# The State of South Carolina

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March 30, 1990

The Honorable James L. Solomon, Jr.
Commissioner, South Carolina
Department of Social Services
Post Office Box 1469
Columbia, South Carolina 29202-1469

Dear Mr. Solomon:

You have raised questions regarding whether federal requirements for reporting child support information to consumer reporting agencies conflict with the State Freedom of Information Act; and whether a contract provision that the request for information is on-going is sufficient to comply with the federal statutory requirement.

First of all, it should be borne in mind that, in general, an exercise of federal power prevails over state action, so that state law or policy which conflicts with federal statutes or regulations must yield. In many matters both federal and state governments may act, and state action is valid except where is interferes with accomplishment of the purpose of the federal legislation. (See 81 CJS States §24 and cases cited therein.)

The stated purpose of 42 U.S.C. §666(a) is to increase the effectiveness of the program which the State administers under the Child Support Enforcement Act. In order to accomplish this goal, specific procedures are outlined which are designed to aid in the collection of overdue child or spousal support. The states are required to have:

> Procedures by which information regarding the amount of overdue support owed by an absent parent residing in the

> State will be made available to any consumer reporting agency . . . upon the request of such agency; except that (A) if the amount of the overdue support involved is less than $1,000, information regarding such amount shall be made available only at the option of the State . . . (Emphasis added) 42 U.S.C. §666(a)(7).

Thus, the only information (concerning absent parents residing in the state) required by the federal law to be given the consumer reporting agency pertains to overdue support payments when the amount is $1,000.00 or more. States have discretion in supplying such arrearage information when the amount is less than $1,000.00. In addition, it appears that the Federal Act contains adequate safeguards for the protection of constitutional rights by providing:

> Any information with respect to an absent parent shall be made available under such procedures only after notice has been sent to such absent parent of the proposed action, and such absent parent has been given a reasonable opportunity to contest the accuracy of such information . . . 42 U.S.C. §665 (a)(7)(B).

> The procedures which are required under paragraphs . . . and (7) need not be used or applied in cases where the State determines (using guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations) that such use or application would not carry out the purposes of this part or would be otherwise inappropriate in the circumstances. (Emphasis added) 42 U.S.C. §666(a)(8).

Similarly, the State Freedom of Information Act allows discretion in disclosing information "of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy." §30-4-40(a)(2) S.C. Code of Laws, (1976, as amended). Thus, both the Federal Act and the State statute allow discretion in disclosing personal information to the public.

There is a general right to inspect and copy public records and documents, including judicial records and documents; Nixon v. Warner Communications, Inc. 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). However, a statute permitting free public access to public records such as court files does not create an absolute right to inspect public records because the trial court retains inherent power to control its files and impound any part of a file. Deere & Co. v. Finley, 103 Ill. App. 3d 774, 59 Ill. Dec. 444, 43 N.E.2d 1301 (1981). Our state supreme court has held that public access to judicial records is subject to court supervision. Ex parte Davidge, 63 S.E. 449 (1909). Thus, a court has the authority to seal records in appropriate cases. However, there must be compelling reasons for sealing records of court proceedings and such reasons can be sufficiently stated without divulging the information sought to be protected. Such reasons should be specifically set forth by the sealing authority. News-Press Publishing Co. v. State, 345 So.2d 865 (Fla. App. D2, 1977).

No cases regarding child support payment information have been found in South Carolina. However, one case from the United States Court of Appeals, District of Columbia Circuit, addressed the question of a parent's protest that release of child support allotment payments constituted an unreasonable invasion of personal privacy. The Court held that there was no violation when the information sought was already known or public access to it was already available. Hollis v. U.S. Dept. of Army, 856 F.2d 1541 (D.C. Cir. 1988).

In Hollis, a former soldier brought suit against the Army for the Army's release of information about his child support allotments which were made to his ex-wife and which were requested for use in pending litigation between the parties. The United States District Court for the District of Columbia granted the Army's motion to dismiss. On appeal, the Court of Appeals held that the Army's tender of information was not a violation of

the Privacy Act. The District Court held that no disclosure within the meaning of the Act had occurred because Phyllis Hollis, as the direct recipient of the child-support payments, already knew what had been remitted to her. Additionally, the court, noting that materials mandatorily disclosable under the Freedom of Information Act (FOIA) 5 U.S.C. §552 (1982 & Supp. IV 1986) are excluded from the Privacy Act's strictures, 5 U.S.C. § 552 a(b)(2), reasoned that the provision of the allotment record to Phyllis Hollis did not constitute "a clearly unwarranted invasion of [Andrew Hollis'] personal privacy" under FOIA Exemption 6, and thus that its release was required by FOIA. Hollis v. Department of Army, Civ. No. 85-3218 (D.D.C. July 21, 1986) (order and memorandum) at 1 Joint Appendix (J. App.) 23. Other courts have also held that when a release consists merely of information to which the general public has access, or which the recipient of the release already knows, the Privacy Act is not violated. Federal Deposit Ins. Corp. v. Dye, 642 F.2d 833, 836 (5th Cir. 1981); Kind v. Califano, 471 F. Supp. 180, 181 (D.D.C. 1979). Pellerin v. Veterans Admin., 790 F.2d 1553, 1556 (11th Cir. 1986).

Although the Hollis case only addresses the alleged conflict between the release of child support information pursuant to the FOIA and the restrictions thereon in accordance with the exceptions thereto, the case is instructive in that it reaffirms other court decisions allowing release of information to third parties where such information is already known or where the public already has access. It does not address any conflict between state and federal laws.

In South Carolina, all trials upon the merits shall be conducted in open court pursuant to Rule 77 (b), SCRCP. Thus it is reasonable to conclude that if public access is allowed at hearings in open court, it would serve no useful purpose to exclude orders, judgments or transcripts stemming from such hearings from those persons permitted to attend the hearings.

## Conclusion

Pursuant to federal law, the Department of Social Services and the Clerk of Court should release information regarding child support arrearages owed by an absent parent located in the State to any consumer reporting agency upon its request unless:

1. the records ordering support payments have been sealed by the court;

2. the amount of support arrearage is less than One Thousand ($1,000.00) dollars and the State exercises its discretion not to release the same;

3. the obligor of the overdue support payments has not been notified that such information will be reported and given a reasonable opportunity to respond; or

4. the Department determines, using the federal guidelines available to it, that release of such information will not carry out the purposes of the Act or will be inappropriate in the circumstances.

Concerning your second question of whether an on-going request for information contained in a contract would be sufficient, it would appear to be the better course to require written requests from the consumer reporting agency each time it desires such information in order that the Department or the Clerk of Court may respond to specific requests on a case-by-case basis and thereby have the opportunity to exercise the discretion allowed by the Statute when the amount owed is less than $1,000.00 or it is determined that disclosure will not carry out the purposes of the Act, i.e. effective collection of child support arrearages or that such disclosure will be inappropriate in the circumstances.

Sincerely,

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