

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF BOSTON

and

MUNICIPAL POLICE PATROLMEN'S ASSOC.  
IBPO LOCAL 650

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Case No. MUP-15-4753

Date Issued:  
February 10, 2016

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Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Robert J. Boyle, Jr. Esq. - Representing the City of Boston

James J. Dever, Esq. - Representing the Municipal Police  
Patrolmen's Association

HEARING OFFICER'S DECISION AND ORDER

Summary of the Case

1 The issue in this case is whether the City of Boston (Employer or City)  
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts  
3 General Laws, Chapter 150E (the Law) by failing to provide certain information to  
4 the Municipal Police Patrolmen's Association/IBPO Local 650 (Union). I find that  
5 the Employer unlawfully failed to provide the information requested by the Union.



1           2. September 5, 2013 1:24 p.m. email to Dashner and Pedersen; and  
2           3. September 6, 2013 9:43 a.m. email to Pedersen.  
3  
4   At the conclusion of the hearing, I left the record open and directed the City to  
5   submit the email messages at issue, which the City claimed were protected by  
6   the attorney-client privilege, to the DLR by November 16, 2015 for an *in camera*  
7   review.

8           The City declined to produce the documents and appealed my order to the  
9   Commonwealth Employment Relations Board (CERB).<sup>2</sup> The CERB issued a  
10   ruling on December 7, 2015, affirming my order and extending the due date for  
11   submission of the emails from November 16 to December 11, 2015. On  
12   December 23, 2015, the City advised DLR Executive Secretary Edward B.  
13   Srednicki that it would not produce the emails for the *in camera* review.<sup>3</sup>

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<sup>2</sup> I ordered the City to produce the documents for an *in camera* review, despite the absence of a request from either party, to aid my consideration of the City's contention that the emails are covered by the attorney-client privilege. See generally, In re Grand Jury Subpoena (Mr. S.), 662 F. 3<sup>rd</sup> 65 (1<sup>st</sup> Cir. 2011) (a court may be well advised to conduct an *in camera* review to determine whether documents are privileged even if the parties do not request such a step.) I need not address the City's arguments that my order was contrary to law and an abuse of discretion because the CERB decided those issues in the ruling that it issued on December 7, 2015.

<sup>3</sup> I need not take an adverse inference from the City's failure to comply with the CERB's directive because other evidence persuades me that the City did not meet its burden to establish that the attorney-client privilege protected the disputed emails. See generally, Bellingham Teacher's Association, 9 MLC 1536, 1548, MUPL-2336 (December 30, 1982) (when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him, citing Auto Workers v. NLRB, 459 F. 2d. 1329 (D.C. Cir.1972)).

1 Consequently, I closed the record on that date. The parties filed post-hearing  
2 briefs on or about January 8, 2016.<sup>4</sup> After reviewing the record evidence and the  
3 parties' arguments, I make the following findings of fact and render the following  
4 decision.<sup>5</sup>

5 Stipulations of Fact

- 6 1. The City of Boston (City) and the MBTA signed a Memorandum of  
7 Understanding on October 23, 2013, that concerned the assignment of police  
8 details for the Government Center Station construction project. The MOU is  
9 marked as Joint Exhibit 1.  
10  
11 2. On or about April 11, 2014, the Boston Municipal Police Patrolmen's  
12 Association, IBPO Local 650 (Union) filed a grievance with the City stating that

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<sup>4</sup> The City argued for the first time in its post-hearing brief that my *in camera* review order was premature and should only have issued after analyzing the evidence and deciding the case. I disagree. It was clear at the conclusion of the hearing that an *in camera* review would be necessary to determine whether or not the disputed email messages that Callahan sent to Pedersen and Dashner were privileged. As discussed below, there was no evidence offered at hearing indicating that anyone advised Dashner and Pedersen that inquiries from Callahan and William Sinnott (Sinnott) were confidential and should not be disclosed. No additional analysis was necessary to reach this conclusion. Viewing the documents *in camera* would have allowed me to determine, among other things, whether Callahan instructed Dashner and Pedersen to keep the information that they received and produced confidential.

Additionally, the City cites no case where a fact-finder conducted an *in camera* review only after reaching a final decision. The procedure that the City proposes would unnecessarily delay the resolution of this case by requiring a hearing officer to assess the evidence twice and draft two separate decisions. Additionally, in City of Boston v. Labor Relations Commission, 61 Mass. App. Ct. 397 (2004), the Appeals Court reversed the former Labor Relations Commission because it had not reviewed the personnel evaluation at issue before it decided that no harm would flow from its disclosure.

<sup>5</sup> The CERB's decision does not suggest that I cannot render a decision without the unredacted emails. Rather, it affirms my view that seeing the unredacted emails *in camera* would have produced a more complete record.

1 the MBTA Police and the Boston Police are working paid details on City Hall  
2 Plaza for the ongoing work being done at Government Center T Station, which is  
3 the work of the BMPPA/IBPO Local 650 members. The grievance is marked as  
4 Joint Exhibit 2.

5  
6 3. The City denied the grievance at Step 1 on April 15, 2014, at Step 2 on April  
7 18, 2014, and Step 3 on July 1, 2014. The City's denials at Steps 1 and 2 are  
8 marked as Joint Exhibit 2a. The City's denial at Step 3 is marked as Joint Exhibit  
9 3.

10  
11 4. The Union filed a demand for arbitration of the grievance on or about August  
12 19, 2014 with the American Arbitration Association.

13  
14 5. The parties held the first day of arbitration on July 1, 2015 before Arbitrator  
15 Tammy Brynie.

16  
17 6. City Property and Construction Management Department Deputy  
18 Commissioner Joseph Callahan (Callahan) testified at the July 1, 2015 arbitration  
19 as a City witness.

20  
21 7. The City and the Union scheduled a second arbitration date for September 10,  
22 2015. The arbitration date was subsequently rescheduled for February 19, 2016.

23  
24 8. The Union served the City with an information request on July 27, 2015. The  
25 Union's July 27, 2015 information request is marked as Joint Exhibit 7B. The  
26 Union requested the following information:

27  
28 1. Any and all email and/or electronic exchanges between Joseph  
29 Callahan and Joseph Dashner regarding the Government Center  
30 MBTA construction MOU, which is the subject of the underlying  
31 grievance. Please include the entire email exchange on or about  
32 August 14, 2013, between said individuals; and

33  
34 2. Any and all email and/or electronic exchanges between Joseph  
35 Callahan and Frank Pedersen regarding the Government Center  
36 MBTA construction MOU which is the subject of the underlying  
37 grievance. Please include the entire email exchanges(s) on or  
38 about August 14, 2013 and September 5/6, 2013 between said  
39 individuals.

