

CMS-0041-N
<NOTICE>

<PREAMB>

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[CMS-0041-N]

Modified Policy on Freedom of Information Act Disclosure of Amounts Paid to Individual Physicians under the Medicare Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice sets forth a new policy regarding requests made under the Freedom of Information Act for information on amounts paid to individual physicians under the Medicare program in which CMS will make case-by-case determinations as to whether exemption 6 of the Freedom of Information Act applies to a given request for such information.

DATES: This notice is effective on [OFR--insert 60 days after the date of publication in the **Federal Register**].

FOR FURTHER INFORMATION CONTACT: Grace Im (202) 260-6770.

SUPPLEMENTARY INFORMATION:

I. Background

In a previous policy on the disclosure of amounts paid to individual physicians under the Medicare program, which was set forth in the November 28, 1980 **Federal Register** (45 FR 79172), the Secretary of the Department of Health, Education, and Welfare (which later became the Department of Health and Human Services (the

Department)) stated that, in considering the two competing interests of public transparency and privacy, the public interest in the Department's disclosure of the amounts that had been paid to individual physicians under the Medicare program was not sufficient to compel disclosure under the Freedom of Information Act. The policy change was premised on two courts having found a compelling privacy interest on the part of the physicians. *See, Florida Medical Association, Inc., et al. v. Department of Health, Education, and Welfare, et al.* (M.D. Fla. 1979) and *The American Staffs of Private Hospitals, Inc., et al. v. Health Care Financing Administration, et al.* (E.D. La. 1980). However, the policy was expressly published in response to the *Florida Medical Association* district court's issuance of a permanent injunction, which barred the Department of Health, Education, and Welfare from disclosing identifiable annual Medicare reimbursement payments of individual physicians or disclosure of payments in a manner that could identify individual physicians.

That district court vacated its permanent injunction on May 31, 2013 after determining that such a broad injunction was no longer authorized under the Privacy Act after the U.S. Court of Appeals for the Eleventh Circuit's decision in *Edison v. Department of the Army* (11th Cir. 1982), and thus its continued enforcement was no longer equitable. Following the court's decision, CMS solicited public comment on August 6, 2013 on its proposed policies with respect to disclosure of individual physician payment information.¹

¹ CMS, "Request for Public Comments on the Potential Release of Medicare Physician Data" (August 6, 2013), available at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Public-Comment.html>

II. Provisions of the Notice

The Secretary has considered the court's decision and the wide spectrum of public comments received by CMS. In doing so, the Department has decided to replace the prior policy, as set forth in the November 28, 1980 **Federal Register** (45 FR 79172), with a new policy in which CMS will make case-by-case determinations as to whether exemption 6 of the Freedom of Information Act applies to a given request for information pertaining to the amounts that were paid to individual physicians under Medicare. Exemption 6 requires CMS to weigh the balance between the privacy interest of individual physicians and the public interest in disclosure of such information. As the outcome of the balancing test will depend on the circumstances, the outcomes of these analyses may vary depending on the facts of each case. However, in all cases, we are committed to protecting the privacy of Medicare beneficiaries.

Dated: January 6, 2014

Marilyn Tavenner,

Administrator,

Centers for Medicare & Medicaid Services.

Approved: January 6, 2014

Kathleen Sebelius,

Secretary,

Department of Health and Human Services.

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