COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK, SS A.C. No. 2018-P-0464

J. WHITFIELD LARRABEE,

Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,

Defendant-Appellee.

On Appeal from The Suffolk Division

of the Superior Court Department

BRIEF OF AMICUS CURIAE BOSTON GLOBE MEDIA PARTNERS, LLC IN SUPPORT OF PLAINTIFF-APPELLANT AND THE REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Petitioner Boston Globe Media Partners, LLC is a Delaware limited liability company and is wholly owned by Algonquin Acquisition Company, LLC, also a Delaware limited liability company.

I. INTEREST OF AMICUS CURIAE

Boston Globe Media Partners, LLC,(the "Globe"), publisher of the Boston Globe newspaper, respectfully submits this brief in response to the Court's March 12, 2019 announcement encouraging interested parties to file *amicus curiae* briefs. The Globe's brief is submitted in support of Plaintiff-Appellant J. Whitfield Larrabee's appeal urging reversal of the Superior Court's judgment below. The judgment permits the Massachusetts Commission Against Discrimination ("MCAD") to categorically withhold from public inspection MCAD complaints (and related data compilations) until such time as the MCAD renders an investigative disposition of the complaints. See App. II at 121-146.

The Globe has a direct interest in this case, as evidenced by the Superior Court's decision to permit the Globe to file an amicus brief below. The Globe regularly makes public records requests to the MCAD, including for the very types of records at issue here. The requests are intended to gather information for dissemination to the public about the statutory and regulatory framework under which the MCAD operates, the manner in which the MCAD discharges its public duties, and the nature and prevalence of discrimination by public and private employers in the Commonwealth.

More generally, the Globe has a significant interest in the proper interpretation and enforcement of

the Public Records Law. The Globe often relies on the Public Records Law to report on how state and municipal government agencies and officials discharge their duties, and other matters of significant public concern. Because the Globe regularly depends upon the Public Records Law in the newsgathering process, it often has litigated cases seeking to enforce public records requests and resolve statutory interpretation questions about the scope of the Law.[1]

II. SUMMARY OF ARGUMENT

A fundamental purpose of the Public Records Law is to limit the discretion of government officials to arbitrarily decide whether and when the public is entitled to inspect a public record. The Law achieves that goal by requiring records custodians to justify any

[1] See, e.g., Bos. Globe Media Partners, LLC v. Dep't of Crim. Justice. Info. Services, Suffolk No. 15-1404 (Dec. 4, 2017) (app. pending); Bos. Globe Media Partners, LLC v. Dep't of Public Health, Suffolk No. 14-4074 (August 25, 2017) (app. pending); Globe Media Partners, LLC v. Dep't of State Police, 92 Mass. App. Ct. 1112 (2017); Bos. Globe Media Partners, LLC v. Ret. Bd. of Massachusetts Bay Transp. Auth. Ret. Fund, Suffolk No. 1484CV01624, 2016 WL 915300 (Mass. Super. Mar. 9, 2016); Globe Newspaper Co. v. Exec. Office of Admin. & Fin., Suffolk No. 011-1184 (Mass. Super. June 4, 2014); Globe Newspaper Company v. District Attorney for Middle District, 439 Mass. 374 (2004); Globe Newspaper Co. v. Police Comm'r of Boston, 419 Mass. 852 (1995); Globe Newspaper Co. v. Chief Med. Exam'r, 404 Mass. 132 (1989); Globe Newspaper Co. v. Bos. Ret. Bd., 388 Mass. 427 (1983).

claim that a government document is statutorily exempt from mandatory disclosure. (Pages 12-14)

