



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 18, 2011

PUBLIC ACCESS OPINION No. 11-005
(Request for Review 2011 PAC 11946)

FREEDOM OF INFORMATION ACT:

Section 7(1)(s) Exemption – Nerve Conduction Velocity
Test results obtained with respect to workers' compensation
claims are not exempt from disclosure

Mr. Robert Morgan
Deputy General Counsel
Department of Central Management Services
Robert.Morgan@illinois.gov

Dear Mr. Morgan:

This binding opinion is issued pursuant to Section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2009 Supp.)).

BACKGROUND

On January 3, 2011, Mr. George Pawlaczyk, a staff reporter for the *Belleville News-Democrat (BND)*, submitted a request via e-mail to the Department of Central Management Services (CMS) seeking copies of a sample of the records showing the results of Nerve Conduction Velocity (NCV) tests that were conducted as part of State employees' claims for workers' compensation in 2009.¹ Specifically, Mr. Pawlaczyk sought copies of approximately 50 NCV test results that were conducted in connection with settled workers' compensation claims for repetitive trauma injuries by employees of the Menard Correctional Center in 2009. In a supplemental e-mail on the same date, Mr. Pawlaczyk narrowed and clarified his request by stating: "Why don't we agree right here in this message to the redaction of any personal identifier

¹ E-mail from George Pawlaczyk, *BND*, to Sunny Clark, FOIA Officer, CMS (January 3, 2011 at 11:17 am).

Mr. Robert Morgan
April 18, 2011
Page 2

on these tests that would identify the patient. Name, SSN, address, etc., can be eliminated. We are primarily interested in the test results and the written reports of the physicians who conducted the tests. And the cost of the test."²

On January 5, 2011, CMS sent a denial letter to Mr. Pawlaczyk asserting that the NCV test results are exempt from disclosure pursuant to Section 7(1)(s) of FOIA (5 ILCS 140/7(1)(s) (West 2009 Supp.)), which exempts "[a]ny and all proprietary information and records related to the operation of an intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool. Insurance or self insurance (including any intergovernmental risk management association or self insurance pool) claims, loss or risk management information, records, data, advice or communications."

On January 19, 2011, this Office received Mr. Pawlaczyk's Request for Review of CMS' denial of his FOIA request.³ This Office initiated further review of this matter on January 24, 2011.⁴ As requested, CMS provided this Office with its analysis of the applicability of the Section 7(1)(s) exemption and with a redacted sample of a NCV test result on February 3, 2011.⁵ In its response letter, CMS argued:

The requested tests are maintained by CMS only in conjunction with the operation of the State of Illinois Risk Management Program. The plain language of [Section 7(1)(s)] leaves no question or ambiguity regarding the legislative intent to protect any and all risk management records from FOIA disclosure.

² E-mail from George Pawlaczyk, *BND*, to Sunny Clark, FOIA Officer, CMS (January 3, 2011 at 4:18 pm). CMS has not suggested that the disclosure of these records with personal identifiers redacted would reveal any medical information regarding individual test subjects that would be exempt under Section 7(1)(b). See *Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill.2d 390 (2006).

³ Letter from George Pawlaczyk, *BND*, to the Public Access Counselor, Office of the Attorney General (January 18, 2011).

⁴ Letter from Matthew C. Rogina, Assistant Public Access Counselor, to Sunny Clark, FOIA Officer, CMS (January 24, 2011).

⁵ Letter from Bob Morgan, Deputy General Counsel – Employee Benefits, CMS, to Matthew Rogina, Assistant Public Access Counselor (February 3, 2011). CMS provided this Office with copies of additional test results on March 16, 2011. CMS redacted all of the records that it provided to this Office to remove any information identifying the name of the State employee and the physician involved.

CMS asserted that Section 7(1)(s) "allows a public agency to deny any and all proprietary information, and any and all records related to the operation of the State of Illinois Risk Management program." (Emphasis in original.)

