AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS
99 CHAUNCY STREET, SUITE 310 BOSTON, MASSACHUSETTS 02111

John Reinstein
Legal Director

(617) 482-3170
Fax (617) 451-0009

January 8, 2004

Alan Cote
Supervisor of Records
Office of the Secretary of State
John W. McCormack Building
Boston, Massachusetts 021008

Re: Case No. SPR03\657

Dear Mr. Cote:

This is an appeal from the refusal of the Department of State Police to make available certain public records. It is my understanding that this appeal will be consolidated with the pending appeals concerning requests for similar records from the City of Springfield, the City of Lawrence, the City of Lowell, the City of New Bedford and the University of Massachusetts.

On October 31, 2003, I wrote to Col. Thomas E. Foley, the Superintendent of the State Police, on behalf of the American Civil Liberties Union of Massachusetts for the stated purpose of "learning whether the Department of State Police ha[d] entered into an agreement with the Department of Justice or the Federal Bureau of Investigation concerning the department's participation in the Joint Terrorism Task Force ('JTTF")." Toward that end, I requested a copy of the following records made or received by the Department of State Police:

1. All records of communications between the FBI and the Department of State Police or any officer, employee or attorney of the Department of State Police concerning participation in the JTTF by the Department of State Police or its police officers; and

2. Any formal intergovernmental agreements, memoranda of understanding or memoranda of agreement concerning participation in the JTTF by the Department of State Police or its police officers.

A copy of that letter is attached as Exhibit A. Similar requests were sent to the Springfield Police Department, the Boston Police Department, the Cambridge Police Department, the Lowell Police Department, the Lawrence Police Department, the New Bedford Police Department, the Fall River Police Department, the Worcester Police Department and the University of Massachusetts.

By letter dated December 9, 2003, Sean W. Farrell, the Department's Staff Counsel, denied the request for these records in its entirety, asserting that the records in question are exempt from disclosure under G.L. c. 4, § 7, clause 26 (f) and (n). A copy of that letter is attached as Exhibit B. None of the claims put forward by the Department justifies withholding of the documents which we have requested.

I wish to emphasize at the outset that we sought only two narrow categories of records. We sought in the first instance any written agreement or agreements between a federal agency and a municipal police department concerning the Department's participation in cooperative anti-terrorism efforts. Based on review of similar agreements which are publicly available, it appears that such agreements would include such non-sensitive issues as number of local personnel, responsibility for supervision, general administration, funding and liability. Examples of similar agreements which are readily available to the public may be viewed at http://faculty.maxwell.syr.edu/asroberts/foi/jttf.html.

The second category of records included records of communications between the Department and the FBI concerning the Department's participation in the JTTF and would certainly include routine correspondence and e-mail concerning the negotiation and administration of the agreement. There was no request for investigative records.

With respect to the specific provisions of the Massachusetts Public Records Law cited by the Department, exemption (f) provides no support for the refusal to release the requested records. That provision of the law is limited by its terms to "investigatory materials." The Department's response, however, simply recites the language of the exemption. It contains no explanation of the reason why an agreement between two government agencies, which appears to deal with the relationship between the agencies and has nothing to do with any specific investigation or with investigative methods, would be covered by the exemption. This is neither an investigatory record nor a document "necessarily compiled out of the public view."

Exemption (n) is likewise unavailing. The Department states, without support or explanation, that "the release of this type of information would publicly reveal law enforcement efforts" and "would, in turn, likely jeopardize public safety." First, the information sought is not the type of information which this provision was intended to

exempt from disclosure. The language was directed at specific structural and operational plans and "other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure within the commonwealth." As recognized in your interpretive bulletin on exemption (n), this provision was intended to place controls on access to the types of records which may facilitate an attack on persons and places. SPR Bulletin No. 04-03, April 1, 2003. The Department's interpretation of the statute goes far beyond this and would exempt virtually any records maintained by the State Police. Second, the exemption is limited to materials the disclosure of which would, "in the reasonable judgment of the custodian," jeopardize public safety. The reasons, however, must be stated with particularity. Custodians are required to "articulate with specificity reasons for denying the request" in their written denial and "must also clearly address the factors surrounding the 'reasonable judgment' utilized by the custodian and why the custodian believed that access to certain records by a particular requestor 'was likely to be used' to jeopardize public safety." SPR Bulletin No. 04-03, April 1, 2003. The Department's response is deficient in each respect.

