

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
C.A. NO.

LMH-LANE CABOT YARD JOINT VENTURE,

Plaintiff,

v.

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY,

Defendant.

COMPLAINT

Plaintiff, LMH-Lane Cabot Yard Joint Venture (“LMH-Lane” or “Plaintiff”), by and through its undersigned counsel, brings this Complaint against Defendant, Massachusetts Bay Transportation Authority (“MBTA” or “Defendant”), and states and alleges as follows:

PARTIES

1. Plaintiff, LMH-Lane, is a joint venture comprised of The Lane Construction Corporation, with its principal place of business located at 90 Fieldstone Court, Cheshire, Connecticut 06410; and LMH-CMC JV, which, in turn, is comprised of LM Heavy Civil Construction, LLC (“LMH”), with its principal place of business located at 100 Hancock Street, Suite 901, Quincy, Massachusetts 02171; and Cooperativa Muratori & Cementisti- C.M.C. Di Ravenna Societa Cooperativa (LMH’s parent company) with its principal place of business in Ravenna, Italy.

2. Defendant, MBTA, is “a body politic of the Commonwealth of Massachusetts created by Chapter 563, Section 18 of the Acts of 1964 of the Commonwealth” with its principal place of business located at 10 Park Plaza, Boston, Massachusetts 02116.

JURISDICTION and VENUE

3. The claims set forth in this Complaint are within the exclusive jurisdiction of the Superior Court pursuant to G.L. c. 66, § 10.

4. Venue is proper in Suffolk County pursuant to G.L. c. 66, § 10A.

FACTS

5. On or about August 2, 2018, LMH-Lane and MBTA entered into a contract for the Cabot Yard & Maintenance Facility Improvements, South Boston, Massachusetts (“Cabot Yard Project” or “Project”).

6. LMH-Lane was the general contractor and the MBTA was the owner on the Project.

7. On or about September 21, 2021, an incident (“Incident”) occurred at the Cabot Yard Maintenance Facility causing an extensive amount of property damage and delays on the Project.

8. LMH-Lane visually identified four (4) cameras present and recording on the Project where the Incident occurred.

9. LMH-Lane, as the general contractor, verbally and in writing requested access to all camera recordings in the area of the Incident and the MBTA initially agreed to provide such camera recordings (see Exhibit 1).

10. Shortly thereafter, the MBTA refused to provide LMH-Lane access to the camera recordings and advised LMH-Lane to file a police report.

11. LMH-Lane, in accordance with the MBTA's directive, filed a police report regarding the Incident.

12. Upon information and belief, LMH-Lane asserts the camera recordings of the Incident on the Project will demonstrate or reveal the cause of the extensive property damage.

13. On or about October 13, 2021, pursuant to G.L. c. 66 and c. 66A, LMH-Lane, by and through its counsel, renewed its public records request seeking any recordings from the cameras at the Cabot Yard Maintenance Facility regarding the Incident by electronic submission to the MBTA (see Exhibit 2).

14. The request for public records of the camera recordings was limited to the visible cameras around the public area in question and was further limited to the time in which the property damage is believed to have occurred.

15. On or about October 20, 2021, the MBTA Records Access Officer ("RAO") responded to the public records request claiming the MBTA was exempt from LMH-Lane's request for public record pursuant to G.L. c. 4, §7(26)(f) (see Exhibit 3).

16. The MBTA RAO claimed exemption under G.L. c. 4, §7(26)(f) asserting that disclosure of camera recordings would be prejudicial to effective law enforcement and not in the public interest (see Exhibit 3).

17. On or about November 2, 2021, LMH-Lane appealed the decision of the MBTA RAO to the Supervisor of Records, Division of Public Records of the Office of the Secretary of the Commonwealth ("Supervisor of Records") (see Exhibit 4).

18. The MBTA maintain camera recordings as a matter of regular business course and practice.

19. The MBTA cameras for the recordings that were requested are in full public view and the general public is aware that the cameras are present and recording.

20. On prior occasions, at the request of LMH-Lane, the MBTA has provided camera recordings of the Project without objection.

21. The MBTA, in refusing to provide the requested camera recordings, asserted that the camera recordings are investigatory materials compiled out of the public view.

22. The MBTA is not an investigatory agency exempt from producing camera recordings from cameras that are compiled in full public view.

23. The MBTA camera recordings are pertinent to the extensive property damage on the Project in which LMH-Lane was the general contractor.

24. On or about November 10, 2021, the Supervisor of Records sent a response to the LMH-Lane appeal to the RAO for the MBTA (see Exhibit 5).

25. The Supervisor of Records ordered the MBTA to respond to LMH-Lane's public record request for camera recordings of the Incident within ten (10) business days.

26. On or about December 1, 2021, the MBTA RAO responded to the Order of the Supervisor of Records informing LMH-Lane that the MBTA Transit Police Department was conducting an investigation which was still ongoing and, again, denied the public records request of LMH-Lane (see Exhibit 6).

27. On or about December 6, 2021, LMH-Lane appealed the decision of the MBTA RAO to the Supervisor of Records (see Exhibit 7).

28. On or about December 16, 2021, the Supervisor of Records sent its decision on the LMH-Lane appeal to the MBTA RAO asserting that the MBTA met its burden to withhold the public record request pursuant to G.L. 4, §7(26)(f) (see Exhibit 8).

COUNT I
(Declaratory Judgment)

29. LMH-Lane incorporates by references paragraphs 1 through 28 above as though fully set forth herein.

30. Pursuant to G.L. c. 66, §10A, there is a presumption that all records in the possession, custody, or control of a public agency are public records.

31. LMH-Lane was denied access to the public records of the MBTA and, as such, is permitted to bring this action to enforce the provisions of G.L. c. 66, §10 and demand production of the public records.

32. LMH-Lane asserts that the MBTA has violated G.L. c. 66, §10 in denying access to public records.

33. Pursuant to G.L. c. 66, §10, the Superior Court has all available remedies at law or in equity.

34. The MBTA is an agency subject to the Public Records Law as defined in G.L. 4, §7(26).

35. The MBTA has willfully and wrongfully withheld the public records request from LMH-Lane.

36. The MBTA has not met its burden to withhold responsive public records under G.L. 4, §7(26)(f) regarding investigative materials of an on-going investigation.

