



U.S. Department of Housing and Urban Development

Atlanta Region, Miami Field Office
Brickell Plaza Federal Building
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Miami, FL 33131-3042

April 14, 2011

Terrence A. Smith
Assistant County Attorney
County Attorney's Office
111 NW 1st Street
Suite 2810
Miami, Florida 33128

RE: Wage Rate Interviews
Release of Record of Employee Interview (HUD Form 11)

Dear Mr. Smith:

This responds to your email inquiry dated March 3, 2011, in which you requested guidance on whether federal law prohibited the release of certain documents held in the custody of the Miami Dade Public Housing Agency, an Agency of the Board of Commissioners of Miami Dade County, ("MDPHA"). As described in your correspondence, a party has submitted a request to the MDPHA for documents residing within its custody. The request is made pursuant to Florida's Public Records Law, Chapter 119, Florida Statutes. The documents being sought are described in your correspondence as copies of HUD Form 11 denominated a *Record of Employee Interview*. This form serves as a tool for gathering sensitive and personal information of interviewees regarding wage claim investigations and complaints. The specific HUD Form 11s being sought to be released contain data from workers obtained during the course of a Wage Complaint Investigation conducted by HUD of a Miami Dade County public housing construction project. As indicated in your correspondence, MDPHA was advised by a HUD official that the document's contents were subject to federal disclosure rules and instructed MDPHA to withhold release of the contents of the HUD 11.

The issue you raise results because of the conflict between the choice and application of similar federal and state laws. Your correspondence sets forth the posture of Florida law. Your correspondence also serves as a request for an opinion of

HUD counsel "...whether ... federal law exempts records from Chapter 119, Florida States, by virtue of preemption". As noted in your correspondence, this is "a matter which must ultimately be considered and passed on by the federal agency charged with the administration of the federal act." See Informal Advisory Legal Opinion, Office of the Attorney General, State of Florida, April 14, 2006.

We conclude that under the circumstances set forth in your inquiry, federal FOIA and Privacy Act law preempts the Florida Public Records Act with respect to the data sought to be released.

Generally, Florida's Public Records Law requires that all public records made or received pursuant to law or in connection with the transaction of official business by any public agency created under Florida law must be open for personal inspection by any person. There is no question that the MDPHA is a Florida agency for the purposes of the Public Records Law and that the records and documents obtained by it constitute public records. It is also settled that MDPHA is not a federal agency. See generally, *Freedom of Information Act Guide*, U.S. Department of Justice, 2007, "Entities Subject to the FOIA", Page 46 et seq. The primary Florida cases involving HUD that address the conflict between the application of the federal disclosure law or local state disclosure laws have arisen in the context of gathering and releasing criminal background reports of residents required by HUD to be obtained and maintained by the public housing agencies in the course of its maintaining tenant records. These cases mentioned in your correspondence are: Housing Authority of the City of Daytona Beach vs. Gomillions, 639 So. 2d 117 (1974) and Dean Forsberg vs The Housing Authority of the City of Miami Beach, 455 So. 2d 373 (1984). These opinions hold that notwithstanding federal funding and HUD requirements regarding disclosure and retention of certain records, public housing agencies are creatures of state law, that housing authorities are not agencies of the United States of America and that release of public records by public housing agencies is governed by the Florida Public Records Law and not FOIA or the Privacy Act, 5 U.S.C.A §552a, ("Privacy Act"). The facts of the instant situation are distinguishable from the cited cases and our present opinion clarifies the Department's position in this regard.

