

September 8, 1995

Jesse Berain, Director  
Idaho Commission on Aging  
**STATEHOUSE MAIL**

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Disclosure of Adult Protection Records

Dear Mr. Berain:

Your memorandum of August 15, 1995, requests an opinion of the Attorney General on the following question:

Does the Department of Health and Welfare (hereinafter "Department") have the right to access the records of the Idaho Commission on Aging (hereinafter "Commission") regarding the names of alleged perpetrators of adult abuse contained in the investigative files of Adult Protective Services?

We conclude that, under the current law, the Department has a right to access all of the Adult Protective Services records of the Commission.

**BACKGROUND**

The Idaho Adult Abuse, Neglect and Exploitation Act (hereinafter the "Act") is codified as Idaho Code § 39-5301 *et seq.* The Department administered the program (sometimes referred to as "Adult Protective Services") under statutory authority until July 1, 1995. On that date, a Memorandum of Understanding (hereinafter "MOU") between the Department and the Commission became effective. In the MOU, the Commission agreed to assume all responsibility for the Adult Protective Services as contained in the Act. The question that is the center of this opinion arose after the Department requested access to the Commission's Adult Protective Services files after the effective date of the MOU.

We conclude that the Act statutorily grants certain powers and mandates certain duties to the Department, which powers and duties entitle the Department to custody of, and access to, the files of the Commission with regard to Adult Protective Services.

**ANALYSIS**

## A. State Law Grants the Department Access

The answer to the central question requires that we construe Idaho Code § 39-5304(6), which states:

Upon completion of an investigation, the department shall prepare a written report of the investigation. The name of the person making the original report or any person mentioned in the report shall not be disclosed unless those persons specifically request such disclosure or unless the disclosure is made pursuant to a request to law enforcement for an emergency access, a court order or a hearing.

(Emphasis added.) The “department” is defined in Idaho Code § 39-5302(3) as the “Idaho department of health and welfare.”

Idaho Code §§ 39-5304(5) and 39-5307 give the Department a basis for access to the Commission’s investigative files.

First, under Idaho Code § 39-5304(5), the Department is statutorily charged with carrying out the duties enumerated in the Act. Although the Department and the Commission have entered into the MOU through which the Commission is exercising many of the duties required by the Act, the Department is still the only state entity required by statute to administer the Act.

Further, Idaho Code § 39-5307 provides that “any person, department, agency or commission authorized to carry out the duties enumerated in this chapter shall have access to all relevant records . . .” (Emphasis added.)

Illustrations of the Department’s duties and authority are found throughout the Act. For example, under Idaho Code § 39-5303, the care givers for the vulnerable adults are required to report suspected abuses to the Department. Also, Idaho Code § 39-5304(2) provides that if allegations of abuse indicate an emergency exists, “the department must initiate an investigation immediately . . .” (Emphasis added.) Idaho Code § 39-5304 further provides for the process for conducting and completing investigations and states that the Department has the duty and power to do so. Under Idaho Code § 39-5305, upon receiving information that abuse, neglect or exploitation has occurred, “the department shall cause such investigation to be made in accordance with the provisions of this chapter as is appropriate.” (Emphasis added.) Under Idaho Code § 39-5306(1), “the department has the responsibility to assist the adult in obtaining available services.” (Emphasis added.) Under Idaho Code § 39-5310, if the abuse, neglect or exploitation has caused an injury or risen to the level of possible criminal activity, “the department shall immediately notify the appropriate law enforcement agency . . .” (Emphasis added.)

In summary, all of the directives required by the Act give authority to the Department to carry out the terms of the Act. Therefore, under Idaho Code § 39-5307, the Department is the primary entity with possession of and access to all relevant records.

## **B. The MOU Requires Access by the Department**

Idaho Code § 39-5304(5) further gives the Department access to the records through the application of Idaho Code § 39-5308 and the MOU between the Department and the Commission. Under Idaho Code § 39-5308, the Department has the right to request the assistance of any other state department, agency or commission to further the duties set forth in the Act. In accordance with this provision, the Department and the Commission entered into the MOU through which the Commission has been performing the duties required in the Act. Although the Commission is currently performing all of the duties, it is doing so in cooperation with the Department. Therefore, any of the Commission's files kept pursuant to Idaho Code § 39-5304(5) are actually files of the Department. The Department must have access to its own records, even if the files are currently in the possession of the Commission.

Moreover, the MOU addresses the issue of the Department's access to the records. Section C of the Agreement is entitled "Idaho Code § 39-5307: Access to Records." Subparagraph 3 of this section states that "[t]he Department, the Commission, and the AAA [Area Agencies on Aging] will have access to necessary records. A system will be developed and local protocols will be established to enable Departmental review of necessary information." (Bracketed language added.) Therefore, under the express terms of the MOU, the Department is entitled to access to all "necessary records." In determining what constitutes a necessary record, the analysis set forth above regarding the Department's statutory authority provides the answer. The Department is entitled to access to all records of the Commission with regard to Adult Protective Services.

## **C. Federal law Requires the Department to Have Access to the Files**

Finally, federal law applicable to the Act likewise requires disclosure to the Department. Under 42 U.S.C. § 3058i(b), the state agency in charge of the prevention of elder abuse, neglect and exploitation is required to investigate and report on allegations of elder abuse and, under 42 U.S.C. § 3058i(e), is required to keep all information gathered in the course of its investigations confidential. The agency that is statutorily mandated to carry out these duties in Idaho is the Department of Health and Welfare.

Thus, the Department must be allowed access to the records under 42 U.S.C. § 3058i(b) and (e) because it is charged with the duties enumerated under the Act.

## **CONCLUSION**

The Commission must disclose its Adult Protective Services files, and any other files kept pursuant to the Act, to the Department. The Department is currently charged with the statutory duties of enforcing the Act and the express provisions of the Act require that the Department be the primary custodian of the records. Further, the Commission, through the MOU, is acting in conjunction with the Department, and the MOU entitles the Department to have access to the necessary records. Finally, the federal statute requires the Department's access to the files due to its state statutory duties. In summary, the Commission must allow the Department access to all of the Commission's records and files regarding Adult Protective Services. We do not address the outcome of this question under any amendments to the Act that may be placed before the 1996 Idaho Legislature.

I hope this adequately addresses your inquiry. If you desire further information or assistance, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General  
Contracts & Administrative Law Division