For the better part of two decades, MCAD discrimination complaints and case data were publicly available, including prior to an investigative disposition concerning whether a complaint was supported by probable cause. The MCAD changed course in 2015, claiming that disclosure prior to an investigative disposition would threaten its investigatory process. In order to justify that decision, the MCAD was required to establish that the complaints and case data were (a) investigatory materials necessarily compiled out of public view; and (b) if publicly disclosed, would so probably prejudice the possibility of effective enforcement of the anti-discrimination laws that such disclosure would not be in the public interest. In proceedings below, the MCAD acknowledged that it had no examples of disclosure interfering with the investigatory process during the sixteen years in which the same records were freely available, and admitted that it continues to provide complaints to respondents promptly after making an investigative determination. The agency also failed to recognize the salutary effect that public disclosure has by encouraging other victims and witnesses from coming forward. Based on these undisputed facts, the Superior Court’s ruling that the MCAD carried its burden of proving that the

investigatory exemption applied was an error of law. (Pages 14-25)

Even assuming that some portions of some complaints might be exempt from mandatory disclosure, the MCAD's categorical ban on producing complaints and case data prior to an investigative disposition violates the Public Records Law's requirement that the agency produce any and all segregable portions of the complaints that do not pose a credible threat to the investigation. (Pages 25-26)

The MCAD's enabling statute does not prohibit disclosure of complaints or case data. Regulations promulgated by the MCAD, moreover, explicitly mandate that the complaints and case data at issue in this case are public information. (Pages 26-28) Nor would public disclosure of the complaints and case data be an unwarranted invasion of personal privacy. The MCAD makes the records public once an investigative disposition is made, regardless of whether or not probable cause supports the complaint, thus undercutting any claim of privacy and further demonstrating the public interest in the records. (Pages 28-30)

The Public Records Law does not require agencies to create new records in response to a public records request. A request that the MCAD extract case data available on an existing database, however, is a valid

request and does not require the agency to create a new record. (Pages 30-31)

III. ARGUMENT

In August 1970, Governor Francis W. Sargent issued Executive Order No. 75 to address shortcomings in the Public Records Law in effect at the time. The Executive Order included the following findings:

> [T]here are many documents which are neither specifically required by said law nor prohibited by it to be open to inspection, but which should be available to citizens of this Commonwealth so that their government will be truly open and accountable; and
>
> [S]tandardized rules and regulations are needed to implement the policy of the legislature and the requirements of the Constitution so that citizens will be better able to understand their rights and so that all requests for information will be granted or denied expeditiously, reasonably, and equitably[.]

Exec. Order No. 75 By His Excellency, Francis W. Sargent (1970). See generally R. Murray, Freedom of Information and Public Records Law in Massachusetts (MCLE 4th ed. 2015) at 4.

Three years later, the legislature amended the Public Records Law, establishing a "general rule … that all records held by government agencies be available to the public unless one of [the] narrow exemptions apply." See J. Brant, et al., Public Records, FIPA and CORI: How Massachusetts Balances Privacy and the Right to Know, 25 Suffolk L. Rev. 23, 25 (1981) ("Brant, Public Records").

See also 1973 Mass. Acts ch. 1050, § 1. The dominant purpose of the legislative amendments was "to afford the public broad access to governmental records." Bos. Ret. Bd., 388 Mass. at 436.

In order to achieve that purpose, the legislature ensured that government officials no longer had wide-ranging discretion to decide whether to produce documents which were "neither specifically required by said law nor prohibited by it to be open to inspection[.]" Exec. Order No. 75 By His Excellency, Francis W. Sargent (1970). The revised law instead imposed "standardized rules" so that "citizens will be better able to understand their rights" and all records requests will be considered "expeditiously, reasonably, and equitably[.]" Id. For those reasons, the burden of proving that a statutory exemption applies to a public record falls squarely on the governmental custodian, not on the requestor. See G.L. c. 66, § 10A(d)(1)(iv); see generally Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444, 447, 454 (2007).

In this case, an agency provided discrimination complaints and data to the public over the course of almost two decades without any reported incidents of prejudice to the agency's investigations or harm to complainants or respondents. Unless we are to return to the unbridled discretion afforded to agencies prior to

Executive Order No. 75 and the 1973 amendments to the Public Records Law, the legal conclusion that those very same records suddenly were rendered exempt from disclosure must be supported by credible evidence, not mere administrative fiat. Because the MCAD offered no such evidence, the judgment below should be reversed.

