Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss **SUPERIOR COURT DEPARTMENT**
CIVIL ACTION NO.

2481CV2456

CITY OF MALDEN,
Plaintiff

RECEIVED 9/13/2024 MG

v.

MANZA ARTHUR, Supervisor of Records of the Public Records Division of the Office of William Francis Galvin, Secretary of the Commonwealth and WILLIAM FRANCIS GALVIN, Secretary of the Commonwealth and OPENCOMMONWEALTH (BRUCE FRIEDMAN D/B/A OPENCOMMONWEALTH.ORG),
Defendants.

COMPLAINT FOR JUDICIAL REVIEW AND REQUEST FOR STAY PURSUANT TO G.L. c. 30A, §14, AND FOR CERTIORARI REVIEW AND INJUNCTION PURSUANT TO G.L. c. 249, § 4.

INTRODUCTION

1. Plaintiff, City of Malden, ("Malden") seeks relief from a determination by Defendant, Manza Arthur the Supervisor of Records and Defendant, Francis Galvin, Secretary of the Commonwealth regarding Malden's response to a public records request submitted by Defendant, OpenCommonwealth ("OC"). Malden seeks relief from this Court to prevent substantial injustice and prejudice to Malden.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this dispute pursuant to the provisions of G.L. c. 30A, § 14; G.L. c. 249, § 4 and of G.L. c. 231A.

3. Venue is proper under of G.L. c. 30A § 14(1).

PARTIES

4. The Plaintiff, City of Malden ("Malden"), is a municipality organized and operating under the laws of the Commonwealth of Massachusetts with a place of business at 215 Pleasant Street in the City of Malden, MA.

5. Defendant, William Francis Galvin, is the Secretary of the Commonwealth of Massachusetts (the "Secretary"). The Secretary is sued in his official capacity as Secretary of the Commonwealth. His usual place of employment is One Ashburton Place, 17th Floor, Boston, MA 02108.

6. Defendant, Manza Arthur, is the Supervisor of Records of the Public Records Division (the "Supervisor"). The public Records Division is a division of the Office of the Secretary and is legislatively assigned the duty to adjudicate administrative appeals under the Massachusetts Public Records Law, of G.L. c. 66 § 10A. The Supervisor is being sued in her official capacity as Supervisor of Records. Her usual place of employment is One Ashburton Place, 17th Floor, Boston, MA 02108.

7. Defendant, OpenCommonwealth, ("OC") states it is a media organization run by Bruce Friedman doing business in the Commonwealth of Massachusetts, in Middlesex County, Malden, Massachusetts.

FACTS

8. The Massachusetts Public Records Law and its Regulations provide that each person has a right of access to public information.

9. Included in this right of access is the right to inspect, copy or have a copy of records provided upon the payment of a reasonable fee, if any.

10. G.L. c. 66, § 10(a) provides in part:

> A records access officer appointed pursuant to section 6A, or a designee shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record as defined in clause twenty-six of section 7 of chapter 4, or any segregable portion of a public record, not later than 10 business days following the receipt of the request...

11. of G.L. c. 66, § 10(b) provides in part:

> If the agency or municipality does not intend to permit inspection or furnish a copy of a requested record, or the magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the agency or municipality such that the agency or municipality is unable to do so within the timeframe established in subsection (a), the agency or municipality shall inform the requestor in writing not later than *10 business days after the initial receipt of the request for public records.* (*Emphasis added*).

12. G.L. c. 66, § 10(d) provides in part, "A records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection.".

13. A records access officer ("RAO") is an employee designated within a governmental entity to coordinate responses to requests for access to public records, assisting individuals seeking public records in identifying the records requested and preparing guidelines that enable requestors to make informed requests regarding the availability of such public records electronically or otherwise.

14. G.L. c. 66, § 10 does not include a definition of the phrase, "business day".

15. The Public Records Law Regulations defines Business Day as "Monday through Friday. Business days do not include Saturdays, Sundays, *legal holidays*, or other weekdays where a custodian's office is closed unexpectedly.". (*Emphasis added*).

16. On May 20, 2024 at 10:33 pm, OC submitted a public records request to Malden. (**See Exhibit A**).

17. OC requested, in relevant part, the following:

> Please provide the following documents/records in the possession or under the control of town/city for the period ***any time prior to and through May 21, 2024***:
> Time
> Any and all electronic mail and calendar information exclusively for the [XXX] account including any draft and any deleted items:
> We are aware that [XXX] has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

18. OC's request was made through the City of Malden's email.

19. Malden responded timely to the request on May 28, 2024 stating OC's request was overly broad and therefore, was not compliant with the Public Records Law. **(See Exhibit B)**.

20. Unsatisfied with Malden's response, OC filed an appeal with the Supervisor on May 28, 2024 reiterating that Malden should comply with his request. **(See Exhibit C)**.

21. Malden provided the Supervisor with additional information. Particularly that a precursory search revealed at least **Forty-Nine Thousand, (49,000)** emails. **(See Exhibit D)**.

22. On June 4, 2024 OC emailed the Supervisor stating that Malden failed to provide a good faith fee petition at the close of business on the "*10th Business day*" (emphasis added). **(See Exhibit E)**.

23. On June 5, 2024, the 10th Business Day, Malden filed a Fee Petition with the Supervisor, **(See Exhibit F)**, with a copy to OC. **(See Exhibit G)**.

24. On June 12, 2024 the Supervisor denied Malden's request, stating that Malden had not demonstrated it had submitted the Fee Petition within ten (10) business days after receipt. **(See Exhibit H)**.

25. Malden requested the Supervisor to reconsider its decision and submitted a chart which indicated that Monday, May 27, 2024 was Memorial Day, and should not have been counted as a Business Day because holidays are not included per the Public Records Law Regulations. As such, Malden Fee Petition should be allowed as Malden responded within ten (10) business days after receipt of the Request. **(See Exhibit I)**.

26. OC responded to Malden's request for reconsideration stating, among other things, that in Malden's original response on May 28, 2024 acknowledged that Malden had "received" the request on May 20, 2024 at 10:33 pm. **(See Exhibit J)**.

27. The Supervisor sent a request to Malden asking Malden to clarify the discrepancy in its two responses: (1) that Malden "received" the request on May 20, 2024 at 10:33 pm and (2) that OC "sent" the request on May 20, 2024 at 10:33 pm. **(See Exhibit K)**

28. Malden responded attaching the original request to its email, explaining it was received on May 20 2024 at 10:33 PM, thus the receive date would be May 21, 2024, the following day. **(See Exhibit L).**

29. On July 3, 2024, the Supervisor denied Malden's request for reconsideration. **(See Exhibit M).**

COUNT I
JUDICIAL REVIEW PURSUANT TO G.L. c. 30A, § 14

30. Malden, restates, realleges and incorporates the allegations contained in paragraphs 1 through 29 of this Verified Complaint.

31. The Supervisor's Determination (a) exceeds the statutory authority or jurisdiction of the Supervisor (b) is based on an error of law; (c) is made upon unlawful procedure; and (d) is arbitrary or capricious, and abuse of discretion, or otherwise not in accordance with law and fundamental fairness.

32. It is therefore appropriate for the Court to enter an order, under G.L. c. 30A, § 14 (3), staying the enforcement of the Supervisor's Determination.

33. The Court should set aside the Supervisor's Determination. Alternatively, the Court should modify the Supervisor's Determination to reflect that the original response was made in a timely fashion, and thus, Malden may charge a fee to produce the records sought in the Request.

COUNT II
CERTIORARI REVIEW PURSUANT TO G.L. c. 249, § 4

34. Malden, restates, realleges and incorporates the allegations contained in paragraphs 1 through 33 of this Verified Complaint.

35. The Public Records Appeal process before the Supervisor regarding the Original Response constitutes a judicial or quasi-judicial proceeding.

36. If judicial review under G.L. c. 30A is not available to Malden, then Malden lacks reasonably adequate remedies to address the manifest injustice it is experience.
37. Malden has suffered a substantial injury or injustice arising from the proceeding before the Supervisor because it has been prevented from charging a fee of $25 per hour to review, redact and produce records sought in the Request, because Malden is being forced to act as OC's private investigator and segregate records without a fee and is being forced to respond to a public record request designed to harass Malden.
38. Certiorari review is appropriate to correct errors in the proceeding before the Supervisor which were not conducted in accordance with the course of common law.
39. The Court should issue an injunction preventing the Supervisor from taking any action to enforce her Determination.
40. The Court should set aside the Supervisor's Determination. Alternatively, the Court should modify the Supervisor's Determination to reflect that the original response was made in a timely fashion, and thus, Malden may charge a fee to produce the records sought in the Request.

COUNT III – DECLARATORY JUDGMENT PURSUANT TO G.L. c. 231A

41. Malden, restates, realleges and incorporates the allegations contained in paragraphs 1 through 40 of this Verified Complaint.
42. Malden responded to the Request within ten (10) business days in accordance with G.L. c. 66, § 10(a).
43. Thus, Malden was entitled to its fees since the reason given by the Supervisor was that Malden had not petitioned the Supervisor within ten (10) business days after receipt.
44. The Request seeks documents that are exempt from disclosure by state and federal law.
45. The Request was intended to harass Malden.
46. The Supervisor's Determination reflects a continuing dispute and an actual controversy between the parties with the meaning of G.L. c. 231A.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

47. Malden seeks, and is entitled to a binding declaration of right, duty, status and other legal relations within the meaning of G.L. c. 231A in the manner herein described.

48. Malden respectfully requests that this Honorable Court declare that (a) the Original Fee Petition on June 5, 2024 was made in a timely fashion, thus allowing Malden to charge a fee to produce the records sought in the Request; and (b) the Request was intended to harass Malden.

WHEREFORE, Malden prays that this Court award the following relief:

a. Set aside the Supervisor's Determination;
b. Issue a stay, under G.L. c. 30A, § 14(3) that Malden is relieved from the production of any records in response to the Request;
c. Issue an injunction under G.L. c. 249, § 4 ordering the Supervisor not to take any action to enforce the Determination;
d. Modify the Supervisor's Determination to reflect that:
    i. The June 5, 2024 Fee Petition was made in a timely fashion, and therefore, Malden may charge a fee to review, redact, segregate and produce the records sought in the Request; and
    ii. The Request was intended to harass Malden.
e. Grant such other relief as is just and equitable.

City of Malden
By its Attorney

/s/ Alicia A. McNeil

Alicia A. McNeil, Esq.
City Solicitor
City of Malden
Legal Department
215 Pleasant Street, 4th Floor
Malden, MA 01248
781-397-7106
BBO# 632134
amcneil@cityofmalden.org

Date: 9.13.2024

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss **SUPERIOR COURT**
DEPARTMENT

CIVIL ACTION NO.

CITY OF MALDEN,
Plaintiff

v.

MANZA ARTHUR, Supervisor of Records of the Public Records Division of the Office of William Francis Galvin, Secretary of the Commonwealth and WILLIAM FRANCIS GALVIN, Secretary of the Commonwealth and OPENCOMMONWEALTH (BRUCE FRIEDMAN D/B/A OPENCOMMONWEALTH.ORG),
Defendants.

PLAINTIFF's RECORD APPENDIX

EXHIBIT	DESCRIPTION
A	Public Records Request from OpenCommonwealth on [1]5.20.2024 at 10:33 PM
B	Malden's Response that Request was Overly Broad
C	OC's First Appeal Alleging Non-Compliance
D	Malden's Response to OC's Appeal – Citing 49,000 Emails
E	OC's Email to Supervisor Stating Malden Did Not Provide a Good Faith Fee Petition
F	Malden's Fee Petition
G	Malden's Copy of Fee Petition to OC
H	Supervisor's Denial of Malden's Fee Petition
I	Malden's Request for Reconsideration Including a Chart Showing One Day fell on Memorial Day, a Holiday
J	OC's Response to Malden's Request for Reconsideration
K	Supervisor's Request for Clarification of when Request was Received by Malden as Opposed to When OC Sent the Request
L	Malden's Response to Supervisor's Request For Clarification
M	Supervisor's Denial of Malden's Request for Reconsideration

[1] Malden City Hall was closed at 10:33 pm. The date Malden *received* the request was 5.21.2024

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT A

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Commonwealth Transparency <info@opencommonwealth.org>
Sent: Monday, May 20, 2024 10:33 PM
To: Carol Ann Desiderio
Cc: Public Records
Subject: Public Record Request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A

Importance: High

Greetings:

This is a ***not*** a modification of a prior public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:

Please provide the following documents/records in the possession or under the control of town/city for the period ***any time prior to and through May 21, 2024***:
Time

Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items:

We are aware that Ms. Mertz has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

This request seeks responsive documents be delivered in electronic format and in the format in which they are regularly maintained, and specifically includes all electronic mail attachments ***and metadata***.

