



The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Shawn A. Williams
Supervisor of Records

March 23, 2016

SPR16/182

Mr. Richard P. Langlois
Superintendent of Schools
Marlborough Public Schools
17 Washington Street
Marlborough, MA 01752

Dear Superintendent Langlois:

I have received the petition of Jennifer A. English appealing the response of the Marlborough Public Schools (School District) to a request for public records. G. L. c. 66 § 10(b); see also 950 C.M.R. 32.08(2). Specifically, Ms. English requested a copy of settlement agreement entered into by the School District with parents and guardians, from January 1, 2010 through January 30, 2016, relative to the provision of special education services and/or disabilities, redacted of all personally identifying information. On March 1, 2016, the School District provided Ms. English with a written fee estimate. Ms. English appealed the School District's charge of segregation at the hourly rate of the School Districts' Legal Counsel.

Failure to provide timely response and provide records

The School District failed to provide a timely response to Ms. English. Your March 1, 2016 written estimate was provided twenty-nine (29) days after Ms. English's request. Under the Public Records Law and the Access Regulations (Regulations) all requests for public records must be met with a response within ten (10) days of the request. G. L. c. 66, § 10(b); 950 C.M.R. 32.05. The ten-day provision is a maximum, rather than a minimum, time frame for complying with a public records request. The response may be an offer to provide records, a fee estimate for provision of the records, or a denial. All records custodians must comply with both the Public Records Law and the Regulations with respect to the timeliness of response.

Fees for search and segregation of public records

A custodian of records may assess a reasonable fee for complying with a request for public records. G. L. c. 66, § 10(a); see also 950 C.M.R. 32.06(2) (where cost of complying with a request for public records is expected to exceed ten dollars (\$10.00), custodian of records shall provide written good faith estimate). Absent specific statutory authority to the contrary, the fees

to be charged for complying with requests for public records are established by the Public Records Access Regulations (Regulations). See 950 C.M.R. 32.06 (fees for public records). Under the Regulations, a custodian of records may assess a maximum fee of five cents (\$.05) per page for a black and white single or double-sided photocopy of a public record. See 950 C.M.R. 32.06(1)(a).

The Regulations provide that in cases where search or segregation time is necessary a custodian of records may charge a pro-rated fee based on the hourly rate of the *lowest paid employee who is capable* of performing the task. 950 C.M.R. 32.06(1)(c). The Regulations define “search time” as the time needed to locate, pull from the file, copy and re-file public records, and “segregation time” as the time used to redact data that is exempt from non-exempt material. 950 C.M.R. 32.03. The costs for search and/or segregation must reflect the actual cost of complying with a particular request. G. L. c. 66, § 10(a).

The School District has charged for searching for and segregating records. The estimate states the School District is charging for search time at the lowest paid administrative office support staff's rate, which is \$24.60 per hour, and I find that this hourly rate is reasonable. In your estimate you list that the following costs associated with the searching, redacting, segregating, photocopying and re-filing of such written records to be a total cost of \$1,265.90. Please be advised, redacting and segregating are the same tasks. Segregation is the time used to redact exempt data or content from a record. Therefore, the School District must revise its estimate for the segregation time that was assessed. See 950 C.M.R. 32.03.

Written, good faith fee estimate

Your estimate did not include the cost of providing copies of the settlement agreements; however your estimate advised Ms. English that the School District will provide her with costs of photocopies once the School District determines the number of pages responsive to her request. Please note that the section of the Regulations associated with fees for copies was amended on February 29, 2016. From that date forward records custodians may only charge a maximum fee of five cents (\$.05) per page for both 8 ½ x 11” black-and-white paper and computer-generated copies.

Your estimate for “segregation/redaction” of personally identifiable information of parents and children in the settlement agreements at an hourly rate of two hundred fifteen (\$215.00) dollars per hour, the hourly of the School District's Legal Counsel is not reasonable. The Regulations mandate that “Segregation time,” which is the time it takes to redact exemption data or information from the content of a record must be assessed at the lowest hourly rate of the individual capable of performing the segregation/redactions. There is no provision in the Public Records Law or its Regulations that mandates segregation to be performed by an attorney.

