



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

Rebecca S. Murray  
Supervisor of Records

January 27, 2020  
**SPR20/0050**

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

Dear Attorney Dolan:

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.

***Previous appeal***

This request was the subject of a previous appeal. See SPR19/2459 Supervisor of Records Determination (December 27, 2019). In my December 27<sup>th</sup> determination I ordered the Board to provide Mr. Lowrey with a response to the request, provided in a manner consistent with the order, the Public Records Law and its Regulations. The Board responded on January 9, 2020. Mr. Lowrey appealed and SPR20/0050 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*

The Board initially responded to Mr. Lowrey on December 10, 2109 and indicated 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 my December 27<sup>th</sup> determination I found that based on the Board’s response, it appeared that the records may contain medical information that is exempt from disclosure under Exemptions (a) and (c). However, it was unclear how segregable portions of the responsive records cannot be provided. I indicated that the Board must explain why segregable portions of the responsive records cannot be provided.

The Board’s January 9<sup>th</sup> response provides additional information regarding the type of records at issue; specifically, you indicate “[t]he specific request in this matter is for an Offer of Proof in a medical malpractice matter. An Offer of Proof is a legal document that accompanies a medical malpractice complaint. This document spells out the specific factual bases for the complaint and describes the circumstances underlying the plaintiff’s belief that the defendant(s) committed medical malpractice.” You further assert “[i]n order for a medical malpractice claim to proceed, the Offer of Proof must be specific enough to convince a malpractice tribunal that there is sufficient evidence to support an inference that the defendant(s) committed malpractice. As a result, an Offer of Proof contains highly-detailed medical and health information relating to one or more identified individuals.” The Board also provides further information regarding its claims under Exemptions (a) and (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.

In its December 10<sup>th</sup> response, the Board stated 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 explained 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’).”

In its January 9<sup>th</sup> response you assert “Offers of Proof are also exempt under G.L. c. 4, § 7(26)(a) because they are “specifically or by necessary implication exempted from disclosure by statute.” Like all malpractice information received by the Board, Offers of Proof are retained in the Data Repository, which, pursuant to G.L. c. 112, § 5, is ‘responsible for the compilation of all data required under sections five A to five J, inclusive, and any other law or regulation which requires that information be reported to the board.’” You further note that “[u]nder the same statute, ‘[t]he board, including but not limited to the data repository and the disciplinary unit, shall keep confidential any complaint, report, record or other information received or kept by the board in connection with an investigation conducted by the board pursuant to this section, or otherwise obtained by or retained in the data repository[.]’”

You conclude by asserting “[b]ecause Offers of Proof are provided to the Board pursuant to G.L. c. 112, §§ 5C and 5E, and 243 CMR 2.14, they are retained in the Data Repository. Therefore, in compliance with the specific language of G.L. c. 112, § 5, the Board must keep Offers of Proof confidential.”

*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 10<sup>th</sup> response, the Board stated 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.”

In its January 9<sup>th</sup> response the Board asserts “[t]ypically, an Offer of Proof contains several dozen to hundreds of pages of factual allegations, medical analysis, and descriptions of

injuries relating to specifically-identified individuals. An Offer of Proof will generally also include hundreds of pages of exhibits, including medical records, photographs of injuries, and other protected health information.” You further indicate that “[d]ue to the specificity required to meet the tribunal threshold, the entire Offer of Proof consists of medical information that is ‘of a personal nature and relate[s] to a particular individual’” and “[t]herefore, it is not possible to segregate ‘public’ portions from the non-public information in an Offer of Proof.”

*Available from other sources*

In his appeal petition Mr. Lowrey asserts “Offer of Proofs are available to the public via the court houses. All the Board needs to do is get a black marker and redact the personal data, not hard to do. Please obtain the records.”

Although the Board provides additional information regarding its claims under Exemptions (a) and (c), I find it is first necessary to determine whether the Offer of Proof at issue in this appeal is available from other sources. In particular, the Board must clarify whether this record is part of a case file that is publically available from the relevant court. See PETA, 477 Mass. at 292 (a factor in considering the strength of a privacy interest is the extent to which the same information is available from other sources).

*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](mailto:pre@sec.state.ma.us).

Sincerely,



Rebecca S. Murray  
Supervisor of Records

cc: Jarod Lowrey