40  
41 9. The City of Boston did not produce the email chains identified in the Union's  
42 information request and asserted the attorney-client privilege. City Attorney  
43 Robert Boyle (Boyle) responded to the Union's July 27, 2015 information request

1 on July 29, 2015. Boyle's response is marked as Joint Exhibit 8 and states as  
2 follows:

3  
4 *Hi Jim-*

5 *Getting back to you on your information request. It seeks production of specific*  
6 *email chains.*

7  
8 *You had portions of these email chains containing statements from Frank*  
9 *Pedersen and Joseph Dashner marked for identification during the first day of*  
10 *arbitration hearings.*

11  
12 *This is to let you know that the email chains at issue concerned communications*  
13 *from the City's Corporation Counsel, William Sinnott. They were privileged and*  
14 *confidential attorney-client communications.*

15  
16 *The fact that there has been a disclosure of portions of these emails chains does*  
17 *not waive the claim of privilege. The privilege belongs to the City, not to the*  
18 *individuals who apparently made unauthorized disclosure.*

19  
20 *Also, please let me know the identity of any witnesses that the Union expects to*  
21 *call at the September 10, 2015 hearing.*

22  
23 *Best regards,*  
24 *Bob Boyle*

25  
26 10. On July 30, 2015, Union attorney James Dever (Dever) responded to the  
27 City's July 29 response as follows:

28  
29 *Bob: The email chains being requested is for the complete emails for both Union*  
30 *ID Exhibit 1 and Union ID Exhibit 2, for the above-cited arbitration [AAA 01-14-*  
31 *0001-2382]. As you can see, neither email is a communication chain from City*  
32 *corporation counsel William Sinnott, nor any other attorney. The email chain of*  
33 *August 14, 2013, is between Mr. Dashner, Mr. Callahan, Mr. Pedersen, Mr.*  
34 *Stearns and/or Mr. Galvin. Similarly, the email chain of September 5/6, 2013, is*  
35 *between Mr. Dashner, Mr. Pedersen and Mr. Callahan. Again, the Union is*  
36 *seeking these complete email chains, and not any communications that are*  
37 *privileged.*

38  
39 *Thus, please explain how the information sought is privileged, and a confidential*  
40 *attorney-client communication. A failure to provide a legal clarification, or*  
41 *alternatively the documents requested, may result in the union seeking recourse*  
42 *through the Department of Labor Relations.*

43

1 *Thank you.*  
2 *Jim*

3

4 11. On August 4, 2015 at 3:55 p.m., Dever sent an email to Boyle regarding the  
5 Union's July 30 email referenced in paragraph 10 above. Dever's email message  
6 stated:

7

8 *Bob: When you have a moment, may you please response to the [July 30 email]?*  
9 *Your response may have an impact on the arbitration date, and we should let*  
10 *witnesses/arbitrator know as soon as possible if that is the case.*

11

12 *Thank you,*  
13 *Jim*

14

15 12. On August 6, 2015 at 11:53 a.m., Attorney James Dever sent the following  
16 email to the American Arbitration Association [AAA]:

17

18 Hello Arbitrator Brynie: Please see the attached, as the IBPO, Local  
19 650 filed yesterday (August 5, 2015) a charge of prohibited  
20 practice against the city of Boston regarding our above-cited  
21 arbitration. Specifically, the city of Boston has refused to provide a  
22 complete version of the emails marked as Union Id 1 and Union Id  
23 2, claiming attorney-client privilege. As noted in the attached  
24 charge, the emails being sought are not communications with an  
25 attorney. Thus, the IBPO, Local 650 is seeking the production of  
26 the emails through the Department of Labor Relations.

27

28 Due to this recent development the IBPO, Local 650 is seeking that  
29 the underlying arbitration be placed in abeyance pending resolution  
30 of this issue. A reason we have continued the arbitration was to  
31 have testimony on the record regarding the emails being sought.  
32 Thus, it does not seem to be productive, and it's prejudicial to the  
33 union's cause, to have an arbitration regarding these emails without  
34 the entire emails. Alternatively, if you believe you have the authority  
35 to compel the city of Boston to produce the emails, or would take  
36 an adverse inference against the city for its failure to produce the  
37 emails, the union would be willing to proceed as scheduled on  
38 September 10, 2015. Please advise when you have a moment.

39

40

41 13. At 12:27 p.m. on August 6, 2015, Attorney Robert Boyle emailed the  
42 American Arbitration Association in response to Attorney Dever's email as  
43 follows:

1  
2 The City objects to the union's request to place the grievance  
3 arbitration in abeyance and requests a conference call with  
4 Arbitrator Tamm[y] Brynie.

5  
6 At the first day of arbitration, the Arbitrator informed the union that  
7 the two email messages that it offered and that were marked for  
8 identification would not be sufficient and the Arbitrator was clear  
9 that the authors of those emails would have to appear for  
10 testimony. I have asked counsel for the identity of union witnesses  
11 for the second day but have not received any response.

12  
13 Instead, counsel has requested the entire email chains from which  
14 Union Exhibits 1 and 2 for ID were derived.

15  
16 The emails that the union offered into evidence were portions of  
17 email chains that were initiated by the City's Corporation Counsel,  
18 William Sinnott. The City asserts its privilege as to the email  
19 communication.

20  
21 The union is free to pursue its unfair labor practice complaint at the  
22 DLR, but that is a matter completely irrelevant to this arbitration  
23 given that the Arbitrator has been clear to the union that the emails  
24 are insufficient and that Frank Pedersen and Joseph Dashner  
25 would have to appear and testify at the second day of hearing  
26 scheduled for September 10, 2015.

27  
28 14. On August 4, 2015, Boyle sent an email to Dever in response to Dever's 3:55  
29 p.m. August 4 email. Boyle's email message stated:

30  
31 *Hi Jim,*  
32 *Just tried to call you via phone. I answered you July 29, 2015. See above. If*  
33 *you want to discuss, please call. I am not going to have an email debate with*  
34 *you. Thank you.*

35  
36 *Bob Boyle*

37  
38 Dever telephoned Boyle on or about August 5, 2015 in response to Boyle's  
39 August 4, 2015 email. In their conversation, Boyle stated that the City stood by  
40 its position that the requested information was privileged.  
41

1 15. On August 19, 2015 at 4:22 p.m., Arbitrator Brynie emailed a message  
2 through AAA Case Administrator Emily Earle to Boyle and Dever that stated as  
3 follows:

4  
5 *Counsel:*

6 *I have received and reviewed your recent correspondence.*

7  
8 *First, I decline to accede to the Union's request to place this matter in abeyance,*  
9 *pending resolution of a DLR matter.*

10  
11 *Instead, I regard the Union's August 6<sup>th</sup> communication as, in effect, a request to*  
12 *postpone the scheduled September 10<sup>th</sup> day two of arbitration in this matter.*

13  
14 *The City has raised a number of concerns and objections. At this time, I decline*  
15 *to rule upon, or otherwise comment about, evidentiary or document production*  
16 *matters, including the Union's request for the e-mail chains and the City's*  
17 *asserted privilege.*

18  
19 *I will, however, grant a request to postpone the September 10 hearing date. I*  
20 *note that the original March 31 date was postponed, at the City's request, and*  
21 *rescheduled for July 1<sup>st</sup>. An initial scheduling alteration request by the Union is*  
22 *being treated in a similar manner.*

23  
24 *Having granted the Union's request to postpone and reschedule day two of*  
25 *arbitration, I offer my currently next available dates to reschedule: January 19,*  
26 *2016 and February 19, 2016.*

27  
28 *I look forward to our next day of hearing.*

29  
30 *T. Brynie*

31  
32 16. Joint Exhibit 5 was the collective bargaining agreement that was relevant to  
33 the arbitration.<sup>6</sup>

34  
35 Findings of Fact

36  
37  

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<sup>6</sup> The parties signed stipulations 1-15 prior to the hearing and agreed during the hearing to add number 16.

1 **City Departments and Personnel in 2013**<sup>7</sup>

2           The City of Boston maintains a cabinet form of government. Cabinet  
3 officers are senior officials who advise the City's Mayor and oversee City  
4 departments. In 2013, Cabinet officers included Chief of Public Property Michael  
5 Galvin (Galvin), Chief of Policy Michael Kineavy (Kineavy), Boston Police  
6 Commissioner Edward F. Davis (Davis), Chief of Personnel and Labor Relations  
7 John Dunlap (Dunlap), and others not named in the record.

