Suffolk Journal of Trial and Appellate Advocacy

Volume 26 | Issue 2 Article 7

1-1-2021

[Redacted] Addressing the Disclosure of Medical Conditions, Mental Health Treatment, and Substance Abuse History in the Online Publication of Court Documents in Massachusetts

Diana Hurtado
Suffolk University Law School

[REDACTED]: ADDRESSING THE DISCLOSURE OF MEDICAL CONDITIONS, MENTAL HEALTH TREATMENT, AND SUBSTANCE ABUSE HISTORY IN THE ONLINE PUBLICATION OF COURT DOCUMENTS IN MASSACHUSETTS

I. INTRODUCTION

Posting personal information online—whether by choice or through unwilling participation—paints a "detailed picture" of who people are for the public.[1] The risks of exposing sensitive information to the general public have increased drastically as more personal data becomes digitized.[2] Data regarding people's mental health, substance use, and medical

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[1] *See* Abdullah Shihipar, *Data for the Public Good*, N.Y. TIMES, (Oct. 24, 2019), https://www.nytimes.com/2019/10/24/opinion/data-privacy-research.html (indicating benefits of online accessibility for personal data).

> Part of the reason so many of us are nervous about our data and who has access to it is that pieces of our data can be combined to paint a detailed picture of our lives: how much money we make, what we're interested in, what car we drive. But in a similar way, individual experiences become data points in sets that shape our understanding of what's happening in this country.

Id. *But see* *Disclosing Personal Information*, REACHOUT.COM, https://schools.au.reachout.com/articles/disclosing-personal-information (last visited May 20, 2021) (discussing criminal use of personal information).

> Some identity thieves have stolen personal information from many people at once, by hacking into large databases managed by businesses or government agencies. While you can't enjoy the benefits of the Internet without sharing some personal information, you can take steps to share only with organizations you know and trust.

Disclosing Personal Information, *supra* note 1.

[2] *See Internet Privacy*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/privacy-technology/internet-privacy (last visited Nov. 11, 2019) ("With more and more of our lives moving online, these intrusions have devastating implications for our right to privacy. But more than just privacy is threatened when everything we say, everywhere we go, and everyone we associate with are fair game."); *see also* Liz Mineo, *On Internet Privacy, be very Afraid*, THE HARVARD GAZETTE (Aug. 24, 2017), https://news.harvard.edu/gazette/story/2017/08/when-it-comes-to-internet-privacy-be-very-afraid-analyst-suggests (discussing limited protections internet privacy laws provide for user information online). "Unfortunately, we live in a world where most of our data is out of our control." Mineo, *supra* note 2; *Internet Privacy Laws Revealed - how your Personal Information is Protected Online*, THOMSON REUTERS, https://legal.thomsonreuters.com/en/insights/articles/how-your-personal-information-is-protected-online (last visited Nov. 11, 2019) (discussing risk of personal data exposure through digital footprints).

conditions are of particular concern.[3] The troubling reality is that many companies collect and store data about an individual's medical and psychiatric histories based on online searches.[4] Digitized medical records, genetic information, and mental health data pose a greater risk of privacy breaches than similar data stored as physical records.[5] When an individual's identifiable medical or mental health information is made public on an online forum, such exposure may lead to stigma, isolation, and discrimination.[6] These consequences can negatively impact individuals' lifestyles and their

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[3] *See Mental Health Information 'Sold to Advertisers,'* BBC NEWS (Sept. 4, 2019), https://www.bbc.com/news/technology-49578500 (noting how European mental health websites use cookies to track users for third party companies); *see also* Angus Chen, *How Your Health Data Lead A Not-So-Secret Life Online*, NPR (July 30, 2016, 5:00 AM), https://www.npr.org/sections/health-shots/2016/07/30/487778779/how-your-health-data-lead-a-not-so-secret-life-online (demonstrating how third-party companies may access personal health information through apps). "A recent report from the Department of Health and Human Services showed that the vast majority of mobile health apps on the marketplace aren't covered by the Health Information Portability and Accountability Act." Chen, *supra* note 3; Brian Merchant, *Looking Up Symptoms Online? These Companies are Tracking You*, VICE (Feb. 23, 2015, 10:25 AM), https://www.vice.com/en_us/article/539qzk/looking-up-symptoms-online-these-companies-are-collecting-your-data (identifying risks to user privacy).

[4] *See* Chen, *supra* note 3 (highlighting how third-party mobile apps collect medical data based on user search history). Online search terms, location, and any other identifiable data can be used to create online profiles for third-party companies. *Id.*; *see also* Merchant, *supra* note 3 (outlining how third parties track users' internet search history regarding medical symptoms). Many online pages collect private data about user health concerns before sending it to third-party corporations. Merchant, *supra* note 3.

[5] *See Medical And Genetic Privacy*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/privacy-technology/medical-and-genetic-privacy (last visited Nov. 12, 2019) (explaining risks associated with digital medical and genetic records). "As medical records are increasingly digitized and genetic sequencing becomes faster and cheaper, threats to our privacy and autonomy intensify." *Id.*; *Genetic Genealogy Site is Vulnerable to Compromised Data*, TECH. NETWORKS (Oct. 30, 2019), https://www.technologynetworks.com/genomics/news/genetic-genealogy-site-is-vulnerable-to-compromised-data-326577 (describing risks associated with genetic information available online through genealogy sites); *see also* Jenn Shanz, *'I Felt So Betrayed.' Woman Sues Beaumont After Medical Records Turn up on Social Media*, WXYZ DETROIT (Nov. 11, 2019, 6:25 PM), https://www.wxyz.com/news/i-felt-so-betrayed-woman-sues-beaumont-after-medical-records-turn-up-on-social-media (discussing harm patient experienced after medical provider posted sexual assault exam results on social media).

[6] *See Mental Health Conditions in the Workplace and the ADA*, ADA NAT'L NETWORK, https://adata.org/factsheet/health (last updated Mar. 2021) ("Because mental health conditions are so highly stigmatized and misunderstood, workers with psychiatric disabilities are more likely than others to experience workplace harassment."); Felicia Gould, *It's Time to Remove the Stigma Of Anxiety, Depression, and Mental Illness,* THE MIAMI HERALD (Oct. 28, 2019, 4:24 PM), https://www.miamiherald.com/living/health-fitness/article236668203.html ("[S]tigma with respect to mental illness is far less widely discussed."); Nicola J. Reavley, *People with a Mental Illness Discriminated Against when Looking for Work and when Employed*, THE CONVERSATION (Feb. 3, 2016, 2:05 PM), http://theconversation.com/people-with-a-mental-illness-discriminated-against-when-looking-for-work-and-when-employed-52864 (introducing survey findings of discrimination against mentally ill employees).

ability to find or maintain work.[7] As a result, people may be dissuaded from seeking professional help or continuing their medications.[8] With 47.6 million adults in the United States experiencing mental illness, 20.3 million struggling with substance abuse disorders, and approximately 133 million suffering from chronic illness, it is impossible to ignore the negative impact of this stigma.[9]

In Massachusetts, the risk of exposing information about someone's mental illness, substance abuse, or medical history online encompasses more than digital medical records and social media posts.[10] In the

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[7] *See* Kate Cronin, *Removing the Stigma of Opioid Addiction is a Corporate Responsibility*, STAT NEWS (Sept. 6, 2019), https://www.statnews.com/2019/09/06/reducing-stigma-opioid-addiction-corporate-responsibility ("[R]esearch suggests that workers battling substance use disorder miss nearly 29 days of work each year, and nearly 9 of 10 overdose deaths are among working-age people."); Reavley, *supra* note 6 (quoting participants' negative experiences with employers upon disclosing mental illness). "Survey participants mentioned negative responses after disclosing their mental illness: 'Once they heard that word that's it. Sometimes I think it's worse than telling them you've been in jail. Once you mention that their face changes and their body language changes and you know you won't get the job'. [*sic*]" Reavley, *supra* note 6.

[8] *See* Sadie F. Dingfelder, *Stigma: Alive and Well,* 40 AM. PSYCHOL. ASS'N 56 (June 2009), https://www.apa.org/monitor/2009/06/stigma ("Stigma can also keep people from taking their medications.") Stigma may also harm an individual's physical health as they are less likely to report symptoms of physical illness out of fear. *Id.*; Mayo Clinic Staff, *Mental Health: Overcoming the Stigma of Mental Illness*, MAYO CLINIC (May 24, 2017), https://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477 (addressing discrimination and listing methods individuals facing stigma use to cope); *see also Mental Health Medications*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/learn-more/treatment/mental-health-medications (last visited Apr. 1, 2020) (providing overview of psychiatric medications); *Psychotherapy*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/learn-more/treatment/psychotherapy (last visited Apr. 1, 2020) (presenting forms of psychotherapeutic treatment used to treat mental illness in conjunction with medication).

[9] *See* Substance Abuse and Mental Health Services Administration, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health* (Aug. 2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf (presenting findings from national survey of drug use and health in United States); National Health Council, *About Chronic Diseases*, https://www.nationalhealthcouncil.org/sites/default/files/AboutChronicDisease.pdf (last updated July 29, 2014) (providing statistics for U.S. adults affected by chronic diseases); *Alcohol and Drug Abuse Statistics*, AM. ADDICTION CTR., https://americanaddictioncenters.org/rehab-guide/addiction-statistics (last updated Apr. 7, 2021) (summarizing statistics for drug abuse for U.S. adults and adolescents); *Chronic Diseases in America*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/chronicdisease/resources/infographic/chronic-diseases.htm (last updated Jan. 12, 2021) (presenting graphics on chronic disease statistics in United States); *Mental Health By The Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/mhstats (last updated Dec. 2020) (referencing studies and statistics compiled by organizations like Substance Abuse and Mental Health Services Administration).

[10] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (introducing definition of public records). Public records include documentary materials or data "regardless of physical form or characteristics." *Id.* Electronic materials and data available online fall under this provision. *Id.*;

sphere of public records, the Commonwealth only recently recognized digital records.[11] The term "public records" now includes records produced "by electronic means" as of the 2017 amendment to the public records law.[12] Additionally, the amendment introduced new requirements for designing, maintaining, and servicing electronic record keeping systems.[13] Now, agencies must provide searchable electronic copies for certain types of records.[14] These records include final opinions and decisions from agency proceedings, annual reports, and any "public record information of significant interest that the agency deems appropriate to post."[15] The Commonwealth also requires agencies to maintain online electronic records to "provide maximum public access."[16] Individuals have the right to inspect the public records of "any Commonwealth agency, executive office, department, board, commission, bureau, division or authority, or any of their political subdivisions [and] any authority established by the general court to serve a public purpose."[17] These agencies and offices must also

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MASS. GEN. LAWS ch. 66, § 3 (2016) (defining public records and their various forms); *see also Access to Public Records in Massachusetts*, DIG. MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/access-public-records-massachusetts (last visited Nov. 5, 2019) [hereinafter *Access to Public Records*] ("The term 'public records' is broadly defined to include all documents, including those in electronic form, generated or received by any government body." (quoting MASS. GEN. LAWS ch. 4, § 7 para. 26)).

[11] *See* MASS. GEN. LAWS ch. 66, § 3 (emphasizing amendment to statutory language). As of 2017, public records now include those made by "handwriting, or by typewriting, or in print, or . . . by electronic means, or by any contribution of the same." *Id.*

[12] *See id.* (presenting newly adopted definition of electronic media for public records purposes).

[13] *See id.* § 19 (presenting requirements of electronic record keeping systems).

[14] *See id.* § 19(b) (requiring agencies to provide digital copies of certain records in commonly available electronic formats).

