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STATE OF MARYLAND
PUBLIC INFORMATION ACT COMPLIANCE BOARD

PIACB 23-15
June 2, 2023
Baltimore City Fire Department, Custodian
Anne Reed (Operation Rescue), Complainant

In response to a Public Information Act ("PIA") request, the Baltimore City Fire Department ("BCFD") produced to the complainant, Anne Reed of Operation Rescue, a redacted version of a 911 call placed in May of 2022 from a Planned Parenthood facility in Baltimore City. Questioning the redactions, the complainant initiated dispute resolution through the Public Access Ombudsman. The Ombudsman ultimately issued a final determination stating that the dispute was not resolved. In a timely filed complaint to this Board, the complainant continues to challenge the BCFD's redactions and asks us to review the unredacted version of the 911 call *in camera* to determine whether they were appropriately applied. As we explain further below, we are unable to resolve this complaint.

Background

The PIA request in this case has a bit of a history. On May 24, 2022, a person (not the complainant) working on behalf of Operation Rescue sent an email to the BCFD and requested "a copy of the audio file and a copy of the CAD[1] printouts related to a 911 call placed from 330 N Howard St., Baltimore, MD 21201[2] on 05/20/2022 at around noon." The BCFD acknowledged the request the following day and asked the requester to "clarify what type of incident took place and double check the date." The requester then explained that it was "an incident involving a fire truck and an ambulance," and that it had occurred between 12:00 and 1:00 p.m. on May 20, 2022. Despite the additional information, the BCFD advised that it was having trouble locating an audio call based on the information provided and asked whether the requester could "clarify what type of incident it was

[1] "CAD" stands for "computer-aided dispatch." CAD reports are generated when a 911 call is placed and emergency responders are dispatched, and typically contain "among other things, the precise time when a call is received, when it is dispatched, the encoded identities of the emergency responders, the times when they arrived and departed, and the location to which they responded." *Hallowell v. State*, 235 Md. App. 484, 520-21 (2018). CAD reports may also contain "one or more summaries of statements made by the 911 caller to the dispatcher, which the dispatcher then relays to the responders." *Id.* at 521.

[2] This is the address of Planned Parenthood's Baltimore City Health Center.

(accident, assault, medical emergency)." The requester responded that it was a medical emergency that involved a fire truck and an ambulance.

About two weeks after the BCFD's exchange with the requester, the BCFD sent a response to the PIA request and attached responsive records comprising a redacted CAD report from the fire department, and two audio files related to police CAD reports. In the response letter, the BCFD explained that the records were redacted to remove medical or psychological information of an individual pursuant to § 4-329,[3] and that the BCFD had withheld emergency medical services reports as medical records protected by Maryland law, specifically §§ 4-301 through 4-309 of the Health-General Article.

Later, on July 26, 2022, the same requester sent another PIA request by email asking for "the recordings associated with Fire Incident #F221400340." As it had before, the BCFD responded by asking for more information, "including the date, time, and address of the incident," which the requester provided. The BCFD then advised the requester that the records had already been provided to him in the BCFD's response to the requester's first PIA request.

In late September 2022, the complainant sought dispute resolution assistance through the Public Access Ombudsman. Through that process, the BCFD ultimately produced a redacted version of the audio file that Operation Rescue had asked for. Unhappy with the redactions, the complainant again engaged the Ombudsman in an attempt to resolve the dispute. This time, however, the Ombudsman issued a final determination stating that the dispute was not resolved. The complainant then filed this complaint.

Noting that the BCFD failed to produce the audio file in response to two PIA requests, and that the redacted version was not produced until dispute resolution was sought, the complainant "lacks confidence in the [BCFD's] response," and asks our Board to conduct an *in camera* review of the audio file to determine whether the redactions exceed the scope of § 4-329's mandatory exemption for "medical or psychological information about an individual." In addition, the complainant contends that the federal Health Information Portability and Accountability Act ("HIPAA")—which the BCFD also cited as a reason for the redactions that it applied to the 911 audio—does not protect any of the information contained in the audio recording because the BCFD is not a "covered entity" for purposes of that law.