On February 20, 2011, Mr. Pawlaczyk responded to CMS' letter and argued that the NCV test results are "not 'proprietary' in nature. Because they are connected to Workers' Compensation settlements that are already available as public records, how can it be argued that the release of these records could in any way jeopardize or adversely affect the operation of a risk management pool?"⁶ The newspaper further argued that "[i]t is inherent in the FOIA statute that records that may show whether the expenditure of public funds was proper, must be open to public scrutiny. In this case, there is reason to suspect th[at] some of the tests, when reviewed by independent medical experts, may show that no reason for corrective surgery existed and therefore no expenditure of public funds was necessary to pay for Workers' Compensation settlements." Mr. Pawlaczyk provided this Office with an additional response to CMS' letter on February 21, 2011.⁷

CMS supplemented its response on March 1, 2011, and stated that the NCV test results "are strictly a medical record used by CMS in the adjudication, evaluation, and settlement of a risk management claim" and that the "records are collected solely for the purpose of the operation of the self-insurance Workers' Compensation pool as described in 7(1)(s)".⁸ Further, CMS argued that the records are "collected only for the internal use of the adjudication of workers' compensation claims with the Risk Management Division of CMS Bureau of Benefits." CMS also asserted that the NCV test results "are in the possession and custody of the Illinois Department of Insurance pursuant to an ongoing investigation. As such, CMS has no responsive records at this time."⁹

⁶ Letter from George Pawlaczyk and Beth Hundsdorfer, *BND*, to Matthew Rogina, Assistant Public Access Counselor, Office of the Attorney General (February 20, 2011).

⁷ E-mail from George Pawlaczyk and Beth Hundsdorfer, *BND*, to Matthew Rogina, Assistant Public Access Counselor, Office of the Attorney General (February 21, 2011 at 3:38 pm).

⁸ Letter from Bob Morgan, Deputy General Counsel – Benefits, CMS, to Matthew Rogina, Assistant Public Access Counselor, Office of the Attorney General (March 1, 2011).

⁹ We note that the fact that another State agency has temporary custody of these records does not relieve CMS from arranging to obtain copies or otherwise producing the records pursuant to a FOIA request.

ANALYSIS

Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2009 Supp.)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." Under Section 1.2 of FOIA (5 ILCS 140/1.2) (West 2009 Supp.)), "[a]ll records in the custody of a public body are presumed to be open to inspection and copying." In keeping with this presumption, the exemptions to disclosure are to be narrowly construed. *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989). Section 1.2 further requires that "[a]ny public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt."

CMS asserts that under Section 7(1)(s) it may withhold "any and all records related to the operation of the State of Illinois Risk Management program." Because the NCV test results are submitted to support State employees' claims for recovery from the workers' compensation program which its Risk Management Division administers, CMS argues that Section 7(1)(s) applies. Specifically, CMS contends that the NCV test results are exempt from disclosure both as proprietary information related to a risk management association under the first sentence of Section 7(1)(s), and also as claims, records and data under that section's second sentence.

CMS's reliance on the first sentence of Section 7(1)(s) to withhold these records, however, is clearly erroneous. The first sentence of Section 7(1)(s) exempts from disclosure "proprietary information and records related to the operation of an *intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool*." None of these terms is applicable to the State's worker's compensation self-insurance program.

Although CMS refers to the program at one point as an "intergovernmental risk management association, funded through a self insurance pool,"¹⁰ it is not an "intergovernmental" program at all. The program covers only workers' compensation claims against State agencies and State universities; it is purely intragovernmental in nature. Further, although it does constitute a "self-insurance" program, it is not a "pool" within the common meaning of that term: "an aggregation usu. made by a group and used mutually for the benefit of all." Webster's Third

¹⁰Letter from Bob Morgan, Deputy General Counsel – Employee Benefits, CMS, to Matthew Rogina, Assistant Public Access Counselor, Office of the Attorney General (February 3, 2011).

Mr. Robert Morgan

April 18, 2011

Page 5

New International Dictionary at 1764 (1981). In fact, claims are paid under the program from the Workers' Compensation Revolving Fund (30 ILCS 105/6z-64 (West 2008)). Other than Federal funds received by CMS as a result of expenditures from the Fund, and amounts recovered through subrogation in workers' compensation and workers' occupational disease cases, the Fund is made up of State moneys and is not a pool of funds from multiple sources. Accordingly, the NCV test results are not exempt from disclosure under the first sentence of Section 7(1)(s) of FOIA.

