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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 2484CV03009-C

SHANNON O'BRIEN

v.

DEBORAH GOLDBERG¹

**MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT'S EMERGENCY MOTION TO IMPOUND
PLAINTIFF'S APPENDIX**

Plaintiff Shannon O'Brien ("O'Brien" or the "Plaintiff") filed this action in the Supreme Judicial Court ("SJC") as a petition in the nature of certiorari under G.L. c. 249, § 4, challenging the decision of Defendant Deborah Goldberg, Treasurer and Receiver General of the Commonwealth of Massachusetts ("Defendant" or the "Treasurer"), to remove O'Brien as Chair of the Cannabis Control Commission ("CCC"). In support of her petition, Plaintiff filed a 1,733-page appendix of documents concerning underlying administrative proceedings (the "Appendix"). The Treasurer moved to impound the Appendix on an emergency basis, on the ground that the filed documents contained personal data of CCC employees that is statutorily protected from public disclosure. On November 14, 2024, a Single Justice of the SJC (Wolohojian, J.) ordered that the action be transferred to this Court pursuant to G. L. c. 211, § 4A, and that the Appendix remain temporarily impounded pending this Court's ruling on the Treasurer's emergency motion.²

¹ Treasurer and Receiver General of the Commonwealth of Massachusetts, in her official capacity.

² The CCC has since filed its own motion to impound the Appendix in this Court, asserting similar grounds for such relief.

The Court has reviewed the parties' submissions and supplemental briefing and, following a hearing, concludes that the Appendix shall be stricken from the record.

"[R]eview under G.L. c. 249, § 4 is limited to correcting 'substantial errors of law that affect material rights and are apparent *on the record*'" (emphasis added). Drayton v. Commissioner of Corr., 52 Mass. App. Ct. 135, 136 n.4 (2001), quoting Gloucester v. Civil Serv. Comm'n, 408 Mass. 292, 297 (1990). For this reason, the Court's review in certiorari is confined to a filed administrative record. Gloucester, 408 Mass. at 297; Seales v. Boston Hous. Auth., 88 Mass. App. Ct. 643, 649 (2015). See Super. Ct. Standing Order 1-96, §§ 4, 5 ("A claim for judicial review shall be resolved through a motion for judgment on the pleadings[.] . . . No testimony or other evidence shall be presented at the hearing; and the review shall be confined to the record.").

Superior Court Standing Order 1-96 governs claims for judicial review of agency proceedings pursuant to G.L. c. 249, § 4, G.L. c. 30A, and similar statutes, including (of relevance here) the process for assembling and filing an administrative record. The subject agency in this case – the Treasurer – must file the case's administrative record within ninety (90) days after service of the complaint. See Super. Ct. Standing Order 1-96, §§ 1, 2. The agency is required, in accordance with SJC Rule 1:24, to redact personal identifying information³ from the record, or file separately and move to impound such portions of the record that contain protected information. Id. at § 2A.⁴ A plaintiff may then, within 20 days after the agency files and serves

³ SJC Rule 1:24, § 2 defines "personal identifying information" as "a social security number, taxpayer identification number, driver's license number, state-issued identification card number, or passport number, a parent's birth surname if identified as such, a financial account number, or a credit or debit card number."

⁴ Documents the agency provisionally designates for impoundment "shall NOT be impounded without a hearing in compliance with Trial Court Rule VIII" of the Uniform Rules of Impoundment Procedure. See Super. Ct. Standing Order 1-96, § 2A(b) (emphasis original).

the administrative record, seek leave to present additional evidence. Id. at § 3.⁵

