The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

August 5, 2025
SPR25/2202

Adrian Walleigh, Esq.
Counsel and Records Access Officer
Executive Office of Housing and Livable Communities
100 Cambridge Street
Boston, MA 02114

Dear Attorney Walleigh:

I have received the petition of John A. Mostyn appealing the response of the Executive Office of Housing and Livable Communities (Office/EOHLC) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On May 23, 2025, Mr. Mostyn requested the following:

> [1] Internal communications (including emails, memos, meeting notes) between EOHLC staff, contractors, and other agencies regarding the evaluation and selection of [an identified address][;]
> [2] Documents related to the assessment of the property's suitability for use as a shelter[;]
> [3] Any funding documents associated with the acquisition, renovation, or operation of the shelter at [an identified address].

The Office responded on May 23, 2025 and June 9, 2025. Unsatisfied with the responses, Mr. Mostyn petitioned this office and this appeal, SPR25/2202, 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.

The Office's May 23rd and June 9th Responses

On May 23, 2025, the Office stated, "EOHLC has received your public record request and will begin the search for responsive records."

On June 9, 2025, the Office cited Exemption (d) of the Public Records Law to withhold responsive records in their entirety.

Current Appeal

In his July 10, 2025 appeal to this office, Mr. Mostyn objected to the Office's withholding of the records in their entirety.

Exemption (d)

Exemption (d) allows the withholding of:

> inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based
>
> G. L. c. 4, § 7(26)(d).

Exemption (d) is intended to avoid premature release of materials that could taint the deliberative process if disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process. See Babets v. Sec'y of the Exec. Office of Human Servs., 403 Mass. 230, 237 n.8 (1988). Factual reports which are reasonably complete and inferences which can be drawn from factual investigations, even if labeled as opinions or conclusions, are not exempt as deliberative or policy making materials. G. L. c. 4, § 7(26)(d); see also Envtl. Prot. Agency v. Mink, 410 U.S. 73, 89 (1973) (purely factual matters used in the development of government policy are subject to disclosure).

Under Exemption (d), the Office stated, "[t]he responsive records are communications concerning decisions related to the development of policy. Because the subject of the communications identified in your request is still in deliberation and does not contain factual matter, EOHLC is withhold[ing] the document[s] in [their] entirety."

Based on the Office's response, it is unclear what records are being withheld from disclosure under Exemption (d). To deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); see also 950 C.M.R. 32.06(3)(c)(4). As such, the Office must identify the records in its possession that it is withholding under Exemption (d).

Further, I find the Office has not established how the records at issue are "inter-agency or intra-agency memoranda or letters" as required by Exemption (d). See DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 4 (2001) (indicating that a requirement for Freedom of Information Act (FOIA) exemption 5 to apply is "its source must be a Government agency"); Cty. of Madison v. United States Dep't of Justice, 641 F.2d 1036, 1040 (1st Cir. 1981) (finding that documents from a private party are not "intra-agency" under FOIA exemption 5); SPR95/336 Determinations of the Supervisor of Records (August 14, 1995; August 31, 1995) (finding that Exemption (d) does not protect materials submitted to an agency by third parties and only applies to governmental agencies or consultants). It is additionally uncertain how disclosure of the records would taint the ongoing deliberative process. The Office must clarify these matters.

Conclusion

Accordingly, the Office is ordered to provide Mr. Mostyn with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of the response to this office at pre@sec.state.ma.us. Mr. Mostyn may appeal the substantive nature of the Office's response within ninety days. See 950 C.M.R. 32.08(1).

Sincerely,

Manza Arthur
Supervisor of Records

cc: John A. Mostyn