



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

Rebecca S. Murray
Supervisor of Records

April 20, 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] . . .”

In a March 22, 2018 determination, I found that the Commission had not met its burden to withhold responsive records in their entirety under Exemptions (a), (c), and (f) of the Public Records Law, and ordered the Commission to provide Mr. Kassel with responsive records in a manner consistent with the order, the Public Records Law, and its Regulations within ten business days. In a letter dated March 29, 2018, the Commission seeks reconsideration of the determination.

Request for reconsideration

In its March 29, 2018 response, the Commission indicates that it possesses the following records: “(1) [t]wo intakes in its investigations database, DPPC Case Nos. 162850 and 162896; (2) [o]ne intake in its death database, DPPC Case No. D-13967 and corresponding Home and Community Services Information System report; (3) [t]he Initial Response in DPPC Case Nos. 1628050 and 162896; and (4) Draft Investigation Report in DPPC Case Nos. 162850 and 162896—received March 2, 2018.” The Commission claims the following exemptions apply to withhold responsive records from disclosure.

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.

The Commission cites its enabling statute and regulations, G. L. c. 19C, § 3(i); 118 C.M.R. 9.03(1); and 118 C.M.R. 9.03(7)(e), as applicable to withhold responsive records under Exemption (a). The statute and regulations provide in pertinent part:

The commission shall promulgate rules and regulations establishing procedures to exclude personally identifiable information regarding the subjects of investigations and to carry out the responsibilities of this chapter in such a way as to disclose as little personally identifiable information as possible.

G. L. c. 19C, § 3(i).

Limitation on Release of Information

For the purposes of dissemination, the records of the Commission shall not be considered "public records" and any release of said records shall be pursuant to the provisions of M. G. L. c. 4, § 7, cl. 26, c. 66, c. 66A, and 118 C.M.R. 9.00. The

following information shall be confidential and shall not be disclosed or otherwise made available to any person except duly authorized staff of the Commission and the duly authorized staff of an agency within the Executive Office of Health and Human Services . . .

- (a) All personal data contained within the initial report of abuse including but not limited, to personally identifying information of the person with disability who is the alleged victim of abuse, of the alleged abuser, of the person who made the report of abuse to the Commission, and of any other third party;
- (b) Any and all notes, papers, documents or other investigative materials, including but not limited to interviews summaries, collected or compiled by personnel duly authorized by the Commission during the course of an investigation; . . .

118 C.M.R. 9.03(1).

The Executive Director, General Counsel and/or designee of either may determine, in their discretion, that due to . . . the specific nature of the request . . . , that mere removal of identifying personal data would not be insufficient to protect existing privacy interests, or that disclosure would be in the public interest; and that accordingly, certain documents or data otherwise subject to disclosure should not be disclosed.

118 C.M.R. 9.03(7)(e).

Under its Exemption (a) claim, the Commission indicates that because its enabling statute gives it the power to promulgate rules and regulations regarding the dissemination of personally identifiable information, it routinely provides records in redacted form. The Commission asserts that it is unable, in this instance, to provide redacted records because, “. . . the requestor specifically seeks reports regarding an identified individual and a very specific incident.” As such, after reviewing the request, it determined that “. . . because mere redaction of identifying personal data would be insufficient to protect existing privacy interests, it is thus impossible to segregate the personally identifying information which must be protected . . . Accordingly, the General Counsel, through her designee, has determined that the responsive material in its entirety cannot be disclosed . . .”

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).

Under the first clause of Exemption (c), the Commission indicates that the responsive records “contain information related to disabilities of and medical care received by the alleged victim.” The Commission indicates that “[s]uch information contained in the DPPC’s investigation reports and intake forms . . . constitutes ‘medical information,’” exempt from disclosure under the first clause of Exemption (c).

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.

Under the second clause of Exemption (c), the Commission indicates that “[v]ictims of abuse are not always willing to be identified publicly.” The Commission indicates that “[r]ecords on investigations of abuse of persons with disabilities by their very nature include information that is unusual, possibly traumatic, and typically intensely personal. Explicit information about the nature of an identified person’s disability, the manifestations and treatment of that disability, and the alleged or substantiated abusive acts or omissions inflicted upon a person with a disability, are ‘intimate details of a highly personal nature,’ and would ‘constitute an unwarranted invasion of personal privacy’ if disseminated publicly.” The Commission indicates that its statutes and regulations were designed to “restrict intimate and personal information from public disclosure so that persons with disabilities and others will feel comfortable providing candid information during an abuse investigation.” The Commission also asserts that investigation reports and intake forms are not disseminated publicly, because they contain information which if released could impact the reputations of the parties involved and could result in an inability to retain employment. The Commission cites the PETA decision and other cases to support its position.

With respect to the balancing test set out under the second clause, the Commission asserts that “[t]here is no showing here that the public interest in the identities and actions of the alleged victim, alleged abusers, or other parties involved in the abuse investigation outweighs the strong privacy interests of the parties whose information would be disclosed.” The Commission reiterates that segregation of the records is not possible because individuals involved could be indirectly identified due to the “[r]equestor’s identification of the alleged victim.”

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.

Under its Exemption (f) claim, the Commission indicates that its investigation remains ongoing. The Commission indicates that pursuant to G. L. c. 19C and 118 C.M.R., it has to review the draft Investigation Report and is engaged in interactive dialogue with investigators which may result in changes to the report prior to its finalization. The Commission indicates that because “disclosure of the names and other identifying information of the victim, complainants, and voluntary witnesses may deter other potential witnesses and citizens from providing information in future DPPC investigations,” Exemption (f) permits it to withhold such information “where individuals can be indirectly identified even with redaction. . . .”

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.

As the Commission has stated in its response, dissemination of its records is governed by its enabling statutes and regulations, which provide that the records of the Commission are not public records. The regulations further provide that certain records of the Commission shall be kept confidential. Additionally, the regulations provide that the Executive Director, General Counsel and/or designee has the discretion to determine if records subject to disclosure should

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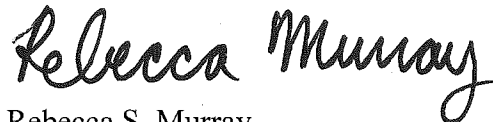
not be disclosed due to the specific nature of the request. The designee of the General Counsel has determined that, due to the fact that the requestor specifically seeks records regarding an identified individual and redaction of personal data "would be insufficient to protect existing privacy interest, . . . the responsive materials in their entirety cannot be disclosed." Consequently, in light of the General Counsel's designee's determination, coupled with the above statutory and regulatory provisions, I find that the Commission has met its burden to withhold responsive records under Exemption (a) of the Public Records Law.

Conclusion

Accordingly, whereas I find that the Commission may permissibly withhold responsive records pursuant to Exemption (a) of the Public Records Law, I decline to opine on the Commission's Exemptions (c) and (f) claims supporting non-disclosure of the requested records. I will consider this administrative appeal closed.

If Mr. Kassel 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) (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: David Kassel