

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Noting

SUPERIOR COURT
CIVIL ACTION
NO. 2011-01184 A

GLOBE NEWSPAPER COMPANY, INC.

vs.

EXECUTIVE OFFICE OF ADMINISTRATION AND FINANCE, & others¹

FINDINGS OF FACT, RULINGS OF LAW, AND
ORDER FOR ENTRY OF JUDGMENT

This is an action for injunctive and declaratory relief pursuant to the Massachusetts Public Records Law, G. L. c. 66, § 10, and the Massachusetts Declaratory Judgment Act, G. L. c. 231A, § 1. Plaintiff Globe Newspaper Company, Incorporated, (Globe) seeks records of all separation, severance, transition, or settlement agreements, involving payments of more than \$10,000, which the defendant government entities entered into with public employees since January 1, 2005, and all records of payments made from the Office of the Comptroller's account for settlements and judgments since January 1, 2005. The Globe seeks all such records to be redacted, if applicable, only of the employee's home address and telephone number.

On December 10, 2012, the parties, including two intervener public unions, tried the case

¹ Executive Office of Energy and Environmental Affairs, Executive Office of Education, Executive Office of Housing and Economic Development, Executive Office of Public Safety and Security, Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation), Executive Office of Health and Human Services, Executive Office of Labor and Workforce Development, Massachusetts Port Authority, and Office of the Comptroller.

jury-waived and, on March 18, 2013, presented closing arguments.² Pursuant to the Court's request prior to summation, the parties submitted an Amended Joint Stipulation of Facts, as an agreed-upon record to supplement the evidence at the one-day bench trial. The parties also filed proposed findings of fact, which they based upon the stipulation, the joint exhibits referenced in it, and the evidence offered at trial.

Based upon the stipulations jointly made by the parties and upon the credible testimony at the jury-waived trial and exhibits admitted into evidence during that proceeding, the Court makes the following findings of fact and conclusions of law.

STIPULATED FINDINGS OF FACT³

I. PARTIES

1. Plaintiff Globe Newspaper Company, Inc. (Globe) is a corporation with a principal place of business in Suffolk County, Massachusetts and is the publisher of The Boston Globe daily newspaper. Todd Wallack (Wallack) is a Globe reporter.

2. Defendant Executive Office of Administration and Finance (EOAF) is an executive office of the Commonwealth that develops and executes fiscal and administrative policies to ensure the financial stability and efficiency of state government.

3. Defendant Executive Office of Energy and Environmental Affairs (EOEEA) is an

² The Globe commenced this action on March 25, 2011, and shortly thereafter moved for a preliminary injunction. After a hearing, the Court (Sanders, J.) issued a memorandum and order, denying the Globe's motion. The Globe's petition pursuant to G. L. c. 231, § 118, seeking relief from that interlocutory order, was denied by a single justice of the Appeals Court (Kantrowitz, J.) on June 16, 2011.

³ The Court sets forth the parties' Amended Joint Stipulation of Facts as submitted, save for corrections of typographical errors and for citation style consistency.

executive office that oversees the Commonwealth's six environmental, natural resource and energy regulatory departments: the Department of Environmental Protection, the Department of Public Utilities, the Department of Energy Resources, the Department of Conservation and Recreation, the Department of Agriculture, and the Department of Fish and Game.

4. Defendant Executive Office of Education (EOE) is an executive office that serves as a single, responsible authority within the Commonwealth's comprehensive education system, which is comprised of the Department of Early Education and Care (EEC), the Department of Elementary and Secondary Education (ESE), and the Department of Higher Education (DHE). The Executive Office also works with the University of Massachusetts (UMASS) to develop, coordinate and implement the Commonwealth's public education policies.

5. Defendant Executive Office of Housing and Economic Development is an executive office responsible for the creation of homes and jobs in the Commonwealth by aligning the state's housing and economic development agencies to better coordinate policies and programs ensuring that Massachusetts maintains a global competitive edge.

6. Defendant Executive Office of Public Safety and Security (EOPSS) is an executive office responsible for supervising and coordinating the major law enforcement agencies and functions of the Commonwealth.

7. Defendant Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation) (DOT) is an executive office that resulted from a merger of the Executive Office of Transportation and Public Works (EOT) and its divisions with the Massachusetts Turnpike Authority (MTA), the Massachusetts Highway Department (MHD), the Registry of Motor Vehicles (RMV), the Massachusetts Aeronautics Commission (MAC), and

the Tobin Bridge.

8. Defendant Executive Office of Health and Human Services (HHS) is an executive office that comprises the largest Commonwealth secretariat. HHS has responsibilities for a wide range of services, such as: providing affordable and accessible health care to residents, administering benefits to Massachusetts veterans and caring for the most vulnerable members of society, including children, elders and individuals with disabilities. The Human Resources Operations core administrative activities are divided among three clusters: the Health Services Cluster, the Community and Disability Services Cluster, and the Children, Youth and Families Cluster, each of which has its own Human Resources Director.

9. Defendant Executive Office of Labor and Workforce Development (EOLWD) is an executive office that provides a wide variety of employment-related programs and services to serve constituents across the Commonwealth, including a network of thirty-seven One-Stop Career Centers and field offices across the Commonwealth.

10. For ease of reference, defendants Executive Office of Administration and Finance, Executive Office of Energy and Environmental Affairs, Executive Office of Education, Executive Office of Housing and Economic Development, Executive Office of Public Safety and Security, Office of the Secretary of Transportation and Public Works (n/k/a Massachusetts Department of Transportation), Executive Office of Health and Human Services, and Executive Office of Labor and Workforce Development collectively are referred to herein as the “Executive Offices.”

11. Defendant Office of the Comptroller is an agency within the Executive Branch responsible for ensuring the integrity and accountability of the Commonwealth’s fiscal

operations, communicating accurate and timely financial information to decision makers within the government, the financial community and the general public, and providing professional guidance on fiscal policy within the Commonwealth.

12. Defendant Massachusetts Port Authority (Massport) is an authority of the Commonwealth established by the General Court pursuant to Chapter 465 of the Massachusetts Acts of 1956. Massport's facilities include airport properties, such as Boston-Logan International Airport, and various port properties.

13. Intervener The American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (AFSCME) is an "employee organization" as defined in c. 150E, § 1.

14. Intervener Massachusetts Organization of State Engineers and Scientist (MOSES) is an "employee organization" as defined in c. 150E, § 1.

II. THE GLOBE'S PUBLIC RECORDS REQUESTS TO THE EXECUTIVE OFFICES

15. On December 18, 2009, Wallack sent an email to Kimberly Haberlin, then the Deputy Press Secretary for Governor Deval Patrick (Haberlin). (Jt. Exh. 2.)

16. Wallack's email to Haberlin forwarded a public records request and asked Haberlin to "let me know if you want me to make any changes." (Id.)

17. The public records request forwarded to Haberlin by Wallack on December 18, 2009 asked for, in relevant part, "copies of any separation, severance, transition or legal settlement agreements with state employees or contractors issued since January 1, 2005 that includes compensation, payment or benefits valued at more than \$10,000." (Id.)

18. On December 28, 2009, Wallack and Haberlin spoke about the public records

request. (Jt. Exh. 3.) Wallack sent an email to Haberlin later that day. (Id.) The email included a revised public records request and stated in part:

Nice chatting with you. Per your suggestion, I've tweaked the public records request to mention a specific cabinet agency. As I mentioned, I'd like to cover the entire executive branch, so it sounds like I would need to file separate requests with the governor's office and each cabinet secretary. Does this approach make sense?

Id.

19. On January 19, 2010, Haberlin sent Wallack an email about the public records request and asked "Do you have time this week to talk to our deputy chief legal counsel about your request? He had some thoughts about how you can tailor it." (Jt. Exh. 4.)

