

1984 S.C. Op. Atty. Gen. 195 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-79, 1984 WL 159886

Office of the Attorney General

State of South Carolina

Opinion No. 84-79

July 20, 1984

*1 James L. Solomon, Jr.
Commissioner
South Carolina Department of Social Services
Post Office Box 1520
Columbia, South Carolina 29202

Dear Commissioner Solomon:

You have asked the opinion of this Office on two questions:

1. Can the South Carolina Department of Social Services, upon request, release copies of cost reports filed by provider nursing homes under Title XIX of the Social Security Act (Medicaid), without violating any constitutional right of privacy or property right of a Provider?
2. Can the cost reports be released to the general public, upon request, within the terms of the South Carolina Freedom of Information Act, [Section 30-4-10 et seq., Code of Laws of South Carolina \(1983\) Cum.Supp.](#)?)

Based upon the following discussion, it is the opinion of this Office that such cost reports may be released to the public without violating either the state or federal Freedom of Information Acts, the privacy right, or the property right of a provider of nursing home services.

In response to your first question, several federal courts have examined the regulation requiring the release of cost reports, the federal Freedom of Information Act, and various privacy and property considerations to conclude that providers' cost reports should be made public upon request. The Commissioner of Social Security, pursuant to Section 1106 of the Social Security Act ([42 U.S.C. § 1306](#)) has promulgated the following regulation, 20 C.F.R. § 422.435, which states in part:

The following shall be made available to the public under the conditions specified:

- (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1815 of the Act to enable the Secretary to determine amounts due such providers.

This regulation has been upheld against contentions that such release would violate the federal Freedom of Information Act (particularly [5 U.S.C. § 552\(b\)\(4\)](#)), the Trade Secrets Act ([18 U.S.C. § 1905](#)), and further against arguments that the regulation is arbitrary, capricious, and an abuse of discretion. See [St. Joseph's Hospital Health Center v. Blue Cross of Central New York, Inc.](#), 489 F.Supp. 1052 (N.D.N.Y. 1979); [United States v. Collins](#), 596 F.2d 166 (6th Cir. 1979); [St. Michael's Convalescent Hospital v. State of California](#), 643 F.2d 1369 (9th Cir. 1981); [Parkridge Hospital, Inc. v. Califano](#), 625 F.2d 719 (6th Cir. 1980); [Westchester General Hospital, Inc. v. Califano](#), 464 F.Supp. 236 (M.D. Fla. 1979); [St. Mary's Hospital, Inc. v. Califano](#), 462 F.Supp. 315 (S.D. Fla. 1978); and [Doctor's Hospital of Sarasota, Inc. v. Califano](#), 455 F.Supp. 476 (M.D. Fla. 1978).

Several of the above-cited cases considered and rejected the argument that privacy would be violated by release of the cost reports. The federal Privacy Act, 5 U.S.C. § 552a, was found in *St. Michael's Convalescent Hospital*, *supra*, to apply only to records of individuals. The court there found no constitutional privacy claim and stated that corporations and sole proprietors lack standing to raise a claim under the Privacy Act. In concluding that there is no cognizable constitutional right of privacy implicated in the disclosure of cost reports, the court applied the following reasoning from *Paul v. Davis*, 424 U.S. 693, 712–713, 96 S.Ct. 1155, 1166, 47 L.Ed. 405 (1976):

*2 'While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power. . . . Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. . . . And our other 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe [v. Wade]* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in *Palko v. Connecticut* . . . The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

'Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.'

643 F.2d at 1375. We believe that a South Carolina court would find this reasoning persuasive and permit the disclosure of the cost reports.

As to property rights, the courts have generally considered trade secrets and the Trade Secrets Act and generally rejected arguments that trade secrets would be disclosed to competitors. That Act, at 18 U.S.C. § 1905, would forbid a government employee from disclosing to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . or [any] report or record made to or filed with, such department . . . which information concerns or relates to the secrets, . . . operations, . . . or . . . confidential statistical data, amount or source of any income, profits, losses, or expenditures of any . . . corporation . . .