Where no such records in the above categories exist, please provide a written statement to that effect.

With respect to the form of production, we note that relevant regulations require the production of records in an accessible, commonly used electronic form, to the extent feasible. See 950 CMR 32.04(5)(d).

The records custodian who receives this request is required to use his or her "superior knowledge" to determine the exact records that are responsive to this request.

Your government entity may have multiple RAOs that are assigned to a specific division or department within that entity. A request to one RAO may include records of another division or department within the RAOs' agency or municipality. RAOs must use their superior knowledge of the records to ensure that a request for records is delivered to the appropriate party. Therefore, an RAO is expected to forward such requests to the appropriate parties within its municipality or agency.

Record custodians are also required to implement new record keeping systems and databases in such a way as to allow for "retrieval of public portions of records to provide maximum public access." See 950 CMR 32.07(1)(e).

Extraction of such data from a database or electronic record system does not constitute creating a new record. See 950 CMR 32.07(1)(f). Printing these records from a database or electronic system, redacting them with a marker, and then re-scanning them, is generally not consistent with these regulations; this process provides the digital records neither in the preferred form nor in a "searchable machine-readable form." 950 CMR 32.04(5)(d).

If necessary, we welcome reasonable suggested modifications pursuant to 950 CMR 32.06(2)(g). Per Attorney Gen. v. Dist. Attorney for Plymouth Dist., 484 Mass. 260, 141 N.E.3d 429 (2020), compiling information from a database is not tantamount to creating a new record that would otherwise be precluded under public records law. Specifically: "Where public records are in electronic form, a public records request that requires a government entity to search its electronic database to extract requested data does not mean that the extracted data constitute the creation of a new record, which would not be required, under the public records law. " Id. at 442 to 443.

Thus, we request that your department query its database and provide a response to the records request. Should you determine that some portions of the documents are exempt from disclosure, please release any reasonably segregable portions that are not exempt. In addition, please note for any such redactions the applicable statutory exemption and explain why it applies to the redacted or withheld information.

This request and all responsive documents are for express purposes of gathering information to promote citizen oversight and further the public understanding of the operation and activities of our government.

Kindest Regards,

OpenCommonwealth.org

OpenCommonwealth.org is a free and open public media organization. We serve the greater Massachusetts community with the goal to provide and empower citizen oversight of governmental operations and activities, help citizens understand how, why and where taxpayer dollars are expended, and to investigate, gather and report the facts in the online publications found on the webpages and social media accounts of OpenCommonwealth.org. OpenCommonwealth.org is a free service, is staffed only by volunteers, and all costs and expenses are borne by its creators. No person has ever paid OpenCommonwealth.org any monies, or any in-kind contributions for its reporting, or access to any of its files. It is the structural intent of OpenCommonwealth.org to maintain and persist as an absolutely free service to the entire public. Since its inception, OpenCommonwealth.org has been viewed by over 130,000 visitors between the website and social media, and has had over 20,000 external visitors view and/or download records from our free and publicly available records repository. Currently OpenCommonwealth.org has over a 1.5 Terabytes of publicly available content published. This communication, along with any attachments, is covered by federal and state law governing electronic communications and may contain confidential and legally privileged information. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, use or copying of this message is strictly prohibited. If you have received this in error, please reply immediately to the sender and delete this message. Thank you. Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any matters addressed herein.

This email has been scanned for spam and viruses by Proofpoint Essentials. Click here to report this email as spam.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT B

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Subject: REF: Request# 2024-0262:
Date: Tuesday, May 28, 2024 at 8:25:11 AM Eastern Daylight Time
From: foiadirect@townforms.com <foiadirect@townforms.com>
To: Commonwealth Transparency <info@opencommonwealth.org>

Your request does not comply with the Public Records Law (PRL), G.L. c. 66 and 950 C.M.R. 32.00. Your request is excessively broad, and so broad that it is not permitted by the PRL. The Supervisor of Public Records requires that public records requests must reasonably describe the records sought. G. L. c. 66, § 10(a)(i).

In a recent Suffolk Superior Court case, the court found that under the PRL "[t]he reasonable description requirement contemplates that a requesting party will identify documents or categories of documents with sufficient particularity that government employees will be able to understand exactly what they are looking for, and then make a prompt production." , Suffolk. Sup. No. 1784CV02087, at 2 (January 23, 2019). Chawla v. Dep't of Revenue

The court further indicated "[r]equests for documents that are articulated with very broad language that calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently 'related' to the category of materials requested, will satisfy this statutory standard." not Id. (emphasis in original).

In accordance with G. L. c. 66, § 10(a)(i) and the Chawla decision described above, whereas you seek "all information and documents" or "any and all communications, documents, e-mails, text messages, voice recordings, and other information or tangible evidence" "pertaining" to elections for example, it is unclear with "sufficient particularity" which records you seek. Thus, your request "calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently '[regarding]' the category of materials requested." Chawla, at 2.

Therefore, your request is not legal and not permitted under the PRL.

Should you wish to define a scope for the emails sought from the City of Malden sever, we can attempt a search.

Right of Appeal-Pursuant to G.L. c. 66, § 10(b)(ix), please note you have a right of appeal to the Supervisor of Records under G.L. c. 66, § 10A(a) and the right to seek judicial review by commencing a civil action in the Superior Court under G.L. c. 66, § 10

Regards,
Public Records
City of Malden

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT C

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Kelly, Mairead (SEC)

From: Commonwealth Transparency <info@opencommonwealth.org>
Sent: Tuesday, May 28, 2024 8:34 AM
To: SEC-DL-PREWEB; SEC-DL-PREWEB
Cc: Carol AnnDesiderio; publicrecords@cityofmalden.org
Subject: Request for Appeal - City of Malden - Non-Responsive

Importance: High

Greetings:

On May 20, 2024 the following PRR was served on. the city of Malden:

From: Commonwealth Transparency info@opencommonwealth.org
Date: Monday, May 20, 2024 at 10:32 PM
To: Carol Ann Desiderio cdesiderio@cityofmalden.org,
Cc: publicrecords@cityofmalden.org publicrecords@cityofmalden.org
Subject: Public Record Request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A

Greetings:

This is a ***not*** a modification of a prior public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:

Please provide the following documents/records in the possession or under the control of town/city for the period ***any time prior to and through May 21, 2024***:
Time

Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items:

We are aware that Ms. Mertz has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

This request seeks responsive documents be delivered in electronic format and in the format in which they are regularly maintained, and specifically includes all electronic mail attachments ***and metadata***.

Where no such records in the above categories exist, please provide a written statement to that effect.

With respect to the form of production, we note that relevant regulations require the production of records in an accessible, commonly used electronic form, to the extent feasible. See 950 CMR 32.04(5)(d).

The records custodian who receives this request is required to use his or her "superior knowledge" to determine the exact records that are responsive to this request.

Your government entity may have multiple RAOs that are assigned to a specific division or department within that entity. A request to one RAO may include records of another division or department within the RAOs' agency or municipality. RAOs must use their superior knowledge of the records to ensure

that a request for records is delivered to the appropriate party. Therefore, an RAO is expected to forward such requests to the appropriate parties within its municipality or agency.

Record custodians are also required to implement new record keeping systems and databases in such a way as to allow for "retrieval of public portions of records to provide maximum public access." See 950 CMR 32.07(1)(e).

Extraction of such data from a database or electronic record system does not constitute creating a new record. See 950 CMR 32.07(1)(f). Printing these records from a database or electronic system, redacting them with a marker, and then re-scanning them, is generally not consistent with these regulations; this process provides the digital records neither in the preferred form nor in a "searchable machine-readable form." 950 CMR 32.04(5)(d).

If necessary, we welcome reasonable suggested modifications pursuant to 950 CMR 32.06(2)(g). Per Attorney Gen. v. Dist. Attorney for Plymouth Dist., 484 Mass. 260, 141 N.E.3d 429 (2020), compiling information from a database is not tantamount to creating a new record that would otherwise be precluded under public records law. Specifically: "Where public records are in electronic form, a public records request that requires a government entity to search its electronic database to extract requested data does not mean that the extracted data constitute the creation of a new record, which would not be required, under the public records law. " Id. at 442 to 443.

Thus, we request that your department query its database and provide a response to the records request. Should you determine that some portions of the documents are exempt from disclosure, please release any reasonably segregable portions that are not exempt. In addition, please note for any such redactions the applicable statutory exemption and explain why it applies to the redacted or withheld information.

This request and all responsive documents are for express purposes of gathering information to promote citizen oversight and further the public understanding of the operation and activities of our government.

Kindest Regards,

OpenCommonwealth.org

On May 28, 2024 the following was received:

From: foiadirect@townforms.com <foiadirect@townforms.com>
Date: Tuesday, May 28, 2024 at 8:25 AM
To: Commonwealth Transparency <info@opencommonwealth.org>
Subject: REF: Request# 2024-0262:

> Your request does not comply with the Public Records Law (PRL), G.L. c. 66 and 950 C.M.R. 32.00. Your request is excessively broad, and so broad that it is not permitted by the PRL. The Supervisor of Public Records requires that public records requests must reasonably describe the records sought. G. L. c. 66, § 10(a)(i).
>
> In a recent Suffolk Superior Court case, the court found that under the PRL "[t]he reasonable description requirement contemplates that a requesting party will identify documents or categories of documents with sufficient particularity that government employees will be able to understand exactly what they are looking for, and then make a prompt production." , Suffolk. Sup. No. 1784CV02087, at 2 (January 23, 2019).

Chawla v. Dep't of Revenue

The court further indicated "[r]equests for documents that are articulated with very broad language that calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently 'related' to the category of materials requested, will satisfy this statutory standard." not Id. (emphasis in original).

In accordance with G.L. c. 66, § 10(a)(i) and the Chawla decision described above, whereas you seek "all information and documents" or "any and all communications, documents, e-mails, text messages, voice recordings, and other information or tangible evidence" "pertaining" to elections for example, it is unclear with "sufficient particularity" which records you seek. Thus, your request "calls upon non-lawyer administrative personnel to interpret the scope of what is sought, and then make fine judgments about what documents are and are not sufficiently '[regarding]' the category of materials requested." Chawla, at 2.

Therefore, your request is not legal and not permitted under the PRL.

Should you wish to define a scope for the emails sought from the City of Malden sever, we can attempt a search.

Right of Appeal-Pursuant to G.L. c. 66, § 10(b)(ix), please note you have a right of appeal to the Supervisor of Records under G.L. c. 66, § 10A(a) and the right to seek judicial review by commencing a civil action in the Superior Court under G.L. c. 66, § 10

Regards,
Public Records
City of Malden

The public records sought are very specifically described: ***"Any and all electronic mail and calendar information exclusively for the "@cityofmalden.org" account including any draft and any deleted items: "***

OpenCommonwealth.org hereby requests that the SPR find and Order the City of Malden to provide all responsive records without delay and without charge as they failed to provide a good-faith response within 10 business days as required under Massachusetts Public Records Laws M.G.L. c66, §§ 10-10A.

