



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

Rebecca S. Murray  
*Supervisor of Records*

March 14, 2022  
**SPR22/0500**

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 J. Pinta, Esq., of *Todd & Weld*, 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).

***Previous Appeal***

The records sought by Attorney Pinta were the subject of a previous appeal. See SPR22/0226 Supervisor of Records Determination (February 7, 2022). In my February 7<sup>th</sup> determination, I requested that the Board clarify the categories of records it was withholding and how the statutes and regulations it cited warrant withholding responsive records pursuant to Exemption (a) of the Public Records Law. The Board provided a response on February 24, 2022. Unsatisfied with the Board's response, Attorney Pinta petitioned this office and this appeal, SPR22/0500, 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 February 24<sup>th</sup> Response***

On February 24, 2022, the Board cited Exemption (a) of the Public Records Law to withhold the requested records.

#### ***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.

*Requests #1, 2, 4, and 5*

In its response, the Board cites the following statutes and regulations to withhold the requested records:

... 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 and, to the extent allowable under M.G.L. c. 111, § 204, not subject to subpoena, discovery or introduction into evidence.

242 C.M.R. 3.04.

Except as otherwise provided in this section, the proceedings, reports and records of a medical peer review committee shall be confidential and shall be exempt from the disclosure of public records under section 10 of chapter 66 ...

G. L. c. 111, § 204(a).

Closed complaint files, which contain the complaint and other information in matters which have been dismissed or otherwise resolved without adjudication, are public records. The name or a complainant or patient and relevant medical records shall be disclosed to the Respondent, but this information is otherwise confidential. The names of reviewers and the contents of complaint reviews shall be confidential.

243 C.M.R. 1.02(8)(c)(1).

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 ...

G. L. c. 112, § 5.

Information and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees, including incident reports required to be furnished to the board of registration in medicine or any information collected or compiled by a physician credentialing verification service operated by a society or organization of medical professionals for the purpose of providing credentialing information to health care

entities shall be deemed to be proceedings, reports or records of a medical peer review committee for purposes of section two hundred and four of this chapter and may be so designated by the patient care assessment coordinator; provided, however, that such information and records so designated by the patient care assessment coordinator may be inspected, maintained and utilized by the board of registration in medicine, including but not limited to its data repository and disciplinary unit. Such information and records inspected, maintained or utilized by the board of registration in medicine shall remain confidential, and not subject to subpoena, discovery or introduction into evidence, consistent with section two hundred and four...

G. L. c. 111, § 205(b).

In its response, the Board stated that:

Pursuant to M.G.L. c. 112, § 5, par 4 [the Board] must establish and maintain a risk management unit to “provide technical assistance and quality assurance programs designed to reduce or stabilize the frequency, amount and costs of claims against physicians and hospitals licensed or registered in the commonwealth. [The Board] created the Quality and Patient Safety Division to comply with M.G.L. c. 112, § 5...”

Where the statutes and regulations cited by the Board require confidentiality for records relating to the functions of the Board’s Quality and Patient Safety Division, I find that the Board has met its burden in withholding records responsive to requests #1, 2, 4, and 5 in their entirety.

### *Request #3*

#### ***No Duty to Create Records***

Further, the Board stated in its response that it does not have records responsive to Request #3.

Please be advised, under the Public Records Law a custodian is not required to create a record in response to a public records request. See G. L. c. 66, § 6A(d). In addition, a public employee is not required to answer questions, or do research, or create documents in response to questions. See 32 Op. Att’y Gen. 157, 165 (May 18, 1977). The duty to comply with requests for records extends to those records that exist and are in the possession, custody, or control of the custodian of records at the time of the request. See G. L. c. 66, § 10(a)(ii).

***Conclusion***

In light of the above, I will consider this administrative appeal closed. If Attorney Pinta 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, § 10A(c) (pursuing administrative appeal does not limit availability of applicable judicial remedies).

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: Ian J. Pinta, Esq.