

March 14, 2008

Major Mark A. Keel
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Major Keel:

In a letter to this office you requested an interpretation of S.C. Code Ann. § 23-3-115 with regard to the costs of disseminating criminal history record information (CHRI) at a reduced fee to the South Carolina Association of Personal Care Providers (“the Association”). You indicated that the Association is requesting a reduced fee for conducting State CHRI reports for the association members. You stated as follows:

SLED acknowledges that...(the Association)...is a non-profit corporation recognized by the South Carolina Secretary of State. SLED also recognizes that the personal care providers are providing a vital function in a critical area of society, which mainly provides services to recipients of Medicaid and other disadvantaged persons. It must be noted that the individuals who are required to get a South Carolina CHRI report by the South Carolina Department of Health and Human Services...(“DHHS”)...are individual care providers and for-profit companies or entities. SLED does not believe that Section 23-3-115 allows a non-profit organization to conduct SLED background checks for a reduced fee for member organizations who are categorized as for-profit.

You indicated that certain statutes specifically provide for CHRI background checks for certain positions. According to S.C. Code Ann. § 59-25-115, school teachers are required to have a background check. S.C. Code Ann. § 40-80-20 requires a criminal records check prior to employment as a paid or volunteer fireman. It is specifically provided that the cost of the background check shall not exceed eight dollars. According to your letter, there is no statute providing for a reduced fee for a background check for personal care providers. It is my understanding that until recently, SLED was running criminal records checks at \$8.00 per check but SLED has now terminated running such checks at that reduced rate and is charging \$25.00 per check. The Association is asking for a reconsideration of that decision and a return to the policy of charging only \$8.00 per criminal record check.

Section 23-3-115 states as follows:

[n]otwithstanding any other provision of law, the State Law Enforcement Division shall charge a fee not to exceed eight dollars for a criminal record search conducted pursuant to this article and related regulations contained in Subarticle 1, Article 3, Chapter 73 of the Code of Regulations, if the criminal record search is conducted for a charitable organization or for the use of a charitable organization. The division shall develop forms on which a charitable organization shall certify that the criminal record search is conducted for the use and benefit of the charitable organization. For purposes of this section, the phrase "charitable organization" shall mean:

- (1) an organization which has been determined to be exempt from taxation under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended;
- (2) a bona fide church, including an institution such as a synagogue or mosque; or
- (3) an organization which has filed a statement of registration or exemption under the Solicitation of Charitable Funds Act, Chapter 56, Title 33.

(emphasis added). Section 56DD.7 of Act No. 117 of 2007 provides for the collection of a twenty-five dollar fee for each criminal record search conducted by SLED. It is further provided that

(2) The fee allowed under paragraph (1) is fixed at eight dollars if the criminal record search is conducted for a charitable organization, a bona fide mentor, or for the use of a charitable organization.

The division shall develop forms on which a mentor or charitable organization shall certify that the criminal record search is conducted for the use and benefit of the charitable organization or mentor. For purposes of this subparagraph, the phrase "charitable organization" means:

- (a) an organization which has been determined to be exempt from taxation under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended.
- (b) a bona fide church, including an institution such as a synagogue or mosque;
- (c) or volunteers of a local recreation commission;
- (d) an organization which has filed a statement of registration or exemption under the Solicitation of Charitable Funds Act, Chapter 56, Title 33 of the 1976 Code. (emphasis added).

According to an attachment to your letter, "SLED...is interpreting § 23-3-115 to prohibit...(the Association)...from running criminal record checks for its members, who are individual care providers and for-profit entities."

As you noted in your letter, "SLED acknowledges that...(the Association)...is a non-profit corporation recognized by the South Carolina Secretary of State." According to the attachments to your letter, the Association has filed nonprofit corporation articles of incorporation with the State Secretary of State's office and has received a certification of incorporation as a nonprofit corporation by the Secretary of State's office dated April 21, 2006. Also forwarded was a letter from the Director of the Public Charities Division of the Secretary of State's office dated April 10, 2007 which states

[t]his Office is in receipt of your Application for Exemption from the filing requirements of the "South Carolina Solicitation of Charitable Funds Act." Based upon a review of your application, please accept this letter as a Letter of Exemption which may be exhibited to the public.

In a letter dated December 19, 2007 from the attorney for the Association, it was indicated that the Association was created in 2002 and in April, 2006, the Association formalized itself as a non-profit corporation under S.C. Code Ann. §§ 33-31-101 et seq. According to that letter, the Association's mission is "to provide an organized and unified voice for Medicaid home-based services providers and to promote the highest standards of home care on behalf of the Medicaid recipients of South Carolina. According to the Association's Bylaws §§ 1.2(a) through (i), the purpose of the Association is:

- (a) To promote high standards of qualitative, comprehensive and cost efficient long-term services on behalf of the citizens and Medicaid recipients of South Carolina;
- (b) To heighten the visibility of Medicaid waived services.
- (c) To provide an organized and unified voice for Medicaid waived clients and provider groups in order to assist companies and individuals to understand legislative, regulatory and financing issues affecting long-term care.
- (d) To promote understanding of Medicaid waived services and related services to the public, physicians and payer sources.
- (e) To collect, interpret and disseminate long-term care data and information to clients, long-term care providers, third party payers, governmental agencies and private sector groups.
- (f) To facilitate and provide consultation and education, and to provide for the exchange of ideas among members.
- (g) To initiate, sponsor and promote research and education related to long-term care services.
- (h) To promote good relations between the association and the program coordinator's office, and to promote the development of acceptable guidelines and distribution of this information between the two groups.
- (i) To inform the general public and members about acceptable guidelines for ethical conduct for providers and their personnel thus promoting and maintaining the highest ethical standards and integrity.