20. As of January 19, 2010, the Governor's Deputy Chief Legal Counsel was Mark Reilly (Reilly). Reilly currently serves as the Governor's Chief Legal Counsel.

21. On or about March 5, 2010, the Globe, through Wallack, made public records requests to each of the Executive Offices seeking copies of all "separation, severance, transition or settlement agreements" made with public employees since January 1, 2005 that required "compensation, benefits or other payments worth more than \$10,000." (Jt. Exh. 5; see also Joint Pretrial Statement at 15-16.)

22. The Executive Offices had in their possession, custody or control documents responsive to the Globe's public records requests.

23. All of the documents responsive to the Globe's public records requests were made or received by an officer or employee of an agency, executive office, department, board, commission, bureau, division or authority of the Commonwealth.

A. The Executive Offices' Responses to the Globe's Public Records Request

1. The Executive Office of Administration and Finance

24. By March 24, 2010, the EOAF determined that it had approximately 7-8 settlement agreements responsive to the Globe's public records request. (Jt. Exh. 6.)

25. On April 20, 2010, Paul Dietl, the Chief Human Resources Officer for the Commonwealth, who serves in the Executive Office of Administration and Finance's Human Resources Division, sent a letter to Wallack responding to the Globe's public records request stating in part:

The Executive Office of Administration and Finance has surveyed its agencies and discovered that the Department of Revenue, Office of Comptroller, Developmental Disabilities Council, Operational Services Division, and Division of Capital Asset Management have records responsive to your request.

Pursuant to 950 CMR 32.06, please accept this correspondence as the Executive Office of Administration and Finance estimate of the costs incurred to comply with the request. The Executive Office of Administration and Finance requests \$92.25 to cover the costs of searching and compiling the information that you seek to obtain. Upon receipt of this amount, the Executive Office of Administration and Finance will process your request.

(Jt. Exh. 7.)

26. On April 22, 2010, Michelle Heffernan, Deputy General Counsel at HRD, sent an email to Wallack enclosing a cost estimate for complying with the Globe's public records request. (Jt. Exh. 8.)

27. On April 23, 2010, Wallack sent a request to Heffernan asking EOAF to waive charges for complying with the Globe's public records request. (Jt. Exh. 9.)

28. On May 4, 2010, Heffernan sent an email to Wallack advising that the Commonwealth would waive the fee for complying with the Globe's public record request and stating that the "documents are being gathered. Upon completion, the records will be forwarded

to you.” (Jt. Exh. 10.)

2. Health and Human Services

29. On March 8, 2010, Paulette Song (Song), the Deputy Communications Director for the Executive Office of Health and Human Services (HHS) notified the Governor’s Press Office of Wallack’s March 5, 2010 public records request to HHS. (Jt. Exh. 5.) Song sent the email to, among others, Kyle Sullivan and Haberlin, *id.* at 209, respectively then the Director and Deputy Press Secretary, Office of the Governor.

30. Haberlin responded to Song’s notification of Wallack’s request with an email stating “We’ll chat on Wednesday in the staff meeting.” (*Id.*)

31. On March 12, 2010, Lana Jerome, then the Human Resources Director for the Health Services Cluster, sent an email to Marianne Dill (Dill), the Labor Relations Director for the Health Services Cluster. (Jt. Exh. 11.) The email requested an estimate for responding to Wallack’s public record request. (*Id.*)

32. The Director of Labor Relations responded by email asking “Is it really legal for them to get settlement agreements? [E]ven if they say in them ‘not for publication[?]’” (*Id.*)

33. On March 18, 2010, Jeffrey McCue (McCue), then the Director of Human Resources for the Executive Office of Health and Safety (EHS), sent an email to eight members of the EHS senior staff notifying them of a meeting to address, among other things, the Globe’s public records request. (Jt. Exh. 14.)

34. By March 24, 2010, EHS had begun to compile the settlement agreements responsive to the Globe’s public records request. (Jt. Exh. 15.)

35. On or before April 1, 2010, a list had been prepared of 31 HHS settlements

responsive to the Globe's public records request. (Jt. Exh. 12.)

36. On March 30, 2010, Roger Tremblay, then the Human Resources Director for EHS, sent an email to Anna Filosi, then of the Department of Transitional Assistance (a department within EHS) attaching a list of nine settlements responsive to the Globe's public records request. (Jt. Exh. 16.)

37. On April 26, 2010, McCue, the Director of Human Resources for EHS, instructed Jerome to contact former employees whose settlement agreements had been compiled in response to the Globe's public records request. (Jt. Exh. 17.)

38. On or before April 29, 2010, EOHHS had attempted to contact eleven former employees whose settlement agreements were responsive to the Globe's public records request. Marianne Dill, the Director of Labor Relations for the HHS, reported that, of the eleven people, one was deceased, three responded that they were "all set," one "just wanted to know if they need to do anything and I said no," and messages either were left or attempted to be left with the remaining six. (Jt. Exh. 18.)

39. On May 13, 2010, Song sent an email to the Governor's Press office advising of a telephone call she had received from Wallack and asking for an update on the Globe's public record request. (Jt. Exh. 19.)

4. Executive Office of Education

40. On March 8, 2010, Jonathan Palumbo, then the Communications Director of the EOE, notified the Governor's Press Office of Wallack's public record request to the EOE. (Jt. Exh. 13.)

5. Executive Office of Public Safety and Security

41. On March 18, 2010, Terrel Harris, the Communications Director for EOPSS, sent Wallack an email stating that EOPSS was “currently in the process of searching for and reviewing our responses” to the Globe’s public records request.” (Jt. Exh. 20.)

6. Department of Transportation

42. On March 31, 2010, William Sweeney, then the Director of Payroll at DOT sent an email to Joan Makie, then the Director of Human Resources at Massachusetts Turnpike Authority, attaching a list of ten settlements responsive to the Globe’s public records request. (Jt. Exh. 21.)

43. On April 23, 2010, Colin Durant of the DOT provided the Governor’s Press Office with separation agreement information responsive to the Globe’s public records request. (Jt. Exh. 22.)

7. Executive Office of Energy and Environmental Affairs

44. On March 5, 2010, the EOEEA forwarded the Globe’s public records request to the Governor’s Press Office. (Jt. Exh. 5.)

8. Executive Office of Labor & Workforce Development

45. On March 31, 2010, Alison Harris, then the Director of Communications at EOLWD sent an email to members of the Governor’s Press office: Kyle Sullivan, then Director of Communications; Juan Martinez, then Press Secretary; and Haberlin, stating “Re Todd Wallack FOIA - we have 4 separation agreements at EOLWD - and at our Quasi Comm Corp - none.” (Jt. Exh. 23.)

46. On April 23, 2010, Wallack sent a request to Harris asking if documents responsive to the Globe’s public records request were available. (Jt. Exh. 24.) Harris forwarded

Wallack's request to the Governor's Press Office. (Id.)

47. On April 26, 2010, Gerald McDonough, then General Counsel of EOLWD, sent a letter to Richard E. Waring, Esq., counsel to the National Association of Government Employees, informing him of the Globe's public records request and identifying an employee whose settlement agreement was responsive to the request. (See Jt. Exh. 25.)

48. On April 29, 2010, Richard Waring, Esq., wrote to McDonough, General Counsel to EOLWD requesting that a specific settlement agreement be withheld from any materials that might be provided to the Globe. (Jt. Exh. 25.)

49. On May 7, 2010, McDonough sent an email to an unidentified person enclosing a copy of Wallack's March 5, 2010 public records request. (Jt. Exh. 26.)

