

IN THE COURT OF APPEALS OF MARYLAND

No. 16

September Term, 1998

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LORETTA V. FIORETTI, R.D.H.

v.

MARYLAND STATE BOARD OF DENTAL  
EXAMINERS

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Bell, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Wilner  
Cathell,

JJ.

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Concurring Opinion by Wilner, J., in which  
Rodowsky and Raker, JJ., join

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Filed: September 1, 1998

I agree entirely that the Circuit Court erred in dismissing appellant's complaint, filed under the Maryland Public Information Act, for disclosure of certain documents in the possession of the State Board of Dental Examiners. My concern with the Court's Opinion is two-fold. First, the Court holds that, because the Board failed to demonstrate that appellant's inspection of the documents would prejudice an investigation then being conducted by the Board, the Circuit Court abused its discretion in dismissing the complaint. I do not believe that, when the agency fails to establish that non-disclosure is permissible under § 10-618 of the State Government Article, there is any discretion involved. If the agency fails to sustain its burden of establishing a permissive non-disclosure, the court must order disclosure. Second, to reach its ultimate conclusion, the Court gratuitously addresses a number of issues that need not be addressed in this case and that can best be left for another day.

This is really a simple case. The Board apparently received a complaint that, on April 16, 1997, Ms. Fioretti, a dental hygienist, had performed dental hygiene procedures in the office of Randall Ramin Yazhary, D.D.S., without on-site supervision by a licensed dentist. If true, that conduct *may* have been in violation of the Maryland Dentistry Act (title 4 of the Health Occupations Article).<sup>1</sup> On April 17 — the day after the alleged misconduct — the

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<sup>1</sup> Section 4-308 of the Health Occupations Article provides that a general license to practice dental hygiene authorizes the licensee to practice that occupation only under the supervision of a licensed dentist who is on the premises and available for consultation, and only in certain settings including a dental office. Section 4-308(d) allows the Board to waive the supervision requirement, however, under certain circumstances. There is nothing in this record to indicate whether, if Ms. Fioretti indeed performed dental hygiene services without on-site supervision by a licensed dentist, any of the circumstances allowing for a waiver might have existed.

Board sent Ms. Fioretti a letter informing her that it had received information, and therefore had reason to believe, that she had violated the law and ordering her, immediately, to cease any unsupervised practice. After reminding her that the unsupervised practice of dental hygiene could result in the suspension or revocation of her license, the Board, based solely on the undisclosed information that it had received, “require[d]” her to sign, date, and return a written agreement that she would henceforth practice only under the supervision of a licensed dentist.

Through counsel, Ms. Fioretti promptly requested a copy of any complaint that was filed “and all other appropriate documents.” That letter, sent April 21, 1997, was apparently ignored by the Board, so a second request was mailed on April 28, seeking “the courtesy of a reply.” On May 7, the Board responded that “[t]he case is currently under investigation” and that the request was denied. The Board cited, as the basis for its non-disclosure, State Government Article, § 10-618 (f)(1)(i) and (ii) and § 10-618 (2)(vi). Section 10-618(f)(1)(i) allows a custodian to deny the inspection of records of investigations conducted by the Attorney General, a State’s Attorney, a city or county attorney, a police department, or a sheriff. Why the Board cited that provision is unclear, as it is not any of those agencies.

Section 10-618(f)(1)(ii) provides that, *subject to § 10-618(f)(2)*, a custodian may deny inspection of “an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose . . . .” The Board urged that the documents sought by Ms. Fioretti constituted part (or all) of an investigatory file compiled for a law enforcement or prosecution purpose, and the Court spends considerable effort addressing that question.

That effort is quite unnecessary, however, for, even if the documents in question, whatever they are, fall within the ambit of that provision, to deny inspection, the Board must also satisfy § 10-618(f)(2). Section 10-618(f)(2)(vi) — the only part of § 10-618(f)(2) cited by the Board — permits a custodian to deny inspection by a person in interest “only to the extent that the inspection would . . . (vi) prejudice an investigation.” Ms. Fioretti is certainly a person in interest.

As the Court points out, when a proper request is made for the inspection of public records, the State agency seeking to deny disclosure has the burden of establishing a legally justifiable reason for the non-disclosure. Section 10-613 provides that, “[e]xcept as otherwise provided by law, a custodian shall permit a person . . . to inspect any public record at any reasonable time,” and § 10-623(b)(2)(i) expressly requires that, in any judicial proceeding to enforce compliance with the law, the agency “has the burden of sustaining a decision to deny inspection of a public record.” In *Faulk v. State’s Attorney for Harford Co.*, 299 Md. 493, 507, 474 A.2d 880, 887 (1984), we held that, in such a judicial proceeding, “the burden is on the public official denying the right to inspect to show that the requested records are within the scope of a statutory exemption.”

