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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-87

August 27, 2024

Board of Professional Counselors and Therapists, Custodian
William Hernandez, Complainant

The complainant, William Hernandez, alleges that the Board of Professional Counselors and Therapists (“BPCT”) violated the Public Information Act (“PIA”) by improperly denying inspection of records. After review of the submissions, we find that, to the extent that the BPCT conducted an insufficient search that failed to locate all responsive records, the BPCT’s response to the complainant’s PIA request violated the PIA. We thus direct the BPCT to continue its search and provide guidance as to how that should be done.

Background

This complaint relates to a previous matter in which we determined that the BPCT violated § 4-203(a)(1)¹ of the PIA by failing to respond to the complainant’s PIA request within the prescribed time limitations. See PIACB 24-50 (Apr. 2, 2024). We provide the background information from that matter and supplement with the information relevant to this complaint below.

On December 3, 2023, the complainant sent a PIA request to the BPCT seeking “all emails in addition to all documents, and records the [Maryland Department of Health] and the BOPCT received” from three specified email addresses related to “any matter pertaining to Louis Leibowitz, from the period of April 2022 until December 2023.”

In early January, after the complainant did not receive a response to the PIA request, the complainant contacted the Public Access Ombudsman. 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. 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

¹ Statutory citations are to the General Provisions Article of Maryland’s Annotated Code unless otherwise specified.

through the Ombudsman and the complainant filed this complaint with our Board.

We received the complaint on January 22, 2024, and forwarded it to the BPCT the next day with a request that the BPCT provide a written response by February 22, 2024. *See* § 4-1A-06(b) (“The custodian or applicant shall file a written response to the complaint within 30 calendar days after receiving the complaint.”). When we did not receive the BPCT’s response by that date, we contacted the BPCT and instructed that a response be sent no later than February 28, 2024. The BPCT ultimately provided a written response on March 4, 2024, explaining that it has been “severely understaffed” and that “due to the voluminous complaints that [it had] received, there was some confusion about which responses had been investigated and which had not.”

The BPCT’s late response notwithstanding, we provided the complainant an opportunity to submit a reply. *See* COMAR 14.02.02.04. The complainant declined to do so, stating that “it is very clear that the BPCT’s response should not even be considered.”

PIACB 24-50, at 1-2 (Apr. 2, 2024).

The BPCT’s response to the complaint in PIACB 24-50 was also its response to the complainant’s PIA request. *Id.* at 2. The BPCT denied inspection of the responsive records under § 4-333(a)(1), the PIA’s mandatory exemption for “information about the licensing of an individual in an occupation or a profession,” stating that the documents requested by the complainant did not fall within any of the exceptions to non-disclosure listed in subsection (b) of that provision. The BPCT also took the position that the PIA request did not “concern public business, but rather, concerns emails and communications in connection with a licensee’s confidential licensing record.”

After we issued our decision, the complainant filed this complaint challenging the BPCT’s denial of the PIA request.² The complainant alleges that the BPCT wrongfully denied access to records and contends that “the majority of records are not even subject to § 4-333.” The complainant also argues that the BPCT was required to “produce certain

² The PIA requires a complainant to first attempt to resolve a dispute through the Public Access Ombudsman before a complaint may be filed. *See* § 4-1A-05. The complainant provides a document titled “Statement of Ombudsman Conflict Precluding Mediation” which indicates that the complainant requested mediation on April 7, 2024. *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”).

records immediately,” including Mr. Leibowitz’s business address, business email, and education background. Noting that the exemption applies to the “part of a public record” that contains protected licensing information, the complainant maintains that the BPCT must disclose records in redacted form. The complainant asks us to order the BPCT to “produce the documents immediately, and that they waive all fees.”

In response to the complaint, the BPCT explains that it searched for records containing the name “Louis Leibowitz” and identified several emails that contained his name. The BPCT states that all of the emails “relate to public information act requests previously submitted by different individuals,” and that three emails contain “requests for information that, if the [BPCT] were able to confirm its existence, could only be disclosed to a person in interest.”³ The BPCT attaches the responsive emails, nine in total, with redactions to certain information, to its response to the complaint.

The complainant replies that none of the emails the BPCT provides are responsive to the PIA request because they were not received from Mr. Leibowitz or “his team of attorneys.” The complainant states that the Department of Health identified more than 800 records responsive to the request and argues that § 4-333 provides “an absolute right to inspect records, to include Leibowitz current business address, or in the absence of a current business address, home address.” The complainant explains that such information is “essential if one sought, for example, to sue Leibowitz for medical malpractice or counterfeiting court documents and subpoenas.” The complainant expresses disbelief that, out of 800 emails, all of them are subject to § 4-333.

