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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
2014-03952

BOSTON GLOBE MEDIA PARTNERS, LLC

vs.

CITY OF BOSTON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

This action arises out of a public records request made by the plaintiff, Boston Globe Media Partners, LLC (“the Globe”), pursuant to the Massachusetts Public Records Law, G.L. c. 66, § 10, for information about employees of the defendant, City of Boston (“the City”). The City declined to comply with the Globe’s request insofar as it sought records that include the race or ethnic group of each individual employee. Before the court is the City’s motion for summary judgment as to both counts of the Globe’s complaint, as well as the Globe’s cross-motion for summary judgment seeking declaratory and injunctive relief. For the reasons that follow, the City’s motion for summary judgment is **DENIED**, and the Globe’s cross-motion for summary judgment is **ALLOWED**.

BACKGROUND

On or about March 31, 2014, the Globe requested from the City public records in the form of: (1) payroll records as of March 31, 2014, from all departments, including for each employee the name, gender, race, or ethnic group, date of hire, whether they are union or non-union, department, title, annual salary, zip code where the employee lives, and whether they

resigned, were terminated, or retired; and (2) a list of all City employees from all departments who have been terminated, retired, or resigned since February 1, 2014, including for each employee the name, gender, race or ethnic group, date of hire, date of departure, whether they are union or non-union, department, title, annual salary, zip code where the employee lives, and whether they resigned, were terminated, or retired.

The City responded to the Globe's request on April 22, 2014 by providing all records requested except those that identified the gender, race, or ethnic group associated with specifically named employees. According to the City, such information was exempt from disclosure under G.L. c. 4, § 7(26)(c).

On May 12, 2014, the Globe appealed the City's determination to the Supervisor of Public Records ("Supervisor"). During the pendency of the appeal, on May 23, 2014, the City released a record identifying the gender of named employees, but refused to release their race and ethnicity. On September 2, 2014, the Supervisor denied the Globe's appeal, ruling that the City properly withheld the race and ethnicity of its employees because such information is exempt from disclosure as "personnel information" under the first clause of the exemption set forth in G.L. c. 4, § 7(26)(c).

The Globe commenced this action on December 17, 2014, seeking a determination under G.L. c. 231A, § 1 that the race and ethnicity of public employees are non-exempt public records under G.L. c. 66, § 10, and an order under G.L. c. 66, § 10(b) compelling the City to comply with the Globe's request.

DISCUSSION

Summary judgment is granted where there are no genuine issues of material fact and

where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). The moving party may satisfy this burden either by submitting affirmative evidence negating an essential element of the opposing party's case, or by demonstrating that "the party opposing the motion has no reasonable expectation of proving an essential element of that party's case."

Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991). If a case only involves a question of law, a court will grant summary judgment to the party entitled to judgment as a matter of law. Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983).

I. Standard of Review

The Globe filed the present action as one for injunctive and declaratory relief pursuant to G.L. c. 66, § 10(b) and G.L. c. 231A, § 1. The City contends, however, that the court should treat this case as an action brought under G.L. c. 30A, and thereby apply a standard that is more deferential to the Supervisor's determination. It is well established that G.L. c. 30A generally governs judicial review of a final decision of an agency in an adjudicatory proceeding. See, e.g., Doe, Sex Offender Registry Bd., No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 108-109 (2014); Salem v. Massachusetts Comm'n Against Discrimination, 44 Mass. App. Ct. 627, 640-641 (1998); Lisbon v. Contributory Ret. Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996). Here, however, nothing in the language of the public records statute, or precedent interpreting such statute, mandates a filing of a claim under G.L. c. 30A.¹ In fact, the statute contains its own

¹ In the case relied upon by the City, Leeman v. Cote, 2006 Mass. Super. LEXIS 404, 21 Mass. L. Rep. 411 (Sept. 18, 2006) (Sikora, J.), the plaintiff filed the action under G.L. c. 30A, and the court found review under c. 30A to be proper. That case does not, however, stand for the proposition that review under c. 30A is the exclusive remedy for a party seeking access to public records. In any event, this decision is not binding precedent.

administrative and judicial remedies for a party seeking public records: § 10(b) provides that in the event that a custodian of a public record refuses or fails to comply with a request, “the person making the request may petition the supervisor of records for a determination whether the record requested is public.” Subsections (b) and (c) contain a judicial remedy in the following language:

If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the . . . superior court shall have jurisdiction to order compliance. (c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

Cases that have interpreted and applied this language have not treated the aggrieved party’s claim as one under G.L. c. 30A, and have certainly not required the aggrieved party to seek relief under c. 30A. See, e.g., Wakefield Teachers Ass’n v. School Comm., 431 Mass. 792, 793 (2000) (“Wakefield”) (plaintiff brought action as one for declaratory and injunctive relief); Georgiou v. Commissioner of Dep’t of Ind. Accidents, 67 Mass. App. Ct. 428, 430 (2006) (plaintiff brought complaint for declaratory and injunctive relief in Superior Court after supervisor of records determined that records sought were exempt; no discussion of mandating review under c. 30A).