8           The City's Law Department handles the City's legal affairs. The Law  
9 Department has two divisions: the Government Services Division that deals with  
10 contracts, transactions, and licensing issues, and the Litigation Division. The  
11 City's Corporation Counsel oversees all of the City's legal matters and acts as  
12 the legal advisor for all of the City's departments and officials. In 2013, Attorney  
13 William Sinnott was the City's Corporation Counsel, and his first assistant was  
14 Henry Luthin (Luthin), who supervised the Government Services Division of the  
15 Law Department.

16           In 2013, the Law Department employed a legal advisor, Amy Ambarik,<sup>8</sup>  
17 and five additional attorneys at the Boston Police Department (BPD), a legal

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<sup>7</sup> The record does not contain a complete list of the City's departments. Also, these findings describe positions that various individuals held in 2013, since that is when the negotiations and email messages at issue occurred. I make no findings on whether the individuals noted remained in their positions past 2013.

<sup>8</sup> Ambarik held a dual role and reported to both Davis and Sinnott. Peter Geraghty (Geraghty), a line attorney for the Boston Public Schools legal advisor's office, worked for Ambarik.

1 advisor and five additional attorneys at the Boston Public Schools and  
2 approximately 25 more attorneys at City Hall. Adam Cederbaum (Cederbaum)  
3 and Catherine Lizotte (Lizotte) both held senior corporation counsel positions.  
4 Chong Liu (Liu) was a Law Department paralegal who worked on permitting and  
5 licensing issues regarding City Hall Plaza. Caroline Driscoll (Driscoll) was a line  
6 assistant counsel and a member of the Government Services Division.

7       The City's Property and Construction Management Department (PCMD)  
8 manages and protects City municipal buildings. In 2013, Galvin was the Chief of  
9 Public Property, and Callahan was the Deputy Commissioner. Frank Pedersen  
10 reported to Callahan and supervised the PCMD's Municipal Protected Services  
11 Division (MPS), which is informally called "Security." Pedersen is a member of a  
12 middle manager bargaining unit which is represented by the Salaried Employees  
13 of North America (SENA).

14       MPS has a police force that is separate from the Boston Police  
15 Department. MPS police officers provide security services for certain City  
16 buildings and properties and are represented by the IBPO in two separate  
17 bargaining units: the Municipal Police Patrolmen's Association (Local 650) and  
18 the Municipal Police Superior Officers Association (Local 539). Michael Stearns  
19 (Stearns) is a sergeant employed by the MPS and a member of the Superior  
20 Officer's bargaining unit.

21       In 2013, Police Commissioner Davis oversaw the BPD and advised the  
22 City's Mayor on law enforcement issues. Ambarik was the BPD's legal advisor

1 and chief attorney, Daniel Linskey (Linskey) was the Boston Police Chief, Steven  
2 Sutliff (Sutliff) was a BPD labor attorney, and Alfredo Andres (Andres) was the  
3 Deputy Superintendent of the BPD's labor affairs. Joseph Dashner was a Boston  
4 Police Sergeant who worked in City Hall to oversee and supervise the City's  
5 Municipal Police force. Dashner acted as an intermediary between the BPD and  
6 the MPS and provided arrest powers to the PCMD.

7 Dunlap headed the City's Department of Labor Relations in 2013, and  
8 Paul Curran (Curran) was the Department's Director of Labor Relations. Thomas  
9 Tinlin (Tinlin) was the City's Transportation Department Commissioner, and  
10 Kevin Morrison (Morrison) was the General Counsel of the Boston  
11 Redevelopment Authority.

#### 12 **Negotiation of the MOU**

13 At an undisclosed point in time, the MBTA decided to renovate the  
14 Government Center subway station on Boston's City Hall Plaza to, among other  
15 things, make it accessible to subway riders with special needs. In or about May  
16 of 2013, the MBTA held a meeting at its Boston headquarters to discuss a  
17 construction project that would add elevators and work on the subway tracks (the  
18 Project). Representatives from the MBTA, the City, the Massachusetts  
19 Department of Transportation (MassDOT) and the BPD attended the meeting,  
20 including Sinnott, Tinlin, Callahan and others. There were no representatives of  
21 the MPPA at this meeting.

1           After the meeting, the City, MassDOT and the MBTA began to negotiate a  
2 memorandum of understanding to address the police detail assignments that  
3 would be necessary to support the Project and ensure the safety of the public  
4 during the construction (MOU). Sinnott led the negotiations on behalf of the City,  
5 and he began to solicit input through meetings and email communications from  
6 City personnel to inform his negotiation position. The MPPA was not a party to  
7 the negotiations.

8           On July 30, 31, and August 9, 2013, Sinnott corresponded by email with  
9 MBTA lawyers Edmond Hunter (Hunter), Paige Scott Reed (Reed) and Rachel  
10 Rollins (Rollins)<sup>9</sup> regarding the Project. Those email messages concerned a  
11 decision that Sinnott and the MBTA lawyers had made to narrow the scope of the  
12 MOU and focus it strictly on the Government Center construction site instead of  
13 other potential City detail sites.<sup>10</sup> Sinnott copied his August 9 email message to  
14 Luthin and Lizotte.

15           Sinnott sent emails on August 12, 2013 at 9:38 a.m. and August 13, 2013  
16 at 4:56 p.m. to City personnel and did not forward or copy these emails to  
17 anyone at the MBTA. The purpose of these two emails was to solicit input to  
18 inform his legal position and help him to negotiate the MOU. The substance of

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<sup>9</sup> Rollins was also the General Counsel for MassDOT.

<sup>10</sup> The MBTA and the City had initially discussed a more global attempt to resolve disputes over who held the responsibility for law enforcement details at places other than the Project.

1 Sinnott's messages in these two emails is literally blacked out in the exhibits that  
2 the City introduced into the hearing record, but Sinnott testified to their general  
3 purpose.<sup>11</sup> Sinnott sent his August 12 email to Luthin, Driscoll and Liu with the  
4 subject line reading: "FW: Government Ctr," and he copied his message to Tinlin,  
5 Galvin, Callahan, Ambarik, Geraghty,<sup>12</sup> and Kineavy. In the August 12 email  
6 message, Sinnott notified the message recipients that the scope of the MOU  
7 would be narrower than was originally contemplated, and it would focus strictly  
8 on the Government Center Project instead of other potential detail sites  
9 throughout the City.

10 On August 13, 2013 at 4:56 p.m., Sinnott send an email to Tinlin, Galvin,  
11 Kineavy, Peter Meade (Meade), James Tierney (Tierney), and Morrison, and  
12 copied it to Driscoll, Luthin, Liu, Callahan, Ambarik, and Geraghty.<sup>13</sup> The subject  
13 line states: "RE: Government Ctr.," and Sinnott starts his message with the  
14 acronym "ALCON," meaning "to all concerned." The purpose of the August 13  
15 4:56 p.m. email was to "recalibrate" the recipients of his email on the newly

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<sup>11</sup> All of the exhibits documenting Sinnott's email correspondence with various MBTA and City personnel were redacted to omit the substance of the messages, but Sinnott testified to the general purpose of his correspondence.

<sup>12</sup> There is no evidence in the record that officials from the Boston Public Schools were involved in the Project, and Sinnott gave no reason why he sent an email concerning the assignment of police details to Geraghty, a BPS legal advisor.

<sup>13</sup> The record does not identify Meade or Tierney or explain their connection to the issues in this case. The record also does not explain why Sinnott forwarded correspondence to Redevelopment Authority General Counsel Morrison.