In its response to the complaint, the BCFD maintains that it both diligently responded to the PIA requests and that the redactions to the audio file are required by both State and federal law. First, it argues that, under § 4-329, the BCFD was obligated to redact the "discussions between a 911 operator and an employee of Planned Parenthood

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[3] Statutory citations are to the General Provisions Article of Maryland's Annotated Code, unless otherwise indicated.

concerning an individual patient's medical condition." To that end, the BCFD stresses that the caller referred to the "emergency" nature of the call, and that the redactions begin after the operator instructed the caller to "tell [her] exactly what happened" and the caller stated "we have a patient here." Second, the BCFD contends that HIPPA, applied via the PIA's exemption for instances in which inspection "would be contrary to . . . a federal statute or a regulation that is issued under the statute and has the force of law," § 4-301(a)(2)(ii), also protects the redacted information. The BCFD explains that it is in fact "covered by HIPAA" because it transmits medical information electronically. Finally, the BCFD disputes the complainant's intimation that its failure to produce the redacted audio file until the matter was with the Ombudsman is indicative of the BCFD's bad faith. Rather, the BCFD states that it located and promptly provided the requested audio after enlisting the assistance of additional personnel.

In reply, the complainant stresses that the BCFD primarily relies upon § 4-329, and argues that the BCFD's response to the complaint fails to justify the redactions it applied to the 911 call. Citing federal regulations, the complainant reiterates her contention that HIPAA does not apply because the BCFD has not demonstrated that it meets the definition of a "covered entity." Specifically, the complainant argues that the BCFD has not addressed HIPAA's requirements that a covered entity be (1) a "health care provider" that (2) "electronically transmits protected health information in connection with a "transaction." At the same time, the complainant agrees that § 4-329 is a "sufficient justification for any legally required denials," and again urges us to review the recording *in camera* to determine whether the redacted information falls within that exemption.

Analysis

The PIA authorizes our Board to resolve complaints that allege certain violations of its provisions. *See* § 4-1A-04. One allegation within our jurisdiction is that a custodian "denied inspection of a public record in violation of [the PIA]." § 4-1A-04(a)(1)(i). Before filing a complaint, a complainant must attempt to resolve a dispute through the Public Access Ombudsman. § 4-1A-05(a). A complaint may be filed only if the Ombudsman issues a final determination stating that the dispute was not resolved. *Id.* Once a complaint alleging wrongful denial of inspection is filed, we may ask the custodian to provide certain additional information, including "a copy of the public record, descriptive index of the public record, or written reason why the record cannot be disclosed." § 4-1A-06(b)(2)(ii)(1). Ultimately, if we conclude that a violation of the PIA has occurred, we must issue a written decision and order an appropriate remedy, as provided by the statute. § 4-1A-04(a)(2), (3). For example, if we determine that a custodian wrongfully withheld or redacted a record, we must direct the custodian to "produce the public record for inspection." § 4-1A-04(a)(3)(ii).

Recordings of calls made to 911 emergency centers are indisputably public records subject to inspection under the PIA. 71 Md. Op. Att'y Gen. 288, 290 (1986); *see also id.*

at 292 ("Records of calls to 911 centers are . . . not automatically and wholly exempt from disclosure under [the PIA]."). However, certain information contained within those calls—e.g., "medical or psychological information about an individual," § 4-329(b)(1)—is not disclosable. Ordinarily, there is a "strong presumption in favor of disclosure," *Glenn v. Maryland Dep't Health & Mental Hygiene*, 446 Md. 378, 380 (2016), and the PIA must be "construed in favor of allowing inspection of a public record," § 4-103(b). But, the general rule of broad construction in favor of disclosure is not unfettered: it is to be applied "unless an unwarranted invasion of the privacy of a person in interest would result." *Id.* Maryland's Attorney General has addressed what is now § 4-103(b) in the context of PIA requests for 911 recordings, observing that:

> Particular calls for emergency assistance might well reveal intimate personal information about the caller or others. In those circumstances, we think that releasing the record to anyone other than the person in interest would be an "unwarranted invasion of [that person's] privacy." Consequently, when the applicant seeking disclosure of such a call is not the person in interest, the PIA's exceptions can and should be construed somewhat more liberally than would otherwise be the case.