Kindest Regards,

OpenCommonwealth.org

OpenCommonwealth.org is a free and open public media organization. We serve the greater Massachusetts community with the goal to provide and empower citizen oversight of governmental operations and activities, help citizens understand how, why and where taxpayer dollars are expended, and to investigate, gather and report the facts in the online publications found on the webpages and social media accounts of OpenCommonwealth.org. OpenCommonwealth.org is a free service, is staffed only by volunteers, and all costs and expenses are borne by its creators. No person has ever paid OpenCommonwealth.org any monies, or any in-kind contributions for its reporting, or access to any of its files. It is the structural intent of OpenCommonwealth.org to maintain and persist as an absolutely free service to the entire public. Since its inception, OpenCommonwealth.org has been viewed by over 130,000 visitors between the website and social

media, and has had over 20,000 external visitors view and/or download records from our free and publicly available records repository. Currently OpenCommonwealth.org has over a 1.5 Terabytes of publicly available content published. This communication, along with any attachments, is covered by federal and state law governing electronic communications and may contain confidential and legally privileged information. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, use or copying of this message is strictly prohibited. If you have received this in error, please reply immediately to the sender and delete this message. Thank you. Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any matters addressed herein.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

May 28, 2024
SPR24/1597

Open Commonwealth
Via Email
MA

Dear Open Commonwealth:

I have received your letter appealing the response of the City of Malden to your request for records.

I have directed a member of my staff, Jeffrey Gottfredsen, Esq., to review this matter. Upon completion of the review, I will advise you in writing of the disposition of this case. If in the interim you receive a satisfactory response to your request, please notify this office immediately.

Any further correspondence concerning this specific appeal should refer to the SPR case number listed under the date of this letter.

Sincerely,

Manza Arthur
Supervisor of Records

cc: Mrs. Carol A. Desiderio

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT D

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia A. McNeil
City Solicitor

Zaheer A. Samee
Assistant City Solicitor

Mark E. Rumley
Special Counsel

CITY OF MALDEN
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, Massachusetts 02148

Law Department

legal@cityofmalden.org
Tel: 781-397-7000, ext. 2106
Fax: 781-397-7105

Sent via email: Jeffrey.Gottfredsen@sec.state.ma.us

30, May 2024
(REVISED)

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

RE: SPR 24/1597 -

Good day Attorney Gottfredsen:

This office is responding to Open Commonwealth's appeal in connection with its records request to the City of Malden ("City" or "Malden") on May 20, 2024. The City responds to this appeal and further reserves the right to provide additional information on this matter.

On May 20, 2024, Open Commonwealth (OC) requested "Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items:" for the time span of "**any time prior to and through May 21, 2024:**" The City of Malden responded to this request on May 28, 2024 informing OC that its request was not permitted by the public records law because it was excessively broad, citing M.G.L. c. 66, § 10(a)(i); 950 C.M.R. 32.00 as well as *Chawla v. Department of Revenue* (Suffolk Sup. Ct. No. 1784CV02087 fn. 2, January 23. 2019).

ANALYSIS

The Massachusetts public records law, G. L. c. 66, § 10, "give[s] the public broad access to governmental records". *Friedman v. Div. of Admin. L. Appeals*, 103 Mass. App. Ct. 806, 807, 231 N.E.3d 957, 960 (2024); citing *Boston Globe Media Partners, LLC v. Department of Criminal Justice Info. Servs.*, 484 Mass. 279, 281, 140 N.E.3d 923 (2020). This is the general and basic principle of the public records law. However, this principle does not give the public carte blanche access to request records that are not reasonably described and are from a period of the beginning of time to the present. In this instant case, that is essentially the request of OC. This request is outrageously broad.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

As the Court ruled in the *Friedman* case, "... a rule of reason governs both the obligation of public agencies to respond and to provide records, and also the conduct of requestors of public documents.". *Id* at 807. In this instance, OC's conduct in its request is unreasonable.

In conducting a precursory search of the records requested by OC, there are at least **Forty-Nine Thousand (49,000)** emails that would be relevant to this search. Sifting through *at the least*, **49,000** emails without OC reasonably describing the records sought, would reduce the City of Malden's employees to "full-time investigators" on behalf of OC. *Id.* at 816; M.G.L. c. 66, § 10(a)(i). This is not the intent of the public records law.

Per our original response, the City of Malden requests that OC define a scope for the emails sought, or alternatively, the City requests that the Supervisor of Records dismiss this appeal with prejudice.

Sincerely,

Alicia A. McNeil

Alicia A. McNeil, City Solicitor

cc: info@opencommonwealth.org

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT E

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Commonwealth Transparency <info@opencommonwealth.org>
Sent: Tuesday, June 4, 2024 5:32 PM
To: pre@sec.state.ma.us; SEC-DL-PREWEB
Cc: Public Records; Carol Ann Desiderio; Jeffrey.Gottfredsen@sec.state.ma.us; Alicia McNeil
Subject: Re: City of Malden's Response to Appeal SPR 24/1597 - REVISED
Attachments: Friedman v. BSEA-DALA.pdf

Importance: High

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Greetings:

Today, as of the Close of Business on the 10th Business day after receipt of the request, the RAO/Malden have failed to provide a good faith response and have also failed to provide any cost/fee petition or estimate and thus are barred to do so.

Interestingly enough the Malden cites *Friedman v. Division of Administrative Law Appeals*, No. 23-P-369 (attached hereto)

The request at issue here and ***Request One*** in the ***Friedman*** case are nearly identical. Also, the responses from the records holders are also nearly identical. The Appellate Court rejected these arguments, and as such so must the SPR.

The requestor does not know what the requestor does not know. In order to know how many records are responsive, the RAO must furnish a quantification of responsive records.

At no point in time did Malden attempt to communicate with OpenCommonwealth, at no time did Malden indicate that there were 49,000 responsive records until Attorney McNeil do so on Friday, May 30, 2024. At no time did Malden offer to assist the requestor or offer to work with OpenCommonwealth to narrow the request. They simply stated, through their singular response, like in ***Friedman*** that the request did not reasonably describe the records sought.

Clearly, in the 48 hours between their initial response and Attorney McNeil's response, Malden was able to quantify the number of responsive records.

In its decision in ***Friedman***, the court addressed Friedman's first request which sought all e-mail and text messages between the Bureau and anyone with an email domain belonging to a law firm that conducted business before the Bureau during a three-year timeframe. Although this request was extensive and burdensome on the Bureau, encompassing 11,000 documents, the court found that the Bureau has a duty to provide the records because the documents can be *identified* with reasonable effort.

Further the Court found that an agency is required to furnish a copy of a public record "provided that" three requirements are met and that no exemptions apply. G. L. c. 66, § 10 (a).12 See G. L. c. 4, § 7, Twenty-sixth. The use of the introductory phrase "provided that" makes clear that the listed requirements are conditions necessary to trigger the agency's obligation to produce. G. L. c. 66, § 10 (a). Relevant here is the first of those conditions, which requires that "the request reasonably describe the public record sought." G. L. c. 66, § 10 (a) (i). A

reasonable description of the requested record is necessary "so that the records can be identified and located promptly." 950 Code Mass. Regs. § 32.06(1)(a) (2017).

An then the Court found that The request [Request One] likely is not "unreasonable" as a matter of law, however, solely because responding to it is extremely burdensome. Indeed, we do not understand the bureau to argue that the request fails based upon burden alone. The documents responsive to request one can be identified with reasonable effort -- it is the production that is extremely time intensive.

The Court's ruling states clearly that the relevant inquiry is whether the request is specific enough that the documents requested can be identified with reasonable effort. The court did not find that any of Friedman's requests were too burdensome to meet the "reasonably describes" requirement.

In the present case, OpenCommonwealth was shocked at the quantification of "...at least Forty-Nine Thousand emails". The subject of the records request, Ms. Antonietta ('Toni') Mertz is and has exclusively been a Malden Public Schools Employee since 2016. She does not work for the City of Malden, she does not report to anyone in the City of Malden and to OpenCommonwealth's knowledge, she is the only member of the Malden Public Schools administration who even has an @cityofmalden.org account. There was no expectation or reason to believe that Ms. Mertz City of Malden email account would contain any significant number of emails, much less in excess of 49,000 emails.

This admission by Malden raises additional issues and problems for Malden and the SPR. Does Ms. Mertz @cityonmalden.org email account contain student information in violation of FERPA? Did Malden properly and honestly and in good faith respond to other public records requests made by OpenCommonwealth and others where the records in her City of Malden email account were improperly excluded from responsive records provided?

In any event, the binding case law cited by Malden and again by OpenCommonwealth leaves the SPR no choice but to rule that the response from Malden was not made in good faith and was incomplete, inaccurate and the defense cited is unavailable to them.

Wherefore, OpenCommonwealth hereby restates its request to the SPR to find and Order that Malden failed to provide a good-faith response within 10 business days as required by law and that they must perform a diligent search for responsive records, and provide all responsive records without delay and without charge under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A.

Kindest regards,

OpenCommonwealth.org

From: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>
Date: Thursday, May 30, 2024 at 12:02 PM
To: Jeffrey.Gottfredsen@sec.state.ma.us <Jeffrey.Gottfredsen@sec.state.ma.us>
Cc: Commonwealth Transparency <info@opencommonwealth.org>, Public Records <publicrecords@CITYOFMALDEN.ORG>, Carol Ann Desiderio <CDesiderio@CITYOFMALDEN.ORG>
Subject: RE: City of Malden's Response to Appeal SPR 24/1597 - REVISED

Good day Attorney Gottfredsen-

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT F

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

City of Malden
Massachusetts

Carol Ann T. Desiderio, City Clerk
cdesiderio@cityofmalden.org

City Clerk's Office
215 Pleasant Streets, Room 220
Malden, Massachusetts 02148

Phone 781-397-7116
cityofmalden.org

June 5, 2024
By E-Mail

Supervisor of Records
Division of Public Records
One Ashburton Place, Room 1719
Boston, MA 02108
Telephone: (617) 727-2832
Fax: (617) 727-5914
Email: pre@sec.state.ma.us

RE: Public Records Request 2024-0262/ SPR24/1597 **FEE PETITION**
Submitted 5/20/24 at 10:33 PM

Dear Supervisor of Records:

On May 20, 2024, at 10:33 pm, the City received the following request:

*This is a **not** a modification of a prior public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:*

*Please provide the following documents/records in the possession or under the control of town/city for the period **any time prior to and through May 21, 2024**:*
Time
Any and all electronic mail and calendar information exclusively for the tmertz@cityofmalden.org account including any draft and any deleted items:

We are aware that Ms. Mertz has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

*This request seeks responsive documents be delivered in electronic format and in the format in which they are regularly maintained, and specifically includes all electronic mail attachments **and metadata**. ...*

The City replied to the request in a timely fashion on May 28, 2024. The City hereby requests that it be allowed to charge $25 per hour for the time that it may take to segregate and redact the records described above. The City's request should be granted. The City is filing this request to the extent that the redactions are under Exemption (C), although the City cannot be certain due to the broad request and the number of emails.

General Laws c. 66, § 10(d)(iii) authorizes the City's instant fee petition and provides, in pertinent part, as follows:

> (iii) if a municipality is required to devote more than 2 hours of employee time to search for, compile, segregate, redact or reproduce a record requested, the records access officer may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce the record requested but the fee (A) shall not be more than $25 per hour unless such rate is approved by the supervisor of records under clause (iv); (B) shall not be assessed for the first 2 hours of work performed where the

> responding municipality has a population of over 20,000 people; and (C) shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the supervisor of records under clause (iv);
>
> (iv) the supervisor of records may approve a petition from an agency or municipality to charge for time spent segregating or redacting, or a petition from a municipality to charge in excess of $25 per hour, if the supervisor of records determines that (A) the request is for a commercial purpose; or (B) the fee represents an actual and good faith representation by the agency or municipality to comply with the request, the fee is necessary such that the request could not have been prudently completed without the redaction, segregation or fee in excess of $25 per hour and the amount of the fee is reasonable and the fee is not designed to limit, deter or prevent access to requested public records; provided, however, that:
>
> 1. in making a determination regarding any such petition, the supervisor of records shall consider the public interest served by limiting the cost of public access to the records, the financial ability of the requestor to pay the additional or increased fees and any other relevant extenuating circumstances;

G. L. c. 66, § 10d(iii)-(iv); see also 950 CMR 32.06(4).

First, these records may contain the content of discussions that are privileged under the attorney-client privilege, which has not been shared with the public. See Suffolk Constr. Co., Inc. v. Div. of Cap. Asset Mgmt., 449 Mass. 444 (2007) (governmental entity may assert attorney-client privilege to protect documents against disclosure where they contain communications between lawyer and client for purpose of obtaining legal advice). "The privilege enable[s] clients to make full disclosure to legal counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice." Suffolk, 449 Mass. At 449. The Guide to the Massachusetts Public Records Law states that "[s]egregation and redaction under the attorney-client privilege has also been found to be 'require [sic] by law.'" Accordingly, the records will need to be reviewed to determine if they contain information protected by the attorney-client privilege and then any necessary redactions will need to be made.

