



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

Rebecca S. Murray  
*Supervisor of Records*

June 23, 2021  
**SPR21/1478**

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 Victoria Winner 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 May 27, 2021, Ms. Winner requested “all documents containing court cases and what county/court they are in and the docket number pertaining to [a named physician].” The Board responded on June 11, 2021, providing responsive records, as well as citing 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). Unsatisfied with the Board’s response, Ms. Winner appealed, and this case was opened as 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 June 11<sup>th</sup> Response***

In its June 11, 2021 response, the Board provided two pages of documents responsive to the request, consisting of a print-out copy of the physician's profile from the Board's Public Profile database. The Board states, in part, that it is prohibited by statute from disclosing certain records related to statutory reports pursuant to Exemption (a) of the Public Records Law and cites G. L. c. 111, § 53B; G. L. c. 112, §§ 5A through 5I and/or 243 CMR 2.00, 243 CMR 1.02(8), 1.03(14), 2.13 and 2.14 in support of its Exemption (a) claim. The Board further states, "patient medical records and/or discussions or quotations of patient medical records are exempt from disclosure. See G. L. c. 4, § 7(26)(a) and (c); see also HIPAA."

The Board also cites previous determinations of the Supervisor of Records. See Determinations of the Supervisor of Public Records, SPR21/0584 (March 23, 2021); SPR21/0534 (March 17, 2021); 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 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 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).

The Board contends that “[it] is prohibited from disclosing records, and information acquired therefrom, that is maintained in the Board’s Data Repository as they are confidential pursuant to statute. Mandated reports are confidential, unless otherwise required by law.”

*Exemption (c)*

Exemption (c) permits the withholding of:

personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

G. L. c. 4, § 7(26)(c).

Analysis under 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 exemption 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 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 exemption 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.

With respect to Exemption (c), the Board asserts, “[m]edical and personnel files or information are absolutely exempt from mandatory disclosure where the files or information are of a personal nature and relate to a particular individual. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 438 (1983). The release of the medical statements, even without other particular identifying details, create[s] a grave risk of indirect identification. Id.”

Given the explanation in its June 11<sup>th</sup> response, I find the Board has met its burden to withhold responsive records pursuant to Exemptions (a) and (c) of the Public Records Law. As a result, I find that the Board has satisfied its burden in responding to this request.

***Conclusion***

Accordingly, I will consider this administrative appeal closed. If Ms. Winner is not satisfied with the resolution of this administrative appeal, please be advised that this office shares jurisdiction with the Superior Court of the Commonwealth. See G. L. c. 66, § 10(b).

Sincerely,

A handwritten signature in black ink that reads "Rebecca Murray". The script is cursive and fluid, with the first name "Rebecca" and last name "Murray" clearly distinguishable.

Rebecca S. Murray  
Supervisor of Records

cc: Victoria Winner