

UNITED STATES GOVERNMENT  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

July 8, 1998

Re: Section 604(b)(3) and Section 609(a) of the Fair Credit Reporting Act

Dear Mr. Hahn:

I am writing in response to your letter concerning the requirement in Section 604(b)(3) of the amended Fair Credit Reporting Act (FCRA) that any person intending to take an adverse employment action, based in whole or in part on the contents of a consumer report from a consumer reporting agency (CRA), must first provide a "copy of the report" to the consumer.

You point out that an "investigative consumer report" (such as a background investigation for employment purposes) is a "consumer report" covered by this provision, and note that Section 604(b)(3)(A) does not expressly permit the employer to delete the identity of the sources of information used in preparing investigative consumer reports before making the disclosure required by Section 604(b). You express concern that employers who obtain investigative consumer reports may have to disclose the entire report, including the identity of sources. If this happens, you believe that it may be difficult for consumer reporting agencies such as your company to obtain information from former employers or friends or associates of a consumer since you will not be able to offer confidentiality to these sources. You ask for our views as to what constitutes a "copy" of an investigative consumer report for Section 604(b)(3)(A) purposes -- the complete report (including sources) or a redacted version in which the sources of information are deleted. We believe the section requires the employer to provide the complete report.

The issue that you raise concerns the meaning of the term "copy of the report" when used in Section 604(b)(3)(A). The term is not defined in the FCRA. Therefore, unless a review of the FCRA reveals a special meaning, the common definition of the term (a mechanical reproduction of the report) should be used. Applying the common definition, it is clear that when a standard consumer report, such as a credit report or a criminal records check, is the basis for an adverse action in the employment context, the employer will have to provide a complete copy of the report. The question is whether the result is any different in the case of investigative consumer reports because of the special treatment accorded "sources" in the two other provisions of the FCRA -- Section 609(a) and Section 603(o) -- that explicitly discuss the disclosure of "sources."

Section 609 sets forth the duties of CRAs when consumers request the disclosure of information in CRA files. Subsection (a)(2) specifically permits CRAs to delete the sources of investigative consumer report information before making the disclosures required by Section 609. This exemption was in the FCRA when it was first passed and was not changed by Congress in the recent amendments to the Act.<sup>(1)</sup> The fact that the exemption remains in the FCRA is of some significance, since the amendments otherwise *increase* the amount of

information that must be disclosed to consumers by CRAs pursuant to Section 609.<sup>(2)</sup> Thus, Congress protected sources from disclosure at the same time that it broadened consumers' rights to gain access to information.

Section 603(o) is an entirely new provision added by Congress in the recent amendments. It exempts from the definition of "consumer report" (and, thus, from coverage by the FCRA) certain communications by employment agencies (the results of interviews with an applicant's personal references) that would otherwise be investigative consumer reports. In order for the exemption to apply, certain procedures must be followed. Among these procedures is a disclosure that parallels the disclosure required by Section 609. Significantly, the subsection that mandates disclosure (603(o)(5)(C)) specifically excludes from disclosure "sources of any information that is acquired solely for use in making the communication and actually used for no other purpose."

In contrast to the disclosures required by Section 609 (for CRAs, when they provide file information to consumers) and Section 603 (for employment agencies, when they seek to exempt their communications from the "consumer report" definition), the disclosure required by Section 604 for employers, when they plan to take adverse action, contains no exception for investigative sources. The requirement of Section 604(b)(3)(A) that an employer must provide a "copy of the report" to the consumer before taking adverse action on it is unqualified. It is therefore our opinion that an employer who redacts reference to investigative sources in the copy of the report, prior to providing it to the consumer, violates Section 604(b)(3)(A).

In order to reduce concerns about disclosure of sources, CRAs such as your company may wish to provide employers with reports that do not specifically identify sources. For example, instead of stating that a specific individual working for a named company provided an item of information, you may state that the information came from a former employer without identifying either the individual or the employer. Your clients may then release these reports to consumers "as is" consistent with the requirements of Section 604(b)(3) of the FCRA.

I hope that this information is helpful to you. The views expressed herein are those of the staff and do not necessarily reflect the views of the Commission or of any Commissioner.

Sincerely,

William Haynes  
Attorney  
Division of Credit Practices

---

1. The legislative history shows that Congress included the "source" exemption in Section 609(a)(2) because of concern that a requirement to reveal sources would make it difficult for consumer reporting agencies to obtain information for investigative consumer reports. This history is discussed in some detail in *Retail Credit Company v. Dade County, Florida*, 393 F. Supp. 577, 580-582 (S.D. Fla. 1975).

2. Before the amendments became effective in September of 1997, Section 609 required a CRA to disclose only the "nature and substance of all information (except medical information) in its files." Section 609(a)(2) now requires disclosure of "all information in the consumer's file" -- a disclosure that may be broader than the

disclosure that Congress now requires employers to make under Section 604(b)(3) (a "copy" of the report relied upon by the employer).