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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 18, 2005

The Honorable Thomas L. Moore
Senator, District # 25
Gressette Senate Office Building, Suite 513
Columbia, South Carolina 29211

Dear Senator Moore:

You have requested an opinion regarding a letter you received concerning the subject of confidentiality and the allocation of funds for emergency food and shelter. The letter you received was attached to your opinion request and forwarded to this Office. It was explained therein that Federal Emergency Management Agency (FEMA) had authorized local boards to distribute allocated funds for emergency food and shelter. The letter noted that the local board was required to compile information and submit a report to the "FEMA board" who then submitted a report to the "Federal Emergency Management Agency." Moreover, the author explained that one of the organizations involved in the program had included the names of recipients in its report. Another organization refused to view the report, claiming that the disclosure of recipient names was a violation of those individuals' privacy rights. The letter then clarified that the names were only shared with members of the local board and that the names were collected solely for the purpose of preventing fraudulent "duplication" ("recipients going from one organization to another and receiving help twice through the same grant."). Finally, the letter questioned whether disclosure of this information was a breach of confidentiality, and whether the local boards should require recipients to sign a release of information form before providing assistance.

Although not specifically mentioned, the process of allocation, distribution and reporting described in the letter appears to be that found in the Federal Emergency Management Food and Shelter Program (EFSP). Therefore, we will advise as to the confidentiality of those who receive EFSP assistance. Second, we observe that, because the EFSP is a federal assistance program, disclosure of information derived from the execution of the program is subject to *federal* disclosure requirements. Finally, as will be seen below, federal case law indicates that the names of the recipients of federal assistance are typically not protected from disclosure pursuant to the Freedom of Information Act if the public's interest in disclosure outweighs the individual's right to privacy. Following review of the pertinent federal statutes and relevant case law, we advise that a court would most likely conclude it not to be a violation of the recipients' privacy if their names are disclosed to the local board. Nevertheless, while perhaps legally unnecessary, it is probably a wise practice for recipients to sign a release of information form prior to providing assistance.

Law / Analysis

Although not specifically addressed in the letter, we have concluded that the author inquired as to the confidentiality of names taken with respect to the EFSP. The Emergency Food and Shelter Program's purpose is "the provision of emergency food and shelter services to needy individuals." *See*, Notice, Federal Emergency Management Agency, The National Board Plan for Carrying out the Emergency Food and Shelter Program," March 4, 1988. We note that the United States Code establishes the Federal Emergency Management Program National Board. 42 U.S.C.A. § 11331. The Board consists of a Director and six members chosen from the United Way of America, the Salvation Army, the National Council of Churches of Christ in the U.S.A., Catholic Charities U.S.A., the Council of Jewish Federations, Inc., and the American Red Cross. The National Board "is chaired by a representative of the Federal Emergency Management Agency (FEMA)." See, http://www.fema.gov/rrr/efs.shtm; see also, 42 U.S.C.A. § 11331 (a). Furthermore, the statute establishes a local board which shall in part "monitor recipient service providers for program compliance" and "ensure proper reporting." 42 U.S.C.A. § 11332 (b)(2), (4). Based upon the description of the program and its processes contained in the enclosed letter, as well as the aforementioned statute, we believe that the subject or inquiry of that letter is the confidentiality of the names of those individuals receiving assistance pursuant to the EFSP.

Thus, we now turn to whether the disclosure of information taken pursuant to the implementation of the EFSP is governed by state or federal law. The EFSP statute explains that the National Board possesses authority to allocate funds to "private nonprofit organizations and local governments," but the Board "may not carry out programs directly." 42 U.S.C.A. § 11343 (b)(1)(A), (b)(2). Furthermore, the statute requires the National Board to create specific written guidelines for implementation of the program. The written guidelines include:

> (1) methods for identifying localities with the highest need for emergency food and shelter assistance;
> (2) methods for determining the amount and distribution to such localities;
> (3) eligible program costs, including maximum flexibility in meeting currently existing needs;
> (4) guidelines specifying the responsibilities and reporting requirements of the National Board, its recipients, and service providers;
> (5) guidelines requiring each private nonprofit organization and local government carrying out a local emergency food and shelter program with amounts provided under this part, to the maximum extent practicable, to involve homeless individuals and families, through employment, volunteer services, or otherwise, in providing emergency food and shelter and in otherwise carrying out the local program; and
> (6) guidelines requiring each private nonprofit organization and local government carrying out a local emergency food and shelter program with amounts provided

> under this part to provide for the participation of not less than 1 homeless individual or former homeless individual on the board of directors or other equivalent policy making entity of the organization or governmental agency to the extent that such entity considers and makes policies and decisions regarding the local program of the organization or locality; except that such guidelines may grant waivers to applicants unable to meet such requirement if the organization or government agrees to otherwise consult with homeless or formerly homeless individuals in considering and making such policies and decisions.

