

OPINION NO. 68-159

Syllabus:

The Federal Freedom of Information Act (Section 552, Title 5, U.S. Code) does not impose a duty upon the Ohio Department of Public Welfare to make available to interested persons compliance report forms and reports of on-site inspections of nursing homes.

To: Denver L. White, Director, Dept. Public Welfare, Columbus, Ohio
By: William B. Saxbe, Attorney General, December 2, 1968

In your request for my opinion you ask whether the Federal Freedom of Information Act requires that the Ohio Department of Public Welfare make available to interested persons certain compliance forms completed by operators of nursing homes and certain reports made by your staff members regarding on-site inspections of nursing homes. You explain that these compliance forms and inspection reports represent part of your department's efforts to assure itself that these homes are in compliance with regulations issued pursuant to Title VI of the Civil Rights Act of 1964.

Federal Freedom of Information Act is the popular name for the law which is now codified in Section 552, Title 5, of the United States Code. As its name implies, this law was enacted to provide guidelines for the public availability of the records of federal departments and agencies.

Section 552, Title 5, U.S. Code, begins as follows:

"552 (a) Each agency shall make available to the public information as follows: * * *"

The controlling definition of "agency" is given in Section 551, Title 5, U.S. Code:

"551. For the purpose of this subchapter -
(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress;

(B) the courts of the United States;
* * *"

Thus, the term, "agency," applies to all the organizational units in the executive branch of the federal government. The Ohio Department of Public Welfare is not, of course, a part of the executive branch of the federal government. Therefore, your department is not controlled by any requirement of the Federal Freedom of Information Act.

Even if your department were subject to this law, the docu-

ments in question appear to fall clearly within the exemption listed in Section 552 (b) (7), Title 5, U.S. Code:

"552 (b) This section does not apply to matters that are -

* * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"

Your federal counterpart, the Department of Health, Education and Welfare, has issued regulations which implement the application of Section 552, Title 5, U.S. Code, to the records of that federal department. These regulations are compiled in 45 CFR 5. The regulation which applies the exemption of Section 552 (b) (7), Title 5, U.S. Code, supra, to the records of the federal Department of Health, Education and Welfare is 45 CFR 5.77:

"5.77 Investigatory files compiled for law enforcement purposes * * *

This exemption covers all matters, including sources of information or complaints, in investigative files and reports compiled for law enforcement or regulatory activities of the Department, or relating to matters in litigation."
(Emphasis added)

In addition to falling within the general exemption above, the records in question appear to be listed as a specific exemption. Appendix A to 45 CFR 5, lists examples of kinds of exempt records. Item 15 appears to include exactly the type of documents mentioned in your request for my opinion:

"45 CFR 5

Appendix A - Examples of Kinds of Exempt Records

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15. Records to the extent they reveal names of complainants, drug abusers or informers; audit, civil rights, disciplinary, grievance, security, and other investigation files, including reports of interviews, signed or sworn statements or other reports and related material."
(Emphasis added)

Thus, even if your department were covered in general by the Federal Freedom of Information Act, the specific reports in question would be exempted from disclosure.

Therefore, it is my opinion, and you are hereby advised that the Federal Freedom of Information Act does not impose a duty upon the Ohio Department of Public Welfare to make available to interested persons compliance report forms and reports of on-site inspections of nursing homes.