In the case at bar, the Treasurer and CCC argue that the Appendix contains protected “personal data” of CCC employees within the meaning of the Commonwealth’s Fair Information Practices Act (“FIPA”) and, as “holders” of such data, they are required to safeguard it against public disclosure. See G.L. c. 66A, §§ 1, 2(c).⁶ They further assert that portions of the Appendix contain privileged attorney-client communications and confidential internal complaints and investigative reports. Plaintiff rejoins that the Treasurer’s request is overbroad, improperly open-ended, and fails to adequately identify the particular protected information as to which impoundment is sought. Plaintiff further argues that her interest in clearing her name and the public’s interest in the proper administration of the CCC outweigh any asserted grounds for impounding the Appendix, and that she (and the public) should not be compelled to wait as long as 90 days for the record of the underlying proceeding in this matter to be publicly available.⁷

Having reviewed the question, the Court has determined that it need not decide whether and to what extent the FIPA provisions or claims of confidentiality the Treasurer and CCC rely upon in their respective motions apply to the Appendix. As the filing of the Appendix does not comport with either Standing Order 1-96 or Mass. R. Civ. P. 8(a), the Court shall strike it from

⁵ A plaintiff must serve the requisite Rule 12(c) motion for judgment on the pleadings and supporting memorandum “within thirty (30) days of the service of the record or of the Court’s decision on any motion specified in [§] 3 ..., whichever is later.” Super. Ct. Standing Order 1-96, § 4.

⁶ It bears note that the definition of “personal data” under FIPA is substantially broader than “personal identifying information” as defined under SJC Rule 1:24. FIPA thus provides:

“Personal data” [is] any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in clause Twenty-sixth of section seven of chapter four and shall not include intelligence information, evaluative information or criminal offender record information as defined in section one hundred and sixty-seven of chapter six.

G.L. c. 66A, § 1.

⁷ The parties do not dispute that the administrative record the Treasurer files in connection with this action shall be publicly available, subject to whatever redactions may be required by law.

the record.

As set forth *supra*, the Court's review of a certiorari petition is circumscribed, and Standing Order 1-96 assigns the duty of assembling the evidentiary record to the relevant agency. The Court acknowledges the public's interest in the governance of the CCC, and the Plaintiff's interest, as she views the matter, in clearing her name following her dismissal as its Chair. Those interests, however, do not warrant a departure from the procedures of Standing Order 1-96, or supply grounds for Plaintiff's preemptive filing of 1,733 pages of documents – which, while voluminous, Plaintiff concedes may not be coextensive with the administrative record. See Pl.'s Compl., at p. 4 n.1. Plaintiff's novel filing likewise fails to comply with her obligation under Mass. R. Civ. P. 8(a) to provide a "short and plain statement" showing her entitlement to relief. See *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000).

Where, as alleged here, "confidential information is at risk of disclosure, [a] judge [may] strike those portions of the complaint that [a]re overly descriptive . . . or . . . redundant and unnecessary." *Pane v. Goffs*, 74 Mass. App. Ct. 1107, 2009 WL 1119480, at *4 (Apr. 28, 2009) (Rule 1:28 decision). Accord *Smaland Beach Ass'n, Inc. v. Genova*, No. PLCV200500088, 2006 WL 1921829, at *3 (Mass. Super. Ct. May 31, 2006) (Rufo, J.) ("Upon the motion of a party or sua sponte, the Court may strike 'any redundant, immaterial, impertinent, or scandalous matter.'"), quoting Mass. R. Civ. P. 12(f). Attachment of the ponderous Appendix to Plaintiff's initial pleading does not, thereby, introduce those materials into the limited scope of the Court's certiorari review. See *Gloucester*, *supra*. And it is plainly not an efficient use of judicial resources for the undersigned to parse claims of privilege and confidentiality, document-by-document, across a 1,700-plus page appendix that forms no part of the evidentiary record and the Court's eventual disposition of the Plaintiff's claim.