The simple answer to this case is that the Board has made no such showing. We need not get into the thicket of what would or might have sufficed, for no evidentiary foundation whatever was produced to warrant non-disclosure. The Board’s written motion to dismiss Ms. Fioretti’s complaint asserted only that “[a]t this time, disclosure of records to the Plaintiff would prejudice the Board’s pending investigation. If the Board determines, based

on its investigation, that formal disciplinary action is appropriate in this case and issues charges, Plaintiff would, at that time, be entitled to inspection of the Board's investigatory file as permitted by law." In an accompanying memorandum, the Board repeated its view that "disclosure of the requested documents to plaintiff at this time would jeopardize and hinder an ongoing investigation" and that disclosure "may, for example, reveal the identity of potential witnesses in the case before Board representatives have an opportunity to interview the witnesses or other individuals who have relevant information." The Board asserted further, in its memorandum, that "[i]t is important to note that as the investigation is ongoing, no charges have been issued against Plaintiff and no disciplinary action has been proposed against Plaintiff's license."

Up to that point, the "case" against Ms. Fioretti consisted solely of information that the Board received that, on one day -- April 16, 1997 -- Ms. Fioretti had practiced dental hygiene in Dr. Yazhary's office without the on-site supervision of a licensed dentist. That information was in the Board's hands by April 17 and was sufficient, in the Board's view, for it to order Ms. Fioretti to cease and desist any such activity and to sign a written statement agreeing to conduct herself in accordance with the law. There has never been any suggestion that Ms. Fioretti violated any other provision of the law or that her alleged practice without on-site supervision occurred at any time other than April 16 or at any place other than Dr. Yazhary's office. The motion and accompanying memorandum were filed on or about July 10, 1997 — some three months after the Board made its first and last communication to Ms. Fioretti regarding the matter. No hearing was ever held on the motion

(or on the complaint itself). On August 1, 1997, the court simply granted the motion and dismissed the complaint without assigning any reason. It summarily denied a motion to reconsider on September 12, 1997, also without the benefit of a hearing.<sup>2</sup> Other than the bald, unsupported statements contained in the Board's motion and memorandum, there is nothing -- absolutely nothing -- in this record to indicate what, if any, kind of investigation was ongoing, what kinds of records the Board had that might be relevant to any ongoing investigation, or how any documents or categories of documents might prejudice an investigation.<sup>3</sup>

An agency cannot satisfy its statutory burden of "sustaining a decision to deny inspection of a public record" by simply asserting that all of the records sought would prejudice an investigation, for, if it could do that, the Public Information Act would be meaningless. That is where this case begins and where it should end. If an agency's decision to deny inspection of a public record is challenged in court, the agency must produce persuasive evidence of some kind to establish that the requested documents are legally shielded — that they fall within one of the statutory exceptions to the general

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<sup>2</sup> As neither the Board nor Ms. Fioretti requested a hearing on either the motion to dismiss or the motion to reconsider, the court was not obliged to hold a hearing on either motion. The problem, thus, is not specifically the lack of a hearing but the failure of the Board to establish a factual foundation for its assertion that disclosure would prejudice an on-going investigation.

<sup>3</sup> The Board continued to raise the prospect of prejudice to an ongoing investigation at oral argument in this Court, on June 9, 1998 — 14 months after it sent its one and only letter to Ms. Fioretti. It gave us no more basis for that prospect than it gave the Circuit Court.

requirement of disclosure. The nature and quantum of that evidence, and whether it should be subjected to *in camera* inspection by the court, may well depend on the circumstances, but we need not address the specifics of that in this case, as no evidence, of any kind, was produced by the Board. I would hold that, even if the documents sought qualify as an investigatory file compiled for a law enforcement or prosecution purpose, within the meaning of § 10-618(f)(1)(ii), the Board failed, as a matter of law, to sustain its burden of showing that disclosure of the documents would prejudice an investigation under § 10-618(f)(2)(vi). Given that failure, I would direct that the Circuit Court order the requested disclosure.

Judges Rodowsky and Raker have authorized me to state that they concur with the views expressed herein.