50. On May 27, 2010, McDonough, General Counsel of the EOLWD, sent an email to an unidentified person stating that EOLWD had decided only to provide redacted versions of the settlement agreements and enclosing a copy of the redacted version of a settlement sent to a former employee. (Jt. Exh. 27.)

B. The Governor's Office Omnibus Response to the Globe's Public Records Request

51. On June 1, 2010, Reilly, Deputy Chief Legal Counsel to the Governor, wrote a letter to Wallack advising that settlement agreements responsive to the Globe's public records request would be produced redacted of employee names pursuant to exemptions (c), (o) and (p) of G. L. c. 4, § 7(26). (Jt. Exh. 28.) Other information that the Executive Offices determined was direct or indirect identifying information was redacted as well.

52. The redacted settlement agreements provided by the Executive Offices indicated

that a total of approximately \$3.2 million had been paid to public employees in settlement agreements from 2005 to 2010. (See Jt. Exh. 29.)

C. Wallack's Supervisor of Public Records Appeal

53. On June 2, 2010, Wallack filed an appeal with the Supervisor of Public Records challenging the redactions of employee names from the settlement agreements provided by the Executive Office. (Jt. Exh. 30.)

54. On October 5, 2010, the Supervisor issued an order on Wallack's appeal determining that the names of public employees who entered into the settlement agreements responsive to the Globe's public records request were public records that were not exempt under G. L. c. 4, § 7(26). (Jt. Exh. 31.)

55. On November 5, 2010, Reilly, Deputy Chief Legal Counsel to the Governor, wrote to the Supervisor of Public Records seeking reconsideration of the order entered on Wallack's appeal. (Jt. Exh. 32.)

56. On November 10, 2010, Richard L. Barry, General Counsel to the National Association of Government Employees, wrote to Reilly, Deputy Legal Counsel to the Governor, concerning the Globe's appeal to the Supervisor of Public Records. (Jt. Exh. 33.)

57. On January 5, 2011, the Supervisor of Public Records issued an order denying the Commonwealth's motion for reconsideration of the October 5, 2010 order on Wallack's appeal. (Jt. Exh. 34.)

58. On February 1, 2011, Reilly, who became Chief Legal Counsel to the Governor in December 2010, wrote a letter to Wallack advising that the Executive Offices would not comply with the Supervisor's order. (Jt. Exh. 35.)

59. On February 9, 2011, Alex Goldstein of the Governor's Press Office emailed Heather Johnson, then the Governor's Deputy Press Secretary, concerning a conversation he had with Wallack. (Jt. Exh. 36.)

60. In February 2011, the Globe made a supplemental request to the Executive Offices seeking separation, severance, transition, or settlement agreements made with executive branch public employees since March 5, 2010 that involved payments of more than \$100,000. (Jt. Exh. 37.)

61. On March 14, 2011, the Governor's Office again responded on behalf of the Executive Offices. (Jt. Exh. 38.)

62. In its response, the Governor's Office maintained and reiterated the position of the Executive Offices that the information previously redacted from the settlement agreements was exempt under the personal privacy and personnel exemptions of the Public Records law. (Id.)

63. On April 13, 2011, Mark Reilly, then Chief Legal Counsel to the Governor, provided a supplemental response to the Globe's two public records requests on behalf of the Executive Offices. The supplemental response included additional redacted settlement agreements. (See Jt. Exh. 1 at 365 et seq.)

64. As with the Executive Offices' earlier responses, the settlement agreements provided in the April 13, 2011 supplemental response were redacted of names and information that the Executive Offices determined was direct or indirect identifying information, which redactions the Executive Offices asserted were based on exemptions (c), (o), and (p) G. L. c. 4, § 7(26). (Id.)

65. On April 20, 2011, the Governor's Office, on behalf of the Executive Offices,

provided a further supplemental response to the Globe's two public records requests. The further supplemental response included additional redacted settlement agreements. (Id. at 373 et seq.)

66. As with the Executive Offices' earlier responses, the settlement agreements provided in the April 20, 2011 further supplemental response were redacted of names and other information that the Executive Offices determined was direct or indirect identifying information, which redactions the Executive Offices asserted were based on exemptions (c), (o), and (p) of G. L. c. 4, § 7(26). (Id.)

67. On May 14, 2012, the Supervisor issued an order in an appeal of the City of Cambridge's refusal to produce a copy of a settlement agreement with two Cambridge employees. On page 2 of his order, the Supervisor made further comments regarding the public records requests by the Globe that are at issue in the present matter. (Jt. Exh. 74.)

D. The Executive Offices' Notifications to Public Employees

68. In April, 2011, the Executive Offices sent 91 Letters to public employees advising them of the Globe's public records request and this litigation. (Jt. Exh. 39 [providing examples].)

69. In October and November 2011 and January 2012, the Executive Offices sent a second set of 86 letters to public employees updating them on the status of the Globe's public records request and this litigation. (Jt. Exh. 40 [providing examples].)

70. All 181 of the letters advised the public employees of their right to seek to intervene in this action and stated that the Executive Offices would support their request to do so.

71. The Executive Offices received one response to the 181 letters. (Jt. Exh. 41.)

72. All but one of the Executive Offices participated in the October-November 2011

and January 2012 second set of letters referenced in the preceding paragraph. The one Executive Office that did not participate, the Executive Office of Labor and Workforce Development, sent its second set of letters to public employees in November 2012. (Jt. Exh. 72.)

III. THE OFFICE OF THE COMPTROLLER REQUEST

73. On March 18, 2010, Wallack sent a public records request to the Office of Comptroller of the Commonwealth (OSC) asking for “copies of any separation, severance, transition or settlement agreements struck with employees of the Comptroller . . . since Jan. 1, 2005 that includes compensation, benefits or other payments worth more than \$10,000.” (Jt. Exh. 42.)

74. On May 27, 2010, Wallack sent an email to Caroline Henriques of OSC saying Joan Kenney, Public Information Officer for the Supreme Judicial Court, had provided him with a list of settlement payments made to court employees since January 1, 2005. Wallack also stated that the list was missing the names and that Kenney said that the OSC would have the data in an account used for legal settlements. (Jt. Exh. 43.)

75. On June 2, 2010, Wallack sent a follow up letter to the OSC concerning his request for settlement payments to court employees. (Jt. Exh. 44.)

76. On June 4, 2010, Wallack made a public records request to John Newell of the OSC asking for “electronic copy of the log/database of all payments made from the Settlements and Judgments accounts handled or tracked by the Comptroller of the Commonwealth since Jan. 1, 2005, including the date and amount of the payments, the recipient name, the agency/department that authorized the payment and other public data fields maintained in the log/database.” (Jt. Exh. 45.)

77. On June 7, 2010, the OSC advised Wallack that a response to his May 27, 2010 public records request for settlement payments made to court employees would take more than 10 days to process. (Jt. Exh. 46.)

78. On June 7, 2010, Wallack asked the OSC about the status of his March 18, 2010 public records request for settlement payments made to OSC employees. (Jt. Exh. 47.) The OSC responded that it did not have Wallack's March 18, 2010 request and asked him to send it again. (Id.) Wallack re-sent the March 18, 2010 request on June 8, 2010. (Jt. Exh. 48.)

79. On June 17, 2010, the OSC sent an email to Wallack stating its understanding that the Governor's Office's letter of June 1, 2010, was the OSC's response to Wallack's March 18, 2010 public records request. (Jt. Exh. 49.)

80. On June 23, 2010, the OSC sent Wallack a redacted copy of the sole settlement agreement responsive to his March 18, 2010 public records request. (Jt. Exh. 50.)

81. On July 1, 2010, Henriques of OSC sent an email to the OSC chief fiscal officers advising them of Wallack's June 4, 2010 public records request. (Jt. Exh. 51.)

