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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-104
September 13, 2024
Board of Professional Counselors and Therapists, Custodian
Steven Brown, Complainant

The complainant, Steven Brown, 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 may have conducted an insufficient search that failed to locate all responsive records, the BPCT’s response to the complainant’s PIA request violated the PIA.

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 24-68 (Apr. 2, 2024). We provide the background information from that matter and supplement with the information relevant to this complaint below.

On December 20, 2023, the complainant sent a PIA request to the BPCT seeking “all emails the BPCT has that mention, reference, or relate to ‘Louis Leibowitz’ from the period of May 2022 to December 2023.” The complainant sent follow-up emails on January 4, 24, and 31, 2024.

In February, after the complainant did not receive a response to the PIA request, the complainant contacted the Public Access Ombudsman. On February 23, 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 through the Ombudsman and the complainant filed this complaint with our Board.

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

The complainant allege[d] that the BPCT failed to acknowledge the PIA request and constructively denied access to records. In its response to the complaint, the BPCT state[d] that it has experienced high staff turnover during the last two years, particularly the Executive Director position, which is the position responsible for responding to PIA requests. Additionally, the BPCT explain[ed] that, “[s]ince August of 2023, the [BPCT] 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.” Despite these circumstances, the BPCT state[d] that it has “attempted to respond to each of these requests,” although it acknowledge[d] that it did not respond to the complainant’s PIA request. The BPCT also indicate[d] that its response to this complaint “functions . . . as the [BPCT’s] official response” and advise[d] that the complainant’s PIA request is denied under § 4-333(a)(1), the PIA’s exemption for “information about the licensing of an individual in an occupation or a profession.”

The complainant replie[d] that the BPCT has not complied with PIA laws and procedures. The complainant also dispute[d] that § 4-333(a)(1) requires denial of the PIA request.

PIACB 24-68, at 1-2 (Apr. 2, 2024).

In this complaint to our Board, the complainant alleges that the BPCT improperly denied access to public records through its application of § 4-333 as a “blanket denial.”² The complainant contends that the BPCT was “legally required to allow [the complainant] to inspect documents and records.” The complainant attaches records provided by the Maryland Department of Education (“MSDE”) in response to a PIA request, stating that MSDE “did an absolutely phenomenal and lightning speed response and turn-around for [his] PIA request for essentially the same matters,” and “correctly allowed for inspection of the parts of the records it was required to show, while simultaneously denying other parts.” The complainant asserts that “[w]ithout a doubt” based on the criteria provided in the PIA request, “mathematically, the BPCT would be in possession of Louis Richard Leibowitz most recent LBA renewal documents, which more or less would be the same as the Department of Education documents.” The complainant also provides a “sample of

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(a). 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”).

documents and records responsive to [the] request” that he claims were “communicated via email at one point.”³

We sent the complaint to the BPCT on May 28, 2024, and asked for a response by June 27, 2024. See § 4-1A-06(a). When no response was sent, we contacted the BPCT and directed that its response be sent by July 15, 2024. On July 15, 2024, the BPCT’s new executive director sent an email stating that he had “just become aware of the request for a response” and asked for “a 30 day extension to gather information to respond appropriately.” The executive director also advised that the BPCT had “just been assigned a new Board Counsel” and that there were “some changes in staffing as well.” Given the mandatory nature of the licensing records exemption, we granted the BPCT’s request for an extension. See §§ 4-401, 4-402 (providing penalties for unlawful disclosure); cf. *Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151, 161 (2004) (a custodian’s failure to respond to a PIA request within prescribed time limitations does not waive any exemptions that might apply to the records). The complainant strenuously objected to this extension.

In its response to the complaint, the BPCT cites § 4-333 and the exceptions to non-disclosure listed in subsection (b). The BPCT also asserts that § 4-301(a)—the PIA’s exemption for records that are privileged or confidential “by law,” or for which inspection would be contrary to a State statute or federal law—applies because § 1-401(d)(1) of the Health Occupations Article (“HO”) provides that the proceedings, records, and files of the BPCT are confidential and not discoverable or admissible in a civil action. Noting that the complainant is not a “person in interest,” the BPCT also argues that no compelling purpose warrants the inspection of email records in Mr. Leibowitz’s licensure file.

In reply, the complainant first reiterates his position that our Board is “not authorized by law to grant unlimited time extension and consider information not provided to it.” The complainant contends that the BPCT “actually has no clue about what documents and records it has that are responsive to [the] request,” and therefore cannot assert that all of the emails are subject to § 4-333 in their entirety. Thus, the complainant argues, the BPCT has improperly denied access to records. The complainant insists that we are “required to order the [BPCT] to produce the records and issue a finding that the [BPCT] has violated the act by denying access to public records, knowingly and willingly, that are not subject to any provisions.”

³ Those forms, which the complainant appears to have found on the Department of Health website, include: (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. The complainant also includes screenshots of information about behavior analysis license applications and online renewal of licenses.

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. § 4-1A-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 § 4-333(c). A custodian also must “allow inspection by the person in interest.”⁵ § 4-333(d).

