



**The Commonwealth of Massachusetts**  
William Francis Galvin, Secretary of the Commonwealth  
Public Records Division

Rebecca S. Murray  
*Supervisor of Records*

June 26, 2019  
**SPR19/1173**

Tara Douglas, Esq.  
Assistant General Counsel  
Board of Registration in Medicine  
200 Harvard Mill Square, Suite 330  
Boston, MA 01880

Dear Attorney Douglas:

I have received the petition of Benita Sanchez appealing the response of the Board of Registration in Medicine (Board) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, Ms. Sanchez requested a copy of the “. . . Offer of Proof sent by the court to [the Board] pertaining to [an identified individual] in case 1984CV00119, Davis, Amanda vs. Mark, M.D., Alice.”

***Previous appeal***

The requested record was the subject of a previous appeal. See SPR19/994 Determination of the Supervisor of Records (May 31, 2019). In my May 31<sup>st</sup> determination, I indicated that it was unclear whether the Board possessed the requested record. Accordingly, I ordered the Board to provide Ms. Sanchez with a response to the request, provided in a manner consistent with the order, the Public Records Law, and its Regulations. Following the May 31<sup>st</sup> determination, the Board responded on June 7, 2019. Unsatisfied with the Board’s response, Ms. Sanchez petitioned this office and this appeal, SPR19/1173, was opened as a result.

***The Public Records Law***

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

It is the burden of the records custodian to demonstrate the application of an exemption in order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist.

Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response a written, good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

### ***The Board's June 7<sup>th</sup> response***

In its June 7, 2019 response, the Board states that “[i]f the Board has received an Offer of Proof in its Data Repository, the Board has traditionally provided the court location and docket number when malpractice case documents are requested via Board public records requests, despite the document itself being kept confidential in the Board’s Data Repository.” The Board indicates that “[i]n this instance, Ms. Sanchez is already aware of the docket number, as it was provided in her initial May 19, 2019 request. Docket number 1984CV119 was brought before the Suffolk Superior Court.”

The Board further states that, “243 CMR 2.14 contains a nonexclusive list of mandated reports. Some mandated reports are not listed within 243 CMR 2.13 and 2.14. *See* 243 CMR 2.14(1). Offers of Proof reported to the Board are regarding open malpractice cases against one or more licensees. Further, offers of proof include personally identifiable information and attach medical records that contain identifiable patient medical information, disclosure of which may constitute an unwarranted invasion of personal privacy. *See* M.G.L. c. 4, § 7(26)(c).”

### ***Exemption (a)***

Exemption (a), known as the statutory exemption, permits the withholding of records that are:

specifically or by necessary implication exempted from disclosure by statute

G. L. c. 4, § 7(26)(a).

A governmental entity may use the statutory exemption as a basis for withholding requested materials where the language of the exempting statute relied upon expressly or necessarily implies that the public’s right to inspect records under the Public Records Law is restricted. See Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 54 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-46 (1977).

This exemption creates two categories of exempt records. The first category includes records that are specifically exempt from disclosure by statute. Such statutes expressly state that such a record either “shall not be a public record,” “shall be kept confidential” or “shall not be subject to the disclosure provision of the Public Records Law.”

The second category under the exemption includes records deemed exempt under statute by necessary implication. Such statutes expressly limit the dissemination of particular records to a defined group of individuals or entities. A statute is not a basis for exemption if it merely lists individuals or entities to whom the records are to be provided; the statute must expressly limit access to the listed individuals or entities.

*Exemption (c)*

Exemption (c) permits the withholding of:

personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy

G. L. c. 4, § 7(26)(c).

*First clause of Exemption (c) – medical*

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-34 (1983). The first clause, relevant to this determination, creates a categorical exemption for personnel and medical information that relates to an identifiable individual and is of a “personal nature.” Id. at 434. Medical information that is of a personal nature and relates to a specifically named individual is exempt from disclosure. Brogan v. School Comm. of Westport, 401 Mass. 306, 308 (1987); Globe Newspaper Co., 388 Mass. at 438. Generally, medical information is sufficiently personal to warrant exemption. Globe Newspaper Co., 388 Mass. at 432-34. There is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person’s body. Globe Newspaper Co. v. Chief Medical Examiner, 404 Mass. 132, 135 (1987).