1 narrowed scope of the MOU that Sinnott was negotiating and seek their  
2 assistance in his negotiations.<sup>14</sup>

3 On August 14, 2013, at 9:32 a.m., Callahan forwarded Sinnott's mail  
4 message to Dashner and Pedersen along with an attachment regarding the  
5 Government Center MOU.<sup>15</sup> The subject line read "FW: Government Ctr.", and  
6 Callahan added his own message. Callahan's message is redacted in the  
7 exhibits that were introduced into evidence.<sup>16</sup>

8 At 9:47 a.m. on August 14, Luthin emailed only Callahan. The substance  
9 of Luthin's email is blacked out in the record exhibit, but the subject line reads:

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<sup>14</sup> Sinnott testified that the entire project of negotiating the MOU was difficult and "sensitive," but he did not state in his testimony that he advised any of the recipients of his emails that his email messages were confidential. The only information that Sinnott gave in his testimony about the substance of any of his emails concerned the scope of the MOU. Also, the documents that the City introduced into the record include boilerplate language indicating that email messages sent by the MBTA are confidential. None of the exhibits documenting email messages that City personnel sent included any boilerplate confidentiality language.

<sup>15</sup> The Union argued at hearing that there was no evidence that Callahan forwarded Sinnott's email to Pedersen and Dashner. However, I credit Callahan's testimony that he did forward Sinnott's email because the Union did not call either Pedersen or Dashner to rebut it. Also, the subject line of Callahan's email to Pedersen and Dashner reads: "FW: Government Ctr."

<sup>16</sup> This message is one of the messages that the Union is seeking. Both parties introduced exhibits in which Callahan's message on this and the other two disputed email messages was redacted. On the City's documents, Callahan's statements are blacked out. On the exhibits that the Union introduced, the words "Quoted text hidden" appear.

1 "FW: Government Ctr. Exhibit B." Exhibit B was a sketch or diagram of the  
2 construction site within City Hall Plaza.<sup>17</sup>

3 Dashner and Pedersen both responded in detail on August 14 to the  
4 August 14 email that Callahan had forwarded to them from Sinnott. Dashner  
5 responded at 12:58 p.m. and copied his response to Pedersen and Stearns.<sup>18</sup>  
6 Dashner stated as follows:

7 Joe: after perusing the agreements, I must state, in support of the  
8 MPS contract, that the plaza has been designated their  
9 jurisdiction. I understand why some of the decisions have been  
10 made, but I don't understand how the MPS was left out of the  
11 discussion. One line in particular bothers me. Sec. 1(e) and  
12 (7). It states, "MBTA police details primarily for access to work  
13 zones for Government Center Station construction support  
14 activities and a mix of MBTA and Municipal Protective Services  
15 details for Government Center Plaza reconstruction activities." This  
16 language is vague and opens the plaza up to the MBTA police  
17 working details on the plaza outside of the work zone in violation of  
18 the jurisdiction in the MPS contract. What do they mean by support  
19 activities? Are they talking about working outside of the designated  
20 work zone fence? If they are, it is unacceptable to the MPS. I just  
21 believe that the wording needs to be more specific so that any  
22 grievances can be averted. Joe.  
23

---

<sup>17</sup> It is not completely clear from the record what attachments Callahan forwarded to Pedersen and Dashner. However, it is clear from their responses that they viewed proposed language for the MOU.

<sup>18</sup> Neither Sinnott nor Callahan gave Dashner authorization to forward emails to Stearns.

1 Pedersen responded to Callahan's August 14 9:32 a.m. email at 1:01 p.m.  
2 on August 14 and copied his email to Galvin.<sup>19</sup> Pedersen's August 14 response  
3 reads as follows:

4 This is the first I have heard these issues but it appears to me  
5 plans have been made without little or any input by Municipal  
6 Protective Services (sic).

7  
8 I do have these issues at this time.

- 9
- 10 • Without seeing drawings for areas 1,2,3A, 3B and 4, it is  
11 difficult to give an opinion regarding MPS details, having  
12 said that, if areas referenced are presently under the  
13 control of the Licensor (Property Management) in my  
14 opinion, consequently the MBTA Police would not be  
15 entitled to any details.
  - 16  
17 • Language such as "in and around" is ambiguous in  
18 particular to jurisdiction *"It has been agreed to between*  
19 *the City and the MBTA and their respective police*  
20 *departments to deploy personnel to provide certain*  
21 *services occurring in or around the Project."* (emphasis  
22 in original.)  
23

24 Callahan emailed Pedersen and Dashner again at 2:02 p.m. on August  
25 14. The one line substance of Callahan's email is also blacked out, but the  
26 subject line reads: "FW: Government Ctr. Exhibit B." Pedersen emailed Callahan  
27 at 2:04 p.m., and copied his email to Galvin and Dashner. Pedersen's one line  
28 message is blacked out, but the subject of the email is "Government Ctr. Exhibit  
29 B." There is no evidence in the record that Callahan forwarded either Dashner's  
30 or Pedersen's August email responses to Sinnott or communicated with Sinnott

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<sup>19</sup> Pedersen subsequently emailed only Dashner on August 14 at 1:21 p.m., but the record contains no evidence of any message in that email.

1 about their information or opinions at any point after receiving their August 14  
2 emails.

3 Sinnott continued to correspond with the MBTA in late August regarding  
4 the Project, and sent numerous emails to MBTA and City personnel on August  
5 23, 26, 29, and September 4, 2013. On September 4, 2013 at 2:01 p.m., Sinnott  
6 sent an email addressed only to City personnel, specifically, Tinlin, Galvin,  
7 Kineavy, Davis, Linskey, Callahan, Ambarik, Geraghty, Andres, Sutliff, Curran  
8 and Dunlap. Sinnott copied this email to Luthin, Criscol and Cederbaum. Sinnott  
9 began the email message with the acronym "ALCON," and the subject line stated  
10 "FW: Details." In this email, Sinnott passed information to the City recipients that  
11 he had received from the MBTA regarding the MBTA's priorities and time  
12 constraints.<sup>20</sup> Sinnott vetted the information that he received from the MBTA  
13 through the City recipients. As before, he sought their feedback so that he could  
14 formulate a legal position to inform his drafting of the MOU.

15 On September 5, 2013, at 1:24 p.m., Callahan emailed only Dashner and  
16 Pedersen. Although most of his one sentence message is blacked out, the first  
17 word is "forwarding," and the subject line reads: "FW:details."<sup>21</sup> Pedersen  
18 responded to Callahan by email on September 5, 2013, at 4:33 p.m. Pedersen's  
19 email is not sent or copied to anyone else and it reads as follows:

---

<sup>20</sup> The MBTA faced a deadline for completion of the Project.

<sup>21</sup> This is the second email message that the Union is seeking.

1 Let me be clear, I find this document insulting to this Department's  
2 Officers. In my opinion, the administrations of the City and the MBTA are  
3 more concerned about the MBTA Police Union and the Unions of the  
4 Boston Police Department than doing what is ethically and contractual[ly]  
5 correct.

6  
7 That being said, as indicated in my response to your email of August 14,  
8 2013 I still believe the jurisdiction, specifically City Hall Plaza, relative to  
9 any details that the Boston Municipal Protective Services Department's  
10 Officers have and would remain with the right of first refusal.

