

Public Records, names of abused aged/disabled adults

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Subject:

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Mr. John S. Slye
General Counsel, Department of
Health and Rehabilitative Services
1317 Winewood Boulevard
Tallahassee, Florida 2399-0700

Dear Mr. Slye:

On behalf of the Secretary of the Department of Health and Rehabilitative Services (HRS), you ask whether s. 415.107(1), F.S., prevents the Department of Health and Rehabilitative Services from releasing the names of aged persons and disabled adults who have died as a result of suspected abuse when such names are contained in an Inspector General's report.

Based upon the following, it appears that the names of the decedents contained in the Inspector General's report which assesses whether HRS procedures have been properly followed and the effectiveness of such procedures are not confidential or exempt from disclosure pursuant to s. 415.107(1), F.S.

You state that based upon a complaint involving the deaths of three elderly people in which abuse was suspected, HRS conducted a Florida Protective Services System investigation. According to your letter, a separate investigation was also instituted by the HRS Inspector General (IG) which has resulted in a draft report. This office has also been advised that HRS has instituted a third investigation which will result in a death review report. Your inquiry, however, concerns access to the names of the decedents contained in the IG report and attachments.[1]

You have advised this office that a copy of the draft IG report was furnished pursuant to a public records request after the names of the decedents were removed. In addition, you state that the attachments to the report have been released with the exception of Attachment #2 which you state is a patient clinical report. Attachment #4 and #5, which you state are interviews with various HRS employees conducted by the IG staff were released with the names of the decedents deleted.

In the absence of a specific legislative exemption, investigative records are open to the public.[2] For example, s. 112.3189, F.S., the so-called Whistle-Blowers Act, provides an exemption for information received by an agency's inspector general or chief auditor under this section or s. 112.31895, F.S.

In 1993 the Legislature enacted a limited exception for investigatory records of an agency's

inspector general when the agency head certifies that such records require an exemption to protect the integrity of the investigation or to avoid unwarranted damage to an individual's good name or reputation. The exemption, however, exists only until the investigation ceases to be active, or until a report is provided to the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever occurs first.[3]

Moreover, a specific exemption for HRS's quality assurance reports was deleted in 1992. In 1991 the Florida Legislature amended s. 415.107, F.S., to provide an exemption from the disclosure provisions of Ch. 119, F.S., for HRS's quality assurance reports.[4] This exemption was repealed by the Legislature in 1992.[5] The staff analysis for the legislation states that by removing such exemption, these reports "would once again be available to the public." [6]

Accordingly, there does not appear to be an exemption for HRS's IG or quality assurance reports with the exception of that provided by s. 119.07(3)(dd), F.S.[7] The actions taken by the Legislature in recent years demonstrate an intent that these types of records be open for public inspection.

You refer, however, to provisions of s. 415.107(1), F.S.[8] Section 415.107(1)(a), F.S., provides for the confidentiality of records generated as a result of reports of abuse of an aged person or disabled adult. Paragraph (1)(b) of s. 415.107, F.S., authorizes that the release of such reports, except for information identifying individuals, when the aged person or disabled adult has died as a result of abuse or neglect.

Section 415.107(1)(b), F.S., thus, provides a method for opening those records made confidential pursuant to s. 415.107(1)(a) when a death has occurred. To read s. 415.107(1)(b) as encompassing an IG report which assesses whether procedures have been properly followed and the effectiveness of such procedures would mean that such a report would be confidential and could not be opened *unless* the aged person or disabled adult died or a person or organization obtains access through the courts pursuant to s. 119.07(7), F.S.

The purpose of an investigation and resulting report by the IG appears to be to determine whether procedures have been properly followed by HRS personnel and the effectiveness of such procedures. In contrast, s. 415.107(1), F.S., appears to be directed toward those records generated by HRS in investigating the report of abuse in order to protect the aged person or disabled adult. As noted above, HRS has instituted a protective services investigation, separate from the IG investigation.

Therefore, it appears that s. 415.107(1), F.S., does not require the department to delete the names of the decedents when contained in the IG's report or in Attachments 4 and 5, which you have advised this office are interviews conducted by the staff of the IG in pursuing its investigation.[9]

You state, however, that Attachment #2 is a patient clinical record. Pursuant to s. 394.459(9), F.S., the patient clinical record is confidential and exempt from s. 119.07(1), F.S., unless waived by express and informed consent by the patient or his or her guardian or, if the patient is deceased, by the patient's personal representative or by that family member who stand next in line of intestate succession. The statute further provides that the confidential status of the clinical

record shall not be lost by either the authorized or unauthorized disclosure to any person, organization or agency. Accordingly, if a patient's clinical record constitutes an attachment to the IG report, that patient's clinical record maintains its confidential status and may not be released except as authorized by statute.[10]