71 Md. Op. Att'y Gen. at 291. "[S]tatements concerning an injured or ill person's symptoms or condition, provided to a 911 center operator for the purpose of obtaining appropriate emergency medical care, are 'medical or psychological information' that must be withheld" under the PIA. *Id.* at 292; *see also* 90 Md. Op. Att'y Gen. 45, 53-54 (2005) (instructing that information concerning "an individual's medical history or condition" should be redacted before an event report created by a county fire department may be disclosed).

Close review of the redacted version of the 911 call at issue here tends to support the BCFD's assertion that the redactions have been applied to shield "medical or psychological information about an individual" protected by § 4-329(b)(1). The start of the call, which lasts six minutes and thirty seconds in its entirety, contains an exchange of basic non-medical information—e.g., the location of the emergency and the name of the caller. The first brief redaction—lasting about four seconds—occurs as the emergency relay connects the 911 caller to the operator. After the 911 operator has obtained the caller's name and phone number, she asks the caller to tell her "exactly what happened." A longer redaction lasting about fourteen seconds begins after the caller explains that "we have a patient here." After that longer redaction, the caller states that she is "not quite sure clinically what's going on," and a third redaction of about twenty seconds occurs. At that point, the caller asks the 911 operator to "hold on one second while I grab someone in clinical that can give you more, a better description." The context surrounding these redactions, and the use of words like "clinical," strongly suggests that the redactions concern a description of the medical emergency, including any symptoms or complications that the patient may have been experiencing.

At about two minutes and fifty-four seconds into the call, another person at the Planned Parenthood facility comes on the line and explains that the first caller had to "step away" but had said that the 911 operator "had some questions." The next forty seconds of the call—during which those questions are likely answered—are redacted. When the redaction ends, that second person asks whether the operator is "sending someone now," and the operator responds that she "already put the call in" and just has to "update and ask more" because "they're asking me to ask questions." A final redaction, lasting about twenty-two seconds—and, again, likely containing the answers to the operator's questions—then occurs. The audio comes back when, as the 911 operator advises that she is sending the paramedics, the caller asks the operator to hold because she "just got word from the physician that we might be cancelling," and that she wanted to "double check in case he thinks we don't have to." There is no conversation—and there are no redactions—for the last two minutes of the call as the operator holds the line. As with the first half of the call, the exchanges surrounding the redactions here support the contention that the redacted portions of the call relate to protected medical information that Planned Parenthood staff and clinicians provided in response to the operator's questions.

Nothing in the redacted 911 call causes us to seriously question the BCFD's assertion that § 4-329 applies here. But, in light of the complainant's urging, and in the interest of more definitively resolving the complaint, we nevertheless asked the BCFD to provide us with an unredacted version of the call. *See* § 4-1A-06(b)(2)(ii). However, the BCFD refused to provide the unredacted record, arguing that, because it cited HIPAA—a federal law—as one justification for the redactions, the BCFD cannot be compelled to provide the record to our Board for *in camera* review. Instead of the record itself, the BCFD provides two affidavits, one of which is discussed in more detail below: (1) from Chief James Matz, Deputy Chief for Emergency Medical Services for the BCFD; and (2) from Ana Rodriguez, the BCFD's Custodian of Records. Before explaining our ultimate decision in this matter, we will address the BCFD's refusal to provide an unredacted copy of the 911 call for our review.

