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**STATE OF MARYLAND**  
**PUBLIC INFORMATION ACT COMPLIANCE BOARD**

**PIACB 24-46**  
**March 13, 2024**

**Maryland Department of Health – Behavioral Health Administration, Custodian**  
**James Lewis, Complainant**

Complainant James Lewis was dissatisfied with the Maryland Department of Health – Behavioral Health Administration’s (“MDH-BHA”) response to his Public Information Act (“PIA”) request for records related to a complaint he had filed with MDH-BHA. Specifically, he believed that MDH-BHA had not produced all responsive records. After he was unable to resolve the issue through the Public Access Ombudsman, the complainant filed this complaint in which he continues to challenge MDH-BHA’s response. MDH-BHA responds that it provided the disclosable records it has, and that the only record it has withheld is a single page investigation report that is subject to the medical review committee privilege. After review of the submissions, we conclude that MDH-BHA has not improperly denied inspection of public records, and explain in more detail below.

**Background**

Though the PIA request here was relatively simple, its history up to this point is not. We take the following facts and background from the submissions supplied by the parties.

In May 2023, the complainant asked MDH-BHA for records related to a complaint he had filed in February that year, including the investigative materials and findings, and the reason for closing the case. After verifying the complainant’s identity, MDH-BHA provided the complainant with responsive records, although it now acknowledges that it did not explain the reasons for withholding the record that was not disclosed. The records that MDH-BHA produced were: (1) a letter regarding the closure of the complaint; (2) a narrative from Behavioral Health System Baltimore (“BHSB”) describing the complaint background and steps taken to address the situation; and (3) a redacted version of the complaint transmittal.

After receiving the records, the complainant apparently asked MDH-BHA for additional information, including the name of the person who conducted the investigation. In the months that followed, the complainant continued to engage MDH-BHA regarding the investigation of the complaint underlying his PIA request, and apparently made new substantive, non-PIA related allegations against the residential behavioral health provider subject to his initial complaint to MDH-BHA.

In September 2023, the complainant contacted the Public Access Ombudsman to request assistance resolving his dissatisfaction with MDH-BHA's response to his PIA request. According to the Ombudsman's final determination, the dispute in mediation was the complainant's "concern about the completeness" of MDH-BHA's response. In December, the Ombudsman issued a final determination stating that the dispute was not resolved.

The complainant then filed this complaint with our Board in which he continues to challenge MDH-BHA's response to his PIA request. He explains that he asked for "the names of everyone interview[ed]," along with their "statements and the names and statements of any outside agencies or participant." The complainant states that, "[b]asically [he] requested information and records for everyone and everything connected with [his] case."

In response to the complaint, MDH-BHA first states that the only issues investigated regarding the complainant's complaint to MDH-BHA were related to the complainant obtaining his medical records and a referral to psychiatry. MDH-BHA explains that records related to this limited investigation were provided to the complainant, "but the documents that were disclosed did not include the formal report of the investigation, which was withheld due to the Medical Review Committee Privilege." MDH-BHA further explains that there are no records of an investigation into the later allegations against the complainant's residential program because no such investigation was conducted. As to the report it withheld, MDH-BHA states that, when the complainant contacted the Ombudsman, MDH-BHA realized that the complainant "was not formally informed that the reason that the investigation report was withheld was the Medical Review Committee Privilege." Thus, MDH-BHA drafted a second response letter, "but due to an error on the Department's part, the letter was never sent" to the complainant.

MDH-BHA explains that "[t]he document that was withheld is a single page investigation report which includes the same information in the narrative that was produced to [the complainant], but also contains information about who was interviewed and who performed the investigation." MDH-BHA maintains that this report falls within the medical review committee privilege as outlined in § 1-401(d) of the Health Occupations Article ("HO"), and is thus exempt under § 4-301(a)(1)<sup>1</sup> of the PIA. MDH-BHA notes that the medical review committee privilege "protects any information about individuals who are interviewed during an investigation," and also "protects employees and other patients who are interviewed from retaliation by the provider being investigated."

In his reply, the complainant explains that his continued contact with MDH-BHA and BHSB—which was apparently interpreted as an effort to lodge new allegations against

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<sup>1</sup> Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

the provider—was meant to provide “more information they could use” to investigate the complainant’s initial complaint. The complainant maintains that the provider’s apparent refusal to give him his medical records was not the “original issue.” From what we can glean, the root issue appears to be the complainant’s belief that the staff at his residential facility are “helping [an] outside agency to have [him] committed,” and “possibly giving out [his] medical records” without consent. The complainant states that he is surprised to hear that no investigation into these issues had been done and that he will file a new complaint if necessary and “still possible.” In addition, the complainant states that he never received MDH-BHA’s letter explaining the Medical Review Committee Privilege, and asks whether that privilege can be waived.