A. Open Complaints and Case Data Are Not Exempt from Disclosure under G.L. c. 4, § 7, cl. 26(f).

To meet its burden of proof under the investigatory exemption, a records custodian must prove that (a) "the materials requested are 'investigatory materials necessarily compiled out of the public view,'" by investigatory officials, Police Comm'r, 419 Mass. at 858; and (b) disclosure of the materials "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest[.]" G.L. c. 4, § 7, cl. 26(f). The MCAD failed to carry its burden of proof on either required element of an exemption (f) claim.

1. Open complaints and case data are not investigatory materials necessarily compiled out of the public view.

The MCAD's regulations and the evidence it submitted below establish that not all open complaints and data are "investigatory materials," and that those complaints that do constitute investigatory materials are not "compiled out of the public view." G.L. c. 4, § 7, cl. 26(f).

As the MCAD's Acting Chief of Enforcement and Deputy General Counsel explained: "[S]ome complaints are subject to a process called "Review and Authorization," … in which the MCAD determines whether the MCAD has the authority to investigate a complaint." App. I-00272 (Par. 9). This explanation is consistent with the requirements of 804 C.M.R. 1.13. That regulation expressly provides that the MCAD shall not authorize a "formal investigation" if "[u]pon review of the complaint, it is determined, for reasons of standing of the parties, timeliness of the filing, or other matters upon which jurisdiction may depend, that a formal investigation … would not serve the public interest." 804 C.M.R. 1.13(1)(a). See also id. ("A complaint will not be investigated under 804 CMR 1.13(2) if the individual provides information which contradicts an inference of discrimination, or, if the proffered complaint is totally unbelievable on its face[.]").

The authorization of an investigation thus marks the transition of the MCAD's role in a case from the administrative intake phase, during which it "receive[s]" complaints (see MCAD Br. at 9), to the investigatory phase, during which it begins to gather and assemble evidence. Although the MCAD characterizes itself as being "statutorily tasked with two discrete functions," it in fact describes three "discrete functions:" first, to "receive . . . complaints," then,

if authorized, to "investigate complaints," and then, "where such investigation results in a finding of probable cause, to adjudicate those charges." MCAD Br. at 9. The transition from each phase to the next is clearly marked: investigation proceeds only where the Commission has authorized it upon review of the complaint, and adjudication proceeds only where there has been a finding of probable cause upon review of the evidence gathered in the investigation.

As the Superior Court observed, "the complaints in MCAD's possession are collected as part of an investigatory process that *may* lead to enforcement proceedings." App. II-00134 (emphasis added). Those complaints that do *not* result an MCAD investigation, however, cannot reasonably be considered "investigatory materials" compiled by law enforcement or other investigatory officials. See generally Reinstein v. Police Comm'r of Bos., 378 Mass. 281, 290 (1979) (firearm discharge reports that might result in discipline of police officers or putative criminal prosecutions are not exempt investigatory materials). Compare Bougas v. Chief of Police of Lexington, 371 Mass. 59, 60 (1976) (police reports and letters from citizens received after police investigation had begun were investigatory materials).

As for those complaints that actually trigger a "formal investigation," they are not "compiled out of

the public view," and thus also fail to meet the requirements of G.L. c. 4, § 7, cl. 26(f). The MCAD's regulations require that, "[u]pon the authorization of a formal investigation …, a copy of the complaint and a written notice advising the Respondent of his or her procedural rights and obligations shall be *promptly* served on each Respondent named in the Complaint[.]" 804 C.M.R. 1.10(7)(b) (emphasis added). As a matter of law, a document prepared by a complainant and promptly served upon the respondent accused of discrimination is not "compiled out of public view." Compare N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 239-42 (1978) (non-disclosure justified where employer would not otherwise obtain access to witness statements given by employees).