82. On July 9, 2010, the OSC responded to Wallack's June 4, 2010 public records request by providing a spreadsheet of settlement payments that included the agencies that authorized the payments and the amount and date of each payment, but not the employees' names. (Jt. Exh. 52.)

83. The OSC used a pre-existing computer program to create a document listing for the requested period the agencies that authorized the payments and the amount and date of each payment. The Comptroller refused to include the names of the payment recipients in the documents or otherwise, on the grounds that the information was private.

84. On July 9, 2010, Wallack sent an email to Henriques of the OSC acknowledging receipt of the response to his March 18, 2010 public records request and asking for an unredacted version of the settlement agreement. (Jt. Exh. 52.)

85. On July 12, 2010, Wallack filed an appeal with the Supervisor of Public Records concerning the OSC's response to his June 4, 2010 public records request, which included the agencies that authorized the payments and the amount and date of each payment, but not employees' names. (Jt. Exh. 53.)

86. On July 13, 2010, the OSC sent an email to Wallack advising that the Supervisor of Public Records previously had confirmed that the OSC was not authorized to release names of employees who entered into settlement agreements with the Commonwealth because the disclosure would constitute an unwarranted invasion of privacy. (Jt. Exh. 53.)

87. On July 13, 2010, Shawn Williams of the Supervisor of Public Records' Office sent an email to the OSC asking for a clarification of the OSC's position that the Supervisor previously had confirmed that names of claimants could not be disclosed. (Jt. Exh. 54.)

88. On July 16, 2010, Jenny Hedderman, General Counsel of the OSC, sent an email to the Supervisor of Public Records attaching a December 5, 2005 letter to the Supervisor that had been relied on by the OSC as confirmation for not having to provide names (Jt. Exh. 55.)

89. On October 8, 2010, the OSC sent an email to the Supervisor of Public Records asking for meeting before Wallack's appeal was decided. (Jt. Exh. 56.)

90. On October 8, 2010, the Supervisor of Public Records responded to the OSC and agreed to hold Wallack's appeal pending their meeting. (Jt. Exh. 56.)

91. The OSC met with the Supervisor of Public Records on October 14, 2010 to

discuss Wallack's appeal of the OSC's response to his public records request of June 4, 2010.

(Jt. Exh. 57.) No representative of the Globe was invited to or attended the meeting.

92. On December 10, 2010, Martin Benison, the Comptroller, wrote to the Supervisor of Public Records opposing Wallack's appeal. (Jt. Exh. 57.)

93. On January 14, 2011, Wallack made a public records request to the Comptroller asking for records of any settlement or judgment payments made to Cognos since January 1, 2005 exceeding \$50, and records of any payments exceeding \$50 from the account to Gov. Patrick or Comptroller Martin Benison. (Jt. Exh. 58.)

94. On January 19, 2011, Wallack sent a letter to Henriques of the OSC narrowing his June 4, 2010 request to payments exceeding \$1,000. (Jt. Exh. 59.)

95. On February 14, 2011, Wallack sent a follow-up email to the OSC concerning his January 14, 2011 public records request. (Jt. Exh. 60.)

96. On March 11, 2011, the Supervisor of Public Records denied the Globe's appeal of the OSC's response to Wallack's June 4, 2010 public record request. (Jt. Exh. 96.)

97. On March 22, 2011, the OSC responded to Wallack's January 14, 2011 public records request stating that no settlement payments had been made to Comptroller Benison. The letter further advised that the OSC "cannot provide any information related to payments to any specific individual," and therefore could not respond to questions about any settlement payments to the Governor. (Jt. Exh. 61.)

98. On March 22, 2011, Alex Goldstein, then the Governor's Press Secretary, sent an email to Wallack stating that Gov. Patrick had not received any financial settlements from the Commonwealth. (Jt. Exh. 62.)

99. On March 24, 2011, Wallack sent an email to the OSC asking a question about the records concerning a \$100,000 settlement payment made by the Commonwealth to a public employee. (Jt. Exh. 63.)

100. On March 28, 2011, the OSC sent an email responding to Wallack's questions about the settlement. (Jt. Exh. 64.) The OSC's response did not mention the former employee by name, and redacted his name from Wallack's email. (Id.)

101. On April 4, 2011, Wallack emailed Comptroller Benison asking to speak to him about the terms of a \$100,000 severance agreement Benison signed with a staff member in 2007. (Jt. Exh. 65.)

102. On April 5, 2011, Comptroller Benison sent an email to Wallack stating that he could not talk about the settlement with a former employee because of the Globe's pending lawsuit and, given the applicable exemption to the public records law, any such discussion would be limited in any case. (Jt. Exh. 66.)

103. The Commonwealth budgeted and spent \$10 million for settlements and judgments in fiscal year 2012. (Comptroller's FY2013 Q1 Report.)

IV. THE REQUEST TO MASSPORT

104. In or about March 2010, the Globe made a request to Massport pursuant to the Massachusetts Public Records Law, G. L. c. 66, § 10, asking for copies of all separation, severance, transition, or settlement agreements entered into by and between Massport and public employees involving payments of more than \$10,000 since January 1, 2005.

105. In response to the Globe's requests, Massport produced partial copies of the requested documents redacted of the names of Massport public employees who received

payments under the agreements and advised the Globe that it was doing so in accordance with the position stated by the Governor's Office.

V. THE MASSACHUSETTS OPEN CHECKBOOK WEB SITE

106. The Commonwealth maintains a web site called "Massachusetts Open Checkbook." The web site is available to the public at the following URL:

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FHome&Page=page%201.

107. Visitors to the Open Checkbook web site are advised of the following:

The Commonwealth is committed to providing citizens with open and transparent government. Last year the legislature passed and the governor signed into law new transparency and accountability reforms as part of the FY 2011 Budget. As part of this proactive approach to civic engagement, the Executive Office for Administration & Finance, the Office of the Treasurer and the Office of the Comptroller have been working jointly on the Open Checkbook Website. (Id.)

108. The Open Checkbook web site makes available the following payroll information to members of the public:

a. The name, corresponding title, department, and current salary of all employees of the Commonwealth. See

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Payroll;

b. Details regarding pension recipients including their last job title and last department, along with their pension amount. See

http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FPension

2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Pensions; and

c. Tax Credit recipients for the Tax Credit Program. See http://opencheckbook.itd.state.ma.us/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FTransparency%2F_portal%2FAdditional%20Spending&Page=Tax%20Expenditures

109. Open Checkbook Project is a Commonwealth of Massachusetts project that the EOAF, OSC and Office of the Treasurer have worked jointly on. See <http://www.mass.gov/osc/guidance-for-agencies/open-checkbook.html>.

VI. PUBLIC INFORMATION ABOUT PERSONS WHO MAKE CLAIMS AGAINST THE COMMONWEALTH.

110. Tort claims against the Commonwealth “for injury of loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment” must be presented in accordance with the provisions of Massachusetts General Laws Chapter 258, the Massachusetts Tort Claims Act. None of the employee agreements at issue in this case involves a tort claims made under Chapter 258.

111. The official web site of the Office of the Attorney General makes available to the public a Presentment Claim Form to assist in complying with the requirements of c. 258 for tort claims. The web site does not have a comparable form for employment-related claims.

112. The Attorney General’s web site advises members of the public who submit a Presentment Claim Form of the following:

Please also be aware that, under most circumstances, your presentment claim will be considered a public record and will be available to any member of the public upon request.

See <http://www.mass.gov/ago/government-resources/cafa-and-claims.html>.

113. The Presentment Claim Form provided by the Attorney General to members of the public also states:

Read this important notice and sign your presentment claim.

