



CITY OF CAMBRIDGE

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February 9, 1993

Margaret Drury
City Clerk
City Hall
Cambridge, MA 02139

Re: *Public Records Opinion Regarding City Manager Evaluations*

Dear Ms. Drury:

I am attaching a copy of the opinion rendered by James W. Igoe, Supervisor of Public Records. You will recall that on December 30, 1992 I sent you an opinion on this same matter in which I indicated that the question should be presented to the Supervisor for a formal opinion.

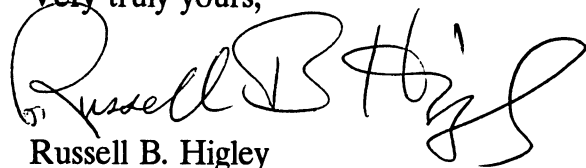
The Supervisor's opinion concludes that the evaluations constitute information that is "personal" to the employee (City Manager) and would not ordinarily be public records. The opinion clearly indicates that unless the evaluator has included information in the evaluation which contains "intimate details of a highly personal nature" (to the evaluator), the City Manager is entitled to see all of the evaluations. Finally, if the evaluations were substantively discussed in an open session of the City Council, the evaluations would become public.

Given this opinion of the Supervisor it is my opinion that you are required to determine whether or not there is any information in the evaluations that contains "intimate details of a highly personal nature" to the evaluators, and if you conclude there is none then all of the evaluations should be available to the City Manager at his request. Since it is my understanding that the City Manager does not object to any of the evaluations being made public, and since the Supervisor concludes that the evaluators cannot have a reasonable

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CAMBRIDGE, MA.

expectation of privacy in their identities, the evaluations must be viewed as public records that do not fall within any of the limited exceptions to the public records law.

Very truly yours,

A handwritten signature in black ink, appearing to read "Russell B. Higley". The signature is stylized with large, flowing loops and a prominent "H".

Russell B. Higley



The Commonwealth of Massachusetts

Office of the Secretary of State
Michael Joseph Connolly, Secretary

James W. Igoe
Deputy Secretary of State
Supervisor of Public Records

February 8, 1993
SPR93/010

Russell Higley
City Solicitor
City of Cambridge
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Dear Mr. Higley:

Pursuant to 950 C.M.R. 32.07, I am in receipt of your request for an advisory opinion. The Cambridge City Council proposes to solicit written evaluations of the City Manager's job performance from Cambridge citizens. These evaluations are to be signed by the citizen evaluator and used by the City Council during its evaluation of the City Manager. You question the public records status of the written evaluations. Specifically, you ask whether:

1. the signed evaluation forms submitted by citizens are subject to mandatory disclosure under the Public Records Law;
2. the City Manager may have access to the evaluation materials regardless of their public records status; and
3. if the evaluations are subject to mandatory disclosure, may the citizen evaluators have their names redacted from the evaluations prior to disclosure.

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"Public records" is broadly defined to include all documentary materials or data made or received by any officer or employee of any city in the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26)(a)-(m) (1990 ed.). The statutory exemptions are strictly and narrowly construed. Attorney General v. Assistant Commissioner of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). Public records, and any non-exempt, segregable portions thereof, are subject to mandatory disclosure upon request. G. L. c. 66, § 10(a) (1990 ed.); Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are not blanket in nature).

Evaluation Materials

You state that the completed evaluation forms will contain evaluative material relating to the City Manager's job performance. Therefore, the privacy exemption merits consideration. It 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) (1990 ed.).

The privacy exemption contains two distinct and independent clauses, each requiring separate analysis. Globe Newspaper Company v. Boston Retirement Board, 388 Mass. 427, 432-34 (1983). Both clauses are relevant to this opinion. Under the first clause, which is analyzed objectively, personnel information which is of a "personal nature" and which relates to a specifically named individual is absolutely exempt. Brogan v. School Committee of Westport, 401 Mass. 306, 368 (1987); Globe Newspaper Company, 388 Mass. at 438. The performance evaluations constitute personnel information relating to a specifically named individual. Therefore, the remaining inquiry is whether the information is of a "personal nature".

Information which is subjective or evaluative constitutes "personal" information. See Connolly v. Bromery, 15 Mass. App. Ct. 661, 664 (1983) (student evaluations of teachers appraising job performance is personal and volatile). Consequently, the evaluations submitted by Cambridge citizens which contain their personal evaluations of the City Manager would be exempt from mandatory disclosure pursuant to the first clause of the privacy exemption in most circumstances. However, discussion of the evaluations in open session will affect their public records status.

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Disclosure to City Manager

You ask whether the City Manager may have access to the evaluations despite operation of the privacy exemption. The privacy exemption is designed to protect against invasions of an individual's personal privacy. An individual, however, is not capable of invading his own privacy. Therefore, the first clause of the privacy exemption may not be used to withhold the evaluations from the City Manager.