[15] *See id.* (outlining requisite types of records that must be available to public subject to redaction). The complete list of applicable records include:

> [F]inal opinions, decisions, orders or votes from agency proceedings; annual reports; notices of regulations proposed under chapter 30A; notices of hearings; winning bids for public contracts; awards of federal, state, and municipal government grants; minutes of open meetings; agency budgets; and any public record information of significant interest that the agency deems appropriate to post.

Id.

[16] *See* MASS. GEN. LAWS ch. 66, § 19 (2016) (requiring ease of public accessibility to greatest extent possible).

[17] *See* MASS. GEN. LAWS. ch. 4, § 7 para. 26 (2019) (identifying public records available to public and organizations that create them); *Access to Public Records*, *supra* note 10 (indicating right to access public records). An individual does not have to disclose the purpose of their request unless it relates to "building and infrastructure plans, vulnerability assessments, security measures, or other such requests that may raise terrorism-related concerns . . . ." *Access to Public Records*, *supra* note 10.

designate a "records access officer" to comply with all public record requests.[18]

While the public has access to records covered under the statute, the right to view all the information contained within them is not absolute.[19] Records access officers may refuse disclosure or release redacted copies of records to ensure public safety and protect an individual's personal information.[20] The public records law and its exemptions do not apply to the Commonwealth's legislature, its committees, or its courts—despite the public's interest in their records.[21] Court records accessible to the public include "docket information, the pleadings and motions of the parties to a lawsuit, decisions and orders of the court, evidence introduced

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[18] *See* 950 MASS. CODE REGS. 32.02 (2019) (defining "records access officer"). Public records officers are "designated within a governmental entity to perform duties . . . including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, and preparing guidelines that enable requesters to make informed requests regarding the availability of such public records electronically or otherwise." *Id.*; MASS. GEN. LAWS ch. 66, §6A (2016) (outlining obligations for records access officers); MASS. GEN. LAWS ch. 66, §10A (2016) (outlining consequences if agency fails to comply with request for public records access under §10).

[19] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26 (introducing exemptions to release of information in public records); *see also Massachusetts State Court Records*, DIG. MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/massachusetts-state-court-records (last visited Nov. 14, 2019) [hereinafter *State Court Records*] (emphasizing right to inspect records filed in Massachusetts state courts is not absolute).

[20] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26 (outlining exemptions to public records release). Information that may jeopardize public safety or cyber security may not be released to the public. *Id.*; MASS. GEN. LAWS ch. 66, § 10(b) (2016) (noting officer may redact and withhold information from requesting party); MASS. GEN. LAWS ch. 66, §19 (permitting redaction of exempt information "in order to provide maximum public access").

[21] *See* Lambert v. Exec. Dir. Of the Jud. Nominating Council, 681 N.E.2d 285, 287 (Mass. 1997) (ruling Massachusetts judiciary and legislature not required to comply with public records law). The court determined that "court records and 'all else properly part of the court files were outside the range' of inspection based on the text of [MASS. GEN. LAWS ch. 4, § 7 para. 26]." *Id.* (quoting Ottaway Newspapers, Inc. v. Appeals Court, 362 N.E.2d 1189, 1193 (Mass. 1977); Westinghouse Broad. Co. v. Sergeant-At-Arms of Gen. Court, 375 N.E.2d 1205, 1208 (Mass. 1978) (explaining why MASS. GEN. LAWS ch. 4, § 7 does not cover legislative records). "[E]ven if the introductory language of [the public records law] might be viewed as applying to legislative records, these records are not open to public inspection because they are records 'specifically or by necessary implication exempted from disclosure by statute.'" *Westinghouse Broad. Co.*, 375 N.E.2d at 1208 (quoting MASS. GEN. LAWS ch. 4, § 7); William Francis Galvin, *A Guide To The Massachusetts Public Records Law*, 39, https://www.sec.state.ma.us/pre/prepdf/guide.pdf (last updated Mar. 2020) (explaining courts, legislature, and legislative committees are exempt). "The Public Records Law does not apply to records held by federal agencies, the legislature or the courts of the Commonwealth. Accordingly, the Supervisor of Records is unable to assist requestors seeking such records." *See* Galvin, *supra* note 21, at 39; Coleman M. Herman, *Guide To The Public Records Law*, COMMONWEALTH MAGAZINE, https://commonwealthmagazine.org/guide-to-the-public-records-law/ (last visited Nov. 19, 2019) (explaining that Massachusetts legislature and judiciary not subject to public records law).

in court by either side, and transcripts of hearings."[22] While not bound by the public records law, the Supreme Judicial Court of Massachusetts provides direction for protecting personal information through impoundment and redaction proceedings.[23]

This note seeks to analyze Massachusetts's public records law and the exemptions intended to protect sensitive medical, mental health, and substance abuse information in public records. This note also suggests how Massachusetts courts could utilize these exemptions to protect personal information in court documents published online.[24]

II. THE FREEDOM OF INFORMATION ACT AND MASSACHUSETTS' PUBLIC RECORDS LAW

A. The Freedom of Information Act

The Commonwealth's public record exemptions are based in part on the federal Freedom of Information Act.[25] The Freedom of Information Act ("FOIA") was enacted in 1966 and requires government agencies to

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[22] *See State Court Records*, *supra* note 19 (identifying some court records available to public access). Other records may include "the index of the parties in both pending and closed civil and criminal cases, case fields, certain juvenile records, documents filed with the court in connection with a settlement, search warrants once returned to the court, and names and addresses of jurors and jury questionnaires." *Id.*

[23] *See* S.J.C. Rule 1:25 (2018) (outlining procedures for protecting information within electronic files used by Supreme Judicial Court); S.J.C. Rule 1:24 (2016) (providing guidance for filing Supreme Judicial Court documents and protecting personal information). To prevent the "unnecessary inclusion of certain personal identifying information in publicly accessible documents filed with or issued by the Courts," the Supreme Judicial Court requires those filing the documents to black out certain information such as government-issued identification numbers and account numbers. S.J.C. Rule 1:24 § 1. Filers—not the court nor its clerks—are responsible for redacting the information in a way that makes it invisible and illegible. S.J.C. Rule 1:24 § 7. For court orders and other court-issued documents, the court is expected to avoid inclusion of personal identifying information unless "specifically covered by law, court rule, standing order, or court-issued form." S.J.C. Rule 1:24 § 9.

[24] *See* MASS. GEN. LAWS ch. 4, § 7 (2019) (outlining public records exemptions courts could consider for decision redaction practices); MASS. GEN. LAWS ch. 66, § 19 (2019) (indicating possibility of redaction that may maintain public accessibility to record information); MASS. GEN. LAWS ch. 66, §10B (2019) (emphasizing how information may be redacted for record requests).

[25] *See* 5 U.S.C. § 552(b) (providing statutory exemptions for federal public records law); MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (presenting Massachusetts' exemptions in similar language to federal counterpart); *What is FOIA?*, U.S. DEP'T OF JUSTICE, https://www.foia.gov/about.html (last visited Mar. 7, 2021) (providing overview of FOIA and rights afforded to public through it). "Since 1967, the Freedom of Information Act (FOIA) has provided the public the right to request access to records from any federal agency. It is often described as the law that keeps citizens in the know about their government." *Id.*

make certain records available to the public.[26] To ensure public access, FOIA also requires agencies to post certain categories of records online.[27] These electronic records include final opinions made in the adjudication of cases, agency statements of policy and interpretations, administrative staff manuals, and copies of all previously released records.[28]

It should be noted, however, that federal agencies are not required to disclose nine types of information explicitly exempted under FOIA.[29] These exemptions, found under 5 U.S.C. § 552(b)(1)-(9), include health information that "would constitute a clearly unwarranted invasion of personal privacy," arguably including an individual's psychological history, medical conditions, and substance use.[30] The exemption was designed to prevent the "unnecessary disclosure of files" from agencies, such as the Veterans Administration, because the records could contain "intimate details of a highly personal nature."[31]

Courts across the United States have held that the FOIA medical-records exemption goes beyond health records and other documents detailing medical information.[32] A decision from the Court of Appeals for District of Columbia Circuit (D.C. Circuit), *Rural Housing Alliance v. U.S.*

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[26] *See* 5 U.S.C. § 552(f) (noting federal agencies subject to FOIA compliance include "any executive department, military department, Government corporation . . . or any independent regulatory agency . . . ." *Id.*; Ivan Boatner, *Supreme Court Ruling Changes FOIA Standard To Better Protect Confidential Information*, JD SUPRA (June 27, 2019), https://www.jdsupra.com/legalnews/supreme-court-ruling-changes-foia-59032/ (discussing FOIA's enactment and purposes).

[27] *See* U.S. Dep't of Justice, *supra* note 25 ("The FOIA also requires agencies to proactively post online certain categories of information, including frequently requested records.")

[28] *See* 5 U.S.C. § 552(a)(2)(A)-(E) (listing records that must be made available online under FOIA).

[29] *See* § 552(b) (outlining explicit federal exemptions to public records law). Exempt information includes internal personnel rules and agency practices; trade secrets and commercial or financial information that is privileged or confidential; certain agency memoranda. *Id.*; information compiled for law enforcement purposes; data found in the reports for agencies regulating and supervising financial institutions; and information specifically barred from disclosure by statute. *Id.*; Boatner, *supra* note 26 ("FOIA contains nine exemptions which protect certain categories of government records from release.")

[30] *See* 5 U.S.C. § 552(b)(6) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . .")

[31] *See* Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971) (explaining rationale for exemption and its language choices). The House and Senate reports for early drafts of the FOIA bill emphasized the need to "guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or Selective Service or Bureau of Prisons, which would contain 'intimate details' of a 'highly personal' nature." *Id.* (first quoting H.R. Rep. No. 89-1497, at 2428 (1966); and then quoting S. Rep. No. 89-813, at 44 (1965)).

[32] *See* Rural Hous. All. v. U.S.D.A., 498 F.2d 73, 77 (D.C. Cir. 1974), *supplemented*, 511 F.2d 1347 (D.C. Cir. 1974) (presenting one instance of courts expanding protections available under FOIA exemption).

Department of Agriculture, emphasized that the exemption "was designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files."[33] The court reasoned that the exemption was phrased broadly to protect individuals from a "wide range of embarrassing disclosures."[34] Information protected under the extensive coverage of the exemption includes intimate details such as "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation."[35]

The D.C. Circuit previously dissected the exemption's "clearly unwarranted invasion" provision in *Getman v. NLRB*.[36] Here, the court determined that a balancing test was necessary to determine whether the disclosure constituted an "unwarranted invasion" of personal privacy.[37] Under the test, a court must balance the individual's right of privacy against the public's right to be informed.[38] When applying the balancing test, the court should first inquire whether the disclosure would constitute an invasion of

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[33] *See id.* (presenting court's rationale for applying FOIA medical-records exemption); *see also* Joseph Horne Co. v. NLRB, 455 F. Supp. 1383, 1386 (W.D. Pa. 1978) (explaining Congressional rationale for protecting personal information under FOIA). In *Horne*, the court ordered the release of documents the plaintiff requested and recognized that the FOIA exemption only protects personnel and medical files where disclosure would result in "a clearly unwarranted invasion of personal privacy." *Id.*

[34] *See Rural Hous. All.*, 498 F.2d at 77 (identifying expansive list of personal details protected under exemption).

[35] *See id.* (noting exemptions broad coverage). The court held that the files in question contained "sufficiently intimate details" to warrant protection under the FOIA exemption. *Id.* These details were enough to classify the report as a "similar file" under the exemption because its release could constitute an unwarranted invasion of privacy. *Id.*; *see also Joseph Horne Co.*, 455 F. Supp. at 1386 (affirming that exemption covers information about marriage, children, welfare payments, and family); Mylan Pharm., Inc. v. NLRB, Region 6, 407 F. Supp. 1124, 1126 (W.D. Pa. 1976) (recognizing "marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcohol consumption, and family fights" are covered); Wine Hobby USA, Inc. v. I.R.S., 520 F.2d 133, 135 (3d Cir. 1974) (declaring home addresses and family status are protected under exemption).

