



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

Rebecca S. Murray
Supervisor of Records

July 14, 2020
SPR20/1051

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 an identified doctor.

The Board provided a June 25, 2020 response in which it provided Mr. Herman with 14 pages of records responsive to his request. The Board informed Mr. Herman that certain information was redacted that could identify complainants, mandated reporters, patients, and/or victims of crimes. The Board cites "Exemptions (a) and (c); 243 CMR 1.02(8)(c)(1); Health Information Portability and Accountability Act (HIPPA), Pub. L. 104-191, 110 Stat. 1936 (1996), and 45 CFR 164.514(B)(2)(i)..."

In addition, the Board states in its June 25th response that it withheld, "Disciplinary Unit files, including records of the Disciplinary Unit's investigation of any disciplinary matter (see G. L. c. 4, § 7(26)(a); see also G. L. c. 112, § 5, and 243 C.M.R. 1.08(2)(c)(2), (5)."

In response, Mr. Herman petitioned the Supervisor of Records (Supervisor) asserting that the Board's response is evasive and does not identify what records it is withholding and the exemptions it is claiming for each record. As a result, this appeal was opened.

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

In its June 25th response, the Board states, “[e]nclosed are 14 pages of records responsive to your request...certain portions of the records have been redacted and/or some records withheld from production due to an exemption pursuant to G. L. c. 4, § 7(26).”

The Board cites Exemptions (a) and (c); 243 CMR 1.02(8)(c)(1) and Health Information Portability and Accountability Act (HIPAA) as applicable to withhold certain information. With respect to the Disciplinary Unit files, including records of the Disciplinary Unit’s investigation of any disciplinary matter, the Board cites, Exemption (a); G. L. c. 112, § 5 and 243 C.M.R. 1.02(8)(c)(2).

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.

The regulations cited by the Board provides the following:

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).

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).

Exemption (c)

The Board has also claimed that Exemption (c) applies to allow the Board to redact and/or withhold certain information or records. However, the Board did not indicate which of its records were either redacted or withheld under Exemption (c).

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).

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 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 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 Medical Examiner, 404 Mass. 132, 135 (1987).

Second clause of (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.

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.

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