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Senate

State of Minnesota

TO: Becca Nash, Director of the Legislative-Citizen Commission on Minnesota Resources

FROM: Senate and House Nonpartisan Staff¹

DATE: August 11, 2020

RE: Questions Re: Criminal Background Check Requirement for ENRTF Grantees

This memorandum is in response to two proposals discussed at the July 1, 2020, meeting of the Legislative-Citizen Commission on Minnesota Resources (LCCMR) and the questions that followed. Under the first proposal, LCCMR would amend its operating procedures to require that all recipients of money from the environment and natural resources trust fund (ENRTF) who work with children certify to the commission that they have a criminal background check system in place for all employees and volunteers. Under an alternative proposal, the commission would request that the chairs of the appropriate legislative committees introduce a bill that would create such a requirement in statute. The meeting was adjourned before action could be taken on either proposal, and numerous questions have been raised about them. This memorandum collects and answers those questions.

CAN THE LCCMR CREATE A BACKGROUND CHECK REQUIREMENT BY ADDING ONE TO ITS OWN OPERATING PROCEDURES?

Minnesota Statutes create the LCCMR and delineate the scope of its authority.² The statutes contain several prerequisites and limitations on the use of ENRTF money,³ but none of them appear intended to authorize the commission to create new prerequisites or limitations on the expenditure of LCCMR money.

Current LCCMR operating procedures deal exclusively with the conduct of the commission, its members, and staff, and do not contain any substantive limitations on how grantees use trust fund money. It is difficult to make a case that requiring grantees to perform a background check

¹ The following nonpartisan staff contributed to or reviewed this memorandum: Tom Bottern, Carlon Doyle Fontaine, Matt Gehring, Greg Knopff, Patrick McCormack, Dan Mueller, Kathy Pontius, Ben Stanley, and Janelle Taylor.

² Minnesota Statutes § 116P.05.

³ See e.g., Minnesota Statutes § 116P.05, subd. 2, paragraph (b) (“It is a condition of acceptance of the appropriations made from the Minnesota environment and natural resources trust fund, ...that the agency or entity receiving the appropriation must submit a work plan....”).

is more like a “procedure” of the LCCMR, rather than a substantive prerequisite or limitation on a grant.

CAN THE LCCMR LAWFULLY MAKE RECOMMENDATIONS TO THE LEGISLATURE ABOUT ADOPTING BACKGROUND CHECK REQUIREMENTS?

Minnesota statutes require the LCCMR to biennially submit a report to the legislature that includes “any findings or recommendations that are deemed proper to assist the legislature in formulating legislation.”⁴ The legislature has thus authorized the commission to make any recommendations it deems proper.

The statutes also require the LCCMR to periodically submit a bill to the legislature with recommended appropriations from the ENRTF, and that bill routinely includes all sorts of recommendations for limiting and qualifying the use of ENRTF money.⁵

Even if this were not the case, since the act of making recommendations is not legally binding on anyone—indeed has no legal effect at all—such an act does not require legal authority. Any person or entity may make recommendations to the legislature and need not cite legal authority to do so.

SINCE IT BRIEFLY DISCUSSED RECOMMENDING GRANTEE BACKGROUND CHECKS BUT ULTIMATELY DID NOT DO SO, COULD THE COMMISSION OR COMMISSIONERS BE FOUND NEGLIGENT IF A CHILD WERE SUBSEQUENTLY ABUSED BY A GRANTEE?

We think this is unlikely. Multiple immunity doctrines and statutes protect individual commissioners and the commission from liability arising out of the work of the commission. Furthermore, even without these immunity doctrines, there would be no liability for negligence in this case because the elements of a negligence claim are not satisfied. While these theories don’t prevent a person from filing a claim – which would require the commission to engage in a lawsuit to assert its immunity – ultimately we think the risk that such a challenge would succeed is low.⁶

IF GRANTEES WERE REQUIRED TO CERTIFY TO LCCMR THAT THEY HAD A BACKGROUND CHECK SYSTEM IN PLACE, COULD LCCMR STAFF BE LIABLE IF THEY FAILED TO ENSURE THE CERTIFICATION WAS RECEIVED?

The proposed language imposes the duty to perform background checks on the grantee, and it is the grantee that is required to certify to LCCMR that it has and will continue to comply with the requirement. To allay all concerns, however, the proposed draft now includes language that clarifies that LCCMR staff cannot be held liable for any failure in connection with a grantee’s duty to perform background checks.

⁴ Minnesota Statutes § 116P.09, subd. 7, clause (8).

⁵ Minnesota Statutes § 116P.05, subd. 2, paragraph (a).

⁶ Staff can provide a more detailed analysis of the immunity and negligence issues if this is something the commission would like to see.

ARE THERE ANY STATUTORY BACKGROUND CHECK REQUIREMENTS FOR RECIPIENTS OF LEGACY FUND MONEY?

We are not aware of any statutory background check requirements that would apply solely because a recipient is using money from one of the four funds established by the Legacy Amendment.