



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

Rebecca S. Murray
Supervisor of Records

March 17, 2021
SPR21/0534

Tara Douglas, Esq.
Assistant General Counsel
Board of Registration in Medicine
178 Albion Street, Suite 330
Wakefield, MA 01880

Dear Attorney Douglas:

I have received the petition of Dusty Rhodes 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 February 25, 2021, Dusty Rhodes requested "... all cases that [were] reported to the [Board] with the docket number and court location regarding [an identified Physician]."

On March 1, 2021, the Board provided Dusty Rhodes with two pages of documents responsive to the request, consisting of a print-out copy of [the identified Physician's] profile from the Board's public profile database, which the Board explains, "... can be found online to view at: <http://profiles.ehs.state.ma.us/ProfilesV3/Physician/33413>, and includes the pertinent public malpractice information with regards to ... as required by [G. L.] c. 112, § 5 and 243 C.M.R. 2.15(f)." The Board also cited statutes and regulations pertaining to records that the Board is prohibited from releasing as they operate through Exemption (a) of the Public Records Law. G. L. c. 4, § 7(26)(a). As a result of the Board's response, Dusty Rhodes petitioned the Supervisor of Records (Supervisor), and 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 March 1, 2021 response

In its March 1st response, The Board indicated it is prohibited by statute from disclosing certain records related to statutory reports pertaining to malpractice allegations, investigations and cases submitted pursuant to G. L. c. 111, § 53B; G. L. c. 112, §§ 5A through 5I; and 243 C.M.R. 2.00, including self-reports. See G. L. c. 4, § 7(26)(a); see also G. L. c. 112, § 5; 243 C.M.R. 1.02(8)(2); 243 C.M.R. 1.03(14) and 243 C.M.R. 2.13, 2.14. The Board is prohibited from disclosing records, and information acquired that are maintained in the Board’s Data Repository, including mandatory reports. See G. L. c. 112, § 5; see also 243 C.M.R. 2.13.

The Board also cites previous determinations of the Supervisor. See Determinations of the Supervisor, SPR17/570 (May 10, 2017); SPR20/0346 (March 6, 2020) and SPR20/1662 (September 24, 2020).

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 Att’y 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 cited by the Board provide in relevant parts:

Any person licensed under section fifty-one shall report to the board of registration in medicine when the licensee denies, restricts, revokes, or fails to renew staff privileges, or accepts the resignation of, any physician registered with the board as qualified to practice medicine in the commonwealth for any reason related to the registrant's competence to practice medicine or for any reason related to a complaint or allegation regarding any violation of law or regulation, or hospital, health care facility or professional medical association by-laws, whether or not the complaint or allegation specifically cites violation of a specific law, regulation or by-law. The report shall be filed within thirty days of the occurrence of the reportable action and include a statement detailing the nature and circumstances of the action, its date, and the reasons for it. Except as provided in section five of chapter one hundred and twelve, all information contained in a report filed under this section shall be confidential, and the board may disclose it only if doing so is necessary to enable the board to use the information in a disciplinary proceeding against the registrant ...

G. L. c. 111, § 53B.

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)(c)(2).

Statutory Reports: the Complaint Committee, an investigator, and any of the Board's units may also review and investigate any report filed, including self-reports pursuant to G. L. c. 111, § 53B, G. L. c. 112, §§ 5A through 5I, or 243 C.M.R. 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).

In the March 2nd petition to the Supervisor, Dusty Rhodes contends, “[t]hey have disclosed court case numbers, locations and docket sheets previously...” The Board’s March 1st response asserts, “[r]eports of medical malpractice matters, which may include patient medical records as part of complaints or offers of proof, are maintained in the Board’s Data Repository as records filed ancillary to the Medical Malpractice Tribunal Findings and Final Disposition by Court of Malpractice Claim records submitted pursuant to [G. L.] c. 231, § 60B and 243 C.M.R. 2.14.” Furthermore, this office was informed by the Board that the requested information is confidential information provided to the Board through mandatory reports, and retained in its Data Repository. See G. L. c. 112, § 5.

Conclusion

Where the above statutes and regulations contemplate the confidentiality of records related to statutory reports, reports or 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 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: Dusty Rhodes