*Second clause of Exemption (c) – privacy*

Analysis under the second clause of Exemption (c) is subjective in nature and requires a balancing of the public’s right to know against the relevant privacy interests at stake. Torres v. Attorney Gen., 391 Mass. 1, 9 (1984); Attorney Gen. v. Assistant Comm’r of Real Property Dep’t, 380 Mass. 623, 625 (1980). Therefore, determinations must be made on a case by case basis.

This clause does not protect all data relating to specifically named individuals. Rather, there are factors to consider when assessing the weight of 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. See People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res., 477 Mass. 280, 292 (2017).

The types of personal information which the second clause of this exemption is designed to protect includes: marital status, paternity, substance abuse, government assistance, family disputes and reputation. *Id.* at 292 n.13; *see also Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 427 (1988) (holding that a motor vehicle licensee has a privacy interest in disclosure of his social security number).

This clause 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. *PETA*, 477 Mass. at 291. The public has a recognized interest in knowing whether public servants are carrying out their duties in a law-abiding and efficient manner. *Id.* at 292.

***Burden of Specificity; segregable portions***

Pursuant to the Public Records Law, the burden shall be upon the records custodian to establish the applicability of an exemption. G. L. c. 66, § 10(b)(iv) (written response must “identify any records, categories of records or portions of records that the agency or municipality intends to withhold, and provide the specific reasons for such withholding, including the specific exemption or exemptions upon which the withholding is based . . .”); *see also Globe Newspaper Co. v. Police Comm’r*, 419 Mass. 852, 857 (1995); *Flatley*, 419 Mass. at 511.

In my May 31<sup>st</sup> determination, I indicated that based on the Board’s May 21<sup>st</sup> response, it was unclear whether the Board possessed the Offer of Proof. Accordingly, I directed the Board to indicate whether or not it possessed such a record and explain how the confidentiality provision of 243 C.M.R. 2.13(2), applies to withhold the record. *See* SPR19/994.

In the Board’s June 7<sup>th</sup> supplemental response, it states “[i]f the Board has received an Offer of Proof in its Data Repository, the Board has traditionally provided the court location and docket number when malpractice case documents are requested via Board public records requests, despite the document itself being kept confidential in the Board’s Data Repository.” Based on this response, it remains unclear whether the requested record is in the Board’s possession, custody or control. The duty to comply with requests for records extends to those records that exist and are in the possession, custody, or control of the custodian of records at the time of the request. *See* G. L. c. 66, § 10(a)(ii). Also, to deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); *see also* 950 C.M.R. 32.06(3)(c)(4). Accordingly, I find the Board must confirm whether it possesses the responsive record.

It is additionally uncertain how the indicated regulations, 243 C.M.R. 2.13 and 243 C.M.R. 2.14, permit the Board to withhold the offer of proof from disclosure.

With respect to Exemption (c), the Board states that “offers of proof include personally identifiable information and attach medical records that contain identifiable patient medical information, disclosure of which may constitute an unwarranted invasion of personal privacy.” Based on the Board’s response, it is uncertain whether the record can be redacted to prevent the disclosure of personally identifiable information or medical information about an identified individual from the responsive records. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). Any non-exempt, segregable portion of a public record is subject to mandatory disclosure. G. L. c. 66, § 10(a).

With respect to the second clause of Exemption (c), based on the Board’s response, I find the Board has neither demonstrated how the offer of proof contains intimate details of a highly personal nature nor how disclosure would result in personal embarrassment to an individual of normal sensibilities. It is additionally uncertain whether this information is available from other sources. PETA, 477 Mass. at 292. Also, the Board has not identified a privacy interest that outweighs the public interest in disclosure. See id. at 291.

### ***Conclusion***

Accordingly, the Board is ordered to provide Ms. Sanchez with a response to the request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within ten business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of this response to this office at [pre@sec.state.ma.us](mailto:pre@sec.state.ma.us).

Sincerely,



Rebecca S. Murray  
Supervisor of Records

cc: Benita Sanchez