It should also be noted that details in an evaluation which if disclosed could identify the author may be exempt if the author has a reasonable expectation of confidentiality with respect to the content of the evaluation. See Attorney General v. School Committee of Northampton, 375 Mass. 127, 129 (1978); Torres v. Attorney General, 391 Mass. 1, 9 (1984); Ackerly v. Ley, 420 F. 2d 1336, 1339-40 n.3 (D.C. Cir. 1969). However, it is my understanding that individuals received the evaluations with the knowledge that they may be read and discussed in open sessions of the City Council. Therefore, as a general rule, these individuals cannot have a reasonable expectation of privacy in their identities. Thus, in most instances, the City Manager will have access to the identities of the citizen evaluators.

However, there may be special circumstances in which disclosure of the identities of the evaluators will result in an unreasonable invasion of the privacy interests of those citizens. A subjective analysis under the second clause of the privacy exemption is required in those instances. The second clause requires a balancing of the competing interests of the public's right to know against the privacy interest which may be harmed by disclosure. Real Property Department, 380 Mass. at 625; Torres, 391 Mass. at 9. Therefore, application of the second clause can only be determined on a case by case basis.

The privacy exemption only protects "intimate details of a highly personal nature." Real Property Department, 380 Mass. at 625. Marital status, legitimacy of children, paternity, medical condition, government assistance, substance abuse, family disputes and reputation are examples of the kind of information the privacy exemption is designed to protect. Id. at 626 n.2. Since the Public Records Law favors disclosure, the exemption will only apply where the privacy interest of the individual outweighs the public interest in disclosure. Attorney General v. Collector of Lynn, 377 Mass. 151, 156 (1979).

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Without knowing the contents of each evaluation, it is impossible to render an opinion as to the potential application of the second clause of the privacy exemption. Where, however, in the course of completing an evaluation, an individual has disclosed "intimate details" such as the examples listed above about her personal life, the individual's privacy interest must be weighed against the public interest in disclosure of the evaluator's identity. If the privacy interest outweighs such public interest, the second clause of the privacy exemption will provide a basis to withhold the identity of the evaluator from the City Manager. Alternatively, the individual's identity may be disclosed upon the redaction of the exempt information. See G. L. c. 66, § 10(a) (1990 ed.) (custodian has duty to segregate exempt information from otherwise public record).

Discussion of Evaluations in Open Meeting

It is my understanding that the Council operates under the provisions of the Open Meeting Law. See G. L. c. 39, § 23B (1990 ed.) (requiring that governmental bodies conduct meetings, with certain exceptions, in open session and that a record of the proceedings be created). Therefore, discussion of the evaluations in an open session of the Council will effect their public records status. I am informed that the City Council intends to so discuss the evaluations in order to assist in its appraisal of the City Manager's job performance.

The legislation which codified the current statutory definition of "public records" contains a grandfather provision which prohibits the application of any of the 1973 exemptions to materials which would have been public under previous definitions. 1973 Mass. Acts c. 1050, § 6. One such previous definition of public records provided that all records referred to in the minutes of a meeting are public records.¹ 1969 Mass. Acts c. 831, § 1; see also Open Meeting Law Guidelines, Scott Harshbarger, District Attorney, Middlesex District, p. 14 (December, 1989 ed.) (providing that minutes should contain a reference to any issue raised and considered, even if no vote is taken).

¹. The 1969 definition of public records provides that all records referred to in the minutes of an open meeting are public records. Such definition refers only to those documents which are openly deliberated upon by the government. Where documents are referred to in open meeting minutes simply to comply with Open Meeting Law procedures, the 1969 definition as applied through the grandfather provision of the current definition of public records will not operate to make those documents public.

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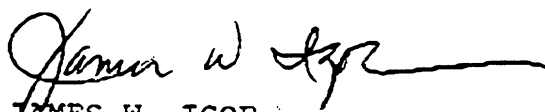
The intent of the General Court in enacting the 1973 definition of public records was to expand the disclosure of records and ensure that governmental activities are open to public examination. Hastings & Sons Publishing Company v. City Treasurer of Lynn, 374 Mass. 812, 816 (1978). The Open Meeting Law similarly provides for public participation in the operations of government. In the absence of the 1969 requirement making public all documents referenced in meeting minutes, meaningful participation would be precluded. Therefore, any evaluations referenced in the minutes of the Council's open meetings will become public in their entirety, including the identities of the evaluators, despite application of the privacy exemption.

Conclusion

Therefore, you are hereby advised that the completed evaluation forms may be withheld from public disclosure pursuant to the first clause of the privacy exemption. However, the first clause does not provide a basis to withhold the evaluations from the City Manager, since he cannot invade his own privacy. Under certain circumstances, the identities of some evaluators may be withheld from the City Manager if those evaluators included information of a sufficiently personal nature to warrant application of the second clause of the privacy exemption. Finally, if the evaluations are substantively discussed in an open session of the City Council, neither clause of the privacy exemption will apply and the evaluations become public records in their entirety.

Please contact this office if you have questions regarding this opinion.

Very truly yours,


JAMES W. IGOE
Supervisor of Public Records

Communication & Reports
from City Officers #1

Opinion RE: City Mgr.
Evaluations

S-72

In City Council,

February 22, 1993

Placed on file