

Lepore, Theresa (CAD)

From: Whitfield Larrabee [REDACTED]
Sent: Saturday, March 9, 2019 9:04 AM
To: MCADProRegs (CAD)
Cc: [REDACTED]
Subject: Comment in Proposed Rule 1.21(1)

Dear MCAD Working Group:

This is a comment on proposed procedural rule 1.21(1):

This rule provides:

"(1) Case Information Available to the Public. The complaint and the investigative file in every charge under investigation shall be confidential and exempt from public disclosure pursuant to M.G.L. c.151B §5 and . Post-determination, the complaint, the investigative disposition and the official record following issuance of the hearing decision shall be available to the public, subject to 804 CMR 1.21(3)."

There is some ambiguity in the rule as to whether you intend to make complaints public at the post-determination point or following the issuance of a hearing decision. There is also some ambiguity in your use of the word complaint rather than charge of discrimination in the regulation, or "charge of complaint."

It would be prudent for the MCAD to await the Appeals Court's decision in the case of J. Whitfield Larrabee v. MCAD, No. 2018-P-0464.

This case will likely resolve whether or not complaints are exempt from public disclosure under M.G.L. c.151B §5 and M.G.L. c. 4 §7 cl. 26(f) as asserted in the regulation. A decision against MCAD would tend to invalidate this proposed regulation.

As I have asserted in the case, complaints in their entirety are not generally exempt under M.G.L. c. 4 §7 cl. 26(a), 26(c) or 26(f).

The Boston Globe, other news media, and many other members of the public have a right to access complaints and a right to know about the activities of the MCAD prior to the investigative disposition. The proposed rule could allow the MCAD to operate in secrecy without public oversight. The rule would conceal these complaints from the public for years in many cases. There are many complaints concerning governmental entities. The public has a compelling need to know about alleged discrimination occurring in municipal, state and other government agencies close in time to when it is occurring. In some instances, the MCAD itself has been subject to discrimination complaints. It is improper, in violation of our public records law, and unconstitutional for the MCAD to promulgate a regulation that conceals most of its activities from the public for long periods of time as is the aim of section 1.21(1). It hampers the proper functioning of our democracy and of the press.

For at least 15 years beginning in 1999, the MCAD allowed public access to complaints/charges of discrimination without restriction. The MCAD carried out its activities during this time period without any difficulty caused by allowing public access.

The proposed rule is anti-democratic & promotes a lack of public oversight of the MCAD and other governmental agencies. It prevents complainants from being able to easily request and identify other instances of discrimination involving respondents. **Concealing allegations of discrimination results in a proliferation of discrimination because it causes discrimination to be swept under the rug.** As the #MeToo movement has shown, when victims of sexual harassment and other abuse become aware that other individuals have made complaints, it encourages others to come forward. The MCAD's action in concealing complaints from the public interferes with this process and hampers the ability of victims of discrimination to identify other similarly situated individuals.

Most court litigation involving discrimination occurs in our courts and is handled by private attorneys. The rule limits the access of pro se complainants to private attorneys who might offer to represent complainants if they were aware of the complaints prior to investigative disposition. The reality is that the MCAD is not the center of the universe when it comes

to combating discrimination. It's an understaffed bureaucracy with a huge backlog. Rather than helping to eradicate unlawful discrimination, as is the MCAD's mission, the current practice and proposed rule will allow discrimination to proliferate to a greater degree than it otherwise would.

The proposed rule demonstrates a staggering degree of bureaucratic myopia. The commissioners who enacted current rule 804 CMR 1.04(4) showed wisdom and foresight. The proposed change to the rule is unwise, unnecessary and ill considered.

Sincerely,

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