



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

Rebecca S. Murray
Supervisor of Records

December 14, 2020
SPR20/2341

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 November 7, 2020, Mr. Herman states: “[p]lease tell me what the board was investigating Roy for. If you choose not to do that, please provide me with Roy’s complete disciplinary file.” The Board provided a response on November 20, 2020, denying access to responsive records pursuant to Exemption (a) of the Public Records Law. G. L. c. 4, § 7(26)(a). Unsatisfied with the Board’s response, Mr. Herman petitioned this office and this appeal, SPR20/2341, 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 November 20th response

In its November 20, 2020 response, the Board explains that it was investigating the identified physician “. . . due to a confidential report from the National Practitioner Data Bank (‘NPDB’) 45 CFR 60.20. NPDB reports are received by the Board’s Data Repository Unit. Reports received by the Data Repository are confidential by statute and are exempt from public disclosure. M.G.L. c. 112, § 5; *see also* G.L. c. 4, § 7(26); *see also* 243 CMR 1.02(8); 1.03(14); 2.13 & 2.14.” The Board also states that “Disciplinary Unit files, which contain portions of complaint files, as well as papers related to adjudicatory proceedings and attorney work product, are not public records and are confidential. *See* G.L. c. 4, § 7(26)(a); *see also* G.L. c. 112, § 5, and 243 CMR 1.0[2]([8])(c)(2); *see also* Determinations of the Supervisor of Public Records, Docket Nos. SPR17/1073 (August 22, 2017) and SPR18/179 (February 26, 2018).”

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 provide in relevant parts:

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.

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)(2).

Statutory Reports. The Complaint Committee, an investigator, and any of the Board's units may also review and investigate any report filed pursuant to M.G.L. c. 111, § 53B, M.G.L. c. 112, §§ 5A through 5I, or 243 CMR 2.00: Licensing and the Practice of Medicine and 3.00: The Establishment of and Participation in Qualified Patient Care Assessment Programs, Pursuant to M.G.L. c. 112, § 5, and M.G.L. c. 111, § 203. If the Board does not issue a Statement of Allegations based upon the statutory report, the statutory report and the records directly related to its review and investigation shall remain confidential. However, if such report and records are relevant to a resignation pursuant to 243 CMR 1.05(5), then they shall be treated like closed complaint files, under 243 CMR 1.02(8)(c) 1.; provided, however, that confidentiality of peer review documents is maintained in accordance with 243 CMR 1.02(8)(c)4[] and that confidentiality of documents filed under M.G.L. c. 111, § 53B is maintained to the extent required by law.

243 C.M.R. 1.03(14).

Confidentiality of National Practitioner Data Bank information

Limitations on disclosure. Information reported to the NPDB is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in §§ 60.17, 60.18, and 60.21 of this part. Persons and entities receiving information from the NPDB, either directly or from another party, must use it solely with respect to the purpose for which it was provided. The Data Bank report may not be disclosed, but nothing in this section will prevent the disclosure of information by a party from its own files used to create such reports where disclosure is otherwise authorized under applicable state or Federal law.

45 C.F.R. 60.20(a).

Conclusion

Where the above statutes and regulations state that information reported to the NPDB, reports received by the Board's Data Repository Unit and the Board's Disciplinary Unit files, are confidential and not subject to disclosure, I find the Board has met its burden to withhold the requested records from disclosure under Exemption (a) of the Public Records Law. Accordingly, I will consider this administrative appeal closed.

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