According to that same letter, “a ‘personal care provider’ is a company that provides home care aides to work in clients’ homes through the Community Long-term Care, Department of Disability Special Needs, and Head and Spinal Cord Injury programs. These are Medicaid programs administered by DHHS.” As stated in that letter, “[a]s of July 1, 2005, DHHS amended its general contract between it and all individual personal care provider companies to include a requirement that the providers conduct background checks on all potential employees beginning July 1, 2006.” It was further stated that “[i]n order to ensure the accuracy, reliability, and timeliness of the criminal records checks, the Association’s members tasked the Association with running SLED criminal record checks on behalf of the members.”

According to a letter from the attorney for the Association dated December 7, 2007, the process used to run a SLED check is as follows:

A member organization would submit a signed request to the Association for a SLED check. An Association staff member would then run the SLED check via the Internet. The Association staff member would forward the print-out of the Internet SLED catch check to a designated recipient at the member organization for use in employment and for filing in the personnel file of the personal care worker - in order to comply with federal regulations mandating that such a check be conducted.

The letter dated December 19 referenced above states that “[b]ecause of its non-profit status, the Association has been paying to SLED the non-profit rate of \$8.00 per criminal record check....” Again, it is my understanding that the individuals for whom the background checks are run by the Association are paid individual care providers and employees of for profit organizations.

As emphasized above, pursuant to Section 23-3-115, the eight dollar fee is to be charged “if the criminal record search is conducted for a charitable organization or for the use of a charitable organization. The division shall develop forms on which a charitable organization shall certify that the criminal record search is conducted for the use and benefit of the charitable organization. (emphasis added). While in practice, the Association, a recognized charitable organization, makes the request for the criminal records check, the check is in reality for a paid individual care provider who is an employee of a for profit organization. I am unaware of any benefit which inures to the Association by the running of the records check. Therefore, it does not appear that practically speaking, the records search is for the charitable organization or for its use.

As set forth in City of Picayune v. Southern Regional Corp., 916 So.2d 510 at 523 (Miss. 2005), “...the basic requirement of a nonprofit, public benefit entity is that it be operated exclusively for a charitable purpose, that it serve the public rather than a private interest....” See also: Summers et al. v. Cherokee Children and Family Services, Inc. et al., 112 S.W.3d 486 at 507 (Ct.App. Tenn. 2002) (“...the Attorney General, acting in the public interest, has authority to seek dissolution of a nonprofit public benefit corporation which fails to devote its assets to a public, rather than a private interest.); 18 Am.Jur.2d Corporations Section 34 (“The basic requirement of a nonprofit, public benefit entity is that it be operated exclusively for a charitable purpose, that it serve a public rather

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than a private interest.”); 6 Fletcher Cyc. Corp. Section 2544 (“[a] nonprofit corporation cannot use its funds to conduct activities unrelated to its nonprofit purposes.”).

As noted previously above, the bylaws of the Association sets forth its purpose. I do not discern within any of the purposes set out in these bylaws the intention to allow a for profit organization to save fees in carrying out its responsibilities of obtaining a criminal record check of care providers. The general powers of nonprofit corporations as set forth in S.C. Code Ann. § 33-31-302 also do not appear to support such a benefit to a private company. By analogy, it could be asserted that utilizing a nonprofit corporation to obtain a less expensive records check of an employee of a private, for profit organization could be construed as a donation by that nonprofit corporation to the for profit group. An opinion of this office dated August 2, 2006 stated that

...the Legislature specifically allows a nonprofit corporation to make donations to other organizations, presuming such donations are within the nonprofit’s purposes. However, if the nonprofit’s articles limit or eliminate a nonprofit corporation’s donation power, if the donation of the nonprofit corporation’s funds is “inconsistent with law for the public welfare or for charitable, religious, scientific, or educational purposes, or if the donation is outside of the nonprofit corporation’s purposes, such acts may be deemed ultra vires by a court.”

Consistent with the above, in the opinion of this office, neither S.C. Code Ann. § 23-3-115 nor any other provision requires the dissemination of criminal history record information at a reduced fee to the South Carolina Association of Personal Care Providers when it will be utilized by paid employees or a for profit company. Instead, it appears that such Association would be subject to the twenty-five dollar fee charged typically for a criminal records search.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General