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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-43

March 21, 2024

Board of Professional Counselors and Therapists, Custodian
Lionel Rodriguez, Complainant

The complainant, Lionel Rodriguez, alleges that the Board of Professional Counselors and Therapists (“BPCT”) violated the Public Information Act (“PIA”) by failing to respond to a request for public records within the time limits in the PIA. The complainant also challenges the response that the BPCT eventually issued. As explained below, we find that the BPCT violated the timing provisions of the PIA but did not improperly deny the complainant’s PIA request.

Background

On August 31, 2023, the complainant sent the following to the BPCT:

Custodian of Records,

This is a Public Information Act request.

According to Section 5-722 - State Board of Professional Counselors and Therapists and persons cooperating therewith, a subsection of Subtitle 7 - IMMUNITIES AND PROHIBITED ACTIONS - STATE BOARDS :

“A person who acts in good faith and within the scope of the jurisdiction of the Board is not civilly liable for giving information to the Board or otherwise participating in its activities”

Please provide all information as to why the Maryland Department of Health and the Board of Professional Counselors and Therapists released a confidential complaint to Board Member^[1] Louis Leibowitz, LBA580, for

¹ In its response to the complaint in this matter, the BPCT clarifies that Mr. Leibowitz is a licensee of the BPCT, not a Board Member. BPCT further notes that Mr. Leibowitz “does not occupy any position on the Board, and is not employed by the Board.” See also Maryland Dep’t Health, Bd. Pro. Couns. & Therapists, <https://health.maryland.gov/bopc/Pages/membersstaff.aspx> (last visited Mar. 20, 2024) (listing BPCT members and staff).

his personal use to retaliate against the individuals who provided information to the board about his illegal activities.

His illegal activities include a felony level sexual offense, which is still under investigation, perjury, and counterfeiting court documents, which is currently set for trial.^[2]

Board Member Louis Leibowitz used the complaint to initiate a variety of retaliatory and harassing civil proceedings predicated entirely upon the complaint and disclosed and disseminated the complaint to multiple sources. This included not just (2) two fraudulent and retaliatory proceedings against the complainant, but (2) two fraudulent and retaliatory proceedings against an individual who was not even involved in the complaint, who just happened to be his sexual assault victim.

Please provide all documents, records and information in the Board of Therapist and MDH's possession as to why the Board of Therapists would allow one of its members to disclose and disseminate the legally privileged and confidential complaint in violation of Md. Code, Cts. & Jud. Proc. § 5-722 and to allow rape suspect and Board Member Louis Leibowitz to retaliate against these individuals and put their lives in danger.

The complainant sent additional emails to the BPCT on November 27 and December 20, 2023, asking for a status update on the request. On December 20, 2023, the BPCT sent the complainant an email advising that the PIA request required a response from Board Counsel and that, when counsel had a response, the BPCT would “pass it on.” On January 12, 2024, the BPCT sent the complainant a letter that responded to the PIA request, although the complainant disagreed, stating “[t]his does not even respond to my request, nor address the documents and records I have been seeking to inspect.”

The BPCT's response to the PIA request first explained that Mr. Leibowitz is a “person in interest” as to his BPCT licensing records, which “include the complaint and investigative information referenced in [the complainant's] inquiry.” The BPCT further explained that it was required to deny the complainant's PIA request because the records sought constituted “information about the licensing of an individual in an occupation or

² A search using the terms “Louis Leibowitz” and “Defendant” in the online Maryland Judiciary Case Search shows no open or pending criminal matters for Mr. Leibowitz. *See* Maryland Judiciary, Maryland Judiciary Case Search, <https://casesearch.courts.state.md.us/casesearch/> (last visited Mar. 20, 2024). We note that the Maryland Judiciary Case Search contains a disclaimer stating that “certain records may not be available for public inspection,” and that the information displayed on the website “is generated from computerized records in the custody and control of the Maryland Judiciary and is intended for informational purposes only.” *Id.*

profession” exempt from disclosure under § 4-333(a)(1)³ of the PIA and no exceptions applied. The BPCT also advised that “[a]ny issues regarding a licensee’s use of their own investigative file in a criminal or civil matter should be directed to the judicial authority that presided over the case in question.”

