

Housing Authority, criminal history records

Number: INFORMAL

Date: August 14, 2006

Subject:
Housing Authority, criminal history records

Mr. Robert K. Groeb
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Post Office Box 1468
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Dear Mr. Groeb:

On behalf of the Gainesville Housing Authority, you ask whether a public housing authority may remove, destroy, or otherwise withhold from disclosure any criminal history information that has been obtained for the purposes of screening or evaluating program participants.

According to your letter, the Gainesville Housing Authority (GHA) is a public housing authority created pursuant to Chapter 421, Florida Statutes. You state that the GHA regularly obtains criminal history information from the Alachua County Clerk of Court in order to screen applicants who are applying for housing assistance. During a recent audit by the U.S. Department of Housing and Urban Development (HUD) from which the GHA receives nearly all of its operating revenue, it was discovered that the GHA has been retaining copies of the criminal history screening information within the files of its program participants. The Director of the Office of Public Housing in HUD's Jacksonville Field Office has advised the GHA to purge such records in light of federal law, stating:

"State law does not supersede Federal law. Federal regulations found at 24 CFR 5.903e(2), 'PHA disclosure of records', clearly outline when and to whom a PHA may disclose criminal records received from law enforcement agencies. There are criminal and civil penalties that may be assessed against a PHA for unauthorized or negligent disclosure of criminal histories of tenants or applicants under covered programs (24 CFR 5.903h). The GHA is obligated to comply with Federal regulations and cannot substitute its own interpretation of when to apply them." [1]

Florida's Public Records Law, Chapter 119, Florida Statutes, requires that all public records made or received pursuant to law or in connection with the transaction of official business by any public agency must be open for personal inspection by any person. [2] It is clear that the GHA is an agency for purposes of the Public Records Law and that the records and documents obtained by it constitute public records as that term is defined in Chapter 119, Florida Statutes. [3] Under state law, criminal history records, except where specific exemptions apply, are open. [4]

The issue thus presented in the instant inquiry is whether federal law preempts state law with regard to criminal conviction records. [5] According to your letter, you have expressed your concerns to HUD in light of the state's Public Records Law, referring to such decisions as

Housing Authority of the City of Daytona Beach v. Gomillion,^[6] and *Forsberg v. Housing Authority of the City of Miami Beach*.^[7]

In *Forsberg*, the Florida Supreme Court, in concluding that a housing authority's tenant records were subject to the state's Public Records Law, held that there was no state constitutional right to privacy or *per se* federal constitutional right to disclosural privacy that would remove such records from disclosure. Subsequently in *Gomillion*, the Fifth District Court of Appeal rejected arguments that the federal privacy act as set forth in 5 U.S.C. s. 552a applied to tenant records held by a state housing authority. While the authority's operations were primarily funded by HUD and the authority did not collect tenant information for any purpose other than administering the federally-assisted housing programs funded by HUD, the court concluded that the authority did not fall within the definition of "agency" for purposes of the federal privacy act. The court noted:

"42 U.S.C. 1437(a)(6) defines a public housing authority as 'any state, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low income housing.' This statute does not declare public housing authorities to be federal agencies although Congress could have easily done so in this law, the FOIA, or the Federal Privacy Act had it wished to. This Court finds no federal or state case law finding a public housing authority to be a federal agency or the records of a public housing authority to be agency records."^[8]

Since the court held that the housing authority was not an agency under the federal privacy act, the provisions of that act did not apply to the authority's records.

In the instant inquiry, however, HUD is relying on federal provisions which apply to state public housing authorities. As noted by the court in *Gomillion* above, the definition of public housing authority includes any state, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low income housing.^[9] Thus, unlike the situation in *Gomillion*, the provisions of 42 U.S.C. 1437 *et seq.*, and regulations adopted thereunder, would appear to be applicable to the GHA in carrying out federal low income housing programs under the federal act.

While HUD referred to 24 C.F.R. s. 5.903, the authority for such regulation is contained in, *inter alia*, 42 U.S.C. 1437d which provides in subsection (q) for the availability of criminal records on tenants. Subsection (q) provides in part:

"(1) In general.

(A) Provision of information. Notwithstanding any other provision of law, except as provided in subparagraph (C), *the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to covered housing assistance agencies regarding the criminal conviction records of adult applicants for, or tenants of, public housing for purposes of applicant screening, lease enforcement, and eviction.*

(B) Requests by owners of project-based section 8 housing. A public housing agency may make a request under subparagraph (A) for information regarding applicants for, or tenants of, housing that is provided project-based assistance under section 8 only if the housing is located within the jurisdiction of the agency and the owner of such housing has requested that the agency obtain such information on behalf of the owner. Upon such a request by the owner, the agency shall

make a request under subparagraph (A) for the information. The agency may not make such information available to the owner but shall perform determinations for the owner regarding screening, lease enforcement, and eviction based on criteria supplied by the owner.

(C) Exception. A law enforcement agency described in subparagraph (A) shall provide information under this paragraph relating to any criminal conviction of a juvenile only to the extent that the release of such information is authorized under the law of the applicable State, tribe, or locality.

* * *

(4) Records management. Each public housing agency shall establish and implement a system of records management that ensures that *any* criminal record received by the public housing agency is--

(A) maintained confidentially;

(B) not misused or improperly disseminated; and

(C) destroyed, once the purpose for which the record was requested has been accomplished.