- Under most circumstances, your presentment claim will be considered a public record and will be available to any member of the public upon request.

See <http://www.mass.gov/ago/docs/government/presentment-claim-form.pdf> (emphasis in original).

114. The Supervisor of Public Records publishes a Guide to the Massachusetts Public Records Law available at <http://www.sec.state.ma.us/pre/prepdf/guide.pdf>.

115. Pages 13-14 of the Guide state as follows:

Are settlement agreements exempt under the Public Records Law? No. The public interest in the financial information of a public employee outweighs the privacy interest where the financial compensation in question is drawn on an account held by a government entity and comprised of taxpayer funds. Additionally, the disclosure of the settlement amount would assist the public in monitoring government operations. Therefore, exemptions to the Public Records Law will not operate to allow for the withholding of settlement agreements as a whole. However, portions of the agreements, and related responsive records, may be redacted pursuant to the Public Records Law.

(Id.)

VII. STIPULATIONS CONCERNING THE REDACTED SETTLEMENT AGREEMENTS PRODUCED

116. The redacted settlement agreements produced to the Globe appear as Exhibit 1

and have been sequentially bated-stamped. In total, there are eighty-nine (89) redacted settlement agreements, covering 404 pages.

VIII. STIPULATIONS REGARDING EMPLOYMENT-RELATED SETTLEMENT AGREEMENTS⁴

117. Private employers often use settlement agreements as a means of resolving employment-related disputes. (Testimony of Administration HR official on witness list)

118. Settlement agreements are a widely used means of resolving employment-related disputes in both the private and public sectors. (Testimony of Administration HR official on witness list)

119. Settlement agreements allow employers to reduce an employment-related dispute to a sum certain and to avoid the time, expense, and uncertainty of litigation. (Testimony of Administration HR official on witness list)

120. On April 11, 2011, the Globe published an article written by Wallack under the headline “State payouts sealed with a promise of silence.” The article is available at: http://www.boston.com/business/articles/2011/04/24/state_payouts_sealed_with_a_promise_of_silence/?page=full. The text of article is as Jt. Exhibit 78.

IX. OFFICE OF THE COMPTROLLER STIPULATIONS

121. The OSC has promulgated regulations at 815 CMR 5.00 governing the payment of settlements and judgments by agencies of the Commonwealth.

122. The OSC’s regulations are “applicable to the payment of settlements and judgments for claims against the Commonwealth and its agencies.” 815 CMR 5.02.

⁴ The stipulations in this Section VIII are not based upon testimony or evidence admitted at trial.

123. The OSC's regulations state that when litigation involving a monetary claim against the Commonwealth terminates in a final settlement or judgment, the agency attorney or staff person assigned to handle or monitor the claim must prepare a report indicating:

- a. the principal amount of the settlement or judgment;
- b. the amount of any attorney's fee award;
- c. the amount of any interest award or accrued, and whether the interest continues to accrue post-judgment;
- d. a request for payment of the amount;
- e. a description of the basis for the request, (e.g., court order or settlement agreement); and
- f. whether the assigned attorney desires to award the payment check to the Claimant.

815 CMR 5.09(1)(a).

124. The OSC requires the agency then to forward to the General Counsel of the Comptroller the report described above, along with a copy of the settlement agreement or judgment. 815 CMR 5.09(1)(b).

125. The OSC is required to review the report, certify the amount due and payable, review agency accounts related to the claim to determine whether funds are available to pay the claim, and consult with the agency regarding available funds. 815 CMR 5.10(1).

126. In February 2010, the OSC issued a memorandum entitled "Public Information Requests – Data Definitions for Reports Available Regarding State Payroll and State Workforce." (AG Doc. 66-73.)

127. The OSC's memorandum describes the "Comptroller's Media Report" as a "snapshot" report that runs quarterly on a set Pay Date schedule. Id. at 1 (AG Doc. at 66.)

128. The OSC's Media Report includes people paid any gross pay as of the date of the report. It gives prior calendar year earnings and excludes all reimbursement codes as well as settlement and judgment payments. (Id.)

129. The OSC is required under G. L. c. 66A, §2(a) to "identify one individual immediately responsible for [the OSC's] personal data system who shall insure that the requirements of this chapter for preventing access to or dissemination of personal data are followed."

130. The OSC's Media Report "excludes certain employees for the following reasons; as victims of domestic violence in accordance with General Laws (G.L.) c. 66 s.10 (d) as well as human service clients or residents earning nominal wages for rehabilitation services in accordance with G.L. c. 4 s, 4(26) (c) and HIPPA restrictions." (Id.)

131. In addition, the OSC "determined that, under the Family Educational Rights and Privacy Act (FERPA), the work records of students (undergraduate or graduate) who work for the University or other higher education college WHILE A STUDENT are protected from disclosure of their work information (title, salary, hours, name, dept). Therefore, students paid are excluded." (Capitalization in original.) (Id.)

132. The field descriptions included in the OSC's Media Reports include:

a. Department – 3 letter code of the department employing Employee. If the employee has multiple paid jobs in that pay period, all jobs will be listed

b. Name – Employee's Last Name, First Name and Middle Initial.

Employees may be known informally by another name or variations of the name. For example, someone may use her legal name for payroll but use maiden name in departmental business.

c. Job Title – Current Position title Description for employee, Human Resource or Department entered field.

d. Std Hours – Standard Hours. For Executive Branch Employees, positions are either a standard 37.5 or 40 hours. Departments enter a standard weekly number of work hours for each employee, either full time (37.5 or 40) or some number of part time hours less than the full time amount.

e. Annual Rate – Calculated field based on standard hours times hourly rate times 52.

f. Earnings – Total of Earnings to the employee for prior calendar year. If the employee worked in multiple jobs during the prior year, all applicable earnings are included. If the employee did not work in the previous calendar year, the field will be blank.

Id.

133. The types of payments are:

- Taxable payments: Base salary, overtime, supplemental pay (shift differentials, longevity, etc.).
- Non-taxable payments: Employee reimbursements (mileage, travel, etc.), Assault Pay, etc.
- Cash: Taxable payments plus non taxable payments.
- Non-cash or Imputed Income: Taxable fringe benefits such as employer provided

parking over the exclusion amount, use of a state vehicle for personal use, health benefits to non-federal eligible spouses, etc.

- Pre-tax deductions: Contributions to Regular Retirement; Dependent Care Assistance Plan and fees; Deferred Compensation under Internal Revenue Code §457(b) for both Voluntary and Mandatory (OBRA 90) contributions; Tax Sheltered Annuities under Internal Revenue Code §403(b); Health Insurance Premiums, Health Care Spending Account contributions and fees; and Transportation expenses

(Id. at 4.)

134. The term “Assault Pay” as used above is as defined in Massachusetts statutes.

135. A true copy of the online version of a March 7, 2011 Globe article by James Vaznis entitled “Public employee unions will pitch plan on health insurance,” with accompanying online commentary by readers as of November 30, 2012, appears as Joint Exhibit 70.

136. A true copy of the online version of a April 7, 2011 Patriot Ledger article by Matt Murphy entitled “Public employee unions resist pension, benefit cuts,” with accompanying online commentary by readers as of November 30, 2012, appears as Joint Exhibit 79.

137. A true copy of a January 14, 2009 “Closing Agreement on Final Determinations Covering Specific Matters” between the Commonwealth of Massachusetts and the United States Commissioner of Internal Revenue, along with true copies of related correspondence and an accompanying check, appears as Joint Exhibit 84.

138. The Massachusetts Port Authority generates its own revenues, accepts no taxpayer funds from the Commonwealth, and does not receive money from the Commonwealth’s general fund. (Jt. Exh. 5; tr. 89: 20-25, 90: 1-7 [Testimony of Todd Wallack].)