It is apparent from the foregoing that federal law is controlling with respect to the EFSP program. The aforementioned authority requires the local boards to implement the EFSP programs directly as a matter of federal law. In collecting information and implementing federal law, the local boards are acting as part of the federal government. Therefore, the local boards are subject to federal law when acting pursuant to federal policy. Accordingly, in implementing federal law, it appears that the local boards are subject to the disclosure requirements of the federal Freedom of Information Act.

The federal Freedom of Information Act governs the confidentiality of information gathered pursuant to a federal program or by a federal agency. See generally, 5 U.S.C.A. § 552. The Supreme Court has concluded that the Act is designed to "facilitate public access to government documents" and that it creates a "strong presumption" in favor of governmental disclosure. *U.S. Dept. of State v. Ray*, 502 U.S. 164, 73, 112 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991). The Freedom of Information Act requires full disclosure of documents unless the information falls within one of the nine statutory exemptions. *Burka v. United States Department of Health and Human Services*, 87 F.3d 508, 515 (D.C.Cir.1996); see also, *Oglesby v. United States Department of Army*, 79 F.3d 1172, 1176 (D.C.Cir.1996).

Exemption 6 of the federal FOIA deals specifically with personnel files, medical files and similar files and will apply only "... if disclosure would constitute a clearly unwarranted invasion of privacy." 5 U.S.C.A. § 552 (b)(6). In order for this exemption to be governing, a court must 'balance the individual's right of privacy' against the public's right to scrutinize agency action. *Department of State v. Ray*, 502 U.S. at 175. As the Court noted in *Washington Post Company v. U.S. Dept. of Agriculture*, 943 F.Supp. 31, 34 (D.C. Cir. 1996), the Supreme Court has rejected the position that the "disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of individuals on the list. Instead, ... whether disclosure of a list of names is a 'significant or a *de minimus* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.'" (quoting *Department of State v. Ray*, 502 U.S. 164, 176 n. 12 (1991)) (quoting *National Association of Retired Federal Employees ("NARFE") v. Horner*, 879 F.2d 873, 877 (D.C.Cir.1989), cert. denied, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990)). Therefore, disclosure is required, unless such disclosure

encourages "clearly unwarranted" intrusions upon individual privacy rights. *NARFE v. Horner*, 979 F.2d at 875.

To our knowledge, the courts have not specifically addressed the question of disclosure with respect to the EFSP. However, in similar disclosure cases, public disclosure of names in cases in which there was little chance that privacy rights would be violated have been upheld. In *Washington Post Company v. United States Department of Agriculture, supra*, for example, the Court concluded that disclosure of the names and addresses of individuals receiving government cotton subsidies was not exempted from release under the Freedom of Information Act. In the view of the Court, there was little or no harm of private intrusion while, at the same time, a substantial interest existed to release the information to the public in order that the workings of the agency could be monitored. The Court reasoned that, because the list was so large, most of the names were those of business people who would not realize a significant increase in the volume of solicitation as a result of the disclosure. Moreover, inasmuch as there was a strong public interest in disclosing the names and addresses of recipients to better understand the workings of the agency, the information was public in nature and properly disclosed. 943 F. Supp. at 34, 35, 36.

Furthermore, we have relied upon similar federal case law interpreting the Federal Freedom of Information Act to interpret the South Carolina's Freedom of Information Act where a purported privacy interest is involved. In *Robles v. Environmental Agency*, 484 F.2d 843 (4th Cir. 1973), the Fourth Circuit Court of Appeals had stated that, "in determining the issue of whether disclosure would constitute a 'clearly unwarranted invasion of personal privacy,' the court should 'tilt the balance in favor of disclosure.' We adopted the same reasoning as set forth in *Robles* and added that, "where an exemption from disclosure is applicable to a particular record, such an exemption is, of course capable of being waived." See, *Op. S.C. Atty. Gen.* May 10, 1984; *Op. S.C. Atty. Gen.* November 14, 1989. *See also, Society of Profess. Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) [matters of public interest are not exempt pursuant to privacy exceptions of FOIA]; *Weston v. Carolina Research and Devel. Foundation*, 303 S.C. 398, 402, 401 S.E.2d 161 (1991) [FOIA "mandates that the public be provided with information regarding the expenditure of public funds."

