



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

Rebecca S. Murray  
*Supervisor of Records*

March 22, 2018  
**SPR18/215**

Andrew Levrault, Esq.  
Assistant General Counsel  
Disabled Persons Protection Commission  
300 Granite Street, Suite 404  
Braintree, MA 02184

Dear Attorney Levrault:

I have received the petition of David Kassel appealing the response of the Disabled Persons Protection Commission (Commission/DPPC) to a request for public records. G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). Specifically, on February 9, 2018, Mr. Kassel requested "any and all reports submitted to and/or produced by the DPPC regarding the death on November 15, 2017, of [an identified individual] . . ." The Commission provided a response on February 13, 2018, denying access to responsive records pursuant to Exemptions (a), (c), and (f) of the Public Records Law. G. L. c. 4, § 7(26)(a), (c), (f).

In a March 1, 2018 determination, I found that the Commission had no duty to create a record because it did not possess documents responsive to Mr. Kassel's amended request. Mr. Kassel's amended request sought for a "copy of the report when the investigation is completed."

***Request for reconsideration***

In correspondence dated March 2, 2018, Mr. Kassel seeks reconsideration of the determination. Mr. Kassel asserts that "I am withdrawing my amended request of February 16<sup>th</sup>, and am restating my original request of February 9 for all reports . . ."

***The Commission's February 13<sup>th</sup> response***

In its February 13, 2018 response, the Commission indicated that "... an investigation is currently pending in this matter, and as such, the DPPC cannot release any records at this time. See: M.G.L. c. 4, section 7, cl. 26 (f); 118 CMR 9.03(7) (c) and (d)." The Commission indicated that "[a]dditionally, the DPPC cannot release information about an identified data subjects [sic] absent a release from the data subject or his/her legal representative. See: M.G.L. c. 4, section 7, clause 26 (a), (c), (f); c. 66A, section 2: 118 CMR 9.03 (6)." The Commission indicated that it

would need authorization from the identified individual in order to release any information once the investigation is complete and provided a link whereby Mr. Kassel could retrieve a copy of the Commission's authorization form.

*Exemption (a)*

The Commission claimed it withheld responsive records pursuant to Exemption (a) of the Public Records Law.

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.

*Fair Information Practices Act (FIPA)*

Although FIPA imposes restrictions on the dissemination of "personal data," the Commission is reminded that FIPA and the Public Records Law are to be construed to work together consistent with the legislative purpose. 32 Op. Atty Gen. Mass. 157, 160 (May 18, 1977). FIPA cannot provide a basis for withholding the requested information unless the records fall within a statutory exemption to the definition of public records. See Allen v. Holyoke Hosp., 398 Mass. 372, 379 (1986) (stating that "determining whether the record sought is protected by FIPA depends on whether the record is a public record pursuant to G. L. c. 4, § 7 Twenty-sixth, and subject to the disclosure provisions of G. L. c. 66A"). FIPA, by itself, cannot justify withholding information. A custodian must first specifically explain how the withheld information is exempt from the Public Records Law. Once a record is found to be exempt from

the definition of public records, FIPA may also operate to restrict disclosure.

*Exemption (c)*

The Commission indicated that it withheld responsive records pursuant to Exemption (c) of the Public Records Law.

Exemption (c) permits the withholding of:

personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy

G. L. c. 4, §7 (26)(c).

*First clause of Exemption (c)*

Exemption (c) contains two distinct and independent clauses, each requiring its own analysis. Globe Newspaper Co. v. Boston Retirement Bd., 388 Mass. 427, 432-34 (1983). The first clause creates a categorical exemption for personnel and medical information that relates to an identifiable individual and is of a “personal nature.” Id. at 434. Medical information that is of a personal nature and relates to a specifically named individual is exempt from disclosure. Brogan v. School Comm. of Westport, 401 Mass. 306, 308 (1987); Globe Newspaper Co., 388 Mass. at 438. Generally, medical information will be of a sufficiently personal nature to warrant exemption. Globe Newspaper Co., 388 Mass. at 432-34. There is a strong public policy in Massachusetts that favors confidentiality as to medical data about a person’s body. Globe Newspaper Co. v. Chief Medical Examiner, 404 Mass. 132, 135 (1987).

