

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

NATIONAL SENIOR CITIZENS LAW CENTER )  
1101 14<sup>TH</sup> St., N.W., Suite 400 )  
Washington, D.C. 20005 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES )  
200 Independence Ave., S.W. )  
Washington, D.C. 20201 )  
 )  
 )  
Defendant. )  

---

C.A. No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff seeks production of agency records related to the use by nursing homes of “single-task workers,” *i.e.*, those individuals trained and qualified to perform only one function, such as feeding residents. The release of these records is mandated under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *as amended*.

2. Facilities that generally are known in the vernacular as “nursing homes” are called skilled nursing facilities in the Medicare law and nursing facilities in the Medicaid law. 42 U.S.C. §§ 1395i-3 (Medicare) and 1396r (Medicaid) (hereafter, collectively called nursing facilities).

3. On March 29, 2002, the defendant Secretary of the Department of Health and Human Services published a proposed regulation to allow nursing facilities to employ feeding assistants who would be trained only to feed facility residents. 67 Fed.Reg.15149 *et seq.* This proposed

regulation was a deviation from the Department's long-standing implementation of the relevant federal law, which permitted residents to be fed only by individuals meeting the federal standard for a "nurse aide." Federal nursing facility law requires that all nursing or "nursing-related" work be performed by licensed health professionals or certified nurse aides. 42 U.S.C. §§ 1395i-3(b)(5)(F), 1396r(b)(5)(F).

4. The proposed regulation was finalized as proposed on September 26, 2003, with an effective date of October 27, 2003. 68 Fed.Reg. 55528.

5. As is more fully set out below, on August 12, 2003, plaintiff sought documents related to the use by nursing facilities of single-task workers, but to date has received neither a response to that request nor a response to four follow-up telephone calls and a follow-up letter.

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

7. Plaintiff National Senior Citizens Law Center is a non-profit organization that advocates on behalf of individuals throughout the country, especially those with limited incomes, on issues affecting their health and economic security, which includes long term care issues.

Plaintiff is the requester of the withheld records, through its employee, Eric Carlson.

8. By letter mailed on August 12, 2003 to Lee Jackson, Freedom of Information Officer of the Centers for Medicare & Medicaid Services (CMS) of the Department of Health and Human Services, plaintiff requested the relevant documents, as detailed in the next paragraph. The United States Post Office confirmed that CMS received the letter, on August 18, 2003.

9. Plaintiff's letter sought the following documents pursuant to the Freedom of Information Act:

"1) Any and all documents relating to the use in nursing facilities of single-task workers,

including but not limited to use of feeding assistants. This request does *not* include the comment letters submitted in response to the proposed feeding assistant regulation, published at 67 Fed. Reg. 15,149-54 (March 29, 2002).

“2) Any and all documents relating to rulings by CMS or HCFA that single-task workers are or are not allowed to work in nursing facilities. This request includes but is not limited to rulings issued in relation to single-task workers used in North Dakota and Wisconsin, and includes rulings made at any time from January 1, 1995 through the present.

“3) Any and all documents relating to the issuance by CMS on July 5, 2001 of the ‘Clarification of Nurse Aide Training Requirements with Regard to Transporting versus Transferring Nursing Home Residents,’ including the clarification document itself.

“4) Any and all documents relating to a question-and-answer issued by HCFA based on the following question: ‘Is it permissible for a licensed nurse to delegate to an unlicensed person the task of feeding a resident in a certified nursing facility?’ This request includes (but is not limited to) a request for the document containing this question-and-answer. A copy of the question-and-answer, printed from the Internet, is enclosed with this letter.

“5) Any and all correspondence to or from any state official or employee related to the use of feeding assistants or any other time of single-task worker in a nursing facility, from January 1, 1995 through the present.”

10. On October 6, 2003, when there had been no response, written or oral, in over a month and a half, plaintiff (through employee Carlson) called and left a voice-mail message for Joseph Tripline, CMS’ Freedom of Information Group Case Development Team Leader,

regarding the FOIA request. Mr. Tripline did not return that call.

11. Plaintiff (through employee Carlson) repeated the effort with Mr. Tripline twice more, on October 29, 2003 and November 25, 2003. Mr. Tripline did not return either of those calls.

12. Also, on November 25, 2003, plaintiff (through employee Carlson) called Robert Horsey, who is in the Office Support section of CMS' Freedom of Information Group, and left a voice-mail message for him. Mr. Horsey did not return that call.

13. On January 23, 2004, plaintiff (through employee Carlson) sent another letter to Lee Jackson, CMS' Freedom of Information Officer, stating that he had sent the letter of August 12, 2003 (and enclosing a copy of it), noting that the post office had confirmed that the August 12 letter had been received by CMS, and pointing out that none of the four telephone calls that plaintiff Carlson had made had been returned. Plaintiff "request[ed] a response by no later than Friday, February 6, 2004" and indicated that the failure to do so would demonstrate that "CMS has no intention of complying with the FOIA request," thus leaving litigation as the only alternative.

14. The Post Office has reported that defendant received the follow-up letter no later than January 27, 2004.

15. Neither Mr. Jackson nor anyone else from CMS has contacted plaintiff in response to either of the letters or the four telephone calls. It has now been about six months since the original FOIA request was mailed to and received by CMS.

16. Plaintiff has a statutory right to the records that it seeks, and there is no legal basis for defendant's refusal to disclose them.

17. Plaintiff has exhausted administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C).

WHEREFORE, plaintiff prays that this Court:

1. Declare that defendant's refusal to disclose the records requested by plaintiff is unlawful;
2. Order defendant to make the requested records available to plaintiff;
3. Award plaintiff its costs and reasonable attorneys' fees in this action; and
4. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

---

TOBY S. EDELMAN  
D.C. Bar No. 202622  
PATRICIA NEMORE  
D.C. Bar No. 204446  
Center for Medicare Advocacy, Inc.  
1101 Vermont Avenue, N.W., Suite 1001  
Washington, D.C. 20005  
(202) 216-0028

EDWARD C. KING  
D.C. Bar No. 931824  
GENE COFFEY  
D.C. Bar No. 458663  
National Senior Citizens Law Center  
1101 14<sup>th</sup> St., N.W., Suite 400  
Washington, D.C. 20005

GILL DEFORD  
D.C. Bar No. 459280  
JUDITH A. STEIN  
Center for Medicare Advocacy, Inc.  
P.O. Box 350  
Willimantic, CT 06226

(860) 456-7790

Attorneys for Plaintiff

DATED: February , 2004