11  
12 Further, the language of "in and around..." has been replaced with the  
13 following:

14  
15 *WHEREAS both parties agree that the City and the MBTA will*  
16 *work cooperatively to review police detail needs[,] manage the*  
17 *placement of police details, and determine when the Project*  
18 *necessitates augmentation of Municipal Protective Services officers*  
19 *on City Hall Plaza; (italics in original.)*

20  
21 The entire paragraph is inane. I believe we are all aware this comes down  
22 to who gets the money. As an administrator for almost thirteen years I am  
23 tired of surrendering what will be ultimately the demands of two larger  
24 Police Unions and in particular within the Boston Police Department.

25  
26 I could go on but what is the sense, this has gone from bad to worse and I  
27 don't think it can get any worse.

28  
29 Respectfully,  
30 Frank Pedersen<sup>22</sup>

31  
32 On Friday, September 6, 2013 at 9:42 a.m. Callahan emailed only

33 Pedersen, stating as follows:

34 Frank: What specific language would you change? Please let me know  
35 asap.  
36

---

<sup>22</sup> There is no evidence in the record that Dashner responded to Callahan's September 5 1:24 p.m. email.

1 One minute later, at 9:43 a.m., Callahan emailed only Pedersen again. His email  
2 message is redacted, but the subject line reads: "RE: Details."<sup>23</sup> Pedersen  
3 emailed only Callahan back on September 6, 2013 at 11:03 a.m. stating:

4 I have already indicated one paragraph. Other language such as 50/50  
5 between MBTA and BPD then "augmentation" in my mind means: MBTA  
6 50% + BPD 50% = 0% for BMPS. But wait, when you augment with  
7 "meetings periodically..." Then the equation amounts to 0% to 0% since  
8 augments is defined as "to make greater, as in size, or quantity."  
9 Someone on[c]e said "I would blow the thing up and start over again."  
10 (emphasis in original.)

11  
12 Respectfully,  
13 Frank Pedersen

14  
15 P.S. This is with no apology.

16  
17 This is the last email in the record. There is no evidence that Callahan  
18 forwarded Pedersen's September 5 and 6 email responses to Sinnott or  
19 communicated with Sinnott about Pedersen's information or opinions at any time.  
20 All of the emails in evidence that Sinnott received from other individuals were  
21 either from, or copied to, MBTA attorneys.

22 The City, the MBTA, and MassDOT signed the MOU on October 23, 2013.  
23 The agreement provided in pertinent part, that "the first right of assignment to any  
24 police detail required to manage access to the MBTA's work zone on City Hall  
25 Plaza or to provide other construction support activities within the footprint of the  
26 Government Center Station construction zone will be made available to MBTA  
27 officers."

---

<sup>23</sup> This is the third email message that the Union is seeking.

1           At some point in October of 2013, the City held a question and answer  
2 session with the MPPA regarding the Project. The Project began in March of  
3 2014, and the MPPA received a signed copy of the MOU at the end of March  
4 2014.

### 5 **The Grievance**

6           The MPPA filed a grievance on April 11, 2014, after reading the MOU.  
7 The MPPA's grievance stated that "MBTA Police and Boston Police are working  
8 paid details on City Hall Plaza for the ongoing work being done at Government  
9 Center T Station, which is the work of the BMPPA/IBPO Loc. 650 members."  
10 The City processed the grievance at Steps 1 and 2 of the grievance procedure  
11 on April 15 and May 5, 2014.

12           The MPPA forwarded the grievance to Step 3 on May 6, 2014, and the  
13 parties held the Step 3 hearing on July 9, 2014. Both parties presented exhibits.  
14 One of the exhibits that the Union presented was a portion of the August 14  
15 email chain described above between Pedersen, Callahan, Galvin, Stearns and  
16 Dashner (August 14 email chain). The portion of the email chain that the Union  
17 introduced included the following messages:

- 18           • Callahan's 9:32 a.m. email to Dashner and Pedersen;
- 19           • Pedersen's 1:01 p.m. email to Callahan that he copied to Galvin;
- 20           • Pedersen's 1:21 p.m. email to Dashner; and
- 21           • Dashner's 12:58 p.m. email to Callahan that he copied to Pedersen  
22           and Stearns.

23  
24           In the document that the Union gave to the City's Step 3 hearing officer,  
25 Callahan's message in his 9:32 a.m. email was redacted and the words: "Quoted

1 text hidden” appear instead.<sup>24</sup> The City did not object to the introduction of this  
2 exhibit on the basis of the attorney-client privilege, and the City’s hearing officer  
3 accepted the August 14 email chain as a Union exhibit.

#### 4 **The Arbitration**

5 After the City denied the grievance at Step 3 on July 30, 2014, the Union  
6 filed a demand for arbitration on or about August 19, 2014. The parties held the  
7 first day of arbitration on July 1, 2015, before Arbitrator Tammy Brynie.

8 At some point before the arbitration, Pedersen gave MPPA President Al  
9 Swank (Swank) a multi-page document containing portions of the email chains  
10 dated September 5 and September 6, 2013 (Sept. 5/6 email chain). The portion  
11 of the email chains that Pedersen gave Swank include the following messages:

- 12 • Callahan’s September 5 1:24 p.m. email to Dashner and Pedersen;
- 13 • Pedersen’s September 5 at 4:33 p.m. email to Callahan;
- 14 • Callahan’s September 6 at 9:42 a.m. email to Pedersen;
- 15 • Callahan’s September 6 at 9:43 a.m. email to Pedersen; and
- 16 • Pedersen’s September 6 11:03 a.m. email to Callahan.
- 17

18 In this document, the text of Callahan’s September 5<sup>th</sup> 1:24 p.m. email and  
19 September 6<sup>th</sup> 9:43 a.m. email messages was redacted and replaced with the  
20 words: “Quoted text hidden.”<sup>25</sup>

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<sup>24</sup> The record contains no information concerning the redaction of these emails or the insertion of the words: “Quoted text hidden.”

<sup>25</sup> The record contains no information concerning the redaction of these emails or the insertion of the words: “Quoted text hidden.”

1           The Union sought to introduce the August 14 and September 5/6 email  
2 chains during the arbitration. The Arbitrator marked the exhibits for identification,  
3 but did not accept them as full exhibits. The Arbitrator indicated that she wanted  
4 to authenticate them through Pedersen and Dashner, who were not present on  
5 the first day of arbitration.<sup>26</sup> The City did not argue at the arbitration that these  
6 documents were protected by the attorney-client privilege.<sup>27</sup>

7           The City presented its case first and called Callahan and Andres as  
8 witnesses. The City did not raise the August 14 and September 5/6 email chains  
9 with either witness, but the Union questioned Callahan about the two chains on  
10 cross-examination. In his testimony, Callahan tried to discredit Pedersen's  
11 opinion about what was MPPA work.<sup>28</sup> The parties did not finish the arbitration on

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<sup>26</sup> Although the City pressed Union witness Swank on his recollection of the Arbitrator's use of the word "authenticate," Callahan testified at the hearing but did not deny or dispute Swank's testimony.

<sup>27</sup> The City argues that the email messages that the Union is seeking are not relevant and reasonably necessary for the Union to represent its members in part, because the Arbitrator told the Union at the arbitration that the August 14 and September 5/6 email chains alone would not be sufficient to sustain its case. Stipulation No. 13 recites an August 6 email from Attorney Boyle to the AAA in which he relays the Arbitrator's statement. Because I have found that the requested email are relevant and necessary for the Union to represent its members regardless of whether the Arbitrator made the statement that the City attributes to her, I need not make an additional finding on that issue.

<sup>28</sup> Union witness Swank testified that at the arbitration, Callahan tried to discredit Pedersen's opinion as to what was MPPA work. Callahan did not deny or dispute this characterization of his arbitration testimony.

