OPINION NO. 81-051

Syllabus:

Neither federal law nor R.C. 149.43 exempts from disclosure records concerning amounts paid to individual providers by the State of Ohio in connection with the Medicaid program.

To: Kenneth B. Creasy, Director, Dept. of Public Welfare, Columbus, Ohio
By: William J. Brown, Attorney General, September 10, 1981

I have before me your request for my opinion concerning the disclosure by the Ohio Department of Public Welfare of the amounts paid by that department to individual providers under the Medicaid program. It is my understanding that you are specifically concerned with whether the recent changes in the disclosure policy of the Federal Department of Health and Human Services concerning amounts paid to individual providers have any impact on Ohio's disclosure practices.

Before analyzing the issues presented by your letter, I believe it would be useful to set out the procedure by which the states participate in the federal medical assistance program and to examine the relationship between state and federal governments in this area. As explained to a member of my staff by your office, the Medicaid program is simply a grant to the participating states of money to be used by those states in providing medical assistance for the poor. In order to qualify for such a grant, a state must submit to the Department of Health and Human Services a plan which meets the specifications of 42 U.S.C. §1396a. When this plan is approved by the federal government, the state then qualifies to receive federal Medicaid funds. 42 U.S.C. §1396. Although the state must comply with a wide range of federal requirements prior to receiving Medicaid funds, 42 U.S.C. §1396a, the federal government does not supervise the daily operations of the state welfare agencies. Rather, the Department of Health and Human Services simply pays a specific percentage of the cost of those operations which meet its

requirements. 42 U.S.C. §1396b. A state is not compelled by any federal law to meet the standards set by the Department of Health and Human Services. Rather, state governments are free to choose whether to comply with the federal requirements which are a prerequisite to the receipt of federal funds, or to independently operate their own programs.

It is the state, not the federal government, which is responsible for carrying out the payments in connection with the Medicaid program. The federal government pays the money directly to the state, which then distributes the funds in accordance with its Medicaid plan. The particular records mentioned in your request are compiled by the Ohio Department of Public Welfare as a necessary step in the distribution function. A copy of this information is forwarded to the federal government; however, the original records are collected and maintained by the Ohio Department of Public Welfare for its own purposes.

Prior to 1980, it was the policy of the federal government to make known to the public the amounts paid by the states to individual providers under both the Medicare and Medicaid programs. 42 F.R. 14703 (March 16, 1977). The disclosure of information concerning amounts paid under Medicare was challenged in two federal district court cases, Florida Medical Assoc., Inc. v. Department of Health, Education & Welfare, 479 F.Supp 1291 (M.D. Fla. 1979), and American Assoc. of Councils of Medical Staffs of Private Hospitals, Inc. v. Health Care Financing Administration, No. 78-1373 (E.D. La. Apr. 30, 1980). Both district courts held that the federal government could not disclose individually identifying information on the amounts paid by the states to providers without the prior written consent of the providers.

The court, in Florida Medical Assoc., concluded that information on the amounts paid to individual providers under Medicare was excluded from the mandatory disclosure normally applicable to federal agencies by exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(6), which provides an exemption for material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court went on to hold that, because the records were exempt under 5 U.S.C. §552(b)(6), "the release of such individually identifying information, without the 'prior written consent' of those individually indentified providers, is prohibited by the Privacy Act." Florida Medical Assoc. at 1306-07. See 5 U.S.C. §552a.

The court, in American Assoc., also found that the data in question was exempted from mandatory disclosure by §552(b)(6). However, unlike Florida Medical Assoc., the court in American Assoc. found that the prohibition against disclosure resulted from the Federal Administrative Procedure Act rather than the Privacy Act, in that the proposed disclosure would constitute an abuse of discretion, subject to injunction under 5 U.S.C. §706(2) (authorizing the court to "hold unlawful and set aside any agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). This difference in analysis is due to the court's finding that the Privacy Act did not afford a private right of action to the plaintiffs in that case. American Assoc., slip op. at 16.

As a result of these holdings, the Department of Health and Human Services announced a change in its procedure for making public the records in its possession concerning the amounts paid by the states to individual providers under the Medicare program. In 45 F.R. 79172 (November 28, 1980), the Department announced that it would no longer make available to the public the amounts paid to individual providers under the Medicare program.