As stated in your correspondence, the information in question was gathered during the course of a HUD wage complaint investigation and was memorialized using an Office of Management and Budget (OMB) approved form called a *Record of Employee Interview* form, OMB Number 2501-0009, alternatively referred to as a HUD Form 11. The manner of handling the information gathered in this form has been the subject of clarification by HUD Labor Relations Letter LR 2006-02, (the Labor Relations letter"), "*Custody, security and disposal of Federal labor standards compliance documents and investigative records*", a copy of which is attached for your perusal as well as in Public Housing Notice 2010-15(HA). This Labor Relations Letter is a statement of agency policy and provides guidance regarding keeping records safe and secure and exercising care that sensitive information is not disclosed except to persons authorized to access the information. Labor Relations Letter LR 2006-02 serves to memorialize HUD'S official policy as it implements the Davis Bacon and Related Acts

(DBRA), including prevailing wage provisions in Section 12(a) of the United States Housing Act of 1937 (42 U.S.C. § 1437j). Federal agency enforcement of the DBRA is subject to standards of the United States Department of Labor, whose regulatory provisions regarding disclosure of sensitive and personal information are set forth in Title 29 of the Code of Federal Regulations, Section 5.6 (a) (5). This section directly addresses the question you have raised regarding the law applicable to disclosure of documents and data resulting from information gathered from laborers and mechanics performing work on construction projects funded or financed or assisted with federal funds gathered during a federal investigation conducted pursuant to the Davis-Bacon and related Acts. The regulatory guidance provides:

It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR part 70) and the Privacy Act of 1974" (5 U.S.C. 552a).

The collection of confidential information from individual complainants or witnesses to violations of federal law that are obtained on the condition of anonymity during the course of a federal investigation is substantially distinguishable from the factual circumstances described in the Florida cases cited above. Based on the foregoing, it is HUD's position as set forth in the Labor Relations Letter and applicable regulations that our national policy prohibits divulging the data contained in employee interviews forms and that access to such information is governed by federal law as set forth in the FOIA and Privacy Act. HUD never relinquished administrative control of the documents or the information contained therein and provides instructions in the Labor Relations Letter as to the manner of storage, maintenance and disposition of the documents and information contained therein.

In addition to the specific application of the DBRA, for further evidence that HUD, the federal agency responsible for compliance with federal privacy programs, has occupied this area with respect to the operations of public housing agencies we refer you to Public Housing Notice 2010-15(HA). This Notice provides extensive guidance about the responsibility of public housing agencies for safeguarding personal identifiable information required by HUD and preventing potential breaches of this sensitive data. As indicated in Notice 2010-15(HA), HUD expects its third party business partners, including Public Housing Authorities, who collect, use, maintain, or disseminate HUD information to protect the privacy of that information in accordance with applicable federal law.

Further, general HUD program requirements applicable to public housing authorities which provides for public housing compliance with the Privacy Act and other requirements for grants and contracts is set forth in 24 CFR §5.212 which states:

(a) *Compliance with the Privacy Act.* The collection, maintenance, use and dissemination of SSNs, EINs, any information derived from SSNs and Employer Identification Numbers (EINs), and income information under this subpart shall be conducted, to the extent applicable, in compliance with the Privacy Act (5 U.S.C. 552a) and all other provisions of Federal, State and local law

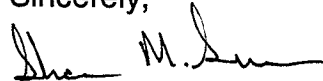
(b) *Privacy Act Notice.* All assistance applicants shall be provided with a Privacy Act notice at the time of application. All participants shall be provided with a Privacy Act notice at each annual income recertification.

Finally, to further demonstrate the applicability of the FOIA and the Privacy Act, housing authorities are subject to the Federal Information Security Management Act of 2002, 44 U.S.C.A. §3541 et seq., (FISMA). The purpose of FISMA is to "provide a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets. 44 U.S.C.A. §3541. As such, because FISMA applies to all PHA data systems, See, OMB Memorandum M-08-21, that are utilized in the collection, processing, maintenance, use, sharing, disseminating, or disposal of information for use by HUD, or just systems containing HUD data or sensitive data, federal disclosure law applies.

