. c. 66, § 10A\(d\)\(3\)](#) and [\(4\)](#).

II. The District's Response to Plaintiffs Public Records Request

In this case, the District's response to plaintiff's public records request did not comply with the Public Records Law. The District does not deny that it has responsive documents or that at least some such documents are public records. Instead, the District flatly refused to produce any documents on the grounds that litigation was pending between the parties. This, as described above, is not a valid basis for the District to withhold any and all public records from being reviewed by and copied for plaintiff.

Beyond this improper articulated basis to withhold all public records, the District's response failed in various other material respects. The District's response failed to identify any records the District intended to produce, failed to identify a reasonable timeframe for it to [*7] produce any such records, failed to suggest a reasonable modification to the scope of the requests to facilitate the production of documents, and failed to provide an itemized estimate of the fees to produce the records. Although the District's response suggested generally that "some of the categories" of documents sought in the public records request are "likely" subject to an exemption, the District failed to itemize the records the District intended to withhold with "the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based." [G.L. c. 66, § 10\(b\)](#).

Having found the District's response to be in violation of the Public Records Law, the question before the court is what remedy should apply. Plaintiff argues that the court should require the District to produce all responsive documents to the court and then the court should conduct an in camera review of the documents. The court is ill-equipped to perform such an evaluation in

the first instance. Moreover, many of the requested records may indeed be subject to an exemption, including by containing confidential information about specific individuals the disclosure of which would be an unwarranted [*8] invasion of personal privacy.² The District is in the best position to make this evaluation at least initially.

Instead of compelling the District to provide all responsive records to the court for evaluation, the court will remand the matter to the District for a proper written response in compliance with the Public Records Law and this opinion. Specifically, the District will have to make a determination in the first instance, among other things, which requested records exist, which will be produced, which can be produced in redacted form, and whether any exemptions apply to justify withholding certain records from production; and will have to state the results of its evaluation in writing and with particularity.

There is a presumption that plaintiff will recover her reasonable attorney's fees in this context. The District has failed to demonstrate that it reasonably relied upon a published opinion of a Massachusetts appellate court or of the Attorney General on similar facts, or that plaintiff's request was designed or intended to harass or intimidate the District. Accordingly, an award to plaintiff of her reasonable attorney's fees to prosecute this public records appeal is appropriate. [*9] Moreover, any fee that would otherwise be assessed under [G.L. c. 66, § 10\(d\)](#) shall be waived. Given the nature of this dispute, I do not find that punitive damages are appropriate.

ORDER

Plaintiff's Motion for Judgment on the Pleadings on Count III of her Pleadings Petitioning for Compliance with her Public Records Request by Defendant Nashoba Regional School District, for an In-Camera Inspection of the Public Records Wrongfully Withheld by Defendant School District, and for her Attorney's Fees and Waiver of Defendant's Production Costs (Docket #35) is **ALLOWED in rjart** as follows, but **otherwise DENIED**:

By February 25, 2020, the District shall respond in writing to plaintiff's public records request dated April 23, 2019 with respect to any public records created through the date of this Order. Such response shall comply with the Public Records Law and this opinion. To the extent any responsive public records are withheld, the public record shall be identified in writing and the specific exemption shall be cited. To the extent any responsive public records are withheld on the ground of privilege, a privilege log shall be produced within thirty (30) days of the date of this Order, identifying each document [*10] withheld and the particular privilege claimed as a basis to withhold the document.

All documents the District agrees will be produced shall be produced within thirty (30) days of the date of this Order, or such later time as the court may permit by motion.

Any fees or costs that could be assessed under [G.L. c. 66, § 10\(d\)](#), including for searching for or producing any documents responsive to plaintiff's public records request, are waived.

² See, e.g., Letter dated April 23, 2019, Item 1 (documents regarding hiring Joan DeAngelis) and Items 5 and 9 (documents potentially regarding specific students in the District's "transitions classroom").

If plaintiff seeks her reasonable attorney's fees in connection with prosecuting her appeal from the District's original response to her public records request, plaintiff shall serve a motion for fees, with a supporting affidavit, by February 26, 2020, and shall file it in compliance with [Superior Court Rule 9A](#) by March 13, 2020. The court will likely decide any such motion on the papers.

Dated: February 11, 2020

/s/ [Signature]

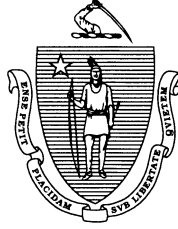
Peter B. Krupp

Justice of the Superior Court

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EXHIBIT D

Response to Public Records Request Appeal
Secretary of the Commonwealth



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

Manza Arthur
Supervisor of Records

October 14, 2022
SPR22/2236

Mark Relation, Esq.
Records Access Officer
Worcester County District Attorney's Office
225 Main Street, G301
Worcester, MA 01608

Dear Attorney Relation:

I have received the petition of Attorney Robert J. Morris II appealing the response of the Worcester County District Attorney's Office (Office) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On September 7, 2022, Attorney Morris requested "Public Complaints filed against prosecutors in the Worcester County DA's Office between January 1, 2018 to the present." The Office responded on September 21, 2022, denying the request. Unsatisfied with the Office's response, Attorney Morris appealed, and this case was opened as a result.

Pending Litigation

950 C.M.R. 32.08(2)(b) provides in pertinent part:

the Supervisor may deny an appeal for, among other reasons if, in the opinion of the Supervisor:

1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation.

In its September 21, 2022 response, the Office states that "the requested records constitute discovery materials in the open and pending civil case regarding this matter." This office has reviewed the trial court's docket and verified that the civil litigation, concerning the requested records, is still active and ongoing in the Worcester Superior Court. See Joao Depina v. Worcester County District Attorney's Office, et al. (Superior Court Docket No. 2285CV00971).

Mark Relation, Esq.
Page 2
October 14, 2022

SPR22/2236

In light of the pending matter, I decline to opine on these matters at this time. See 950 C.M.R. 32.08(2)(b). It should be noted that a change in the status of this action could impact the applicability of 950 C.M.R. 32.08(2)(b).

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: Robert J. Morris II, Esq.