37. LMH-Lane seeks declaration that the records requested from the MBTA constitute public records under G.L. 4, §7(26),

38. LMH-Lane has a right to order compliance under G.L. c. 66, §10A.

WHEREFORE, the plaintiff, LMH-Lane, respectfully requests that this Honorable Court enter judgment in its favor and grant the following relief:

1. Declare the requested camera recordings constitute public records;
2. Order the MBTA to produce the requested public records;
3. Enjoin the MBTA from removing or otherwise rendering the requested public records out of its possession, custody, or control;
4. Enjoin the MBTA from relying on any exemption to withhold or redact records responsive to LMH-Lane's request for public records;
5. Waive any and all fees in the MBTA's search and production of the public records;
6. Award LMH-Lane reasonable attorneys' fees and costs pursuant to G.L. c. 66, §10A(d)(2); and
7. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

**LMH-LANE CABOT YARD JOINT
VENTURE,**

By its counsel,

/s/ John J. McNamara

John J. McNamara, BBO No. 557882

LANE McNAMARA LLP

257 Turnpike Road, Suite 240

Southborough, MA 01772

(508) 905-1010

jmcnamara@lanemcnamara.com

EXHIBIT 1

From: Hughes, James O. <JOHughes@laneconstruct.com>
Sent: Thursday, September 30, 2021 11:35 AM
To: Papini, Marc E.
Subject: [EXTERNAL] FW: View all Cameras that had view of Yard on North Side of Car House

FYI



James O. Hughes
Project Director
M (863) 510-1009
johughes@laneconstruct.com

The Lane Construction Corporation
1 Wadleigh Place, Suites 201/301

www.laneconstruct.com

From: Lepore, Lisa <llepore@MBTA.com>
Sent: Thursday, September 30, 2021 11:30 AM
To: Jordan, Ryan <RRJordan@MBTA.com>; Hughes, James O. <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

confirmed

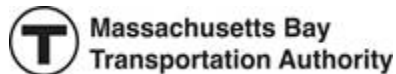
Lisa Lepore PE
Senior Director of Transit Infrastructures
MBTA Capital Delivery Department
Room 5170 10 Park Plaza
Boston MA 02116
llepore@mbta.com
Office 617.222.6124
Mobile: 617.620.8243

From: Jordan, Ryan <RRJordan@MBTA.com>
Sent: Thursday, September 30, 2021 11:26 AM
To: Lepore, Lisa <llepore@MBTA.com>; 'Hughes, James O.' <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

I would like to be present when the video is viewed.

Thanks
Ryan

Ryan R. Jordan
Deputy Director of Field Staff
MBTA Capital Support
10 Park Plaza
Suite 5170
Boston MA 02116
Mobile: 617.276.5287
Rrjordan@mbta.com



From: Lepore, Lisa <llepore@MBTA.com>
Sent: Thursday, September 30, 2021 11:17 AM
To: 'Hughes, James O.' <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>; Jordan, Ryan <RRJordan@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

Dear Jim:

Thank you for your email. As I relayed to you yesterday I have requested through Jay Berry, **Deputy Director of Heavy Rail Maintenance**, the video access you requested. He has reached out to the appropriate people to get the footage for you.

Jay please advise when you think this request would be fulfilled, given recent MBAT events

Sincerely

Lisa Lepore PE
Senior Director of Transit Infrastructures
MBTA Capital Delivery Department
Room 5170 10 Park Plaza
Boston MA 02116
llepore@mbta.com
Office 617.222.6124
Mobile: 617.620.8243

From: Hughes, James O. <JOHughes@laneconstruct.com>
Sent: Thursday, September 30, 2021 10:57 AM
To: Lepore, Lisa <llepore@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: View all Cameras that had view of Yard on North Side of Car House

Lisa,

Will we be able to view the cameras this week on the incident that occurred at the new Substation foundation work being constructed in the yard on the North side of the Car House as we have discussed last week and again this week. By visual inspection we know there are at least four (4) Cameras that could have had a view of this area. One on Pole by Non-Revenue Vehicle Repair, One on the Heating Plant, one on the side of the Bus Maintenance Facility and also at least one inside the maintenance facility that shoots toward the North doors in the Facility which have a view of the North Yard while the doors are open, which they were that day (I believe they would be the same cameras that we viewed with Ellen DeNooyer, when our Superintendent was requested to be removed from the project). The time frame we are looking to view is between 1:30pm and 2:45pm on September 21, 2021. I understand that you will have to make a request to Dan Blackler of MBTA Security and they will have to be viewed at OCC at 45 High Street. Your earliest response would be greatly appreciated.

Thank You,
Jim Hughes



James O. Hughes
Project Director
M (863) 510-1009
johughes@laneconstruct.com

The Lane Construction Corporation
1 Wadleigh Place, Suites 201/301

www.laneconstruct.com

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CAUTION: This email originated from outside of the MBTA organization. Do not click links, open attachments, or respond unless you recognize the sender and know the content is safe.

This email/electronic message, including any attached files, is being sent by the MBTA. It is solely intended for the recipient(s) and may contain information that is proprietary, confidential, legally privileged, and/or exempt from disclosure pursuant to state and federal law. If you have received this message in error or are not the intended recipient(s), please notify the sender immediately by reply, and delete all copies of this email/electronic message and any attached files from your computer. If you are the intended recipient(s), you may use the information contained in this email/electronic message and any attached files only as authorized by the MBTA. Any unauthorized use, dissemination, or disclosure of this email/electronic message and/or its attached files is strictly prohibited.

EXHIBIT 2

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 13, 2021 2:45:05 PM

Dear Elise Kuehn,

Your public records request has been entered and given the case number R000470-101321 for tracking purposes.

Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

ALERT: Please be advised that at the current time, there may be a delay in the processing and fulfillment of your request— this includes the timely receipt of requests, search/compilation of responsive records, and responses to public records requests. Thank you for your anticipated understanding and cooperation as we work through these issues.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

[Click Here to View Your Request](#)

Thank you for using the MBTA's Public Records Center.

Massachusetts Bay Transportation Authority



EXHIBIT 3

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 20, 2021 2:15:05 PM

--- Please respond above this line ---

October 20, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for “Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.”

Our Case No.: R000470-101321

Dear Attorney Kuehn,

The Massachusetts Bay Transportation Authority (“MBTA”) is in receipt of your request for public records dated October 13, 2021 regarding the above-referenced matter; this request was received by our Records Access Officer on October 13, 2021.

Please be advised that your public records request seeks information that is exempt from disclosure under Massachusetts General Laws Chapter 4, Section 7(26)(f), which exempts certain investigatory materials. Specifically, it applies to materials necessarily compiled out of the public view by investigatory officials that, if disclosed, “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

According to information available to this office, video from the locations and date you cite in your request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video you have requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this

time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer



EXHIBIT 4

LANE McNAMARA LLP
COUNSELLORS AT LAW

257 TURNPIKE ROAD
SUITE 240
SOUTHBOROUGH, MASSACHUSETTS 01772
TELEPHONE (508) 905-1010

PAUL M. LANE
JOHN J. McNAMARA

PLANE@LANEMcNAMARA.COM
JMcNAMARA@LANEMcNAMARA.COM

ELISE M. KUEHN
MANSOORUDDIN AHMED
KAREN L. NOWICKI

EKUEHN@LANEMcNAMARA.COM
MAHMED@LANEMcNAMARA.COM
KNOWICKI@LANEMcNAMARA.COM

November 2, 2021

VIA EMAIL ONLY

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719
Boston, MA 02108

Re: Administrative Appeal to Supervisor of Records Pursuant to G.L. c. 66, § 10A(a)

Dear Sir or Madam:

The undersigned submits this appeal to the Supervisor of Records regarding denial of its October 13, 2021 public records request to the Massachusetts Bay Transportation Authority.

I. INTRODUCTION.

On October 13, 2021, the undersigned submitted the following request for public records to the MBTA:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

The MBTA assigned the request Case No. R000470-101321 and denied the request on October 20, 2021 stating that disclosure of the requested video was subject to “Exemption (f)” because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” The request and response are attached hereto as Exhibit A.

