



HENRY McMASTER
ATTORNEY GENERAL

September 22, 2010

John L. Finan, Interim Executive Director
Department of Employment and Workforce
PO Box 995
Columbia, SC 29202

Dear Mr. Finan:

We have received your letter requesting an opinion of this Office concerning the Department of Employment and Workforce's participation in a data warehouse initiative operated by the Office of Research and Statistics of the Budget and Control Board (ORS). You posed the following questions:

- 1) Whether amending [S.C. Code § 41-29-170(B)] to allow the department to provide information otherwise confidential to "a state agency . . . charged with workforce development or training or with jobs recruitment" would satisfy any or all of the Department of Labor's reservations? [The underlined language would be added to this statutory section.]
- 2) What would be required by way of amendment to State law that would satisfy the Department of Labor's concerns?
- 3) Is there any other legal way we can participate in the Budget and Control Board's data warehouse and still meet the concerns of the Department of Labor?

This opinion will address prior opinions, relevant statutes and regulations to answer the questions asked above.

Law/Analysis

Title 41, Chapter 29 governs the Employment Security Commission. Specifically, S.C. Code § 41-29-170 governs permitted disclosure of information. S.C. Code § 41-29-170(B) states as follows:

- (B) Upon written request the **commission may furnish information** obtained through the administration of Chapters 27 through 42 **including, but not limited to, the name, address, ordinary occupation, wages, and employment status** of each covered worker or recipient of benefits and the recipient's rights to further benefits under Chapters 27 through 41, to:

- (1) an agency or agent of the United States charged with the administration of public works or assistance through public employment;
- (2) **a state agency similarly charged**; or
- (3) an agency or entity to which disclosure is permitted or required by federal statute or regulation or by state law.

This disclosure must be made subject to restrictions the commission may by regulation prescribe.

S.C. Code § 41-29-170(B) (emphasis added). State law encourages the integration of information; however, state law must be consistent with federal law. One should note that under S.C. Code § 1-7-10, there is no provision in state law for the Attorney General to advise or issue opinions to a department or agency of the United States. Op. S.C. Atty. Gen., June 11, 1980.

Confidentiality of unemployment compensation (UC) information is governed by the Department of Labor regulations at 20 CFR 603. According to the letter submitted by the Department of Labor, “Statutory authority for the regulation is found at Section 303(a)(1) of the Social Security Act (SSA) . . . [which is interpreted] to require that UC information be kept confidential to avoid deterring either beneficiaries or employers from participating in the [UC] program.”

20 CFR 603.5(e) permits states to disclose confidential information to public officials in the performance of their duties as follows:

Disclosure of confidential UC information to a **public official** for use in the performance of his or her official duties is permissible. “**Performance of official duties**” means **administration or enforcement of law or the execution of the official responsibilities** of a Federal, State, or local elected official. **Administration of law includes research related to the law administered by the public official.** Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

20 CFR 603.5(e) (emphasis added).

“Public official” is defined in 20 CFR 603.2(d) as follows:

Public official means an official, **agency**, or public entity within the executive branch of Federal, State, or local government who (or which) has **responsibility for administering or enforcing a law**, or an elected official in the Federal, State, or local government.

20 CFR 603.2(d) (emphasis added).

Adding the proposed language to subsection (2) would allow the statute to read: “Upon written request the commission may furnish information [to] a state agency . . . charged with workforce development or training or with jobs recruitment.” This language would clarify the types of state

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agencies that fall under the description of a “public official” in the context of 20 CFR 603. However, adding the language alone does not ensure compliance with federal law.

While the entity seeking confidential information and access to data records is different, the analysis is applicable. In an opinion of this Office dated June 11, 1980, we stated as follows:

[T]he Employment Security Commission is governed by the requirements of § 41-29-170, Code of Laws of South Carolina, 1976 (as amended), as you noted. According to that statute, the U.S. Department of Agriculture might have access to certain information in the records of the Employment Security Commission if the Department were charged with the administration of a public assistance law. Thus, the resolution of this matter would seem to turn on whether the Food Stamp Act were a public assistance law and then if so, whether the U.S. Department of Agriculture were charged with the administration of that law. The Food Stamp Act is most likely not a public assistance law as that term is used in the South Carolina statute. See Maricopa County v. State, 51 Ariz. 372, 77 P. 2d 212. At the time of its enactment in 1941 this statute most likely referred only to those programs, enumerated under the Social Security Act, providing for cash payments to recipients. *Id.* The Food Stamp Act is not such a program. Therefore, it is most likely that the U.S. Agriculture Department is not authorized under State law to have access to the records of the Employment Security Commission.

It has been pointed out to us that the information in the computer records of the Employment Security Commission is available through the computer terminals located at the State Department of Social Services. Thus, it would appear that your Office already has immediate access to this very information from the Department of Social Services.

Op. S.C. Atty. Gen., June 11, 1980.

The Department of Employment and Workforce, like the Department of Agriculture, should determine whether the information is being used in the performance of official duties, meaning the administration or enforcement of the law, including research related to the law administered by the public official. This Office is not a fact-finding entity; “investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court.” Op. S.C. Atty. Gen., April 6, 2006; September 14, 2006. However, from information provided in the request letter and conversations with individuals involved, it is the opinion of this Office that the Department of Employment and Workforce would be using confidential UC information for use in the performance of official duties. 20 CFR 603.5(e). It is also the opinion of this Office that the Department of Employment and Workforce would be categorized as a public official under 20 CFR 603.2(d).

Conclusion

To specifically answer the questions posed above, this Office has provided the following conclusions:

- (1) No, changing the statutory language alone would not completely satisfy the Department of Labor's reservations. However, this change is a positive step as it would help agencies determine whether confidential UC information can be disclosed to them under federal regulations.
- (2) For State law to satisfy the Department of Labor's concerns, the statute should state that all provisions are subject to the Department of Labor's regulations on confidential information.
- (3) Yes, the Department of Employment and Workforce and ORS may consider creating a memorandum of understanding which encompasses the Department of Labor's requirements for handling confidential information. The Department of Employment and Workforce and the ORS may consider going through 20 CFR 603, line by line to determine which regulations govern the confidentiality of unemployment compensation (UC) information under the Department of Labor.

Sharing information is encouraged by the policies of both ORS and the Department of Labor; however, the Department of Labor also has policies mandating that certain requirements be met if confidential information is involved. Collaborative review by the Department of Employment and Workforce and ORS of requirements set in place by the Department of Labor should ensure that participation in the Data Warehouse Initiative fully complies with state and federal law.

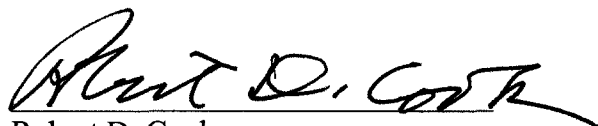
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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