Moreover, it is not clear to the court that review under G.L. c. 30A is available here. Nothing in the language of the statute requires the Supervisor to hold a hearing before making a determination, and the parties have not demonstrated that the Globe has a constitutional right to a hearing as required by G.L. c. 30A. See G.L. c. 30A, § 1 (relief only available after adjudicatory proceeding, which is defined as “a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing”); see

also School Comm'n of Hudson v. Board of Educ., 448 Mass. 565, 577 (2007) (if agency decision is not made in adjudicatory proceeding, court will lack jurisdiction to review case under G.L. c. 30A, § 14).

In any event, assuming *arguendo*, that the Globe brought this action as a G.L. c. 30A appeal, the court would nonetheless allow summary judgment in its favor. As G.L. c. 66, § 10 contains a provision relative to the form of review of the Supervisor's decision, review of such decision is governed by the public records statute; the court only looks to G.L. c. 30A for the *standard* of review. See G.L. c. 30A, § 14 (where "a statutory form of judicial review . . . is provided such statutory form shall govern in all respects, except as to standards for judicial review"). For the reasons discussed below, the Supervisor's decision was incorrect as a matter of law.

II. Personnel Exemption

The City argues that racial and ethnic information as to specifically named City employees is exempt from disclosure as "personnel . . . files or information" under G.L. c. 4, § 7(26)(c) because it may play a role in employment determinations. The court does not agree.

The public records statute, G.L. c. 66, § 10, mandates disclosure of public records upon request. The primary purpose of the statute is "to give the public broad access to governmental records." Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 3 (2003) ("Worcester"). "Public records are broadly defined and include all documentary materials made or received by an officer or employee of any corporation or public entity of the Commonwealth, unless one of [the] statutory exemptions is applicable." Wakefield, 431 Mass. at 796 (internal citation omitted). Because of the statute's presumption in favor of disclosure, the

statutory exemptions must be strictly and narrowly construed. Globe Newspaper Co. v. DA for Middlesex Dist., 439 Mass. 374, 380 (2003) (internal citation omitted). In a court proceeding to enforce compliance with the request of any person to inspect or copy a public record, “there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.” G.L. c. 66, § 10(c).

General Laws c. 4, § 7(26)(c) creates two categories of records exempt from public disclosure: first “personnel and medical files or information” and second, “any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.” Wakefield, 431 Mass. at 796-797.² “While exempting ‘personnel [file] or information’ from the broad definition of ‘public record,’ the statute does not define ‘personnel [file] or information.’” Worcester, 58 Mass. App. Ct. at 5. The cases make clear, however, that the definition “is neither rigid nor precise and that the determination is case-specific.” Id. The scope of the exemption turns on the character of the information sought. Id. at 6.

At a minimum, the term personnel files includes “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee.” Wakefield, 431 Mass. at 798. “These constitute the core categories of personnel information that are ‘useful in making employment decisions regarding an employee.’” Id. (internal citation omitted).

However, materials within the personnel files or information category is not limited to,

² The City asserts no claim that the materials are exempt under the second category of (26)(c), for “other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy” (“the privacy exemption”).

nor does it extend to, all files or information that are located physically in an individual employee's personnel file. Id. at 799; see also Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 435 (1983) ("Not every bit of information which might be found in a personnel or medical file is necessarily personal so as to fall within the exemption's protections."). "[T]he legislation does not exempt from disclosure a personnel record wholly unrelated to any individual's privacy interest, such as a generic job description or generic qualification requirement for a particular level of position that might constitute part of a personnel record." Wakefield, 431 Mass. at 800. "For example, an employee's personnel file may contain an employee's name, home address, date of birth, and social security number." Id. at 799. Although these records are "'personal' in that they pertain to a particular individual, they are not 'useful in making employment decisions' regarding a particular employee" Id. In addition, the reports of law enforcement, witness interview summaries, and an internal affairs report are not part of a "personnel . . . file or information" exempt from disclosure under G.L. c. 4, § 7. Worcester, 58 Mass. App. Ct. at 6-8.