SUPPLEMENTAL FINDINGS OF FACT

I. TESTIMONY OF TODD WALLACK

1. Prior to his hire as a reporter for the Globe, Wallack had been employed by the San Francisco Chronicle. He had an interest in reporting stories which involved the field of government responsibility.

2. His work at that newspaper had included reporting on governmental payments made to settle claims, particularly those involving employees in the University of California public educational system. His investigative journalistic efforts focused upon the settlement of claims involving high-level public employees and on whether particular agencies of government had settled an inordinately high number of employee claims. His attempts to secure information about such settlements initially were unsuccessful, as a consequence of a policy of non-disclosure cited by officials responsible for dissemination of public records within that system.

3. Ultimately, it was determined that a policy cited as barring disclosure of the terms of such settlement agreements was in conflict with policies in place under existing law in that state. Materials ultimately released revealed terms of a particular settlement agreement arrived at between the system and a high level employee, which in that case provided for payment to the employee of continued salary while specifically requiring modest or no work requirements.⁵

4. Wallack was hired by the Globe in 2009 where he was first assigned to work as a

⁵ These matters were contained in Wallack's testimony, and they were not the subject of dispute in questioning or argument by counsel for EOAF or the Interveners. Wallack's testimony as to this is credited on the issue of his past experience and journalistic focus, and not for the purpose of any necessary relevance to any of the settlement agreements at issue in the present litigation.

business reporter.

5. While Wallack was making his public record requests as referenced in ¶ 15, et seq., ante, he had directed requests to several specific agencies of the Commonwealth which did respond with particular information. These included the Massachusetts Technology Collaborative and the Massachusetts Commission Against Discrimination, each of which did furnish names of employees who had been paid under settlement agreements. It also included the University of Massachusetts and the Office of the Treasurer, each of which provided some, but not all of the names of employees who had received funds under settlement agreements.⁶

6. When Wallack was told that a basis for EOAF's claim of non-disclosure was that certain of the agreements contained confidentiality provisions, he endeavored to seek to contact an employee who had been a party to an agreement containing such a provision in order to learn, if possible, the origin of its inclusion.

7. He was successful in speaking with one such employee, Daniel Grabauskas, who had held the position of General Manager with the Massachusetts Bay Transportation Authority. Wallack learned that the insertion of that provision had not originated with Grabauskas or any legal representative acting on his behalf and that Grabauskas had discovered its inclusion only when he had reviewed the final draft of the settlement agreement.

II. THE TESTIMONY OF JENNY HEDDERMAN

8. Jenny Hedderman occupies the position of General Counsel to OSC, in which capacity she advises the state Comptroller. OSC's legal office consists of two attorneys

⁶ The University system proffered as its basis for this disparity in treatment that it was disclosing names where the dispute had been the subject of a public lawsuit.

including herself, and OSC has 120 employees overall.

9. OSC is charged with acting as the accounting authority for all income and expenses for each of the roughly 150 separate agencies of the Commonwealth. It is responsible for financial reporting for all of those agencies to the Internal Revenue Service and the Commonwealth's Department of Revenue.

10. Any settlements entered by any of these state agencies is reported to OSC. Those settlements may implicate issues of taxation, and the obligation for accurate reporting of such matters falls to OSC.⁷ Accurate reporting as to the fact of these payments and the identity of their recipients is vital, as any error in that reporting to the federal taxing authority could subject the Commonwealth to financial penalties.

11. OSC focuses strictly on the accounting and tax reporting issues raised by these settlements; factual analysis of the underlying dispute is irrelevant to and beyond its charged responsibilities. OSC does not necessarily receive information which would enable it to determine whether release of the contents of any settlement agreement would implicate the privacy interests of a recipient of settlement proceeds.

12. In its operation of the Comptroller's Media Report referenced in ¶ 126 et seq., ante, OSC bases its exclusion of the few limited categories of state funds recipients exempted from disclosure by state or federal statute upon a code inserted by the reporting agency, so that it is that agency itself, rather than OSC, which has made that determination as to applicability of exclusion.

⁷ Hedderman cited as an illustration a settlement in which a component of the payment might be in the form of fees paid to the recipient's attorney.

13. OSC itself had one settlement of a claim brought by one of its own employees in which that claimant was paid monies by the Commonwealth. That settlement agreement did contain a provision which called for both confidentiality and non-disparagement. It was not determinable from the hearing evidence at whose instance, OSC or its employee or both, those provisions were included in that settlement agreement.⁸

RULINGS OF LAW

“The public records law opens records made or kept by a broad array of governmental entities to public view” (footnote omitted). Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 452-453 (2007), citing Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 382-383 (2002), and Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 436 (1983). “The statute expresses the Legislature’s considered judgment that ‘[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner,’ Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1979), and that ‘[g]reater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government,’ New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Ct. of Bristol, 377 Mass. 404, 417 (1979) (Abrams, J., concurring)” (alterations and omission in original). Id. at 453. “[T]he statute obligates certain government entities to produce all ‘public records’ for inspection, examination, and copying in response to a proper public records request made by any

⁸ While Hedderman initially asserted her belief that the employee who received the settlement funds and his attorney had asked those clauses be inserted, her responses on re-direct and re-cross were characterized by significant uncertainty, and the court does not credit her tentative initial supposition as to the impetus for the inclusion of those clauses.

'person' (footnote omitted). Id. at 453-454, citing Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976), and quoting G. L. c. 66, § 10(a).

However, "[n]ot every record or document kept or made by the governmental agency is a 'public record.'" Id. at 454. "The statute specifies [certain enumerated] categories of materials or information that fall outside the definition of a 'public record,' either permanently or for a specified duration." Id., citing G. L. c. 4, § 7, and Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. 587, 591-592 & n.14 (2005). "If a dispute over a withheld document is brought to court, the statute establishes a clear 'presumption that the record sought is public' and places the burden on the record's custodian to 'prove with specificity the exemption which applies' to withheld documents." Id., quoting G. L. c. 66, § 10(c). "Given the statutory presumption in favor of disclosure, exemptions must be strictly construed." Attorney Gen. v. Assistant Comm'r of Real Prop. Dep't of Boston, 380 Mass. 623, 625 (1980), citing Attorney Gen. v. Assessors of Woburn, 375 Mass. 430, 432 (1978); Georgiou v. Commissioner of Dep't of Indus. Accidents, 67 Mass. App. Ct. 428, 432 (2006). "To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt 'segregable portion' of the record is subject to public access." Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. at 383, quoting G. L. c. 66, § 10 (a), and citing Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 287-288, 290 (1979).

In this case, the defendants produced copies of the requested agreements redacted both of the names of the public employees who were parties to the agreements and of other information the defendants claimed could permit identification of those individuals. In addition, OSC produced a spreadsheet of the requested settlement payments redacted of the names of the public

employees to whom those payments had been made. The defendants argue that the employees' names and the other withheld information are statutorily exempted from disclosure. In support of this contention, they cite two categories of exemptions contained in the law which governs public records disclosure which they contend are applicable: first, as "personnel . . . files or information;" and second, as "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, Twenty-sixth, (c). The Court addresses these arguments in turn.

I. THE "PERSONNEL FILE OR INFORMATION" EXEMPTION

Under the public records law of the Commonwealth, "personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual." Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 438. Although the legislative term "personnel files or information" has not been defined with precision, "it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee." Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. 792, 798 (2000). "These constitute the core categories of personnel information that are 'useful in making employment decisions regarding an employee.'" Id., quoting Oregonian Publ. Co. v. Portland Sch. Dist. No. 1J, 329 Or. 393, 401 (1999).

