



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

Rebecca S. Murray
Supervisor of Records

April 12, 2022
SPR22/0736

Tara Douglas, Esq.
Assistant General Counsel
Board of Registration in Medicine
200 Harvard Mill Square, Suite 330
Wakefield, Massachusetts 01880

Dear Attorney Douglas:

I have received a petition from Dr. Bharani Padmanabhan appealing the denial 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 March 1, 2022, Dr. Padmanabhan requested, "... all records held by BORIM pertaining to an investigation of [identified physician] ... [and] ...include the names of BORIM (salaried) staff such as Investigators and Complaint Counsel, and the names of BORIM Members, who reviewed the investigatory materials ... "

The Board responded on March 14, 2022 and March 28, 2022. Unsatisfied with the Board's responses, Dr. Padmanabhan petitioned this office and this appeal, SPR22/0736, 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 responses

In its March 14th response, the Board produced a print-out of the physician's profile from the BORIM's Public Profile database and stated that "the Board is prohibited by statute from disclosing certain records related to statutory reports" pursuant to Exemptions (a) and (c) 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 Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 154 (1979); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 545-546 (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.

In support of withholding the requested records, the Board cited the following statutes and regulations: G. L. c. 112, § 5; G. L. c. 111, § 53B; G. L. c. 112, § 5; C.M.R. 1.02(8)(c)(2); 243 C.M.R. 2.15(f); 243 C.M.R. 1.08, 1.03(14) 2.13 2.14 and 243 C.M.R. 2.00. Further, the Board opined that Statutory Report is not a Complaint; See 243 CMR 1.03(14).

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.

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.

Statutory Reports. The Complaint Committee, an investigator, and any of the Board's units may also review and investigate any report filed pursuant to 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 G.L. c. 112, § 5, and 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 G.L. c. 111, § 53B is maintained to the extent required by law.

243 C.M.R. 1.03(14).

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).

I find the Board has met its burden to withhold investigation records as well as the names of reviewers and files as contemplated by 243 C.M.R. 1.02(8)(c)(1). See also G. L. c. 112, § 5; G. L. c. 111, § 53B; 243 C.M.R. 1.02(8)(c)(1); 243 CMR 1.03(14). As the records are permissibly withheld under Exemption (a), I decline to opine on the applicability of Exemption (c).

Conclusion

Accordingly, I will now consider this administrative appeal closed. If Dr. Padmanabhan is not satisfied with the resolution of these administrative appeals, 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: Dr. Bharani Padmanabhan