The court in *St. Joseph's Hospital Health Center*, *supra*, found that the regulation authorizing disclosure of cost reports, 20 C.F.R. § 422.435(c), had been properly promulgated according to the standards set by the Court in *Chrysler Corporation v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979), as is required by the Trade Secrets Act to provide the authorization necessary to exempt an otherwise illegal disclosure under the Trade Secrets Act, and thus rejected the argument that disclosure of case reports would violate property rights by revealing trade secrets of the providers.¹

*3 It must be noted that not all courts considering these issues have been in accordance with the decisions cited above. The courts in at least three instances have enjoined the appropriate agency from releasing cost reports of nursing home providers: *Humana of Virginia, Inc. v. Blue Cross of Virginia*, 455 F.Supp. 1174 (E.D.Va. 1974); *Parkridge Hospital, Inc. v. Califano*, 430 F.Supp. 1093 (E.D. Tenn. 1977), vacated 625 F.2d 719 (6th Cir. 1980), *supra*; and *McCoy v. Weinberger*, 386 F.Supp. 504 (W.D. Ky. 1974). It should be noted that these cases were decided prior to *Chrysler Corporation v. Brown*, *supra*, and that these decisions are not now regarded as persuasive authority on the issue of disclosing cost reports. *St. Joseph's Hospital Health Center*, *supra*, 489 F.Supp. at 1056, footnote 6.

Therefore, as to your first question, it is the opinion of this Office that the South Carolina Department of Social Services can, upon request, disclose cost reports filed by provider nursing homes under Title XIX of the Social Security Act (Medicaid) without violating any constitutional right of privacy or property right of a provider.

Your second question relates to the disclosure, upon request, of the cost reports under South Carolina's Freedom of Information Act, [Section 30-4-10 et seq.](#) Unquestionably, this Act would apply to an agency such as the State Department of Social Services and records maintained by that agency (to the extent not otherwise declared confidential by statute). [Op. Atty. Gen.](#) dated May 25, 1984. This Office has cited on numerous occasions the purpose of the Act and the fact that exemptions from disclosure are to be construed narrowly. [Ops. Atty. Gen.](#) dated February 22, 1984 and August 8, 1983. The only possible exemption under which cost reports could conceivably fall would be in [Section 30-4-40\(a\)\(2\) of the Code](#), which exempts '[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy, including, but not limited to, information as to gross receipts contained in applications for business licenses.' As has already been discussed, other courts have not found the disclosure of cost reports to violate a right of privacy; moreover, in construing Ohio's Privacy Act, similar to this State's Freedom of Information Act, the court in [United States v. Collins, supra](#), stated that the disclosure of cost reports would not violate Ohio's Act since the reports were financial and not personal in nature. Following the reasoning of these several court decisions, it is very likely that a court in this State would order the disclosure of cost reports under the Freedom of Information Act.

While the Supreme Court of South Carolina has not ruled on the issue, we believe that our court would find persuasive the reasoning of the Iowa Court of Appeals and thus allow disclosure of the cost reports, notwithstanding [Section 30-4-40\(a\)\(2\)](#). That Court, in [Craigmont Care Center v. Department of Social Services, — Iowa App. —, 325 N.W.2d 918 \(1982\)](#), in considering cost reports submitted by providers of intermediate-level nursing care facilities to the Iowa Department of Social Services to qualify with that agency for payments, which providers received Title XIX (Medicaid) funds, decided that strong public interests would permit disclosure of cost reports under a statute similar to this State's Freedom of Information Act. The Iowa Court cited the public's interest in knowing the cost of care for Medicaid recipients residing in nursing homes and also noted the magnitude of the nursing home industry, the number of people affected by the industry, and the tax dollars used to support the industry, stating that the public interest in the free flow of information about the nursing home industry overshadowed, for example, any advantage competitors might gain from access to cost reports.

*4 Thus, in response to your second question, it is the opinion of this Office that cost reports could be released to the general public, upon request, within the terms of the South Carolina Freedom of Information Act.

We would further point out that the views expressed herein by this Office appear to be in accord with the opinions of the Attorneys General of the States of Idaho and Ohio. Digests of their opinions, found in the CCH Medicare and Medicaid Guide at paragraphs 30,844 and 31,556 respectively, are enclosed for your review.

We hope that we have satisfactorily responded to your questions. If you need clarification or additional information, please advise us.

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 While such disclosure of a provider's cost reports would be allowed to competing nursing home providers, the court in [Parkridge Hospital, Inc., supra](#), pointed out that the provider would be able to obtain the cost reports of his competitors in return. Thus, while a provider must share his 'secrets,' he may also gain by learning the 'secrets' of his competitors.

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