Although a presumption of disclosure exists, we note also that the courts have been hesitant to uphold disclosure when it would invite an unwarranted invasion of personal privacy. In *NARFE v. Horner, supra*, the D.C. Circuit Court found that disclosure of the names and addresses of retired federal employees would be overly intrusive because it would significantly increase the volume of solicitation mail received and was, therefore, an unwarranted invasion of personal privacy. 979 F.2d at 875. Furthermore, in *Stabasefski v. United States*, 919 F.Supp. 1570 (M.D. Ga. 1996) the District Court for the Middle District of Georgia found that the names of Federal Aviation Administration (FAA) employees who had received disaster assistance were exempt from disclosure under the Freedom of Information Act because disclosure would cause unwarranted invasion of personal

privacy. At the same time, disclosure would not reveal any information about the workings of the FAA.

Based upon the foregoing, we advise that the disclosure of recipient names when implementing the EFSP would most likely not constitute a violation of the Freedom of Information Act. In the attached letter, the author explained that the recipient names were provided for the purpose of preventing fraudulent "duplication" (recipients going from one organization to the next and receiving double recovery from the same grant). Importantly, the letter indicates that the names were only disclosed to the local board members rather than to the public at large. Implementing the above-referenced balancing test, we must thus discern whether the right of the recipient's personal privacy outweighs the public's interest in disclosure. See, *Department of State v. Ray*, 502 U.S., *supra* at 175. Second, we must determine whether the information was actually disclosed. Based upon the information presented to us, the only information disclosed were the names of the EFSP recipients. We thus conclude that, because only the names were disclosed, there is little or no chance that disclosure would constitute a "clearly unwarranted invasion of personal privacy." In the present situation, disclosure of the names would do nothing more than reveal the identity of the individual receiving federal assistance. If the recipients' names were coupled with addresses or social security numbers, there would undoubtedly be a far more significant chance for an invasion of privacy. However, as the Supreme Court has indicated, the mere disclosure of a list of names is not automatically an invasion of one's privacy. See, *Washington Post Company v. United States Department of Agriculture*, *supra*; *see also, Hertzberg v. Veneman*, 273 F.Supp.2d 67, 85 (D.C. Cir. 2003) [unlimited disclosure of name and address "is not enough to satisfy the requirements of Exemption 6 ...."] Furthermore, the courts have clearly established that where doubt exists, one should err on the side of disclosure. See, *Robles v. Environmental Protection Agency*, 484 F.2d, *supra*, at 843. Accordingly, we advise that no personal privacy issue is raised by the mere disclosure of recipient names.

In analyzing the issue, the courts have also focused upon the issue of whether disclosure of the names would assist the public in analyzing the actions of the agency. In this case, the author of your enclosed letter noted that the sole purpose for providing the names was to prevent fraudulent "duplication." In *Washington Post*, the Court explained that disclosure served to shed light on "the workings of the Department of Agriculture and the administration of this massive subsidiary program." 943 F.Supp. at 36. Likewise, it appears that disclosure of recipient names in this case would also serve an important public interest. As indicated, the purpose for collecting the names is to prevent fraudulent "duplication." Disclosure would provide valuable information as to who receives funds and how those funds are distributed. Furthermore, disclosure would ensure that the funds are being properly administered in compliance with the program and the statute as required in 42 U.S.C.A. § 11332 (b)(2). Accordingly, we believe that disclosure would not violate personal privacy interests. Furthermore, disclosure serves the valid purpose of monitoring the actions of the local board as well as the organizations distributing the program funds.

