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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 24-107
September 13, 2024
Board of Professional Counselors and Therapists, Custodian
Seb Fialon, Complainant

The complainant, Seb Fialon, 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 24-76 (May 22, 2024). We provide the background information from that matter and supplement with the information relevant to this complaint below.

The complainant sent a PIA request to the BPCT on November 12, 2023. After the BPCT failed to respond to the request, the complainant contacted the Public Access Ombudsman. On March 18, 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. Thus, that dispute was not resolved through the Ombudsman and the complainant filed this complaint with our Board.

The complaint ask[ed] us to “order the BPCT to produce [the] documents with a waiver of all fees and find that they have violated the act.” In its response to the complaint, the BPCT acknowledge[d] that its response to the complainant’s PIA request—which it provide[d] with its response to this complaint—[was] untimely. The BPCT explain[ed] that, when the PIA request came in in November of last year, it was experiencing turnover in the executive director position as well as managing a high volume of phone calls

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

and emails related to continuing education and license renewals, as that time period is also when licenses are renewed. The BPCT also advise[d] that it had received “numerous requests for information related to the same case filed by different people,” and that it “may have reasonably believed that it had already responded.”

PIACB 24-76, at 1-2 (May 22, 2024).

The specific records sought by the complainant were:

[A]ll records, documents, and in particular, emails, the Maryland Department of Health and the Maryland Board of Professional Counselors and Therapists (each agency) has between the period of June 2022 up until present, November 2023, with, to, from, or relating to the following individuals and [their] email accounts:

“Louis Leibowitz”

“Erica Reed”

“Arnold Abraham”

In this complaint to our Board, the complainant alleges that the BPCT improperly denied access to public records through its application of § 4-333 to all of the responsive records.² The complainant attaches a “copy of how a custodian of records should respond to 4-333,” which he describes as “department of education redaction, also for Leibowitz.”

We sent the complaint to the BPCT on June 3, 2024, and asked for a response by July 3, 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

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 May 22, 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”).

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 the 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 a time extension.” The complainant contends that the BPCT’s response is “without merit,” and that the BPCT “does not actually know what documents and records the [BPCT] has that are responsive to [the] request.” Stating that “[t]here is a plethora of information that the [BPCT] is required to allow for inspection,” the complainant takes the position that the BPCT must disclose “Leibowitz’s business and home address.” The complainant insists that we must order the BPCT to “produce all documents and records . . . that relate to Leibowitz and produce them immediately, free of charge, and redact ‘only the parts’ of the records that are explicitly related to Leibowitz ‘licensing.’”³

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

³ As example, the complainant notes that “administrative agency appeal C-24-CV-24-001520 relates to Leibowitz, but is not a licensing record,” and suggests that the BPCT’s notice to Mr. Leibowitz that the appeal has been filed would not constitute a licensing record.

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 records that might 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 records related to Mr. Leibowitz and his attorneys⁶ 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 Mr. Leibowitz or his attorneys 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 records 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.

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”).

⁶ We understand, based on information in a related complaint, that Ms. Reed and Mr. Abraham are, or were at one point, Mr. Leibowitz’s attorneys. See PIACB 24-87 (August 27, 2024).

As explained above, we expect that a majority of the responsive “records, documents, and in particular emails . . . with, to, from, or relating to” Mr. Leibowitz and his attorneys 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 records, we cannot conclude that the BPCT’s response complied with what the PIA requires. To the extent that there are responsive records 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 records. We thus direct the BPCT to conduct another search for responsive records, review those records, and disclose *any parts* of them that may fall within § 4-333(b).⁷

As to the BPCT’s contention that HO § 1-401(d)(1) confers some sort of blanket confidentiality on *all* of the BPCT’s records that relate to or mention Mr. Leibowitz or his attorneys, 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 records 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 the records 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

⁷ The complainant contends that the BPCT is “required by law” to permit inspection of “Leibowitz’s business and home address.” That contention is not 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.” § 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.

find that BPCT has failed to justify its application of § 4-301(a) to *all* responsive records, without explaining more about what those records 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 records," *Glass*, 453 Md. at 232, and to disclose the parts of the responsive records that fall within § 4-333(b), if any. Because the licensing records exemption is broad, and because we would expect the majority of records in the BPCT's custody that relate to 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

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