

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

Superior Court Department

COMMITTEE FOR PUBLIC COUNSEL SERVICES,

Plaintiff,

v.

MASSACHUSETTS STATE POLICE,

Defendant.

COMPLAINT

Civil Action No. 23-2324

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND JURY DEMAND**

INTRODUCTION

1. Over the past two years, the Committee for Public Counsel Services (CPCS) has made several public record requests to the Massachusetts State Police (MSP).

2. In an ongoing effort to see those requests answered, CPCS has followed up with counsel for MSP time and again and engaged in extensive discussions about these requests. CPCS has waited, emailed repeatedly, waited longer, called, and clarified. It has agreed to narrow the scope of some requests to reduce the burden of production and made multiple appeals to the Supervisor of Records, all of which were successful. Yet, more than two years later, fewer than half of these requests have been resolved. None were fully answered within the timeframes required by law. Even when MSP has produced documents, it has not made it clear that its search and production is complete.

3. Despite CPCS's patience and accommodations, Defendant continues to violate the Public Records Law by withholding and failing to timely furnish public records requested by CPCS in violation of G. L. c. 66, § 10 and 950 Code Mass. Regs. § 32.06. Therefore, Plaintiff files this lawsuit seeking declaratory and injunctive relief requiring the MSP to produce the records lawfully sought.

4. Plaintiff also seeks declaratory and injunctive relief requiring MSP to comply with the timelines set forth in the Public Records Law in the future. Its failures here are not an isolated event, and CPCS is not alone in confronting MSP's regular practice of flouting the Public Records Law. On information and belief, based on a review of the Secretary of the Commonwealth's Public Record Appeal Tracking System, hundreds of appeals have been filed against MSP since November 2016 for a complete lack of response. That pattern goes back nearly a decade, to when the Investigative Reporters and Editors awarded the Massachusetts State Police its 2015 "Golden Padlock," a tongue-in-cheek award designed to shame government agencies across the country for stonewalling public records requests. In announcing the "award," the organization stated, "The Massachusetts State Police habitually go to extraordinary lengths to thwart public records requests, protect law enforcement officers and public officials who violate the law and block efforts to scrutinize how the department performs its duties."

PARTIES

5. Plaintiff Committee for Public Counsel Services is responsible for "plan[ning], oversee[ing], and coordinat[ing] the delivery of criminal and certain noncriminal legal services by salaried public counsel, bar advocate and other assigned counsel programs and private attorneys serving on a per case basis" on behalf of indigent criminal defendants and other

litigants who are entitled to counsel. G. L. c. 211D, § 1. See G. L. c. 211D, § 5. CPCS has a principal place of business at 75 Federal Street, 6th Floor, in Boston, Massachusetts, 02110.

6. The Massachusetts State Police is a statewide law enforcement agency comprised of more than 2,000 Troopers and additional civilian personnel. It is organized within the Executive Office of Public Safety. See G. L. c. 22C. The general headquarters of the MSP are at 470 Worcester Road, Framingham, MA 01702.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to G. L. c. 66, § 10A(d)(1); G. L. c. 212, § 4; and G. L. c. 231A, § 1.

8. Venue is proper because any action to enforce the public records law “shall be filed in Suffolk superior court with respect to agencies.” G. L. c. 66, § 10A(c).

FACTUAL ALLEGATIONS

9. Defendant is the custodian of public records for purposes of G. L. c. 66, § 10.

10. Over the course of the past two years, CPCS made the following requests for public records to MSP:

Request	Date	Information Requested
1	05.19.21	Civil lawsuits
2	12.17.21	Barracks assignments
3	01.19.22	Criminal cases against troopers
4	06.15.22	Data contained within the MSP Brady Portal
5	11.07.22	Union contracts and arbitration decisions
6	04.10.23	Information regarding Callyo and Pulse
7	06.13.23	Information regarding “Body Bugs”
8	06.27.23	Information regarding North Worcester County Drug Task Force and MSP Central Gang Unit

11. None of CPCS’s requests were intended to harass or intimidate, nor were any of them for a commercial purpose.

Request 1: May 2021 request – Civil lawsuits

12. On May 19, 2021, Attorney Mitchell Kosht (then a fellow in the Strategic Litigation Unit) requested information about civil lawsuits against employees of MSP for acts or omissions committed in the course of employment, and internal affairs records related to the underlying events.

