

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
March 28, 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' third and final 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 officials 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 11-15 Medicaid waiver status.

In our prior two responses of January 22, 2013 and February 26, 2013, we released approximately one thousand, seven hundred, sixty-three (1,763) pages of records to you, disclosing one thousand, three hundred, thirteen (1,313) pages in full, and four hundred, fifty (450) pages in part. For this final response, we have reviewed the remaining eight hundred, thirty-seven (837) pages of responsive records and also an Excel spreadsheet. That spreadsheet is approximately three (3) to six (6) pages, depending upon how the record is formatted and printed.

Based upon a careful review of these records, the disposition of these materials is as follows:

- The aforementioned spreadsheet is being released to you in full;
- Of the eight hundred, thirty-seven pages (837) contained in the enclosed PDF file, two hundred, eighty-four (284) pages are being released to you in full;
- One hundred, ninety-five (195) pages are being partially released to you with redactions under FOIA Exemption 5 (5 U.S.C. § 552(b)(5));
- Three (3) pages are being partially released to you with redactions under both FOIA Exemptions 5 and 6 (5 U.S.C. § 552(b)(5) and (b)(6));
- One (1) page is being partially released to you with redactions under Exemption 6 (5 U.S.C. § 552(b)(6));
- Three hundred, fifty-four (354) 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, both the deliberative process privilege and the attorney-client privilege apply 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 records withheld under the deliberative process privilege contain numerous draft letters, other unfinalized draft documents, internal agency discussions and deliberative commentary, regarding matters upon which CMS sought input from agency staff prior to a final action. The majority of the pages which CMS fully withheld under Exemption 5 are various draft versions of the Special Terms and Conditions document, which was circulated within the agency prior to issuance of the final document.

The attorney-client privilege protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” Within these records are communications between the agency’s Office of the General Counsel and CMS staff, within which CMS sought advice from its legal advisors. Those records have been redacted under both the attorney-client privilege and the deliberative process privilege.

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 numbers of individuals and a reference to another individual as a possible whistleblower. In examining this information, I find that the release of this information 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. Please note that on Bates-stamped page 109, there is the annotation “REDACTED” and several lines have been blacked-out on this page. Please be advised that this document was not created by CMS, but was provided to CMS by an outside party in this redacted state.

If you have any further questions regarding this final 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)