Under § 4-1A-06(b)(2)(ii)(1), if a complaint "alleges that the custodian denied inspection of a public record in violation of [the PIA]," a custodian *shall*, upon the Board's request, provide "a copy of the public record, descriptive index of the public record, or written reason why the record cannot be disclosed, as appropriate." This general mandate is, however, subject to subsection (b)(3)(i), which provides that "if the complaint alleges that the custodian denied inspection of a public record under § 4-301(a)(2)(ii) of [the PIA], the custodian may not be required to produce the public record for Board review." Section 4-301(a)(2)(ii) requires a custodian to deny inspection of a public record if inspection would be "contrary to . . . a federal statute or regulation that is issued under the statute and has the force of law." While the plain language of § 4-1A-06(b)(3)(i) appears satisfied here—the complaint states that the BCFD has cited HIPAA, a federal statute, as a reason for non-disclosure—we are not so certain that, under the particular facts of this matter, this provision applies.

Federal regulations promulgated under HIPAA provide that a covered entity[4] may "disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1); *see also* 45 C.F.R. § 164.103 (required by law means "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law"). Courts in at least three states have found that, under this regulation, HIPAA defers to state open records laws. For instance, in *State ex rel. Adams County Historical Soc'y v. Kinyoun*, the Supreme Court of Nebraska noted that "[a]lthough HIPAA prevents the release of individually identifiable medical information, it also provides for release of information when required by state law." 765 N.W.2d 212, 218 (Neb. 2009). Thus, the court held that, because "Nebraska's public records statutes require that medical records be kept confidential, but exempt birth and death records from that requirement," a state-run health facility was required to disclose burial records containing patients' names, dates of death, and medical record numbers, even though HIPAA may have precluded release of some of that information under different circumstances. *Id.* at 215, 218. In reaching its conclusion, the Nebraska court cited cases from Ohio and Texas, explaining that those cases "demonstrate that HIPAA can and does give way to state laws requiring disclosure of certain kinds of information." *Id.* at 281 (citing *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006) and *Abbott v. Texas Dep't of Mental Health and Mental Retardation*, 212 S.W.3d 648 (Tex. App. 2006)).

In *Daniels*, the Supreme Court of Ohio concluded that certain lead assessment reports generated by a health department were disclosable under Ohio law even if they

[4] Despite the complainant's arguments to the contrary, we do not question the BCFD's assertion that it is, in fact, a "covered entity" for purposes of HIPAA—at least as far as the precise facts of this matter are concerned. The complainant cites to an Attorney General opinion that agreed with the Baltimore County Fire Department's representation that was *not* a "covered entity" for purposes of HIPAA—a conclusion that, we note, is contained in a footnote and is not fully explored in the opinion. *See* 90 Md. Op. Att'y Gen. at 49 n.2. Even more, the Attorney General's agreement was premised on the county fire department's assertion that the department "d[id] not bill for [emergency health care] services or transmit health information in electronic form in connection with those services." *Id.* In contrast, it appears that the BCFD does bill for services and, in turn, transmits health information in electronic form. *See* Baltimore City Code, Art. 9, §§ 3-1 to 3-5 (2022) (governing fees charged by the BCFD for the "utiliz[ation] of ambulance services provided by the Emergency Medical Services Division of the Fire Department"); *see also* Baltimore City Fire Dep't, EMS Reports and Billing, https://fire.baltimorecity.gov/ems-reports-and-billing (last visited Apr. 12, 2023) (providing information regarding requests for billing records). We further credit the BCFD's explanation that it is a covered entity because it "employs administrative emergency response personnel and emergency medical technicians who record and transmit relevant health information in an electronic form." At the same time, we do not necessarily conclude that HIPAA protects the information redacted in the 911 call. Nor do we draw any broad conclusions about whether other fire departments may be "covered entities."