1 July 1, 2015, and scheduled a second day for September 10, 2015. They  
2 subsequently postponed the second day to February 19, 2016.

3 As indicated in the stipulations, the Union served the City with information  
4 requests following the arbitration. On July 27, 2015, the Union requested  
5 information concerning the August 14 and September 5/6 email chains,  
6 specifically describing the information it sought as follows:

7 1. Any and all email and/or electronic exchanges between Joseph  
8 Callahan and Joseph Dashner regarding the Government Center MBTA  
9 construction MOU, which is the subject of the underlying grievance.  
10 Please include the entire email exchange on or about August 14, 2013,  
11 between said individuals; and  
12

13 2. Any and all email and/or electronic exchanges between Joseph  
14 Callahan and Frank Pedersen regarding the Government Center MBTA  
15 construction MOU which is the subject of the underlying grievance.  
16 Please include the entire email exchanges(s) on or about August 14,  
17 2013 and September 5/6, 2013 between said individuals.  
18

19 City Attorney Boyle responded to the information request by emailing Union  
20 Attorney Dever on July 29, 2015. Boyle acknowledged that the Union had  
21 portions of the requested email chains marked for identification at the arbitration,  
22 but asserted that the information that the Union requested was protected from  
23 disclosure by the attorney-client privilege. Dever responded on July 30, 2015,  
24 challenging Boyle's assertion of the privilege, and the two attorneys continued to  
25 communicate in August about the Union's information request.<sup>29</sup> Ultimately, the

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<sup>29</sup> Boyle and Dever's email communications are reprinted in the stipulations and need not be repeated here.

1 City declined to produce any additional information in response to the Union's  
2 request.

3 Opinion

4 As noted, the information that the Union is seeking is the unredacted text  
5 of the following three email messages from Callahan that appear in the August  
6 14 and September 5/6 email chains that the Union produced on the first day of  
7 arbitration,<sup>30</sup> specifically his:

- 8 • August 14, 2013 9:32 a.m. email to Dashner and Pedersen;
- 9 • September 5, 2013 1:24 p.m. email to Dashner and Pedersen; and
- 10 • September 6, 2013 9:43 a.m. email to Pedersen.

11  
12 The issue here is whether the City is obliged to provide the Union with this  
13 information, or whether its failure to do so was lawful because the emails are  
14 protected from disclosure by the attorney-client privilege, or are not relevant and  
15 reasonably necessary for the Union to represent its membership.

16 Information Requests, Generally

17 If a public employer possesses information that is relevant and reasonably  
18 necessary to an employee organization in the performance of its duties as the  
19 exclusive collective bargaining representative, the employer is generally  
20 obligated to provide the information upon the employee organization's request.

---

<sup>30</sup> Although the Union's information request seeks all of the email/electronic exchanges between Callahan and Dashner on August 14 regarding on the Project MOU, and all of the email/electronic exchanges between Callahan and Pedersen on August 14 and September 5 and 6 regarding the Project MOU, the only email messages that the Union seeks and does not already possess are Callahan's redacted statements.

1 City of Boston, 32 MLC 1, MUP-1687 (June 23, 2005). The employee  
2 organization's right to receive relevant information comes from the statutory  
3 obligation to engage in good faith collective bargaining, including both grievance  
4 processing and contract administration. The CERB's standard for determining  
5 relevancy is a liberal one, similar to the standard for determining relevancy in  
6 discovery proceedings in civil litigation. Board of Trustees, UMass Amherst, 8  
7 MLC 1148, 1149, SUP-2427 (June 24, 1981).

8       Once a union has established that the requested information is relevant  
9 and reasonably necessary to its duties as the exclusive representative, the  
10 burden shifts to the employer to establish that it has legitimate and substantial  
11 concerns about disclosure, and that it has made reasonable efforts to provide the  
12 union with as much of the requested information as possible, consistent with its  
13 expressed concerns. Board of Higher Education, 26 MLC 91, 93, SUP-4509  
14 (January 11, 2000). If an employer advances legitimate and substantial concerns  
15 about the disclosure of information to a union, the CERB will examine the facts  
16 contained in the record and balance the employer's concerns against the  
17 employee organization's need for information.<sup>31</sup> Boston School Committee, 13  
18 MLC 1290, 1295 (MUP-5905) (November 21, 1986). Absent a showing of great  
19 likelihood of harm flowing from disclosure, the requirement to furnish a

---

<sup>31</sup> The City argues in its brief that the CERB's framework for balancing competing interests does not apply where the information request seeks attorney-client privileged communications. I disagree, because the CERB used it in Trustees of UMass Medical Center, 26 MLC 149, SUP-4392, SUP-4400 (March 10, 2000).

1 bargaining representative with relevant information necessary to carry out its  
2 duties overcomes any claim of confidentiality. Greater Lawrence Sanitary  
3 District, 28 MLC 317, 318-319, MUP-2581 (April 19, 2002).

4 Although the CERB has not squarely decided whether an employer must  
5 give a union privileged information that is relevant and reasonably necessary to  
6 the union's role as the exclusive bargaining representative, the National Labor  
7 Relations Board (NLRB) did so in BP Exploration (Alaska) Inc., and Paper, Allied  
8 Industrial Chemical and Energy Workers International Union, Local 8-369, AFL-  
9 CIO, 337 NLRB 887 (2002). In BP Exploration, the NLRB applied the balancing  
10 test of Detroit Edison v. NLRB, 440 U.S. 301 (1979), weighing a union's need for  
11 information concerning workplace safety and health against the employer's  
12 confidentiality interest in communications that are subject to the attorney-client  
13 privilege. It found that the Union was not entitled to relevant information that was  
14 protected by the attorney-client privilege.

### 15 **Relevance and Necessity**

16 I first address whether Callahan's unredacted emails are relevant and  
17 reasonably necessary for the Union to fulfill its role as the exclusive bargaining  
18 representative.<sup>32</sup> The Union wants this information for the pending arbitration.  
19 Dever's August 5, 2015 email to Arbitrator Brynie through the AAA states that:

---

<sup>32</sup> In its post-hearing brief, the Union cites my Ruling on the City's Motion to Defer for the proposition that the disputed emails are necessary for the Union to argue at arbitration that the City violated the CBA. As noted in my Ruling, I addressed the relevance and necessity of the disputed email messages there for the limited purpose of responding to the City's deferral argument.

1 “[a] reason we have continued the arbitration was to have testimony on the  
2 record regarding the emails being sought. Thus, it does not seem to be  
3 productive, and it’s prejudicial to the union’s cause, to have an arbitration  
4 regarding these emails without the entire emails.” Also, Callahan sought  
5 information from Pedersen concerning police details at the Project, yet in his  
6 testimony at the arbitration, Callahan tried to discredit Pedersen’s opinion. The  
7 Union argues that seeing the actual messages that Callahan sent to Dashner  
8 and Pedersen could explain why Callahan rejected the opinion that he sought  
9 from Pedersen and may also be useful for impeachment purposes.

10 Conversely, the City argues that Union could not need Callahan’s  
11 unredacted messages at the arbitration since the Union did not request them  
12 before or after the Step 3 hearing; they are useless for impeachment purposes  
13 because Callahan did not offer impeachable testimony about the Project MOU;  
14 the Arbitrator did not consider the emails to be reliable without Pedersen and  
15 Dashner’s presence at the arbitration; and she advised the Union that the August  
16 14 and the September 5/6 email chains were insufficient alone to establish the  
17 Union’s case. I am not persuaded by the City’s arguments for the following  
18 reasons.