(5) Confidentiality. A public housing agency receiving information under this subsection may use such information only for the purposes provided in this subsection and such information may not be disclosed to any person who is not an officer, employee, or authorized representative of the agency and who has a job-related need to have access to the information in connection with admission of applicants, eviction of tenants, or termination of assistance. For judicial eviction proceedings, disclosures may be made to the extent necessary. The Secretary shall, by regulation, establish procedures necessary to ensure that information provided under this subsection to a public housing agency is used, and confidentiality of such information is maintained, as required under this subsection. The Secretary shall establish standards for confidentiality of information obtained under this subsection by public housing agencies on behalf of owners." (e.s.)

In discussing what criminal records are covered by the subpart, Subpart J, Part V, Subtitle A of Title 24 (which includes 24 C.F.R. 5.903) applies, Title 24 C.F.R. 5.901 provides in part:

"(a) General criminal records searches. This subpart applies to criminal conviction background checks by PHAs (public housing authorities) that administer the Section 8 and public housing program when they obtain criminal conviction records, under the authority of section 6(q) of the 1937 Act (42 U.S.C. 1437d(q)), *from a law enforcement agency* to prevent admission of criminals to public housing and Section 8 housing and to assist in lease enforcement and eviction." (e.s.)

"Law enforcement agency" is defined in 24 C.F.R. 5.902(b) to mean the "National Crime Information Center (NCIC), police departments and other law enforcement agencies that hold criminal conviction records."

In many states, criminal conviction records may not be readily open to the public. The provisions of the federal act and regulations, which establish the right of a public housing agency to obtain criminal conviction records from law enforcement agencies, would appear to be drafted to ensure access to such records by a public housing agency where access is not generally available.[10] The confidentiality of such records so obtained is required to be maintained by the

federal act and regulations. Thus, the provisions regarding the use and maintenance of such records generally refer to records received from law enforcement agencies.[11]

The records of the GHA, however, were not obtained from a law enforcement agency; such records in Florida are, except where specific exemptions apply, public records subject to disclosure and the GHA did not need to avail itself of the provisions of 42 U.S.C. 1437d(q) to obtain such records. According to your letter, the GHA has obtained its copies of the criminal records from the office of the clerk of the courts rather than from a law enforcement agency. Thus, it appears questionable whether the provisions of the federal act and regulations apply to records received from an entity other than a law enforcement agency. In fact, this office notes that the letter received from the HUD Jacksonville Field Office does not directly address the issue of whether the federal act and regulations apply to records not obtained from law enforcement but rather states that "[f]ederal regulations found at 24 CFR 5.903e(2), 'PHA disclosure of records', clearly outline when and to whom a PHA may disclose criminal records *received from law enforcement agencies*."

This office, however, has generally stated that any legal determination as to whether a provision of federal law exempts records from Chapter 119, Florida Statutes, by virtue of preemption, is a matter which must ultimately be considered and passed on by the federal agency charged with the administration of the federal act.[12] In light of the above, this office would suggest that you seek a formal determination on this issue from HUD's General Counsel.

Sincerely,

Joslyn Wilson
Director, Opinions Division

JW/tfl

[1] Letter to Robert K. Groeb, Attorney, Gainesville Housing Authority, from John G. Niesz, Director, Office of Public Housing, U.S. Department of Housing and Urban Development, Jacksonville Field Office, dated March 29, 2006.

[2] See s. 119.07(1), Fla. Stat. *And see* s. 119.011(11), Fla. Stat., defining "[p]ublic record" as any document, paper, letter, map, book, tape, photograph, film, sound recording or other material, regardless of the physical form or characteristic, which is "made or received pursuant to law . . . or in connection with the transaction of official business by any agency."

[3] See s. 119.011(2), Fla. Stat., defining "Agency" for purposes of Ch. 119, Fla. Stat., to include "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law"

[4] See Op. Att'y Gen. Fla. 77-125 (1977); *and see* s. 943.046, Fla. Stat.

[5] See, e.g., Op. Att'y Gen. Fla. 05-03 (2005), discussing the applicability of federal

confidentiality provisions to the state child abuse death review committee and stating that if a federal statute requires particular records to be closed and the state is clearly subject to the provisions of the statute, then pursuant to the Supremacy Clause of the United States Constitution, the state must keep the records confidential. *See also State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); Ops. Att'y Gen. Fla. 03-26 (2003), 90-102 (1990), 85-03 (1985), and 82-63 (1982). *Cf. Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, No. 91-2108 (Fla. 2d Cir. Ct., September 20, 1991), *per curiam affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992) (where federal law did not clearly require that documents received by a state agency in the course of settlement negotiations to resolve a federal lawsuit be kept confidential, such documents were open to inspection under Ch. 119, Fla. Stat.).

[6] 639 So. 2d 117 (Fla. 5th DCA 1994).

[7] 455 So. 2d 373 (Fla. 1984).

[8] 639 So. 2d at 121.

[9] 42 U.S.C. 1437a(6).

[10] *See, e.g.*, 24 C.F.R. 5.903(a) providing that the section authorizes a public housing authority that administers the Section 8 program and/or the public housing program to obtain criminal conviction records from a law enforcement agency as defined in 24 C.F.R. 5.902 to screen applicants for admission to covered housing programs and for lease enforcement or eviction of families residing in public housing or receiving Section 8 project-based assistance.

[11] *See, e.g.*, 24 C.F.R. 5.903(e) which sets forth the permitted uses and disclosure of criminal conviction records "received by a PHA from a law enforcement agency in accordance with this section"; and 24 C.F.R. 5.903(g) which addresses records management refers to criminal records received by a PHA from a law enforcement agency. While 42 U.S.C. 1437d(q)(4) refers to the confidentiality of any criminal record received by a public housing agency, it would appear appropriate to read such provision in conjunction with the other provisions of the statute referencing criminal conviction records received from a law enforcement agency.

[12] *See, e.g.*, Ops. Att'y Gen. Fla. 81-101 (1981) and 77-69 (1977).