Before the BPCT issued its January 12 response, the complainant contacted the Public Access Ombudsman.⁴ On January 10, 2024, the Ombudsman issued a statement in which she indicated that she was unable to mediate the matter due to a conflict.⁵ The statement indicated that the PIA dispute presented was the BPCT’s failure to respond to the complainant’s PIA request. Thus, that dispute was not resolved through the Ombudsman and the complainant filed this complaint with our Board.

The complaint alleges that “the BPCT clearly failed to respond to [the] PIA request within the required time limits.” The complainant also alleges that the BPCT provided a “bullshit response” and “effectively denied [the complainant] access to public documents and records for no legitimate reason via their intentional evasiveness and passive aggression.” Asserting that the BPCT is “without a doubt the custodian of these records,” the complainant describes the BPCT’s response as “bogus” and “nonsensical,” contending that the request sought “the documents, records, and correspondence of the BPCT releasing the documents to Mr. Leibowitz for his personal and nefarious uses, not the actual ‘personnel file’ itself.” The complainant claims that the Maryland Department of Health (“MDH”) and the BPCT located “over 100 documents, records, and communications related to this matter for a different PIA applicant.”

In response to the complaint, the BPCT first states that the BPCT has experienced high staff turnover in the last two years, particularly for the Executive Director, which is the position responsible for responding to PIA requests. Further, the BPCT explains that, since August 2023, it has “received multiple, repetitive PIA inquiries for the same, if not similar information from multiple individuals,” and that the requests were often “combative, inflammatory, and repetitive, and occasionally made by individuals who refused to identify themselves to the Board.” Nevertheless, the BPCT maintains that it has “attempted to respond to each of these requests,” though many of those responses have been “deemed ‘non-responsive’ by the requester.”

³ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code unless otherwise stated.

⁴ The PIA charges the Ombudsman with making “reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records.” § 4-1B-04(a).

⁵ See COMAR 14.37.02.07C(3) (providing that, “[i]f the Ombudsman is unable to proceed in a neutral, impartial, and independent manner,” then the Ombudsman must withdraw from the mediation and issue a final determination “stating that the dispute was not resolved through the Ombudsman due to conflict”).

Focusing on the complainant's PIA request in particular, the BPCT states that it responded to the request on January 12, 2024, by denying inspection of the records under § 4-333(a)(1). The BPCT stresses that this provision, which applies to licensing records, is a "required denial." Quoting the PIA request, the BPCT takes the position that "'all documents, records and information [the Board] had related to the [Board] providing Louis Richard Leibowitz, LBA580, a confidential complaint and investigative file for his personal use' would be considered part of the investigative file, and Mr. Leibowitz's licensing records."

The complainant begins his reply with the assertion that "[t]he BPCT has provided [this Board] with false information." The complainant contends that the PIA request sought "documents and records related to primarily Shelly Ann Barnes and other BPCT staff, not Leibowitz' personnel file nor the actual investigative file." The complainant also contends that the BPCT's response letter did not actually relate to the PIA request: "[T]hey provided me a copy of a fake bullshit response they provided, verbatim, to a completely different PIA applicant for a completely different PIA request."⁶ The complainant reiterates that none of the records sought "directly related to an individuals' licensing information or personnel file," but rather related to the "release of confidential documents in contradiction to the MDH and BPCT's policies as defined by Maryland statute, which grants a complaint [sic] immunity and the right to be informed."⁷