By contrast, the Court anticipates that striking the Appendix and proceeding in the

normal course in accordance with Standing Order 1-96 will narrow any disputes over purportedly protected information, and thereby promote a more expeditious resolution of the case. (This, of course, will further the most salient interests of both the parties and the public.) The administrative record appears due for filing in a matter of weeks,⁸ militating without more against the wisdom of a deep dive into the impoundment-worthiness of documents that make up the Appendix now. Given the nature of the underlying proceedings and the asserted bases for Plaintiff's removal as Chair of the CCC, the Court is, frankly, skeptical that the administrative record itself is likely to contain a significant amount of protected personal information that satisfies the narrow definition of same under SJC Rule 1:24. The Treasurer has not identified, and the Court has not located, any case authority suggesting that an administrative record filed in the context of a review under G.L. c. 249, § 4 or G.L. c. 30A is subject to the broader strictures of G.L. c. 66A, § 2(c), to claims of attorney-client privilege asserted after the subject information was disclosed in an administrative proceeding, or to a private promise of confidentiality that a governmental agency may have extended to a complaining employee, such as would justify impoundment or redaction of the administrative record on those grounds.⁹ Moreover, it bears emphasis that Standing Order 1-96 plainly contemplates that an agency's filing of a provisional motion to impound portions of the administrative record need not delay or interfere with the Court's resolution of the claim on the merits.¹⁰

⁸February 12, 2025, at the latest, assuming Plaintiff served the Complaint on or before November 14, 2024.

⁹ This is the more remarkable when one considers the fact that the government's broad construction of FIPA's applicability to matters in civil litigation could be asserted in virtually *any* case in which an administrative agency is a Chapter 30A defendant. So far as the undersigned is able to discern, this case represents the first occasion when a department of the Commonwealth has pressed the expansive position on impoundment the Treasurer now does.

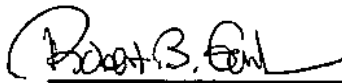
¹⁰ See Super. Ct. Standing Order 1-96, § 2A(b) ("The provisional motion to impound will be forwarded to the session judge for Rule VIII notice, hearing and findings ONLY if a non-party seeks to review the documents." See Super. Ct. Standing Order 1-96, § 2A (emphasis original). Accord *Pixley v. Commonwealth*, 453 Mass. 827, 836 n.12 (2009) ("[A]n order of impoundment prevents the public, but not the parties, from gaining access to impounded material, unless otherwise ordered by the court.").

“Massachusetts has long recognized a common-law right of public access to judicial records . . . including transcripts, evidence, memoranda, and court orders[.]” Republican Co. v. Appeals Court, 442 Mass. 218, 222-23 (2004). “[I]mpoundment is always the exception to the rule, and the power to deny public access to judicial records is [] strictly construed in favor of the general principle of publicity.” Id. at 223. Likewise, “[t]he public interest in seeing legislative policies adhered to by a governmental agency” generally overrides individual promises of a government official to the contrary. See Sullivan v. Chief Just. for Admin. & Mgmt. of Trial Ct., 448 Mass. 15, 30 (2006). Here, to the extent the Treasurer seeks to impound any portion of the administrative record, she must do so by accompanying motion in accordance with Standing Order 1-96. In such motion, the Treasurer must identify the specific information she seeks to withhold, and, as to each piece of information so referenced, she must cite the specific statutory or common law basis for the claim that the material is protected from public disclosure. See Super. Ct. Standing Order 1-96, § 2A.¹¹

CONCLUSION AND ORDER

For the foregoing reasons, the “Appendix” filed in connection with Plaintiff’s Petition in the Nature of Certiorari shall be, and hereby is, **STRICKEN FROM THE RECORD OF THIS CASE**. The parties shall proceed going forward in accordance with Superior Court Standing Order 1-96.

SO ORDERED.


Robert B. Gordon
Justice of the Superior Court

Date: January 21, 2025

¹¹ That said, this case has not proceeded with the alacrity one might expect in a matter that carries the level of importance attached to it by the parties and public alike. It is the Court’s fervent hope that the case not become further enmired in procedural wrangles that keep it from getting to the merits.