Where the requested video footage is not exempt under G.L. c. 4, § 7(26)(f) because the MBTA is not an investigatory agency nor law enforcement and the requested video footage is

Supervisor of Records
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kept in the regular course of business of the MBTA, the requested video footage must be produced.

II. BACKGROUND.

There is an on-going construction project located at the Cabot Yard Maintenance Facility (“Cabot Yard”). An incident occurred at Cabot Yard on September 21, 2021 that affected both the MBTA and the general contractor on the construction project. In order to investigate this incident, the general contractor on the construction project requested access to the videos outlined in the public records request. That verbal request was initially granted, and MBTA personnel repeatedly assured the general contractor that arrangements were being made to give them access to the video.

After the general contractor spent about two weeks following up and MBTA gave multiple assurances that the general contractor would get access to the video, the MBTA abruptly reversed itself and denied the general contractor access to the video. Instead, the MBTA advised the general contractor to file a police report, which, the general contractor was informed, would aid the general contractor in obtaining that video footage for its own review.

Thereafter, the general contractor filed the police report and then submitted the public records request for the video footage to the MBTA. The MBTA denied that request in writing. The denial of the public records request is deficient where it does not allege any specific concerns regarding disclosure of this particular video footage nor provide sufficient information to demonstrate that the footage should be exempt from disclosure under G.L. c. 4, § 7(26)(f).

III. ARGUMENT.

Pursuant to G.L. c. 4, § 7(26)(f), documents exempt from public disclosure are those “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.” G.L. c. 4, § 7(26)(f). “Investigatory materials compiled in public, or investigatory materials compiled out of the public view for which there was no necessity that they be so compiled, would not appear to be entitled to the benefit of the exemption.” McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the public records statute presumes disclosure, exemptions “must be strictly and narrowly construed.” Boston Globe Media Partners, LLC v. Department of Pub. Health, 482 Mass. 427, 432 (2019), quoting Globe Newspaper Co. v. Dist. Att’y for Middle Dist., 439 Mass. 374, 380 (2003). “Among the reasons for exemption (f) are ‘the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in

Supervisor of Records
November 2, 2021
Page 3

recording their observations, hypotheses and interim conclusions’.” Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020) (quoting Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976)).

As explained by Gerald A. McDonough in Massachusetts Practice Series

[e]xemption (f) thus seeks to provide protection for those law enforcement activities that require a cloak of confidentiality to succeed. It is the work product of the investigation that is exempted from public disclosure. It is those materials developed and used in the course of an investigation that the exemption seeks to protect.

McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the purpose behind the exemption involves “protection for those law enforcement activities that require a cloak of confidentiality to succeed,” a large number of cases evaluating a G.L. c. 4, § 7(26)(f) exemption involve a public record request to a law enforcement agency. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020); Sheriff of Bristol County v. Labor Relations Com’n, 62 Mass. App. Ct. 665, 671 (2004); WBZ-TV4 v. Dist. Att’y for Suffolk Dist., 408 Mass. 595 (1990); Boston Police Superior Officers Federation v. City of Boston, 414 Mass. 458, 465-466 (1993); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976); Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 691 (1972).

The video requested by the undersigned is video that is recorded by the MBTA as a matter of course and practice. The MBTA is not an investigatory agency nor is its purpose for law enforcement. The MBTA is a division of the Massachusetts Department of Transportation that “provides subway, bus, Commuter Rail, ferry, and paratransit service to eastern Massachusetts and parts of Rhode Island.” <https://www.mbta.com/mbta-at-a-glance>.

The mere existence of an investigation is not sufficient to provide for an exemption under G.L. c. 4, § 7(26)(f), nor has the MBTA specifically demonstrated why such an exemption would be necessary. The cameras from which the video was requested are in full view of anyone who enters the Cabot Yard, and the general public is therefore aware that the cameras are present and recording. Moreover, the MBTA has on other occasions made similar video footage available to the general contractor upon request. The simple fact that an investigatory agency, who was not a party to the public record request, has a copy of this video does not preclude its disclosure to the undersigned. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020).

The purpose of G.L. c. 4, § 7(26)(f) is not to withhold documentation that is given to an investigatory agency, but is for the purpose of prohibiting disclosure of documents that are creating during the course of an investigation or identifying documents that were compiled by a law enforcement agency for an investigation. The undersigned did not request information regarding any investigation nor did it request public records from a law enforcement agency. The

Supervisor of Records
November 2, 2021
Page 4

undersigned knows from having visited Cabot Yard that these cameras exist and therefore requested the video from the custodian of the video for the limited time period of the date of the incident, and these materials must be produced to the undersigned where they are not subject to exemption under G.L. c. 4, § 7(26)(f).

IV. CONCLUSION.

Where the video footage is not exempt from disclosure under G.L. c. 4, § 7(26)(f), the undersigned requests that Supervisor of Records order that the video footage requested be produced by the MBTA to the undersigned no later than November 12, 2021.

Very truly yours,

Elise M. Kuehn

Elise M. Kuehn

Enclosure

cc: Brian N. Krulick, Esquire (all via email only)
Sarah K. Carpenter, Esquire
John J. McNamara, Esquire

EXHIBIT A

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 13, 2021 2:45:05 PM

Dear Elise Kuehn,

Your public records request has been entered and given the case number R000470-101321 for tracking purposes.

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ALERT: Please be advised that at the current time, there may be a delay in the processing and fulfillment of your request— this includes the timely receipt of requests, search/compilation of responsive records, and responses to public records requests. Thank you for your anticipated understanding and cooperation as we work through these issues.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

[Click Here to View Your Request](#)

Thank you for using the MBTA's Public Records Center.

Massachusetts Bay Transportation Authority



From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 20, 2021 2:15:05 PM

--- Please respond above this line ---

October 20, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for “Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.”

Our Case No.: R000470-101321

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Please be advised that your public records request seeks information that is exempt from disclosure under Massachusetts General Laws Chapter 4, Section 7(26)(f), which exempts certain investigatory materials. Specifically, it applies to materials necessarily compiled out of the public view by investigatory officials that, if disclosed, “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

According to information available to this office, video from the locations and date you cite in your request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video you have requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this

time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer



EXHIBIT 5



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

Rebecca S. Murray
Supervisor of Records

November 10, 2021
SPR21/2913

Julie A. Ciollo, Esq.
Assistant General Counsel
Records Access Officer
Massachusetts Bay Transportation Authority
10 Park Plaza, Suite 7760
Boston, MA 02116

Dear Attorney Ciollo:

I have received the petition of Attorney Elise M. Kuehn of *Lane McNamara LLP* appealing the response of the Massachusetts Bay Transportation Authority (MBTA) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On October 13, 2021, Attorney Kuehn requested the following:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

The MBTA responded on October 20, 2021, citing Exemption (f) of the Public Records Law for withholding responsive records. G. L. c. 4, § 7(26)(f). Unsatisfied with the MBTA's response, Attorney Kuehn appealed, and this case 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).

Julie A. Ciollo, Esq.
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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. Kuehn argues the following:

The video requested . . . is video that is recorded by the MBTA as a matter of course and practice. The MBTA is not an investigatory agency nor is its purpose for law enforcement.

