



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

Shawn A. Williams  
Supervisor of Records

June 17, 2013  
SPR13/111

Mr. Greg Smith  
89 Norwood Avenue  
Newton, MA 02460

Dear Mr. Smith:

I have received your petition appealing the response of the City of Newton Law Department (Department) to your numerous requests for public records related to education. G. L. c. 66 § 10(b); see also 950 C.M.R. 32.08(2).

Between February and April of 2013 you made several public records requests to the Department. Some of these consisted of repeat copies of previously submitted requests to which a response had not yet been provided. Based on my review of this appeal it appears that the Department to date has responded to each of the requests.

In your appeal to this office you state that the City and the Department had "failed to produce a single record of any kind related to education." That statement is misleading, in that the Department had provided fee estimates to you to provide responsive records. Also, the Department indicated that many of the records you requested did not actually exist. In your appeal you also demanded access to budget and finance records; however, the requests provided to this office include no such reference, therefore no comment will be provided on this issue.

***Records in existence***

You indicated in your appeal that the Department ought to be ordered to provide records that City Solicitor Donnalyn B. Lynch Kahn repeatedly asserted do not exist. The duty of a custodian of records to comply with requests for information extends only to records that exist and are in the custodian's custody. G. L. c. 4, § 7(26); see also 950 C.M.R. 32.03.

There is a presumption that all government employees perform their duties in an honest and impartial manner. LaPointe v. License Bd. of Worcester, 389 Mass. 454, 459 (1983) see also Konover Mgt. Corp v. Planning Bd. of Auburn, 32 Mass. App. Ct. 319, 326 (1992).



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Furthermore, it is the duty of a record custodian to use his superior knowledge of the records to assist a requester in obtaining the records 950 C.M.R. 32.05(4). Therefore, I accept that Attorney Kahn understood your request and responded to it with the best of her knowledge. Whereas the Department cannot be required to disclose records that do not exist, this portion of your appeal is closed.

### *Department's responses to your requests*

In your appeal you request this office order the Department to provide a "point by point" response to your requests. In reviewing the responses I find the Department acted properly in breaking down each request and responding to each point individually. I also find that the Department subsequently responded to your clarifications and refinements with equal detail.

### *Records made available to you*

In her responses Attorney Kahn indicated that responsive records made or received by the Department would be made available to you. The materials not made available consist of copyrighted documents received by the Department, subsequent disclosure of which would be prohibited. Advanced Computer Systems of MI, Inc., v. MAI Systems Corp., 845 F. Supp. 356, 365-366 (E.D. Va. 1994). You subsequently requested a list of these materials be provided. Attorney Kahn responded that no such list exists. A records custodian is not required to create a record in response to a request for public records. Accordingly, whereas the Department has offered to provide responsive records this portion of your appeal is closed.

### *Attorney-client privilege*

You requested that the Department be ordered to provide materials deemed exempt pursuant to the common-law attorney client privilege. There is an implicit assumption that a 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." Brossard v. University of Massachusetts, 9 Mass. L. Rep. 471 (1998), referencing Judge Rotenberg Educ. Center, Inc., v. Commissioner of the Dept. of Mental Retardation (No. 1), 424, Mass. 430 (1997).

The issue of whether this privilege extends to governmental entities was discussed in the affirmative by the Massachusetts Supreme Judicial Court (Court). Suffolk Constr. Co., Inc., v. Div. of Capital Asset Management, 449 Mass. 444 (2008). The Court found that the privilege applies in the public realm. The Supervisor of Records has the authority to determine whether records may be withheld as privileged. See Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co., 414 Mass. 609, 614-615 (1993).



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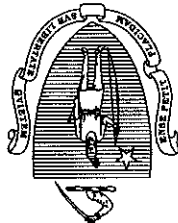
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