Secondly, these emails may require redactions in accordance with the exemption set for at G.L. c. 4, § 7(26)(c). Exemption (c), commonly referred to as the privacy exemption applies to:

personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy. G. L. c. 4, § 7(26)(c).

In terms of the first clause of the privacy exemption, the Supreme Judicial Court has held that "[w]hile the precise contours of the legislative term "personnel [file] or information" may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personnel information that are 'useful in making employment decisions regarding an employee.'" Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. 792, 798 (2000). The second clause of the privacy exemption applies to requests for records that implicate privacy interests. Analysis under the second clause of Exemption (c) is subjective in nature and requires a balancing of the public's right to know against the relevant privacy interests at stake. Torres v. Attorney Gen., 391 Mass. 1, 9 (1984); Attorney Gen. v. Assistant Comm'r of the Real Property Dep't of Boston, 380 Mass. 623, 625 (1980).

In accordance with the exemption, the City needs to review, and if applicable, redact the emails to the extent they contain information concerning employees that relates to performance or complaints, evaluations of employees, requests for accommodations, leaves of absences, and discipline of employees.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

It is impossible to determine if any exemptions to the public records exist without reviewing each and every email. Segregation time "includes the time used to review records to determine what portions are subject to redaction or withholding under G. L. c. 4, § 7(26) or other legally applicable privileges. Redaction time includes the time to delete, or otherwise remove that part of a public record that is exempt from disclosure under G. L. c. 4, § 7(26) or other legally applicable privileges from non-exempt material.

As a result, Malden *estimates* a total of 2496.75 hours. In accordance with 950 CMR 37.02(2)(m)(1) OpenCommonwealth will not be charged for the first two (2) hours of those services. By subtracting the 2 hours allowed by law, and charging the statutory rate of $25 per hour, the estimated fee would be $62,368.75. The actual fee to produce these records may vary based on the actual time spent completing the necessary review and redaction process.

In accordance with G.L. c. 66, § 10(d)(iv), copy of this fee petition has been sent to the requestor.

Respectfully,

Stephanie M. Burke
Public Records Administrator

CC: Carol Ann Desiderio, City Clerk
OpenCommonwealth info@OpenCommonwealth.org

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

City of Malden
Massachusetts

Carol Ann T. Desiderio, City Clerk
cdesiderio@cityofmalden.org

City Clerk's Office
215 Pleasant Streets, Room 220
Malden, Massachusetts 02148

Phone 781-397-7116
cityofmalden.org

June 6, 2024

By E-Mail

Supervisor of Records
Division of Public Records
One Ashburton Place, Room 1719
Boston, MA 02108
Telephone: (617) 727-2832
Fax: (617) 727-5914
Email: pre@sec.state.ma.us

RE: Public Records Request 2024-0262/ SPR24/1597 SPR24/1669
Submitted 5/20/24 at 10:33 PM
TIME PETITION/HARRASSMENT

Dear Supervisor of Records:

On May 20, 2024, at 10:33 pm, the City received the following request:

*This is a **not** a modification of a prior public records request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:*

Please provide the following documents/records in the possession or under the control of town/city for the period any time prior to and through May 21, 2024:
Time
Any and all electronic mail and calendar information exclusively for the mmertz@cityofmalden.org account including any draft and any deleted items:

We are aware that Ms. Mertz has at least a cityofmalden.org and a maldenps.org account, and perhaps others.

This request seeks responsive documents be delivered in electronic format and in the format in which they are regularly maintained, and specifically includes all electronic mail attachments and metadata. ...

The City replied to the request in a timely fashion on May 28, 2024 and on June 5, 2024. The City is hereby requesting relief from responding based on harassment pursuant to G. L. c. 66, § 10(c), and in the alternative, additional time to respond pursuant to G.L. c. 66, § 10(b)(vi).

Harassment

The City believes, pursuant to G. L. c. 66, § 10(c), that this request is part of a series of requests that is intended to harass the City and thereby will seek from the Supervisor relief from the City's obligation to provide copies of the records sought. See Erickson v. Executive Office of Environmental Affairs, 2006 WL 3010949 (Superior Court, Suffolk County) (public records requests may not be used as part of a "pattern of harassment to government officials and anyone else" with whom a party has a dispute). 950 CMR 32.06(4)(f) states that "if, when reviewing a petition for extension of time described in 950 CMR 32.06(4)(d),the Supervisor determines that the request is part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass, and the requests are not intended for the

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

broad dissemination of information to the public about actual or alleged government activity, the Supervisor may . . .relieve the custodian of its obligation to provide copies of the records sought." The serial requests submitted by Open Commonwealth and the series of contemporaneous requests submitted by Open Commonwealth are not intended for broad dissemination of information to the public about actual or alleged government activity; the serial requests and series of contemporaneous requests are frivolous and designed to intimidate and harass the City. Our Department and numerous other Departments have had to put aside regular business work and, on some occasions, work past the normal work hours to catch up with day to day work as a result of Open Commonwealth's continuous and consistent requests.

A tremendous amount of time is spent receiving and processing public records requests from this one requestor. These requests are far from harmless; they are negatively affecting the interests of other constituents who rely on the work of the City.

Time Petition
The Public Records Guide states the following: "If a custodian is unable to complete the request within the time provided in G.L. c. 66, § 10(b)(vi), it may petition the Supervisor for an extension of the time to furnish copies of the requested record that the custodian intends to provide. A petition for an extension of time must be submitted within 20 business days of receipt of request or within 10 business days after receipt of a determination by the Supervisor that the requested record constitutes a public record." The City has filed this request within those time periods.

Given the broad scope of the request and the volume of potentially responsive records (resulting in over 49,000 emails) which require detailed review and redaction, the City submits that it is not reasonable to require it to produce the responsive records within 10 business days. Therefore, the City hereby petitions for an extension of time to respond to the request, given that the scope of redaction required to prevent unlawful disclosure is significant. Additionally, the employee who will perform the search and recovery, segregation and redaction process has many other responsibilities which they cannot ignore. The City will be unable to complete its review, redaction, and production of records during normal business hours of operation without an extension.

Pursuant to M.G.L. c. 66, section 10(c), the City requests an additional 30 business days beyond the time specified under the statute (25 business days) – for a total of 55 business days from the date of receipt of payment for the work, to respond to the request.

In accordance with G.L. c. 66, § 10(d)(iv), a copy of this petition has been sent to the requestor.

Respectfully,

Stephanie M. Burke
Public Records Administrator

CC: Carol Ann Desiderio, City Clerk
OpenCommonwealth info@OpenCommonwealth.org

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT G

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Alicia McNeil
Sent: Thursday, May 30, 2024 12:02 PM
To: Jeffrey.Gottfredsen@sec.state.ma.us
Cc: info@opencommonwealth.org; Public Records; Carol Ann Desiderio
Subject: RE: City of Malden's Response to Appeal SPR 24/1597 - REVISED
Attachments: Malden's Response SPR24-1597 Commonwealth Transparency - tmertz 5.30.2024.pdf

Good day Attorney Gottfredsen-

See Revised Letter.

Alicia A. McNeil
City Solicitor
City of Malden
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, MA 02148
amcneil@cityofmalden.org
Phone: 781-397-7106
Fax: 781-397-7106

The information contained in this message may be CONFIDENTIAL and is for the intended addressee only. Any unauthorized use, dissemination of the information, or copying of this message is prohibited by law. If you are not the intended addressee, please notify the sender immediately and delete this message and any documents attached to this message.

From: Alicia McNeil
Sent: Thursday, May 30, 2024 11:27 AM
To: Jeffrey.Gottfredsen@sec.state.ma.us
Cc: info@opencommonwealth.org; Public Records <publicrecords@CITYOFMALDEN.ORG>; Carol Ann Desiderio <CDesiderio@CITYOFMALDEN.ORG>
Subject: City of Malden's Response to Appeal SPR 24/1597

Good day Attorney Gottfredsen-

Attached you will find the City of Malden's response to Open Commonwealth's appeal. Kindly let me know if you need any additional information.

Thank you.

Alicia A. McNeil

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT H

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

June 12, 2024
SPR24/1690

Carol Desiderio
City Clerk
City of Malden
215 Pleasant Street
Second Floor, Room 220
Malden, MA 02148

Dear Ms. Desiderio:

On June 5, 2024, this office received your petition on behalf of the City of Malden (City) requesting permission to assess fees for time spent segregating and redacting responsive records. G. L. c. 66, § 10(c); G. L. c. 66, § 10(d)(iv); see also 950 C.M.R. 32.06(4). As required by law, it is my understanding that the City furnished a copy of the petition to the requestor, Open Commonwealth. G. L. c. 66, § 10(c); G. L. c. 66, § 10(d)(iv)(2). On May 20, 2024, the requestor sought "[a]ny and all electronic mail and calendar information exclusively for the . . . cityofmalden.org account including any draft and any deleted items, for the period any time prior to and through May 21, 2024."

Current and Previous Appeal

This request was the subject of a previous appeal. See SPR24/1597 Determination of the Supervisor of Records (June 10, 2024). In my June 10th determination, I learned that the City provided a supplemental response to the requestor and this office on June 5, 2024. Additionally, this request is the subject of a current appeal, SPR24/1669. A decision on this matter will be issued within 10 business days.

Petition to assess fees – Municipalities

The Supervisor may approve a petition from a municipality to charge for time spent segregating or redacting or to charge in excess of $25 per hour, if the Supervisor determines that 1) the request is for a commercial purpose or 2) the fee represents an actual and good faith representation by the municipality to comply with the request. G. L. c. 66, § 10(d)(iv).

In rendering such a decision, the Supervisor is required to consider the following: a) the

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

public interest served by limiting the cost of public access to the records; b) the financial ability of the requestor to pay the additional or increased fees; and c) any other relevant extenuating circumstances. G. L. c. 66, § 10(d)(iv).

The statute sets out a two-prong test for determining whether the Supervisor may approve a municipality's petition to allow the municipality to charge for time spent segregating or redacting records or to charge in excess of $25 an hour for the provision of public records. The first prong is whether the request for records was made for a commercial purpose. G. L. c. 66, § 10(d)(iv). It is my understanding that this request was not made for a commercial purpose.

The second prong of the test is whether the fee represents an actual and good faith representation by the municipality to comply with the request. The Supervisor must consider 1) if the fee is necessary such that the request could not have been prudently completed without the redaction or segregation or fee in excess of $25 per hour; 2) the amount of the fee is reasonable; and 3) the fee is not designed to limit, deter or prevent access to requested public records. Id.

Petitions seeking a waiver of statutory limits to fees assessed to segregate and/or redact public records must be made within ten business days after receipt of a request for public records. 950 C.M.R. 32.06(4)(g).

Fee Estimates – Municipalities

A municipality may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents ($.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Municipalities may not assess a fee for the first 2 (two) hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested unless the municipality has 20,000 people or less. G. L. c. 66, § 10(d)(iii). Where appropriate, municipalities may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than $25 per hour. Id. However, municipalities may charge more than $25 per hour if such rate is approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv).

A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(iii); 950 C.M.R. 32.06(4).

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

SPR24/1690

Conclusion

Accordingly, in light of the fact the City has not demonstrated that it submitted its petition within ten business days after receipt of the request, permission to charge for segregation or redaction that is not required by law cannot be granted. 950 C.M.R. 32.06(4)(g). Please note, however, this determination does not preclude the City from charging for segregation and redaction that is required by law.