Based on the foregoing, we conclude that the HUD Form 11 and the information contained therein are essentially federal agency records subject to FOIA and the Privacy Act. Accordingly, we advise you that the data contained in the HUD Form 11s in the custody of the MDPHA are subject to the disclosure requirements established under federal law non obstante the general applicability of the State of Florida's broad statute governing the release of documents in the custody of state and local agencies and therefore cannot be disclosed except as provided by the FOIA or Privacy Act, or with the individual's consent.

If you have any questions please contact Chali Roché García of this office at 305-520-5102.

Sincerely,



Sharon M. Swain
Chief Counsel

Attachment



Office of Labor Relations
LABOR RELATIONS LETTERS

Date: November 15, 2006

Letter No. LR 2006-02

Subject: Custody, security and disposal of Federal labor standards compliance documents and investigative records

- I. Purpose.**
- II. Definitions.**
- III. Custody, security and disposal of Federal labor standards compliance documents and investigative records.**

I. Purpose.

The purpose of this Letter is to reiterate HUD policy and to provide guidance for HUD staff and program participants regarding the custody, security, and disposal of Federal labor standards compliance documents and investigative records.

The Department of Housing and Urban Development (HUD), and State, local, and tribal agencies as well as non-profit and some for-profit recipient organizations that administer HUD programs, collect, generate, and retain labor standards compliance documents and investigative records related to work subject to Federal prevailing wage requirements (e.g., Davis-Bacon wage and reporting requirements, and HUD-determined maintenance wage rates). These include payroll reports and other compliance documents, and investigative records such as employee interview statements. These documents and records contain highly sensitive and confidential information. For example, payroll reports contain workers' personal information such as their names, Social Security Numbers (SSNs), home addresses, earnings, and net wages; and may contain the employer tax identification numbers (EINs). Employee interview statements record the identity and statements made by persons who are ensured confidentiality. With the growing rise in identity theft and fraud, it is critical that HUD and agencies administering HUD programs carefully guard this sensitive information so that the person(s) or firm(s) to which that information pertains is not unduly exposed to financial or personal risk.

II. Definitions.

For the purposes of the policy and guidelines expressed in this Letter:

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-3-1 (RC); R-6, R-6-2; R-7, R-7-2, R-9 (Labor Relations)

HUD program participants shall mean State, local, and tribal agencies as well as non-profit and some for-profit organizations that administer HUD programs and are responsible for Federal labor standards administration, compliance, and enforcement requirements applicable to the HUD programs they administer. This term also includes any contractors, consultants or others that participate in such labor standards activities on a participant's behalf, including subgrantees or others if they are in possession of labor standards compliance documents or investigative records.

Informant shall mean any person who provides information relating to labor standards compliance or enforcement. An informant may be a laborer or mechanic who files a complaint of underpayment. An informant may also be a person who is not a complainant, or is not a laborer or mechanic, but who provides information relating to labor standards compliance or enforcement.

Investigative records shall mean documents assembled and/or created during the course of labor standards compliance reviews. Such documents include Records of On-site Interview (HUD-11s); employee questionnaires; interview statements; records and notes from informant interviews; complaints; records supplied by complainants such as pay stubs, W-2s, and work calendars; back wage computations; determinations of wages due; schedules of wages due; and enforcement reports (required by Department of Labor regulations at 29 CFR Part 5, Section 5.7¹).

Labor standards compliance documents shall mean documents relating to labor standards administration and employer compliance. These documents include employer records such as payroll reports; time cards; fringe benefit statements and reports; employee authorizations for deduction; and apprenticeship/trainee registrations; and other documents pertaining to labor standards compliance.

Sensitive information shall mean the names, SSNs, and addresses of individuals reported on payrolls and other compliance documents; EINs; and the identity of any informant who makes or provides a statement in written or oral form relating to labor standards activities and any portion of such statement(s) that may reveal that informant's identity.