However, "[n]ot every bit of information which might be found in a personnel . . . file is necessarily personal so as to fall within the exemption's protection." Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 435. For instance, "the legislation does not exempt from disclosure a personnel record wholly unrelated to any individual's privacy interest," Wakefield

Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 800, nor does it permit withholding “[e]mployer records that . . . are properly viewed as payroll records . . . rather than as ‘personnel [file] or information’ as that term is used in G. L. c. 4, § 7, Twenty-sixth (c), even though such data might also be located in an individual employee’s personnel file” (omissions and second alteration in original), id. at 801 n.17. Such nonexempt payroll data include the employee’s name, base pay, overtime pay, miscellaneous payments, and gross pay of individual public employees, Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. 812, 817-818 (1978), among other items, see Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 799-802 & n.17. At base, “[t]he scope of the exemption falls on the character of the information sought.” Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 435.

In light of this developed case law, it is reasonably clear that the defendant public entities were not in all cases required under the public records law of Massachusetts to produce unredacted copies of the separation, severance, transition, or settlement agreements which the plaintiff had requested. Certain information contained in the agreements submitted as exhibits at the trial of this case trenches upon the core “personnel information” identified in Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 798. Without routing through the details of each and every one of the eighty-nine agreements at issue, the information that properly was subject to redaction may generally be classified into the following categories: (1) promotion of grade; (2) compensation at a different salary grade; (3) adjustment in compensation; (4) waiver of bumping rights and/or recall rights; (5) entitlement to remain on administrative leave; (6) requirement to tender a letter of resignation; (7) demand of voluntary resignation; (8) reinstatement; (9) layoff; (10) agreement by an agency to remove a letter from a personnel file;

(11) agreement by an agency concerning the providing of references and their contents; (12) the requirement that an employee meet with a supervisor to review progress of assigned matters; (13) adjustment of an agency's records to reflect an employee's status; (14) adjustment or continuation of employee benefits, such as unemployment assistance, COBRA, and retirement benefits, and agreement regarding back wages; (15) recitations concerning grievances, including agreement to withdraw a grievance and acknowledgment by an employee of the absence of a pending grievance; (16) a statement of resolution of all claims concerning termination of employment and prior disciplinary actions, (17) agreement to turn in agency property, (18) global resolution involving the entering of a *nolle prosequi* by a prosecutorial official; (19) language affirming an agency's legitimate concern for discipline and an employee's receipt of a memorandum of verbal discipline; and (20) completion by an employer of harassment training.⁹

The distinguishing characteristic of these categories of information is their manifest "useful[ness] in making employment decisions regarding an employee," *id.* Such portions contained in the agreements which have been submitted as exhibits are entitled to be withheld from mandatory disclosure.

The defendants are not permitted, however, under the principles of governing law to redact from either the agreements or the OSC spreadsheet of settlement payments, the names of public employees who receive public funds in settlements of claims, or other information on the basis simply that it might facilitate identification of those individuals. The redaction of that

⁹ Although perhaps a closer question, legal authority supporting the redacting of information would not appear to extend as far as language contained in the agreements which does not directly involve that specific employee's personnel or discipline matters, but instead refers to generic types of employment law claims and sets forth the categories of those claims, such as age discrimination or hostile work environment, which the employee agrees to waive.

identifying information may have been viewed as an expedient means to meet the defendants' obligation to safeguard personnel information based upon a belief that excised of names, the employee agreements and OSC payments document could not be "of a personal nature and relate to a particular individual," Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 438.¹⁰ But the method used did not satisfy the defendants' obligation to disclose the nonexempt "segregable portion" of the records sought, see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. at 383. The plaintiff should have been provided the names of the public employees in addition to information reflecting any settlement payments or other financial disbursements.¹¹ See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818.

The defendants make two arguments citing grounds based upon public policy that the names of employees who have received settlements should not be ordered disclosed. The defendants first argue that withholding the public employees' names from the records which the plaintiff requested furthers the "government's ability to function effectively as an employer,"

¹⁰ The Court is mindful of the defendants' additional concern about compliance with the Fair Information Practices Act (FIPA). That statute bars "[a]gencies" from providing access to "personal data" in their possession, G. L. c. 66A, § 2(c), with potential liability for damages and litigation costs as a consequence of noncompliance, G. L. c. 214, § 3B. See Tivnan v. Registrar of Motor Vehicles, 50 Mass. App. Ct. 96, 100 & n.5 (2000). As the defendants acknowledge, however, "[i]nformation contained in public records is exempted from the definition of 'personal data' contained in FIPA. G. L. c. 66A, § 1." Allen v. Holyoke Hosp. 398 Mass. 372, 379 (1986).

¹¹ To be clear, OSC is not required to produce copies of any agreements forwarded to it by other government entities. On the facts of this case, OSC's obligations extend to producing the spreadsheet of the requested settlement payments with the names of the individuals included and, like the other defendants, to producing copies of the agreements to which OSC itself is a party, subject to redaction. Further, neither OSC nor any agency subject to this ruling will be required to provide the name of any funds recipient the identity of whom is barred from disclosure by state or federal law. See Office of the Comptroller Stipulations, ¶ 130 and 131, and Supplemental Findings of Fact, ¶ 12.

Wakefield Teachers Ass'n v. School Comm. of Wakefield, 431 Mass. at 802. They cite the ability to promise confidentiality as a factor which could help to expedite settlement negotiations and possibly allow parties to reach settlements of disputes with employees that might otherwise elude resolution. The defendants argue that public employees will be dissuaded from signing settlement agreements if the facts and terms of those agreements will be made public.

For support, the defendants point to language in Wakefield Teachers Ass'n v. School Comm. of Wakefield, *supra*. In that case, the Supreme Judicial Court did make reference to the benefit of the personnel exemption generally as a means to facilitate the government's ability to function as would a private employer. See 431 Mass. at 802. This observation, however, does not lead to the conclusion that a governmental agency's understandable desire to operate under ground rules analogous to those permissible for a private entity authorizes an unwarranted and legally untenable expansion of the exemptions to the law governing disclosure of public records. Even if it is true that government might function more economically in its role as employer if it could enter into confidential agreements, this would not serve as a basis to override case law which has asserted that the names of public employees simply are not the "kind of private facts that the Legislature intended to exempt from mandatory disclosure" under the personnel information exemption, see Brogan v. School Comm. of Westport, 401 Mass. at 308, quoting Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818. The language cited in Wakefield Teachers Ass'n v. School Comm. of Wakefield, *supra*. does not suggest otherwise.

Further, the great weight of legal authority runs solidly counter to the defendants' contention. Courts which have considered the issue have rejected uniformly the argument that settlement agreements should be kept confidential based upon the risk that disclosure might serve

to chill the prospects for future settlements between employees and public entities. See, e.g., Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989); Denver Publ. Co. v. University of Colo., 812 P.2d 682, 684-685 (Colo. App. 1990); Des Moines Indep. Community Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 669 (Iowa 1992); Tribune-Review Publ. Co. v. Westmoreland County Hous. Auth., 574 Pa. 661, 673 (2003); Yakima Newspapers, Inc. v. City of Yakima, 77 Wash. App. 319, 328 (1995).

Particularly in the absence of apposite authority to the contrary, and the defendants cite none, the court finds no basis to determine that Massachusetts law interpreting issues related to public records' disclosure is at variance to the position taken by the very clear majority of courts which have dealt with this issue.