Sincerely,

Manza Arthur
Supervisor of Records

cc: Open Commonwealth

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT I

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia A. McNeil
City Solicitor

Zaheer A. Samee
Assistant City Solicitor

Mark E. Rumley
Special Counsel

CITY OF MALDEN

Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, Massachusetts 02148

Law Department

legal@cityofmalden.org
Tel: 781-397-7000, ext. 2106
Fax: 781-397-7105

Sent via email: pre@sec.state.ma.us

13, June 2024

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

RE: Request for Reconsideration of Decision SPR 24/1690 – **FEE PETITION**
(Public Records Request 2024-0262/SPR 24/1597)

Good day Supervisor Arthur:

This office is writing to request that you reconsider your decision in the above referenced matter. As reason for this request, the City states that it submitted its Fee Petition within ten business days after receipt of the request. Below is the table of *business days* allowed for the City to file its requested Fee Petition.

ACTUAL DAYS	DATE	EVENT	BUSINESS DAYS*
1	Monday, May 20, 2024 at **10:33 PM**	Request Sent to City	0
2	Tuesday, May 21, 2024	Request Received	0
3	Wednesday, May 22, 2024		1
4	Thursday, May 23		2
5	Friday, May 24, 2024		3
6	Saturday, May 25, 2024	Weekend	~
7	Sunday, May 26, 2024	Weekend	~
8	Monday, May 27, 2024	Memorial Day – Holiday	~
9	Tuesday, May 28, 2024		4
10	Wednesday, May 29, 2024		5
11	Thursday, May 30, 2024		6
12	Friday, May 31, 2024		7
13	Saturday, June 1, 2024	Weekend	~
14	Sunday, June 2, 2024	Weekend	~
15	Monday, June 3, 2024		8
16	Tuesday, June 4, 2024		9
17	Wednesday, June 5, 2024	Fee Petition Sent to	10

*The days in red are not counted towards the ten day period.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

In this case, the City states that the fee requested in its Fee Petition reflects "an actual and good faith representation...to comply with the request". G.L. c. 66 § 10(d)(iv). In your decision on a related matter involving the same request of over 49,000 emails, (SPR24/1698) you found that the City had established good cause for an extension of time "in light of the need to collect, segregate and examine the records", and granted the City 30 additional business days.

As stated in the City's original Fee Petition, the emails of over 49,000 will require searching through, segregating and possibly redacting, which you recognized in approving the City's Time Petition. Given the broad scope of the request and the volume of potentially responsive records which require detailed review and redaction, the Fee Petition requested by the City is reasonable and is not designed to limit, deter or prevent access to the requested records.

Considering your reason for denying the City's request was that "the City [did] not demonstrate[ ] that it submitted its petition within ten business days after receipt of the request...", and that the table above establishes that the City did in fact submit its Fee Petition within ten business days after receipt of the request, (along with the sheer volume of emails that are the subject of this request), we ask that you reconsider your determination and grant the Fee Petition.

Sincerely,

Alicia A. McNeil

Alicia A. McNeil, City Solicitor

cc: Carol Ann Desiderio, City Clerk
publicrecords@cityofmalden.org
info@opencommonwealth.org

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT J

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Commonwealth Transparency <info@opencommonwealth.org>
Sent: Sunday, June 16, 2024 9:27 PM
To: pre@sec.state.ma.us; SEC-DL-PREWEB
Cc: Alicia McNeil
Subject: Re: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION
Attachments: Receipt Acknowledgment 6-5-24 SPR24-1690[37].pdf; REF: Request# 2024-0262.pdf.pdf

Importance: High

Greetings:

OpenCommonwealth would like to point out the following facts:

- The City acknowledges receipt of the request: "On May 20, 2024, at 10:33 pm, the City received the following request". - This admission is made on the attached first page of their response.
- The City had the entire day of May 21, 2024 and did not provide a fee request until 4:11 PM on June 5, 2024 which is the eleventh day after receipt.
- The City NEVER provided a fee estimate to the requestor as required by law, they only provided a fee petition to the SPR.
- The City's first response (5/28/2024 – Attached) was an improper response, and is the ONLY response provided to the requestor.

Kindest Regards,

OpenCommonwealth.org

From: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>
Date: Thursday, June 13, 2024 at 1:44 PM
To: pre@sec.state.ma.us <pre@sec.state.ma.us>
Cc: Carol Ann Desiderio <CDesiderio@CITYOFMALDEN.ORG>, Public Records <publicrecords@CITYOFMALDEN.ORG>, Commonwealth Transparency <info@opencommonwealth.org>
Subject: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Good day Supervisor Arthur –

Attached you will find the City's Request for Reconsideration of its Fee Petition. Kindly let me know if you have any questions.

Alicia A. McNeil

City Solicitor
City of Malden
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, MA 02148
amcneil@cityofmalden.org
Phone: 781-397-7106
Fax: 781-397-7106



The information contained in this message may be CONFIDENTIAL and is for the intended addressee only. Any unauthorized use, dissemination of the information, or copying of this message is prohibited by law. If you are not the intended addressee, please notify the sender immediately and delete this message and any documents attached to this message.

OpenCommonwealth.org is a free and open public media organization. We serve the greater Massachusetts community with the goal to provide and empower citizen oversight of governmental operations and activities, help citizens understand how, why and where taxpayer dollars are expended, and to investigate, gather and report the facts in the online publications found on the webpages and social media accounts of OpenCommonwealth.org. OpenCommonwealth.org is a free service, is staffed only by volunteers, and all costs and expenses are borne by its creators. No person has ever paid OpenCommonwealth.org any monies, or any in-kind contributions for its reporting, or access to any of its files. It is the structural intent of OpenCommonwealth.org to maintain and persist as an absolutely free service to the entire public. Since its inception, OpenCommonwealth.org has been viewed by over 130,000 visitors between the website and social media, and has had over 20,000 external visitors view and/or download records from our free and publicly available records repository. Currently OpenCommonwealth.org has over a 1.5 Terabytes of publicly available content published. This communication, along with any attachments, is covered by federal and state law governing electronic communications and may contain confidential and legally privileged information. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, use or copying of this message is strictly prohibited. If you have received this in error, please reply immediately to the sender and delete this message. Thank you. Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any matters addressed herein.

This email has been scanned for spam and viruses by Proofpoint Essentials. Click here to report this email as spam.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT K

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Chan, Benjamin (SEC) <Benjamin.Chan@sec.state.ma.us>
Sent: Tuesday, July 2, 2024 11:42 AM
To: Alicia McNeil; SEC-DL-PREWEB
Cc: Carol Ann Desiderio; Public Records
Subject: RE: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Good Morning,

In your City's initial petition dated June 5, 2024, you state that the City received the subject records request on May 20, 2024. However, in your City's request for reconsideration dated June 13, 2024, you claim the request was sent to the City on May 20, 2024 and the City received said request on May 21, 2024. Please clarify the discrepancy here.

Additionally, could you please provide a copy of the original request which is the subject of Petition – SPR24/1690?

Very Respectfully,
Benjamin

Benjamin Chan (he/him/his)
Senior Legal Clerk
Office of the Secretary of the Commonwealth
Public Records Division
One Ashburton Place, Room 1719
Boston, MA 02108
617-727-2832

From: Chan, Benjamin (SEC) <Benjamin.Chan@sec.state.ma.us>
Sent: Thursday, June 13, 2024 3:07 PM
To: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>; SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
Cc: Carol AnnDesiderio <cdesiderio@cityofmalden.org>; Public Records <publicrecords@CITYOFMALDEN.ORG>; Commonwealth Transparency <info@opencommonwealth.org>
Subject: RE: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Hello,

Based on the following correspondence below, this Division opened subject case, SPR24/1690, for reconsideration as of **Thursday, June 13, 2024.**

In keeping with the timeframes set out in SPR Bulletin 04-17 (https://www.sec.state.ma.us/divisions/public-records/prepra/significant-interest/SPR-Bulletin-04-17-Timeframes-for-Reconsiderations-and-In-Camera-Reviews.htm) the decision on this matter will be due from this Division 15 business days from the date the request for reconsideration was received.

Very Respectfully,
Benjamin

Benjamin Chan (he/him/his)
Senior Legal Clerk
Office of the Secretary of the Commonwealth

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Public Records Division
One Ashburton Place, Room 1719
Boston, MA 02108
617-727-2832

From: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>
Sent: Thursday, June 13, 2024 1:44 PM
To: SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
Cc: Carol AnnDesiderio <cdesiderio@cityofmalden.org>; Public Records <publicrecords@CITYOFMALDEN.ORG>; Commonwealth Transparency <info@opencommonwealth.org>
Subject: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Good day Supervisor Arthur –

Attached you will find the City's Request for Reconsideration of its Fee Petition. Kindly let me know if you have any questions.

Alicia A. McNeil
City Solicitor
City of Malden
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, MA 02148
amcneil@cityofmalden.org
Phone: 781-397-7106
Fax: 781-397-7106

The information contained in this message may be **CONFIDENTIAL** and is for the intended addressee only. Any unauthorized use, dissemination of the information, or copying of this message is prohibited by law. If you are not the intended addressee, please notify the sender immediately and delete this message and any documents attached to this message.

This email has been scanned for spam and viruses by Proofpoint Essentials. Click here to report this email as spam.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT L

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

Alicia McNeil

From: Public Records
Sent: Tuesday, July 2, 2024 12:07 PM
To: Chan, Benjamin (SEC); Alicia McNeil; SEC-DL-PREWEB
Cc: Carol Ann Desiderio; Public Records
Subject: RE: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION
Attachments: Public Record Request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A

Hello,
Please find the original request attached. It was received on 5/20/2024 at 10:33 P.M. Thus, the receive date is 5/21/2024.

Regards,
Stephanie

Stephanie M. Burke
Records Access Administrator

From: Chan, Benjamin (SEC) <Benjamin.Chan@sec.state.ma.us>
Sent: Tuesday, July 2, 2024 11:42 AM
To: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>; SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
Cc: Carol Ann Desiderio <CDesiderio@CITYOFMALDEN.ORG>; Public Records <publicrecords@CITYOFMALDEN.ORG>
Subject: RE: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Good Morning,

In your City's initial petition dated June 5, 2024, you state that the City received the subject records request on May 20, 2024. However, in your City's request for reconsideration dated June 13, 2024, you claim the request was sent to the City on May 20, 2024 and the City received said request on May 21, 2024. Please clarify the discrepancy here.

Additionally, could you please provide a copy of the original request which is the subject of Petition – SPR24/1690?

Very Respectfully,
Benjamin

Benjamin Chan (he/him/his)
Senior Legal Clerk
Office of the Secretary of the Commonwealth
Public Records Division
One Ashburton Place, Room 1719
Boston, MA 02108
617-727-2832

From: Chan, Benjamin (SEC) <Benjamin.Chan@sec.state.ma.us>
Sent: Thursday, June 13, 2024 3:07 PM
To: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>; SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
Cc: Carol AnnDesiderio <cdesiderio@cityofmalden.org>; Public Records <publicrecords@CITYOFMALDEN.ORG>;

Commonwealth Transparency <info@opencommonwealth.org>
Subject: RE: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Hello,

Based on the following correspondence below, this Division opened subject case, SPR24/1690, for reconsideration as of **Thursday, June 13, 2024.**

In keeping with the timeframes set out in SPR Bulletin 04-17 (https://www.sec.state.ma.us/divisions/public-records/prepra/significant-interest/SPR-Bulletin-04-17-Timeframes-for-Reconsiderations-and-In-Camera-Reviews.htm) the decision on this matter will be due from this Division 15 business days from the date the request for reconsideration was received.

Very Respectfully,
Benjamin

Benjamin Chan (he/him/his)
Senior Legal Clerk
Office of the Secretary of the Commonwealth
Public Records Division
One Ashburton Place, Room 1719
Boston, MA 02108
617-727-2832

From: Alicia McNeil <amcneil@CITYOFMALDEN.ORG>
Sent: Thursday, June 13, 2024 1:44 PM
To: SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>
Cc: Carol AnnDesiderio <cdesiderio@cityofmalden.org>; Public Records <publicrecords@CITYOFMALDEN.ORG>; Commonwealth Transparency <info@opencommonwealth.org>
Subject: Request for Reconsideration of Decision SPR 24/1690 – FEE PETITION

Good day Supervisor Arthur –

Attached you will find the City's Request for Reconsideration of its Fee Petition. Kindly let me know if you have any questions.

