



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

Rebecca S. Murray
Supervisor of Records

January 24, 2020

SPR20/0053

Robert E. Harvey, Esq.
Board Counsel
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, Massachusetts 01880

Dear Attorney Harvey:

I have received the petition of Reggie Kennedy 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, on January 9, 2020, the requestor sought copies of all complaints pertaining to four identified physicians.

The Board provided a response to the requestor on January 9, 2020. Unsatisfied with the Board's response, the requestor petitioned this office and SPR20/0053 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) (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 ... "); 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).

Current Appeal

In its January 9th response, the Board responded that it had no responsive records for two of the identified physicians.

No Duty to Create Records

Please be advised, under the Public Records Law the Board is not required to create a record in response to a public records request. See G. L. c. 66, §6A(d). 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).

The Board's January 9th Response

In its January 9th response, the Board produced 19 pages of redacted responsive documents pertaining to closed complaints. Additionally, the Board claimed Exemptions (a), (c), and (f) of the Public Records Law to withhold responsive records from disclosure.

Exemption (a)

The Board indicated that it withheld closed anonymous complaint records, which are determined to be frivolous or lacking in either legal merit or factual basis, pursuant to G. L. c. 112, § 5; 243 C.M.R. 1.02(8)(c)(6) and 243 C.M.R. 1.03(3)(a), as well as records relating to open complaints, under Exemption (a). G. L. c. 4, § 7 (26)(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.

The regulations cited by the Board provide in pertinent part:

C.M.R. 1.02(8)(c)(6) Availability of Board Records to the Public. Closed anonymous complaints, which are determined to be frivolous or lacking in either legal merit or factual basis, consistent with 243 C.M.R. 1.03(3)(a); are not public records and are confidential.

243 C.M.R. 1.03(3)(a) Preliminary Investigation. A Board Investigator shall conduct such preliminary investigation, including a request for an answer from the licensee, as is necessary to allow the Complaint Committee to determine whether a complaint is frivolous or lacking in either merit or factual basis. If, after a preliminary investigation of an anonymous complaint, the investigator determines that the anonymous complaint is frivolous or lacking in either merit or factual basis, the anonymous complaint shall not be docketed, shall be filed in a general correspondence file, and shall remain confidential.

Upon review of the Board's January 9th response, to the extent records are closed anonymous complaints or complaints that have been determined to be frivolous or lacking in legal merit or factual basis, as described by the regulations referenced above, these records may be withheld.

Exemption (c)

The Board explained that it made redactions of patient and third-party identification pursuant to Exemption (c) of the Public Records Law. Exemption (c) applies to:

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)

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, creates a categorical exemption for personnel 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 to warrant exemption. Globe Newspaper Co. 338 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 (1989).

Nevertheless, there is a strong public interest in monitoring public expenditures and public employees have a diminished expectation of privacy with respect to public employment matters. See George W. Prescott Publishing Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 278 (1985); Globe Newspaper Co., 388 Mass. at 436 n.15. Further, the public has an interest in knowing whether public employees are "carrying out their duties in an efficient and law-abiding manner." Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158 (1979). As a result, certain information that is considered personal in the ordinary sense of the word may be considered part of a public record if relating to an individual's official responsibilities. See Brogan v. School Comm. of Westport, 401 Mass. 306, 309 (1987).

Second clause of Exemption (c)

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, Inc. (PETA) v. Department of Agricultural Resources, 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, 428 (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 292. 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.

The Board's January 9th response did not contain the specificity required in a denial of access to public records. Specifically, the Board has not provided a description of the information which was redacted. Instead, the Board's response simply cites Exemption (c) without any further explanation as to the exemption's applicability to the requested records.

With respect to the second clause of Exemption (c), the Board has neither demonstrated how the information 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.

Exemption (f)

Further, the Board denied access to open complaints under Exemption (f). Exemption (f) permits the withholding of:

investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.

G. L. c. 4, § 7 (26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Attorney Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a "case-by case consideration" of whether disclosure "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest." See Reinstein, 378 Mass. at 289-290.

The Board contends that "...records relating to any open complaint are confidential ... pursuant to Exemption (f)." The Board must clarify the ongoing nature of these investigations.

Burden of specificity in claiming exemptions

Under the Public Records Law, the burden shall be upon the records custodian to prove with specificity the exemption which applies. 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. See also 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).

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Conclusion

Accordingly, the Board is ordered to provide a response to the requestor 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,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive style with a long, sweeping underline.

Rebecca S. Murray
Supervisor of Records

cc: Reggie Kennedy