### Analysis

The PIA charges us with resolving complaints that allege certain violations of its provisions, including that a custodian improperly denied inspection of public records, either by application of an exemption or by failing to locate all responsive records. § 4-1A-04(a)(1)(i); *see also* PIACB 24-08 (Sept. 28, 2023). Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman<sup>2</sup> and receive a final determination that the dispute was not resolved. § 4-1A-05(a). If we conclude that the alleged violation of the PIA has occurred, we must issue a written decision and order a statutory remedy. § 4-1A-04(a)(2) and (3). When we determine that a custodian improperly denied inspection of a public record, we must order the custodian to “produce the public record for inspection.” § 4-1A-04(a)(3)(i).

This complaint appears to involve allegations of both types of improper denial to some degree. First and foremost, the complainant seems to suggest that there are additional responsive records that MDH-BHA either has not uncovered, or has withheld but not advised of this fact. These are records of an investigation into the complainant’s allegations to MDH-BHA that staff at his residential program are working with an outside agency to have the complainant committed and also disclosing his medical records without consent. Upon receiving a PIA request, a custodian must “conduct a search in good faith that is reasonably designed to capture all responsive records,” and that is “focused on where responsive records are likely to be found.” *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017).

MDH-BHA explains that, “based on the complaint made and the responses provided by [the complainant] when he was contacted by the investigator,” the only issues investigated were related to the complainant obtaining his medical records and a referral to

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<sup>2</sup> The Ombudsman is charged with making “reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records under [the PIA].” § 4-1B-04(a).

psychiatry.<sup>3</sup> The records disclosed to the complainant tend to support this assertion. BHSB's narrative "response to client complaint investigation," dated February 2023, is focused on the complainant's medical records and how he can obtain them, as well as "documentation from every program in which he is enrolled." And, the May 25, 2023, letter advising of complaint closure refers to "concerns regarding care provided by [the complainant's] treating licensed mental health professional" and "ability to obtain a copy of his records."<sup>4</sup> Given the apparent scope of MDH-BHA's investigation, it is reasonable to conclude that no other records related to the investigation of the complainant's complaint exist.<sup>5</sup>

The PIA "establishes a public policy and a general presumption in favor of disclosure of government or public documents." *Kirwan v. The Diamondback*, 352 Md. 74, 80 (1998). This general presumption notwithstanding, the PIA also contains both mandatory and discretionary exemptions from disclosure. One of those exemptions is § 4-301(a)(1), which requires a custodian to deny inspection of a public record if "by law, the public record is privileged or confidential." The medical review committee privilege, cited by MDH-BHA as authority for withholding the one page investigative report responsive to the complainant's PIA request, is encompassed by § 4-301(a)(1). Thus, if the investigative report is covered by the privilege, MDH-BHA may not disclose it.

The parameters of the medical review committee privilege are set out in HO § 1-401. That statute defines "medical review committee" as "a committee or board that: (i) Is within one of the categories described in subsection (b) of this section; and (ii) Performs functions that include at least one of the functions listed in subsection (c) of this section." HO § 1-401(a)(3). Subsection (b) provides that a "medical review committee" is, among other things, "[a] regulatory board or agency established by State or federal law to license, certify, or discipline any provider of health care." HO § 1-401(b)(1). Subsection (c) states:

For purposes of this section, a medical review committee:

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<sup>3</sup> In his reply, the complainant states that "[a]t no time to the best of [his] recollection" did he "recall BHSB referring [him] to a psychiatrist."

<sup>4</sup> The "Brief Description" field in the redacted MDH-BHA complaint transmittal form, which is dated February 13, 2023, does contain the complainant's allegation that "the staff here [have] been helping some outside organization possibly law enforcement to have me committed to [a] mental hospital." It also states that the complainant had been "denied copies of my medical papers." However, it seems from both the BHSB narrative and the closure letter that this first allegation was not addressed. Whether or not it should have been is not for us to determine.

<sup>5</sup> The complainant does not appear to strenuously contest MDH-BHA's representations about the scope of its investigation. Rather, it seems from both parties' submissions that there may have been confusion over the nature of both the complainant's original complaint to MDH-BHA and his subsequent PIA request for records related to that investigation. The complainant indicates that he will file another complaint with MDH-BHA if he needs to and it is possible to do so.

- (1) Evaluates and seeks to improve the quality of health care provided by providers of health care;
- (2) Evaluates the need for and the level of performance of health care provided by providers of health care;
- (3) Evaluates the qualifications, competence, and performance of providers of health care; or
- (4) Evaluates and acts on matters that relate to the discipline of any provider of health care.