contained health information otherwise protected by HIPAA because HIPAA "does not supersede state disclosure requirements." 844 N.E.2d at 1183-84. Referencing the federal regulation, the Ohio court explained that "the 'required by law' exception to the HIPAA privacy rule," acting in conjunction with the Ohio Public Records Law, would allow disclosure of the records because the state records law "require[d] disclosure of the[] reports." *Id.* at 1184; *see also Abbott*, 212 S.W.3d at 660 (concluding that the Texas Public Information Act is "a statute requiring the disclosure of protected health information as described in section 164.512(a) of the Privacy Rule").[5] These state court holdings appear consistent with the federal Department of Health and Human Services's interpretation of 45 C.F.R. § 164.512(a). *See* U.S. Dep't Health & Hum. Servs., Health Info. Privacy, https://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html (last visited Mar. 29, 2023) (explaining that "where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law").

Returning to the matter at hand, if HIPAA allows disclosure of health information when required by state public records law, then it is the PIA that controls because, absent an exemption to the PIA, public records must be disclosed. See § 4-201(a)(1) ("Except as otherwise provided by law, a custodian *shall* allow a person or governmental unit to inspect any public record at any reasonable time." (emphasis added)). Put differently, under 45 C.F.R. § 164.512(a), inspection of information otherwise protected by HIPAA would not be "contrary to" HIPAA, § 4-301(a)(2)(ii), if the PIA would require that information to be disclosed. Here then, it is really a question of whether § 4-329—and not HIPAA—prevents disclosure of the information redacted in the 911 call at issue. *Cf. Abbott*, 212 S.W.3d at 662 ("If a request for protected health information is made under the [Texas] Public Information Act, then the exception to nondisclosure found in section 164.512(a) of the Privacy Rule applies, and the agency must determine whether the Act compels the disclosure or whether the information is excepted from disclosure under the Act."). In the absence of § 4-329, it seems that HIPAA would not justify the redactions that the BCFD applied.[6]

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[5] The Texas court noted that "[t]he confusion in this case arises due to the cross references to other statutes found in both the [HIPAA] Privacy Rule and the Public Information Act." *Abbott*, 212 S.W.3d at 662. Some have referred to this as a "circular deference problem" in which "records custodians and courts are faced with an inability to determine which statute controls the public nature of the record." Catherine J. Cameron, *Jumping off the Merry-Go-Round: How the Federal Courts Will Reconcile the Circular Deference Problem Between HIPAA and FOIA*, 58 Cath. U. L. Rev. 333, 335-36 (2009).

[6] The BCFD has not claimed that any other provision in the PIA aside from §§ 4-301(a)(2)(ii) and 4-329 would exempt the redacted information.

Despite our reservations about whether § 4-1A-06(b)(3)(i) truly applies to preclude the BCFD from providing an unredacted version of the 911 call for our confidential *in camera* review, the fact remains that we lack the means to compel compliance with § 4-1A-06(b)(2). We cannot force the BCFD to provide us with the record, even if we think that HIPAA may not act to prevent our review of the records here—and, in any event, whether or not this is the case is far from clear.

The complainant urges us to wholly disregard the BCFD's response to our request for the unredacted 911 call, arguing first that, by failing to raise some of the arguments in its response to the complaint, the BCFD has waived its right to rely on those arguments, and second that, because the complaint alleges that HIPAA is irrelevant, the elements of § 4-1A-06(b)(3)(i) are not met. As to the first point, we view the City's response to our request as just that: as an explanation of why the BFCD will not comply with our request for an unredacted version of the record for our review, and not necessarily as a new argument supporting its redaction of the record. To the extent that Ms. Rodriguez's affidavit attesting that "all of the information redacted [from the 911 audio] is protected pursuant to the requirements of both PIA Section 4-329 and [HIPAA]" may be regarded as additional evidence, we note that § 4-1A-06(b)(3)(ii) allows the Board to "request more information about the public record from the custodian."