In sum, complaints that do not trigger an MCAD investigation are not "investigatory materials." Those that result in investigations promptly are provided to the respondents and therefore are not "compiled out of the public view." Neither group of documents meets the requirements of G.L. c. 4, § 7, cl. 26(f).

The MCAD nevertheless claims that because the "form and content of the complaints is prescribed by the MCAD's regulations" the complaints are the "initial investigatory tool" of the MCAD. MCAD Br. at 30. This argument proves too much. The Supreme Judicial Court has made clear that "an agency such as a police

department cannot simply take the position that, since it is involved in investigatory work and some of its records are exempt under the statute, every document in its possession somehow comes to share in that exemption." Bougas, 371 Mass. at 63.

The MCAD also argues that complaints are investigatory materials because "MCAD staff almost always help complainants draft and submit their complaints[.]" MCAD Br. at 30. This also misses the mark. According to the MCAD, its staff "helps . . . make sure that complainants articulate their allegations and make sure that complainants include the information required for an investigation to commence." App. I-270, at ¶ 8. The MCAD concedes that the investigation has not yet "commence[d]" at the intake phase, thus demonstrating that the staff's role is not part of the investigative process. In short, the administrative assistance the MCAD provides to complainants does not inject the agency into the complaint process any more than assistance provided by court clerks to *pro se* litigants puts the court in the role of a litigant.

2. Disclosure of open complaints and data would not "probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."

The parties appear to agree that there is no "blanket exemption" provided for investigative materials and that "the potential prejudicial effect of disclosure

on 'effective law enforcement' is to be considered on a case-by-case basis." Police Comm'r of Boston, 419 Mass. at 859 (citation omitted). Based on the record below, the MCAD failed to carry its burden of proof on this issue.

There undoubtedly are situations in which an investigation requires confidentiality. A witness's cooperation might depend on anonymity. Or investigators may have reason to believe that alerting the subject of an investigation will cause him to flee or to interfere with the investigation by threats or retaliation against witnesses.

The MCAD cannot credibly make any such claim in this case. The agency's own regulations dictate that upon initiation of an investigation, respondents must promptly receive a copy of the complaint identifying their accuser and describing the allegations against them. 804 C.M.R. 1.10(7)(b). Denying the same information to the public does nothing to mitigate against the risk of retaliation or interference with the investigation by the party with the greatest motive to do so.

What then is the basis for the MCAD's stated concern that disclosure to the public poses a greater risk of interference with the investigation than disclosure to the accused? The MCAD has yet to answer that question. The agency conceded below that it "could not identify

any instances of retaliation against any complainant resulting from disclosure of names and addresses of complainants," nor could it "identify any 'adverse incidents' that have resulted in the disclosure of paper charges of discrimination or computerized data[.]" App. I-87-88; see also id. at 212-14.

The agency's assertion that it "does not have … the time or the resources to investigate and identify instances of retaliation or other adverse instances resulting from disclosures" of open complaints and data does not help its cause. App. I-88. Had a complainant alleged such retaliation during the period between 1999-2015, the MCAD surely would not have ignored it. The statement nevertheless stands as an admission that the MCAD's position – besides being contrary to sixteen years of experience – is devoid of any factual support.[2]

The relevant issue here is not, as the MCAD argues, whether an agency is entitled to adopt a different interpretation of its enabling statute or regulations. Rather, the issue is whether the MCAD has carried its burden of proving that the requirements of exemption (f)

[2] The MCAD offered no evidence that its prior practice of disclosing complaint records had a chilling effect on the filing of charges of discrimination, and the backlog of complaints as of the end of 2015 indicates that complainants were not inhibited from filing charges. See http://www.mass.gov/mcad/pubs-regs/press-releases/2016-backlog-milestone.html (showing 1,778 cases in the "backlog" as of 12/31/2015).

have been satisfied. That burden cannot be met by arguing, as the MCAD does, that the absence of evidence that disclosure resulted in retaliation or other adverse conduct "is not proof that they do not happen[.]" Id.

