



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

Rebecca S. Murray
Supervisor of Records

January 28, 2020
SPR20/0064

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 Vincent Dunn, Esq. of *Hamel Marcin Dunn Reardon & Shea, PC* 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 November 27, 2019, Attorney Dunn requested “. . . a copy of the investigation file for [an identified individual] in Docket No. 15-326.” The Board provided a response on December 6, 2019, denying access to responsive records pursuant to Exemptions (a) and (c) of the Public Records Law. G. L. c. 4, § 7(26)(a), (c). Unsatisfied with the Board’s response, Attorney Dunn petitioned this office and this appeal, SPR20/0064, 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.

Purpose of request; identity of requestor

Please note that the reason for which a requestor seeks access to or a copy of a public record does not afford any greater right of access to the requested information than other persons in the general public. The Public Records Law does not distinguish between requestors. Access to a record pursuant to the Public Records Law rests on the content of the record and not the circumstances of the requestor. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976). Accordingly, Attorney Dunn's purpose in making the request has no bearing on the public status of any existing responsive records.

The Board's December 6th response

In its December 6, 2019 response, the Board asserts that "[t]he cited docket is an open and ongoing matter. Consequently; any records pertaining to [Attorney Dunn's] client remain confidential at this time, and cannot be provided." The Board states that to the extent that it possesses records responsive to Attorney Dunn's request, they are withheld 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.

Under Exemption (a), the Board cites G. L. c. 112, § 5, which states in relevant part:

The 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; provided, however, that, **except to the extent that disclosures of records or other information may be restricted as otherwise provided by law, or by the board's regulations**, investigative records or information of the board shall not be kept confidential after the board has disposed of the matter under investigation by issuing an order to show cause, by dismissing a complaint or by taking other final action nor shall the requirement that investigative records or information be kept confidential at any time apply to requests from the person under investigation, the complainant, or other state or federal agencies, boards or institutions as the board shall determine by regulations.

G. L. c. 112, § 5 (emphasis added).

The Board contends that “[t]his statute prohibits [it] from releasing records of open investigations to the public.” The Board explains that “[t]he language in bold creates a clear exception for the following text where the Board’s regulations restrict disclosure of records or other information. Pursuant to Board regulation 243 CMR 1.02(8)(b), ‘[b]efore the Board issues a Statement of Allegations, dismisses a complaint, or takes other final action, the Board’s records concerning a disciplinary matter are confidential.’ In the case of [the identified individual], none of the listed events has yet occurred.” The Board further explains that, pursuant to its “regulation 243 CMR 1.02(8)(c)(2), ‘Disciplinary Unit files, which contain portions of complaint files (and related confidential files) as well as papers related to adjudicatory proceedings and attorney work product, are not public records and are confidential.’ Board investigations are conducted by the Disciplinary Unit and investigative records are contained in the Disciplinary Unit’s files. Therefore, the investigative records are confidential by statute and exempt from production in response to a public records request pursuant to G.L. c. 4, § 7(26)(a).”

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, 378 Mass. at 290 n.18. 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 289-90.

Under Exemption (f), the Board states that these records are exempt from disclosure, “. . . because they constitute ‘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[.]’” The Board posits that “[i]n order to preserve the integrity of its investigations and the privacy of medical and/or other personal information, the Board necessarily compiles its investigatory files out of the public view. Disclosure of these materials to the public while an investigation is ongoing would clearly prejudice the Board’s law enforcement efforts and would not be in the public interest. . . .”

In his appeal petition, Attorney Dunn states the following: “[t]he Board cannot rely on a general exemption from the public records law because the Legislature has specifically and clearly prohibited the withholding of investigatory materials from the person who is the subject of the investigation. See G.L. c. 112, sec. 5. While the statute provides generally for the confidentiality of investigatory records, it clearly prohibits keeping these records confidential from the person under investigation: ‘. . . nor shall the requirement that investigation records or information be kept confidential *at any time* apply to requests from the *person under investigation.*’ (emphasis added); see also Cronin v. Strayer, 392 Mass. 525, 533 (1984)(‘[t]he [Board of Registration in Medicine’s] investigations are confidential by statute. However, the policy of confidentiality is inapplicable to a request made by a physician under investigation for the board’s investigatory records and documents,’ citing G.L. c. 112 sec. 5, fourth par.)” Attorney Dunn further states that “[t]he Board’s strained interpretation of clear, plain and unambiguous statutory language and assumption of the power to ‘regulate’ the Legislative scheme as it sees fit finds no support in the statutory or case law of the Commonwealth. . . . In short, the Board cites no authority to justify withholding the requested documents and [my client] respectfully requests that the Board be ordered to produce the investigatory file(s) . . . as required by law.

Based on the foregoing, in conjunction with the Board’s response, citing statute and regulations, it is unclear what the basis of Attorney Dunn’s appeal is. Specifically, it is uncertain if Attorney Dunn is objecting to the regulations cited by the Board to withhold responsive records. Attorney Dunn is reminded that all petitions for appeal “shall specifically describe the

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nature of the requestor's objections to the response or failure to timely respond." 950 C.M.R. 32.08(1)(f).

Conclusion

Accordingly, Attorney Dunn must describe his specific objections to the Board's response.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The signature is written in a cursive, flowing style.

Rebecca S. Murray
Supervisor of Records

cc: Vincent Dunn, Esq.