Analysis

The PIA charges us with reviewing and resolving complaints that allege certain violations of its provisions, including that a custodian failed to respond to a PIA request within prescribed time limits or that a custodian improperly denied inspection of a public record.⁸ § 4-1A-04(a)(1). If, after review of the complaint and the parties' submissions, we conclude that the alleged violation occurred, we must issue a written decision and order

⁶ The complainant states that the request from the "different PIA applicant" and the BPCT's "verbatim" response are attached to his reply. We do not see any such attachments. There is one attachment, which the complainant labels "MDH_Letterhead (1) MP," that does appear to be a response to a different applicant's PIA request. But this response is dated October 2, 2023, and refers to a PIA request made that same day. And, the response is substantively different from the BPCT's response to the complainant's request—which is unsurprising given that the PIA request, though it concerned Louis Leibowitz, sought different records, namely "all information and records . . . that is [sic] releasable and not privileged" about Mr. Leibowitz.

⁷ As with the PIA request itself, the complainant's complaint and reply contain accusations of misconduct by both private individuals and government employees, as well as allegations related to other PIA requests, all beyond our jurisdiction. We do not consider them.

⁸ A complainant must first attempt to resolve the dispute through the Public Access Ombudsman and receive a final determination that the dispute was not resolved. § 4-1A-05(a).

a statutory remedy—e.g., that the custodian “produce the public record for inspection” or “promptly respond.” § 4-1A-04(a)(2) and (3).

After receiving a PIA request, a custodian must “grant or deny the [request] promptly, but not more than 30 days after receiving the [request].” § 4-203(a)(1). The PIA provides a specific procedure for the denial of a PIA request. A custodian must provide the requester with a “written statement” that states the reason and legal authority for the denial, notice of remedies, and “without disclosing the protected information, a brief description of the undisclosed record that will enable the [requester] to assess the applicability of the legal authority for the denial.”⁹ § 4-203(c)(1)(i). This written statement must issue within ten working days of the denial. § 4-203(c)(1)(i).

Ordinarily, the PIA must be “construed in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.” § 4-103(b). That general rule is applied “unless an unwarranted invasion of the privacy of a person in interest would result [from inspection].” § 4-103(b). The Supreme Court of Maryland has explained that the PIA’s provisions “reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government.” *Amster v. Baker*, 453 Md. 68, 76 (2017) (quotation and citations omitted). At the same time, the PIA contains exceptions to disclosure, including § 4-333, the provision the BPCT cites to justify its denial.

Subject to certain exceptions, § 4-333(a)(1) requires a custodian to deny inspection of “the part of a public record that . . . contains information about the licensing of an individual in an occupation or a profession.” One exception is found in subsection (b), which requires a custodian to disclose certain information about licensees, including names, business telephone numbers and email addresses, their educational and occupational background, their professional qualifications, and “any orders and findings that result from formal disciplinary actions.” § 4-333(b). Subsection (c) allows inspection of “other information about a licensee,” but only if “the custodian finds a compelling public purpose” and “the rules or regulations of the official custodian allow the inspection.” § 4-333(c). A custodian also must “allow inspection by the person in interest.”¹⁰ § 4-333(d).

We begin by noting that there are two distinct allegations before us—i.e., that (1) the BPCT violated the PIA’s timing provisions and (2) the BPCT’s late-issued denial of the complainant’s PIA request was improper. Arguably, only that first allegation is properly before us. This is because the final determination issued by the Ombudsman

⁹ For discretionary denials, a custodian must also explain why the denial is necessary and why “redacting information would not address the reasons for the denial.” § 4-203(c)(1)(i)(2).

¹⁰ A “person in interest” is typically the person “that is the subject of a public record or a designee of the person.” § 4-101(g)(1).

indicates that the dispute presented for mediation was the BPCT's failure to respond to the PIA request. Indeed, that final determination issued on January 10, 2024, two days before the BPCT sent its response. As stated, *supra*, note 8, a complainant must attempt to resolve a dispute through the Public Access Ombudsman before filing a complaint with our Board. § 4-1A-05(a); *see also* COMAR 14.02.02.01B(1) ("The complaint shall . . . [p]ertain only to the dispute described in the Final Determination."). Thus we question whether we have jurisdiction to entertain the complainant's second allegation.