Alicia A. McNeil
City Solicitor
City of Malden
Office of the City Solicitor
215 Pleasant Street, Suite 420
Malden, MA 02148
amcneil@cityofmalden.org
Phone: 781-397-7106
Fax: 781-397-7106

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

EXHIBIT M

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

July 3, 2024
SPR24/1690

Carol Desiderio
City Clerk
City of Malden
215 Pleasant Street
Second Floor, Room 220
Malden, MA 02148

Dear Ms. Desiderio:

I have received your petition on behalf of the City of Malden (City) requesting reconsideration of my June 12, 2024 determination, pertaining to a request to the City from Open Commonwealth. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On May 20, 2024, the requestor sought "[a]ny and all electronic mail and calendar information exclusively for the...cityofmalden.org account including any draft and any deleted items, for the period any time prior to and through May 21, 2024."

Previous Petition

This request was the subject of a previous petition from the City. See SPR24/1690 Determination of the Supervisor of Records (June 12, 2024). In my June 12th determination, I found that the City had not demonstrated that it submitted its petition within ten business days after receipt of the request. In an email to this office on June 13, 2024, a representative of the City requests that I reconsider my previous determination.

Previous Appeals

This request was the subject of previous appeals. See SPR24/1597 Determination of the Supervisor of Records (June 10, 2024) and SPR24/1669 Determination of the Supervisor of Records (June 17, 2024). In my June 10th determination, I learned the City provided a supplemental response to the requestor and this office on June 5, 2024. In my June 17th determination, I ordered the City to clarify if additional records responsive to the request exist.

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

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).

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. Attorney 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.

Reconsideration Request

In its request for reconsideration, the City argues the following:

> [A]s stated in the City's original fee petition, the emails of over 49,000 will require searching through, segregating and possibly redacting, which you recognized in approving the City's time petition. Given the broad scope of the request and the volume of potentially responsive records which require detailed review and redaction, the fee petition requested by the City is reasonable and is not designed to limit, deter or prevent access to the requested records.
>
> [C]onsidering your reason for denying the City's request was that "the City [did] not demonstrate that it submitted its petition within ten business days after receipt of the request…", and that the table above establishes that the City did in fact submit its fee petition within ten business days after receipt of the request, (along with the sheer volume of emails that are the subject of this request), [we] ask that you reconsider your determination and grant the fee petition.

Conclusion

After another careful and thorough review of this matter, I respectfully decline to reverse my findings in the June 12th determination. If the City 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)(pursuing administrative appeal does not limit availability of applicable judicial remedies).

Date Filed 9/13/2024 3:23 PM
Superior Court - Middlesex
Docket Number

SPR24/1690

Sincerely,



Manza Arthur
Supervisor of Records

cc: Open Commonwealth
Alicia A. McNeil, Esq.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPT
WOBURN DIVISION
DOCKET NO. 2481 CV 1699

DONALD H. AMES, III and
BEHN C. REYNOLDS, on behalf of and for the benefit of
NORTHEAST FACILITY SOLUTIONS, LLC
Plaintiffs
v.

METROWEST CLEANING SYSTEMS, INC.,
CONEXUS BUILDING SOLUTIONS, INC.,
ADELINO FERREIRA
Defendants

AFFIDAVIT OF THE PLAINTIFF BEHN C. REYNOLDS, IN SUPPORT OF MOTION OF THE PLAINTIFFS, DONALD H. AMES, III, AND BEHN C. REYNOLDS, ON BEHALF OF AND FOR THE BENEFIT OF NORTHEAST FACILITY SOLUTIONS, LLC, FOR A PRELIMINARY INJUNCTION – ADELINO FERREIRA

I, Behn C. Reynolds, do under oath depose and state as follows:

1. I am a plaintiff in this matter, and I am a manager of Northeast Facility Solutions, LLC.
2. I was involved with the purchase of assets from the defendant MetroWest Cleaning Systems, Inc.
3. The purchase of assets was made pursuant to the provisions of an Asset Purchase Agreement.
4. I have attached to this affidavit a true and accurate copy of the Asset Purchase Agreement.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY, THIS THE 13TH DAY OF SEPTEMBER, 2024.

Behn C. Reynolds

Dated: September 13, 2024

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement ("Agreement") is made and entered into as of the 30th day of September, 2023 (the "Effective Date"), by and among Northeast Facility Solutions, LLC, a Massachusetts limited liability company with offices 449 Boston Post Road East, Suite 3, Marlborough, Massachusetts 01752 ("Buyer"), MetroWest Cleaning Systems, Inc., a Massachusetts corporation with offices at 449 Boston Post Road East, Suite 3, Marlborough, Massachusetts 01752 ("Seller"), and Adelino A. Ferreira ("Principal").

W I T N E S S E T H:

WHEREAS, Seller is engaged in providing cleaning services to businesses, schools, and other facilities in Massachusetts and other New England states (the "Business"); and

WHEREAS, Principal is the sole owner of all of the issued and outstanding capital stock of Seller; and

WHEREAS, Buyer desires to purchase from Seller and Seller desires to sell to Buyer certain tangible and intangible assets of Seller used in connection with the Business for the consideration and upon the terms and conditions hereinafter set forth; and

WHEREAS, Buyer desires to obtain the representations and warranties of Seller and Principal and the agreements of Seller and Principal not to compete with Buyer following completion of the transactions contemplated hereby;

NOW, THEREFORE, in consideration of the mutual covenants, agreements, representations and warranties set forth herein, the parties hereto agree as follows:

ARTICLE 1

PURCHASE AND SALE OF ASSETS

1.1 Purchase and Sale of Assets. Subject to the terms and conditions of this Agreement, Buyer shall purchase, acquire and accept from Seller, and Seller shall sell, assign, convey, transfer and deliver to Buyer, all of the Seller's right, title and interest in and to the following assets of the Business, tangible or intangible, as the same exist as of the close of business on the Closing Date, free and clear from all Liens (as defined below) (collectively, the "Purchased Assets"):

(a) Identified Equipment. The equipment owned by Seller, used in connection with the Business, and the accessories, parts, hardware, and tools, associated with such equipment;

(b) Inventory. Any usable, unopened, and current inventory owned by Seller as the same exists as of the Effective Time (as hereinafter defined), wheresoever situated, and which can be used within twelve (12) months of Closing ("Business Inventory");

(c) Customer List. The customer list attached hereto as Schedule 1.1(c) ("Customer List");

(d) Goodwill. All goodwill of the Business including all goodwill of Seller and Principal associated with the customers of the Business (collectively, "Goodwill");

(e) Purchased Contracts. All open service contracts entered into by Seller in the ordinary course of business prior to the Effective Time, as approved by Buyer and described on Schedule 1.1(e)(i) (collectively, "Service Contracts"); and

(f) Purchased Rights. The telephone and toll-free numbers, domain names, websites and related URL's, yellow page listings, trademarks, tradenames, fictitious names, doing business as names owned or used by Seller in the conduct of the Business;

(g) Office Equipment and Computers. All of Seller's office equipment, computer hardware, software and programs, related to managing customer accounts and job history, together with all user manuals, training manuals, sales literature, and other system and operations documentation relating to such computer programs, in each case to the extent transferable;

(h) Business Records. All customer archives, books, records, ledgers, files, notes, job histories, hardware, documents, correspondence, lists, notes, customer lists, supplier lists, sales lists, drawings and specifications, creative materials, advertising and promotional materials, databases, catalogues, price lists, forms, labels, shipping material, artwork, personnel records of Seller's employees, manufacturing and quality control records and procedures and all other business documents relating to or reasonably necessary to the operation of the Business (collectively, "Business Records"), and any and all software and/or other programs used to access, manipulate or otherwise use the Business Records;

(i) Permits. The permits, authorizations, licenses, and approvals relating to the Business as of Closing, as approved by Buyer (collectively, "Permits");

(j) Deposits and Rebates. All customer deposits related to Sales Contracts ("Customer Deposits"), all deposits and credits with vendors related to Supply Contracts ("Vendor Deposits"), and all rebates and other consideration due from or paid after Closing by vendors for promotional and other sales programs ("Vendor Rebates"); *provided, however*, that Customer Deposits shall not include deposits made by customers in respect of Customer Inventory prior to the Effective Time; and

(k) Real Property Lease. All of Seller's rights and leasehold interests in the real property located at 499 Post Road East, Suite 3, Marlborough, Massachusetts 01752 (the "Leased Real Property"). The written lease agreement between Seller and landlord for the Leased Real Property is referred to herein as the "Real Property Lease".

1.2 Excluded Assets. The Purchased Assets shall not include, and Buyer shall not purchase or acquire any of the following (collectively, the "Excluded Assets"):

(a) Cash, bank deposits, cash equivalents and marketable securities of the Seller as of the Closing Date;

(b) Accounts Receivable (as hereinafter defined) of the Business that accrue before the Effective Time;

(c) all credits, prepaid expenses, prepaid items, deferred charges, advance payments, deposits and rights to credits, refunds or rebates of the Seller not acquired by the Buyer pursuant to Section 1.1; and

(d) any other Business asset listed on Schedule 1.2(d).

ARTICLE 2

PURCHASE PRICE, TAX ALLOCATIONS AND COST ALLOCATIONS.

2.1 Purchase Price. In consideration of the execution, delivery and performance by Seller and Principal of their respective obligations under this Agreement and the Principal and Seller Non-Compete Agreement (as defined below), and in reliance on the representations and warranties made by Seller and Principal hereunder, Buyer shall in full payment thereof pay to Seller and Principal of (i) SEVEN HUNDRED THOUSAND DOLLARS AND NO/100 ($700,000.00) (the "Cash Purchase Price") and (ii) a Nineteen and a Half Percentage (19.5) Membership Interest in Northeast Facility Solutions, LLC (the "Equity Interest"), together the "Total Purchase Price").

2.2 Payment Terms. At Closing, Buyer shall deliver to Seller, by wire transfer of immediately available funds to the account or accounts specified by Seller or Principal prior to Closing, an amount equal to (i) the Cash Purchase Price, *minus* (ii) the Payoff Amounts (as defined below), *minus* (iii) the Seller Transaction Expenses (as defined below; (iv) *minus* the deposit(s) paid by the Buyer prior to closing, minus purchase price financed by Seller. At Closing, Buyer shall pay on behalf of Seller and Principal (a) to each holder of Indebtedness listed on Schedule 2.2(a) the applicable amount necessary to be paid to fully repay, satisfy, release and discharge all obligations of Seller or Principal under any agreements between the Seller or Principal and the holders of such outstanding Indebtedness (the "Payoff Amounts"), and (b) each payee of Seller broker fees and legal fees listed on Schedule 2.2(a) (the "Seller Transaction Expenses"). For purposes of this Agreement "Indebtedness" means, with respect to Seller or Principal, all indebtedness for (x) borrowed money, whether current or funded, secured or unsecured, (y) past due amounts owed to any governmental authority including, without limitation, any taxing authority, and (z) all interest, fees, prepayment penalties, and other penalties or expenses owed with respect to amounts owed pursuant to subparts (x) and (y) above.

2.3 Allocation of Purchase Price. The Purchase Price shall be allocated among the Purchased Assets as follows:

Category of Purchased Asset	Purchase Price Allocation
Identified Equipment	$34,300.00

Inventory	$
Non-Compete Agreement of Seller	$
Non-Compete Agreement of Principal	$
Customer List and Goodwill	$665,700.00

Buyer and Seller (i) shall execute and file all Tax returns in a manner consistent with the allocation determined pursuant to this Section 2.3 and (ii) shall not take any position on any Tax return, before any governmental authority or in any judicial proceeding that is inconsistent with such allocation. Buyer and Seller shall each timely file a Form 8594 with the Internal Revenue Service in accordance with the requirements of Section 1060 of the Internal Revenue Code of 1986, as amended (the "Code") this Agreement. Seller and Buyer each agree to notify the other in the event any adjustment is expressly required or imposed by taxing authorities that is inconsistent with the requirements of this Section 2.3. This Section 2.3 shall survive the Closing without limitation.

