

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-833

IRVING F. ROUNDS

vs.

THE GOVERNOR & others.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Irving F. Rounds, requested that the Clinton Police Department release a police report that he believed was in their possession based on his assertion that "a Department of Justice (DOJ) manager has been relentlessly harassing, stalking, threatening and intimidating" him. The police department informed Rounds that they had no such report. Rounds appealed the responses to the Public Records Division of the Office of the Secretary of the Commonwealth (Secretary). On July 10, 2019, the Secretary found that the police department had complied with its obligations under the Public Records Law, G. L. c. 66, § 10, and did not have the records in its

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<sup>1</sup> Attorney General of the Commonwealth, Secretary of the Commonwealth, Public Records Division of the Secretary of the Commonwealth.

possession. Rounds sought reconsideration from the Secretary, which was denied on October 16, 2019.

On November 25, 2019, Rounds filed an action in Suffolk Superior Court seeking a preliminary injunction and an order to require specific Massachusetts State agencies to provide Rounds the records he sought, as well as requesting the court to cite an attorney in the Secretary's office for misconduct. Rounds's complaint was dismissed, however no separate entry of final judgment was made on the docket. Rounds filed a motion for reconsideration five days after the order dismissing the complaint entered. A Superior Court judge held a hearing on the motion, but did not issue a decision before his retirement in February 2021. Rounds refiled his motion for reconsideration in 2021, and on June 14, 2021, another Superior Court judge held a hearing on the motion. Two days later, Rounds's motion was denied, and he filed this appeal.<sup>2</sup>

Discussion. 1. Motion to dismiss. We review the Superior Court's dismissal of the complaint de novo. Curtis v. Herb

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<sup>2</sup> As no party has raised or disputed the issue, we treat the order dismissing the complaint as a final disposition of the matter and the filing of the motion to reconsider as tolling the appeal period pursuant to Mass. R. A. P. 4, as appearing in 481 Mass. 1606 (2019). Similarly, as no party has raised the issue and the parties have fully briefed the merits of the underlying disposition, we treat the notice of appeal, which referenced only the motion to reconsider, as also encompassing the appeal from the dismissal of the complaint.

Chambers I-95, Inc., 458 Mass. 674, 676 (2011). A person may request public records from the Superior Court pursuant to G. L. c. 66, § 10A, in two ways: (1) by seeking judicial review of a supervisor's decision in the nature of certiorari, G. L. c. 66, § 10A (a); or (2) by filing a direct suit to enforce compliance with their request, G. L. c. 66, § 10A (c).

Here, it is unclear under which subsection Rounds was petitioning the Superior Court. However, regardless of the method requested, Rounds did not properly file his complaint. A petition for certiorari must "be commenced within sixty days next after the proceeding complained of." G. L. c. 249, § 4. Here, the supervisor issued her decision on July 10, 2019, and Rounds did not file his complaint until November 25, 2019, 138 days later. Alternatively, if Rounds filed this action as a direct suit, he failed to bring the action against the police departments that allegedly had the records. Also, G. L. c. 66, § 10A (c), requires a direct suit to "be filed in Suffolk superior court with respect to agencies and, with respect to municipalities, in the superior court in the county in which the municipality is located." Here, Rounds was seeking documents in Clinton, Burlington, Waltham, and Framingham, none of which are in Suffolk County. Therefore, regardless of which subsection of G. L. c. 66, § 10A, Rounds brought this action under, the judge properly dismissed the complaint.

Rounds also argues the judge erred in dismissing the complaint on the ground that the alleged records do not exist. However, under G. L. c. 66, § 10A, "a member of the public may not, through a public records request, require an agency or municipality to create new documents that do not already exist." Attorney Gen. v. District Attorney for the Plymouth Dist., 484 Mass. 260, 275 (2020).

Lastly, the complaint fails to state a claim against the Governor or Attorney General. Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). Though the Attorney General has the authority to compel compliance with public records requests, they have broad discretion to do so. See Shepard v. Attorney Gen., 409 Mass. 398, 402 (1991) ("in the absence of allegations that the Attorney General acted arbitrarily and capriciously, discretionary executive decisions made by the Attorney General are beyond judicial review"). Nothing alleged by Rounds suggests any abuse of that discretion.

2. Motion for reconsideration. We review the Superior Court's denial of the motion for reconsideration for an abuse of discretion. Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 278 (2020). "A motion for reconsideration 'should specify (1) "changed circumstances" such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original

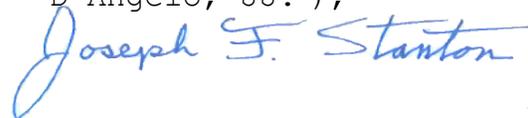
ruling or decision." Id., quoting Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc. 82 Mass. App. Ct. 461, 470 (2012).

Rounds has not alleged any changed circumstances here, but rather has repeated arguments made previously and alleged facts which could have been brought up in the initial complaint. See Blake, supra at 278; Audubon Hill S. Condo. Ass'n, supra at 471. In his motion, Rounds does not add any information about the police departments withholding records, but only further allegations of harassment. Because Rounds did not specify any changed circumstances, new evidence, new law, or a particular and demonstrable error in the original decision, the judge did not abuse his discretion by denying the motion for reconsideration.

Order dismissing complaint affirmed.

Order denying motion to reconsider affirmed.

By the Court (Meade, Singh & D'Angelo, JJ.<sup>3</sup>),



Clerk

Entered: November 22, 2022.

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<sup>3</sup> The panelists are listed in order of seniority.