The complainant also states that “an exact copy of the documents and records” the BPCT received from Mr. Leibowitz was provided to the BPCT, presumably as an example of records responsive to the PIA request. The complainant attaches “similar documents” from the Department of Education “to show how an agency should properly allow for inspection of the parts of the record for all the forms [the complainant] provided to the BPCT.”⁴

Analysis

We are authorized to review and resolve complaints that allege certain violations of the PIA, including that a custodian improperly denied inspection of a public record. § 4-

³ A “person in interest” is typically the person “that is the subject of a public record.” § 4-101(g)(1). The complainant here is thus not a person in interest as to Louis Leibowitz’s licensing records.

⁴ Those forms, which the complainant appears to have found on the Department of Health website, are: (1) a reinstatement form; (2) a criminal history records check form; (3) a change of information form; (4) an application for inactive licensure status form; and (5) a verification request form.

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

“[U]nless an unwarranted invasion of the privacy of a person in interest would result, [the PIA] shall be construed in favor of allowing inspection of a public record.” § 4-103(b). Thus, 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). However, Maryland's Supreme Court has also cautioned that, though the PIA is “a powerful tool for understanding the activities and actions of the State government,” it “should not be a means of invading the privacy of individuals merely because the State has collected information about those people.” *Immanuel v. Comptroller*, 449 Md. 76, 95 (2016). To that end, the PIA contains exceptions to the general rule of 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.” § 4-333(d).

The submissions left some factual gaps, so we asked the BPCT for more information about the email records it possesses and how it searches those records. Specifically, we noted the complainant's assertion that the Department of Health found “800+” responsive records and asked whether some or all of those records are also in the custody of the BPCT.⁵ We also asked the BPCT to provide the number of emails received from Mr. Leibowitz or his attorneys during period from April 2022 and December 2023 and to explain how the BPCT conducts searches for email records.

In response, the BPCT advised that once it receives a PIA request, the request is forwarded to the custodian who searches the BPCT's share drive and “sends an urgent

⁵ Though the BPCT is a health occupations board, it is its own entity, see Md. Code Ann., Health Occ. § 17-201 (establishing the BPCT), and has its own records custodian apart from the Department of Health. In other words, the Department of Health's records are not necessarily the BPCT's records, and vice versa.

request to all staff to conduct a search for any emails containing the search terms pertinent to the request.” The custodian also searches any relevant paper files. Once responsive records are located, those records are reviewed and BPCT’s counsel provides advice regarding exemptions. If no responsive records are located, then the BPCT advises the requester of that fact. The BPCT also advised that it has contacted the Maryland State Department of Information Technology (“DoIT”) to assist with a search of the BPCT’s electronic files, including “former staff emails,” for records responsive to the complainant’s PIA request.

Though the BPCT did not address the complainant’s allegation that MDH had found “800+” responsive records, the BPCT did reiterate that a “review for records containing the names ‘Louis Leibowitz,’ ‘Erica Reed’ and ‘Arnold Abraham’ . . . was conducted,” and that the BPCT provided records of nine emails (eight of them in redacted form) to the complainant. In addition, the BPCT explained that it found “two email chains containing the name ‘Louis Leibowitz,’” and that those email chains “consisted of communication between Mr. Leibowitz and [BPCT] staff and between [BPCT] staff regarding Mr. Leibowitz’ licensure file.” Those records were withheld entirely.

After review of the submissions and the additional information provided by the BPCT, we cannot find that the BPCT’s application of § 4-333 *to the records it found* violated the PIA. 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). Given that the BPCT’s powers and duties relate foremost to the licensing and regulation of professional counselors and therapists, *see* Md. Code Ann., Health Occ. § 17-205, it is not surprising that many of the BPCT’s communications with its licensees—or their attorneys—would be “about the licensing of an individual” and therefore subject to the exemption. Indeed, it is hard to imagine why Mr. Leibowitz or his lawyers would be communicating with the BPCT for any reasons other than ones that relate to his license.

The complainant contends that § 4-333 provides an “absolute right” to inspect Mr. Leibowitz’s “current business address, or in the absence of a current business address, home address.” That contention is not wholly accurate. It is true that subsection (b)(2)(i) requires a custodian to allow inspection of “the business address of the licensee or, if the business address is not available, the home address of the licensee.”⁶ § 4-333(b)(2)(i). But, subsection (b)(2)(i) is “subject to item (ii),” which provides for required inspection of, “if the licensee is licensed by *a health occupations board*, the business address of the licensee.” § 4-333(b)(2)(ii) (emphasis added). The BPCT is a health occupations board, thus the home addresses of its licensees are not subject to inspection under that section. And, in any event, the complainant did not specifically ask to inspect records providing,

⁶ The custodian must redact “any information that identifies the location as the home address of an individual with a disability as defined in § 20-701 of the State Government Article.” § 4-333(b)(2)(i).

e.g., Mr. Leibowitz’s business address or telephone number, or his “educational and occupational background” or “professional qualifications,” § 4-333(b), or even generally for all documents Mr. Leibowitz ever provided to the BPCT. Rather, the PIA request asked for “all emails in addition to all documents, and records” *that the BPCT received from Mr. Leibowitz’s “email selector” or the “email selectors” of his attorneys*. In other words, communications and records the BPCT received *via email*. As discussed above, it seems unlikely that Mr. Leibowitz or his attorneys would be sending emails to the BPCT for reasons unrelated to Mr. Leibowitz’s professional license.