On the other side of the equation, the MCAD utterly fails to consider the likely benefits resulting from transparency. As the Supreme Judicial Court has observed, "[s]everal courts have noted, with some persuasiveness, that the possibility of limited disclosure of investigatory materials might promote candor." Police Comm'r, 419 Mass. at 865 n.13.

> A police officer who knows that no one from outside the law enforcement community will scrutinize his statements or his investigatory work may not feel the same level of pressure to be honest and accurate as would his counterpart in a system where ... [a] person from the outside already has substantial information about the incident under investigation and has a strong motive to challenge the accuracy of the officer's memory or the reliability of his conclusions.

Id. (internal quotations and citations omitted).

Similarly, disclosure of the complaints at the outset of an investigation serves the public interest by encouraging those with relevant evidence to come forward. This domino effect, in which victims of or witnesses to sexual harassment are emboldened to come forward with information after seeing others come forward with the same, recently has been referred to as the "#metoo effect," or the "Weinstein effect," and

weighs against the MCAD's speculative concerns regarding a "chilling effect." As the acting chair of the U.S. Equal Employment Opportunity Commission recently stated, the more than 50 percent increase in sexual harassment charges "absolutely reflects a greater willingness to report it and speak about it."[3] In its current Annual

[3] Jena McGregor, The #MeToo Effect: Sexual Harassment Charges with the EEOC Rose for the First Time in Years, The Washington Post (Oct. 5, 2018), https://www.washingtonpost.com/business/2018/10/05/metoo-effect-sex-harassment-charges-with-eeoc-rose-first-time-years/?noredirect=on&utm_term=.7d8df5c289df. See also David Crary, After Six Months of #MeToo, Hopes High for Lasting Effect, The Boston Globe (Mar. 31, 2018),https://www.bostonglobe.com/news/nation/2018/03/31/after-six-months-metoo-hopes-high-for-lasting-effect/n8jVOcv5Aj616aUZFO6MWL/story.html("There is also ample evidence that the movement has some staying power that will make it a force six months from now and beyond as lawmakers across the nation enact an array of antiharassment legislation, corporate America roots out bad behavior in the workplace, and more women feel emboldened to speak out."); 2017 Words of the Year, The Boston Globe (Dec. 2017), https://apps.bostonglobe.com/opinion/graphics/2017/12/words-of-year/ (defining "the Weinstein effect" as a phenomenon in which "Women, emboldened by Weinstein's brave accusers, are coming forward with a torrent of #MeToo allegations, derailing men of all ages, races, and political ideologies."); Dialynn Dwyer, It's Been a Year Since the #MeToo Movement Took Off. Here's the Change a Local Rape Crisis Center Has Seen, Boston.com (Oct. 12, 2018),https://www.boston.com/news/local-news/2018/10/12/boston-area-rape-crisis-center-metoo-movement-one-year-later (reporting that the Boston Area Rape Crisis Center's hotline experienced "a 400 percent increase over the normal volume of calls to the hotline" on the day after Christine Blasey Ford testified that then-Supreme Court nominee Brett Kavanaugh had sexually assaulted her); Hillary Busis, These Are the Powerful Men Feeling the Harvey Weinstein Effect, Vanity Fair (Oct. 27,

Report, the MCAD similarly noted that, "[o]n the heels of the #metoo movement sending shockwaves," it "received 400% more sexual harassment complaints" as well as "overwhelming requests for sexual harassment preventing training from the commission." 2018 MCAD Annual Report, https://www.mass.gov/doc/2018-mcad-annual-report/download, at 7-10.

