



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

Rebecca S. Murray
Supervisor of Records

January 28, 2021
SPR21/0093

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 Joseph Bertrand of *Murray & Bertrand, P.C.* 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). On November 30, 2020, Attorney Bertrand requested “. . . the complete complaint filed under Docket No. 20-383, including the name of the complainant, as the Board of Registration in Medicine has closed the complaint.” The Board responded on January 11, 2021, 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, Attorney Bertrand petitioned this office and this appeal, SPR21/0093, 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 January 11th response

In its January 11, 2021 response, the Board asserts that where the complaint is a statutory report made pursuant to G. L. c. 112, § 5F, it is exempt from disclosure under Exemption (a). The Board states that it “. . . is prohibited by statute from disclosing certain records related to statutory reports submitted pursuant to G.L. c. 111, § 53B; G.L. c. 112, §§ 5A through 5I; and/or 243 CMR 2.00, including self-reports. *See* G.L. c. 4, § 7(26)(a); *see also* G.L. c. 112, § 5, and 243 CMR 1.02(8), 1.03(14), 2.13(2) through (4), and 2.14(2).” The Board explains that “[i]f [it] 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. *See* 243 CMR 1.03(14). The Board is prohibited from disclosing records maintained in the Board’s Data Repository as they are confidential pursuant to statute. *See* G.L. c. 4, § 7(26)(a); *see also* G.L. c. 112, § 5, and 243 CMR 2.13(2) through (4) and 2.14(2). Furthermore, all communications with the Board charging misconduct, or reporting or providing information to the Board pursuant to G.L. c. 112, §§ 5 through 5I, or assisting the Board in any manner in discharging its duties and functions, are privileged, and a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason. *See* 243 CMR 1.02(10).”

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 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.

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).

Conditional Privilege of Communications with the Board. All communications with the Board charging misconduct, or reporting or providing information to the Board pursuant to M.G.L. c. 112, §§ 5 through 5I, or assisting the Board in any manner in discharging its duties and functions, are privileged, and a person making a communication is privileged from liability based upon the communication unless the person makes the communication in bad faith or for a malicious reason. This limitation on liability is established by M.G.L. c. 112, §§ 5 and 5G(b).

243 C.M.R. 1.02(10).

Conclusion

Where the above statute and regulations contemplate the confidentiality of records related to statutory reports, complaints received or kept by the Board in connection with an investigation, and records maintained in the Board's Data Repository, I find the Board has met its burden to withhold the requested record 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 script is cursive and fluid, with the first letter of each name being capitalized and prominent.

Rebecca S. Murray
Supervisor of Records

cc: Joseph Bertrand, Esq.