

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

DEBRA and HERM CLAUSSEN,)
18125 Baxter Road)
Lawson, Missouri 64062)

and)

LELAND DEMPSEY)
1267 W. 61st Street)
Kansas City, Missouri 64113)
Plaintiffs,)

v.)

Case No.

CENTERS FOR MEDICARE)
& MEDICAID SERVICES,)
7500 Security Boulevard)
Baltimore, MD 21244)

and)

U.S. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES,)
200 Independence Ave., SW,)
Washington, D.C. 20201)

Defendants.)

COMPLAINT

1. Plaintiffs Debra and Herm Claussen (the “Claussens”) and Leland Dempsey (“Dempsey”) bring this suit pursuant to the Freedom of Information Act, 5 U.S.C. § 552, (“FOIA”) to redress Defendants’ failure to provide responsive documents, or to otherwise adequately respond to FOIA requests, which sought various records pertaining to the death of the Claussens’ son, Travis Claussen, while hospitalized in an Overland Park, Kansas hospital, and the resulting investigation of the hospital by government regulators.

PARTIES

2. Plaintiffs Debra and Herm Claussen (the “Claussens”) are the parents of Decedent Travis Claussen who was treated at Pinnacle Regional Hospital f/k/a Blue Valley Regional Hospital prior to his death in April 2018.

3. Plaintiffs Debra and Herm Claussen are residents of Missouri, residing at 18125 Baxter Road, Lawson, Missouri 64062.

4. The facts surrounding Travis Claussen’s treatment at Pinnacle Regional Hospital and subsequent death were one of the subject matters of an investigation into Pinnacle Regional Hospital by federal and state regulators. Much of the focus of this investigation centered upon medication management issues surrounding the deaths of patient Joseph Metz who died on December 27, 2017 secondary to oxycodone toxicity and patient Travis Claussen who died on April 11, 2018 secondary to fentanyl toxicity. The investigation and the deaths of two patients at Pinnacle Regional Hospital have been the subject matter of local and regional media coverage as well as wrongful death lawsuits against the Hospital. The Claussens, by and through attorney Leland Dempsey, submitted the FOIA requests at issue in this case.

5. The requests included a signed authorization from Debra Claussen, as personal representative of the Estate of Travis Claussen, to produce all Medicare records regarding Travis Claussen directly to the Dempsey & Kingsland law firm, as well as signed letters of administration and a death certificate.

6. Attorney Leland Dempsey is included as a party in this matter because his name was included on the face of the request along with the Claussens’ names, and it appears in subsequent communications that CMS has treated Dempsey as the requestor, despite the request being clearly made on behalf of and with express authorization from the Claussens as clients of Dempsey’s firm.

7. Plaintiff Leland Dempsey is a resident of Missouri residing at 1267 W. 61st Street, Kansas City, Missouri 64113.

8. Defendant U.S. Department of Health and Human Services (“HHS”) is a federal agency subject to the Freedom of Information Act, 5 U.S.C. § 552.

9. Defendant Centers for Medicare and Medicaid Services (“CMS”) is a federal agency, a component of HHS, and subject to the Freedom of Information Act, 5 U.S.C. § 552.

JURISDICTION AND VENUE

10. This case is brought under 5 U.S.C. § 552(a)(4)(B) and presents a federal question conferring jurisdiction on this Court. *See* 28 U.S.C. § 1331.

11. Venue is proper under 5 U.S.C. § 552(a)(4)(B) as Plaintiffs reside in this district.

April 21, 2020 FOIA Request – Records/Reports Concerning Patient Travis Claussen

12. On April 21, 2020, Debra and Herm Claussen, through their attorneys, submitted a request to CMS under FOIA and the Federal Privacy Act of 1974, for:

- i. The complete contents of any investigative file(s) discussing Mr. Claussen’s death, which occurred on or about April 11, 2018 at Blue Valley Hospital/Blue Valley Surgical Associates;
- ii. All medical records referencing Mr. Claussen.
- iii. A complete copy of any Statement of Deficiencies referencing Mr. Claussen, along with any supporting documentation that references Mr. Claussen, including but not limited to surveyor notes, witness statements, meeting minutes, nurse notes, medication orders, and medication administration records.
- iv. A complete copy of any Plan of Correction, or any supporting document submitted therewith, which references Mr. Claussen.

