

Health Information Compliance Alert

State Courts COURT SAYS COMPUTER DATA IS PUBLIC RECORD

Legal action in New Hampshire may have some significant things to say about the right to access information in the computer age.

In 1998, counsel for Cassandra Hawkins petitioned the New Hampshire Department of Health and Human Services to make available records of dental services provided to the state's Medicaid recipients under the age of 21 and records of Medicaid reimbursement payments made to their dental providers from 1993 to 1998 in order to evaluate HHS' compliance with federal Medicaid law.

HHS provided "pre-formatted tabular summary reports," which, according to the plaintiff, were unsatisfactory because the data didn't distinguish between recipients by age and offered no information specific to the under-21 recipients.

The plaintiff filed suit in 1999, claiming the data were public records subject to disclosure and state's Right-to-Know law required HHS to copy the requested information onto tapes.

A superior court, however, sided with HHS and concluded: "The plaintiff here does not simply seek a copy of a particular government document, but rather asks the Court to order the defendant to create a new document to meet her request."

An appeal to the state's supreme court followed , and on Dec. 31, 2001, that court vacated and remanded the superior court's decision.

At the heart of the appeal were the plaintiff's contentions that "public records remain accessible and don't lose their public status just because they're stored in a computer," says Ken Barnes, an attorney in the Manchester office of New Hampshire Legal Assistance and one of the plaintiff's attorneys. "The question is 'What's a public record in this new world of computerized information?' The court sided with us that all these unlinked bits of electronic information are not going to get us anywhere."

Cost Is Not An Exemption

The court concluded that while the law does not compel HHS "to compile data into a format specifically requested by a person seeking information," it does "require that public records received by HHS be maintained in a manner that makes them available to the public." [*4]

"I think it's a very strong statement by the court that supports an agency's obligation. It's not enough to say, 'We didn't think the public would be interested in this,'" Barnes tells Eli.

HHS also made the argument that because the requested information was kept in discrete bits spread throughout its information systems, the cost of extracting just the required data would be tremendous. While the superior court had agreed and used cost as a factor in deciding whether the information constituted a public record, the supreme court wasn't buying it. "Cost is not listed as an exemption to disclosure of otherwise public information," reads the decision.

However, the court left the decision over the allocation of those costs for another day. "Obviously, the next thing we'll be fighting over is who pays," says Barnes. *Hawkins v. NH Dept. of Health*, 2001 N.H. Lexis 229 (N.H. Dec. 31, 2001)