However, we are mindful that we have, in the past, asserted jurisdiction over a complaint that did not strictly comply with these provisions. *See* PIACB 24-05, at 3 (Nov. 1, 2023) (reviewing a challenge to a "modified PIA request" that was not subject to mediation where the modified request was "substantially similar to the original and the arguments for and against disclosure [were] essentially the same"). While this complaint presents different circumstances in that the disputes are materially different, there are similarly compelling reasons for reviewing the complainant's second allegation here. First, the BPCT has addressed the merits of that allegation, and therefore does not appear to object to our considering them. Notably, the same was true for the custodian in PIACB 24-05. *See id.* (stating the custodian's expressed wish "to have a resolution on this matter notwithstanding [the complainant's] lack of following the outlined process").

Moreover, it is possible that, were we to dismiss the complainant's second allegation, that same allegation would be before us again. The Ombudsman's final determination was titled "Statement of Ombudsman Conflict Precluding Mediation," and indicated that the Ombudsman was unable to mediate the matter due to a prior conflict. Presumably, that same conflict will exist in the event that the complainant attempts to resolve his dispute with the BPCT's response through the Ombudsman. The same form of final determination would issue, and given the complainant's position, we assume for purposes of this decision that a second complaint with our Board would be filed. Under these specific circumstances, and in the interest of efficiency, we will review the complainant's challenge to the BPCT's denial here. *Cf. Rosales v. State*, 463 Md. 552, 569-70 (2019) (reviewing the merits of a belated appeal despite "the absence of the postconviction court's proper findings" because "a remand would inevitably result in the postconviction court making the appropriate findings," and the "appeal working its way up the appellate ladder, and this Court addressing the exact issue that was already briefed and argued before this Court"). We note also, that, like the BPCT, the complainant does not object to our review of his second allegation, having affirmatively sought it in his complaint and reply.

We may dispose of the complainant's first allegation easily. The complainant sent the PIA request on August 31, 2023, and the BPCT's response did not issue until January 12, 2024—more than four months later. Thus, the BPCT failed to "grant or deny the [request] promptly, but not more than 30 days after receiving the [request]." § 4-203(a)(1). In that way, the BPCT violated the PIA. When we determine that a custodian violated §

4-203(a), we must order the custodian to “promptly respond,” and have discretion to waive any associated fees if our decision explains why. § 4-1A-04(a)(3)(iii). Here, the BPCT has issued a response and has not charged any fees. We therefore order no further relief.

Turning to the merits of the BPCT’s denial, we find no violation of the PIA. Although couched in inflammatory language and accusations of criminal conduct, the complainant’s PIA request was relatively simple: it asked the BPCT to “provide all information as to why the Maryland Department of Health and the Board of Professional Counselors and Therapists released a confidential complaint” to Louis Leibowitz. Later in the request the complainant asked, “[p]lease provide all documents, records and information in the Board of Therapist and MDH’s possession as to why the Board of Therapists would allow one of its members to disclose and disseminate the legally privileged and confidential complaint.” Although perhaps not a model of clarity, the BPCT’s letter was responsive to the complainant’s request—it explained that Mr. Leibowitz is a “person in interest” under the PIA and for purposes of the BPCT’s licensing records, which include the complaint and investigative information to which the complainant referred. Though the BPCT did not explain that, under § 4-333(d), it was required to allow Mr. Leibowitz to inspect these records, the implication is there when read together with the PIA request.¹¹