[36] 450 F.2d 670, 674 (D.C. Cir. 1971) (describing balancing of interests Exemption 6 requires).

[37] *See id.* (introducing balancing test to assess questionable data); *Rural Hous. All.*, 498 F.2d at 77 (remanding FOIA request and reminding district court to apply balancing test established in *Getman*).

[38] *See Getman*, 450 F.2d at 674 ("Exemption (6) requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed . . . .") The court explained that the statutory language of "clearly unwarranted" suggests the court should favor disclosure unless there is a serious threat to an individual's privacy. *Id.*

privacy, and if so, assess the severity of the invasion.[39] The second inquiry requires the court to determine whether the public interest in the information outweighs the severity of disclosure.[40] This balancing test is unique for a FOIA exemption, as "normally no inquiry into the use of information is made" for the other FOIA exemptions.[41]

FOIA and subsequent amendments to the statute provide guidance for redacting both physical and electronic copies of records.[42] Updates to federal public record redaction practices emerged after President Obama signed the FOIA Improvement Act of 2016 into law.[43] One notable amendment included codification of the Department of Justice's "Foreseeable Harm Standard."[44] Agencies are required to redact information "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."[45] The amendments also state that agencies must consider partial disclosure when full disclosure of a record is not possible.[46] The agency must then take reasonable steps to "segregate and release nonexempt information."[47] For electronic and online records, FOIA states that agencies may redact information as needed to prevent an "unwarranted invasion of personal privacy"

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[39] *See id.* (introducing first element of balancing test); *see also Rural Hous. All.*, 498 F.2d at 77 ("Specifically we suggested that in balancing interests the court should first determine if disclosure would constitute an invasion of privacy, and how severe an invasion.")

[40] *See Getman*, 450 F.2d at 675 (presenting second element of balancing test); *Rural Hous. All.*, 498 F.2d at 77 ("Second, the court should weigh the public interest purpose of those seeking disclosure, and whether other sources of information might suffice.")

[41] *See Rural Hous. All.*, 498 F.2d at 77 (noting unique attributes of balancing test for FOIA exemption).

[42] *See* 5 U.S.C. § 552(a)(2)(E) (outlining redaction procedures for agencies); *OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016 (last updated Aug. 17, 2016) (introducing amendments made to FOIA in 2016 under Obama administration).

[43] *See* U.S. DEP'T OF JUSTICE, *supra* note 42 (discussing 2016 amendments in depth). The 2016 amendments addressed gaps in FOIA's previous agency requirements. *Id.* Other changes included adjustments to procedures for processing requests, establishing new duties for chief FOIA officers, and the creation of a "Chief FOIA Officer Council" among others. *Id.*

[44] *See id.* (discussing codification of "Foreseeable Harm Standard").

[45] *See id.* (highlighting language and new emphasis on potential harm); U.S. DEP'T OF JUSTICE, *supra* note 25 (reiterating agencies shall not disclose where harm to an interest protected by exemption exists).

[46] *See* U.S. DEP'T OF JUSTICE, *supra* note 25 ("Agencies should also consider whether partial disclosure of information is possible whenever they determine that full disclosure is not possible . . . ."). Agencies may also consider partial disclosure and take steps to separate nonexempt information prior to release. *Id.*

[47] *See* U.S. DEP'T OF JUSTICE, *supra* note 45 (emphasizing agent's duty to assess and identify questionable information prior to release).

prior to publication.[48] Where technically feasible, agencies shall indicate the extent of the deletion where it was made in the document.[49] These provisions only require mandatory redaction for the nine explicit exemptions, which does not include information that results in unwarranted invasions of privacy.[50] When agencies choose to redact information to protect the privacy of an individual, they should also consider whether the redacted portions are "sufficient to protect the privacy of individuals" before disclosing it the public.[51]

B. Massachusetts Public Records Law - Mass. Gen. Laws ch. 4, § 7 para. 26(c)

The Massachusetts Public Records Law is described as the "Commonwealth's counterpart" to FOIA.[52] This comparison is appropriate, as the exemptions in the Commonwealth's public records law adopts the FOIA's statutory language.[53] Like FOIA, the list of public record exemptions for the Commonwealth are strictly construed.[54] The Massachusetts exemptions similarly provide a basis for agencies to withhold records

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[48] *See* § 552(a)(2)(E) ("To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D).") All redactions must be explained in writing and the extent of the deletion must be noted on the portion of the record. *Id.* However, the extent of the deletion does not have to be included if disclosure may harm an interest protected by an exemption. *Id.*; § 552(b)(9) (stating that segregable portion of record shall be released after deleting exempt portions).

[49] *See* § 552(b)(9) (noting mandatory duty to indicate where redactions are made in record); *see also* § 552(a)(2)(E) (providing redaction procedure).

[50] *See* § 552(a)(2)(E) (explaining exemptions under FOIA to redacting requirement). Deletion of information that could constitutes an unwarranted invasion of privacy is merely permissive. *Id.*

[51] *See* Rural Hous. All. v. U.S.D.A., 498 F.2d 73, 78 (D.C. Cir. 1974) (noting how courts consider agency deletions as means to protect individual privacy).

[52] *See* Herman, *supra* note 21 ("The Massachusetts Public Records Law – the Commonwealth's counterpart to the federal Freedom of Information Act – allows citizens to inspect and obtain copies of documents in the possession of state and municipal agencies as well as other government entities such as boards, commissions and authorities.")

[53] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26 (2019) (defining public records and exemptions under Massachusetts law using similar language to FOIA); Wakefield Tchr. Ass'n v. School Comm., 731 N.E.2d 63, 66-67 (Mass. 2000) (citing Globe Newspaper Co. v. Boston Retirement Bd., 446 N.E.2d 1051, 1054 (Mass. 1983) ("We concluded . . . based on the structure, language, legislative history, and comparison with the analogous Federal public records exemption on which it is based, 5 U.S.C. §552(b)(6) (1994), the Massachusetts exemption . . . creates two categories of records exempt from public disclosure.")

[54] *See* Att'y Gen. v. Assistant Comm'r of Real Prop. Dep't of Bos., 404 N.E.2d 1254, 1256 (Mass. 1980) ("Given the statutory presumption in favor of disclosure, exemptions must be strictly construed.")

wholly, or in part, before disclosing to the public.[55] Also like FOIA, non-exempt portions of the record must be released once exempt portions are removed.[56] Paragraph 26(c) of the Massachusetts Public Records Law also provides a privacy exemption with similar language to its federal counterpart in § 552(b)(6).[57] The exemption requires mandatory non-disclosure for "medical files or information and other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy . . . ."[58]

Over the years, Massachusetts courts parsed the medical files exemption into two distinct clauses.[59] The first clause provides an absolute exemption for medical files and related data.[60] For this first clause, Massachusetts courts generally hold that medical information is always sufficiently personal to warrant the protection of the exemption.[61] The second clause applies to other record requests that may negatively impact an individual's privacy interests.[62] Additionally, the second clause protects non-medical records that contain "intimate details of a highly personal nature[,]" and re-

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[55] *See* Galvin, *supra* note 21, at 14 (citing Mass. Gen. Laws ch. 4, § 7 para. 26 (2019) ("The statutory definition of 'public records' contains exemptions providing the basis for withholding records completely or in part.")

[56] *See id.* ("Where exempt information is intertwined with non-exempt information, the non-exempt portions are subject to disclosure once the exempt portions are deleted.")

[57] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (presenting similar language to FOIA exemption). Like the federal statute, Massachusetts provides an exemption for medical records and information contained within those records. *Id.* The exemption places all other personal information under an "unwarranted invasion of personal privacy" standard as in § 552(b)(6). *Id.*

[58] *See id.* (quoting statutory language). This exemption also applies to personnel information found in public records. *Id.*

[59] *See* Wakefield Tchr. Ass'n v. School Comm., 731 N.E.2d 63, 66-67 (Mass. 2000) (noting two categories of records existing under Massachusetts exemption). "[B]ased on the structure, language, legislative history . . . the Massachusetts exemption . . . creates two categories of records exempt from public disclosure . . . ." *Id.*; *see also* Galvin, *supra* note 21, at 16-18 (explaining how state courts have deconstructed medical files exemption into separate clauses).

[60] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (exempting "personnel and medical files or information"); Galvin, *supra* note 21, at 16-17 ("Exemption (c) is made up of two separate clauses, the first of which exempts personnel and medical files.")

[61] *See* Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1358 (Mass. 1989) (noting strong public policy to protect an individual's medical information); Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1060 (Mass. 1983) (concluding that medical statements are not subject to mandatory disclosure under exemption); Galvin, *supra* note 21, at 17 ("As a general rule, medical information related to an identifiable individual will always be of a sufficiently personal nature to warrant exemption."); *see also* MASS. GEN. LAWS ch. 123, § 36 (2019) (presenting example of statute that holds mental health information must remain private). Records about "admission, treatment, and periodic review" of individuals admitted to mental health facilities must remain private subject to a few exemptions. *Id.*

[62] *See* Galvin, *supra* note 21, at 18 ("The second clause of the privacy exemption applies to requests for records that implicate privacy interests.")

late to a specifically-named individual.[63] Massachusetts courts have recognized that such details include "marital status, paternity, substance abuse, government assistance, family disputes, and reputation."[64] Other personal information Massachusetts courts have classified as "intimate details" include:

> [A] resident's first name and last name or first initial and last name in combination with any [one] or more of the following data elements that relate to such resident . . . social security number, driver's license number or state issued identification card number . . . [and] financial account number . . . .[65]

Similar to the FOIA balancing test presented in both *Rural Housing Alliance* and *Getman*, Massachusetts courts perform a two-step analysis for information covered under the second clause.[66] The court must determine: (1) whether the information is "an intimate detail;" and (2) whether the public's interest in the information outweighs the individual's privacy interest.[67] The courts must apply this balancing test on a case-by-case basis.[68]

While the Massachusetts courts are not subject to the Public Records Law's exemptions themselves, they have established policies to pro-

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[63] *See Wakefield Tchr. Ass'n*, 731 N.E.2d at 67 ("We concluded further that the phrase 'relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy' modifies *only* the second category."); Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. Of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980) (noting disclosure should not publicize "'intimate details' of a 'highly personal nature'") (quoting Att'y Gen. v. Collector of Lynn, 385 N.E.2d 505 (1979)).

[64] *See Assistant Comm'r of the Real Prop. Dep't of Boston*, 404 N.E.2d at 1257 n.2 (referring to federal privacy exemption articulated in *Rural Hous. All.*).

[65] *See* MASS. GEN. LAWS ch. 93H, § 1 (2020) (defining personal information in context of data breaches). Personal information that does not receive additional protection includes "information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public." *Id.*

[66] *See* Galvin, *supra* note 21, at 18 (presenting balancing test).