13. On May 21, 2021, Attorney Kosht spoke by telephone with members of the Office of Chief Legal Counsel for the MSP.

14. During the telephone conversation, Attorney Kosht agreed to narrow and modify the request to a list of civil rights cases filed under 42 U.S. Code § 1983 and related settlement information. He further agreed to withdraw the remainder of his request and not seek internal affairs records.

15. On June 4, 2021, following the telephone conversation, Attorney Joshua Reilly wrote to Attorney Kosht, indicating that he could anticipate a response to the modified request “in the near future.”

16. Nearly two years later, on April 11, 2023, Defendant provided CPCS with the requested records. This was 690 days and 467 business days¹ after the request was filed.

Request 2: December 2021 request - Barracks assignments

17. On December 17, 2021, Daniel Jaffe, employed by CPCS as a paralegal, made a request via the MSP public record portal for the unit, division, precinct, and/or barracks assignments for members of the MSP.

¹ Throughout, the number of days and business days is calculated via <https://www.timeanddate.com/date/workdays.html>.

18. On December 30, 2021, MSP denied the request, citing G. L. c. 4, § 7, cl. 26(n) (terrorism exemption) as the basis for denial.

19. On January 11, 2022, CPCS filed an appeal to the Supervisor of Records in the Public Records Division of the Secretary of the Commonwealth pursuant to G. L. c. 66, § 10A(a).

20. On January 24, 2022, Rebecca S. Murray, counsel for the Supervisor of Records, issued a decision on the appeal. She found that MSP had not met its burden to withhold the requested record pursuant to exemption (n), and ordered MSP to provide a response consistent with her order within ten business days. See Addendum at 3-6, Decision of Supervisor of Records in Appeal SPR22/0066.

21. MSP did not provide a response for the following eighteen months.

22. On June 8, 2023, CPCS requested an update on this request and several other open requests by emailing Attorney Joshua Reilly, staff counsel for the Office of Chief Legal Counsel for the MSP.

23. On June 14, 2023, Attorney Reilly agreed to look into the status of the open requests.

24. The parties agreed to discuss this and other open requests by telephone on June 27, 2023.

25. Attorney Reilly and Attorney Siobhan Kelly from MSP, and Daniel Jaffe and Attorney Lauren Russell from CPCS attended the telephone conference on June 27, 2023.

26. During the telephone conference, with respect to this request, Deputy Chief Legal Counsel Siobhan Kelly stated that MSP would not provide barracks assignments, or even the number of officers assigned to each barracks, despite the ruling of the Supervisor of Records.

27. Attorney Kelly asked CPCS to agree to a modification consisting of a list of specialty units and assignments to those units, and troop assignments for every officer.

28. CPCS did not agree to withdraw or narrow its request, but asked for the records that MSP offered to provide.

29. On June 29, 2023, Attorney Kelly sent CPCS a list of the specialty units that fall under the Division of Investigative Services as well as the Division of Homeland Security.

30. On July 7, 2023, during a subsequent telephone call with Attorney Reilly, CPCS inquired about the other documents that Attorney Kelly offered to provide, including the organizational command structure for the other specialty units, and the troop assignments for all officers.

31. Attorney Reilly indicated that he would look into the issue and send any records that he could.

32. Attorney Lauren Russell sent additional correspondence to Attorneys Reilly and Kelly via email on July 21 and July 26, 2023.

33. On August 8, 2023, Attorney Kelly responded to Attorney Russell that she was “working on it” that day. In a separate email on the same date, she sent some documents relative to other CPCS requests, but did not send any documents relative to this request.

34. That same date, August 8, 2023, Attorney Russell asked Attorney Kelly when she could expect full compliance with CPCS’s public records requests. Attorney Kelly did not respond to this email.

35. On August 23, 2023, Attorney Russell sent an additional email, indicating that this lawsuit was imminent if the MSP did not provide a complete response.

36. Attorney Kelly and Attorney Reilly responded the same day and provided a listing of department members, including troop and division assignments, as well as the link to a website containing more information on the specialized units. The response did not include barrack assignments, which MSP continues to withhold, citing the terrorism exemption (n) to the Public Records Law. This production was 614 days and 416 business days after the request.

Request 3: January 2022 request – Criminal cases against troopers

37. On January 19, 2022, Maheeb Rabbani, an intern for CPCS, made a request via the MSP public record portal for information about criminal prosecutions against employees of the MSP for acts or omissions committed in the course of employment.