III. Custody, security and disposal of Federal labor standards compliance documents and investigative records.

HUD staff and program participants are required to collect, preserve, and retain labor standards compliance documents and investigative records for a period of three (3) years following the completion of the covered work, after which these documents and records may

¹ See DOL Regulations 29 CFR 5.7(a); and Labor Relations Letter 92-02.

be destroyed provided there are no outstanding investigations, enforcement activities, or appeals.² In addition, HUD staff and program participants create and transmit documents, in hard copy and in media records (e.g., computer files, storage disks, email, facsimile), concerning labor standards compliance and enforcement actions that relate to, or contain, sensitive information. Examples include review notes; back wage computations; notices to employers concerning compliance discrepancies; schedules of wages found due; and 5.7 enforcement reports relating to enforcement actions, referrals for administrative review of findings in dispute, and recommendations for debarment. Because of the sensitive nature of the information contained in these documents and records, HUD staff and program participants must exercise care that sensitive information is not disclosed except to persons authorized to access the information and that documents and records that are created contain sensitive information only as necessary. The following guidelines will minimize the risk of improper and/or unnecessary disclosure.

- a) Keep sensitive materials secure at all times. HUD staff and program participants must ensure that documents and records containing sensitive information are secured while in their custody. Aggressive steps must be taken to prevent unintended disclosure of this sensitive information. For example, such materials must not be left in areas accessible to the public or left unattended in open settings; store these materials in a secure location (e.g., locked file cabinets) at all times when not in use; lock computers when unattended; and do not leave sensitive documents on computer display screens in the view of persons who are not authorized access.
- b) Do not include SSNs on documents and records unless it is absolutely necessary. Many times, SSNs are not relevant or not needed for the document or record purposes. Examples include review notes, back wage computation sheets, notices or schedules of back wages due that are sent to contractors or employers, and 5.7 reports concerning completed enforcement actions or referring cases in dispute or recommending debarment. Notes and computation sheets may need to distinguish between the workers that are involved, but such distinctions can usually be made by the workers' names, alone. For notices and schedules, the employer will need to know which employees have been underpaid and how much is due to each, but the employer should already have the SSNs of the affected workers. SSNs add no value to enforcement reports where no further action is required or recommended. If the enforcement report concerns findings of underpayment in dispute, the supporting documents that must accompany the report should contain the SSNs.

² See DOL Regulations 29 CFR 5.6(a)(2); and HUD Handbooks 1344.1, Rev 1, Chg 1, Para 3.3(c); and 2225.6, Rev 1, Chg 60, Appendix 49.

Recommendations for debarment, generally, are not supported by facts associated with SSNs.

SSNs *must* be included on very few documents. Employers must include the SSN on the first payroll report on which an employee's name appears. Program participants that transmit to HUD wage restitution that has been collected but not paid because underpaid workers could not be located must provide a schedule to HUD that includes the name, last known address and SSN for each unlocated worker.

- c) Do not disclose the identity of any informant unless it is necessary and only if authorized by the informant. Informants may offer information alleging labor standards violations. Often, the allegations can be substantiated, independently, such that the identity of the informant(s) is not crucial to defending any findings of violation that may result. In such cases, then, it is not necessary to reveal the identity of any informants to defend the findings in presentations to the employer or to resolve the violations. In those instances where it is necessary to disclose the identity of the informant(s) in order to pursue resolution, the informant(s) *must* authorize the disclosure, in writing, in advance.
- d) Dispose of documents and records containing sensitive information, responsibly. HUD staff and program participants must ensure that any documents and records, including media files, which contain sensitive information are shredded or otherwise destroyed at disposal. Documents and records that do not contain sensitive information may be discarded with other waste. HUD encourages recycling of waste materials whenever possible.

Any questions regarding this Letter should be directed to the Regional or Field HUD Labor Relations staff responsible for the jurisdiction involved. A list of Labor Relations staff and contact information is available at the Office of Labor Relations website: www.hud.gov/offices/olr

/S/

Edward L. Johnson

Director

Office of Labor Relations