



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

Rebecca S. Murray  
*Supervisor of Records*

October 21, 2020  
**SPR20/1918**

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 EB May 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 September 21, 2020, EB May requested “. . . all the documents in the file pertaining to [an identified physician].” On October 6, 2020, the Board provided a response, including responsive records provided in redacted form 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, EB May petitioned this office and this appeal, SPR20/1918, 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.

***The Board's October 6<sup>th</sup> response***

In its October 6, 2020 response, the Board enclosed 44 pages of responsive records in redacted form. The Board explained that it redacted “[p]ersonal information, including but not limited to social security numbers, drug provider identification numbers, home addresses, personal telephone numbers, personal email addresses, and dates of birth (*see* G.L. c. 4, § 7(26)(a) and (c); *see also* G.L. c. 66A, § 2; *see also* G.L. c. 93H; *see also* Board Policy 98-02); Personal medical information (*see* G.L. c. 4, § 7(26)(c); *see also* Determination of the Supervisor of Public Records, Docket No. SPR17/570 (May 10, 2017)); and Physician evaluations and/or evaluative files, including but not limited to character evaluations, academic evaluations, and academic transcripts (*see* G.L. c. 4, § 7(26)(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.

***Exemption (c)***

Exemption (c) 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) – personnel & 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 creates a categorical exemption for personnel information that relates to an identifiable individual and is of a “personal nature.” Id. at 434. Massachusetts courts have found that “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’” may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee,” may be withheld pursuant to the first clause of Exemption (c). Wakefield Teachers Ass’n v. School Comm., 431 Mass. 792, 798 (2000). The courts have also discussed specific categories of records that may be redacted under the first clause. See Globe Newspaper Co. v. Exec. Office of Admin. and Finance, Suffolk Sup. No. 11-01184-A (June 14, 2013).

The first clause also creates a categorical exemption for medical information that relates to an identifiable individual and is of a “personal nature.” Globe Newspaper Co., 388 Mass. at 434. Medical information that is of a personal nature and relates to a specifically named individual is exempt from disclosure. Brogan, 401 Mass. at 308; Globe Newspaper Co., 388 Mass. at 438. Generally, medical information is sufficiently personal to warrant exemption. Id. 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 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.

### ***Burden of specificity***

Under the Public Records Law, the burden is on 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's response did not contain the specificity required in a denial of access to public records. Instead, the Board's response merely cites Exemptions (a) and (c), G. L. c. 66A, § 2; G. L. c. 93H and Board Policy 98-02 without sufficient explanation as to the exemptions' or statutes' applicability to the redacted information. The Board is not permitted to issue a blanket denial without providing any further information with respect to the requested records. As a result, I find that the Board has not satisfied its burden in responding to this records request. The Board is advised that a records custodian is required to not only cite an exemption, but to specifically explain the applicability of the exemption to the requested records in order to comply with the Public Records Law and its Access Regulations.

### ***Conclusion***

Accordingly, the Board is ordered to provide EB May with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (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,

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: EB May