Regarding the complainant's second argument, it is true that the plain language of the statute provides that "*if the complaint alleges* that a custodian denied inspection of a public records under § 4-301(a)(2)(ii)," then "the custodian may not be required to produce the public record for Board review." § 4-1A-06(b)(3)(i) (emphasis added). But, our regulations—which were adopted pursuant to § 4-1A-04(c), and thus have the force of law—provide:

> If a complaint alleges that a custodian denied inspection of a public record in violation of the [PIA], the Board may request that the custodian provide, as appropriate in the Board's discretion . . . [a] copy of the public record for in camera inspection, unless the *custodian's response to the request for a public record* indicated that inspection was denied under . . . § 4-301(a)(2)(ii).

COMAR 14.02.05.03A(1) (emphasis added). While both the statute and our regulation may leave some clarity to be desired,[7] and notwithstanding our questions about whether 45 C.F.R. § 164.512(a) may operate to allow us to review the disputed record, it seems to us

[7] Under a broad and literal reading of the "if the complaint alleges" language of § 4-1A-06(b)(3)(i), a complainant could conceivably prevent the application of that section entirely by simply omitting a custodian's claim that § 4-301(a)(2)(ii) applies from the complaint—at least in cases where, as here, a custodian claims that multiple exemptions apply. Conversely, under our regulation, a custodian could assert that § 4-301(a)(2)(ii) protects a record—even absent a colorable claim that it does—and thus preclude our ability to review a record *in camera*.

that the requirements of both § 4-1A-06(b)(3)(i) and our regulation are met here. In its response to the PIA request, the BCFD claimed that HIPAA—a federal law—prevents disclosure, a claim that is certainly plausible given the nature of the record. And, although it strenuously disputes the accuracy of the BCFD's claim, the complaint recognizes within its allegation that the BCFD has denied inspection under § 4-301(a)(2)(ii). Further, we perceive no effort on the BCFD's part to manipulate or otherwise exploit the PIA in an attempt to conceal information from our Board or the complainant.

So, after that somewhat exhausting detour, the question is, then, what to do with what we have. We have before us three pieces of particularly relevant information: (1) the redacted audio recording which, as discussed above, does not suggest to us that anything more than protected medical information has been redacted; (2) the affidavit from the BCFD's Custodian of Records, which affirms under penalty of perjury that the redacted information is protected by § 4-329; and (3) the Attorney General's guidance—which we heed—that, when it comes to 911 calls for emergency medical assistance, "the PIA's exceptions can and should be construed somewhat more liberally than would otherwise be the case." 71 Md. Op. Att'y Gen. at 291. Although all of this information tends to weigh against finding that the BCFD violated the PIA by redacting—i.e., denying inspection of—information subject to disclosure under its provisions, we cannot say so definitively without reviewing the record itself. *Cf. Lamson v. Montgomery County*, 460 Md. 349, 369 (2018) (suggesting that *in camera* review may be the most appropriate tool to evaluate the application of attorney-client privilege to disputed notes because the records were not voluminous and the assertion of the privilege was "general in nature"). Thus, we feel constrained to conclude that we are "unable to resolve the complaint." § 4-1A-07(c)(2)(i).

We realize that our conclusion leaves the complainant unable to appeal our decision. *See* § 4-1A-07(c)(2)(ii) ("A person may not appeal under § 4-1A-10 of [the PIA] or § 4-362(a)(2) of [the PIA] a decision of the Board stating that the Board is unable to resolve the complaint."). However, other avenues of relief may be available to the complainant. *See* § 4-362(a)(1) ("[W]henever a person or governmental unit is denied inspection of a public record . . . the person or governmental unit may file a complaint with the circuit court."); § 4-362(c)(2) ("The court may examine the public record in camera to determine whether any part of the public record may be withheld under [the PIA].").

Conclusion

To definitively resolve this complaint, we must be able to conduct a confidential, *in camera* review of the unredacted version of the 911 call at issue here. We are unable to do so because, citing § 4-1A-06(b)(3)(i), the BCFD has declined to provide the unredacted record to us. Though we question whether this provision of the PIA truly operates to preclude our review, we are thus left in a position where we are unable to resolve the complaint.

Public Information Act Compliance Board*

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