To support his allegations against the BPCT, the complainant attaches five forms that he maintains are responsive (presumably as filled out by Mr. Leibowitz), and that the BPCT should have provided in redacted form. After reviewing those forms, it is not at all clear that they would have been received by the BPCT from Mr. Leibowitz via email. First, there is no indication that Mr. Leibowitz would have submitted all of these forms during the identified time period. For example, one form relates to the reinstatement of licensure. We have no evidence that Mr. Leibowitz’s license was inactive during the relevant time such that he would have submitted this form. Even more, it appears to us that many of these forms would not be submitted via email in the first place. The licensure reinstatement form instructs the licensee to “mail form and fee to the Board.” Similarly, the request for verification of licensure/certification form directs a licensee to “complete this form and return it to the mailing address above with your non-refundable verification fee.” And, to undergo a criminal history records check, a licensee must “present the LiveScan Pre-Registration Form” at the time of fingerprinting—i.e., in person, and not via email.⁷

The complainant also attaches “similar documents” from the Department of Education to “show how an agency should properly allow for inspection of the parts of the record for all forms [the complainant] provided to the BPCT.” Those documents are contained in a PDF labeled “PIA_Redacted_SF,” which suggests to us that they were provided by the Department of Education in response to a PIA request—a PIA request that we do not have. It is thus very possible—perhaps even likely—that that PIA request was worded differently and did not seek only records that were sent to the Department of Education by Mr. Leibowitz’s “email selector” or the “email selectors” of his attorneys. The response of a different custodian to a different PIA request is thus not convincing evidence that the BPCT’s response to *this* PIA request violated the PIA.

Based on the BPCT’s responses to our request for additional information, however, we have concerns about the searches it conducted. First, it appears that there may be additional responsive records that the BPCT has not yet reviewed—i.e., records that DoIT

⁷ We also note that there are separate restrictions on disclosure of criminal history record information that may apply to any records or information that Mr. Leibowitz may have submitted in conjunction with undergoing a criminal history records check. See 92 Md. Op. Att’y Gen. 26, 30-37 (2007).

may locate in its further search of the BPCT’s electronic files, which include the email accounts of former staff members. Second, we worry that the search the BPCT conducted internally was fatally flawed and thus produced underinclusive results. This is because the BPCT indicates that it searched for records containing the names “Louis Leibowitz,” “Erica Reed,” and “Arnold Abraham.” But, emails from any of these individuals may well not have included all three names, and in fact, some emails from any of these individuals may not have even included their names, as their email addresses may not include their full names. Thus, it seems that the BPCT’s search was not “reasonably designed to capture all responsive records.” *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017). In that way, the BPCT’s response to the complainant’s PIA request violated the PIA.

We see two ways to remedy the deficiencies in the BPCT’s search for responsive records. One, the BPCT should search internally for emails from any of the email addresses as well as emails containing any of the three names, and not all three together. The BPCT should also ensure DoIT searches for records in this way.⁸ Second, to the extent that DoIT’s search locates additional, non-exempt responsive records—e.g., a record that lists the information subject to required disclosure under § 4-333(b) or a record that may be redacted to reveal only that information—the BPCT must provide those records (emails or documents attached to them) to the complainant. Consistent with our discussion above, it would not surprise us if (assuming additional records are located) those records consist primarily of “information about the licensing of an individual”—Mr. Leibowitz—“in an occupation or a profession” that cannot be disclosed. § 4-333(a)(1).

Conclusion

Based on the information before us, we find that the BPCT’s search for responsive records was insufficient. If the BPCT anticipated that it would require the assistance of DoIT to conduct a sufficiently responsive search, it should have contacted DoIT to assist in the search for email records when it initially received the complainant’s PIA request. Since the BPCT did not do so, the resultant search undertaken without the assistance of DoIT was insufficient and violated the PIA. At the same time, we find no violation in the BPCT’s application of § 4-333 to the records it did find. Because the exemption is broad, and because we would expect the majority of email communications between a licensee (or a licensee’s attorneys) and the BPCT to constitute “information about the licensing of an individual in an occupation or a profession,” we are not surprised that few records were

⁸ On August 22, 2024, after we had begun the process of finalizing our decision, we received an update from the BPCT reporting that DoIT had located “a total of 25 email chains that are communications between Louis Leibowitz (the Board’s licensee) and Board staff and 0 emails from the other specified email addresses.” This update notwithstanding, we direct the BPCT to conduct the remedial searches outlined above. In particular, we note that the update did not address whether DoIT’s search produced any “documents” attached to the responsive emails it located.

disclosed. Once DoIT provides any additional responsive records, the BPCT must review those records and release any non-exempt records (or non-exempt information) to the complainant in accordance with § 4-333 and the other provisions in the PIA.

Public Information Act Compliance Board

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