Local news reporting underscores that conclusion. In 2018, the Globe reported on allegations of sexual harassment and sexual assault in the Boston Fire Department, some of which came to light only after a firefighter was charged with an alleged assault on female colleague.[4] Subsequent news coverage included

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2017),https://www.vanityfair.com/hollywood/2017/10/harvey-weinstein-effect-roy-price-mark-halperin-john-besh-sexual-harassment-assault (listing sexual assault allegations which surfaced in the wake of reporting on allegations against Harvey Weinstein and noting that "[i]n the weeks that have followed [the story's publication], the allegations against Weinstein have increased exponentially as scores of woman have come forward with allegations about other powerful men in entertainment and media.").

[4] Meghan Irons, Firefighter Faces Charges after Alleged Assault on Female Colleague at Jamaica Plain Firehouse, The Boston Globe (Apr. 26, 2018), https://www.bostonglobe.com/metro/2018/04/26/firefighter-accused-assaulting-female-worker-jamaica-plain-firehouse/1DCcHF7plI85NqgjAh9xCM/story.html?p1=Article_Inline_Text_Link; Meghan Irons, Boston Has Just 16 Female Firefighters. Several Say Discrimination is Rampant, The Boston Globe (May 12, 2018), https://www.bostonglobe.com/metro/2018/05/12/women-firefighters-complained-harassment-and-discrimination-

interviews of other firefighters who reported allegations of harassment and/or sexual assault, noting that "[t]he women said that after what allegedly happened to their colleague in January, they decided to break their silence and publicly speak out in hopes City Hall would intervene," including one who had a complaint pending before the MCAD. Id.[5] Earlier this month, the Globe reported on complaints of gender discrimination and retaliation in the Boston police force, including individuals pursuing court actions after their MCAD proceedings were closed.[6]

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and-then-worst-happened/cFuAw6wuQe6ELQLHbTzNeL/story.html.

[5] The Globe's 2016 Spotlight series on sexual abuse at New England private schools similarly reported on "a growing number of former students at New England private schools who are breaking their silence about sexual abuse by staffers . . . emboldened by a cascade of recent revelations about cases — many of them decades old — that were often ignored or covered up when first reported, and that school administrators still struggle to handle appropriately today." Private Schools, Painful Secrets, The Boston Globe (May 6, 2016), https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html?p1=Article_Inline_Text_Link

[6] Meghan Irons, Women Allege Discrimination, Retaliation on Male-Dominated Boston Police Force, The Boston Globe (May 5, 2019), https://www.bostonglobe.com/metro/2019/05/05/lawsuits-women-allege-discrimination-retaliation-male-dominated-boston-police-force/65vGv4MCUG7Qyqc4ocenVM/story.html.

Complaint data also can be used to document trends in discrimination claims against public and private employers. For example, the Globe used the database previously provided by the MCAD to document that the MBTA had the highest number of complaints of any state agency.[7]

Public disclosure of complaints and related data thus encourages witnesses and victims to come forward, better enabling the MCAD to identify and address systemic issues that would otherwise go undetected. These positive effects of openness, viewed in light of the MCAD's successful sixteen-year history of providing complaints and case data to the public, demonstrate that the MCAD has failed to carry its burden of proof under exemption (f).

B. The Public Records Law does not permit categorical denials of requests for open complaints and case data.

The Public Records Law provides that records custodians "shall" furnish a copy of any public record "or any segregable portion of a public record[.]" G.L. c. 66, § 10 (a). The fact that "some exempt material may be found in a document or report of an investigatory character does not justify cloture as to all of it." Reinstein, 378 Mass. at 290.

[7]See https://www.bostonglobe.com/metro/2014/01/14/mbta-nears-deal-revamp-employment-rules-after-getting-hit-with-discrimination-complaints/4fRsLnj53ZJROL7a8oK7tJ/story.html.