[67] *See* People for the Ethical Treatment of Animals v. Dep't of Agric. Res., 76 N.E.3d 227, 238 (Mass. 2017) (articulating factors court must address in its assessment of privacy interests). The factors Massachusetts courts consider are: "(1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources." *Id.*; *see also* Galvin, *supra* note 21, at 18 (describing balancing test). "[The exemption] requires a balancing test which provides that where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield." *Id.*

[68] *See* Galvin, *supra* note 21, at 18 (detailing how Massachusetts' courts address each case's unique circumstances).

tect the "unnecessary inclusion" of personal and identifying information in publicly accessible court documents (excluding case opinions).[69] In the Supreme Judicial Court, publicly accessible documents filed in civil or criminal cases—offered as evidence in any trial or hearing, and any order, decision, or other document issued by the court—are subject to the rule.[70] For court filings, the burden of redacting personal identifying information is placed on the document filer rather than the record holder.[71] As a result, the rule permits the individual filing the documents to request more or less protection of such information as they see fit.[72] Additionally, courts may provide further protection for personal information covered under the rules.[73]

When filing a publicly accessible court document, filers must not include personal identifying information, such as government-issued identification numbers, parents' birth surnames, and financial account numbers unless permitted under the rule.[74] Proper redaction procedures for such in-

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[69] *See* S.J.C. Rule 1:24 (prohibiting "the unnecessary inclusion of certain personal identifying information in publicly accessible documents filed with or issued by the Courts, in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes.") The filer must ensure that they redact from briefs and other filings the personal identifying information listed in the rule.*See* S.J.C. Rule 1:24 § 3; S.J.C. Rule 1:25 § 12 (providing that electronic filings should comply with Rule 1:24); Mass. R. APP. P. 21 (providing that appellate court filings should comply with Rule 1:24)*; see also* Peter Sacks, *The New Interim Guidelines for the Protection of Personal Identifying Data in Publicly-Accessible Court Documents*, BOSTON B.J., Winter 2010, at 12 (discussing Supreme Judicial Court 2009 interim guidelines for protection of personal data in publicly accessible documents).

[70] *See* S.J.C. Rule 1:24, § 1 (outlining documents subject to rule)*; see also Interim Guidelines For The Protection Of Personal Identifying Data In Publicly Accessible Court Documents*, MASSACHUSETTS LAWYERS WEEKLY (Aug. 31, 2009), https://masslawyersweekly.com/2009/08/31/interim-guidelines-for-the-protection-of-personal-identifying-data-in-publicly-accessible-court-documents/ (introducing guidelines that ensured protection of personal information in publicly accessible court documents). The Supreme Judicial Court approved interim guidelines in August 2009 to protect personal information in criminal and civil court documents. *See* MASSACHUSETTS LAWYERS WEEKLY, *supra* note 72.

[71] *See* S.J.C. Rule 1:24, § 3 ("When filing a document in court that will be publicly accessible, a filer may not, unless otherwise allowed by this rule, include personal identifying information, except when the filer redacts it [according to subsections (a), (b), and (c)]."); S.J.C. Rule 1:24, § 7 ("The filer is responsible for redacting personal identifying information. The clerk will not review each filed document for compliance.") Clerks, however, are still responsible for reviewing selected documents to ensure filer met redaction responsibilities. S.J.C. Rule 1:24, § 7.

[72] *See* S.J.C. Rule 1:24, § 1 ("The rule does not prevent a document's filer from requesting more or less protection of personal identifying information than this rule requires.")

[73] *See id.* ("[T]he rule does not prohibit any Department of the Trial Court, or any appellate court, from adopting a rule or standing order providing additional protections for personal identifying information covered by this rule, or protecting additional categories of personal identifying information.")

[74] *See id.* at § 3 (identifying what filer may not disclose). Government-issued identification numbers include "a social security number, taxpayer identification number, driver's license number, state-issued identification card number, or passport number . . . ." *Id.*

formation includes redacting all but the last four digits of a number or first initial of the birth surname.[75] For any documents drafted for court filing, the filer must redact the information in a way "that prevents the redacted information from being read or made visible" in the document.[76] However, these redactions are subject to the courts' unique exemptions.[77] Unless the court orders otherwise, personal identifying information may be included in file documents when: the law requires it; the document is a transcript of the court proceeding filed by a court reporter or transcriber; the document is a record of administrative adjudicatory or quasi-adjudicatory proceedings filed by the administrative agency; the document includes personal identifying information produced by a nonparty in response to a subpoena; the document contains a financial account number necessary to identify an account in the proceeding; and if the documents are related to criminal and youthful offender cases.[78] Non-compliance may require corrective action, including:

> [S]triking and returning to the filer any noncompliant document, with or without an order that a property redacted copy be filed in its place . . . requiring the filer to file a redacted version of the document and move to impound the unredacted version . . . forfeiting any protection under this rule for the filer's own personal identifying information, if the information has become public or if other parties or persons would be unduly prejudiced by treating the information as protected. . . entering orders to ensure the filer's future compliance or to protect the interests under this rule

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[75] *See id.* at § 4 (explaining proper redaction procedures for government-identification numbers, financial numbers, and surnames). All mandatory redactions must be sufficiently obscured and clearly marked in the document. *Id.*

[76] *See id.* (indicating how filer must redact personal identifying information). Omitted information may be done by replacing the information with three "x" characters. *Id.*

[77] *See* SJC Rule 1:24, at § 5 ("Unless the court orders otherwise, unredacted personal identifying information may be included in documents filed with the court . . . .")

[78] *See id.* at §§ 5-6 (listing exemptions to redaction for certain documents filed with court). For criminal and youthful offender cases, court filings may not include the following:

> [Data] related to the criminal matter or investigation and that is prepared before the filing of a criminal case or is not filed as part of any docketed criminal case; an arrest or search warrant; or a charging document, including an application for a criminal complaint, and supporting documents filed in support of any charging document.

Id.

> of other parties and persons; and . . . imposing monetary sanctions . . . .[79]

These rules, however, fail to address whether certain court documents should be made publicly available online or how an individual's personal data can be protected.[80] Furthermore, the rule lacks guidance for redacting information that does not fall neatly into its established categories of personal information.[81]

III. JUDICIAL INTERPRETATION OF MASS. GEN. LAWS CH.4, §7 PARA. 26(C) EXEMPTION

Massachusetts' courts have determined that state agencies must show "with specificity" that an exemption applies to the information in question to avoid disclosure.[82] The agency with custody of the record shall not refuse disclosure unless it falls under one of the nine statutory exemptions.[83] Furthermore, in a situation where an exemption applies and the information is disclosed, the agency must justify the release of the information.[84] If only a portion of the record falls under the exemption, all non-exempt portions are subject to disclosure and public access.[85]

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[79] *See id.* at § 8 ("In the event of a filer's noncompliance with this rule, the court, on its own initiative or on motion of a party or the person whose personal identifying information is at issue, may require corrective action.") The filer has the ultimate burden to prove that noncompliance was inadvertent. *Id.*

[80] *See id.* at § 1 ("This rule does not govern the separate question whether various court documents should be made publicly available on the Internet.")

[81] *See id.* at § 3 (establishing personal information as limited to three categories). While protecting government issued identification numbers, financial account numbers, and parent surnames are important to prevent identity theft, these categories do not encompass all forms of sensitive personal information. *Id.* There are various types of sensitive personal information that an individual does not want disclosed to the public and the current rule does not provide sufficient guidance to ensure protection. *Id.* Rather, the rule relies heavily on the filer knowing what information should be redacted. *Id.* at § 1.

[82] *See* Worcester Tel. Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 605 (Mass. App. Ct. 2003) ("The burden is upon the custodian of the requested record to prove, with specificity, the applicability of the relevant exemption."); Globe Newspaper v. Police Comm'r, 648 N.E.2d 419, 424 (Mass. 1995) ("[A] government agency which refuses to comply with an otherwise proper request for disclosure has the burden of proving 'with specificity' that the information requested is within one of nine statutory exemptions to disclosure."); Torres v. Att'y Gen., 460 N.E.2d 1032, 1037-38 (Mass. 1984) ("In an action to obtain information under the public records law, the burden is placed on a holding agency seeking to withhold that information to prove that one of the exemptions in the definition of the public record applies.")

[83] *See Police Comm'r*, 648 N.E.2d at 424 (suggesting agency may face penalties if it refuses to comply).

[84] *See Torres*, 460 N.E.2d at 1038 (explaining agency must argue why disclosure was warranted).

The courts gradually defined "medical records" and related information through the application of exemption (c) and interpretation of legislative intent.[86] For exemption (c), the Supreme Judicial Court of Massachusetts recognized that the legislature had a "clear intent . . . to establish an absolute exemption for personnel or medical files or information."[87] In *Globe Newspaper Company v. Boston Retirement Board*,[88] the Supreme Judicial Court analyzed the legislative intent for the medical files exemption by comparing its language to FOIA.[89] In their assessment, the court determined the Massachusetts exemption differs from its federal counterpart in several material aspects.[90] First, the Massachusetts exemption substitutes "files" in FOIA for the all-encompassing phrase "files or information."[91] Second, the exemption distinguishes personal information from medical information through the use of a semi-colon—which is something

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> When a data subject shows that information falls within the definition of personal data, but for the exemption for public records, and further shows that the disclosure . . . in fact is, an invasion of privacy, the State agency seeking to justify the disclosure has the burden of showing that an invasion of privacy is warranted.

Id.

[85] *See Worcester Tel. Gazette Corp.*, 787 N.E.2d 602 at 605 ("To the extent that only a portion of a public record may fall within an exemption to disclosure, the nonexempt 'segregable portion' of the record is subject to public access.") (quoting Worcester Tel. Gazette Corp. v. Chief of Police of Worcester, 764 N.E.2d 847, 852 (Mass. App. Ct. 2002)).

[86] *See* Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1357-58 (Mass. 1989) (defining what information is considered part of medical record). "Autopsies performed by physicians are diagnostic in nature and yield detailed, intimate information about the subject's body and medical condition. Therefore, they are medical records." *Id.*; Brogan v. Sch. Comm. of Westport, 516 N.E.2d 159, 161 (Mass. 1987) ("Information as to a named individual's medical condition inherently is 'of a personal nature.'"); Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1056 (Mass. 1983) (explaining holding that "medical files or information are absolutely exempt from disclosure."); Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007) ("[U]nredacted IME reports . . . which provide detailed medical information on identified individuals, clearly fit within the absolute exemption and are not subject to production or review."); Viriyahiranpaiboon v. Dep't of State Police, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) (reiterating legislature's desire to protect medical information).

[87] *See Boston Ret. Bd.*, 446 N.E.2d at 1056 (noting that exemption's language indicated "clear intent of the Legislature to establish an absolute exemption for personnel or medical files or information").

[88] 446 N.E.2d 1051 (Mass. 1983).

[89] *See id.* at 1055 (highlighting that SJC "continue[d] with a comparison of the exemption with its Federal counterpart" for its analysis).

[90] *See id.* (providing differences between Massachusetts exemption and FOIA that would aid in interpreting legislative intent).

[91] *See id.* (explaining how Massachusetts exemption "substitutes the phrase 'files or information' for the word 'files' in the Federal statute.")

absent from the federal exemption.[92] Finally, the exemption replaces the phrase "similar files" in FOIA with the phrase "also any other materials or data relating to a specifically named individual."[93] Based on these key differences, the Supreme Judicial Court determined the state legislature made a conscious decision to deviate from FOIA's definition of medical information and produce an absolute exemption.[94] The court determined the legislature's word choice was "intended to ensure that the scope of the exemption turn on the character of the information sought rather than on the question whether the documents containing the information constituted a [medical] file."[95] Thus, all medical files or related information found in public records must be exempt from mandatory disclosure.[96]

The Massachusetts courts have since defined the scope of the phrase "medical files or information."[97] Court opinions determined medical files and information must contain data "of a personal nature and relate

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[92] *See* Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1055 (Mass. 1983) ("[T]he Massachusetts statute contains a semicolon after the word 'information'; the Federal statute contains no such punctuation.") In their analysis of the statutory language, the court's primary concern was to determine if modification of the first clause produced an absolute exemption. *Id.* at 1055.

