Caesar P. Cardozo, Esq.
General Counsel
Boston Housing Authority
52 Chauncy Street, 10th Floor
Boston, MA 02111

Dear Attorney Cardozo:

I have received the petition of Laura Kiesel of Dig Boston appealing the response of the Boston Housing Authority (Authority) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On October 21, 2021, Ms. Kiesel requested various records concerning the use of Second Generation Coagulant Rodenticides (SGARs) at the Authority’s properties since October 2015. The Authority responded on the following day, seeking to clarify the request, and Ms. Kiesel expanded the scope of her request to cover 2010 to the present, and to include “first generation ARs.” The Authority again responded on November 4, 2021, providing a fee estimate and further suggesting modifications to the scope of the request. Objecting to the fees, Ms. Kiesel appealed, and this case was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). “Public records” is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist. Att’y for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.
If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

**Fee Estimate – Municipalities**

A municipality may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection. G. L. c. 66, § 10(d). The fees must reflect the actual cost of complying with a particular request. Id. A maximum fee of five cents ($0.05) per page may be assessed for a black and white single or double-sided photocopy of a public record. G. L. c. 66, § 10(d)(i).

Municipalities may not assess a fee for the first (two) 2 hours of employee time to search for, compile, segregate, redact or reproduce the record or records requested unless the municipality has 20,000 people or less. G. L. c. 66, § 10(d)(iii). Where appropriate, municipalities may include as part of the fee an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill required to search for, compile, segregate, redact or reproduce a record requested, but the fee shall not be more than $25 per hour. Id. However, municipalities may charge more than $25 per hour if such rate is approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv).

A fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor of Records under a petition under G. L. c. 66, § 10(d)(iv). See G. L. c. 66, § 10(d)(iii); 950 C.M.R. 32.06(4).

**Current Appeal**

In her appeal petition, Ms. Kiesel contends that the Authority’s “correspondence demanding $10k begins with an acknowledgement that their letter is not a response to [her] request,” and she argues that “if a response is later than the ten business days allowable under the law then the agency/municipality cannot charge fees.”

**The Authority’s November 4th Response**

In its November 4, 2021 response, the Authority provides an example of the responsive records, along with a fee estimate, broken down between “small sites” and “large sites.”

**G. L. c. 66, § 10(e)**

G. L. c. 66, § 10(e) provides that “[a] records access officer shall not charge a fee for a public record unless the records access officer responded to the requestor within 10 business days under subsection (b).” Pursuant to the Public Records Law, the written response must be made via first class or electronic mail and must:
(i) confirm receipt of the request;
(ii) identify any public records or categories of public records sought that are not within the possession, custody, or control of the agency or municipality that the records access officer serves;
(iii) identify the agency or municipality that may be in possession, custody or control of the public record sought, if known;
(iv) identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based, provided that nothing in the written response shall limit an agency’s or municipality’s ability to redact or withhold information in accordance with state or federal law;
(v) identify any public records, categories of records, or portions of records that the agency or municipality intends to produce, and provide a detailed statement describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the agency or municipality and therefore requires additional time to produce the public records sought;
(vi) identify a reasonable timeframe in which the agency or municipality shall produce the public records sought; provided, that for an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records and for a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records; and provided further, that the requestor may voluntarily agree to a response date beyond the timeframes set forth herein;
(vii) suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably;
(viii) include an itemized, good faith estimate of any fees that may be charged to produce the records; and
(ix) include a statement informing the requestor of the right of appeal to the supervisor of records under subsection (a) of section 10A and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court under subsection (c) of section 10A.

G. L. c. 66, § 10(b).

Where the Authority received Ms. Kiesel’s request on October 21, 2021, and provided a response on November 4, 2021, within ten business days of receiving the request, I find the Authority may assess a fee to produce responsive records.

Modification

In email correspondence on October 22, 2021, the Authority and Ms. Kiesel clarify several aspects of the request. Additionally, in an email to Ms. Kiesel on November 5, 2021, the
Authority provides several suggestions for Ms. Kiesel to narrow the scope of her request and to reduce the time spent searching and compiling responsive records. Ms. Kiesel indicated that she was “glad to shorten the time frame from a decade to a half-decade (from 2015 to present), if that would help.”

Where Ms. Kiesel and the Authority have both shown a willingness to modify the scope of the request, this office encourages Ms. Kiesel and the Authority to continue communicating in order to facilitate providing records more efficiently and affordably. See G. L. c. 66, § 10(b)(vii) (a municipality shall suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the municipality to produce the records sought more efficiently and affordably).

If issues remain after further communication, Ms. Kiesel may file a subsequent appeal.

Sincerely,

Rebecca S. Murray
Supervisor of Records

cc: Laura Kiesel