38. MSP did not provide a timely response within ten business days.

39. On March 28, 2022, CPCS appealed the non-response to the Supervisor of Records.

40. On April 11, 2022, the Supervisor of Records issued a decision on the appeal, ordering MSP to provide CPCS with a response consistent with her order within ten business days. See Addendum at 8, Decision of Supervisor of Records in Appeal SPR22/0711.

41. More than one year later, MSP had not provided a response.

42. MSP did not provide a response until CPCS reinitiated discussions regarding this and other open requests in June 2023.

43. During the June 27, 2023 telephone conference, with respect to this request, Attorney Kelly stated that MSP did not maintain a list of employees criminally prosecuted for acts or omissions committed in the course of employment, but that the information was included in the “Brady portal” which CPCS had separately requested.

44. Attorney Kelly asked CPCS to agree to a modification consisting of an informal and non-comprehensive list of known criminal prosecutions.

45. CPCS agreed to accept the informal list because MSP stated it did not possess any other public records responsive to the request.

46. CPCS followed up with a telephone call on July 7, 2023, and additional emails sent to MSP on August 8, and August 23, 2023.

47. On August 30, 2023, MSP produced a list of individuals charged criminally after an investigation into overtime fraud in Troop E. Attorney Kelly represented that she was unable to locate any other list or document compiling MSP members charged with crimes. This production came 588 days and 401 business days after the request.

Request 4: June 2022 request – Data contained within the MSP Brady Portal

48. On June 15, 2022, Daniel Jaffe made a request via the MSP public record portal for several fields of data contained within the MSP Brady Portal and all data keys, memoranda, policies, and procedures regarding the MSP Brady Portal.

49. Almost one year later, on June 13, 2023, Mr. Jaffe received the first response to his request. The response indicated, erroneously, that the request was initially made on May 9, 2023.

50. The response included an Excel spreadsheet containing the fields of data requested as the Brady Portal.

51. The response did not include the policy level documents requested, such as data keys, memoranda, policies, and procedures regarding the MSP Brady Portal, nor was there any explanation for said documents being withheld.

52. On June 27, 2023, during the telephone discussion about this and other requests, Defendant agreed to provide the missing documents responsive to this request.

53. On July 7, 2023, during a follow-up telephone call, Defendant again agreed to provide the missing documents responsive to this request.

54. Attorney Lauren Russell sent additional correspondence to Attorneys Reilly and Kelly via email on July 21 and July 26, 2023.

55. On August 8, 2023, Attorney Kelly sent the data key to the Brady portal.

56. Also on August 8, 2023, Attorney Russell asked Attorney Kelly when she could expect full compliance with CPCS's public records requests, and on August 23, 2023, Attorney Russell specified that the policy-level documents responsive to this request were still missing.

57. On August 30, 2023, Attorney Kelly represented that there were no policy-level documents about the Brady Portal because department members do not have access to it.

58. On September 6, 2023, Attorney Russell questioned this response, stating that she "would have expected there to be policies or procedures surrounding permitted access, restrictions on access, data entry, and other rules regarding the operation of the portal." That same date, Attorney Kelly then produced the agreement signed by prosecutors who have access to the Brady Portal.

59. In a telephone conference on September 8, 2023, Attorney Kelly indicated she would provide a training manual/guide for IA Pro, software used by the MSP in relation to the Brady Portal.

60. On September 11, 2023, Attorney Kelly sent a list of registered users with access to the Brady Portal. The latest part of this production came 453 days and 307 business days after the request.

61. The training manual for IA Pro has not been produced. It remains unclear why MSP initially failed to identify it as a responsive, policy-level document.

62. On September 13, 2023, CPCS again emailed MSP asking for the promised IA Pro training manual.

Request 5: November 2022 request – Union contracts and arbitration decisions

63. On November 7, 2022, Stefan Liu, an intern at CPCS, made a request via the MSP public record portal for active contracts between MSP and law enforcement unions, and information about arbitrations between MSP and law enforcement unions.

64. MSP did not respond to this request at all until after CPCS requested an update on June 8, 2023, approximately six months later.

65. During the telephone conference on June 27, 2023, Attorney Kelly indicated with respect to this request that she expected to provide all responsive records.

66. On June 29, 2023, Attorney Kelly sent CPCS responsive records. This production came 234 days and 158 business days after the request.

Request 6: April 2023 request – Information regarding Callyo and Pulse

67. On April 10, 2023, Daniel Jaffe made a request via the MSP public record portal for information regarding MSP's use of "Callyo" and "Pulse" software. On information and belief, this software is designed and marketed for use by law enforcement officers and includes the ability to make covert recordings using a cell phone.