Additionally, CMS asserted that the NCV test results are exempt from disclosure as "insurance or self insurance * * * claims, loss or risk management information, records, data, advice or communications" under the second sentence of Section 7(1)(s). As explained in Public Access Opinion No. 11-004, issued April 15, 2011, a copy of which is enclosed, Section 7(1)(s) does not exempt from disclosure information relating to individual "claims" or "losses." Rather, this provision exempts from disclosure only proprietary "claims management," "loss management" and "risk management" information such as the policies, procedures and practices that a risk management association or self-insurance pool adopts to manage its claims, loss and risk exposure, the release of which could disclose sensitive business policies or result in an unfair advantage to persons dealing with the entity.

Our review of the test results confirms that these records consist exclusively of de-identified medical findings about State employees who filed workers' compensation claims with the State of Illinois. CMS has not demonstrated how these anonymous test results constitute proprietary information that relates to the operation of CMS' risk management program. The records do not pertain to the policies, procedures and practices that CMS has adopted to manage its claims, loss and risk exposure, or contain any other data that might disclose confidential operational information.

Through CMS, the State annually spends tens of millions of dollars on workers' compensation claims for State employees. Following CMS' reasoning, all of the information that would give insight into how CMS evaluated the claims and arrived at its decisions to settle claims and make payments would be shielded from public review. CMS' arguments for a broad exemption for all records relating to the workers' compensation program are not only unsupported by the language on Section 7(1)(s), but, if successful, would frustrate the purpose of Section 2.5 of FOIA (5 ILCS 140/2.5 (West 2009 Supp.)), which clearly provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public."

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

1) On January 3, 2011, Mr. George Pawlaczyk submitted a FOIA request to Central Management Services seeking copies of a sample of the records showing the results of Nerve Conduction Velocity tests that were conducted as part of State employees' claims for workers' compensation in 2009. Mr. Pawlaczyk sought copies of approximately 50 NCV test results that were conducted in connection with settled workers compensation claims for repetitive trauma injuries by employees of Menard Correctional Center in 2009.

2) On January 5, 2011, CMS sent a denial letter to the *BND* asserting that the NCV test results Mr. Pawlaczyk requested are exempt from disclosure pursuant to Section 7(1)(s) of FOIA.

3) On January 19, 2011, this Office received the *BND's* Request for Review of CMS' denial of its FOIA request.

4) Mr. Pawlaczyk's Request for Review was timely filed and otherwise complies with Section 9.5 of FOIA (5 ILCS 140/9.5 (West 2009 Supp.)). Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the records at issue.

5) CMS has not produced to Mr. Pawlaczyk for inspection or copying the requested NCV test results.

6) CMS, as a matter of law, has denied Mr. Pawlaczyk's FOIA request by failing to furnish a copy of the NVC test results within the response period set forth in Section 3(d) of FOIA (5 ILCS 140/3(d) (West 2009 Supp.)).

7) CMS has not met its burden of demonstrating that the NCV test results are exempt from disclosure under Section 7(1)(s) of FOIA.

8) The NCV test results requested by Mr. Pawlaczyk are public records that CMS is required to produce to Mr. Pawlaczyk for inspection and copying under Section 3 of FOIA (5 ILCS 140/3 (West 2009 Supp.)).

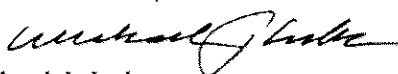
Mr. Robert Morgan
April 18, 2011
Page 7

In conclusion, it is the opinion of the Attorney General that CMS has, in violation of Section 3 of the Freedom of Information Act, improperly denied Mr. Pawlaczyk's request for access to and/or a copy of a sample of 50 NCV test results. Accordingly, CMS is directed to take immediate and appropriate action to comply with this opinion by furnishing the requested NCV test results to Mr. Pawlaczyk. In accordance with Mr. Pawlaczyk's stipulation, the names of the test subjects, their social security numbers and home addresses, as well as any other "private information" as defined in Section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2009 Supp.)), may be redacted.¹¹

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2008). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. George Pawlaczyk as defendants. *See* 5 ILCS 140/11.5 (West 2009 Supp.).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General

cc: Mr. George Pawlaczyk
Belleville News-Democrat
gpawlaczyk@bnd.com

¹¹ In providing the documents to this Office, CMS redacted the names of the physicians who evaluated and signed the test results. CMS has not provided any basis for redaction of physicians' names and we do not find a basis to do so.