Applying this framework to the information sought in this case, the court finds that the race and ethnicity of City employees does not fall within any accepted interpretation of the term "personnel . . . files or information." G.L. c. 4, § 7(26)(c). Indeed, the race and ethnicity of City employees does not constitute a work evaluation, performance assessment, disciplinary report, or promotion, demotion, or termination information—the core categories of personnel information determined to be useful in making employment decisions. See Wakefield, 431 Mass. at 798; Worcester, 58 Mass. App. Ct. at 8. Nor does this information relate to an employee's education or qualifications for employment. Worcester, 58 Mass. App. Ct. at 10.

The information sought does not play a role in employment determinations in the manner contended by the City. The City is required to collect race and ethnicity data and report it to the Equal Employment Opportunity Commission. The City may, in turn, use this information to monitor its hiring practices and promote a more diverse workforce. Nevertheless, an employee's race or ethnicity is completely independent from the employee's education or qualifications for employment. See *id.* at 6-7. Unlike a performance evaluation or disciplinary report, an employee certainly cannot be promoted, demoted, or terminated on account of his or her race or ethnicity. While this information is likely physically placed within an employee's personnel file, that fact alone does not transform it into an assessment of the employee's qualifications, documentation of performance or disciplinary report, or any other information related to promotion, demotion, or termination.

Furthermore, an employee's race and ethnicity are not of a "personal nature," or the "kind of private facts that the Legislature intended to exempt from mandatory disclosure." *Brogan v. School Comm. of Westport*, 401 Mass. 306, 308 (1987) (comparing to *Globe Newspaper Co.*, 388 Mass. at 438, and finding that names of employees, and dates and generic classifications of absences as sick or personal day not inherently "of a personal nature" in the same manner as information as to a named individual's medical condition).³ It is axiomatic that one's race and

³ As the City points out, the Supreme Judicial Court subsequently clarified in *Wakefield*, 431 Mass. at 800, that the personnel exemption must not be interpreted to require that the personnel information concern "intimate details of a highly personal nature." Nevertheless, a review of Massachusetts precedent reveals that the personal nature of the information sought is, at the very least, relevant to the determination of whether such information falls within the personnel exemption. See *id.* (public records statute does not exempt personnel information that is wholly unrelated to an individual's privacy interest); *Globe Newspaper Co.*, 388 Mass. at 438 ("[M]edical and 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."); see

ethnicity is more akin to one's gender, information which the City has already agreed to release, than a personal medical condition or a poor performance review.

The court's holding is not inconsistent with the legislative purpose behind the exemption to protect the government's ability to function effectively as an employer. Wakefield, 431 Mass. at 802. As the court found in Worcester, "[i]t would be odd, indeed, to shield from the light of public scrutiny as 'personnel [file] or information' the workings and determinations of a process whose quintessential purpose is to inspire public confidence." 58 Mass. App. Ct. at 9. The purpose of obtaining race and ethnicity data is to prevent discrimination and promote a diverse workforce by ensuring that the City provides equal access to opportunity to all individuals, regardless of their race or ethnicity. The court does not find that the Legislature sought to shield from public scrutiny information that is collected for the very purpose of protecting the rights of the public. Indeed, "the nature and character of [this information], and the context in which [it arises], take [it] beyond what the legislature contemplated when exempting 'personnel . . . files or information.'" Id.

The City argues that disclosure of race and ethnicity data will impede upon the privacy rights of its employees. While the statute "does not exempt from disclosure a personnel record wholly unrelated to any individual's privacy interest," Wakefield, 431 Mass. at 800, the effect of disclosure on an employee's privacy interest is more properly an issue in the application of the second exemption of G.L. c. 4, § 7(26)(c), which pertains to "other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." Id. at 799. The court's inquiry with respect to the personnel exemption is


also Brogan, 401 Mass. at 308.

“limited to ‘whether the records sought are or contain [personnel files or information].’” Id. at 799-800. Where the information sought is essentially of a nonpersonal nature, and does not play a factor in employment decisions in the manner protected by the exemption, it simply does not qualify as personnel information.

Accordingly, the court finds that the City has failed to meet its burden of proving, with specificity, the applicability of the “personnel . . . files or information” exemption.

ORDER

For the foregoing reasons, it is hereby ordered that the City’s motion for summary judgment be **DENIED**, and the Globe’s cross-motion for summary judgment be **ALLOWED**. Judgment shall enter forthwith in favor of the Globe on Counts I and II of the Globe’s complaint. It is hereby **DECLARED** that the race and ethnic origin of specifically named City employees is a non-exempt public record under G.L. c. 66, § 10. The City of Boston is hereby **ORDERED** to comply with the Globe’s request for public records of the race and ethnicity of specifically named City employees.



Mary K. Ames
Justice of the Superior Court

DATED: May 9, 2016