68. MSP did not provide a timely response within ten business days.

69. On May 5, 2023, Mr. Jaffe appealed the non-response to the Supervisor of Records.

70. On May 19, 2023, the Supervisor of Records issued a decision on the appeal, ordering MSP to provide CPCS with a response within ten business days. See Addendum at 10-11, Decision of Supervisor of Records in Appeal SPR23/0913.

71. On June 27, 2023, prior to the scheduled telephone conference between parties, Attorney Kelly sent CPCS a partial response which contained some documents responsive to the first three paragraphs of the request.

72. The response did not include any documents responsive to the fourth paragraph of the request, which sought: "All records containing or reflecting data storage, evidence control, device management, officer use or device logs, authorized officer user lists, or audits regarding Callyo devices and/or Pulse software."

73. On August 30, 2023, after additional follow up emails, MSP produced a training on Callyo software.

74. On September 6, 2023, Attorney Kelly produced notices which were sent to prosecutor's offices following an internal audit regarding the use of Callyo software. The notices identified cases in which covert recordings were made by state troopers, but not turned over to prosecutors or defense counsel.

75. In the September 8, 2023 telephone conference, Attorney Kelly indicated that she was still deciding whether the audit could be withheld under an exemption to the Public Records Law. She agreed to make that determination by September 14, 2023, and either produce the audit on that date or explain why it was being withheld.

76. On September 14, 2023, Attorney Kelly sent an email indicating that MSP had identified three Callyo trainings created by Motorola. She explained that these trainings were

being withheld under G. L. c. 4, § 7(26)(f), the “investigatory exception.” She did not mention the audit.

77. On September 21, 2023, Attorney Kelly produced two letters summarizing the results of the audit. In the same email, she indicated that the full audit and underlying data were being withheld under the investigatory exception.

78. The latest production came 164 days and 113 business days after this request was made.

Request 7: June 2023 request – Information regarding “Body Bugs”

79. On June 13, 2023, Daniel Jaffe made a request via the MSP public record portal for information regarding MSP’s use of surveillance devices and applications, including “body bugs.”

80. MSP’s response was due June 28, 2023.

81. In the telephone conference of September 8, 2023, Attorney Kelly explained that “body bugs” were a Callyo product, so there would be significant overlap between this request and CPCS’s prior request for Callyo information. Nevertheless, she indicated that she would provide a response to this request.

82. On September 11, 2023, MSP produced some responsive documents about the “Callyo VIP ‘Mobile Body Bug’ application.” This production came 90 days and 61 business days after the request.

83. The documents produced were mostly duplicative of those produced for the “Callyo” request. The production did, however, include a previously undisclosed list of all MSP members with Callyo account credentials. It remains unclear why this list was not produced in

response to CPCS's prior request. It is also unclear whether the audit previously withheld would be responsive to CPCS's request for information about body bugs.

Request 8: June 2023 request – Information regarding North Worcester County Drug Task Force and MSP Central Gang Unit

84. On June 27, 2023, Daniel Jaffe made a request via the MSP public record portal for information regarding the North Worcester County Drug Task Force and MSP Central Gang Unit of MSP.

85. MSP's response was due July 12, 2023.

86. On September 6, 2023, Attorney Kelly emailed asking CPCS to send another copy of the public records request, as she was unable to locate it. Attorney Russell emailed a copy that same date.

87. During the September 8, 2023 telephone conference, Attorney Kelly acknowledged that this request was outstanding. She indicated she had yet to conduct a search for records, but still intended to do so.

88. MSP has not responded. It has been 112 days and 77 business days since this request.

Outstanding Documents

89. MSP did not appeal to the Supervisor of Records for an extension of time, nor produce records to CPCS within the timeframe established by law, for any of these requests.

90. In response to CPCS's requests, MSP has not furnished any records for CPCS's eighth request (policy documents on central MA specialty units; dated June 27, 2023), has not properly claimed exemptions for CPCS's second and sixth requests (Barracks Assignments and Callyo documents; dated Dec. 17, 2021 and April 10, 2023), and continues to withhold public records for CPCS's fourth request (Brady Portal Guidance; dated June 15, 2022)..

91. While Plaintiff would have agreed, in good faith, to modifications proposed by Defendant during negotiations, Plaintiff here asserts the right to receive all public records, without regard to any narrowing that was previously discussed.

92. In many instances where Plaintiff may have agreed to modifications that narrowed any of its requests, such modifications were agreed upon in reliance upon information provided by Defendant.