- v. Any correspondence that references Mr. Claussen.
- vi. Any documents gathered by CMS but not yet produced pursuant to similar, prior FOIA requests of October 26, 2018 and January 9, 2019.¹
- vii. Any documents provided to CMS by the Kansas Department of Health & Environment referencing Travis Claussen.

See Exhibit 1.

13. The Request included letters of administration and a death certificate for Travis Claussen, as well as an authorization to disclose Protected Health Information signed by Debra Claussen, the personal representative of his Estate, which instructed that all Medicare information and records be disclosed to Dempsey & Kingsland PC.

14. By separate letters sent April 22, 2020 and April 28, 2020, CMS appeared to acknowledge receipt of the request and assigned reference number 042220207074 (PIN WZ6M) to the matter. Exhibit 2.

15. On July 16, 2020, CMS responded by written letter to Debra and Herm Claussen's April 21, 2020 FOIA requests for documents.

16. CMS's July 16, 2020, letter stated that CMS was providing a total of 112 pages of redacted documents under Exemption (b)(6) &(b)(7)(c) of FOIA. These same documents had already been provided in response to a prior FOIA request.

17. CMS/HHS provided no particularized description or analysis as to why the cited exemptions applied. Nor did the response provide any explanation of its search parameters and methods or include enough detail to allow a court to assess the merits of its denial.

18. Further, the response by CMS failed demonstrate that the agency had conducted a reasonable search for records, particularly because it failed to address the "large volume" of

¹ A prior communication by CMS's Anna Lee made reference to a "large volume" of records it was awaiting from the state agency which delayed a prior FOIA response by the agency.

records that CMS had previously acknowledged that it was awaiting from the state agency before it could respond to a prior request made on the Claussens' behalf.

April 21, 2020 FOIA Request – Records/Reports Concerning Blue Valley Hospital

19. On the same date as the above-referenced request, Debra and Herm Claussen, through their attorneys, also submitted a broader FOIA request to CMS, seeking not only those records relating to Travis Claussen encompassed in the above-described request, but also:

- i. The complete contents of any investigative file(s) discussing Blue Valley Hospital 2015-present.
- ii. A complete copy of any Statement of Deficiencies referencing Blue Valley Hospital along with any supporting documentation including but not limited to surveyor notes, investigator's notes, witness statements, meeting minutes. This seeks records for the time period 2015-present.
- iii. A complete copy of any Plan of Correction submitted by Blue Valley Hospital along with any supporting documents submitted therewith for the time period 2015-date.
- iv. Any correspondence that references Blue Valley Hospital.
- v. The complete investigative file concerning the death of any other patients at Blue Valley Hospital for the time period 2015-date.
- vi. Any documents gathered by CMS but not yet produced pursuant to our previous FOI requests of October 26, 2018 and January 9, 2019. It is believed that this comprised a "large volume" of records gathered by the Kansas Department of Health & Environment.
- vii. Any documents provided to CMS by the Kansas Department of Health & Environment referencing Blue Valley Hospital.

Exhibit 3.

By its communications of April 22, 2020 and April 28, 2020, CMS appeared to acknowledge receipt of the request and assigned reference number 042220207074 (PIN WZ6M) to the matter.

Exhibit 2.

20. Yet despite acknowledging receipt of this Request, the response by CMS failed to address this request in its response of July 16, 2020, which referred only to a single “request” and not the separate, distinct requests submitted by Plaintiffs.

July 16, 2020 Partial Response and Denial

21. On July 16, 2020, CMS provided a partial response that referred only to a single “request” and not the multiple requests submitted. Exhibit 4.

