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July 10, 2014

Dr. Waseem Khan, Chairman
Lake Shore Hospital Authority Board
259 NE Franklin Street, #102
Lake City, FL 32055

Dear Dr. Khan:

It has come to our attention that Ms. Barbara Jeffords made a public records request for information in the personnel file of the hospital authority's Executive Director, Jackson P. Berry. The Lake Shore Hospital Authority Board provided Ms. Jeffords with the first two pages of the report, but excluded the third and fourth pages, claiming that federal law exempts the information from disclosure under Florida's Public Records law. We believe that the hospital Board's position is legally invalid and the Board must provide Ms. Jeffords with the complete report pursuant to her public records request.

FACTS

On December 2, 2013, Ms. Jeffords made a public records request for the background information report in Mr. Berry's personnel file; the background check was conducted when Mr. Berry was under consideration for the Authority's manager position. Ms. Jeffords received pages 1 and 2 of the background information report but was denied access to pages 3 and 4 of the report. Subsequently, Ms. Jeffords attempted to gain access to the report through the open government mediation program run by the Florida Attorney General's office. However, mediation was not successful and as of April 10, 2014, Mr. Berry still had not provided Ms. Jeffords pages 3 and 4 of the background information report. Pursuant to Florida law, Ms. Jeffords requested that the reasons for the denial of her request be made in writing, including the specific statutory citation authorizing the denial. [Section 119.07(1)(f), F.S., requires "the custodian of public records" to "state in writing *and with particularity* the reasons for the conclusion that the record is exempt or confidential" if requested to do so by the person seeking the record. (emphasis added)]

On May 9, 2014, the Lake Shore Hospital Authority Board attorney, Mr. Marlin Feagle, issued a letter to Ms. Jeffords stating pages 3 and 4 of the records request were not provided as those pages include Mr. Berry's personal credit report. The Board claims that the credit report is exempt from public records request under the Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq. Failing to cite the statute with any particularity, the Board maintains that the FCRA requires credit reports to remain closed, and that federal law preempts any state laws requiring the release of those reports. The Board further claims that this credit report is unavailable for public inspection when there is a conflict between federal and state law relating to the

confidentiality of records.

LEGAL ANALYSIS

Federal Law

It is our opinion that the Board's assertion that Mr. Berry's credit report – pages 3 and 4 of the background information report – is exempt from disclosure pursuant to FCRA is ill founded. Mr. Feagle cited §1681 of the Fair Credit Report Act as the general grounds for denying Ms. Jeffords access to the credit report, claiming that provisions in the federal statute conflict with state law, which prevent the report's disclosure. However, the prohibitions on the release of credit report information in the statute directly and clearly apply only to consumer reporting agencies and not to potential employers such as the Lake Shore Hospital Authority.

Section 607(a) [15 U.S.C. §1681e] of the Act specifically requires “[e]very *consumer reporting agency*” to “maintain reasonable procedures designed to avoid violations” of FCRA and “to limit the furnishing of consumer reports to the purposes listed” within the Act. The term “consumer reporting agency” is defined in § 603 [15 U.S.C. § 1681a] as

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Clearly, the Lakeshore Hospital Authority does not fall with the statutory definition of “consumer reporting agency” and is not subject to the requirements and prohibitions of the FCRA.

Furthermore, § 604 of the Act [15 U.S.C. §1681b] speaks to the permissible purposes of consumer reports, and provides limitations as to when an individual's credit report may be furnished by a consumer reporting agency. The statutory language explicitly limits the use of credit information in the furnishing of a consumer report, but does not limit access to such information under state public records laws.

Florida's Public Records Law

In Florida, there is a presumption of openness, and all public records are open for inspection and copying by any person absent a specific statutory exemption, and only the Legislature can create exceptions to the public's right of access.

Under our statutory scheme, however, access to a record that is subject to disclosure under the state's public records law can be denied pursuant to federal law “when there is *an absolute conflict* between federal and state law relating to confidentiality of records. If a federal statute requires particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the [U.S. Constitution] the state must keep the records confidential.” [2014 *Government-in-the-Sunshine Manual*, p. 150. (emphasis added)]

When federal law requires protection of state records, the Florida Legislature has created specific statutory exemptions under our public records law. For example, the federal Driver's Privacy Protection Act, 18 U.S.C. § 2725, prohibits disclosure of certain personal identifying information in driver history records; in response to the federal act, the Legislature created s.119.0712(2)(b), F.S., providing an exemption for such information under state law. Similarly, s. 1002.2221(1), F.S., provides restrictions on public access to student academic records pursuant to the federal Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232.

Absent clear statutory language in the federal Fair Credit Reporting Act prohibiting disclosure of credit reports obtained by an agency subject to Florida's public records law, it is inappropriate for the Board to assume an exemption and withhold the report. In addition, no legislative history exists indicating any attempt on the part of the Florida Legislature to create a public record exemption for FCRA credit reports.

CONCLUSION

It is our position that your failure to disclose Mr. Berry's credit report pursuant to Ms. Jeffords' public record request is founded on a misreading of the federal statute and is not grounded in law. The federal Fair Credit Reporting Act, 15 U.S.C. § 1681, does not expressly restrict the disclosure of credit reports obtained by an agency pursuant to a public record request, and thus the statute does not in fact create a conflict with Florida's public records law. Therefore, Mr. Berry's credit report is not exempt from disclosure under federal or state law, and access cannot be lawfully denied under our public records law. This assertion is strengthened by the absence of any attempt by the Florida Legislature to create a public records exemption for credit reports.

Accordingly, we ask that you rectify this public records violation and immediately provide Ms. Jeffords with a copy of pages 3 and 4 of Mr. Berry's background information report.

Sincerely,



Barbara A. Petersen
President

Cc: Mr. Stephen Douglas, Vice Chair, LHSA Board
Ms. Loretta Chancy, Secretary/Treasurer, LHSA Board
Mr. DeKoven Adams, Trustee, LHSA Board
Mr. Marc Vann, Trustee, LHSA Board
Mr. Tim Murphy, Trustee, LHSA Board
Ms. Janet Creel, Trustee, LHSA Board
Mr. Marlin Feagle, Esq.
Mr. Jack Berry, LHSA Authority Manager
Mr. Jon Kaney, General Counsel, First Amendment Foundation
Ms. Pat Gleason, Special Counsel for Open Government, Florida Attorney General's Office
Ms. Barbara Jeffords