Personnel information that relates to an identifiable individual is also exempt from disclosure. Globe Newspaper Co., 388 Mass. at 434. Massachusetts courts have found that “core categories of personnel information that are ‘useful in making employment decisions regarding an employee’ may be withheld from disclosure. Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5 (2003). For example, “employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee,” may be withheld pursuant to the first clause of Exemption (c). Wakefield Teachers Ass’n v. School Comm., 431 Mass. 792, 798 (2000).

*Second clause of Exemption (c)*

Analysis under the second clause of 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 clause 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 the second clause of 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 clause 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.

#### *Exemption (f)*

The Commission claimed it withheld responsive records pursuant to Exemption (f) of the Public Records Law.

Exemption (f) permits the withholding of:

investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest

G. L. c. 4, §7 (26)(f).

A custodian of records generally must demonstrate a prejudice to investigative efforts in order to withhold requested records. Information relating to an ongoing investigation may be withheld if disclosure could alert suspects to the activities of investigative officials. Confidential investigative techniques may also be withheld indefinitely if disclosure is deemed to be prejudicial to future law enforcement activities. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976). Redactions may be appropriate where they serve to preserve the anonymity of voluntary witnesses. Antell v. Attorney Gen., 52 Mass. App. Ct. 244, 248 (2001); Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 n.18 (1979). Exemption (f) invites a "case-by-case consideration" of whether disclosure "would probably so prejudice the possibility of

effective law enforcement that such disclosure would not be in the public interest.” See Reinstein, 378 Mass. at 289-90.

### ***Burden of specificity***

Pursuant to the Public Records Law, the burden shall be upon the records custodian to establish the applicability of an exemption. 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 . . .”); see also Globe Newspaper Co. v. Police Comm’r, 419 Mass. 852, 857 (1995); Flatley, 419 Mass. at 511.

The Commission did not identify any records, categories of records or portions of records that it intends to withhold from disclosure. To deny access to a record under the Public Records Law, a records access officer must identify the record, categories of records, or portions of the record it intends to withhold. G. L. c. 66, § 10(b)(iv); 950 CMR 32.06(3)(c)(4). Here, the Commission withheld responsive records without identifying the records. Therefore, the Commission must identify the type of record(s) it has in its possession that it withheld.

Further, the Commission’s initial February 13<sup>th</sup> response did not contain the specificity required in a denial of access to public records. Instead, the Commission’s response merely cites Exemptions (a), (c), and (f) without any further explanation as to the exemptions’ applicability to the requested records. The Commission is not permitted to issue a blanket denial without providing any further information with respect to the requested records. Consequently, I find that the Commission has not satisfied its burden in responding to this records request. As stated above, the custodian bears the burden to prove with specificity any exemption that applies. G. L. c. 66, § 10(b)(iv). Additionally, a custodian of a record shall not only cite an exemption but must explain with specificity why the exemption applies to a withheld or redacted portion of the responsive record in order to comply with the Public Records Law and its Regulations. See G. L. c. 66, § 10(a). See also Reinstein v. Police Commissioner of Boston, 378 Mass. 281, 289-90 (1979) (statutory exemptions are not blanket in nature). I understand a Public Records Division staff attorney contacted your office about this appeal.

### ***Conclusion***

Given that the Commission did not meet its burden to explain how an exemption applies to the records, the requested records may not be withheld. Accordingly, the Commission is ordered to provide Mr. Kassel with responsive records, provided in a manner consistent with this order, the Public Records Law, and its Regulations within ten 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](mailto:pre@sec.state.ma.us). The Commission may file a request for reconsideration of this determination within ten business days of the date of this determination letter.

Andrew Levrault, Esq.  
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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: David Kassel