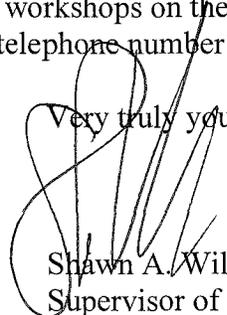
In most cases, and with some guidance, a much lower paid employee within the School District's office is capable of segregating/redacting exempt data from a settlement agreement. A records custodian must justify why a particular individual at a higher hourly rate is the only individual who can perform the task of segregation. Whether it is reasonable that a higher paid individual where the records are normally located is the only person capable of performing the task is determined on a case-by-case basis. Therefore, I find that the School District has not met its burden of proving that the School District's Legal Counsel is the only individual capable of segregating exempt data from the records. I find that the School District must revise the hourly rate for segregation.

Order

The School District is hereby ordered, within ten (10) days of this order, to provide Ms. English with a revised written, good faith estimate, prepared in a manner consistent with this order, the Public Records Law and its Regulations. If the School District maintains that any portion of the responsive records are exempt from disclosure it must, within ten (10) days provide to Ms. English a written explanation, *with specificity*, how a particular exemption applies to each record or each portion of a record. 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. A copy of any such response, including a revised estimate must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

To assist the School District in responding to requests for public records, the School District is advised to review our publication, *A Guide to the Massachusetts Public Records Law*. This document is available on the Internet, free of charge, at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>. Attorneys on my staff are available during regular business hours to answer general questions regarding the Public Records Law. In addition, members of my staff will visit a records custodian in person to conduct training workshops on the Public Records Law upon request. Please contact my office directly at the telephone number below for further information.

Very truly yours,



Shawn A. Williams
Supervisor of Records

cc: Ms. Jennifer A. English



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

Shawn A. Williams
Supervisor of Records

May 19, 2016
SPR16/277

Mr. Michael J. Joyce, Esq.
Legal Counsel for the Marlborough Public Schools
Nuttall, Macavoy & Joyce, P.C.
Marshfield Professional Center
1020 Plain Street, Suite 270
Marshfield, MA 02050

Dear Attorney Joyce:

I have received the petition of Jennifer A. English appealing the March 31, 2016 written, response of the Town of Marlborough – Public Schools (School District) to a request for public records. G. L. c. 66 § 10(b); see also 950 C.M.R. 32.08(2). Specifically, Ms. English requested a copy of all settlement agreements entered into by the Town of Marlborough – Public Schools with parents and guardians, from January 1, 2010 through January 30, 2016, relative to the provision of special education placement(s) for students with disabilities, redacted of all personally identifiable information. In my prior determination, I ordered the School District to revise its March 1, 2016 written, good faith estimate provided to Ms. English. See SPR16/182 Determination of the Supervisor of Records (March 23, 2016). The School District provided Ms. English with a revised estimate, and Ms. English appealed. As Legal Counsel for the School District, you petitioned this office for reconsideration of my March 23, 2016 determination.

In my March 23, 2016 determination, I ordered the School District to revise its written, good faith estimates by revising the number of hours assessed for segregation and the hourly rate of \$215 for a review and segregation of exempt material by the School District's Legal Counsel. For the reasons stated below I find the School District has complied with a portion of my order. With respect to fees assessed at the Legal Counsel's hourly rate, I respectfully decline to reverse my prior findings.

School District has complied with my March 23 order to revise the segregation time and rate

In its March 1 written, good faith estimate, the School District mistakenly assessed the task of segregation/redaction twice in its estimate, believing that segregation and redaction were separate tasks. The School District was ordered to revise the number of hours for segregation. Its revised estimate assesses six (6) hours to segregate exempt material from the responsive records at the hourly rate of \$24.60, the lowest paid hourly rate of School District support staff. I

find that the School District is now in compliance with my determination regarding revision of number of hours for segregation and hourly rate.

