

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

Division of Credit Practices
Bureau of Consumer Protection

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Attorney
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July 10, 1998

Re:

- (1) State law enforcement agencies - FCRA § 603(f)
- (2) Employers/investigative consumer reports - FCRA §§604(b), 606, 615(a)

Dear Mr. Pickett:

This responds to your letter concerning the application of the Fair Credit Reporting Act ("FCRA") to public school districts in connection with background checks they conduct on employment applicants. Specifically you state that "schools are requesting, and in many cases are required by law to obtain, one or more of the following kinds of information" after which you enumerate five fact patterns. We list verbatim each of those five items and follow each with our analysis of the FCRA's applicability.

1-2. Criminal history background information obtained by means of submitting an applicant's fingerprints, via a state agency designated to complete these tasks (here, the Arizona Department of Public Safety), to the Federal Bureau of Investigation, which in turn will provide to the employing school district a criminal history record concerning the applicant based upon records maintained by the FBI. A similar report, limited to criminal records within this state, that is obtained solely based upon the records maintained by the designated law enforcement agency in this state to retain and provide this data (again, the Arizona Department of Public Safety).

In our opinion, a state agency does not become a "consumer reporting agency" (CRA) under the definition of that term set forth in Section 603(f) of the FCRA by conducting criminal background checks as part of its statutory duties. Our reasoning is explained in the attached staff letter (*Copple*, 6/10/98), where we discuss the inapplicability of the FCRA to reports provided by Iowa's Department of Criminal Investigation and by the FBI. The Iowa agency provides reports to the health care industry that appear to be virtually parallel to those the Arizona Department of Public Safety (DPS) provides to educational managers in your state. Even though the Iowa agency received a statutory fee for the service (which you report DPS does not), we did not consider it a CRA because it was a public agency carrying out its mandate to protect the public by assisting employers to monitor individuals hired in a sensitive sector. It is similarly our opinion that DPS is not a CRA, and that the criminal records reports that it provides directly to educational employers pursuant to its duties under Arizona law are not consumer reports governed by the FCRA, regardless of whether or not

they include FBI input.

3. A "reference check" performed by personnel of the school district by contacting those persons listed as personal references by the applicant in an application or resume, to inquire generally about the applicant's employment history and job performance at previous work sites.

The FCRA would not apply to any communication by a previous employer about the applicant's job performance because Section 603(d)(2)(A)(i) specifically exempts "experiences between the consumer and the person making the report" from the definition of "consumer re-port" in the FCRA. Because the "reference check" that you describe -- a communication from a person listed as a reference by a job applicant, directly to a party considering the consumer's application -- is not a consumer report from a CRA, the FCRA is inapplicable to it.

4. A background investigation completed by a private investigator or detective retained under contract by a school district, where the private investigator or detective contacts persons identified by the applicant from the applicant's previous work sites, and perhaps others whose names are discovered as inquiries are made, who can verify various kinds of information such as dates of employment, positions held, reasons for leaving, performance, character, whether the person would be rehired and the like.

The investigator hired by the school district would be a CRA, and any communication to the district reporting on an employment applicant would be a "consumer report" (probably an "investigative consumer report") subject to the FCRA. See attached staff opinion letters (*Beaudette*, 6/9/98; *Hinkle*, 7/9/98), where we discuss the applicability of the FCRA to third parties that investigate applicants on behalf of employers. The main duties of the school district would be to make the disclosures required by Sections 604(b), 606, and 615(a) of the FCRA of parties that use consumer reports. See the attached staff opinion letters (*Hawkey*, 12/18/97; *Steer*, 10/21/97; *Weisberg*, 6/27/97) and brochure ("[Using Consumer Reports: What Employers Need to Know](#)") where we discuss these duties in detail.

5. The same type of background investigation as described in paragraph 4 above, when the school district utilizes its own employees to make the contacts and obtain the information requested, as part of their regularly assigned job duties.

As discussed in our reply to #3, the FCRA does not apply to communications concerning job applicants that the school district obtains directly from prior employers or others.

The opinions set forth in this informal staff letter are not binding on the Commission.

Sincerely yours,

Clarke W. Brinckerhoff