[93] *See id.* (highlighting significant discrepancy from federal statutory language).

[94] *See id.* (explaining court's rationale for interpretation of state legislative intent). Based on the Massachusetts statute's structure and choice of phrasing, the court determined that there was a "conscious decision by the Legislature to deviate from the standard embodied in the Federal statute concerning the disclosure of medical and personnel information." *Id.* at 1055; *Chief Medical Examiner*, 533 N.E.2d at 1358 ("The Legislature has made such medical files or information absolutely exempt without need for further inquiry as to whether their disclosure constitutes 'a clearly unwarranted invasion of personal privacy.'"); Viriyahiranpaiboon v. Dep't of State Police, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) ("In contrast to material covered by the clause after the semi-colon, medical files or information permit no balancing; the Legislature has made the 'decision that medical files or information are absolutely exempt from disclosure.'")

[95] *See Boston Ret. Bd*., 446 N.E.2d at 1057 (indicating state legislature wanted to avoid narrow interpretation of term "files" for medical information).

[96] *See id.* at 1058 (emphasizing there is absolute exemption "where the files or information of a personal nature and related to a particular individual."); Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1358 (Mass. 1989) (confirming scope of medical records exemption as absolute). *But see Boston Ret. Bd.*, 446 N.E.2d at 1058 (quoting United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 & no.4 (1982)). The court explains that—while medical information and records are absolute—any "information which does not permit the identification of any individual is not exempt." *Boston Ret. Bd.*, 446 N.E.2d at 1058.

[97] *See Chief Med. Exam'r*, 533 N.E.2d at 1357-8 (defining autopsy reports as within scope of "medical files or information"); Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 561-62 (Mass. App. Ct. 2007) (finding impartial medical examiner reports as falling under exemption); Brogan v. Sch. Comm. of Westport, 516 N.E.2d 159, 161 (Mass. 1987) (highlighting information surrounding serious medical condition is exempt); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (identifying how court classified "medical files or information"); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (presenting definition of medical information within scope of exemption).

to a particular individual" to warrant mandatory non-disclosure.[98] Medical statements, "even without particular identifying details," still possess a risk of indirect identification.[99] The courts recognize the importance of classifying this sensitive data because public policy has a strong interest in protecting an individual's medical information.[100] *Globe Newspaper Company v. Chief Medical Examiner*[101] explains that this public policy covers the confidentiality of hospital records, records discussing venereal diseases, and records pertaining to infectious diseases among others.[102] The public favors confidentiality in these circumstances because they discuss intimate information about an individual's body.[103] The court held that if the records are "diagnostic in nature and yield detailed, intimate information about the [individual's] body and medical condition . . . they are medical records"

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[98] *See Brogan*, 516 N.E.2d at 160 (presenting examples of information not of "a personal nature"). Information such as the names of school committee employees, paired with days marked as "sick day" or "personal day[,]" was not considered to be intimate details of a highly personal nature. *Id.* The court agreed that this data did not constitute the "kinds of private facts" the legislature sought to exempt from mandatory disclosure as it was incredibly general in nature and did not provide the medical reason for the absences. *Id.*; *Boston Ret. Bd.*, 446 N.E.2d at 1058 (presenting one view of medical files and information scope). The court found that the "particular identifying details" found in the records must meet this "personal nature" standard to receive protection. *Boston Ret. Bd.*, 446 N.E.2d at 1058; *Logan*, 863 N.E.2d at 562 (emphasizing how attributing medical information to identifiable individuals classifies data as "of a personal nature"). The court found that the unredacted IME reports provided detailed medical information that was attributed to explicitly identified individuals. *Logan*, 863 N.E.2d at 562. The court ruled that these reports were of a "personal nature" that "relate[d] to a particular individual" because the individuals could be attributed to the extensive and detailed medical information provided in the reports. *Logan*, 863 N.E.2d at 562.

[99] *See Boston Ret. Bd.*, 446 N.E.2d at 1058 ("We conclude that the release of the medical statements, even without other particular identifying details, creates a grave risk of indirect identification. The information is, therefore, exempt from disclosure by virtue of G. L. c. 4, § 7, Twenty-sixth *(c)*."); *Logan*, 863 N.E.2d at 562-63 (discussing how redaction of identifying details may bring documents outside exemption). "Where 'indirect identification' of the individual is still possible, such redaction is insufficient [to bring document outside the scope of exemption]." *Logan*, 863 N.E.2d at 562.

[100] *See Chief Med. Exam'r, 533 N.E.2d* at 1358 (identifying public policy reasons for protecting medical data from disclosure); *Viriyahiranpaiboon*, 756 N.E.2d at 639 ("'[T]here is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body.' Numerous statutes were cited indicating legislative concern for privacy in medical matters.")

[101] 533 N.E.2d 1356 (Mass. 1989).

[102] *See id.* at 1358 (showing how public policy mandates protection for various kinds of medical information). "This policy can be seen in the confidentiality of hospital records . . . of HTLV [AIDS] testing . . . of records pertaining to venereal disease . . . of records concerning Reyes Syndrome . . . of reports of infectious diseases . . . and in many other instances." *Id.* (citations omitted).

[103] *See id.* at 1357-58 (identifying character of information found in autopsy reports).

worthy of protection.[104] Based on this definition, the Supreme Judicial Court held that autopsy reports, independent medical examiner reports, and blood tests qualify as "medical files or information."[105] Other court interpretations suggest that medical information does not have to contain intimate details to bar disclosure.[106] Cursory medical statements—like " bad back, heart problem, [and] hypertension" that can be traced to identifiable persons—fall within the exemption, even if the statements are not typically considered "sensitive."[107] Accordingly, the court must assess whether deleting particularly identifying details from the medical records may place it outside the exemption.[108]

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[104] *See id.* (characterizing information found in medical records). The court determined that these characteristics are key in classifying information as medical data rather than personal information. *Id.*

[105] *See id.* at 1358 (identifying autopsy reports as medical records under exemption); Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 562 (Mass. App. Ct. 2007) (explaining why independent medical examiner reports are considered medical records). The unredacted reports in question provided "detailed medical information on identified individuals." *Logan*, 863 N.E.2d at 562. The reports explained whether an individual's disability existed and the nature of the disability. *Id.* Therefore, there was enough medical information to classify the reports as "medical files and information." *Id.*; *Viriyahiranpaiboon*, 756 N.E.2d at 640 (explaining how exemption covers blood tests).

> Based on the strong legislative policy reviewed in [Globe Newspaper Co. v. Chief Med. Exam'r], and the cursory nature of the materials held in [Globe Newspaper Co. v. Boston Ret. Bd.], as well as the routine use of blood tests to obtain diagnostic information, [the court held] that blood tests in general, and particularly those which reveal genetic markers, are 'medical data about a person's body.' Accordingly . . . [blood grouping tests] are absolute exempt from disclosure under the first clause of exemption (c)

Viriyahiranpaiboon, 756 N.E.2d at 640.

[106] *See Viriyahiranpaiboon*, 756 N.E.2d at 639 (indicating "medical information need not concern intimate details of a highly personal nature to bar disclosure.")

[107] *See id.* (highlighting how cursory medical statements are exempt); *see also* Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1060 (Mass. 1983) (noting cursory medical statements describing medical reasons for granting disability pension are exempt). The court barred the release of "'a cursory statement of the medical reason for granting the disability pension' and . . . 'giving any medical information whatsoever concerning persons receiving disability pensions'" by virtue of the exemption. *Boston Ret. Bd.*, 446 N.E.2d at 1060.

[108] *See Boston Ret. Bd.*, 446 N.E.2d at 1058 ("We must therefore consider whether the deletion of particular identifying details from the documents sought . . . may bring the documents outside the exemption.") *Logan*, 863 N.E.2d at 562-63 (considering whether "deletion of particular identifying details from the documents sought. . .may bring the documents outside the exemption."). Portions of the medical record may be released if the identifying information is redacted sufficiently to protect the individuals discussed. *See Logan*, 863 N.E.2d at 563. Redactions are considered insufficient if those familiar with the individual could still identify the individual and the medical condition. *Logan*, 863 N.E.2d at 563. . This poses a "grave risk" of exposure otherwise. *Logan*, 863 N.E.2d at 563.

The second clause of exemption (c) applies to sensitive information that does not fit within the scope of "medical files or information."[109] It prevents the disclosure of data that relates to a particular individual that may result in an unwarranted invasion of privacy.[110] The court must determine whether this information would identify a certain individual.[111] The standard for identification is not only from the viewpoint of the public, but from the view of those familiar with the individual.[112] The greatest privacy concern is often attributed to records that contain a questionable amount of personal information—the disclosure of which would affect large groups of individuals.[113] Records that pair various kinds of intimate details have an increased privacy interest because identification of the da-

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[109] *See* Boston Globe Media Partners, LLC v. Dep't of Pub. Health, 124 N.E.3d 127, 137-38 (Mass. 2019) ("Where the second category under exemption (c) is implicated, a court should first determine whether there is a privacy interest in the requested records. If there is not, then the requested material does not fall under exemption (c)."); Champa v. Weston Pub. Sch., 39 N.E.3d 435, 444 (Mass. 2015) (providing guidance to determine impact of disclosure on privacy interest); Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980) (reiterating exemption's coverage of "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy."); Georgiou v. Comm'r of the Dep't of Indus. Accidents, 854 N.E.2d 130, 134 (Mass. App. Ct. 2006) ("This clause exempts from the expansive statutory definition of 'public record' those 'materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of privacy.'")

[110] *See* Torres v. Att'y Gen., 460 N.E.2d 1032, 1038 (Mass. 1984) (explaining exemption's coverage for personal data). Where the information disclosed is determined to be personal data as defined by the exemption, it is not subject to disclosure. *Id.*; Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880, 885 (Mass. App. Ct. 1988) ("The only relevant provision is (c), which excludes from public record status any 'data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.'")

[111] *See Champa*, 39 N.E.3d at 445 (quoting Dep't of the Air Force v. Rose, 425 U.S. 352 (1976)). The court must perform the following analysis to determine if the available information is enough to identify a particular individual:

> [T]he pertinent inquiry is whether the deletion of particular identifying information from the documents sought places the documents outside the exemption. In assessing whether the documents contain identifying information, the inquiry must be considered "not only from the viewpoint of the public, but also from the vantage of those who [are familiar with the individual].

Id. (citation omitted).

[112] *See id.* (providing standard by which information may be classified as "identifying").

