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Howard Friedman
David Milton

July 22, 2011

Mr. Shawn Williams
Assistant Director, Public Records Division
1 Ashburton Place, 17th Floor
Boston, MA 02108

Re: Public records appeal SPR 11/098

Dear Mr. Williams,

Your resolution of the above public records appeal does more than confirm that the Public Records Law has no teeth. It removes the gums. That this injury to the law comes from the agency charged with upholding it makes it all the more shameful.

Your letter of July 19, 2011 states, "[I]t has come to the attention of this office that on October 21, 2010 you sent a letter to the City that appears to have been made in preparation for litigation involving one of your clients." Williams Ltr., 7/19/11. But in your letter of May 18, 2011, you had already addressed this issue, saying:

> The Public Records Law does not distinguish between requesters. While the underlying issues associated with a public records request may escalate into litigation, the right of requesters to inspect and obtain copies of public records is a clear statutory mandate. See G.L. c. 66 § 10(a)…; *see also Bougas v. Chief of Police of Lexington,* 371 Mass. 59, 64 (1976)….

Williams Ltr., 5/18/11, at 2.

Your July 19 letter disregards this statutory mandate on the basis of a regulation that purportedly gives you discretion to avoid deciding appeals where "the responsive records are related to a matter where litigation is imminent." Williams Ltr., 7/19/11. It is difficult to square this basis for refusing to hear an appeal with the much narrower language of the regulation itself, which states that the supervisor may decline to hear an appeal "where the public records in question are the subjects of disputes in active litigation." 950 C.M.R. 32.08(2). There is no "active litigation" between my client and the City of Lowell, much less litigation in which the requested records are the "subjects of disputes."

Besides being legally unsound, the newly created "imminent litigation" exemption to the Public Records Law violates public policy and common sense. As

your May 18 letter recognized, people who request public records are sometimes contemplating litigation. This fact should not be used as basis for withholding public records in the first place. Lawyers should be encouraged to investigate potential claims before filing suit, not after. In some cases, the public records will show that there is no basis for a lawsuit; in others, it will provide the evidence necessary to bring one. In both cases, disclosure serves the public interest in informed decision making about the government, to say nothing of the clear statutory mandate of Public Records Law. Under your interpretation, only disinterested persons can obtain public records, not anyone who needs them.

It appears your decision to dismiss my appeal is a tacit response to the City's June 21, 2011 letter, which you do not mention. The City sent this letter after your office inexplicably undercut its May 18 order that the City provide the records within 10 days by giving the City the option to "provide this office with a more comprehensive response to support the City's exemption claims." Williams Ltr., 5/18/11, at 2.

The predictable result was further delay and obfuscation. The City's 13-page single-spaced letter, sent over a month later, is a thumb in the nose of the Public Records Law. The City's letter effectively claims a blanket exemption for all police records, contrary to repeated rulings of the SJC and to previous instruction from your office. *See, e.g., Reinstein v. Police Comm'r of Boston*, 378 Mass. 281, 289 (1979); SPR Bulletin 3-03 (Nov. 21, 2003); SPR Bulletin 3-04 (March 10, 2004). I hoped that your office would welcome the opportunity to provide instruction on this recurrent area of contention under the law, but I see now my confidence was misplaced.

Sincerely,

David Milton

Cc: Christine O'Connor, Esq.
Sarah Wunsch, Esq., A.C.L.U. of Massachusetts