The MCAD's position that it is entitled to impose a blanket rule denying access to all complaints until after an investigative disposition is made. Even assuming that the disclosure of *some* portions of *some* complaints would probably so prejudice the possibility of effective law enforcement that disclosure is not in the public interest, categorically denying access to *all* portions of *all* complaints contravenes longstanding requirements of the Public Records Law. Cf. 804 C.M.R. 1.04(2) (empowering Commission to enter protective orders governing hearing evidence).

C. The Statutory Exemption does not apply to open complaints and case data.

The Superior Court correctly ruled that G.L. c. 151B, § 5 does not prohibit the disclosure of open complaints prior to an investigative determination. The language of § 5 cited by the MCAD simply provides that *after* a commissioner makes a finding of probable cause, and *if* neither the complainant nor the respondent proceeds to court, the commissioner immediately shall "endeavor" to eliminate the unlawful practice complained of and shall not disclose what occurred "in the course of such endeavors," except that the commission is free to publish the facts of any case in which the complaint has been dismissed. Id. ¶ 2. This statutory language is directed at conciliation and mediation endeavors, and cannot reasonably be interpreted as mandating that

complaints remain private until an investigative determination is made.

The MCAD's reliance on 804 C.M.R. § 1.04 also is misplaced. G.L. c. 4, § 7, cl. 26 (a) (the "Statutory Exemption") permits the withholding of records "specifically or by necessary implication exempted from disclosure *by statute*." G.L. c. 4, § 7, cl. 26 (a) (emphasis added). Because MCAD regulations are not a statute, and because an agency regulation cannot override the statutory mandates of the Public Records Law, 804 C.M.R. 1.04 does not trigger Exemption (a).[8]

In all events, 803 C.M.R. 1.04 by its terms mandates disclosure of the records at issue here. The first subsection of the regulations provides that, "[*e]xcept as otherwise provided* in this Regulation, the *record* in every charge pending before the Commission shall be confidential … pursuant to M.G.L. c.4, § 7 Twenty-sixth(f)[.]" 804 C.M.R § 1.04(1) (emphasis added). Subsection 1.04(4) goes on to provide:

> (4) Public Information. Except as may be placed under protective order by the Commission or processed as a pseudonym complaint pursuant to 804 CMR 1.10(5)(d), the charge of complainant and the investigative determination pursuant to 804 CMR 1.15 in any matter shall be available for public

[8] See generally Champa v. Weston Public Schools, 473 Mass. 86, 93 n.10 (2015) (declining to decide whether the word "statute" in exemption (a) should be interpreted to include "regulations").

> inspection upon making appropriate arrangements with the Commission.

804 C.M.R. 1.04(4). Read together, subsection (1) requires that the entire "record" of every charge is confidential except as otherwise provided in the regulation, and subsection (4) carves out from that general rule the complainant's charge and the investigative determination (subject to the commission's power to enter a protective order). Stated otherwise, the MCAD's own regulation requires that open complaints and case data are "Public Information."

Finally, treating 804 C.M.R. 1.04(1) as prohibiting the disclosure of complaints would have unintended and unwarranted effects. At observed by counsel during oral argument of this case, MCAD complainants typically are not subject to gag orders, and a blanket regulatory ban on complainants discussing their grievances would raise significant First Amendment concerns.

D. The Privacy Exemption does not apply to discrimination complaints and case data.

The MCAD's theory is that *all* complaints (regardless of the nature of the charge and regardless of whether the complainant is an employee, an employer, or the MCAD itself) contain intimate details of a highly personal nature, the disclosure of which would constitute an unwarranted invasion of privacy. According to the MCAD, however, once an Investigative Disposition is issued, the intimate and personal nature

of those facts vanish, the documents are made public, and any invasion of privacy becomes fully warranted.

This is not a tenable privacy analysis. Treating all complaints as private regardless of their contents is an abdication of a records custodian's obligations to make privacy determinations on a case by case basis. And the MCAD's determination that complaints shall be publicly disclosed once an investigative disposition is made –- regardless of whether the complaint is supported by probable case –- is proof positive that the contents of the complaints are not intimate details of a highly personal nature.[9]

The public interest in disclosure significantly outweighs any interest in temporarily delaying public access to complaints and case data. Disclosure of pending complaints allows the public to better monitor the workings of the MCAD, ensuring that the MCAD is responding to charges of discrimination in an effective and efficient manner.