[113] *See Dep't of Pub. Health*, 124 N.E.3d at 139-41 (identifying where courts find greatest concern for individual privacy). "But where requested records include a fair amount of personal information, it matters how many individuals the records implicate: the more people affected by disclosure, the greater the privacy concerns." *Id.* at 139. *But see Torres*, 460 N.E.2d at 1037 ("[T]he same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another.") The courts, however, recognize an individual's privacy interest may be protected under certain circumstances and not others. *Torres*, 460 N.E.2d at 1037.

ta's subject is more likely.[114] As a result, the Massachusetts courts recognize an increased privacy interest in records that compile various personal details.[115] Additionally, the Supreme Judicial Court recognized in its 1995 decision, *Globe Newspaper Company v Police Commissioner*, that an individual's involvement with drugs, whether true or purported by a witness, should nevertheless be protected through the privacy exemption.[116]

The court may consider several factors to determine whether an individual's privacy interest in the information exists.[117] Courts may assess whether disclosure would cause personal embarrassment to an "individual of normal sensibilities", whether the information sought contains highly personal details, if the information is available from other sources, and the risk of identity fraud.[118] Other factors include the extent multiple indices can be compared to reveal personal information, the extent disclosures of the record would cause an unwarranted intrusion of privacy, and the individual's expectation of privacy.[119] The Supreme Judicial Court noted that information previously available online does not automatically decrease an

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[114] *See Dep't of Pub. Health*, 124 N.E.3d at 139 (explaining increased privacy interest in compilations of intimate data). The court found that records that may be conjoined with other details to identify an individual include medical records. *Id.*

[115] *See id.* at 138 (noting how indices provide increased privacy interests). The court determined that there was a greater privacy interest in records containing data about individuals that are stored in collective indices (i.e. marriage records). *Id.*

[116] *See* Globe Newspaper Co. v. Police Comm'r of Bos., 648 N.E.2d 419, 426 (Mass. 1995) (identifying drug use as personal and sensitive information protected under exemption). "The revelation by a citizen witness that another person is a drug addict, for example, is precisely the type of 'intimate' and 'highly personal' information that the privacy exemption would protect . . . We conclude that this information also should be redacted prior to release of the citizen witness statements." *Id.*

[117] *See* People for the Ethical Treatment of Animals v. Dep't of Agric. Res., 76 N.E.3d 227, 238 (Mass. 2017) (providing three factors to assess privacy interests at stake). "We have also said that 'other case-specific factors' may influence the calculus." *Id.*; Champa v. Weston Pub. Sch., 39 N.E.3d 435, 444 (Mass. 2015) ("In identifying the existence of privacy interests, we consider . . . whether disclosure would result in personal embarrassment to an individual of normal sensibilities, whether the materials sought contain intimate details of a highly personal nature, and whether the same information is available from other sources.")

[118] *See Dep't of Pub. Health*, 124 N.E.3d at 138 (adding identity fraud to factors presented in *People for the Ethical Treatment of Animals*); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 238 ("[T]hree factors to assess the . . . the privacy interest at stake: (1) whether disclosure would result in personal embarrassment to an individual of normal sensibilities; (2) whether the materials sought contain intimate details of a highly personal nature; and (3) whether the same information is available from other sources."); *Champa*, 39 N.E.3d at 444 (presenting how courts may address personal information during factual assessment).

[119] *See Dep't of Pub. Health*, 124 N.E.3d at 138-39 (explaining how comparing indices may increase privacy interest); Torres v. Att'y Gen., 460 N.E.2d 1032, 1037 (Mass. 1984) ("Certainly the expectations of the data subject are relevant in determining whether disclosure of information might be an invasion of privacy.")

individual's privacy interest.[120] Additionally, the Supreme Judicial Court found that the information falls within the scope of exemption (c) if its disclosure could lead to stigma.[121] All of these factors must be considered within the unique circumstances presented for each case.[122]

Once the information is classified as sufficiently personal under the exemption, the individual's privacy interest must be balanced with the public's right to know.[123] The second clause of exemption (c) calls "for a balancing of interests rather than for an objective determination of fact."[124] The Supreme Judicial Court held that public interest in information found in public records may be considered outside the scope of government operations.[125] If a requesting party provides a public interest—even one that is unrelated to government activities—it may strengthen the public interest portion of the balancing test.[126] The Supreme Judicial Court recognized

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[120] *See Dep't of Pub. Health*, 124 N.E.3d at 141 (holding that previous availability of information in public forum does not impact protective interest). "[O]therwise private information does not necessarily lose that character by having been at one time placed in the public domain." *Id.* (quoting *Police Comm'r*, 648 N.E.2d at 426).

[121] *See Champa*, 39 N.E.3d at 444-45 (stating embarrassment and potential stigma are enough to protect information under exemption). The court determined that records detailing identifying a child and their disabilities contained information that was incredibly sensitive, as the information was "highly personal, and disclosure may result in embarrassment and potentially lead to stigma bringing it within the scope of exemption (c)." *Id.*

[122] *See People for the Ethical Treatment of Animals*, 76 N.E.3d at 239 (highlighting importance of addressing unique circumstances of each case). "Exemptions to the public records laws must be applied on a case-by-case basis." *Id.*

[123] *See Dep't of Pub. Health*, 124 N.E.3d at 147 (identifying balancing test for exemption (c)); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 238 (stating information covered by exemption (c) requires a balancing test); *Champa*, 39 N.E.3d at 444 (explaining privacy exemption must be balanced with public's right to know); Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980) (noting public interest should prevail absent significant privacy interests).

[124] *See Torres*, 460 N.E.2d at 1037 (introducing balancing test as one balancing interests over determination of facts).

> The word "unwarranted," added by the 1977 amendment, particularly suggests a weighing of the circumstances of the data subject—a balancing of the public's right to know as reflected in the Commonwealth's public records law, and the individual's right to protection against an unwarranted intrusion into his privacy. The exemption of subclause (c) appears to be the only exemption in the definition of "public records" calling for a balancing of interests rather than for an objective determination of fact.

Id.

[125] *See Dep't of Pub. Health*, 124 N.E.3d at 145 ("However, the parties have not pointed to, and we have not found, any published Massachusetts case that expressly limits the public interest analysis. In fact, Massachusetts courts have considered public interests other than the interest in government operations.")

[126] *See id.* at 146-47 ("To ensure that the public-private balancing test reflects the various uses to which government information may be put, we conclude that where a requester articulates

that the balancing test acknowledges both the public right of access and the legislature's intent to restrict access in certain circumstances.[127] For personal information, the court must balance "the public interest in disclosure [and] the legitimate interest in personal privacy of individuals about whom the government maintains information."[128] Additionally, the court must establish whether public interest "substantially outweighs the seriousness of an invasion of privacy."[129] The court's determination about the severity of an invasion of privacy may consider several factors, such as: the different privacy interests held between private parties and public employees, the impact of such disclosure on the individual, and the availability of information in other sources.[130] Ultimately, the public's right of access should prevail unless disclosure would be substantially harmful.[131]

IV. ANALYSIS

While guidelines exist for redacting publicly accessible documents filed with, or issued by, the Massachusetts courts, additional precautions are necessary to protect personal information from unwarranted disclosure.[132] With the emergence of publicly accessible court documents readily

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with specificity a public interest, even one unrelated to government operations" can add weight to the public interest aspect.")

[127] *See* Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1057 (Mass. 1983) (stressing right of public access is not absolute). "We agree that the dominant purpose of the law is to afford the public broad access to governmental records. But this purpose should not be used as a means of disregarding the considered judgment of the Legislature that the public right of access should be restricted in certain circumstances." *Id.* (citations omitted).

[128] *See id.* (declaring public interest is subject to the individual's interest in personal privacy); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 28 (identifying where disclosure is permissible under balancing test). "Exemption (c) requires a balancing test: where the public interest in obtaining the requested information substantially outweighs the seriousness of an invasion of privacy, the private interest in preventing disclosure must yield." *See People for the Ethical Treatment of Animals*, 76 N.E.3d at 23.

[129] *See* Att'y Gen. v. Collector of Lynn, 385 N.E.2d 505, 508 (Mass. 1979) (presenting instances where public interest outweighs individual's privacy interest). "Where the public interest in obtaining information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield to the public interest." *Id.*

[130] *See Dep't of Pub. Health*, 124 N.E.3d at 139 (construing reasonable expectations of privacy for balancing test); *People for the Ethical Treatment of Animals*, 76 N.E.3d at 239 (explaining nuanced analysis); *Collector of Lynn*, 385 N.E.2d at 509 (addressing concerns that emerge with disclosure of information in the context of tax delinquency records).

[131] *See* Att'y Gen. v. Assistant Comm'r of the Real Prop. Dep. of Boston, 404 N.E.2d 1254, 1256 (Mass. 1980) (concluding that public's right to know must triumph over privacy interests to permit disclosure).

[132] *See* S.J.C. Rule 1:24 (2016) (explaining how rule seeks to prevent "the unnecessary inclusion of certain personal identifying information in publicly accessible documents files or issued

available online, developing well-defined redaction policies have become increasingly important.[133] Most court redaction policies focus on preventing identity theft and other unscrupulous uses of an individual's personal information—often neglecting information that may trigger discrimination or stigma.[134] As a result, redaction policies created for publicly accessible court documents should consider Mass. Gen. Laws ch. 4, § 7 para. 26(c) as a point of reference to protect mental health, medical, and substance use information from public exposure.[135] Existing precedent for Mass. Gen. Laws ch. 4, § 7 para. 26(c) provides additional categories of sensitive data that may be integrated into existing policies and procedural guidance to prevent the indirect identification of individuals.[136]

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by the Courts, in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes.")

[133] *See* Doe v. Registrar of Motor Vehicles, 528 N.E.2d 880, 886 (Mass. App. Ct. 1988) ("There is a negative public interest in placing the private affairs of so many individuals in computer banks available for public scrutiny.") The court emphasized that—generally—there is negative public interest in keeping private information in online banks open to the public. *Id.* If this information is aggregated in online data banks—like those maintained by the Division of Motor Vehicles—it increases the risk of identity theft and exposing private data, such as social security numbers. *Id.*

[134] *See* S.J.C. Rule 1:24 at § 1 (expressly mentioning identity theft and other improper purposes as reason for implementing proper redaction policies).

[135] *See* MASS. GEN. LAWS ch. 4, § 7 para. 26(c) (2019) (setting forth foundation for record redaction policies to prevent unwarranted disclosure of personal information). The statute's well-defined medical records and personal information exemption clauses establish absolute exemptions that may supplement existing redaction policies. *Id.*

[136] *See* Boston Globe Media Partners, LLC v. Dep't of Pub. Health, 124 N.E.3d 127, 137 (Mass. 2019) (providing guidelines for judges to establish privacy interest in public record); People for the Ethical Treatment of Animals v. Dep't of Agric. Res., 76 N.E.3d 227, 238 (Mass. 2017) (addressing factors courts may use to assess privacy interests at stake in public records); Champa v. Weston Pub. Sch., 39 N.E.3d 435, 444 (Mass. 2015) (addressing risk of indirect identification and how it may lead to stigma); Globe Newspaper v. Police Comm'r, 648 N.E.2d 419, 426 (Mass. 1995) (highlighting drug use and other sensitive details are protected under exemption); Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1358 (Mass. 1989) (emphasizing exclusion of certain types of medical files and information within them); Brogan v. Sch. Comm. of Westport, 516 N.E.2d 159, 161 (Mass. 1987) (defining scope of medical statements protected under exemption); Torres v. Att'y Gen., 460 N.E.2d 1032, 1038 (Mass. 1984) (assessing protections available for individual's personal data in public records); Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1056 (Mass. 1983) (explaining Legislature's intent to establish absolute exemption for medical files or information); *Assistant Comm'r of the Real Prop. Dep't of Boston*, 404 N.E.2d at 1256 (declaring exemption covers certain categories of information that constitute unwarranted invasion of privacy); Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 561-62 (Mass. App. Ct. 2007) (providing guidance to redact identifying information so record may fall outside exemption); Georgiou v. Comm'r of the Dep't of Indus. Accidents, 854 N.E.2d 130 (Mass. App. Ct. 2006) (establishing protections available for personal information that falls outside of medical record exemption); Viriyahiranpaiboon v. Dep't of State Police, 756 N.E.2d 635, 639 (Mass. App. Ct. 2001) (defining medical records as absolutely exempt and rejecting need for public interest balancing test); *Doe*, 528 N.E.2d at 885 (reiterating importance of balancing test in conjunction with objective determination of fact).