. . .

The mere existence of an investigation is not sufficient to provide for an exemption under G.L. c. 4, § 7(26)(f), nor has the MBTA specifically demonstrated why such an exemption would be necessary. The cameras from which the video was requested are in full view of anyone who enters the Cabot Yard, and the general public is therefore aware that the cameras are present and recording.

. . .

The simple fact that an investigatory agency, who was not a party to the public record request, has a copy of this video does not preclude its disclosure.

. . .

The purpose of G.L. c. 4, § 7(26)(f) is not to withhold documentation that is given to an investigatory agency, but is for the purpose of prohibiting disclosure of documents that are creating during the course of an investigation or identifying documents that were compiled by a law enforcement agency for an investigation. [Ms. Kuehn] did not request information regarding any investigation nor did [she] request public records from a law enforcement agency.

The MBTA's October 20th Response

In its October 20, 2021 response, the MBTA states that it is withholding responsive records pursuant to Exemption (f) of the Public Records Law.

Exemption (f)

Exemption (f) permits the withholding of:

Julie A. Ciollo, Esq.
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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.

G. L. c. 4, § 7(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Att’y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a “case-by-case consideration” of whether disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” See Reinstein, 378 Mass. at 289-290.

Under Exemption (f), the MBTA argues the following:

Video from the locations and date [Attorney Kuehn] cite[s] in [her] request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video [Ms. Kuehn has] requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

While the MBTA states that the requested records are associated with an active and ongoing investigation, it does not explain the subject of the investigation nor does it describe how the requested records are part of the investigation. Additionally, it is unclear how video recordings from cameras that are in full view of the public would constitute “investigatory materials necessarily compiled out of the public view.” See G. L. c. 4, § 7(26)(f). The MBTA must clarify these matters.

Julie A. Ciollo, Esq.
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Conclusion

Accordingly, the MBTA is ordered to provide Attorney Kuehn with a response to her 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.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Elise M. Kuehn, Esq.

EXHIBIT 6

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Cc: pre@sec.state.ma.us
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, December 01, 2021 9:48:10 AM

--- Please respond above this line ---

December 01, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for "Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility."

Our Case No.: R000470-101321

Dear Attorney Kuehn,

This letter is a supplemental response in connection with SPR 21-2913.

In your appeal, you state: "The MBTA is not an investigatory agency nor is its purpose for law enforcement." Please be advised that the MBTA includes the Transit Police Department, which is a civil service police department with full police powers within the cities and towns in the MBTA's service area.

The MBTA's Transit Police is currently conducting an investigation into occurrences at the MBTA's Cabot Yard. The video you requested is evidence in that investigation, that was compiled for the purpose of the investigation. Any incidents and occurrences that may have been captured by cameras at the Cabot Yard have not been publicly disseminated and remain in the exclusive possession of key investigatory personnel. We have consulted with the Transit Police and are told that the investigation remains ongoing. Releasing video prior to its conclusion could prejudice the investigative efforts that have yet to be completed. Therefore, the MBTA must deny your request.

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial

review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer



EXHIBIT 7

LANE McNAMARA LLP
COUNSELLORS AT LAW

257 TURNPIKE ROAD
SUITE 240
SOUTHBOROUGH, MASSACHUSETTS 01772
TELEPHONE (508) 905-1010

PAUL M. LANE
JOHN J. McNAMARA

PLANE@LANEMcNAMARA.COM
JMcNAMARA@LANEMcNAMARA.COM

ELISE M. KUEHN
MANSOORUDDIN AHMED
KAREN L. NOWICKI

EKUEHN@LANEMcNAMARA.COM
MAHMED@LANEMcNAMARA.COM
KNOWICKI@LANEMcNAMARA.COM

December 6, 2021

VIA EMAIL ONLY

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719
Boston, MA 02108

Re: Administrative Appeal to Supervisor of Records Pursuant to G.L. c. 66, § 10A(a)

Dear Sir or Madam:

The undersigned submits this appeal to the Supervisor of Records regarding denial of its October 13, 2021 public records request to the Massachusetts Bay Transportation Authority (“MBTA”) and in regard to the MBTA’s subsequent “supplemental response” dated December 1, 2021.

I. INTRODUCTION.

On October 13, 2021, the undersigned submitted the following request for public records to the MBTA:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

The MBTA assigned the request Case No. R000470-101321 and denied the request on October 20, 2021 stating that disclosure of the requested video was subject to “Exemption (f)” because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” The request and response are attached hereto as Exhibit A.

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Thereafter, my office appealed the denial of the public records request on November 2, 2021 to the Supervisor of Records. The Supervisor of Records responded to the appeal on November 10, 2021 requesting further information from the MBTA and stating the MBTA “does not explain the subject of the investigation nor does it describe how the requested records are part of the investigation. Additionally, it is unclear how video recordings from cameras that are in full view of the public would constitute ‘investigatory materials necessarily compiled out of the public view.’” The Letter of Appeal and Supervisor of Records Response are attached hereto as Exhibit B.

The MBTA responded to the Supervisor of Records on December 1, 2021 and essentially regurgitated its previous denial. The “supplemental response” failed to demonstrate “the subject of the investigation” nor address “how video recordings from cameras that are in full view of the public would constitute ‘investigatory materials necessarily compiled out of the public view.’” The MBTA December 1, 2021 response is attached hereto as Exhibit C.

Where the requested video footage is not exempt under G.L. c. 4, § 7(26)(f) because the video is kept in full public view, in the regular course of business of the MBTA, and is not maintained in the possession of an investigatory agency nor law enforcement the requested video footage must be produced.

II. BACKGROUND.

There is an on-going construction project located at the Cabot Yard Maintenance Facility (“Cabot Yard”). An incident occurred at Cabot Yard on September 21, 2021 that affected both the MBTA and the general contractor on the construction project. In order to investigate this incident, the general contractor on the construction project requested access to the videos outlined in the public records request. That verbal request was initially granted, and MBTA personnel repeatedly assured the general contractor that arrangements were being made to give them access to the video.

After the general contractor spent about two weeks following up and MBTA gave multiple assurances that the general contractor would get access to the video, the MBTA abruptly reversed itself and denied the general contractor access to the video. Instead, the MBTA advised the general contractor to file a police report, which, the general contractor was informed, would aid the general contractor in obtaining that video footage for its own review.

Thereafter, the general contractor filed the police report and then submitted the public records request for the video footage to the MBTA. The MBTA denied that request in writing. The undersigned appealed that decision, and the Supervisor of Requests requested further information from the MBTA regarding denial of the public records request.

The MBTA submitted a supplemental response, which again denied the public records request. The supplemental response is deficient where it still does not allege any specific

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concerns regarding disclosure of this particular video footage nor provide sufficient information to demonstrate that the footage should be exempt from disclosure under G.L. c. 4, § 7(26)(f).

