



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 89

Judith K. Stringer
Consumer Credit Commissioner
Landon State Office Building
900 Jackson, Room 352
Topeka, Kansas 66612

Re: Monopolies and Unfair Trade--Fair Credit Reporting
Act--Permissible Uses of Credit Reports

Synopsis: A government agency such as the state department of social and rehabilitation services (S.R.S.) may obtain consumer reports from a consumer reporting agency for any of the permissible purposes outlined in K.S.A. 50-703. In our opinion, collecting overpaid benefits is not one of the permissible purposes. However, collecting overdue state hospital accounts and medical subrogation accounts, and conducting background investigations of S.R.S. staff may be considered permissible purposes in certain circumstances. Cited herein: K.S.A. 1987 Supp. 16a-1-301; K.S.A. 50-701; 50-702; 50-703; 50-707; 15 U.S.C.A. §§1681b, 1681f.

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Dear Commissioner Stringer:

You request our opinion regarding the fair credit reporting act, K.S.A. 50-701 et seq. Specifically, you inquire whether a "consumer reporting agency," K.S.A. 50-702(e), may furnish a "consumer report," K.S.A. 50-702(c), to the Kansas department of social and rehabilitation services (S.R.S.)

without a court order or consent of the consumer upon whom the report is based.

A government agency's ability to obtain consumer reports is stated in K.S.A. 50-707, which provides as follows:

"Notwithstanding the provisions of K.S.A. 50-703, a consumer reporting agency may furnish identifying information respecting any consumer, limited to name, address, former addresses, places of employment, or former places of employment, to a governmental agency."

In interpreting 15 U.S.C.A. § 1681f of the federal fair credit reporting act, which parallels K.S.A. 50-707, the United States District Court for the Eastern District of New York stated:

"The clear implication from [15 U.S.C.A. §1681f] is that the Act is applicable to all governmental agencies, including the Internal Revenue Service, and to the extent that a government agency seeks a consumer report in the hands of a consumer reporting agency it must obtain a Court order therefor pursuant to Section 1681b of the Act or otherwise comply with such section." United States v. Puntorieri, 379 F.Supp. 332, 334 (E.D.N.Y. 1974). (Emphasis added).

Thus, government agencies may obtain consumer reports under the federal act pursuant to the "permissible purposes" provisions of 15 U.S.C.A. §1681b as well as the information specifically allowed government agencies under 15 U.S.C.A. §1681f. See also Federal Trade Commission v. Manager Retail Credit Company, Miami Branch Office, 515 F.2d 988, 989, 990 (D.C. Cir. 1975); Annot., 17 A.L.R. Fed. 675, 696 §4 (1973) (Government agencies may not obtain consumer reports except as authorized by 15 U.S.C.A. §§1681b and 1681f.) 15 U.S.C.A. §1681b corresponds with K.S.A. 50-703, quoted below. Thus, it is our opinion that government agencies, in this case S.R.S., may obtain consumer reports pursuant to the provisions of K.S.A. 50-703, as well as the information allowed them pursuant to K.S.A. 50-707, but may not obtain consumer reports except as authorized by these sections. [Note also the definition of "person," as used in K.S.A. 50-703(c), includes

"government or governmental subdivision or agency." K.S.A. 50-702(a).]

You inform us that the fraud and recovery division of S.R.S. wishes to obtain consumer reports from a consumer reporting agency for purposes of 1) collecting benefit overpayments from present or former S.R.S. clients, 2) collecting medical subrogation accounts and past due accounts at the state mental health and mental retardation hospitals, and 3) conducting background investigations for employment of S.R.S. staff members. S.R.S. contends that it should be allowed such information pursuant to K.S.A. 50-703(c)(1), (2) and (5).

K.S.A. 50-703 provides:

"A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

"(a) In response to the order of a court having jurisdiction to issue such an order;

"(b) in accordance with the written instructions of the consumer to whom it relates; and

"(c) to a person which it has reason to believe

"(1) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review and collection of an account of, the consumer; or

"(2) intends to use the information for employment purposes; or

"(3) intends to use the information in connection with the underwriting of insurance involving the consumer; or

"(4) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental

instrumentality required by law to consider an applicant's financial responsibility or status, or

"(5) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

Subsections (a), (b), (c)(3) and (c)(4) do not apply to the situation under consideration: a court order has not been issued, the consumers about whom the information relates have not consented to its distribution to S.R.S., and S.R.S. has not expressed any intention to use the information sought for insurance or licensing purposes. The question therefore becomes whether the uses to which S.R.S. wishes to put the information fall within the permissible purposes expressed in subsections (c)(1), (2) or (5) of K.S.A. 50-703.

