

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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ALABAMA MEDICAID AGENCY,)
)
Plaintiff,)
)
v.)
)
CENTERS FOR MEDICARE &)
MEDICAID SERVICES,)
)
Defendant.)

Case No. 2:08 CV 942 - MHT

THOMAS D. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

COMPLAINT FOR INJUNCTIVE RELIEF

The Alabama Medicaid Agency, by and through the Attorney General of Alabama, brings this action seeking disclosure of wrongfully withheld agency records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties thereto pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) because the Alabama Medicaid Agency's principal place of business lies within this district.

PARTIES

3. Plaintiff is the Alabama Medicaid Agency, on whose behalf the FOIA request at issue in this case was submitted. The Alabama Medicaid Agency is the "single State agency" responsible for administering the State's Medicaid Program pursuant to 42 U.S.C. § 1396a(a)(5). The Alabama Medicaid Agency's headquarters are located at 501 Dexter Avenue, Montgomery, Alabama 36103. The Attorney General, as the State of Alabama's chief legal officer, is statutorily authorized to initiate and maintain this action pursuant to Alabama Code § 36-15-12.

4. Defendant Centers for Medicare & Medicaid Services (“CMS”) is a federal agency within the Department of Health and Human Services. CMS is the federal agency from whom the Alabama Medicaid Agency sought agency records pursuant to FOIA. CMS’s headquarters are located at 7500 Security Boulevard, Baltimore, Maryland 21244. CMS is an “agency” within the meaning of 5 U.S.C. §§ 551(1) and 701(b)(1).

STATEMENT OF FACTS

5. On October 28, 2008, CMS issued a five-page “Dear State Health Official” letter, index number SHO #08-004, which was signed by Herb B. Kuhn in his capacity as Deputy Administrator of CMS and the Acting Director of CMS’s Center for Medicaid and State Operations.

6. On October 29, 2008, a FOIA request was submitted to CMS on behalf of the Alabama Medicaid Agency, requesting agency records related to the “Dear State Health Official” letter. Specifically, the Alabama Medicaid Agency’s FOIA request sought

[a]ll agency records related to, referenced in, or considered during development of the policies and content set forth in the “Dear State Health Official” letter dated October 28, 2008, index number SHO #08-004, signed by Herb B. Kuhn, Deputy Administrator of CMS and Acting Director, Center for Medicaid and State Operations.

A true and correct copy of the Alabama Medicaid Agency’s FOIA request is attached hereto as Exhibit A.

7. The Alabama Medicaid Agency’s FOIA request was sent to CMS’s Freedom of Information Group via facsimile. CMS guidance expressly provides that a FOIA request may be sent to the agency via facsimile. *See* Centers for Medicare & Medicaid Services, *Making a FOIA Request*, http://www.cms.hhs.gov/FOIA/02_requests.asp (last visited Nov. 24, 2008). The status report for the facsimile sent to CMS demonstrates that CMS’s Freedom of Information Group received the Alabama Medicaid Agency’s FOIA request on October 29, 2008.

8. Five days after the Alabama Medicaid Agency submitted its FOIA request to CMS, the State of Alabama filed suit against CMS and various other federal agencies and officials related to the requirements set forth in the October 28, 2008 “Dear State Health Official” letter. *See Alabama v. Centers for Medicare & Medicaid Servs.*, No. 2:08-cv-881-MEF (M.D. Ala. filed Nov. 3, 2008). The filing of that action did not divulge CMS of its legal responsibility to respond to the Alabama Medicaid Agency’s FOIA request.

9. FOIA provides that an agency must “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of [a FOIA] request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i). CMS received the Alabama Medicaid Agency’s FOIA request on October 29, 2008. Therefore, the twenty-day time limit for CMS to “determine . . . whether to comply with such request” expired on November 28, 2008.

10. Neither the Alabama Medicaid Agency nor its counsel has received a determination from CMS as to whether CMS will comply with the October 29, 2008 FOIA request.

CAUSE OF ACTION

VIOLATION OF THE FREEDOM OF INFORMATION ACT FOR IMPROPER WITHHOLDING OF AGENCY RECORDS

11. The Alabama Medicaid Agency repeats and realleges paragraphs 1-10.
12. The documents requested by the Alabama Medicaid Agency’s FOIA request constitute “agency records” subject to mandatory disclosure under FOIA.
13. CMS has improperly withheld the requested agency records from the Alabama Medicaid Agency, in violation of 5 U.S.C. § 552(a)(3)(A).

14. The Alabama Medicaid Agency has constructively exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

PRAYER FOR RELIEF

WHEREFORE, the Alabama Medicaid Agency prays that this Court:

- A. Provide for expeditious proceedings in this action;
- B. Order CMS to produce all agency records responsive to the Alabama Medicaid Agency's FOIA request by a date certain;
- C. Award the Alabama Medicaid Agency its costs and reasonable attorney's fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E), as amended by the Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525; and
- D. Grant such other relief as the Court deems just and proper.

Dated: December 1, 2008

Respectfully submitted,

TROY KING
ATTORNEY GENERAL
STATE OF ALABAMA

CHEAIRS M. PORTER
SPECIAL ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL

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**Motion for Admission to Practice Pro
Hac Vice Filed Contemporaneously
Herewith, Pursuant to M.D. Ala. LR 83.1(b)*