III. ARGUMENT.

Pursuant to G.L. c. 4, § 7(26)(f), documents exempt from public disclosure are those “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.” G.L. c. 4, § 7(26)(f). “Investigatory materials compiled in public, or investigatory materials compiled out of the public view for which there was no necessity that they be so compiled, would not appear to be entitled to the benefit of the exemption.” McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the public records statute presumes disclosure, exemptions “must be strictly and narrowly construed.” Boston Globe Media Partners, LLC v. Department of Pub. Health, 482 Mass. 427, 432 (2019), quoting Globe Newspaper Co. v. Dist. Att’y for Middle Dist., 439 Mass. 374, 380 (2003). “Among the reasons for exemption (f) are ‘the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions’.” Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020) (quoting Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976)).

As explained by Gerald A. McDonough in Massachusetts Practice Series

[e]xemption (f) thus seeks to provide protection for those law enforcement activities that require a cloak of confidentiality to succeed. It is the work product of the investigation that is exempted from public disclosure. It is those materials developed and used in the course of an investigation that the exemption seeks to protect.

McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the purpose behind the exemption involves “protection for those law enforcement activities that require a cloak of confidentiality to succeed,” a large number of cases evaluating a G.L. c. 4, § 7(26)(f) exemption involve a public record request to a law enforcement agency. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020); Sheriff of Bristol County v. Labor Relations Com’n, 62 Mass. App. Ct. 665, 671 (2004); WBZ-TV4 v. Dist. Att’y for Suffolk Dist., 408 Mass. 595 (1990); Boston Police Superior Officers Federation v. City of

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Boston, 414 Mass. 458, 465-466 (1993); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976); Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 691 (1972).

The video requested by the undersigned is video that is recorded by the MBTA as a matter of course and practice. The video is apparently compiled not by the Transit Police Department, but by a separate department of the MBTA. See Exhibit D, Email Correspondence dated September 30, 2021 from Lisa Lepore, Senior Director of Transit Infrastructures to James O. Hughes. As demonstrated by this email correspondence, Jay Berry would appear to be the custodian of the requested video. Jay Berry is not part of the MBTA Transit Police, and the requested video is not wholly maintained by the MBTA Transit Police.

Not only is the video not solely maintained by the MBTA Transit Police, but the video is routinely accessible to employees of the MBTA and individuals outside of the MBTA. As demonstrated in the email correspondence attached as Exhibit D, video maintained by the MBTA is apparently not maintained for the sole use of the MBTA Transit Police, where James O. Hughes from The Lane Construction Corporation and Ellen DeNooyer apparently viewed different camera footage together previously in regard to a separate incident at the Cabot Yard Rail site, which video footage was viewed at the MBTA's Control Center in Boston.¹ This video is clearly compiled in full public view, is compiled by a department separate and distinct from the MBTA Transit Police, and is used for purposes other than police investigations.

The mere existence of an investigation is not sufficient to provide for an exemption under G.L. c. 4, § 7(26)(f), nor has the MBTA, in either of its responses, specifically demonstrated why such an exemption would be necessary. The cameras from which the video was requested are in full view of anyone who enters the Cabot Yard, and the general public is therefore aware that the cameras are present and recording. The simple fact that an investigatory agency, who was not a party to the public record request, has a copy of this video does not preclude its disclosure to the undersigned. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020).

In its Supplemental Response, the MBTA was tasked with explaining “the subject of the investigation,” “describ[ing] how the requested records are part of the investigation,” and demonstrating “how video recordings from cameras that are in full view of the public would constitute ‘investigatory materials necessarily compiled out of the public view’.” The MBTA asserts in its Supplemental Response that “[a]ny incidents and occurrences that may have been captured by cameras at the Cabot Yard have not been publicly disseminated” and that the video “was compiled for the purpose of the investigation.”

This lack of public dissemination of the video has no bearing on whether the requested video is subject to exemption pursuant to G.L. c. 4, § 7(26)(f). The purpose of G.L. c. 4, § 7(26)(f) is not to withhold documentation that is given to an investigatory agency, but is for the purpose of prohibiting disclosure of documents that are creating during the course of an investigation or identifying documents that were compiled by a law enforcement agency for an

¹ The MBTA Transit Police Department is located at 240 Southampton Street, Boston, Massachusetts 02118.

Supervisor of Records

December 6, 2021

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investigation. The existence of the cameras is public knowledge, and the production of the video is therefore not maintained outside of public view. Moreover, the email correspondence attached hereto as Exhibit D demonstrates that the video footage from the construction site is not kept solely for the purpose and use of the MBTA Transit Police and has been previously provided to the public for non-law enforcement uses.

The MBTA's limited three-paragraph response offers nothing new in support of its denial of the undersigned's public records request. Where the MBTA has wholly failed to explain or demonstrate why the requested materials are subject to G.L. c. 4, § 7(26)(f), the requested video should be produced forthwith.

IV. CONCLUSION.

Where the video footage is not exempt from disclosure under G.L. c. 4, § 7(26)(f), the undersigned requests that Supervisor of Records order that the video footage requested be produced by the MBTA to the undersigned no later than December 12, 2021.

Very truly yours,

Elise M. Kuehn

Elise M. Kuehn

Enclosure

cc: Brian N. Krulick, Esquire (all via email only)
Sarah K. Carpenter, Esquire
John J. McNamara, Esquire

EXHIBIT A

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 13, 2021 2:45:05 PM

Dear Elise Kuehn,

Your public records request has been entered and given the case number R000470-101321 for tracking purposes.

Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

ALERT: Please be advised that at the current time, there may be a delay in the processing and fulfillment of your request— this includes the timely receipt of requests, search/compilation of responsive records, and responses to public records requests. Thank you for your anticipated understanding and cooperation as we work through these issues.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

[Click Here to View Your Request](#)

Thank you for using the MBTA's Public Records Center.

Massachusetts Bay Transportation Authority



From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 20, 2021 2:15:05 PM

--- Please respond above this line ---

October 20, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for “Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.”

Our Case No.: R000470-101321

Dear Attorney Kuehn,

The Massachusetts Bay Transportation Authority (“MBTA”) is in receipt of your request for public records dated October 13, 2021 regarding the above-referenced matter; this request was received by our Records Access Officer on October 13, 2021.

Please be advised that your public records request seeks information that is exempt from disclosure under Massachusetts General Laws Chapter 4, Section 7(26)(f), which exempts certain investigatory materials. Specifically, it applies to materials necessarily compiled out of the public view by investigatory officials that, if disclosed, “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

According to information available to this office, video from the locations and date you cite in your request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video you have requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this

time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer



EXHIBIT B

LANE McNAMARA LLP
COUNSELLORS AT LAW

257 TURNPIKE ROAD
SUITE 240
SOUTHBOROUGH, MASSACHUSETTS 01772
TELEPHONE (508) 905-1010

PAUL M. LANE
JOHN J. McNAMARA

PLANE@LANEMcNAMARA.COM
JMcNAMARA@LANEMcNAMARA.COM

ELISE M. KUEHN
MANSOORUDDIN AHMED
KAREN L. NOWICKI

EKUEHN@LANEMcNAMARA.COM
MAHMED@LANEMcNAMARA.COM
KNOWICKI@LANEMcNAMARA.COM

November 2, 2021

VIA EMAIL ONLY

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719
Boston, MA 02108

Re: Administrative Appeal to Supervisor of Records Pursuant to G.L. c. 66, § 10A(a)

Dear Sir or Madam:

The undersigned submits this appeal to the Supervisor of Records regarding denial of its October 13, 2021 public records request to the Massachusetts Bay Transportation Authority.