22. The response began by stating incorrectly that Plaintiffs had “requested access to and copies of all of CMS’ records that references your clients, Debra L. Claussen and Herm Claussen’s deceased father, [sic] Travis Claussen, including but not limited to, the complete contents of any investigative file(s) discussing Mr. Claussen’s death, which occurred on or about April 11, 2018 at Blue Valley Hospital/Blue Valley Surgical Associates.”

23. The Denial goes on to state, “You also requested copies of other-related matters listed in your April 21st request (see attached).” The attached request, however, was only the request seeking records related to Mr. Claussen, not the broader request for other records regarding Blue Valley Hospital/Blue Valley Surgical Associates.

24. Nowhere did the Denial acknowledge the separate request submitted to CMS on the same date, April 21, 2020, which sought a much broader range of documents not limited to those involving Travis Claussen.

25. Similarly, the Denial nowhere made reference to the request included in the Claussens’ request for records about their son under the Privacy Act.

26. With regard to the process used for responding to the Request, the Denial letter states only that the CMS Kansas City Regional Office (“RO7”) forwarded the request to the Kansas Department of Health and Environment for processing and that “After a search of KDHE files, that office located documents that were responsive to your request and forwarded the documents to RO7, who in turn forwarded your request and responsive records to me because of my responsibility under the FOIA.”

27. The Denial then goes on to state that “After careful consideration of the documents submitted to me” (totaling 112 pages), CMS was releasing 76 of the 112 pages in their entirety with no redactions, but that 36 pages were being released, in part, with redactions made pursuant to FOIA exemptions (b)(6) and (b)(7)(C).

28. With regard to exemption (b)(6), the Denial stated only in conclusory terms, after discussing the relevant standard, that “the personal privacy interests of the subject individuals outweigh the public interest in disclosure in this particular matter,” without any further discussion of how the exemption applies to the various categories of requested documents.

29. Exemption (b)(7)(C) was afforded even less discussion in the Denial, which simply cited to the exemption but did not provide any analysis or discussion as to why it applied to the various categories of requested documents and the potentially responsive documents encompassed therein.

30. The 112 pages of documentation referenced in the Denial consisted largely of the same survey of deficiencies summaries for Blue Valley Hospital that the Claussens previously possessed, including the very documents that had been attached to the Claussens’ request as an example of just one of the types of materials sought in unredacted form.

31. By its terms, however, a Summary of Deficiencies is not the only document containing information potentially responsive to the Claussens’ requests, given that each such

Summary is, on its face, a compilation of information, based upon voluminous notes and interviews. Those notes and interviews were expressly included in the scope of Plaintiffs' requests, along with "[a]ny documents gathered by CMS but not yet produced pursuant to our previous FOI requests[.]"

32. In particular, as incorporated into the Request by reference, the Claussens had previously been informed in a February 27, 2019 communication from CMS's Anna Lee that the response to their prior request was delayed because CMS was awaiting the "last set" of documents from the state agency, which had to gather a "large volume of records."

33. To date, however, Plaintiffs have seen no particularized accounting or index of these referenced records.

34. Indeed, the cursory Denial letter failed to address these requested underlying survey documents at all, nor does it give any particularized description of the efforts undertaken by CMS to locate *any* records in response to the various categories of requests, other than asking KDHE to "process" the request and simply forwarding along any documents that KDHE stated it possessed.

35. Because this appears to have been the sole action undertaken by CMS to respond to the request, the letter contains no further discussion of efforts to identify and locate any potentially responsive documents, nor does it provide any detailed itemization of categories of documents located but not produced.

Appeal and Acknowledgement of Appeal by CMS

36. On October 13, 2020, Plaintiffs, by and through the undersigned counsel, timely appealed the denial of records via letter sent to the CMS Principal Deputy Administrator. The appeal, which is attached hereto as Exhibit 5, appealed the denial on grounds including the following:

- The overall inadequacy of and lack of particularity in the Denial, contrary to the

spirit of open government embodied by FOIA.