Public officials sometimes prefer to release summaries of investigations in lieu of the underlying documents, whether the investigations concern a charge of discrimination or possible high crimes and

[9] The MCAD's privacy analysis also risks perpetuating the notion that victims are expected to carry shame or embarrassment regarding their unlawful treatment at the hands of others, a misconception rapidly diminishing in the face of the #metoo phenomena discussed supra.

misdemeanors. Summaries, like metrics, are no doubt helpful to public oversight of government processes, but they tell only part of the story. The Public Records Law was meant to arm the public with details of how the government functions. For sixteen years, the MCAD's policy of openness promoted public awareness of the MCAD's performance in investigating and addressing discrimination complaints, as well as the employment practices of public and private entities. The MCAD's abrupt and unjustified change of course leaves the public in the dark regarding these important matters of public interest despite the fact that the agency has not, and cannot, carry its burden of showing that any exemption applies.

E. Disclosure of the Open Complaints and Data Would not Require the Commission to Create a New Record.

The MCAD claims that it "no longer generates the Excel spreadsheets synthesizing its database of open complaints," and that producing the requested case data would require it to create a new document, something the Public Records Law does not require. MCAD Br. at 17, 55-56 n. 10.

The MCAD does not explain whether it no longer maintains a "database of open complaints" or simply has stopped generating the spreadsheets from that database.[10]

[10] The MCAD's annual report includes data analysis of a number of characteristics across both open and closed complaints, which would likely be difficult to ascertain

If the latter, extracting the requested information from a database is not the same as creating a new document in response to a request. See G.L. c. 66, § 6A(d) ("furnishing a segregable portion of a public record shall not be deemed to be creation of a new record"). As the Supervisor of Public Records has explained:

> Information contained in a database is presumed to exits at the time of the request. Provision of an extract of requested data does not constitute creation of a public record. An RAO may not deny a request for data contained in such a database on the theory that extraction results in creating a new record. To do so would deny access to information that does exist at the time of the request, though not in a form easily accessible by the requester.

A Guide to the Massachusetts Public Records Law, (Secretary of State's Office, January 2017) at 9. Thus, while it may be that the MCAD no longer generates the exact spreadsheet format it previously provided, if the same data can be extracted from an existing database, the agency remains obligated to produce the requested data.

IV. CONCLUSION

For the reasons stated above, the Globe joins Plaintiff-Appellant in seeking reversal of the judgment of the Superior Court.

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without utilizing some type of electronic database. Annual Report, at 7-10.

Respectfully submitted,

Boston Globe Media Partners, LLC,

/s/ Emma D. Hall

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Dated: May 21, 2019

RULE 17(C)(9) CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of amicus briefs, including but not limited to Mass. R. App. P. 17(brief of an amicus curiae) : Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). Compliance with the applicable length limit was ascertained by using Courier New, size 12, in Microsoft Word 2016, and counting 4800 non-excluded words.

/s/ Emma D. Hall
Emma D. Hall

RULE 17(C)(5) DECLARATION

The undersigned hereby certifies that no party or a party's counsel authored the brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, no person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, that neither the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and.

/s/ Emma D. Hall
Emma D. Hall

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS A.C. No. 2018-P-0464

J. WHITFIELD LARRABEE,

Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,

Defendant-Appellee.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Emma D. Hall, hereby certify that on May 21, 2019, I served the attached Brief of Amicus Curiae Boston Globe Media Partners, LLC for Leave to File Brief After Deadline through the Electronic Filing Service Provider Odyssey File & Serve, which is charged with the responsibility of electronic service on all counsel of record.

/s/ Emma D. Hall
Emma Diamond Hall