

via email

February 11, 2022

Cooley LLP
500 Boylston Street 14th Floor
Boston, MA 02116-3736

Attn: Adam Gershenson; Dane Voris

Re: Public Records Request B00169-01320

Dear Attorney Gershenson and Attorney Voris:

The Boston Police Department (Department), has received your December 2021 letter regarding the Brennan Center for Justice at New York University School of Law (“Brennan Center”), noting your objections to the Department’s previous response. This letter acts as supplemental response addresses your concerns and provides you with further responsive material. This response applies only to records that exist and are in the custody of the Department. See A Guide to the Massachusetts Public Records Law, p. 32, n.115. It is expected that a custodian of records must use her superior knowledge of her records with respect to responses to public records requests. 950 CMR 32.04(5).

Specifically, you stated:

First, given that BPD considers its production complete for all but two requests, the Brennan Center requests that, in accordance with the Massachusetts Public Records Law, BPD describe whether it is withholding any documents pursuant to any exemption, and if so, to provide the complete and specific factual basis supporting each such exemption. M.G.L. c. 66 § 10(b)(iv) (agencies must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based”). Second, please address in writing the following issues raised by the positions taken by BPD in its October 26 letter:

6. *Collection of Social Media Account Information: Any and all records reflecting interactions with civilians in which police department employees requested information about the civilian’s social media account information, including but not limited to a username, identifier, handle, linked email, or password.*

7. *Civilian Communications: Any and all records reflecting any communications conducted on social media platforms between uniformed or undercover police department employees and civilians, including but not limited to direct messages, group messages, chat histories, comments, or “likes,” but excluding communications conducted as part of ongoing investigations and*

communications appearing on a page or account operated by the BPD and bearing the BPD's name, insignia, or other indicia of ownership or control.

8. *Use for Criminal Investigations: Any and all records reflecting the number of criminal investigations in which social media research has been used, the number of criminal investigations in which fictitious/undercover online personas have been used, the nature of the offense(s) charged in each investigation, and the number of those investigations that resulted in arrests and/or prosecutions.*

9. *Use for Purposes Other Than Criminal Investigations: Any and all records reflecting the number of matters in which social media was used to collect information about individuals for purposes other than criminal investigations or background checks for police department employment, the nature of each such matter, the number of such matters in which an individual or group was charged with a crime, and the nature of each such matter.*

BPD responded to these four requests on October 26 by repeating its statement that it "does not maintain a centralized list or database" of these records.

The Brennan Center again reminds BPD that its obligation to produce public records extends beyond just those reflected in a "centralized list or database." Please confirm that BPD will search for and produce documents notwithstanding the lack of any "centralized list or database." Further, BPD's assertion that it is not required to "conduct research" into its own investigative files to determine whether responsive information exists misses the point. Searching or sorting existing records "does not involve creating new records or conducting research." See Att'y Gen. v. Dist. Att'y for Plymouth Dist., 484 Mass. 260, 277 (2020) (citation omitted) ("The extraction of categories of information from an existing database does not impose burdens on public record holders that exceed what is required under the public records law"). Indeed, agencies like BPD have a legal obligation to maintain information in a format that is "searchable and accessible... so as not to undermine the purpose of the public records law." Id. The Attorney General has made clear that "ease of access is not a basis for a records custodian to decline access." 2001 Mass. Op. Att'y Gen. 1 (2001) (finding that Commonwealth was required to provide access to electronic voter information even where it was not easily accessible and could only be provided for one town at a time through a "programming effort" using a "structure query language process"). Please confirm that BPD will conduct a search of its existing files and databases for responsive documents and provide the parameters of BPD's search for any such documents.

Response: The Department has conducted a search in regards to these records. The Department used an internal electronic search for the following general search term "social media" as well as common social media programs: "Facebook, Twitter, Snap-Chat, Instagram, and Tik-Tok."

For requests #6, #7, #8, #9, #12, the Department contends that it has used social media investigations in a variety of different contexts, including homicide, domestic violence, gang-related crimes, and gun possession. The Department has determined that pulling all responsive records for the above requests during the stated time period would require thousands of hours of searching through individual case files and compiling material. Social media has been used in hundreds of different criminal cases in a variety of different contexts, some of which are active and ongoing. Furthermore, the responsive records would need to be redacted in order to comply with public records law. As stated earlier, the responsive material is not located in a centralized

database. Rather, the responsive records exist in individual case files related to past or ongoing investigations. The Department does not currently have the resources to pull every use of social media through every criminal investigation across nearly a decade of time. The Department contends that the public records law does not demand that the Department conduct searches that are overboard and unduly burdensome. It further contends that conducting thousands of hours of responsive searching would constitute research under G. L. c. 66, § 6A(d); 32 Op. Atty Gen. 157, 165 (May 18, 1977).

In lieu of producing all representative documents, the Department has produced representative samples, attached in the portal. The Department is willing to work with the requester to provide additional representative samples.

Response No. 10

The BPD conducted an electronic records using the term “audit” and confirmed with members with the Boston Regional Intelligence Center that no responsive records exist for this request.

Response No. 11

Additional responsive records have been located. Please see additional documentation attached via the portal. The Department affirms that is has used the above third-party material to train officers during seminar and training sessions.

The Department contends that currently does not have a social media policy in effect. The Department currently has two draft policies regarding the use of social media. The Department is withholding these records pursuant to M. G. L. c. 4, § 7(26)(d). See *Babets v. Sec’y of the Exec. Office of Human Servs.*, 403 Mass. 230, 237 n.8 (1988); See also, *Boston Globe Media Partners, LLC v. Dep’t of Public Health*, Suffolk Sup. No. 19-02387(October 21, 2019).

Response No. 14

The Department conducted an electronic search in its records of contracts, licenses, and grants, and memorandums of understanding. It has also confirmed with staff at the BRIC that all there is no further responsive documentation to this request.

The Department contends that it used a trial version of GeoFedia during the allotted trial period, but ultimately did not purchase a license to use the software. The Department does not currently monitor social media feeds through the use of a third party software program. Licenses related to GeoFedia were previously provided by the department in September 2021 response.

Response No. 15

See the above response. The Department confirmed with members of its staff as well as electronic search that GeoFedia was the only third-party product that was used.



Response No. 17

The Department conducted an electronic search using the terms “metrics”, “report” with a connector for “social media” as well” Facebook, Twitter, Snap-Chat, Instagram, and Tik-Tok”. There are no records responsive to this request.

There is a presumption under the Massachusetts Public Records Law that government records are public; however, government records custodians are permitted to redact or withhold portions of public records. See G. L. c. 4, § 7 (26).

Any exemptions to the Public Records Law that apply to permit or require redaction or withholding will be described at that time.

You may appeal this response to the Supervisor of Records in the Office of the Secretary of the Commonwealth. G. L. c. 66, § 10A (c); G. L. c. 66, § 10(b)(ix); 950 CMR 32.08; 950 CMR 32.08(1)(h) (in petitioning the Supervisor, the requester shall provide a copy of such petition to the records access officer associated with such petition). You may also appeal to the Superior Court. 950 CMR 32.06(3)(c).

Very truly yours,

Martha DeMaio
Director of Public Information
Boston Police Department