19 First, it seems illogical to contend that Sinnott needed information from  
20 City managers to negotiate which police force should handle police details at the  
21 Project, but the comments and questions he posed to solicit that information are  
22 irrelevant to the MPPA’s claimed entitlement to the details. At issue in the

1 arbitration is whether the City violated the MPPA contract when the MOU gave  
2 the MBTA police the right of refusal to perform details for the Project.<sup>33</sup> Sinnott  
3 sought input from Callahan when negotiating which police force would receive  
4 the detail work, and Callahan sought Pedersen and Dashner's opinions on the  
5 subject. Callahan clearly believed that Pedersen and Dashner had relevant  
6 information to offer, and he continued to seek their opinions even after they  
7 challenged the proposed detail assignment to the MBTA police and opined that  
8 the MPS had jurisdiction over City Hall Plaza work. The grievance concerned the  
9 MPPA's contractual right to Project details, and Callahan's questions and  
10 comments to Dashner and Pedersen on that subject relate to the Union's  
11 arguments and efforts to challenge the terms of the MOU at arbitration. Also,  
12 because the final terms of the MOU differed significantly from the opinions that  
13 Dashner and Pedersen were clearly voicing, knowing Callahan's questions may  
14 support the Union's argument that their opinions were correct.

15 Second, the fact that the Arbitrator needed to authenticate the August 14  
16 and September 5/6 email chains before accepting them into evidence does not  
17 affect their relevance or necessity because the chains pertain whether the detail  
18 assignments in the MOU violate the MPPA contract. Consequently, the fact that  
19 the Arbitrator has only accepted the August 14 and September 5/6 email chains  
20 for identification on at this point in the process is immaterial. Nor would it matter

---

<sup>33</sup> Although it may be accurate, the record does not appear to contain specific evidence supporting the City's assertion that the Union dropped its initial claims against the BPD from the grievance.

1 whether the Arbitrator believed or stated that the email chains would be  
2 insufficient to establish the Union's case. An employer's obligation to disclose  
3 information does not turn on whether the information will help a union to win its  
4 case. It is enough that the information would enable the Union to assess its rights  
5 and options along the way by reviewing the terms of contractual work  
6 assignments to non-bargaining members; see City of Boston, 25 MLC 181, 186  
7 MUP-9794 (May 20, 1999); monitoring compliance with the contract; Worcester  
8 School Committee, 14 MLC 1682, 1685, MUP-6169 (April 20, 1988); and  
9 deciding whether to file and pursue a grievance, City of Boston, 28 MLC 374,  
10 376, MUP-2448 (June 13, 2002). A union is also entitled to information that  
11 "sheds light" on the merits of the grievance. City of Boston v. Labor Relations  
12 Commission, 61 Mass. App. Ct. at 402.

13 Finally, the timing of the Union's request is immaterial. The Union did not  
14 waive its right to the information by not requesting it earlier, so it doesn't matter  
15 whether the Union should have recognized the significance of Callahan's email  
16 messages before arbitration or realized their value only after hearing his  
17 arbitration testimony. If Callahan's statements help the Union to assess or put  
18 together its case at arbitration, the City is obligated to provide his unredacted  
19 email messages unless they are otherwise protected from disclosure.

#### 20 **The City's Burden**

21 Since the Union has met its burden to show that Callahan's unredacted  
22 emails are relevant and reasonably necessary to the Union's role as the

1 exclusive representative, it is the City's burden to demonstrate that its concerns  
2 about disclosure of Callahan's statements are legitimate and substantial and that  
3 it initiated a discussion to explore acceptable alternative ways to permit the union  
4 access to the information. Trustees of UMass Medical Center, 26 MLC at 158.  
5 Here, the City promptly responded on July 29 to the Union's July 27 request. It  
6 advised the Union that the requested email concerned communications from  
7 Corporation Counsel Sinnott and were protected from disclosure by the attorney-  
8 client privilege.<sup>34</sup>

### 9 **The Attorney-Client Privilege**

10 The City contends that its concerns for the confidentiality of Callahan's  
11 unredacted email messages were legitimate and substantial because the emails  
12 were privileged attorney-client communications. In Commissioner of Revenue v.  
13 Comcast Corporation & another, 453 Mass 293, 303 (2009), the SJC explained  
14 that where legal advice of any kind is sought from a professional legal adviser in  
15 his capacity as such, the communications relating to that purpose, made in  
16 confidence by the client, are at his instance permanently protected from  
17 disclosure by himself or by the legal adviser, except if the protection is waived.

---

<sup>34</sup> The record indicates that Dever sent Boyle an email noting that the requested email chains contained no communications from Sinnott or another attorney, and asking Boyle to further explain how the requested information was privileged. Boyle and Dever subsequently talked on August 5, 2015, and Boyle stated that the City stood by its position that the requested information was privileged. This limited evidence does not specifically show that the City offered to discuss alternative ways to provide the information, consistent with its expressed concerns. However, I need not decide the case on this point since I have found that the City did not establish that the documents were privileged.

1 Because the privilege runs contrary to society's interest in full disclosure of  
2 relevant information, it must be narrowly construed. Id. at 304.

3 The burden of proving that the attorney-client privilege applies to a  
4 communication rests on the party asserting the privilege. Purcell v. District  
5 Attorney for the Suffolk Dist., 424 Mass. 109, 115 (1997). The City asserts that  
6 the three emails at issue are privileged because they were part of confidential,  
7 internal email communications that Sinnott initiated to gather information from  
8 high-level City managers and lawyers to help him negotiate the Project MOU.  
9 The privilege was not waived, the City contends, when Pedersen gave parts of  
10 the email chains to Swank, or when Dashner copied Stearns on his August 14  
11 reply to Callahan because Sinnott and Callahan did not authorize either of these  
12 disclosures. Nor did the City waive the privilege by putting the messages at issue  
13 in the grievance procedure or disclosing a portion the privileged communication  
14 to obtain a litigation advantage.

15 The City is correct that Callahan's messages to Pedersen and Dashner  
16 stemmed from Sinnott's request for input to help him negotiate the MOU. The  
17 privilege applies to communications between in house counsel and employees,  
18 enabling employees to disclose factual information to legal counsel so that the  
19 lawyer can render fully informed legal advice. Upjohn Co. v. United States, 449  
20 U.S. 383, 389 (1981). However, it is the City's burden to show that Callahan's  
21 communications with Dashner and Pedersen were made in confidence,  
22 Comcast, 453 Mass. at. 304, and it failed to carry this burden. There is no

1 evidence that Callahan or Sinnott ever instructed any of the addressees or  
2 recipients of their emails that the communications were confidential, and  
3 confidentiality is not mentioned in the subject line of any of their emails.<sup>35</sup>  
4 Although Sinnott testified that the negotiations were sensitive and difficult, he  
5 never said that he told the addressees that the information must not be  
6 disclosed. Compare Upjohn Co. v. United States, 449 U.S. at 395  
7 (communications between employees and in house counsel deemed privileged  
8 where the chairman of the board gave explicit instructions that the  
9 communications at issue were highly confidential); Kellogg Brown & Root, 756  
10 F.3d. 754, 758 (2014) (employees told that the company's legal department was  
11 conducting an investigation of a sensitive nature, the information they disclosed  
12 would be protected by the company, and they should not discuss their interviews  
13 without the specific advance authorization of counsel.) Moreover, there is no  
14 evidence that Callahan advised Dashner after August 14 that the email  
15 messages were confidential and Dashner should not copy Stearns or anyone  
16 else on responses that he sent to Callahan that may have included Callahan's  
17 communications. Consequently, the City failed to establish a key requirement of  
18 the privilege.