Court redaction policies should continue to exclude the following information: social security numbers, taxpayer identification number, state-issued identification card numbers, financial information, addresses, parent's birth surnames, welfare information, marital status, driver's license numbers, and passport numbers.[137] However, considering the existing precedent surrounding Mass. Gen. Laws ch. 4, § 7 para. 26(c), courts should consider integrating protective measures for information about an individual's mental health, substance use, and medical conditions.[138] Information about an individual's medical conditions—like chronic illnesses and venereal diseases, among others—has consistently received protection from disclosure under Mass. Gen. Laws ch. 4, § 7.[139] Additionally, the Massachusetts judiciary has consistently recognized the strong public policy favoring confidentiality of information about a person's body.[140] How-

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[137] *See* S.J.C. Rule 1:24, § 3 (listing categories of information redaction); *Rural Hous. All.*, 498 F.2d at 77 ("[I]nformation regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights . . . .")

[138] *See Rural Hous. All.*, 498 F.2d at 77 (identifying medical conditions as sufficiently intimate to fall under medical record exemption); *Champa*, 39 N.E.3d at 444 (advocating that information surrounding an individual's disabilities deserves protection from disclosure); *Police Comm'r*, 648 N.E.2d at 426 (arguing drug use, whether true or alleged, deserves protection); *Chief Med. Exam'r*, 533 N.E.2d at 1358 (presenting one instance where judiciary recognized protecting sensitive information about human body); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (arguing cursory statements describing medical conditions deserve protection if attributable to identified individual); *Logan*, 863 N.E.2d at 562 ("The Supreme Judicial Court has held that 'medical . . . files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual.'"); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (classifying information found in medical records according to Mass. Gen. Laws ch. 4, § 7(26)(c)).

> While neither the statute nor case law defines medical information, the material held to be within the absolute exemption in [Mass. Gen. Laws ch. 4, § 7(26)(c)] is instructive. Even cursory medical statements such as "bad back, heart problem, hypertension," if related to identifiable persons, were held to be within the absolute exemption.

Viriyahiranpaiboon, 756 N.E.2d at 639.

[139] *See* MASS. GEN. LAWS ch. 4, § 7 (providing explicit instruction that medical records must be exempt); *see also Chief Med. Exam'r*, 533 N.E.2d at 1358 (indicating public policy favoring confidentiality of medical data "can be seen in the confidentiality of hospital records . . . of HTLV [AIDS] testing . . . of records pertaining to venereal disease . . . of reports of infectious diseases . . . and many other instances."); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (presenting judiciary's conclusion that medical statements with identifying details warrant additional protection); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (arguing even cursory statements about medical conditions deserve protection under medical files exemption).

[140] *See Chief Med. Exam'r*, 533 N.E.2d at 1358 ("There is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person's body."); *Boston Ret. Bd.*, 446 N.E.2d at 1058 (recognizing "that medical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual."); *Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (upholding privacy for sensitive data found in blood grouping tests and other genetic research).

ever, existing court redaction policies—such as the Supreme Judicial Court's—fail to extend the same protection in their own publicly accessible court records.[141] Therefore, to best address sensitive medical information, redaction policies should provide an absolute exemption for information directly transcribed from medical files, data acquired through research or medical testing, information about an individual's treatment for substance abuse, and cursory statements about an identifiable individual's medical condition or diagnosis (i.e. "bad back[,]" "hypertension[,]" "diabetic[,]" etc.).[142] Records discussing an individual's medical history or condition should remain absolutely exempt based on existing Legislative intent and the nature of the materials.[143]

This rationale should also extend to mental health records, treatment plans, and related data.[144] Psychiatric diagnoses and treatment information pertain to the human body just as much as any other chronic illness recognized by the Massachusetts judiciary.[145] Psychiatric conditions are

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[141] *See* S.J.C. Rule 1:24, § 1 (presenting scope of rule to protect certain personal identifying information). The rule presents the intent to prevent embarrassing disclosures but provides a limited scope of information covered. *Id.* Despite a history of the judiciary protecting such data from disclosure in public records, the categories presented fail to address sensitive information like medical records, mental health conditions, and substance use. *Id.* § 3. This gap in a court's redaction policy exposes a host of sensitive information that may lead to stigma for an identified individual. *Id.*

[142] *See Police Comm'r*, 648 N.E.2d at 426 (presenting rationale for redacting substance use information and substance abuse treatment from records). While the court has not explicitly addressed substance abuse treatment, the decision in *Police Comm'r* indicates the Commonwealth's courts recognize the sensitive and stigmatizing nature of such information. *Id.* Therefore, it would be in the courts best interests to redact substance abuse treatment information as well as substance abuse. *Id.*; *see also Boston Ret. Bd.*, 446 N.E.2d at 1058 (advocating for medical record redaction where information can lead to indirect identification of patient); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (explaining how cursory statements should be redacted and advocating for protecting medical test results); *Chief Med. Exam'r*, 533 N.E.2d at 1358 (presenting rationale for protecting medical data—such as venereal test results—from public scrutiny).

[143] *Chief Med. Exam'r*, 533 N.E.2d at 1358 ("The Legislature has made such medical files or information absolutely exempt without need for further inquiry as to whether their disclosure constitutes 'a clearly unwarranted invasion of personal privacy.'"); *see also Boston Ret. Bd.*, 446 N.E.2d at 1058 (upholding medical records exemption for medical files and information); *Viriyahiranpaiboon*, 756 N.E.2d at 639 (reiterating strong legislative policy for exempting medical information). *But see Boston Ret. Bd.*, 446 N.E.2d at 1056 ("Not every bit of information which might be found in a personnel or medical file is necessarily personal so as to fall within the exemption's protection.")

[144] *See* Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 563 (Mass. App. Ct. 2007) ("[records] which provide detailed medical information on identified individuals, clearly fit within the absolute exemption and are not subject to production or review.") Mental health information and records may also be characterized as falling under the medical records exemption as a result. *Id.*

[145] *See Chief Med. Exam'r*, 533 N.E.2d at 1358 (listing various medical conditions recognized by Legislature and judiciary to be protected under exemption). While the *Chief Med. Exam'r* decision doesn't discuss psychiatric disorders, the rationale applicable to other disorders

ailments that affect the human body both physically and emotionally.[146] They affect an individual's neurological functions and are classified as medical disorders.[147] Additionally, mental health problems may trigger other chronic illnesses, such as heart disease.[148] Undoubtedly—in order to remain consistent with current judiciary practices—redaction policies should exempt diagnoses of psychiatric conditions, cursory statements discussing an individual's mental health condition, prescriptions for psychiatric medication, and discussions of psychiatric treatment (i.e. cognitive behavioral therapy) from public disclosure.[149] Psychiatric records or mental

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may still apply. *Id.* Psychiatric disorders can also be considered sensitive data pertaining to the human body, as they produce neurological and physical ailments like other chronic illnesses. *Id.*; *see also Viriyahiranpaiboon*, 756 N.E.2d at 639 (addressing non-invasive medical statements and protection under exemption). Diagnosis information for psychiatric disorders—even as cursory as "diagnosed with obsessive compulsive disorder"—should be treated as medical statements under the exemption. *Viriyahiranpaiboon*, 756 N.E.2d at 639 (recognizing legitimacy of psychiatric disorders as medical statements).

[146] *See Mental Health Conditions in the Workplace and the ADA*, *supra* note 6 (identifying mental illness as physical ailment). "The term mental illness is typically used in a medical context to refer to a wide range of conditions related to emotional and mental health." *Id.*

[147] *See id.* (classifying mental health problems as physical ailments that affect the brain). "Mental health conditions are brain disorders." *Id.*; *see also* Gould, *supra* note 6 ("Mental illness results from complex physical changes in the brain like many other diseases. Therefore, mental illnesses require assessment, monitoring and treatment by a skilled provider — just like any other medical illness.")

[148] *See Mental Health By The Numbers*, *supra* note 9 (linking mental illness to other chronic diseases). "People with depression have a 40% higher risk of developing cardiovascular and metabolic diseases than the general population. People with serious mental illness are nearly twice as likely to develop these conditions." *Id.*

[149] *See Chief Med. Exam'r*, 533 N.E.2d at 1357 (presenting characteristics of medical information exempt from disclosure). The court deemed data that is "diagnostic in nature and yield[s] detailed, intimate information about the subject's body and medical condition" as exempt from public disclosure. *Id.* Based on this argument, records detailing psychiatric diagnoses and treatment should be included. *Id.*; *see also Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (protecting blood tests and genetic information). The court in *Viriyahiranpaiboon* determined that blood tests and genetic markers constituted "medical data about a person's body" and were exempt from disclosure. *Viriyahiranpaiboon*, 756 N.E.2d at 639-40. Based on this rationale and public policy, research and testing results for psychiatric disorders should also be protected from public disclosure. *Viriyahiranpaiboon*, 756 N.E.2d at 639-40; *Mental Health Medications*, *supra* note 8 (describing intimacies of psychotherapy and related medications). Medications specifically used to target psychiatric disorders—when attributed to a specifically identified individual—should be exempt from disclosure. *See Mental Health Medications*, *supra* note 8. Medication prescriptions and their effects are considered intimate information of the human body, regardless of if they are for psychiatric or other physical ailments. *See Mental Health Medications*, *supra* note 8; *Psychotherapy*, *supra* note 8 (defining various forms of psychotherapeutic treatment). In conjunction with medication, psychotherapy may help patient manage their mental health issues. *Psychotherapy*, *supra* note 8. While other forms of treatment—such as physical therapy—have not been discussed in context of the exemption, it may be considered exempt by virtue of its relationship to the body. *Psychotherapy*, *supra* note 8. Cognitive behavioral therapy—for example—helps patients address their mental health problems by targeting unhealthy thought patterns. *Psychotherapy*, *supra* note 8. Through a combination of therapeutic sessions and medication, patients learn

health data which "provide[s] detailed medical information on identified individuals, clearly fit within the absolute exemption" and should be an explicitly protected class of information within court record redaction policies.[150] The judiciary recognizes the importance of protecting data related to the human body; mental health data should be no different.[151]

Although information about substance abuse disorders is not explicitly mentioned in the statute, the judiciary recognizes that such information also deserves protection.[152] However, like mental health data, the judiciary fails to extend protection to publicly accessible court documents.[153] The Massachusetts judiciary has previously classified drug and alcohol use as "intimate" and "highly personal" information that should be protected from public scrutiny.[154] *Globe Newspaper v. Police Commissioner* addressed the risks surrounding substance abuse stigma.[155] The court explained that the "revelation by [another person] that [an individual] is a drug addict, for example, is precisely the type of 'intimate' and 'highly personal' information that the privacy exemption would protect." [156] Accordingly, the court determined that the stigma related to drug addicts and

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to address negative thoughts. *Psychotherapy*, *supra* note 8. Research shows that "[i]ndividuals who undergo CBT show changes in brain activity, suggesting that this therapy actually improves your brain functioning as well." *Psychotherapy*, *supra* note 8. Therefore, information about an identifiable patient's psychotherapy treatment should be excluded. *Psychotherapy*, *supra* note 8.

[150] *See* Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 562-63 (Mass. App. Ct. 2007) (arguing that unredacted medical examiner reports should be exempt). Unredacted reports, so long as they provide detailed medical information pertaining to an identifiable individual, should be exempt. *Id.* Therefore, courts should extend this protection within their own redaction policies. *Id.*

[151] *See Chief Med. Exam'r*, 533 N.E.2d at 1357 (reiterating judiciary classification of medical data); *see also Viriyahiranpaiboon*, 756 N.E.2d at 639-40 (summarizing judicial and legislative desire to protect sensitive information about individuals' bodies).

[152] *See* Rural Hous. All. v. U.S. Dep't of Agric., 498 F.2d 73, 77 (D.C. Cir. 1974) (identifying alcohol consumption as sensitive information warranting protection); *see also* Globe Newspaper Co. v. Police Comm'r, 648 N.E.2d 419, 426 (Mass. 1995) (explaining why drug use is considered highly personal information).