I. INTRODUCTION.

On October 13, 2021, the undersigned submitted the following request for public records to the MBTA:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

The MBTA assigned the request Case No. R000470-101321 and denied the request on October 20, 2021 stating that disclosure of the requested video was subject to “Exemption (f)” because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” The request and response are attached hereto as Exhibit A.

Where the requested video footage is not exempt under G.L. c. 4, § 7(26)(f) because the MBTA is not an investigatory agency nor law enforcement and the requested video footage is

Supervisor of Records
November 2, 2021
Page 2

kept in the regular course of business of the MBTA, the requested video footage must be produced.

II. BACKGROUND.

There is an on-going construction project located at the Cabot Yard Maintenance Facility (“Cabot Yard”). An incident occurred at Cabot Yard on September 21, 2021 that affected both the MBTA and the general contractor on the construction project. In order to investigate this incident, the general contractor on the construction project requested access to the videos outlined in the public records request. That verbal request was initially granted, and MBTA personnel repeatedly assured the general contractor that arrangements were being made to give them access to the video.

After the general contractor spent about two weeks following up and MBTA gave multiple assurances that the general contractor would get access to the video, the MBTA abruptly reversed itself and denied the general contractor access to the video. Instead, the MBTA advised the general contractor to file a police report, which, the general contractor was informed, would aid the general contractor in obtaining that video footage for its own review.

Thereafter, the general contractor filed the police report and then submitted the public records request for the video footage to the MBTA. The MBTA denied that request in writing. The denial of the public records request is deficient where it does not allege any specific concerns regarding disclosure of this particular video footage nor provide sufficient information to demonstrate that the footage should be exempt from disclosure under G.L. c. 4, § 7(26)(f).

III. ARGUMENT.

Pursuant to G.L. c. 4, § 7(26)(f), documents exempt from public disclosure are those “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.” G.L. c. 4, § 7(26)(f). “Investigatory materials compiled in public, or investigatory materials compiled out of the public view for which there was no necessity that they be so compiled, would not appear to be entitled to the benefit of the exemption.” McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the public records statute presumes disclosure, exemptions “must be strictly and narrowly construed.” Boston Globe Media Partners, LLC v. Department of Pub. Health, 482 Mass. 427, 432 (2019), quoting Globe Newspaper Co. v. Dist. Att’y for Middle Dist., 439 Mass. 374, 380 (2003). “Among the reasons for exemption (f) are ‘the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in

Supervisor of Records
November 2, 2021
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recording their observations, hypotheses and interim conclusions’.” Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020) (quoting Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976)).

As explained by Gerald A. McDonough in Massachusetts Practice Series

[e]xemption (f) thus seeks to provide protection for those law enforcement activities that require a cloak of confidentiality to succeed. It is the work product of the investigation that is exempted from public disclosure. It is those materials developed and used in the course of an investigation that the exemption seeks to protect.

McDonough, G., “Investigatory materials prejudicial to effective law enforcement”, 39 Mass. Prac. Series § 16:14, Administrative Law & Practice (2021 update).

Where the purpose behind the exemption involves “protection for those law enforcement activities that require a cloak of confidentiality to succeed,” a large number of cases evaluating a G.L. c. 4, § 7(26)(f) exemption involve a public record request to a law enforcement agency. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020); Sheriff of Bristol County v. Labor Relations Com’n, 62 Mass. App. Ct. 665, 671 (2004); WBZ-TV4 v. Dist. Att’y for Suffolk Dist., 408 Mass. 595 (1990); Boston Police Superior Officers Federation v. City of Boston, 414 Mass. 458, 465-466 (1993); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976); Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 691 (1972).

The video requested by the undersigned is video that is recorded by the MBTA as a matter of course and practice. The MBTA is not an investigatory agency nor is its purpose for law enforcement. The MBTA is a division of the Massachusetts Department of Transportation that “provides subway, bus, Commuter Rail, ferry, and paratransit service to eastern Massachusetts and parts of Rhode Island.” <https://www.mbta.com/mbta-at-a-glance>.

The mere existence of an investigation is not sufficient to provide for an exemption under G.L. c. 4, § 7(26)(f), nor has the MBTA specifically demonstrated why such an exemption would be necessary. The cameras from which the video was requested are in full view of anyone who enters the Cabot Yard, and the general public is therefore aware that the cameras are present and recording. Moreover, the MBTA has on other occasions made similar video footage available to the general contractor upon request. The simple fact that an investigatory agency, who was not a party to the public record request, has a copy of this video does not preclude its disclosure to the undersigned. See e.g., Rahim v. Dist. Attorney for Suffolk Dist., 486 Mass. 544, 551 (2020).

The purpose of G.L. c. 4, § 7(26)(f) is not to withhold documentation that is given to an investigatory agency, but is for the purpose of prohibiting disclosure of documents that are creating during the course of an investigation or identifying documents that were compiled by a law enforcement agency for an investigation. The undersigned did not request information regarding any investigation nor did it request public records from a law enforcement agency. The

Supervisor of Records
November 2, 2021
Page 4

undersigned knows from having visited Cabot Yard that these cameras exist and therefore requested the video from the custodian of the video for the limited time period of the date of the incident, and these materials must be produced to the undersigned where they are not subject to exemption under G.L. c. 4, § 7(26)(f).

IV. CONCLUSION.

Where the video footage is not exempt from disclosure under G.L. c. 4, § 7(26)(f), the undersigned requests that Supervisor of Records order that the video footage requested be produced by the MBTA to the undersigned no later than November 12, 2021.

Very truly yours,

Elise M. Kuehn

Elise M. Kuehn

Enclosure

cc: Brian N. Krulick, Esquire (all via email only)
Sarah K. Carpenter, Esquire
John J. McNamara, Esquire

EXHIBIT A

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 13, 2021 2:45:05 PM

Dear Elise Kuehn,

Your public records request has been entered and given the case number R000470-101321 for tracking purposes.

Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

ALERT: Please be advised that at the current time, there may be a delay in the processing and fulfillment of your request— this includes the timely receipt of requests, search/compilation of responsive records, and responses to public records requests. Thank you for your anticipated understanding and cooperation as we work through these issues.

You can monitor the progress of your request at the link below and you'll receive an email when your request has been completed.

[Click Here to View Your Request](#)

Thank you for using the MBTA's Public Records Center.

Massachusetts Bay Transportation Authority



From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, October 20, 2021 2:15:05 PM

--- Please respond above this line ---

October 20, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for “Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.”

Our Case No.: R000470-101321

Dear Attorney Kuehn,

The Massachusetts Bay Transportation Authority (“MBTA”) is in receipt of your request for public records dated October 13, 2021 regarding the above-referenced matter; this request was received by our Records Access Officer on October 13, 2021.

