



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

Rebecca S. Murray
Supervisor of Records

February 7, 2022
SPR22/0226

Tara Douglas, Esq.
Assistant General Counsel
Board of Registration in Medicine
200 Harvard Mill Square
Wakefield, MA 01880

Dear Attorney Douglas:

I have received the petition of Ian Pinta, Esq. 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 18, 2021, Attorney Pinta requested:

All Boston Medical Center and medical staff bylaws, policies, procedures, rules, standards and regulations, in effect at any and all times from February 1, 2017 to the present, concerning the following:

1. quality assessment and risk management programs
2. medical peer review
3. early resolution programs for medical negligence
4. reporting conduct by a health care provider that indicates incompetency in his specialty or conduct that might be inconsistent with or harmful to good patient care or safety (including those concerning, without limitation, procedure for investigation, review and resolutions of such reports)
5. Qualified Patient Care Assessment Programs (as defined by 243 CMR 3.02).

On December 2, 2021, the Board stated that it did not possess responsive records for a number of the requests and withheld responsive records for the remainder of the requests pursuant to Exemption (a). Unsatisfied with the Board's response, Attorney Pinta petitioned this office and this appeal, SPR22/0226, 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 agency or municipality 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.

The Board’s December 2nd Response

On December 2, 2021, the Board stated, “for Requests #2 and 4, there are no responsive records.” The Board withheld responsive records for “Requests #1, 2, and 5” pursuant to Exemption (a) of the Public Records Law.

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 Board stated that, “information and records both generated pursuant to 243 CMR 3.00 and which relate to the functions of a "Medical Peer Review Committee" (as defined by M.G.L. c. 111, § 1), are hereby deemed confidential. See G.L. c. 4, § 7(26)(a); see also M.G.L. c. 111, § 203(d) and M.G.L. c. 112§ 5; see also 243 CMR 3.04.”

Current Appeal

In his current appeal, Attorney Pinta stated:

The Board does not identify any statute that expressly exempts production of BMC’s bylaws and procedures, but instead suggests that exemption is proper because it is “in line” with 243 CMR 3.04

...

Even if § 3.04(2) is valid, and it is not, the Board overlooks § 3.04(4), which provides that “[t]he provisions in 243 CMR 3.04 shall not apply to ‘proceedings, reports and records of a medical peer review committee,’ within the meaning of M.G.L. c. 111, § 204(a), if such proceedings, reports or records are obtained from a source independent of a Medical Peer Review Committee.” The requested materials were not created or provided by a PRC, but were instead created and provided by BMC

...

[W]hile the work product of the various committees ...e.g., minutes from meetings, reports, or recommendations generated by or for the committees—are protected by § 204(a), documents used by such committees are not necessarily similarly protected.” Hallmark Health Corp., 454 Mass. at 509–510. BMC’s bylaws, policies and procedures, which are not specific to any patient, medical provider or incident, are not necessary to the work product of a PRC

...

Even if the requested materials qualify under § 205, and they do not, and are designated as “proceedings, reports and records of a medical peer review committee” under G.L. c. 111, § 204(a), to be exempt they nonetheless must be “created by, for, or otherwise as a result of a medical peer review committee.” Hallmark Health Corp., 454 Mass. at 509 (quotations and citation omitted)...Here, the bylaws were not created by any peer review committee, but were instead created by BMC pursuant to different statutes. See G.L. c. 111, §§ 1 and 203(a).

Burden of specificity; duty to segregate

Under the Public Records Law, the burden shall be upon 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 did not meet its burden of demonstrating how the responsive records, in their entirety, are exempt from disclosure. See Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289-90 (1979) (the statutory exemptions are narrowly construed and are not blanket in nature). For example, where Attorney Pinta seeks neither documents concerning a specific patient, medical provider, or medical incident nor any proceeding, report, or record of any particular peer review committee, I find it unclear how the statutes and regulations cited by the Board apply. The Board must clarify this.

Further, it is unclear whether the Board has responsive records for a number of Attorney Pinta's requests. For example, the Board stated in its initial response that it does not have responsive records for Request #2 and that responsive records for Request #2 were being withheld under Exemption (a). Further, the Board does not indicate whether it has responsive records or it is withholding responsive records pursuant to a statutory exemption to the Public Records Law for Request #3. The Board must clarify whether it has responsive records for Requests #2, 3, and 4, respectively.

Conclusion

Accordingly, the Board is ordered to provide Attorney Pinta with a response to the request, provided in a manner consistent with this order, the Public Records Law, and its Regulations within 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.

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: Attorney Ian Pinta, Esq.