The School District failed to comply with my order to revise the charges for Legal Counsel

The School District has revised the hourly rate from the School District's Legal Counsel of two hundred fifteen dollars (\$215.00) per hour for segregation time to twenty-four dollars and sixty cents (\$24.60), the hourly rate of School District support staff. However, as School District Legal Counsel you have asked this office for reconsideration to allow the use of your \$215 hourly rate to conduct a legal review of the records after segregation of exempt materials, and prior to disclosure to Ms. English. In your April 1, 2016 letter, you state, "[T]he Supervisor's opinion that the District cannot charge for legal review of the documents to ensure proper redaction, would essentially force the District to pay for legal counsel's review of the responsive documents, but not be able to pass that cost on to the requester. Such an unfunded mandate is in contravention of the Public Records Law."

Furthermore, you object to the Supervisor's finding that the hourly rate of Legal Counsel is not reasonable. You write that the School District is represented in all legal matters of and relating to special education, student services and student records laws by private counsel. You believe the rate billed by counsel for all legal matters is the lowest rate of an individual capable of performing a legal review, and is less than the amount determined to be "per se reasonable" for counsel in the Boston Metropolitan area by the Appeals Court of Massachusetts in 2011. As support you cite a 2011 insurance defense case in which a \$225.00 per hour rate for attorney's fees billed in that case were found to be reasonable. N. Sec. Ins. Co., Inc. v. R. H. Realty Trust, 2011 WL 362213 (Mass. App. Ct. February 8, 2011).

Your statement that the Supervisor's order to revise the hourly rate assessed by Legal Counsel would leave the School District without any recourse in recovering costs for legal services from a requester for a public records request is a misinterpretation of the purpose of assessing fees under the Public Records Law. A requester should not pay a premium to obtain public records. A citizen requesting records ought not bear the brunt of the fees assessed by outside counsel for review of records responsive to a public records request.

The Public Records Access Regulations (Regulations) mandate that search and segregation time must be assessed at the lowest hourly rate of the individual capable of performing the search and/or segregation. Please note, reviewing records in order to segregate exempt material is a task that is naturally built into the time assessed for "segregation" at the lowest hourly rate of an individual in the School District's office. I affirm my determination that the \$215.00 per hour rate is unreasonable in the context of a public records request.

Counsel's example of a court finding of reasonable attorney's fees in a private-sector civil litigation matter, has no bearing on the tenets of the Public Records Law and reasonableness of fees that may be assessed to the public at large. The Regulations state that the fee for search

Mr. Michael J. Joyce, Esq.
Page 3
May 19, 2016

SPR16/277

and segregation is not assessed for the individual who is available or that the government entity chooses to taken on the task. I decline to reverse my prior finding, and again order the School District to revise the hourly rate for Legal Counsel. If the School District insists that Legal Counsel review the records after segregation, the cost should not be passed through to a requester.

Conclusion

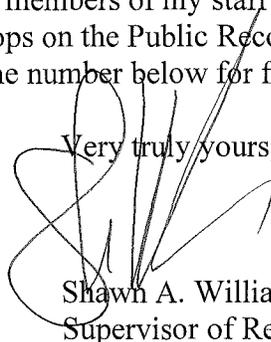
Whereas, the School District has revised its written, good faith estimate for segregation time, including the hourly rate, I find that the School District is in compliance with the directives in my March 23, 2016 administrative order.

However, I also find that the School District is still not in compliance with the Regulations regarding a fee of two (2) hours at the hourly rate of \$215.00 for legal review. Accordingly, the School District is hereby ordered to revise its estimate by eliminating the charges for two hours of time at \$215.00 for legal review, within ten (10) days of this order, and provide Ms. English with the revised estimate in a manner consistent with this order, the Public Records Law and its Regulations.

Furthermore, when the School District segregates exempt material from the responsive records, Ms. English must receive a separate written explanation, *with specificity*, how a particular exemption applies to each record or each portion of a record. 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. A copy of any responses must be provided to this office. It is preferable to send an electronic copy of this response to this office at pre@sec.state.ma.us.

To assist in responding to requests for public records, I advise the School District to review our publication, *A Guide to the Massachusetts Public Records Law*. This document is available on the Internet, free of charge, at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>. Attorneys on my staff are available during regular business hours to answer general questions regarding the Public Records Law. In addition, members of my staff will visit a records custodian in person to conduct training workshops on the Public Records Law upon request. Please contact my office directly at the telephone number below for further information.

Very truly yours,



Shawn A. Williams
Supervisor of Records

cc: Ms. Jennifer A. English