In determining what effect these case holdings and the change in practice by the Department of Health and Human Services has on the disclosure of Medicaid records by the Ohio Department of Public Welfare, it is first necessary to determine whether the scope of the court holdings would extend to disclosure by

the states. Both the Florida Medical Assoc. and the American Assoc. cases apply only to the federal government and only to the Medicare program, rather than to the Medicaid program about which you have inquired. No state government was named as a defendant in either case, nor did either holding extend to the action of state government. Thus, the injunctions issued in these cases clearly do not affect the disclosure by a state government of information on individual providers accumulated in connection with the state's administration of its Medicaid program.

Having concluded that the case holdings themselves do not affect the states, it is next necessary to determine whether the statutes which formed the basis for the finding that the federal government may not release information on amounts paid to individual providers under the Medicare program also preclude the release of similar information collected by the states pursuant to the Medicaid program. As discussed previously, both the Florida and Louisiana courts applied the FOIA in reaching their decisions. The FOIA, however, is applicable only to federal agencies and instrumentalities. 5 U.S.C. §551(1) (" 'agency' means each authority of the Government of the United States"). A state agency or department is not required to conform to the provisions of the FOIA. Ciccone v. Waterfront Commission of New York Harbor, 438 F.Supp 55 (D.C. N.Y. 1977). The Privacy Act and the Administrative Procedure Act use the definition of "agency" found in 5 U.S.C. §551 and are, thus, like the FOIA, applicable only to agencies of the federal government. 5 U.S.C. §552 ("the term 'agency' means agency as defined in section 552(e)"); 5 U.S.C. §552(e) ("the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Governmental controlled corporation or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."); 5 U.S.C. §701(b)(1) (" 'agency' means each authority of the Government of the United States"). Due to the fact that the FOIA, Privacy Act and Administrative Procedure Act are binding only on the federal government and the fact that the Ohio Department of Public Welfare is an agency of state government, I conclude that the case holdings cited above and the subsequent change in policy by the Department of Health and Human Services have no effect on the disclosure practices of the Ohio Department of Public Welfare.

Having concluded that federal law does not prohibit the disclosure by the Ohio Department of Public Welfare of records compiled by that Department concerning the amounts paid to individual providers under Medicaid, it is next necessary to determine whether Ohio law prohibits such disclosure. Like the federal government, Ohio has enacted both a public records statute, R.C. 149.43, and a Privacy Act, R.C. Chapter 1347. However, the substantive provisions of the Ohio statutes are not identical to those of the federal statutes. Ohio's public records statute does not contain a balancing test similar to that enacted in exemption 6 of the FOIA. Rather, R.C. 149.43 contains blanket exemptions for the following specific types of records: "medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records [and] confidential law enforcement investigatory records." Information on the amounts paid by the state to individual providers under the Medicaid program clearly does not fall within any of the above-listed exemptions.

R.C. 149.43 also contains an exemption for "records the release of which is prohibited by state or federal law." There is no state statute which expressly prohibits the release of information concerning amounts paid to individual providers. On the federal level, no express prohibition against the disclosure of the type of information in question is contained in either a statute or administrative regulation; the prohibitions on which the courts relied in Florida Medical Assoc. and American Assoc. are directed toward federal agencies and are not phrased so as to provide blanket protection to the records involved. The federal government does require states to safeguard some information collected under the Medicaid program. See, e.g., 42 C.F.R. 431.300 ("a State plan must provide. . .safeguards. . .that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the

administration of the plan"); 42 C.F.R. 431.301-.307. See also 42 C.F.R. 430.1 (defining "[r]ecipient" as "an individual who has been determined eligible for Medicaid"). The fact that the government has chosen to require states which participate in the Medicaid program to adopt specific provisions governing the disclosure of information concerning those persons applying for or receiving aid, but has chosen not to do so for information regarding individual providers, is indicative of an intent not to prevent states from disclosing information concerning providers.

In addition, it must be remembered that R.C. 149.43 was enacted to deal with the disclosure of information by the State of Ohio and its political subdivisions. Thus, the phrase "the release of which is prohibited by. . .federal law" implicitly refers to release of such information by the state or its political subdivisions. As was previously discussed, the federal statutes in question govern the dissemination of information only by the federal government. These acts do not prohibit the release of information by the states and do not, therefore, trigger the R.C. 149.43 exclusion quoted above.

Therefore, it is my opinion, and you are advised that, neither federal law nor R.C. 149.43 exempts from disclosure records concerning amounts paid to individual providers by the State of Ohio in connection with the Medicaid program.