

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N2-20-16
Baltimore, Maryland 21244-1850



Office of Strategic Operations and Regulatory Affairs / Openness, Transparency & Accountability Group
February 26, 2013

Refer to: FOIA Control Number 0307 2012 7082
Legal Case: 0:12-cv-03065-JRT-TNL \ Public Record Media, LLC v.
U.S. Department of Health and Human Services

Via Overnight Mail

Mr. Matt Ehling
Public Record Media, LLC
2375 University Avenue West
Suite 200
Saint Paul, Minnesota 55114

Dear Mr. Ehling:

This letter is CMS' second interim response to your February 22, 2012 Freedom of Information Act (FOIA) request and your subsequent April 23, 2012 administrative appeal, which you submitted to the Centers for Medicare & Medicaid Services (CMS). Within your request, you sought the following agency records:

Any and all memoranda, correspondence, or communications, in paper or electronic form, between employees or official of CMS, and Minnesota State Senator John Marty;

Any and all memoranda, correspondence, or communications, in paper or electronic form, between employees and/or officials of CMS related to Minnesota State Senator John Marty;

Any and all memoranda, correspondence, or communications, in paper or electronic form, between employees and/or officials of CMS, produced between January 1, 2011 and February 1, 2012, related to determinations made by your agency about Minnesota's 1115 Medicaid waiver status.

In our first response of January 22, 2013, we fully released approximately 20 megabytes of electronic files, which was the equivalent of approximately 592 pages of printed records. For this second response, we have reviewed an additional 2,694 pages of responsive records. Based upon a careful review of these records, the disposition of these materials is as follows:

- Seven hundred, twenty-one (721) pages are being released to you in full;
- Four hundred, forty-eight (448) pages are being partially released to you with redactions under FOIA Exemption 5 (5 U.S.C. § 552(b)(5));
- Two (2) pages are being partially released to you with redactions under FOIA Exemption 6 (5 U.S.C. § 552(b)(6));
- One thousand, five hundred, twenty-three (1,523) pages are being fully withheld under Exemption 5 (5 U.S.C. § 552(b)(5))

Exemption 5: This Exemption protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Amongst the several bases upon which records may be withheld under Exemption 5, the deliberative process privilege applies to the materials withheld and redacted in this case. To meet the fundamental requirements to invoke the deliberative process privilege, the documents must be predecisional, i.e., “antecedent to the adoption of an agency policy” and must be deliberative, i.e., “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.”

The deliberative process privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making process of the agency. The general purpose of the deliberative process privilege of Exemption 5 is to “prevent injury to the quality of agency decisions”, “to encourage open, frank discussions on matters of policy between subordinates and superiors” (thus preserving free and candid internal dialogue leading to agency decision making), and “to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action.” The records withheld under this Exemption contained draft letters, other unfinalized draft documents, and internal agency discussions and deliberative commentary, regarding matters upon which CMS sought input from agency staff prior to a final action. In particular, this compilation of records contained many draft versions of a document pertaining to the waiver application process (the Special Terms and Conditions (STC’s)), which ranged from 40 pages to approximately 50 pages in the various versions which were circulated within the agency, prior to issuance of a final document. Please note we are releasing all final documents to you. Regarding the documents which we are providing you in a redacted form, we have endeavored to release the segregable factual information contained within those records.

Exemption 6: FOIA Exemption 6 permits a federal agency to withhold information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” In analyzing these records, I find they meet this threshold requirement of the Exemption.

The United States Supreme Court has held that Congress intended the term "similar files" to be interpreted broadly, rather than narrowly (*United States Department of State v. Washington Post Co*, 456 U.S. 595 (1982)). The Court stated that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information" and opined that information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. When a privacy interest is found to exist, the public interest in disclosure of the information, if existent, must be examined and weighed against the privacy interest in nondisclosure.

In this case, Exemption 6 is being invoked to protect certain personal information contained within these records, which pertains to named individuals. Specifically, we have redacted what appear to be the personal cell phone number of an individual and the personal e-mail address of another. In examining this information, I find that the release of this information would not serve to enhance or increase the public understanding of government functions, and would constitute an unwarranted invasion of these individuals' privacy, and is thus appropriately withheld under Exemption 6.

A CD containing the records being released to you is enclosed, which contains approximately 54 megabytes of data, housed in 25 subject matter folders. We are continuing to process your request, and are currently reviewing the remaining responsive records provided by the program area.

If you have any further questions regarding this interim response, or wish to further discuss your FOIA request, you may contact either Christopher Hammond in the Office of the General Counsel, U.S. Department of Health and Human Services at [REDACTED] or [REDACTED], or Ann Bildtsen, Assistant U.S. Attorney, U.S. Department of Justice at [REDACTED] or [REDACTED].

We appreciate your time and cooperation in this matter.

Sincerely yours,



Michael S. Marquis
Director
Division of Freedom of Information

Enclosures

cc: Jonathan T. Haines, Esq.
Christopher Hammond, Esq. (via email)