93. On information and belief, Defendant has suggested modifications to Plaintiff's requests that were not reasonable or appropriate under the Public Records Law because such suggestions were not for the purpose of enabling the MSP to produce responsive records more efficiently and affordably, but rather to prevent responsive records from being produced at all.

94. On September 8, 2023, Attorney Kelly agreed that MSP would produce all outstanding documents by September 14, 2023. She also agreed to certify that after a diligent search, MSP's production in response to these requests was complete to the best of her knowledge.

95. MSP has not certified that after a diligent search, its production is complete.

96. While CPCS does not and cannot know what responsive records are yet to be discovered within the MSP, the Defendant has acknowledged the existence of the following responsive documents, but not produced them:

- a. Barrack assignments for all Troopers – wrongfully withheld under exemption (n);
- b. A training manual/guide for IA Pro;
- c. The full audit conducted by MSP about its use of Callyo software – wrongfully withheld under exemption (f);

- d. Three additional Motorola/Callyo trainings – wrongfully withheld under exemption (f).

CLAIM FOR RELIEF

Defendant’s responses and non-responses to public record requests violate G. L. c. 66, § 10.

97. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth herein.

98. “[A] presumption shall exist that each record sought is public and the burden shall be on the defendant agency or municipality to prove, by a preponderance of the evidence, that such record or portion of the record may be withheld in accordance with state or federal law.” G. L. c. 66, § 10A(d)(1)(iv).

99. Once a request for public records is made, a custodian of records must either permit inspection or furnish a copy of the public record, G. L. c. 66, § 10(a), 950 Code Mass. Regs. § 32.06(2), or provide written notice that it is denying the request to access the record. G. L. c. 66, § 10(b), 950 Code Mass. Regs. § 32.06(3).

100. The statutory default timeframe is 10 business days to produce the responsive records or otherwise provide a written notice consistent with G. L. c. 66, § 10(b). If additional time is needed, an agency can notify a requestor in writing that it requires up to five additional business days. Id. In uniquely burdensome circumstances, an agency can petition the Supervisor of Records for a one-time extension for up to 20 days. G. L. c. 66, § 10(c).

101. MSP’s failure to provide documents, in a timely manner or at all, in response to CPCS’s requests, its failure to certify that it has provided all responsive documents, and its improper withholding of other documents violates G. L. c. 66, § 10, the Public Records Law

102. MSP's regular pattern of failing to timely respond to requests for public records is so substantial and widespread that it evinces a lack of good faith. It appears this has not changed and that it will not change absent the intervention of this Court.

PRAYER FOR RELIEF

WHEREFORE, pursuant to G. L. c. 66, § 10A(d)(1)(iii), Plaintiff respectfully requests that this Court expedite these proceedings, and grant the following relief:

1. Declare that Defendant violated G. L. c. 66, § 10 by failing to produce responsive records;
2. Order Defendant to produce, forthwith, all responsive records, including, but not limited to: the unit, division, precinct, and/or barracks assignments for all members of the MSP; the training manual/guidance for IA Pro; the full audit of the MSP's use of Callyo software and its underlying data, the Motorola/Callyo trainings; and any responsive records related to the North Worcester County Drug Task Force and MSP Central Gang Unit;
3. Declare that MSP violates G. L. c. 66, § 10 by failing to comply with the timelines set forth therein;
4. Grant an injunction enjoining MSP from failing to comply with the timelines set forth in G. L. c. 66, § 10 for public records requests made to MSP;
5. Award reasonable attorneys' fees and costs pursuant to G. L. c. 66, § 10A(d);
6. Assess punitive damages against Defendant as authorized by the Public Records Law in an amount to be determined by the Court to be deposited into the Public Records Assistance Fund established in section 35DDD of chapter 10 of the General Laws; and

7. Order such other and further relief as the Court deems necessary, just, and appropriate under the circumstances.

DEMAND FOR JURY TRIAL

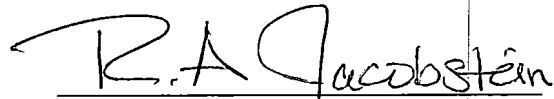
Plaintiff hereby demands a trial by jury on all claims and issues so triable.

Dated: October 13, 2023

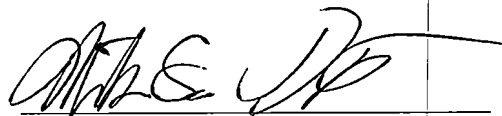
Respectfully Submitted,

Committee for Public Counsel Services,

By its attorneys,



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