- The failure to provide any analysis as to why the cited exemptions applied ;
- The failure to provide any itemized accounting of the universe of potentially responsive documents, and how they were identified and gathered;
- Defendants’ failure to respond to one of the two requests submitted (or in the alternative, Defendants apparently treating two distinct requests as a single request without providing a particularized response to any requested category of documents), violating Defendants’ duties to make a determination under FOIA.;
- The failure to conduct a reasonable search, particularly given that CMS merely deferred the request to a state agency and failed to address its prior assertion that it was awaiting a “large volume” of records regarding Blue Valley Hospital which had to be gathered by state-agency representatives and sent to CMS; and
- The inapplicability of the stated exemptions to the redacted documents provided, particularly given the public interests at stake in the context of a patient’s death at the hands of a critical and highly regulated and licensed industry, and the lack of a particularized discussion of any law-enforcement purpose justifying the applicability of exemption (b)(7).

37. On October 23, 2020, CMS’s Hugh Gilmore, using the same Control Number/PIN referenced in the original responses by CMS in April/ July 2020, acknowledged receipt of the appeal, promising that “We will process your appeal as expeditiously as possible, consistent with Department of Health and Human Services FOIA rules set forth at 45 CFR Part 5.” Exhibit 6.

38. As of today’s date, however, no response to the Administrative Appeal has been received.

COUNT I

(April 21, 2020, FOIA Request – Records/Reports Concerning Patient Travis Claussen)
Plaintiffs v. Defendants CMS & HHS

39. The above paragraphs are incorporated by reference.
40. Defendants Centers for Medicare and Medicaid Services and U.S. Department of Health and Human Services are federal agencies and subject to FOIA.
41. The requested records are not exempt under FOIA.
42. Defendants have refused to produce the requested records in a timely manner.
43. Defendants have failed to conduct a reasonable search for responsive records.
44. Defendants have no valid legal basis for their refusal to provide the requested records.
45. Defendants have wrongfully withheld the requested records from Plaintiffs.
46. Defendants have failed to respond to Plaintiffs' administrative appeal, leaving them no legal recourse except to file this Action.

WHEREFORE, Plaintiffs Debra Claussen, Herm Claussen, and Leland Dempsey pray for the Court's order (1) declaring Defendants Centers for Medicare and Medicaid Services and U.S. Department of Health and Human Services have violated FOIA, (2) ordering Defendants to conduct a reasonable search for records and to produce the requested records, (3) enjoining Defendants from withholding non-exempt records under FOIA, (4) awarding Plaintiffs their attorney's fees and costs, and (5) awarding such other relief the Court considers appropriate.

COUNT II

(April 21, 2020, FOIA Request – Records/Reports Concerning Blue Valley Hospital)
Plaintiffs v. Defendants CMS & HHS

47. The above paragraphs are incorporated by reference.
48. Defendants Centers for Medicare and Medicaid Services and U.S. Department of

Health and Human Services are federal agencies and subject to FOIA.

49. The requested records are not exempt under FOIA.

50. Defendants have failed to provide a response to Plaintiffs' request within the statutorily mandated time frames, resulting in a constructive denial of access to the records contrary to the Freedom of Information Act.

51. Defendants have failed to conduct a reasonable search for responsive records.

52. Defendants have no valid legal basis for their refusal to provide the requested records.

53. Defendants have wrongfully withheld the requested records from Plaintiffs.

54. Defendants have failed to respond to Plaintiffs' administrative appeal, leaving them no legal recourse except to file this Action.

WHEREFORE, Plaintiffs Debra Claussen and Herm Claussen and Leland Dempsey pray for the Court's order (1) declaring Defendants Centers for Medicare and Medicaid Services and U.S. Department of Health and Human Services have violated FOIA, (2) ordering Defendants to conduct a reasonable search for records and to produce the requested records, (3) enjoining Defendants from withholding non-exempt records under FOIA, (4) awarding Plaintiffs their attorney's fees and costs, and (5) awarding such other relief the Court considers appropriate.

Dated: February 26, 2021

Respectfully submitted,

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