---

<sup>35</sup> I need not consider whether boilerplate confidentiality language that is sometimes attached to emails would be sufficient, because the email exhibits in the record only contain boilerplate confidentiality language for the MBTA emails.

1           Additionally, I find that the City waived any privilege that might have  
2 attached to Callahan's communications to Dashner and Pedersen when Dashner  
3 copied Stearns on his August 14 12:58 p.m. response to Callahan, and Pedersen  
4 gave Swank a copy of the September 5/6 email chains.<sup>36</sup> A party that argues that  
5 the inadvertent disclosure of information to third parties did not waive the  
6 privilege must show that it has taken adequate steps to ensure the confidentiality  
7 of the information. In the Matter of the Reorganization of Electrical Mutual  
8 Liability Insurance Company, Ltd. (EMILCO), 425 Mass. 419, 423 (1997). As  
9 noted above, there is no evidence that Sinnott or Callahan told anyone that the  
10 communications were confidential. There is also no evidence that anyone told  
11 Dashner and Pedersen not to forward their responses, or the  
12 questions/comments prompting them, to Municipal Police officers who would be  
13 affected by the terms of the MOU. As noted, there is no evidence that Callahan  
14 told Dashner after August 14 not to send emails regarding the negotiations to  
15 anyone else. Although the City argues that Dashner and Pedersen could not  
16 waive the privilege since they were not authorized to disclose email  
17 communications, the City has cited no case law holding that an unauthorized but  
18 intentional communication from an employee to a third party can be deemed  
19 inadvertent. Accordingly, since the City took no steps to ensure the confidentiality

---

<sup>36</sup> The City initially argues that I decided the waiver issue by my rulings during the hearing. However, it subsequently differentiated between the evidentiary rulings regarding the email messages from Dashner and Pedersen and the redacted statements from Callahan at issue here.

1 of the information, Dashner's transmission of the August 14 email chain to  
2 Stearns, and Pedersen's transmission of the September 5/6 emails to Swank do  
3 not constitute inadvertent disclosures. As a result, when Dashner and Pedersen  
4 disclosed the emails to Swank and Stearns, the City waived any privilege that  
5 might otherwise have attached to Callahan's emails.<sup>37</sup>

6 Finally, although the City proved that Callahan's messages to Dashner  
7 and Pedersen stemmed from the ALCON messages that he received from  
8 Sinnott, there is no evidence that Callahan ever communicated any information  
9 back to Sinnott. The only evidence of emails that were sent or copied to Sinnott  
10 came from MBTA personnel or were copied to MBTA personnel. I cannot find  
11 that Callahan's messages to Dashner and Pedersen were a privileged part of an  
12 internal fact-gathering mission if there is no evidence that Callahan relayed facts  
13 back to Sinnott to inform his negotiating position. Compare, Upjohn Co. v. United  
14 States, 449 U.S. at 394 (communications were made by employees to in house  
15 counsel during an internal investigation); Kellogg Brown & Root, 756 F.3d. at  
16 758. Callahan pressed Pedersen repeatedly for his opinion on proposed

---

<sup>37</sup> Because the City did not establish that the disputed emails were made in confidence, and any privilege was waived by disclosing the emails to Stearns and Swank, I need not consider the effect of Sinnott's transmission of his August 12 and August 13 emails to individuals who had no explained connection to his negotiation of the Project MOU, such as Meade, Tierney, or Geraghty. Also, I need not consider whether any of Sinnott's own emails were protected by the attorney-client privilege since they are beyond the scope of the Union's information request.

1 language for the MOU, but there is no evidence that Callahan communicated  
2 Pedersen's position to Sinnott, and the final MOU is contrary to Pedersen's view.

3 Because I find that Callahan's three disputed email messages are not  
4 protected from disclosure by the attorney-client privilege, the City has not  
5 established its burden to show that its concerns for confidentiality are legitimate  
6 and substantial. Accordingly, the City should have provided the information to the  
7 Union upon request, and its failure to do so violated Section 10(a)(5) and,  
8 derivatively, Section 10(a)(1) of the Law.

9 Conclusion

10 Based on the record and for the reasons explained above, I conclude that  
11 the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law  
12 by failing to provide the MPPA with the unredacted text of the following three  
13 email messages from Joseph Callahan:

- 14 1. August 14, 2013 9:32 a.m. to Joseph Dashner and Frank Pedersen;  
15 2. Sept. 5, 2013 1:24 p.m. to Joseph Dashner and Frank Pedersen; and  
16 3. Sept. 6, 2013 at 9:43 a.m. to Frank Pedersen.

17  
18 Order

19 WHEREFORE, based upon the foregoing, it is hereby ordered that the City of  
20 Boston shall:

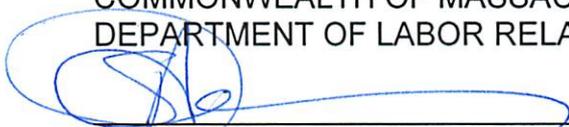
21  
22 1) Cease and desist from:

- 23  
24 a) Failing to bargain in good faith by not providing information  
25 that is relevant and reasonably necessary to the Union in its  
26 role as exclusive bargaining representative; and  
27

- 1           b) In any like or related manner, interfering with, restraining or  
2           coercing employees in the exercise of their rights  
3           guaranteed under the Law.  
4
- 5        2) Take the following affirmative action that will effectuate the purposes of  
6        the Law:  
7
- 8           a) Immediately forward to the Union unredacted copies of the  
9           following email messages from Joseph Callahan:<sup>38</sup>  
10
- 11           • August 14, 2013 at 9:32 a.m. to Joseph Dashner and Frank  
12           Pedersen;
  - 13           • September 5, 2013 at 1:24 p.m. to Joseph Dashner and Frank  
14           Pedersen; and
  - 15           • September 6, 2013 at at 9:43 a.m. to Frank Pedersen.
- 16
- 17           b) Post in all conspicuous places where members of the  
18           Union's bargaining unit usually congregate, or where notices  
19           are usually posted, including electronically, if the City  
20           customarily communicates with these unit members via  
21           intranet or email, and display for a period of thirty (30) days  
22           thereafter, signed copies of the attached Notice to  
23           Employees.  
24
- 25           c) Notify the DLR in writing of the steps taken to comply with  
26           this decision within ten days of receipt of the decision.  
27

28    SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



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SUSAN L. ATWATER, ESQ., HEARING OFFICER

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<sup>38</sup> Because I find that Callahan's email messages are not protected from disclosure by the attorney-client privilege, no safeguards are necessary.

**APPEAL RIGHTS**

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

# NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF  
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations has held that the City of Boston (City) violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith by not providing requested information that is relevant and reasonably necessary to the Municipal Police Patrolmen's Association (MPPA).

Section 2 of M.G.L. Chapter 150E gives public employees the following rights: to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

The City posts this Notice to Employees in compliance with the hearing officer's order.

WE WILL NOT fail to bargain in good faith by not providing information that the MPPA requests that is relevant and reasonably necessary to the MPPA in its role as exclusive bargaining representative.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed Section 2 of the Law.

WE WILL immediately forward to the MPPA unredacted copies of the following email messages from Joseph Callahan:

- August 14, 2013 at 9:32 a.m. to Joseph Dashner and Frank Pedersen;
- Sept. 5, 2013 at 1:24 p.m. to Joseph Dashner and Frank Pedersen; and
- Sept. 6, 2013 at 9:43 a.m. to Frank Pedersen

\_\_\_\_\_  
City of Boston

\_\_\_\_\_  
Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114. (Telephone: (617) 626-7133).