After review of the submissions, we find the BPCT's response to the PIA request and this complaint troubling. Though 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”—it is unclear to us whether there are responsive email records that might

⁴ The BPCT has adopted a regulation allowing for inspection beyond what § 4-333(b) requires if a “compelling public purpose” exists. See COMAR 10.58.10.01. None of the circumstances described in that regulation appear to exist here.

⁵ The complainant is not a “person in interest” as to Mr. Leibowitz's licensing records. See § 4-101(g) (defining “person in interest” as, among others, the person “that is the subject of a public record”).

contain information that the BPCT must disclose under § 4-333(b). We recognize that, given that the BPCT's powers and duties relate foremost to the licensing and regulation of professional counselors and therapists, *see* HO § 17-205, it would not be surprising that many of the BPCT's communications with and about its licensees would be "about the licensing of an individual" and therefore subject to the exemption. Indeed, it is hard to imagine why the BPCT would be communicating with or about Mr. Leibowitz for any reasons other than ones that relate to his license. But, the BPCT has provided no information about the search efforts undertaken in response to the complainant's PIA request, or the responsive emails it located through those efforts. In that way, the BPCT has failed to demonstrate that it conducted a search that was "reasonably designed to capture all responsive records," *Glass v. Anne Arundel County*, 453 Md. 201, 232 (2017), and that those records are subject to the exemptions it cites.

As explained above, we expect that a majority of the responsive "emails the BPCT has that mention, reference, or relate to" Mr. Leibowitz will constitute a "part of a public record that . . . contains information about the licensing of an individual in an occupation or a profession," § 4-333(a), which cannot be disclosed to the complainant. However, in the absence of any information about the BPCT's search efforts or the responsive emails, we cannot conclude that the BPCT's response complied with what the PIA requires. To the extent that there are responsive emails or attachments that contain, e.g., "the educational and occupational background" of Mr. Leibowitz, or "any orders and findings that result[ed] from formal disciplinary actions," § 4-333(b), the BPCT has constructively denied inspection of those emails. We thus direct the BPCT to conduct another search for responsive email records, review those records, and disclose *any parts* of the emails or attachments that may fall within § 4-333(b).⁶

⁶ To support his allegations against the BPCT, the complainant attaches 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. *See also* 92 Md. Op. Att'y Gen. 26, 30-37 (2007) (discussing restrictions on disclosure of criminal history information). Perhaps most convincing, the document the complainant attached titled "Behavior Analyst License Application" explains that a licensee must renew a license every two years—notably, the time period identified in the PIA request is May 2022 to December 2023, thus it is possible that Mr. Leibowitz's license was not up for renewal

As to the BPCT's contention that HO § 1-401(d)(1) confers some sort of blanket confidentiality on *all* of the BPCT's emails that relate to or mention Mr. Leibowitz, we are not convinced. That provision covers "the proceedings, records, and files of a *medical review committee*," § 1-401(d)(1) (emphasis added), which is specifically defined in the Health Occupations Article. The BPCT has offered no argument or evidence that all of the responsive emails constitute records of the BPCT acting as a "medical review committee." Section 1-401(a)(3) defines "medical review committee" as "a committee or board that . . . [i]s within one of the categories described in subsection (b) . . . and . . . [p]erforms functions that include at least one of the functions listed in subsection (c)." While the BPCT satisfies the first prong—it is a "regulatory board or agency established by the State or federal law to license, certify, or discipline any provider of health care," § 1-401(b)(1)—we have no information as to whether all of the emails relate to circumstances in which the BPCT was performing one of the functions listed in subsection (c). *See also* PIACB 23-11 (April 4, 2023) (finding that the disputed records fell within the scope of HO § 1-401(d)(1) and thus the custodian properly denied inspection under § 4-301(a)(1)). Further, we note that the "specific disclosure obligation[s]" outlined in § 4-333(b) are likely to "trump[] the application of the more general disclosure exemption" found in § 1-401(d)(1). *See Comptroller v. Immanuel*, 216 Md. App. 259, 273-74 (2014) (citing *Suter v. Stuckey*, 402 Md. 211, 231 (2007)). Thus, though we do not conclude that there are no responsive records subject to HO § 1-401(d)(1)'s confidentiality mandate, we find that BPCT has failed to justify its application of § 4-301(a) to *all* responsive emails, without explaining more about what those emails contain.

Conclusion

Based on the information before us, we find that the BPCT's response to the complainant's PIA request did not conform to the PIA. The lack of any information about the BPCT's search process and the responsive records located leads us to conclude that the BPCT may have constructively denied access to information it was required to disclose under § 4-333(b). We therefore direct the BPCT to conduct a search that is "reasonably designed to capture all responsive [email] records," *Glass*, 453 Md. at 232, and to disclose the parts of the responsive email records that fall within § 4-333(b), if any. Because the licensing records exemption is broad, and because we would expect the majority of email communications in the BPCT's custody that are from or about a licensee would constitute "information about the licensing of an individual in an occupation or a profession," we would not be surprised if there are few records to disclose.

Public Information Act Compliance Board

Sareesh Rawat, Chair

during that time period. Even more, that document advises that "[a]pplications **may not** be submitted via fax or email." (Emphasis original).

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