2.4 Allocation of Costs. The cost of the appraisal of the Seller, Metro West Cleaning Systems, Inc., and the cost of the appraisal of the Buyer's related entity, Pristine Premises, LLC shall be combined and allocated such that the Seller will pay 19.5% of the combined cost of the appraisals, and the Buyer will pay 80.5% of the combined cost of the appraisals. Similarly, the lender's attorney's fee will be allocated such that the Seller will pay 19.5% of the fee charged by the lenders' attorney, and the Buyer will pay 80.5% of the charged by the lenders' attorney.

ARTICLE 3

DUE DILIGENCE PERIOD

Buyer's Due Diligence Review. Within ten (10) days of the Effective Date, Seller shall deliver to Buyer all documents, records and other information relating to the Purchased Assets in Seller's possession, including the customer list (Schedule 1.1(c)), the Service Contracts (Schedule 1.1(d)(i)), a list of Service Contracts (Schedule 1.1(e)(i), a list of other Business Assets (Schedule 1.2(d)), a list of any holders of indebtedness including payoff amounts and Seller Transaction Expenses (Schedule 2.2(a)) and any other information requested by Buyer, which is in Sellers possession or otherwise readily and/or reasonably available to Seller).

ARTICLE 4

SELLER'S LIABILITIES

4.1 Non- assumption of Seller's Liabilities. The transaction contemplated by this Agreement is the purchase and sale of assets and not a merger of Seller and Buyer. Buyer is not a successor in interest to Seller, and neither Seller nor the Principal shall have any continuing participation in the ownership or management of the business conducted with the Purchased Assets

following the Closing. Buyer will not assume any debt, liability or other obligation of Seller of any kind or description, known or unknown, absolute or contingent, accrued or pending.

ARTICLE 5

CLOSING

5.1 Closing. Subject to the conditions set forth in this Agreement, the closing of the transactions provided for herein (the "Closing") shall take place on **October 4th, 2023**, or on such other date as shall be mutually agreed upon by the parties. In the event a condition to the Closing has not been met (or waived by the party or parties entitled to waive it) as of the scheduled date, any party may postpone the Closing from time to time, by giving at least two (2) days' prior notice to the other party or parties, until the condition has been met (which all parties will use their best efforts to cause to happen), but **in no event to a date later than October 6th, 2023** (the "Termination Date"). The day on which the Closing actually takes place is herein sometimes referred to as the "Closing Date." The parties agree that should the Closing occur, the effective time and date of the transactions for financial and accounting purposes shall be 11:59:59 p.m. Eastern Time on the Closing Date (the "Effective Time"). The Closing shall take place at the Law Office of Daniel Walsh, P.C., 40 Court Street, Plymouth, Massachusetts; *provided, however*, that the parties may mutually agree that Closing will take place remotely by electric mail or other electronic exchange of documents.

ARTICLE 6

INVENTORY; ACCOUNTS RECEIVABLE; SERVICE CONTRACTS PAYABLE

6.1 Business Inventory. Within two (2) days prior to Closing, a designated representative of each of Seller and Buyer shall cause a physical inventory to be taken of the Business Inventory for the purpose of determining the quantity and the value thereof.

6.2 Accounts Receivable. From and after the Closing, any payments received by the Buyer for services provided solely by the Seller prior to closing shall be delivered directly to Adelino A. Ferreira or to his assignee. From and after the Closing, payments for services provided for a period of time that includes dates both before and after the Closing (the "Accounts Receivable") shall be collected by Buyer on Seller's behalf in accordance with Buyer's customary collection procedures, and collections thereof shall be remitted to Seller not later than the last day of each month for collections made during the immediately preceding month. Buyer shall not be obligated to commence any litigation to effect collection of any Accounts Receivable payable solely to the Seller. Seller and Principal shall cooperate with Buyer in all collection efforts to minimize any interference with any relationship between Buyer and customers of the Business. All of Seller's Accounts Receivable for services provided by the Seller prior to the Closing but not collected within one hundred twenty (120) days following the Closing Date shall be reassigned by Buyer to Seller for collection by Seller or Principal, in its discretion. In connection with collections by Buyer, if a payment is received from an account debtor that has not designated the invoice being paid thereby, whether a Seller invoice or a Buyer invoice, such payment shall be applied to the earliest invoice outstanding with respect to indebtedness of such account debtor, except for those invoices which are subject to a written dispute by the account debtor to the extent of such dispute.

From and after the Closing, all accounts receivable that may accrue in respect to services provided after the Closing shall be collected and retained solely by Buyer. If, following the Closing, any account debtor misdirects payments to Buyer in respect of any Accounts Receivable or to the Seller, then the Seller or the Buyer shall promptly notify the Buyer or the Seller, as the case may be, and forward such misdirected payments to Buyer or Seller.

6.3 Sub-Contracts Payable. From and after the Closing, all Sub-Contracts of Seller for services provided after the Closing shall be paid by Buyer, in accordance with the payment terms in the sub-contracts. Seller and Principal shall reimburse the Buyer on a percentage basis, based on the closing date, the Subcontractors expenses for that month.

ARTICLE 7

REPRESENTATIONS AND WARRANTIES OF SELLER

Each of Seller and the Principal represent and warrant to and covenant with Buyer as of the Closing Date that:

7.1 Organization and Authority. Seller is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts and has the corporate power and authority to own its assets and to carry on the Business as now being conducted. Seller has all Federal, state, local and other Permits necessary for Seller to carry on the Business as now being conducted, and to the extent such Permits are transferrable, Seller shall transfer, or cause to be transferred, the same unto Buyer in connection herewith.

7.2 Compliance with Laws; Litigation. Seller has complied with all existing laws, rules, regulations, ordinances, orders, judgments and decrees applicable to the Business as presently conducted. There are no (and have not in the past five (5) years been any) Legal Proceedings to which Seller or Principal are a party and no such Legal Proceeding has been threatened. "Legal Proceeding" means any claim, action, suit, litigation, arbitration, mediation, hearing, proceeding or investigation, whether civil, criminal, judicial or investigative, formal or informal, public or private, commenced, brought, conducted or heard by or before any governmental authority, judicial authority or arbitral panel.

7.3 Ownership of Seller. Principal is the sole legal and beneficial owner of all the authorized, issued, and outstanding capital stock of the Seller.

7.4 Financial Statements. Seller has made available to Buyer the financial statements and other financial information and those financial statements are true and correct, present fairly the financial condition of Seller and the Business as of the dates thereof and the results of operations and cash flows of Seller and the Business for the periods indicated, and have been prepared in accordance with generally accepted accounting principles consistently applied during the periods indicated, except as may be noted therein.

7.5 Taxes. The Seller and Principal have filed all Tax Returns that it was required to file on or before the date hereof with the appropriate governmental agencies in all jurisdictions in

which such Tax Returns are required to be filed. All Taxes owed by Seller or Principal (whether or not shown or required to be shown on any Tax Returns) have been paid in full on a timely basis to the appropriate authorities. Neither Seller nor Principal is delinquent in the payment of any Taxes. The Buyer shall have no liability for any Taxes related to the ownership or operation of the Purchased Assets or the Business prior to or on the Effective Time. There are no Liens on any of the Purchased Assets which arose in connection with the failure to pay any Taxes, and neither the Seller nor Principal has taken or failed to take any action which could create any Tax Lien on any of the Purchased Assets.

7.6 Absence of Certain Changes. Since June 30, 2023 ("Balance Sheet Date"), there has not been (a) any material adverse change in the nature of the Business, results of operations, financial condition, method of accounting or accounting practice or manner of conducting the business of Seller.

7.7 Books and Records. The Business Records of Seller are in all material respects accurate and complete, there are no material transactions or matters for which proper entry has not been made or reflected therein.

7.8 Title to Purchased Assets. Seller has good and marketable title in fee simple to all of the Purchased Assets, free and clear of any claim, lien, pledge, option, charge, easement, security interest, right-of-way, encumbrance, mortgage or other right (each a "Lien").

7.9 Customer List. The Customer List sets forth all of the customers of the Business that have made purchases from Seller during the two (2) year period immediately prior to Closing, the aggregate amount purchased by each customer by calendar year (or part thereof through Closing), and the status of each such customer's account. Seller (a) has not disclosed, offered to sell or sold, and shall not following the Closing disclose, offer to sell, or sell, any copy of the Customer List or any Business Records to any Person other than Buyer and (b) shall not following the Closing, except as provided in the immediately following sentence, retain any copy of the Customer List or any Business Records.

7.10 Employees. No Employee, or former employee of Seller, has any claim against Seller, and Seller is not obligated or liable to any such Employee, or former employee of Seller, in any way or for any amounts, except current salaries and wages, medical insurance benefits, reimbursable business expenses incurred in the ordinary course of business, and incentive compensation. All employment arrangements between Seller and its Employees are terminable at will.

7.11 Brokers; Finders. Transworld Business Advisors of Boston, 1583 Andover Street, Suite 102, Danvers, MA 01923 is the only broker involved in this transaction. No other liability has been incurred or shall be incurred by any person or entity for brokerage or finders' fees or agents' commissions or any similar charges in connection with this Agreement or the transactions contemplated hereby as a result of the actions of the Seller or Principal.

7.12 Reaffirmation of Representations and Warranties. Each of the representations and warranties of Seller and the Principal set forth in this Agreement shall be true and correct as of the Closing Date as though such representation and warranty was made on and as of the Closing Date.

ARTICLE 8

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller that:

8.1 Organization and Authority. Buyer is a limited liability company duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts, and has the power and authority to own its property and assets and to carry on its business as it is now being conducted.

8.2 Authorization and Approval. Buyer has complete and unrestricted power and authority to enter into this Agreement and to perform its obligations hereunder. The execution, delivery and performance of this Agreement by Buyer and the consummation of the transactions contemplated hereby have been duly and validly authorized and approved by all requisite corporate and other action of Buyer, including approval thereof by the board of directors and the shareholders of Buyer.

8.3 Consents. No notice to, filing with, authorization of, exemption by, or consent or approval of, any public body or authority with respect to Buyer is necessary for the consummation of the transactions contemplated by this Agreement.

8.4 Disclosure. No representation or warranty of Buyer in this Agreement omits to state a material fact necessary to make the statements herein not misleading.

ARTICLE 9

ADDITIONAL COVENANTS OF THE PARTIES

9.1 Employees. The employment by Buyer of any employee of the Business who accepts the employment offered by Buyer will commence at the Closing and the employment by Seller of such employees will be deemed terminated at the Closing. Buyer's offer of employment to any employee of the Business shall be subject to Buyer's satisfactory review of the applicable Employee's personnel records and shall be on terms and conditions satisfactory to Buyer.

9.2 Principal Non-Compete Agreement. At the Closing, and in consideration of the payment of the Purchase Price as set forth in Section 2, Principal and Seller shall enter into a non-compete agreement (the "Principal and Seller Non-Compete Agreement"), substantially in the form attached hereto as Exhibit A.

9.3 Non-Competition; Non-Solicitation; Confidentiality.

(a) For a period of five (5) years commencing on the Closing Date (the "Restricted Period"), each of Seller and Principal, severally and jointly, shall not, and shall not permit any of their affiliates, directly or indirectly, to (i) engage in or assist others in engaging in the Business in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, or Connecticut, (the "Territory"); (ii) have an interest in any Person that engages directly or indirectly in the



Business in the Territory in any capacity, including as a partner, shareholder, member, employee, principal, agent, trustee or consultant; or (iii) intentionally interfere in any material respect with the business relationships (whether formed prior to or after the date of this Agreement) between the Business and customers or suppliers of the Business. Notwithstanding the foregoing, Principal shall not be restricted from being employed by a manufacturer or machine company that is not involved, directly or indirectly, in a business entity providing cleaning services.

(b) During the Restricted Period, each of Seller and Principal shall not directly or indirectly hire or solicit any employee of the Business or encourage any such employees to leave such employment.