Please be advised that your public records request seeks information that is exempt from disclosure under Massachusetts General Laws Chapter 4, Section 7(26)(f), which exempts certain investigatory materials. Specifically, it applies to materials necessarily compiled out of the public view by investigatory officials that, if disclosed, “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

According to information available to this office, video from the locations and date you cite in your request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video you have requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this

time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer





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

Rebecca S. Murray
Supervisor of Records

November 10, 2021
SPR21/2913

Julie A. Ciollo, Esq.
Assistant General Counsel
Records Access Officer
Massachusetts Bay Transportation Authority
10 Park Plaza, Suite 7760
Boston, MA 02116

Dear Attorney Ciollo:

I have received the petition of Attorney Elise M. Kuehn of *Lane McNamara LLP* appealing the response of the Massachusetts Bay Transportation Authority (MBTA) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On October 13, 2021, Attorney Kuehn requested the following:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

The MBTA responded on October 20, 2021, citing Exemption (f) of the Public Records Law for withholding responsive records. G. L. c. 4, § 7(26)(f). Unsatisfied with the MBTA's response, Attorney Kuehn appealed, and this case 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).

Julie A. Ciollo, Esq.
Page 2
November 10, 2021

SPR21/2913

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. Kuehn argues the following:

The video requested . . . is video that is recorded by the MBTA as a matter of course and practice. The MBTA is not an investigatory agency nor is its purpose for law enforcement.

. . .

The mere existence of an investigation is not sufficient to provide for an exemption under G.L. c. 4, § 7(26)(f), nor has the MBTA specifically demonstrated why such an exemption would be necessary. The cameras from which the video was requested are in full view of anyone who enters the Cabot Yard, and the general public is therefore aware that the cameras are present and recording.

. . .

The simple fact that an investigatory agency, who was not a party to the public record request, has a copy of this video does not preclude its disclosure.

. . .

The purpose of G.L. c. 4, § 7(26)(f) is not to withhold documentation that is given to an investigatory agency, but is for the purpose of prohibiting disclosure of documents that are creating during the course of an investigation or identifying documents that were compiled by a law enforcement agency for an investigation. [Ms. Kuehn] did not request information regarding any investigation nor did [she] request public records from a law enforcement agency.

The MBTA’s October 20th Response

In its October 20, 2021 response, the MBTA states that it is withholding responsive records pursuant to Exemption (f) of the Public Records Law.

Exemption (f)

Exemption (f) permits the withholding of:

Julie A. Ciollo, Esq.
Page 3
November 10, 2021

SPR21/2913

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.

G. L. c. 4, § 7(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Att’y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a “case-by-case consideration” of whether disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” See Reinstein, 378 Mass. at 289-290.

Under Exemption (f), the MBTA argues the following:

Video from the locations and date [Attorney Kuehn] cite[s] in [her] request is part of an open and active investigation. Please note that while the MBTA does not currently have the employee or technological resources to search for and archive the amount of video [Ms. Kuehn has] requested, relevant video from September 21, 2021 and within the time period stated has been archived.

It is the MBTA’s position that disclosing the requested video prior to the investigation’s conclusion is likely to harm the ongoing investigation efforts by the MBTA and/or other investigative entities. In particular, disclosing video at this time is likely to jeopardize the cooperation of witnesses, hinder investigative efforts by revealing potential leads, or lead to interim conclusions that may change based on additional facts that are gathered over the course of the ongoing investigation. Therefore, the MBTA is claiming Exemption (f) to withhold the requested video because disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”

While the MBTA states that the requested records are associated with an active and ongoing investigation, it does not explain the subject of the investigation nor does it describe how the requested records are part of the investigation. Additionally, it is unclear how video recordings from cameras that are in full view of the public would constitute “investigatory materials necessarily compiled out of the public view.” See G. L. c. 4, § 7(26)(f). The MBTA must clarify these matters.

Julie A. Ciollo, Esq.
Page 4
November 10, 2021

SPR21/2913

Conclusion

Accordingly, the MBTA is ordered to provide Attorney Kuehn with a response to her 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.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Elise M. Kuehn, Esq.

EXHIBIT C

From: [MassDOT Records Center](#)
To: [Elise Kuehn](#)
Cc: pre@sec.state.ma.us
Subject: Public Records Request (MBTA) :: R000470-101321
Date: Wednesday, December 01, 2021 9:48:10 AM

--- Please respond above this line ---

December 01, 2021

Elise Kuehn
257 Turnpike Road
Southborough, MA 01772

Re: Public Records Request for "Any recordings from cameras trained on the the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility."

Our Case No.: R000470-101321

Dear Attorney Kuehn,

This letter is a supplemental response in connection with SPR 21-2913.

In your appeal, you state: "The MBTA is not an investigatory agency nor is its purpose for law enforcement." Please be advised that the MBTA includes the Transit Police Department, which is a civil service police department with full police powers within the cities and towns in the MBTA's service area.

The MBTA's Transit Police is currently conducting an investigation into occurrences at the MBTA's Cabot Yard. The video you requested is evidence in that investigation, that was compiled for the purpose of the investigation. Any incidents and occurrences that may have been captured by cameras at the Cabot Yard have not been publicly disseminated and remain in the exclusive possession of key investigatory personnel. We have consulted with the Transit Police and are told that the investigation remains ongoing. Releasing video prior to its conclusion could prejudice the investigative efforts that have yet to be completed. Therefore, the MBTA must deny your request.

Please be advised that you have the right to seek an administrative appeal to the Supervisor of Records, pursuant to G. L. c. 66, § 10A(a) and 950 CMR 32.08(1) (the Code of Massachusetts Regulations), as well as the right to seek judicial

review by commencing an action in the Superior Court under G. L. c. 66, § 10A(c).

Sincerely,

Julie Ciollo
Assistant General Counsel/
Records Access Officer



EXHIBIT D

From: Hughes, James O. <JOHughes@laneconstruct.com>
Sent: Thursday, September 30, 2021 11:35 AM
To: Papini, Marc E.
Subject: [EXTERNAL] FW: View all Cameras that had view of Yard on North Side of Car House

FYI



James O. Hughes
Project Director
M (863) 510-1009
johughes@laneconstruct.com

The Lane Construction Corporation
1 Wadleigh Place, Suites 201/301

www.laneconstruct.com

From: Lepore, Lisa <llepore@MBTA.com>
Sent: Thursday, September 30, 2021 11:30 AM
To: Jordan, Ryan <RRJordan@MBTA.com>; Hughes, James O. <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

confirmed

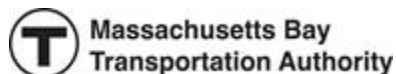
Lisa Lepore PE
Senior Director of Transit Infrastructures
MBTA Capital Delivery Department
Room 5170 10 Park Plaza
Boston MA 02116
llepore@mbta.com
Office 617.222.6124
Mobile: 617.620.8243

From: Jordan, Ryan <RRJordan@MBTA.com>
Sent: Thursday, September 30, 2021 11:26 AM
To: Lepore, Lisa <llepore@MBTA.com>; 'Hughes, James O.' <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

I would like to be present when the video is viewed.

Thanks
Ryan

Ryan R. Jordan
Deputy Director of Field Staff
MBTA Capital Support
10 Park Plaza
Suite 5170
Boston MA 02116
Mobile: 617.276.5287
Rrjordan@mbta.com



From: Lepore, Lisa <llepore@MBTA.com>
Sent: Thursday, September 30, 2021 11:17 AM
To: 'Hughes, James O.' <JOHughes@laneconstruct.com>; Berry, Jay <JBerry@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>; Jordan, Ryan <RRJordan@MBTA.com>
Subject: RE: View all Cameras that had view of Yard on North Side of Car House

Dear Jim:

Thank you for your email. As I relayed to you yesterday I have requested through Jay Berry, Deputy Director of Heavy Rail Maintenance, the video access you requested. He has reached out to the appropriate people to get the footage for you.