We are unaware of any request having been made pursuant to the federal Freedom of Information Act in this instance and therefore assume no such request has been made. Thus, the real question here is whether the names could be properly taken and reviewed by the local board.[1] In implementing the EFSP, the local board is delegated certain oversight responsibilities that it must perform, including:

> (1) determine which private nonprofit organizations or public organizations of the local government in the individual locality shall receive grants to act as service providers;
> (2) monitor recipient service providers for program compliance;
> (3) reallocate funds among service providers;
> (4) ensure proper reporting; and
> (5) coordinate with other Federal, State, and local government assistance programs available in the locality.

42 U.S.C.A. § 11332 (b).

The foregoing statutory language demonstrates that the local board possesses broad authority to implement the program and to oversee that implementation. Yet, the statute is silent as to whether recipient names must be included in any report to the local board. In our view, however, it is within the local board's authority to prevent "duplication" when exercising its aforementioned duties and to monitor how the taxpayer funds are being spent. Therefore, absent express statutory language prohibiting such practice, we are of the opinion that the local boards may collect and view the names of recipients in the scope of fulfilling their duties to monitor recipient service providers and ensure proper reporting. See, 42 U.S.C.A. § 11332 (b). Such a function is part and parcel of the local board's oversight function and is a minimal intrusion upon the recipient's privacy interests.

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[1] We will assume for purposes of this opinion that the organizations providing the names to the local bards are "agencies" for purposes of the federal FOIA. *See, Rocap v. Indiek,* 539 F.2d 174 (U.S. App. D.C. 1976) [Federal Home Loan Mortgage Corp. is subject to substantial federal control and is thus an "agency" for purposes of FOIA]; *Krebs v. Rutgers*, 797 F.Supp. 1246 (D.N.J. 1992) [entity has FOIA or Privacy Act agency status if government is involved in and/or has authority over decisions affecting ongoing, daily operations of entity]. That an entity is an "agency" for purposes of the federal FOIA/Privacy Act is a "threshold" question which must be resolved by a court.

In this instance, it appears that the list of names is originally generated by the organization distributing EFSP funds and that such list is then provided to the local board as part of its review process. It is unclear whether this information would be considered as a record of the organization or of the local board. Again, however, we will assume that the information is that of an "agency" pursuant to the FOIA.

Finally, as to the question regarding release forms, we encourage the use of such forms. As stated, we believe that the recipient names are disclosable, particularly in such a limited fashion as is contemplated here, because disclosure does not constitute a clearly unwarranted invasion of personal privacy. Furthermore, it is well within the authority of the local board to collect the names. Nevertheless, we caution that we have located no judicial decision which is precisely on point in this area. Therefore, although we believe that a court would likely find the names to be disclosable in the circumstances outlined in your letter, we advise that it is probably a good practice for recipients to sign a waiver of information before taking their names.

The courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest, may validly waive it. *See, Sherman v. United States Dept. of the Army*, 244 F.3d 357 (5th Cir. 2001). The privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information. *Id.* Thus, certainly a local board would be wise to obtain a valid waiver through the use of a waiver form, particularly if such names are to be disclosed to the public as part of an FOIA request therefor. The use of such forms would serve to remove any doubt concerning the release of such names.

Conclusion

It is our opinion that a court would most likely conclude that the local agency's collection of recipient names pursuant to the Emergency Food and Shelter Program is not exempt under Exemption 6 of the federal Freedom of Information Act. In Exemption 6, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.' The device adopted to achieve that balance was the limited exception where privacy was threatened for 'clearly unwarranted' invasions of privacy. *Dept. of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Here, a court would likely conclude that the intrusion upon the privacy interests of recipients of EFSP assistance is "*de minimis*" rather than "clearly unwarranted." All that will be disclosed to the local boards by nonprofit agencies is the name of the recipient receiving federal assistance. Moreover, disclosure of such information properly sheds light with respect to the implementation of the program. Further, as we understand, there has been no request to make such information public, and no FOIA request has been made, but would be only disclosure to the local board is contemplated. The local boards' ability to review such information is a valid exercise of its duties, and in the context of providing the names of recipients of assistance to the local boards, we conclude that such is not a "clearly unwarranted invasion of personal privacy" under the federal FOIA.

With respect to your question regarding the necessity of a release of information form, the use of such a form is obviously a prudent course and we encourage such use. Although we consider any privacy interest in this circumstance to be *de minimis*, a valid waiver of any privacy interest

regarding disclosure of a recipient's name would eliminate any dispute regarding the existence of such privacy right.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General