



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

Rebecca S. Murray
Supervisor of Records

December 27, 2019
SPR19/2459

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

Dear Attorney Douglas:

I have received the petition of Jared Lowrey 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, Mr. Lowrey requested the "Offer of Proof pertaining to" a certain medical malpractice case.

The Board responded to Mr. Lowrey on December 10, 2109 withholding responsive records pursuant to Exemptions (a) and (c) of the Public Records Law. Unsatisfied with this response, Mr. Lowrey petitioned this office and this appeal, SPR 19/2459, 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.

Current Appeal

In its December 10th response, the Board indicates that the requested records contain “individually identifying medical information,” and as such is withholding responsive records pursuant to Exemptions (a) and (c) of the Public Records Law.

In his appeal petition, Mr. Lowrey states that “[a]ll [they] simple [sic] need to do is get a black marker and redact the name, ss number, dob and all personal info and leave the rest in.”

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.

In its December 10th response, the Board states that it is “prohibited from disclosing individually identifying medical information because this information constitutes protected health information protected from disclosure pursuant to the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule....” The Board explains that it is “further prohibited from disclosing this information because it constitutes personal data protected from disclosure pursuant to G.L. c. 66A, the Massachusetts Fair Information Practices Act (“FIPA”).

Exemption (c)

Exemption (c) of the Public Records Law 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, 432-33 (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 will be of a sufficiently personal nature 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 Med. 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.

In its December 10th response, the Board states that “this information is exempt from disclosure pursuant to G.L. c. 4, §7(26)(c) as it is medical and private information, the disclosure of which may constitute an unwarranted invasion of personal privacy. This information is of a highly personal nature and contains specific details, which may identify individuals.”

Based on the Board’s response, it appears that the records may contain medical information that is exempt from disclosure under Exemptions (a) and (c). However, it is unclear how segregable portions of the responsive records cannot be provided. See Reinstein v. Police Comm’r of Boston, 378 Mass. 281, 289-290 (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. See G. L. c. 66, § 10(a). The Board must explain why segregable portions of the responsive records cannot be provided.

I understand a Public Records Division staff attorney contacted your office about this appeal but was unable to reach you prior to the issuance of this decision.

Conclusion

Accordingly, the Board is ordered to provide Mr. Lowrey with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within 10 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.

Sincerely,



Rebecca S. Murray
Supervisor of Records

cc: Jarod Lowrey