



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

Shawn A. Williams
Supervisor of Records

February 13, 2014
SPR13/235

Mr. Diego Ibargüen, Esq.
Hearst Corporation
300 West 57th Street
New York, NY 10019-3792

Dear Attorney Ibargüen:

This office has received your petition appealing the response of the MBTA Retirement Fund to the requests for public records made by Kathy Curran of WCVB-TV. See G. L. c. 66, § 10(b); see also 950 C.M.R. 32.08(6). Specifically, Ms. Curran sought access to and copies of records of the MBTA Retirement Fund and its Board.

Public Entity Status

The first matter of consideration with respect to Ms. Curran's public records requests requires a determination as to whether the Fund or its Board are considered a public entity subject to the requirements of the Public Records Law and Access Regulations (Regulations). See G. L. c. 66, § 10(b); 950 C.M.R. 32.00. The Supreme Judicial Court (SJC) held that the Fund is not a public entity to the extent that it does not perform an essentially governmental function and does not receive or expend public funds. See Massachusetts Bay Transportation Authority Retirement Board v. State Ethics Commission, 414 Mass. 582 (1993) (Board I); see also Globe Newspaper Co. v. Massachusetts Bay Transportation Authority Retirement Board, 416 Mass. 1007 (1993) (Board II).

In Board I, the SJC held that the Fund was not a state agency for the purposes of the Conflict of Interest Law (G.L. c. 268A). In its finding, the SJC developed a five-factor test, where no one factor was dispositive, that the SJC used in making a determination that the Fund was not a public entity. In Board II, the SJC further held that its prior opinion governed with respect to the Public Records Law, where records of the Fund were not considered public records subject to disclosure.

In a matter of appeal before this office where the public status of an entity receiving a public records request is challenged, this office will utilize the five-factor test developed by the SJC in Board I. When a petitioner has made a request for records, and subsequently challenges the response from the records custodian that its records are exempt from the Public Records Law, this office will render a finding after analyzing the structure and character of the organization with respect to each of these five factors. With respect to Ms. Curran's requests, such analysis of each factor is not required. In Board I and Board II, the SJC unequivocally held that the Fund is not considered a public entity for the purposes of the Public Records Law. Of particular importance with respect to the SJC opinion is the analysis it devoted to the third factor, which addressed the issue of whether the Fund receives or expends public funds.

In an analysis of the funds contributed to the Fund, the SJC held that these funds, like funds paid to private health care providers, are a contractually determined form of employee compensation. Board I at 591. Upon transfer to the Fund, the contributed funds are irrevocable and become private in nature once paid to the Fund. Id. In summary, the SJC held that the Fund does not receive or expend public funds.

Definition of "Public Records"

In your petition to this office, you contend that a 2013 legislative amendment to the definition of "Public Records" now renders the Fund's records subject to public disclosure. The amended definition states as follows:

"Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32

G. L. c. 4, § 7(26)

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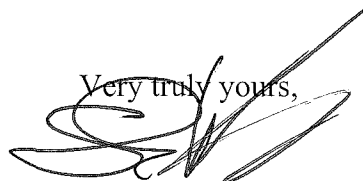
While your claim warrants a more detailed review from this office, it is my finding that the statutory language included within the amendment does not alter the SJC holding that the Fund's records are not subject to public disclosure. The amended definition, passed as part of the FY2014 appropriations act, includes the following language; "or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions." See G. L. c. 4, § 7(26). By comparison, the third factor outlined by the SJC as part of its "public entity" test utilizes the exact same language stated as follows: "whether the entity receives or expends public fund." See Board I at 590.

In a letter to this office, Fund and Board Counsel Carl Valvo noted that a Senate bill specifically identified the Fund as an entity whose records were subject to disclosure. However, the Legislature adopted language that failed to include any direct reference to the Fund.

While a consideration of legislative intent is critical to the reading of any statutory language, I must look to the actual language adopted by the Legislature. The adopted language refers to entities receiving or expending public funds. Whereas the SJC clearly stated that the Fund does neither of these, the amended language will not operate to compel the Fund or its Board to disclose records pursuant to a request made under the Public Records Law.

Accordingly, whereas the amended portion of the Public Records Law does not apply to the Fund or its Board, I will consider this administrative appeal closed.

Very truly yours,



Shawn A. Williams
Supervisor of Records

cc: Mr. Carl Valvo, Esq.