HO § 1-401(c). Generally, “the proceedings, records, and files of a medical review committee are not discoverable and are not admissible in evidence in any civil action.”<sup>6</sup>  
HO § 1-401(d)(1).

We have previously reviewed a complaint involving the medical review committee privilege. *See* PIACB 23-11 (Apr. 4, 2023). In that case, we concluded that records of an investigation conducted by the Maryland Institute for Emergency Medical Services Systems were subject to the privilege and thus exempt from disclosure under § 4-301(a)(1) of the PIA. *Id.* at 6. We explained that the medical review committee privilege has been construed broadly by Maryland courts, and that it “was intended to provide broad statutory protection and is based on legislative appreciation that a high level of confidentiality is necessary for effective medical peer review.” *Id.* at 3 (quoting *McCoy v. Hatmaker*, 135 Md. App. 693, 726 (2000)); *see also St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assoc.*, 392 Md. 75, 95 (2006) (observing that the “words ‘records’ and ‘files’ are broad,” and that letters or testimony that are “considered by [a] committee and may have resulted in a committee investigation or inquiry, would normally become part of the committee’s ‘record’ or ‘file’ regarding the matter”). We noted that the privilege recognizes the need to encourage “candid and conscientious evaluation of clinical practices,” and that the protections “result in increased peer review activity,” which “improves medical care.” PIACB 23-11, at 4 (Apr. 4, 2023) (quoting *Baltimore Sun v. Univ. of Maryland Med. Sys.*, 321 Md. 659, 666-67 (1991)).

According to MDH-BHA, the investigative report that it did not disclose contains the same information that was provided to the complainant in the BHSB narrative, as well as “information about who was interviewed and who performed the investigation.” MDH-BHA argues that its “investigative ‘proceedings, records, and files’ concerning matters that are listed in [HO] § 1-401(c)(1) are not discoverable and are not admissible in evidence.”

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<sup>6</sup> There are exceptions to this general rule, *see* HO § 1-401(e), but they are not relevant here.

First, we note that MDH-BHA is an “agency established by State . . . law to license, certify, or discipline any provider of health care.” HO § 1-401(b)(1); *see also* Md. Code Ann., Health-Gen. § 7.5-205 (requiring MDH-BHA to, among other things, “[p]rovide oversight of community-based services for persons with behavioral health disorders” and to adopt certain regulations, “including provisions for the issuance of licenses”). MDH-BHA is thus “within one of the categories described in subsection (b),” HO § 1-401(a)(3), for purposes of the statutory definition of “medical review committee.”

Given the facts and circumstances described in both parties’ submissions, we also have little trouble concluding that the investigative report was prepared by MDH-BHA in its efforts to “[e]valuate[] and seek[] to improve the quality of health care provided by providers of health care.” HO § 1-401(c)(1). MDH-BHA was acting on a complaint about the “quality of health care” the complainant was receiving at his residential facility. In doing so, MDH-BHA was necessarily “evaluating” the quality of that care. Thus, MDH-BHA was operating as a medical review committee as defined in HO § 1-401, and its “proceedings, records, and files” related to the complaint—including the one page investigative report responsive to the complainant’s PIA request—are subject to the privilege contained in HO § 1-401(d)(1). MDH-BHA did not violate the PIA by denying inspection of that record under § 4-301(a)(1).<sup>7</sup>

### **Conclusion**

After review and consideration of the parties’ submissions, we conclude that MDH-BHA has not improperly denied the complainant inspection of public records. Based on the explanation of the limited investigation conducted, it does not appear that there are additional responsive records that MDH-BHA has either failed to locate or not disclosed. Further, the investigative report MDH-BHA did not disclose is subject to the medical review committee privilege as provided in HO § 1-401 and therefore exempt under § 4-301(a)(1) of the PIA. Whether or not MDH-BHA has the authority to waive the privilege covering the undisclosed document, as the complainant has requested, it is apparently unwilling to do so, and we have no authority to require such a waiver.

### **Public Information Act Compliance Board**

*Michele L. Cohen, Esq.*

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<sup>7</sup> As acknowledged in its response, MDH-BHA did not provide the complainant with the timely explanation of that denial required by the PIA. *See* § 4-203(c) (custodian must, within ten working days of a denial, provide certain information in writing, including the reasons and legal authority for the denial, and “a brief description of the undisclosed record that will enable the applicant to assess the applicability of the legal authority for the denial”). That error was belatedly rectified when MDH-BHA provided that explanation in its response to this Board complaint, and there is no other remedy available concerning the delay under these circumstances.

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