For the foregoing reasons, I request that the Department of State Police be ordered to comply with the requirements of G.L. c. 66, § 10 and to provide us with the records which we have requested.

Very truly yours,

John Reinstein

Encl.

cc: Sean W. Farrell, Esq.

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John Reinstein
Legal Director

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October 31, 2003

Col. Thomas Foley
Superintendent
Massachusetts State Police
470 Worcester Road
Framingham, MA 01702

Re: Public Records Request

Dear Colonel Foley:

This is a request under the Public Records Law. G.L. c. 66, § 10.

I am interested in learning whether the Department of State Police has entered into an agreement with the Department of Justice or the Federal Bureau of Investigation concerning the Department's participation in the Joint Terrorism Task Force ("JTTF"). Would you please provide me with a copy of the following records made or received by the Department of State Police:

1. All records of communications between the FBI and the Department of State Police or any officer, employee or attorney of the Department concerning participation in the JTTF by the Massachusetts State Police; and

2. Any formal intergovernmental agreements, memoranda of understanding or memoranda of agreement concerning participation in the JTTF by the Massachusetts State Police.

Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt. In addition, please note the applicable statutory exemption and explain why it applies to the redacted portions. As you know, a custodian of public records shall comply with a request within ten days after receipt.

Sincerely yours,

John Reinstein

cc: Eleanor Sinnott, Chief Legal Counsel

MITT ROMNEY
GOVERNOR

KERRY HEALEY
LIEUTENANT GOVERNOR

EDWARD A. FLYNN
SECRETARY

COLONEL THOMAS J. FOLEY
SUPERINTENDENT

The Commonwealth of Massachusetts
Department of State Police

Office of the Chief Legal Counsel
470 Worcester Road
Framingham, Massachusetts 01702

December 9, 2003

John Reinstein, Esq.
American Civil Liberties Union
99 Chauncy Street, Suite 310
Boston, MA 02111

RE: ***Public Records Request***

Dear Attorney Reinstein:

This office is in receipt of your 31 October 2003 public records request seeking documents relative to the "Joint Terrorism Task Force ('JTTF')."

Upon review of the request, the Department of State Police denies your request pursuant to G.L. c. 4, §7, cl.26, para. (n). This exemption to the public records law exempts from disclosure all "records including but not limited to blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, *or any other records relating to the security or safety of persons* or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety." (emphasis added).

The Department, moreover, denies your request pursuant to G.L. c. 4, §7, cl 26, para. (f) which exempts from public disclosure "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."

The basis of the Department's denial of your request rests in the fact that the nature of the information you seek regarding the Joint Terrorism Task Force is, in the opinion of the Department, investigatory in nature and relates to "the security or safety of persons or buildings." See G.L. c. 4, §7, cl 26, para. (a) & (n). The Department, furthermore, contends that the release of this type of information would publicly reveal

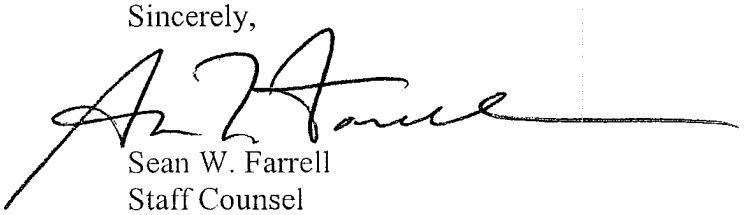
investigative and security/law enforcement efforts. Such dissemination would, in turn, likely jeopardize the public safety.

In light of these concerns, the Department posits that such disclosure would not be in the public interest given the paramount importance of the public safety and considering the possibility of terrorist attacks not only within the United States, but within the Commonwealth. Accordingly, for the foregoing reasons, the Department denies your request.

Please be advised that you have the right to appeal this denial to the Secretary of State's Office located at One Ashburton Place in Boston.

Your attention to this matter is greatly appreciated.

Sincerely,



Sean W. Farrell
Staff Counsel
Massachusetts State Police
(508) 820-2311

SWF/st
cc: Eleanor C. Sinnott, Esq.