[153] *See* S.J.C. Rule 1:24 (presenting information protected under court filing procedures); *see also supra* note 143 and accompanying text (discussing gaps in court redaction policies that fail to cover various types of sensitive information).

[154] *See Rural Hous. All.*, 498 F.2d at 77 (identifying individuals' alcohol consumption as data as sensitive information warranting protection); *see also Police Comm'r*, 648 N.E.2d at 426 (arguing exemption "protects from public scrutiny information that would lead to an unwarranted invasion of privacy of any person mentioned in the requested materials.") The court emphasizes that statements about an identifiable individual's drug use—whether fabricated, alleged, or true—may lead to stigma. *See Police Comm'r*, 648 N.E.2d at 426. Therefore, substance is exempt due to its potential harm. *See Police Comm'r*, 648 N.E.2d at 426.

[155] 648 N.E.2d at 426 (explaining stigma in context of citizen witness statements describing individual's drug use).

[156] *Id.* (citations omitted) (classifying an individual's real and purported drug use as sensitive information)

alcoholics was sufficient to justify exemption from public disclosure.[157] Therefore, redaction policies should expressly call for the redaction of statements describing an individual's present substance use, substance use history, and substance abuse treatment.[158]

Court record redaction policies should provide guidance for obscuring details that may result in indirect identification.[159] Court redaction procedures should ensure that "any order, memorandum of decision, or other document issued by the court that will be publicly accessible" is free of medical, mental health, and substance abuse information of an *identifiable* person unless required by law.[160] Redacting exempt information may be accomplished through traditional methods like "blacking out" the offending text, or replacing the text with "x" characters.[161] For the names of parties and locations, complete omission or use of pseudonyms may help protect an individual's identity.[162] Sufficiently redacting information, how-

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[157] *See id.* ("We conclude that this information also should be redacted prior to release of the citizen witness statements."); *see also* Cronin, *supra* note 7 (addressing stigma associated with opioid addicts and its impact on addicts seeking treatment); Thomas, *supra* note 9 (outlining substance use disorder statistics).

[158] *See Police Comm'r*, 648 N.E.2d at 426 (calling for redaction of information describing an individual's real or purported drug use).

[159] *See* S.J.C. Rule 1:24, § 1 (presenting current protections in place for personal information in court documents). Currently, there are some procedures in place to protect personal information in court filings; however, the listed categories are lacking when compared to the types of information recognized under case law. *Id.*

[160] *See id.* at § 9 (addressing how to approach redaction if disclosure is required by law). Redaction of sensitive information is recommended "unless including it (a) is specifically required by law, court rule, standing order, or court-issued form or (b) is necessary to serve the document's purpose." *Id. But see id.* at § 5 (providing general exemptions for unredacted personal information that may be included in court documents).

[161] *See* S.J.C. Rule 1:24 at § 4 (explaining methods of redaction for court documents filed in Supreme Judicial Court). The rule provides some requirements for redacting sensitive personal information. *Id.* These redaction standards may be used to formulate or improve other court redaction policies. *Id.* The Supreme Judicial Court's standards provide excellent guidance for obscuring text and clearly tagging the location of each redaction. *Id.* These redaction techniques should be extended to documents published online. *Id. But see id.* at comment § 9 (explaining exemption does not always allow for complete redaction of all personal identifying information). Personal identifying information may be included in court documents when it is "necessary to serve the document's purpose." *See id.* at comment § 9. However, the rule reminds document filers that the inclusion of personal identifying information "should be minimized when drafting such documents, [because] sometimes, unredacted information will be necessary to serve the purpose of the document." *Id.* at comment § 9.

[162] *See* People for the Ethical Treatment of Animals v. Dep't of Agric. Res., 76 N.E.3d 227, 240 (Mass. 2017) (recognizing importance of redacting names and addresses to protect individual privacy interests); Torres v. Attorney Gen., 460 N.E.2d 1032, 1037 (Mass. 1984) (emphasizing how "information about a person, such as his name and address" warrant protection). If there is a valid privacy interest, names and other information should be given protection. *Torres*, 460 N.E. 2d at 1037; *see also* S.J.C. Rule 1:24 at § 9 (suggesting how courts can avoid exposure of personal identifying details through alternative redaction procedures). Applying pseudonyms for party

ever, presents its own unique challenges.[163] Following all redactions, it is imperative that the redacting party ensures that indirect identification of an individual is not possible.[164] The redacting party must consider the information from the viewpoint of the public and those familiar with the individual and their career.[165] It will be challenging to create a bright-line rule, as each case will have unique circumstances and varied interests in privacy.[166] However, some explicit guidelines—such as an absolute exemption for removing names and locations—can help ensure parties are not directly identified.[167]

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names, locations, and occupations may ensure court documents do not "[include] a complete version of any personal identifying information" in the document. S.J.C. Rule 1:24 at § 9.

[163] *See* Rural Hous. All. v. U.S. Dep't of Agric., 498 F.2d 73, 78 (D.C. Cir. 1974) (emphasizing deletions must protect individuals' privacy); Champa v. Weston Pub. Sch., 39 N.E.3d 435, 444-45 (Mass. 2015) (explaining how failure to sufficiently redact may lead to stigma for identifiable party); Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1058 (Mass. 1983) (stressing disclosure, even without specific identifying details, may create risk of indirect identification); Logan v. Comm'r of the Dep't of Indus. Accidents, 863 N.E.2d 559, 562-63 (Mass. App. Ct. 2007) (noting how "indirect identification" indicates insufficient redaction of records).

[164] *See Boston Ret. Bd.*, 446 N.E.2d at 1058-59 (highlighting risk of indirect identification through release of medical statements); *Logan*, 863 N.E.2d at 562-63 (discussing methods to eliminate indirect identification of individual).

[165] *See Boston Ret. Bd.*, 446 N.E.2d at 1058-59 ("The inquiry as to what constitutes identifying information regarding an individual . . . must be considered not only from the viewpoint of the public but also from the vantage of those who are familiar with the individual and his career."); *Logan*, 863 N.E.2d at 562-63 (reiterating how courts determine indirect identification).

> Where "indirect identification" of the individual is still possible, such redaction is insufficient. In determining whether the individual can be indirectly identified, [the court reviews] the documents not from the vantage point of the public at large but from those familiar with the individual. Therefore, removing the name of the employee . . . is not enough.

Logan, 863 N.E.2d at 562-63.

[166] *See People for the Ethical Treatment of Animals*, 76 N.E.3d at 239-40 (addressing exemptions considering case's unique circumstances). The Supreme Judicial Court explained that a case-by-case analysis of privacy interests are critical, as "the same information about a person, such as his name and address, might be protected from disclosure as an unwarranted invasion of privacy in one context and not in another." (quoting Torres v. Attorney Gen., 460 N.E.2d 1032, 1037 (Mass. 1984). As such, the Supreme Judicial Court recognizes that a bright line rule is unlikely to evaluate privacy interests in a given situation. *Id.*

[167] *See* S.J.C. Rule 1:24 at § 1 (declaring filer should avoid "unnecessary inclusion of certain personal identifying information in publicly accessible documents.") Redacting information—such as names and discernable locations—could ensure no unnecessary, identifiable information emerges in publicly accessible court documents. *Id.*; *see also* S.J.C. Rule 1:24, § 3 (calling for redaction of personal identifying information). In addition to the listed categories of exempt information, redaction policies could implement explicit instructions to completely redact names, occupations, and locations unless required by law. *See* S.J.C. Rule 1:24, § 3; *People for the Ethical Treatment of Animals*, 76 N.E.3d at 240 (supporting conclusion that case-specific factors should play role in classifying identifiable information). Additionally, the analysis of identifying

Even after names, locations, occupations, and other specific identifying details are removed, redactions must prevent even *indirect* identification.[168] Inadequate redactions may enable the public or those familiar with the individual to identify them, especially if the record is publicly available online.[169] It is imperative that redactions of publicly accessible records discussing medical conditions, mental illness, or substance abuse, prevent indirect identification because the consequences of the related stigma can be devastating.[170] Following all necessary redactions, the redaction policy should require the public release of all non-exempt portions of the record.[171]

V. CONCLUSION

While cultural attitudes about mental illness, substance abuse, and chronic illness are becoming more sympathetic, stigma remains a real threat to the wellbeing of millions of Americans who suffer from those afflictions. The internet's ease of access and push for digital documents presents concerns for protecting a party's information. Online records may unnecessarily expose an individual to stigma if they are identified in a public forum. In an age where internet privacy matters most, the Massachu-

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information should consider any "risks to the personal safety of individuals from the release of certain requested information." *People for the Ethical Treatment of Animals*, 76 N.E.3d at 240.

[168] *See Rural Hous. All.*, 498 F.2d at 78 (emphasizing importance of thorough redactions). It is important to consider "whether the deletions [at the time of review] are sufficient to protect the privacy of the individuals." *Id.*

[169] *See id.* (warning how others may indirectly identify individual). Insufficient redaction of highly confidential material may "enable people with knowledge of the area to determine the identity of the individuals involved." *Id.*; *see also Logan*, 863 N.E.2d at 563 (explaining grave risk associated with indirect identification). Failing to redact information about an employee's work duties or his workplace, even if the party's name is removed, could lead to indirect identification. *See Logan*, 863 N.E.2d at 563. If this unredacted information is paired with sensitive data, like information surrounding an individual's medical condition, the individual is at risk of exposure and stigma. *See Logan*, 863 N.E.2d at 563.

[170] *See* Champa v. Weston Pub. Sch., 39 N.E.3d 435, 444-45 (Mass. 2015) (explaining risks associated with indirect identification in context of disabilities). The failure to redact information sufficiently to prevent identification "may result in embarrassment and potentially lead to stigma." *Id.*

[171] *See id.* at 445 (noting how redaction subjects publicly accessible records to disclosure). "[Documents] may be redacted to remove personally identifiable information they contain, after which they become subject to disclosure." *Id.* at 437; *see also* Globe Newspaper Co. v. Boston Ret. Bd., 446 N.E.2d 1051, 1058 (Mass. 1983) (noting remaining unredacted record must be disclosed); Globe Newspaper Co. v. Police Comm'r, 648 N.E.2d 419, 424 (Mass. 1995) ("[T]he existence of some exempt information in a document will not 'justify cloture as to all of it,' because the right to access extend[s] to any nonexempt "segregable portion" of a public record.") (second alteration in original) (citations omitted); Galvin, *supra* note 21, at 14 ("[T]he non-exempt portions are subject to disclosure once the exempt portions are deleted.")

setts' courts must adapt to best protect personal information as court documents become available online. Massachusetts expanded the universe of public records with the inclusion of electronic records, but no guidelines exist for the courts to sufficiently redact publicly accessible, electronic court documents.

It would be in the courts' best interest to update existing redaction policies with new categories of protected information and redaction techniques to protect parties from discrimination. Redaction policies currently in place provide some guidance, but they ultimately fail to address information that may lead to stigma. The gaps allow stigmatizing information to slip through the cracks, which can lead to the suffering of individuals whose private information was inadvertently disclosed to the public.

While the public records law does not apply to the courts, case law provides guidance for what information should receive protection—even when balanced against public interest. The courts themselves have determined that certain kinds of information should receive additional protection, but these decisions are not reflected in court redaction policies. Medical information, psychiatric information, and substance abuse disorder information deserve protection in publicly accessible court documents, just as in other public records. It may be difficult to create a universal policy, especially due to the unique circumstances of each case and public interest in the information. However, this should not deter the courts from facilitating additional protective measures for parties and their sensitive information. By establishing clear guidelines for questionable information, the courts may aid in both meeting the public's interest in the information and the individuals' interest in protection from debilitating stigma.

Diana Hurtado