9.4 Trade Payables. Except where Seller may have a bona fide payment dispute with a vendor, Seller covenants to pay, within sixty (60) days after the Closing Date, all trade accounts payable and all accrued expenses outstanding as of the close of business on the Closing Date.

9.5 Business Records of Seller. Seller may have access to the Business Records following the Closing for a period (the "Retention Period") of up to 120 days after the close of the tax year during which Closing occurred, as reasonably determined by Buyer, in order for Seller to complete its final Tax returns and the orderly termination of the Business, *provided, however*, that Seller shall not use such Business Records for any purpose in competition with Buyer, shall not disclose such Business Records to any Person (except that Seller may disclose such Business Records other than the Customer List to those accountants and attorneys of Seller who need such Business Records to perform services for Seller related to completion of its final Tax returns and the orderly termination of the Business), and shall not violate the Non-Compete Agreement. During the Retention Period, Buyer shall make such Business Records available to Seller or its attorneys, accountants or other representatives at all reasonable times during regular business hours.

9.6 Lease Agreement. At Closing, Seller and Principal shall assign to Buyer the lease agreement for the Leased Real Property for Buyer to occupy the Leased Real Property. Seller and Principal shall provide evidence of the landlord's written approval of such assignment. In the alternative, at Closing, Buyer shall enter into a written lease agreement with the landlord for the Leased Real Property for Buyer to occupy the Leased Real Property, duly executed by landlord. In the event that Seller has paid to the landlord a security deposit, Seller shall assign all of its interest in the security deposit to Buyer, and Buyer shall reimburse Seller for Seller's share of the security deposit, subject to any deductions related to damages caused by Seller prior to closing. Prior to Closing, Seller and Principal shall dispose of all the waste, waste products, and spent materials located at the Leased Real Property.

ARTICLE 10

CONDITIONS TO CLOSING

10.1 Conditions Precedent to Obligations of Buyer. The obligation of Buyer to purchase and pay for the Purchased Assets at the Closing is subject to the satisfaction or waiver at or prior to the Closing of each of the following conditions:

(a) Good Standing Certificates. Seller shall have obtained and delivered to Buyer (i) a certificate of corporate good standing of Seller from the Secretary of State of the Commonwealth of Massachusetts, dated not more than thirty (30) days prior to the Closing Date, (ii) a certificate of tax good standing of Seller from the Massachusetts Department of Revenue, dated not more than thirty (30) days prior to the Closing Date, and (iii) a waiver of corporate tax lien for Seller issued by the Massachusetts Department of Revenue, dated not more than thirty (30) days prior to the Closing Date.

(b) Transfer of Purchased Assets. Seller shall have executed and delivered to Buyer the Assignment and Assumption Agreement, bills of sale, assignments, and other transfer documents, in form and substance acceptable to Buyer and its counsel, transferring all of the Purchased Assets to Buyer, subject to no Lien, and Seller shall have executed and delivered to Buyer a bill of sale relating to the Purchased Assets, substantially in the form attached hereto as Exhibit B ("Bill of Sale").

(c) Absence of Adverse Changes. From the Balance Sheet Date to the Closing Date, there shall have been no material adverse change in the financial condition, business or prospects of the Business, and none of the Purchased Assets necessary to the normal operations of the Business shall have been materially damaged by fire, flood, casualty, act of God or any other cause.

(d) Absence of Litigation. No suit, action, proceeding or governmental investigation involving Seller or Buyer shall be threatened or pending before any court or governmental agency, which, if decided adversely, could reasonably be expected to prevent any of the parties from consummation of the transactions contemplated by this Agreement or to have a material adverse effect on the Seller, the Business, or Buyer's ability to enjoy the benefit or use of the Purchased Assets upon consummation of the transactions contemplated by this Agreement.

(e) Lease Agreement. Principal shall have delivered to Buyer an assignment of the Real Property Lease, duly executed by the landlord for the Leased Real Property.

(f) Customer List. Buyer shall have received from Seller the Customer List in accordance with Section 1.1(c) and determined that the identity of customers and concentration of sales set forth therein is acceptable to Buyer in Buyer's sole and absolute discretion.

(g) Sub-Contracts. Buyer shall have received from Seller copies of all Sub-Contracts in effect as of the Closing Date.

(h) Due Diligence. Buyer shall be satisfied, in Buyer's sole discretion, with the results of Buyer's due diligence review of the Business and the Purchased Assets.

10.2 Conditions Precedent to Obligations of Seller. The obligation of Seller to transfer the Purchased Assets to Buyer pursuant to this Agreement is subject to the satisfaction or waiver at or prior to the Closing of each of the following conditions:

(a) Legal Authority. The Managers of Buyer shall have approved the transactions contemplated hereunder and the nature and amount of consideration to be paid by

Buyer, and Buyer shall have delivered to Seller a certificate of its secretary dated as of the Closing Date evidencing such approval.

(b) Other Certificates, Approvals and Consents. Buyer shall have obtained and delivered to Seller a certificate of corporate good standing of Buyer from the Secretary of State of the Commonwealth of Massachusetts dated not more than fifteen (15) days prior to the Closing Date.

(c) Payment of Purchase Price. Buyer shall have provided for the Closing Payment and Buyer shall have executed and delivered, as the case may be, the Assignment and Assumption Agreement, the Bill of Sale, and the Principal and Seller Non-Compete Agreements.

ARTICLE 11

INDEMNIFICATION

11.1 Survival of Provisions. The representations, warranties, covenants and agreements contained herein shall survive the Closing and the consummation of the transactions provided for in this Agreement subject to the terms hereof.

11.2 Indemnification of Buyer. Notwithstanding any investigation made by Buyer prior to the Closing, Seller and Principal shall jointly and severally indemnify and hold harmless Buyer from, against and in respect of any and all claims, demands, losses, costs, expenses, obligations, liabilities, and damages, including reasonable attorneys' fees and accountants' fees incurred in defending or prosecuting any of the foregoing (collectively, "Loss" or "Losses"), arising out of or resulting from:

(a) Any and all activities of Seller, and those of any predecessor of Seller prior to the Effective Time;

(b) Any and all liabilities or obligations of Seller and those of any predecessor of Seller and any claim by a third party which arises from any such liability or obligation, other than Assumed Liabilities;

(c) Any Taxes, or Tax liability, levied, imposed upon or payable in connection with the Purchased Assets or the conduct or operation of the Business prior to the Effective Time or the sale of the Purchased Assets contemplated by this Agreement;

(d) The inaccuracy or breach of any written representations or warranties made by Seller or Principal in this Agreement or in any exhibit, certificate, document, or agreement delivered by Seller or Principal; or

(e) The failure of Seller of Principal to perform any of their respective agreements contained in this Agreement or in any other agreement or instrument delivered in connection herewith.

11.3 Indemnification of Seller. Buyer shall indemnify and hold harmless Seller and Principal from, against and in respect of any and all Losses, arising out of or resulting from:

(a) the inaccuracy or breach of any of the representations or warranties made by Buyer in this Agreement or in any exhibit, certificate or document delivered by Buyer to the extent the same relates to a representation or warranty made hereunder; or

(b) the failure of Buyer to perform any of its agreements contained in this Agreement or in any other agreement or instrument delivered in connection herewith.

ARTICLE 12

GENERAL PROVISIONS

12.1 No Publication; Notice. Neither party will make any announcement of the transactions contemplated by this Agreement without prior written approval of the other party. To the extent possible, the parties agree to cooperate with one another and coordinate all announcements to the vendors, customers and Employees of Seller.

12.2 Notices. All demands, notices and communications hereunder shall be in writing and shall be effective when delivered to the party entitled thereto or when deposited in the United States mail (postage prepaid, certified, return receipt requested) addressed to the party entitled thereto at such party's address set forth below (or at such other address as such party shall have provided by not less than five (5) days' notice conforming to this Section):

If to Seller or Principal:
Metrowest Cleaning Systems, Inc.
449 Boston Post Road East, Suite 3
Marlborough, MA 01752
Attn: Mr. Adelino Ferreira

with a copy to:

If to Buyer:
Pristine Premises, LLC
9 Everett Street
Stoneham, MA 02180
Attn: Donald H. Ames, III
Behn C. Reynolds

with a copy to:
Daniel Walsh & Associates, P.C.
40 Court Street, 3rd Floor
Plymouth, MA 02360
Attn: Daniel Walsh, Esq.

12.3 Separability Clause. Any provision of this Agreement that conflicts with applicable law or is held to be void or unenforceable shall be ineffective to the extent of such conflict, voidness or unenforceability without invalidating the remaining provisions hereof, which remaining provisions shall be enforceable to the fullest extent permitted under applicable law. No party shall be deemed the drafter of this Agreement for any purpose.

12.4 Expenses. Except as otherwise provided herein, each party hereto shall pay its own expenses incurred in connection with the negotiation of this Agreement and the performance by such party of its obligations hereunder. Seller shall pay all sales, transfer and documentary taxes, if any, payable in connection with the sales, assignments, conveyances and transfers of the Purchased Assets contemplated by this Agreement.

12.5 Governing Law. This Agreement shall be construed and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with the laws of the Commonwealth of Massachusetts. The parties hereto consent to the exclusive jurisdiction of the state and federal courts of Massachusetts in the event any dispute arises hereunder.

12.6 Successors and Assigns; Assignment of Agreement. This Agreement shall bind and inure to the benefit of and be enforceable by the parties hereto and their respective heirs, personal representatives, successors and assigns; *provided*, however, that no party to this Agreement shall assign, pledge or hypothecate its rights nor delegate its obligations under this Agreement to any Person, by operation of law or otherwise, without the written consent of all parties hereto. This Agreement is not intended to confer upon any Person not a party hereto any rights or remedies hereunder unless such Person is a permitted successor to or assignee of a party hereto. As used herein, the term "Person" shall mean any individual, estate, trust, partnership, limited liability company, corporation, governmental agency or public body or other legal entity, however described.

The Buyer shall, however, have the right to assign the Buyer's rights and obligations under this agreement to a new business entity formed by the principals of the Buyer.

12.7 Waiver. The failure of any party to insist upon strict performance of any covenant or obligation hereunder, irrespective of the length of time for which such failure continues, shall not be deemed a waiver of such party's right to demand strict performance of such covenant or obligation. No consent to or waiver of any breach or default in the performance of any covenant or obligation hereunder, whether express or implied, shall constitute a consent to or waiver of any other breach or default in the performance of the same or any other covenant or obligation hereunder. No term or provision of this Agreement shall be deemed waived unless such waiver is in writing and signed by the party against whom such waiver is sought to be enforced.

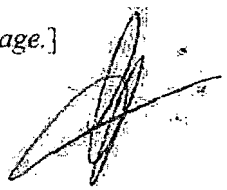
12.8. Entire Agreement. Each reference herein to an Exhibit or Schedule shall be deemed to refer to the Exhibit or Schedule so designated that is attached hereto, and each such Exhibit and Schedule shall be deemed incorporated by reference in this Agreement at each place where so referenced herein. This Agreement (including the Exhibits and Schedules) constitutes the entire agreement and supersedes all other prior agreements and understandings, both written and oral,

between the parties hereto with respect to the subject matter hereof. No provision of this Agreement may be modified, altered or amended except in a writing executed by all parties hereto.

12.9 Attorneys' Fees. In the event of any litigation between or among the parties hereto with regard to the subject matter of this Agreement, the prevailing party shall be entitled to recover its costs and expenses incurred in connection with such suit or proceeding, including its reasonable attorneys' fees.

12.10 Additional General Provisions. This Agreement is subject to and void in the absence of the successful completion of the operational agreement for Northeast Facility Solutions, LLC and signed by all parties to this Agreement.

[Signatures appear on the immediately succeeding page.]



IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement or caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

Northeast Facility Solutions, LLC, Buyer

By: _____
Donald H. Ames, III, Manager

Northeast Facility Solutions, LLC, Buyer

By: _____
Behn C. Reynolds, Manager

Metrowest Cleaning System Inc., Seller

By: _____
Adelino A. Ferreira, President

_____
Adelino A. Ferreira, as Principal

* * * SCHEDULES AND EXHIBITS FOLLOW * * *