Building on their first policy contention, the defendants advance a second closely-related argument, that an interpretation of the law which has the effect of dissuading public employees from settling claims would "undercut the well-established public policy favoring the private settlement of disputes," Cabot Corp. v. AVX Corp., 448 Mass. 629, 638 (2007), citing Ismert & Assocs. Inc. v. New England Mut. Life Ins. Co., 801 F.2d 536, 550 (1st Cir. 1986). Courts which have considered this argument have squarely rejected it, concluding to the contrary that the specific provisions of an open records statute "reflect a policy determination favoring disclosure of public records over the general policy of encouraging settlement." Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d at 1193; Lexington-Fayette Urban County Gov't v. Lexington Herald-Leader, 941 S.W.2d 469, 472-473 (Ky. 1997). There is no reason to assume that the law of the Commonwealth should reflect with any less force that same guiding principle. Our public records law manifests a wholly parallel and equally compelling specific interest on the part of the

Commonwealth's citizens to be able to monitor and to evaluate the affairs of their government. See Attorney Gen. v. Collector of Lynn, 377 Mass. at 158. See, e.g., Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. at 592, quoting General Elec. Co. v. Department of Env'tl Protection, 429 Mass. 798, 802 (1999) (citing the policy which favors broad public access to government documents and the presumption of disclosure).

II. THE PERSONAL PRIVACY EXEMPTION

The defendants argue an alternative basis for their contention that the identities of the settling employees are exempt from disclosure under the second clause of G. L. c. 4, § 7, Twenty-Sixth (c), the personal privacy exemption to the public records statute. Analysis of this exemption “requires a balancing between the seriousness of any invasion of privacy and the public right to know.” Attorney Gen. v. Collector of Lynn, 377 Mass. at 156, citing Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818-19; Georgiou v. Commissioner of Dep't of Indus. Accidents, 67 Mass. App. Ct. at 432-433. “Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest.” Attorney Gen. v. Collector of Lynn, 377 Mass. at 156, citing Campbell v. United States Civil Serv. Comm'n, 539 F.2d 58, 62 (10th Cir. 1976).

In identifying the existence of privacy interests, the Supreme Judicial Court has suggested that courts should consider whether the public disclosure would “result in personal embarrassment to an individual of normal sensibilities,” *id.*, citing cases; whether the materials sought would disclose “facts involving ‘intimate details’ of a ‘highly personal’ nature,” Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818, quoting Getman v. NLRB, 450

F.2d 670, 675 (D.C. Cir. 1971); and whether “substantially the same information is available from other sources,” Attorney Gen. v. Collector of Lynn, 377 Mass. at 157. See In the Matter of Subpoena Duces Tecum, 445 Mass. 685, 688-689 (2006), quoting Globe Newspaper Co. v. Police Comm’r of Boston, 419 Mass. 852, 858 (1995). The Court has also observed that “the expectations of the data subject are relevant in determining whether disclosure of information might be an invasion of privacy,” and, thus, that “the same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another.” (Citations omitted.) Torres v. Attorney Gen., 391 Mass. 1, 9 (1984); see Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 434.

In the context of this second cited exemption, the Court agrees that the defendants were not obligated to produce unredacted agreements in response to the plaintiff’s records request. If the various agreements in the record of this case were not subject to redaction based upon the “personnel files or information” grounds as described in the preceding portion of this ruling, then the nature of the content of that information as linked to particular identities might well weigh strongly against disclosure under the personal privacy exemption. See, e.g., Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 435. However, it is not the disclosure of the employees’ names themselves which brings into play their privacy interests; rather, the privacy exemption would be triggered by exposing their particularized personnel-related information to public view. In effect, the Legislature has established that disclosure of personnel information necessarily constitutes “an unwarranted invasion of personal privacy.” See Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 436; Wakefield Teachers Ass’n v. School Comm. of Wakefield, 431 Mass. at 800-801. Put differently, where

disclosure involves those particular categories of personnel information set forth in the prior section, the exemptions in the first and second clauses of G. L. c. 4, § 7, Twenty-Sixth (c), on the factual circumstances presented here, may be seen as functionally coextensive.

Since, as referenced earlier, the agreements produced must be redacted of all contextual personnel information, there is no basis for redaction of the identities of the public employees from disclosure based upon the privacy exemption. It is a matter of settled law that “[p]ublic employees, by virtue of their public employment, have diminished expectations of privacy.” Pottle v. School Comm. of Braintree, 395 Mass. 861, 866 (1985), citing Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818-819; Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. at 436 n.15. Disaggregated from the protected personnel information, the identities of the employees and the other information contained in the agreements are “wholly unrelated to any individual’s privacy interest,” Wakefield Teachers Ass’n v. School Comm. of Wakefield, 431 Mass. at 800, and, therefore, are not subject to exemption.¹² Cf. Georgiou v. Commissioner of Dep’t of Indus. Accidents, 67 Mass. App. Ct. at 435.

Essentially what remains after the records are properly redacted are the identities of the public employees, the entities for which they work or had worked, the financial consideration they may have received as part of the agreements, and various formulaic legal provisions which are unrelated to specifics which properly fall within the personnel-related. These sorts of facts and miscellaneous data, as the Supreme Judicial Court consistently has held, do not implicate a

¹² Within the universe of possible provisions contained in future settlement agreements, it is conceivable that one may trench upon a privacy interest which does not directly implicate exemption under the personnel file and information exemption as is the case with the agreements at issue here. The court’s ruling does not suggest that redaction of any such information before disclosure would be impermissible in such circumstances.

right of privacy.¹³ See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818; Pottle v. School Comm. of Braintree, 395 Mass. at 862; Brogan v. School Comm. of Westport, 401 Mass. at 308-309; Cape Cod Times v. Sheriff of Barnstable County, 443 Mass. at 594-595.

Weighing on the other side of the balance to be considered in determining the scope of the privacy exemption is the public's recognized right to be informed about its government's expenditures, see, e.g., Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818, and its "interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner," Attorney Gen. v. Collector of Lynn, 377 Mass. at 158. See, e.g., Yakima Newspapers, Inc. v. City of Yakima, 77 Wash. App. at 328 (noting public agency's settlement agreement should be able to withstand public scrutiny). That interest unquestionably is one of a compelling nature which warrants recognition. See Hastings & Sons Publ. Co. v. City Treasurer of Lynn, 374 Mass. at 818 (citing the "paramount right of the public to know what its public servants are paid" in the context of public access to municipal payroll records). In sum, once they have been redacted of "personnel information," public disclosure of the contents of the various agreements at issue in this case does not constitute an unwarranted invasion of privacy under the exemption contained in G. L. c. 4 § 7, Twenty-sixth (c).

¹³ The interveners have posited an additional argument against disclosure based upon privacy grounds. They note that stories concerning public employees elicit responses often vitriolic in nature, in the interactive reader/subscriber comments feature which many media entities operate in their internet editions. (Exhibit 79.) The interveners' argument, that many such comments, which are very often posted by persons afforded concealment behind a cloak of anonymity, are unfair and uninformed, may be true. The fact of media publication or transmission of hurtful and even malicious sentiments, however, affords no legal basis for the shading of the interpretation of the public records law in a manner not consistent with its language and with precedential case law.

ORDER FOR ENTRY OF JUDGMENT

It is therefore **ORDERED, ADJUDGED, and DECLARED** that:

1. records of separation, severance, transition, or settlement agreements entered into by and between the defendant government entities and public employees involving payments of more than \$10,000, since January 1, 2005, redacted, where applicable, only of the employee's home address, telephone number, and "personnel information" as described in this decision, are public records subject to mandatory disclosure under G. L. c. 66, § 10; and

2. records of payments made from the Office of the Comptroller's account for settlements and judgments since January 1, 2005, redacted, where applicable, only of the employee's home address, telephone number, and "personnel information" as described in this decision, are public records subject to mandatory disclosure under G. L. c. 66, § 10.

Date: June 14, 2013



Thomas A. Connors
Justice of the Superior Court