



COMMONWEALTH of VIRGINIA

Department of Medical Assistance Services

CYNTHIA B. JONES
DIRECTOR

February 16, 2016

SUITE 1300
600 EAST BROAD STREET
RICHMOND, VA 23219
804/786-7933
800/343-0834 (TDD)
www.dmas.virginia.gov

Maria J.K. Everett, Esq.
Executive Director
Virginia Freedom of Information Advisory Council
General Assembly Building
201 North 9th Street, Second Floor
Richmond, VA 23219

Dear Ms. Everett:

Thank you for allowing us the opportunity to comment on your letter of December 22, 2015, regarding the review of the Agency's Freedom of Information Act (FOIA) exemption(s) re: Proprietary Records and Trade Secrets.

I would also like to thank Alan Gernhardt for contacting Nancy Malczewski, the Department of Medical Assistance Services' (DMAS') FOIA Coordinator, and advising her to have someone represent DMAS on this much debated matter. At that meeting (I believe in August 2015), Ms. Malczewski and a representative from the Office of the Attorney General (OAG) represented DMAS. Ms. Malczewski explained the need to retain the exemption § 2.2-3705.3.4

"Records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1."

As she stated in that meeting, she has cited and used this exemption as follows:

1. When audits are being done and have not yet been completed, and the provider/client has not yet been notified of the findings, or has not had the opportunity to respond regarding any dollar amount that may be retracted or required repayment.
2. When there is an active appeal and documents relating to that appeal are being requested under FOIA.

Upon completion, the information would be available, except those that have been referred to the OAG for investigation.

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It was DMAS' understanding at that August meeting that the above exemption would be retained for DMAS. From the attachment you provided with your letter "Proprietary Records & Trade Secrets Exemptions (Current as of July 1, 2015), the above exemption has been eliminated. Could this be an error or simply an oversight? In any instance, DMAS strongly urges the FOIA Council to reinstate DMAS' exclusion under § 2.2-3705.3.

Under Federal regulations, DMAS is required to have an investigative and audit process that verifies the provision of services to Medicaid recipients. *See* 42 CFR §455.1. The exclusion at issue allows DMAS investigators to audit Medicaid providers' documentation without any hindrance. The loss of this exclusion would unduly interfere in DMAS' ability to properly investigate providers who fail to properly provide care to Medicaid recipients or maintain documentation by allowing providers to obtain investigator notes and communications prior to the issuance of an adverse action. By obtaining the investigator notes and communications, Medicaid providers will have the opportunity to circumvent the DMAS' investigation and audit process and interfere with DMAS' ability to verify the provision of services to Medicaid services.

If it was meant to be eliminated, we would like to make suggestions regarding the replacement of that wording in one of two code citations. You could modify and add the **bold and underlined wording to:**

II. Exemptions limited to A Specific Public Body

§2.2-3705.5. Exclusions to application of chapter; health and social services records.

4. Investigative notes; proprietary information not published, copyrighted or patented; information obtained from employee personnel records; personally identifiable information regarding residents, clients or other recipients of services; other correspondence and information furnished in confidence to the Department of Social Services in connection with an active investigation of an applicant or licensee pursuant to Chapters 17 (§ 63.2-1700 et seq.) and 18 (§ 63.2-1800 et seq.) of Title 63.2; **records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1;** and records and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 8:01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. However, nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supply information, or other individuals involved in the investigation."

After the Department of Social Services determines Medicaid eligibility, the client's information is placed in the Virginia Medicaid Management Information System. Placing DMAS' exemption in the above citation would further protect DMAS when also providing

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records to the Office of the Attorney General in connection with their investigations after DMAS has notified them of the possibility of fraud by a provider or a client.

Further, DMAS has also received complaints and allegations of fraud by providers and clients and would like to keep their identity from being disclosed.

Another suggestion would be to modify the following:

"II. Exemptions limited to A Specific Public Body

§2.2-3705.6. Exclusions to application of chapter, proprietary records and trade secrets.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1; records of active investigations being conducted by the Department of Medical Assistance Services pursuant to Chapter 10 (§ 32.1-323 et seq.) of Title 32.1; and records and information furnished to the Office of the Attorney General in connection with an investigation or litigation pursuant to Article 19.1 (§ 18:01-216.1 et seq.) of Chapter 3 of Title 8.01 and Chapter 9 (§ 32.1-310 et seq.) of Title 32.1. However nothing in this section shall prohibit disclosure of information from the records of completed investigations in a form that does not reveal the identity of complainants, persons supplying information, or other individuals involved in the investigation.

Thank you for the opportunity to provide specific exemption language regarding DMAS. If you have any questions, you may contact me directly at 804-225-2765 or my email address: craig.markva@dmas.virginia.gov . You can also contact Nancy Malczewski at 804-371-6391 or nancy.malczewski@dmas.virginia.gov .

Sincerely,



Craig Markva
Director, Communications, Legislation and
Administration

CM/njm

J:/FOIA/FOI Advisory Council