We look first at the use of consumer reports to collect overpayments made by S.R.S. K.S.A. 50-703(c)(1) allows the use of consumer reports "in connection with a credit transaction . . . and involving the . . . review or collection of an account of the consumer. . . ." (Emphasis added). For this section to apply, there must be a consumer credit transaction involving either the extension of credit or the review or collection of an existing consumer credit account. "Consumer report is defined in K.S.A. 50-702(c) as

"information . . . to be used or collected . . . for the purpose of serving as a factor in establishing the consumer's eligibility for credit . . . to be used primarily for personal, family or household purposes. . . ."

See Fernandez v. Retail Credit Co., 349 F.Supp. 652, 654 (E.D.La. 1972). (The language in 15 U.S.C.A. §1681a is interpretive of the permissible purposes found in 15 U.S.C.A. §1681b. Thus, the definition of a consumer report in K.S.A. 50-702(c) defines the parameters of the permissible purposes found in K.S.A. 50-703. "Consumer credit transaction" is defined generally as "[c]redit offered or extended to a natural person, in which the money, property or service which is the subject of the transaction is primarily for personal, family, household or agricultural purposes. . . ." Black's Law Dictionary 287 (rev. 5th ed. 1979). "Credit" is defined as "[t]he ability of a business or person to borrow

money, or obtain goods on time, in consequence of the favorable opinion held by the particular lender as to solvency and reliability." Id. at 331. In the Kansas Consumer Credit Code "credit" is defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." K.S.A. 1987 Supp. 16a-1-301.

We do not believe overpayments of benefits to S.R.S. clients constitute extension of credit as contemplated by K.S.A. 50-703(c)(1). These overpayments were not a right granted by S.R.S. to its clients "to defer payment of a debt or to incur debt and defer its payment." The overpayments were made inadvertently by the agency. Because these accounts do not represent consumer credit transactions, it is our opinion that consumer reports may not be obtained pursuant to K.S.A. 50-703(c)(1) to review or collect such accounts.

Whether K.S.A. 50-703(c)(5) allows S.R.S. to obtain consumer reports to collect these overpayments is a more difficult question. However, several federal court cases interpreting the parallel federal section, 15 U.S.C.A. §1681b(3)(e), lead us to conclude that S.R.S. may not obtain consumer reports for purposes of collecting overpaid benefits pursuant to K.S.A. 50-703(c)(5). This subsection provides that a consumer report may be furnished to a person whom the disseminator has reason to believe "has a legitimate need for the information in connection with a business transaction involving the consumer."

"The few courts that have dealt with this provision [of the federal act] have found that it refers only to those transactions in which there is a 'consumer relationship' between the requesting party and the subject of the report, Daniels, [v. Retail Credit Co., No. 73-CV-484 N.D.N.Y. April 26, 1976]; or in which the subject was seeking some benefit mentioned in the Act (credit, insurance, employment, licensing), Ley v. Boron Oil Co., et al., (W.D. Pa. 1976). One court has stated that the Act is intended to cover only 'commercial' transactions and no other form of 'business.' Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174 (S.D.N.Y. 1973)." Henry v. Forbes, 433 F.Supp. 5, 9 (D. Minn. 1976). See also Boothe v. TRW

1976). See also Boothe v. TRW Credit Data, 557 F.Supp. 66, 70 (S.D.N.Y. 1982); Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978).

"Business transaction" has been described by at least one court as "a purchase of goods or services." Greenway v. Information Dynamics, Ltd., 399 F.Supp. 1092, 1095 (D.Az. 1974). We do not believe that overpayment of benefits by a government agency creates a "consumer relationship," particularly since no purchase of goods or services is involved. See Porter v. Talbot Perkins Children's Services, 355 F.Supp. 174 (1973) (Adoption services held not to be commercial business transaction.) Thus, we do not believe that collection of such overpayments constitutes a "legitimate business need . . . in connection with a business transaction" as required by K.S.A. 50-703(c)(5).

Collection of medical subrogation accounts and past due state hospital accounts, however, may constitute purposes for which consumer reports may be obtained by S.R.S. if such accounts were created for the purpose of extending services to clients on credit. In this event there would be a consumer credit transaction whereby the purchaser of services is granted the right to defer payment for such services until a later date, and the provisions of K.S.A. 50-703(c)(1) would apply.

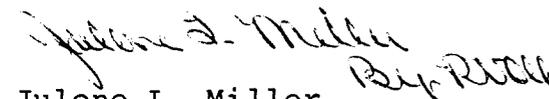
Finally, consumer reports may be furnished to government agencies for employment purposes. "Employment purposes" is defined at K.S.A. 50-702(g) as "evaluating a consumer for employment, promotion, reassignment or retention as an employee." It is our opinion that S.R.S. may obtain consumer reports for these employment purposes.

In conclusion, a government agency such as the state department of social and rehabilitation services may obtain consumer reports from a consumer reporting agency for any of the permissible purposes outlined in K.S.A. 50-703. Collecting overpaid benefits is not a permissible purpose. However, collecting overdue state hospital accounts and medical subrogation accounts, and conducting background

investigations of S.R.S. staff may be considered permissible purposes in certain circumstances.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

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