



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

Rebecca S. Murray  
*Supervisor of Records*

July 14, 2020  
**SPR20/1050**

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, on June 12, 2020, Mr. Herman requested: “a copy of the disciplinary file” for a certain doctor.

On June 25, 2020, the Board provided Mr. Herman with records responsive to his request. The Board also withheld responsive records pertaining to the Board’s Data Repository, claiming they are confidential pursuant to G. L. c. 112, § 5 and 243 CMR 2.13; 2.14, as they operate through G. L. c. 4, § 7(26)(a) of the Public Records Law. The Board further indicates that it withheld any other Disciplinary Unit files, including records of the Disciplinary Unit’s investigation, under G. L. c. 112, § 5, 243 CMR 1.02(8)(c)(2) and 243 CMR 2.13.

In Mr. Herman’s July 1, 2020 petition to the Supervisor of Records (Supervisor), he asserts that the Board was evasive and did not identify exactly what records it is withholding and the exemptions for each record not provided. As a result of Mr. Herman’s July 1<sup>st</sup> petition, the Supervisor opened this appeal.

***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).

***The Board’s June 25, 2020 response***

The Board withheld responsive records pertaining to the Board’s Data Repository under G. L. c. 112, § 5 and 243 CMR 2.13; 2.14, as they operate through G. L. c. 4, § 7(26)(a) of the Public Records Law. Further, the Board withheld other Disciplinary Unit files, including records of the Disciplinary Unit’s investigation under G. L. c. 112, § 5 and various Board regulations as they operate through Exemption (a).

***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 statute cited by the Board provides the following, in pertinent 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...

G. L. c. 112, § 5.

This regulation cited by the Board provides the following:

The availability of the Board's records to the public is governed by the provisions of the Public Records Law, M.G.L. c. 66, § 10, and M.G.L. c. 4, § 7, clause 26, as limited by the confidentiality provisions of M.G.L. c. 112, § 5 through 51 and 243 C.M.R. A file or some portion of it is not a public record if the Board determines that disclosure may constitute an unwarranted invasion of personal privacy, prejudice the effectiveness of law enforcement efforts (if the records were necessarily compiled out of public view), violate any provision of state or federal law, or if the records are otherwise legally exempt from disclosure.

243 C.M.R. 1.02(8)(a).

Closed complaint files, which contain the complaint and other information in matters which have been dismissed or otherwise resolved without adjudication, are public records. The name or a complainant or patient and relevant medical records shall be disclosed to the Respondent, but this information is otherwise confidential. The names of reviewers and the contents of complaint reviews shall be confidential.

243 C.M.R. 1.02(8)(c)(1).

***Burden of specificity in claiming exemptions; identifying records***

In his petition, Mr. Herman asks the Supervisor to, "...order the [Board] to identify exactly what records it is withholding and the exemptions it is claiming for each record."

The Board denied Mr. Herman's request without claiming the exemptions with specificity to withhold each of the responsive records. Under the Public Records Law, the burden shall be upon the custodian to prove with specificity the exemption which applies. G. L. c. 66, § 10(b)(iv); see also Globe Newspaper Co. v. Police Comm'r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511. The Board did not meet its burden of demonstrating how the responsive records, in their entirety, are exempt from disclosure. See 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). The Board must produce any non-exempt, segregable portions of the public records. G. L. c. 66, § 10(a).

In addition, the Board did not identify the records, categories of records or portions of records in its possession that it intends to withhold from disclosure under Exemptions (a) and (c). To deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); 950 CMR 32.06(3)(c)(4).

***Conclusion***

Accordingly, the Board is ordered to provide Mr. Herman with a response to the request, in a manner consistent with this order, the Public Records Law and its Regulations as soon as practicable. 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,

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: Colman Herman