

Dear Superintendent,

This request is being made pursuant to General Laws c. 66 §10 of the Massachusetts public records law (Public Records Law). I am requesting that I be provided with a copy of the following records:

Settlement agreements entered into by your School District with parents and guardians, from January 1, 2011 through today, relative to the provision of special education services and/or educational placement(s) for students with disabilities, redacted of all personally identifying information

I recognize that you may charge reasonable costs for copies of these agreements. If you expect costs to exceed \$10.00, please provide a detailed fee estimate. Please note that Public Records Access Regulations mandate that search and segregation time must be assessed at the lowest hourly rate of an individual in the School District's office, and may not include attorney's fees. See SPR16/277 Determination of the Supervisor of Records (May 19, 2016).

Please also note that when the School District segregates exempt material from the responsive records, I 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, you must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record. See SPR16/277 Determination of the Supervisor of Records (May 19, 2016). Please include this information along with your response.

As you are aware, the public records law requires you to provide me with a written response within 10 calendar days. If you cannot comply with my request, you are statutorily required to provide an explanation in writing.

Very truly yours,



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

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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

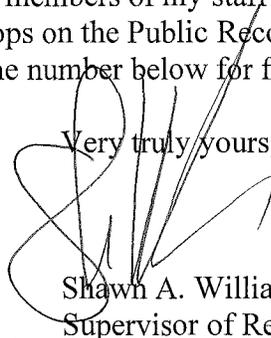
Whereas, the School District has revised its written, good faith estimate for segregation time, including the hourly rate, I find that the School District is in compliance with the directives in my March 23, 2016 administrative order.

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