



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

Rebecca S. Murray
Supervisor of Records

June 30, 2020
SPR20/0969

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 Colman Herman 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. Herman requested the disciplinary file for a certain doctor.

Previous Appeal

This request has been the subject of a prior appeal. See SPR20/0880 Determination of the Supervisor of Records (June 16, 2020). I closed SPR20/0880 on the understanding that the Department intended to provide a supplemental response to Mr. Herman. The Board provided this response on June 17, 2020, indicating that it is withholding responsive records pursuant to Exemption (a) of the Public Records Law. Unsatisfied with this response, Mr. Herman petitioned this office and this appeal, SPR20/0969, 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 June 17, 2020 response, the Board indicates that it is withholding responsive records pursuant to Exemption (a) of the Public Records Law. The Board cites G. L. c. 112, § 5, 243 C.M.R. 1.02(8)(c)(2), and 243 C.M.R. 2.13 in support of its Exemption (a) claim.

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.

The statutes and regulations cited by the Board provide, in pertinent part:

The board shall investigate all complaints relating to the proper practice of medicine by any person holding a certificate of registration under sections two to twelve A, inclusive, or of section sixty-five so far as it relates to medicine and report the same to the proper prosecuting officers.

...

There shall be established within the board of registration in medicine a data repository which will be 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.

G. L. c. 112, § 5.

(c) The Board's records of disciplinary matters, as limited by 243 CMR 1.02(8)(a) and (b), include the following:

...

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.

243 C.M.R. 1.02(8)(c)(2).

Pursuant to M.G.L. c. 112, § 5, the Board shall maintain a Data Repository to compile all reports filed under M.G.L. c. 112, §§ 5A through 5M, and reports filed under any other state or federal law or regulation requiring that information be reported to the Board, excluding Safety and Quality Reviews filed pursuant to M.G.L. c. 111 § 20. Mandated reports received in the Data Repository are confidential, unless otherwise required by law. The term Data Repository refers to the compilation of all mandated reports received by the Board.

243 C.M.R. 2.13(1).

In its June 17th response, the Board explains it “is notified of out-of-state discipline on physicians licensed in Massachusetts through reports to its Data Repository Unit...” and states that it has “withheld DRU files as they are confidential by statute.” The Board further indicates that it has “also withheld any other Disciplinary Unit files, including records of a Disciplinary Unit’s investigation because these records are specifically exempt from production by statute.”

Based on the Board’s response, I find it has met its burden to show that the responsive files are exemption from disclosure pursuant to 243 C.M.R. 1.02(8)(c)(2) and 243 C.M.R. 2.13(1), as they operate through Exemption (a) of the Public Records Law.

Conclusion

Accordingly, whereas I find the Board may permissibly withhold the responsive files pursuant to Exemption (a) of the Public Records Law, I will consider this administrative appeal closed. If Mr. Herman is not satisfied with the resolution of this administrative appeal, please be advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10(b) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

Tara Douglas, Esq.
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Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first name "Rebecca" and last name "Murray" clearly distinguishable.

Rebecca S. Murray
Supervisor of Records

cc: Colman Herman