Jay please advise when you think this request would be fulfilled, given recent MBAT events

Sincerely

Lisa Lepore PE
Senior Director of Transit Infrastructures
MBTA Capital Delivery Department
Room 5170 10 Park Plaza
Boston MA 02116
llepore@mbta.com
Office 617.222.6124
Mobile: 617.620.8243

From: Hughes, James O. <JOHughes@laneconstruct.com>
Sent: Thursday, September 30, 2021 10:57 AM
To: Lepore, Lisa <llepore@MBTA.com>
Cc: Luzier, Dennis A. <DALuzier@laneconstruct.com>; Moore, Stephen <smoore2@MBTA.com>
Subject: View all Cameras that had view of Yard on North Side of Car House

Lisa,

Will we be able to view the cameras this week on the incident that occurred at the new Substation foundation work being constructed in the yard on the North side of the Car House as we have discussed last week and again this week. By visual inspection we know there are at least four (4) Cameras that could have had a view of this area. One on Pole by Non-Revenue Vehicle Repair, One on the Heating Plant, one on the side of the Bus Maintenance Facility and also at least one inside the maintenance facility that shoots toward the North doors in the Facility which have a view of the North Yard while the doors are open, which they were that day (I believe they would be the same cameras that we viewed with Ellen DeNooyer, when our Superintendent was requested to be removed from the project). The time frame we are looking to view is between 1:30pm and 2:45pm on September 21, 2021. I understand that you will have to make a request to Dan Blackler of MBTA Security and they will have to be viewed at OCC at 45 High Street. Your earliest response would be greatly appreciated.

Thank You,
Jim Hughes



James O. Hughes
Project Director
M (863) 510-1009
johughes@laneconstruct.com

The Lane Construction Corporation
1 Wadleigh Place, Suites 201/301

www.laneconstruct.com

Note: This message is for the named person's use only. It may contain confidential, proprietary or legally privileged information. No confidentiality or privilege is waived or lost by any miss-transmission. If you receive this message in error, please immediately delete it and all copies of it from your system, destroy any hard copies of it and notify the sender. You must not, directly or indirectly, use, disclose, distribute, print, or copy any part of this message if you are not the intended recipient. LANE INDUSTRIES and any of its subsidiaries each reserve the right to monitor all e-mail communications through its networks. Any views expressed in this message are those of the individual sender, except where the message states otherwise and the sender is authorized to state them to be the views of any such entity. Thank You.

CAUTION: This email originated from outside of the MBTA organization. Do not click links, open attachments, or respond unless you recognize the sender and know the content is safe.

This email/electronic message, including any attached files, is being sent by the MBTA. It is solely intended for the recipient(s) and may contain information that is proprietary, confidential, legally privileged, and/or exempt from disclosure pursuant to state and federal law. If you have received this message in error or are not the intended recipient(s), please notify the sender immediately by reply, and delete all copies of this email/electronic message and any attached files from your computer. If you are the intended recipient(s), you may use the information contained in this email/electronic message and any attached files only as authorized by the MBTA. Any unauthorized use, dissemination, or disclosure of this email/electronic message and/or its attached files is strictly prohibited.

EXHIBIT 8



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

Rebecca S. Murray
Supervisor of Records

December 16, 2021
SPR21/3175

Julie A. Ciollo, Esq.
Assistant General Counsel
Records Access Officer
Massachusetts Bay Transportation Authority
10 Park Plaza, Suite 7760
Boston, MA 02116

Dear Attorney Ciollo:

I have received the petition of Attorney Elise M. Kuehn of *Lane McNamara LLP* appealing the response of the Massachusetts Bay Transportation Authority (MBTA) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On October 13, 2021, Attorney Kuehn requested the following:

Any recordings from cameras trained on the outside track area at the Cabot Yard Maintenance Facility (rail) on the north side of the Car House on September 21, 2021 from 6:00 a.m. to 3:00 p.m. Said cameras to include, but not be limited to, (1) camera on pole by Non-Revenue Vehicle Repair, (2) camera on the Heating Plant, (3) camera on the side of the Bus Maintenance Facility, and (4) camera inside the maintenance facility that looks toward the northern doors in the facility.

Previous Appeal

This request was the subject of a previous appeal. See SPR21/2913 Supervisor of Records Determination (November 10, 2021). In my November 10th determination, I ordered the MBTA to clarify how the requested records are part of an ongoing investigation, and how the records constitute investigatory materials compiled out of public view. Subsequently, the MBTA responded on December 1, 2021. Unsatisfied with the MBTA's response, Attorney Kuehn appealed, and this case 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

Julie A. Ciollo, Esq.
Page 2
December 16, 2021

SPR21/3175

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.

Current Appeal

In her appeal petition, Attorney Kuehn argues the following:

The existence of the cameras is public knowledge, and the production of the video is therefore not maintained outside of public view. Moreover . . . email correspondence [provided with the appeal petition] demonstrates that the video footage from the construction site is not kept solely for the purpose and use of the MBTA Transit Police and has been previously provided to the public for non-law enforcement uses.

The MBTA’s December 1st Response

In its December 1, 2021 response, the MBTA reiterates that it is denying the request pursuant to Exemption (f) of the Public Records Law.

Exemption (f)

Exemption (f) permits the withholding of:

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.

G. L. c. 4, § 7(26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity

Julie A. Ciollo, Esq.
Page 3
December 16, 2021

SPR21/3175

of voluntary witnesses. Antell v. Att’y Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a “case-by-case consideration” of whether disclosure “would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” See Reinstein, 378 Mass. at 289-290.

In its December 1st response, the MBTA argues the following:

The MBTA’s Transit Police is currently conducting an investigation into occurrences at the MBTA’s Cabot Yard. The video [Attorney Kuehn] requested is evidence in that investigation, that was compiled for the purpose of the investigation. Any incidents and occurrences that may have been captured by cameras at the Cabot Yard have not been publicly disseminated and remain in the exclusive possession of key investigatory personnel. [The MBTA has] consulted with the Transit Police and are told that the investigation remains ongoing. Releasing video prior to its conclusion could prejudice the investigative efforts that have yet to be completed.

Where the MBTA has explained the subject of the ongoing investigation and how the video recording pertains to that investigation, and has confirmed that the recording remains in the possession of investigatory personnel, I find the MBTA has met its burden to withhold the responsive record pursuant to Exemption (f) of the Public Records Law. See G. L. c. 4, § 7(26)(f). Please be advised that a change in the status of the investigation could impact the applicability of Exemption (f) to these records.

Conclusion

Accordingly, I will consider this administrative appeal closed. If Attorney Kuehn is not satisfied with the resolution of this administrative appeal, please be advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, §§ 10(b)(ix), 10A(c) (pursuing administrative appeal does not limit availability of judicial remedies).

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Elise M. Kuehn, Esq.