

NOTE

*No opinion numbered "95-5" was prepared or issued by
the Office of the Attorney General.*

ATTORNEY GENERAL OPINION NO. 95-06

To: Linda L. Caballero, Director
Department of Health and Welfare
P.O. Box 83720
Boise, ID 83720-0036

Per Request for Attorney General's Opinion

QUESTION PRESENTED

You have asked whether a public record exemption under Idaho Code § 9-340 constitutes valid grounds to refuse compliance with an administrative subpoena issued by the Department of Health and Welfare pursuant to Idaho Code § 56-227C.

CONCLUSION

No. The Department of Health and Welfare's statutory subpoena power is not limited by the Public Records Act.

BACKGROUND

You indicated in your letter dated September 19, 1995, that, pursuant to Idaho Code § 56-227C, the Department of Health and Welfare issued a subpoena to the Idaho State Board of Nursing seeking records related to the board's investigation and possible action against a licensee who provides personal care services under the Medicaid program. You further pointed out that the department is authorized by law to take independent action against Medicaid providers who engage in abusive conduct. The Board of Nursing refused to provide the information on the grounds that the information sought was exempt from disclosure under Idaho Code §§ 9-340(14), (15) and (26) of the Idaho Public Records Act. Specifically, you have asked whether an exemption by the Idaho Public Records Act constitutes "reasonable cause or legal excuse" for failing to comply with the department's subpoena.

ANALYSIS

The Idaho Public Records Act, Idaho Code §§ 9-337 *et seq.*, provides that “every person has a right to examine and take a copy of any public record of this state, and there is a presumption that all public records in Idaho are open . . . except as otherwise provided by statute.” Idaho Code § 9-338(1). Idaho Code § 9-340 sets forth those records that are exempt from disclosure to the general public. For the purposes of this analysis, it is assumed that the records subpoenaed by the department are exempt from disclosure to the general public pursuant to exemptions set forth in Idaho Code § 9-340.

As noted above, the Idaho Public Records Act governs access to records by the general public. Specifically, it governs those records that “every person has a right to examine (and copy).” (Emphasis added.) By its terms, the act does not purport to govern the rights that specific persons or agencies may have to examine records pursuant to separate statutory authority. In this case, the department seeks to compel production of records pursuant to the statutory subpoena power granted to the department by Idaho Code § 56-227C, not the Public Records Act. As such, the exemptions by the Idaho Public Records Act are simply inapplicable. Moreover, the Idaho Public Records Act specifically provides at Idaho Code § 9-343(3) that the availability of records for administrative and judicial adjudicatory proceedings shall not be limited by the Idaho Public Records Act:

Nothing contained in this act shall limit the availability of documents and records for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings.

Thus, the Idaho Public Records Act expressly recognizes that the laws and rules of evidence and of discovery governing administrative proceedings dictate what evidence may be obtained for those proceedings. The Idaho Public Records Act does not itself govern the issue. We must look to the department’s administrative subpoena power to determine the scope of the department’s power.

The department is authorized to issue administrative subpoenas pursuant to Idaho Code § 56-227C. That statute provides the department with broad subpoena powers provided the subpoena is issued “for the purposes contemplated by this act (the public assistance law).” These powers include the power to “compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony.” Idaho Code § 56-227C also provides for judicial enforcement of the department’s subpoenas. It provides in pertinent part:

[I]f the judge shall determine that such person has refused, without

reasonable cause or legal excuse, to be examined or to answer a legal or pertinent question, or to produce a book or paper which he has ordered to bring or produce, he may forthwith punish the offender as for contempt of court.

(Emphasis added.)

The above quoted enforcement provision recognizes that the department's subpoena power is limited. The court may refuse to enforce the subpoena based upon "reasonable cause or legal excuse." This phrase is not defined.

However, "reasonable cause" appears to relate to factual circumstances sufficient to avoid a contempt citation, and "legal excuse" appears to relate to legal reasons that the subpoena cannot be enforced. For example, a failure to find certain records after a good faith effort to find them may constitute "reasonable cause" to avoid a contempt citation. In contrast, a "legal excuse" implies some constitutional or statutory right not to produce the information requested.

While there is no case law construing Idaho Code § 56-227C, in our opinion a valid "legal excuse" for failure to comply with an administrative subpoena should be construed to mean a legal reason recognized with respect to administrative proceedings in Idaho. In this regard, the Idaho Administrative Procedure Act provides in pertinent part at 67-5251:

(1) The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state.

If administrative subpoena powers are harmonized with the Administrative Procedure Act, a "legal excuse" for failure to honor an administrative subpoena could include a constitutional provision or statute that would protect the information from disclosure to the agency. Moreover, evidentiary privileges recognized by statute or court rules would provide a "legal excuse" for failure to comply with an administrative subpoena.

In sum, refusal to provide records or documents on the grounds that such records or documents are exempt from disclosure pursuant to the Idaho Public Records Act does not constitute reasonable cause or legal excuse for failing to comply with the department's administrative subpoena. As indicated in Idaho Code § 9-343(3), the Idaho Public Records Act does not limit the availability of information requested pursuant to an administrative adjudicatory proceeding. The laws of evidence and discovery governing

administrative subpoenas dictate what constitutes “reasonable cause or legal excuse” from complying with an administrative subpoena. This phrase should be harmonized with Idaho Code § 67-5251 which governs evidence issues in administrative hearings. A document’s lack of availability under the Public Records Act is not a valid basis to refuse to honor a subpoena.

CONCLUSION

Public records that are exempt from public disclosure are nevertheless subject to disclosure in a judicial or administrative proceeding if they are subject to disclosure under the laws or rules of evidence and of discovery governing those proceedings.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 9-337.
§ 9-338(1).
§ 9-340.
§ 9-340(14).
§ 9-340(15).
§ 9-340(26).
§ 9-343(3).
§ 56-227C.

2. Other Authorities:

I.R.E. 501.

DATED this 26th day of October 1995.

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Analysis by:

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