Sincerely,

Richard Doran
Assistant Deputy Attorney General

RD/tjw

[1] While your letter states that an ombudsman council initiated a complaint regarding the death of the aged person, this office has not been advised that the IG was acting as the agent or staff of the ombudsman council in conducting the investigation. See s. 400.0069, F.S., as amended by s. 6, Ch. 93-177, Laws of Florida, stating that HRS shall provide administrative support for each district ombudsman council staff within available resources until the Legislature appropriates funds for such administrative support; and s. 400.0077, F.S., as amended by s. 9, Ch. 93-177, Laws of Florida, which provides for the confidentiality of resident ombudsman council and for the names or identities of the complainants or residents involved in a complaint except as provided therein.

[2] See *generally* *Caswell v. Manhattan Fire and Marine Insurance Company*, 399 F.2d 417 (5th Cir. 1968); see *generally* *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979) (only the Legislature can create exemptions to the Public Records Law).

[3] See s. 4, Ch. 93-405, Laws of Florida, which creates s. 119.07(3)(dd), F.S., to provide:

"1. If certified pursuant to 2., an investigatory record of the Chief Inspector General within the Executive Office of the Governor or of the employee designated by an agency head as the agency inspector general under s. 112.3189 is exempt from the provisions of subsection (1) until the investigation ceases to be active, or a report detailing the investigation is provided to the Governor or the agency head, or 60 days from the inception of the investigation for which the record was made or received, whichever first occurs. Investigatory records are those records which are related to the investigation of an alleged, specific act or omission or other wrongdoing, with respect to an identifiable person or group of persons, based upon information compiled by the Chief Inspector General or by an agency inspector general, as named under the provisions of s. 112.3189, in the course of an investigation. An investigation is active if it is continuing with a reasonable, good faith anticipation of resolution and with reasonable dispatch.

2. The Governor, in the case of the Chief Inspector General, or agency head, in the case of an employee designated as the agency inspector general under s. 112.3189, may certify such investigatory records require an exemption to protect the integrity of the investigation or avoid unwarranted damage to an individual's good name or reputation. The certification shall specify the nature and purpose of the investigation and shall be kept with the exempt records and made

public when the records are made public.

3. The provisions of this paragraph do not apply to whistle-blower investigations conducted pursuant to the provisions of ss. 112.3187, 112.3188, 112.3189, and 112.31895."

[4] See Ch. 91-71, Laws of Florida, amending s. 415.107(3), F.S. 1991, to state in part that "[a] quality assurance report generated pursuant to s. 415.103(3)(a) may not be released to any person outside the department under any circumstances."

[5] See s. 43, Ch. 92-58, Laws of Florida.

[6] See Final Bill Analysis & Economic Impact Statement, Florida House of Representatives Committee on Health and Rehabilitative Services, on CS/HB 2379, passed as Ch. 92-58, Laws of Florida, dated March 25, 1992.

[7] *Cf.* The Tribune Company v. Florida Department of Health and Rehabilitative Services, 19 Med. L. Rptr. 1088, 1090 (13th Jud. Cir., Hillsborough Co., 1991), in which the circuit court stated that Inspector General reports, district death reviews and quality assurance reports "perform essentially the same function."

[8] Section 415.107(1), F.S., provides:

"(a) In order to protect the rights of the individual or other persons responsible for the welfare of an aged person or disabled adult, all records concerning reports of abuse, neglect, or exploitation of the aged person or disabled adult, including reports made to the central abuse registry and tracking system, and all records generated as a result of such reports shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by ss. 415.101-415.113.

(b) Except for information identifying individuals, all records involving the death of an aged person or disabled adult as a result of abuse or neglect, including reports to the central abuse registry and tracking system, and all records generated as a result of such reports, shall be released to the public within 10 days after completion of the investigation."

These exemptions are subject to the Open Government Sunset Review Act in accordance with s. 119.14.

[9] *Cf.* s. 415.103(2), F.S., providing that the autopsy report maintained by the medical examiner is not exempt pursuant to s. 415.107, F.S.; and AGO 90-103 in which this office concluded that to read s. 119.07(3)(h), F.S., which makes the identify of a victim of child abuse confidential, as exempting the identify of a victim of child abuse whose death results from such abuse from the Public Records Law would be inconsistent with s. 415.504(3), F.S., which makes such information public in the autopsy report.

[10] See AGO 91-10 stating that the Legislature has provided that clinical treatment records created under s. 394.459(9), F.S., retain their confidential status in the possession of the clerk of the court.