The complainant now states that the request actually sought “documents and records related to primarily Shelly Ann Barnes and other BPCT staff,” and “mainly the documents and records of BPCT staff, namely Shelly Ann Barnes, in her release of confidential documents.” But that is not what the PIA request stated. The PIA request asked why the BPCT released the complaint against Mr. Leibowitz to Mr. Leibowitz. The answer is, because Mr. Leibowitz is a “person in interest.” Herein lies the difficulty with PIA requests that ask questions or editorialize. As we have observed before, when PIA requests “straddle the line” between requests for public records and “interrogations directed toward [a custodian],” requesters are often dissatisfied with the response. PIACB 23-23, at 5 n.5 (June 20, 2023). We emphasize again that a custodian’s obligation under the PIA is to search for and provide public records that may respond to the questions posed in a PIA request. *Id.* A custodian is “not obligated to create new records that answer those questions to [a] complainant’s full satisfaction.” *Id.*

To the extent that the BPCT has records related to the BPCT’s transmittal of the complaint to Mr. Leibowitz that may be responsive to the PIA request here—e.g., an email asking for his response to the complaint, *see supra*, note 11—we cannot find that the

¹¹ We also note that the “Complaints and Disciplinary Procedure” section of the BPCT’s website indicates that a “licensee/certificate holder may be informed of the complaint and asked to respond to the allegation.” Maryland Dep’t Health, Bd. Pro. Couns. & Therapists, Complaints & Disciplinary Procedure, <https://health.maryland.gov/bopc/Pages/complaintold.aspx> (last visited Mar. 20, 2024).

BPCT's denial of inspection under § 4-333(a) was improper. The scope of § 4-333(a)(1) is broad. It generally prohibits disclosure of "information about the licensing of an individual in an occupation or a profession." § 4-333(a)(1). Many of the BPCT's powers relate to the licensing and regulation of professional counselors and therapists, *see* Md. Code Ann., Health Occ. § 17-205, and it is therefore not surprising that many of the BPCT's public records would be subject to § 4-333. Especially in circumstances where—as here—a PIA request seeks records related to an action taken against a licensee. And, while § 4-333(b)(7) requires a custodian to permit inspection of "any orders and findings that result from formal disciplinary actions,"¹² that is not what the complainant has requested. Rather, the complainant requested records related to why the BPCT released a complaint to Mr. Leibowitz. Those records would fall within "information about the licensing of an individual." *See also* 71 Md. Op. Att'y Gen. 305, 311 (1986) (addressing the exception now found in § 4-333(b)(7) and observing that, "[b]y implication, any form of disciplinary action that has not culminated in a formal order or finding by the agency cannot be disclosed unless authorized by regulation after the custodian has found a compelling public purpose").¹³

Conclusion

After consideration of the parties' submissions, including the attached exhibits, we find that the BPCT violated § 4-203(a)(1) by failing to issue its response to the complainant's PIA request "promptly, but not more than 30 days" after it received the request. However, because the BPCT has responded at this point and has not charged any fees, we order no further relief. We find no violation of the PIA as to the BPCT's response to the PIA request. Rather, the BPCT provided information in response to the question posed and properly denied inspection of any responsive records under § 4-333(a)(1).

Public Information Act Compliance Board*

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¹² Orders following formal disciplinary actions can be found on the BPCT's website. *See* Md. Dep't Health, Bd. Pro. Couns. & Therapists, Board Orders / Formal Disciplinary Actions, <https://health.maryland.gov/bopc/Pages/publicorders.aspx> (last visited Mar. 20, 2024).

¹³ The BPCT's regulation regarding disclosure for a compelling purpose affords the BPCT discretion to "find that a compelling public purpose warrants disclosure of information in a certification, licensing, or investigative file" under certain enumerated circumstances, including when "[t]he information concerns possible criminal activity and is disclosed to a federal, state, or local law enforcement or prosecutorial official or authority." COMAR 10.58.10.01. Notably, this regulation does not mandate disclosure.

* Board member Deborah Moore-Carter did not participate in the deliberation, preparation, and issuing of this decision.