

Personal Identifying Information Subcommittee
July 12, 2007 Meeting Summary

The Personal Identifying Information Subcommittee (the PII Subcommittee) held its second meeting on July 12, 2007.¹ For the first part of the meeting, the PII Subcommittee was joined by a JCOTS Subcommittee consisting of Delegates May and Alexander and Senator Watkins to jointly consider HB 2821 (Sickles) and SB 819 (Cuccinelli), which bills were referred by the 2007 General Assembly to both the FOIA Council and JCOTS for further examination. HB 2821 would have exempted from the mandatory disclosure requirements of FOIA those portions of records containing an individual's social security number, except that access could not be denied to the person who is the subject of the record. HB 2821 also provided that any person, 18 years of age or older, who is the subject of the record may waive these protections. If the protections are so waived, the public body shall open such records for inspection and copying. SB 819 would have exempted those portions of records containing personal information concerning an identifiable individual, including date of birth, social security number, driver's license number, bank account numbers, credit or debit card numbers, personal identification numbers, electronic identification codes, automated or electronic signatures, biometric data, or fingerprints. Like HB 2821, SB 819 contained provision for the waiver of protection for record subjects.

Delegate May, chair of the JCOTS Subcommittee, indicated that his subcommittee was approaching the issue of access to social security numbers (SSNs) from a slightly different perspective - one of evolving technology to scrub SSNs from databases. He stated that development of the policy belonged to the FOIA Council on whether to use available technology. Senator Houck, chair of the FOIA Subcommittee, agreed with Delegate May's assessment and noted that the PII Subcommittee was seriously considering the development of one sound public policy governing access. Senator Houck called on Delegate Sickles, patron of HB 2821, to provide information on the genesis of the bill. Delegate Sickles stated that he originally considered an approach similar to SB 819, but upon reflection limited HB 2821 to protection of SSNs. He noted that the public's expectation is that SSNs are protected by government and not readily made available to the public. He informed the Subcommittees that 19 other states protect SSNs in some form. Following Delegate Sickles' remarks, staff provided an overview of SB 819 on behalf of Senator Cuccinelli who was not present at the meeting.

There was discussion among the Subcommittees about how SSNs come into the possession of government. Concern was also expressed about individual financial information contained in government records, which should likewise be protected from release. There was a sense that entire records should not be excluded from the public, but only those portions that contain personal identifying information. Delegate Griffith noted that from a historical perspective, he is easy to identify because he has a relatively unique name. He pointed out, however, that to verify the identity of an individual, one needs to use biometric data. He stated that he was aware that the Library of Virginia standard makes public

¹ Senator Houck, Delegate Griffith, Ms. Spencer, and Mssrs. Edwards, and Malveaux were present; Mr. Bryan was absent.

records containing personal identifying information available 25 or more years after death of the individual to protect against identity theft, among other things. Delegate May indicated that he believed that SB 819 was over reaching and would have unintended consequences. HB 2821 was preferred as the approach because SSN is as nearly a unique identifier as is one's DNA. He noted that the SSN stays associated with the individual for the individual's lifetime and provides specificity as to a particular individual. He suggested limiting access to the last four digits of a SSN as those digits increase the specificity of correctly identifying an individual.

The Subcommittees next called for public comment. Mike Stollenwerk of the Fairfax County Privacy Council indicated that his council supports both bills. He noted that with the passage of HB 2062 court records are now outside the provisions of FOIA. At the same time other sectors of records are subject to FOIA and currently there is limited protection for release of SSNs. He advised the Subcommittees that the federal FOIA contains an exemption for SSNs. Next the Subcommittees heard from Mark Dudenhefer, Vice Chairman of the Stafford County Board of Supervisors, who stated that he is employed at the federal level and the federal government is now taking unnecessary SSNs out of federal records. He averred that access to the last four digits of a SSN is not a good idea and will lead to identity theft. He concluded that the public would be appalled to know that SSNs are not protected in Virginia. Nicole Bocra, a registered private investigator, told the Subcommittee that she conducts investigations of white collar crime and needs access to SSNs to verify identity. She suggested that perhaps an exclusion could be made for private investigators to allow them access to SSNs should there be a move to remove SSNs from public records generally. Eric Ellman, Consumer Data Industry Association (CDIA), reported that members of his association use SSNs to confirm the identities of individuals as part of risk management decisions. He indicated that for employment screening purposes, SSNs are used to match the correct "John Smith" to judgment liens, criminal convictions and arrests. Marc Greidinger, representing himself, told the Subcommittees that in 1991 he sued the Commonwealth of Virginia regarding the requirement that one have an SSN in order to register to vote. He stated that as a consequence of his lawsuit the General Assembly passed laws restricting access to voter registration and driver's license records. He opined that there is hemorrhage of public information and that 13 years after his lawsuit, we are still trying to prevent access to records that should already be protected. Craig Merritt on behalf of the Virginia Press Association (VPA) advised the subcommittee that VPA agreed that being able to correctly identify individuals is important. He noted that the real issue that was not being addressed was the over-collection of personal information by government. He stated that VPA offered an amendment to HB 2821 during the 2007 Session that would prevent disclosure of a complete SSN, but would allow access to the last four digits of a SSN. Frosty Landon, former executive director of the Virginia Coalition for Open Government (VGOG), stated that the VCOG board of directors voted four years ago that bank card numbers and SSN should be removed from public records. He urged the Subcommittees to do no harm to access to public records generally and cautioned them not to use a sweeping approach to address the issue. He suggested that the Subcommittees consider allowing an individual to opt out from release of his personal information. In addition, he suggested they consider an approach that would make SSNs unavailable, but a portion of the SSN would be available to private investigators and others who could

demonstrate a need for access. Mr. Landon concluded that the government should not collect information it does not need and if it does, whatever is deemed confidential should be carefully protected and all other government information should be open.

Senator Houck then asked for comment from representatives of government agencies. Karen Grim, Division of Motor Vehicles, stated that DMV collects SSNs as required by federal law for commercial drivers and by state law for child support enforcement. She indicated that § 46.2-208 exempts this and other classes of information from release by deeming them privileged records. Nicole Bocra indicated that there is a carve out under DMV law for private investigators having a legitimate use for the information.

At the conclusion of the public comment segment, Senator Houck observed that there appeared to be little appetite for SB 819 as drafted. He indicated that with the concurrence of both subcommittees, further discussion would be limited to HB 2821, as access to SSNs is the most pressing concern. He suggested that one approach might be to shift the onus in that government has to ask for the authority to collect SSNs instead of government having free reign to collect whatever it wanted. Delegate May agreed that focusing on SSNs as a unique identifier would be the best approach. By consensus, the Subcommittees agreed to include consideration of the Virginia Public Records Act and records retention as part of their examination of the issue. The Subcommittees asked staff to gather information relative to what other states' are doing with regard to release of SSNs. Mr. Edwards asked the Subcommittees to give consideration to two principles consistently followed throughout FOIA to date: (1) that a requester's purpose in seeking records does not affect whether the records will be released, and (2) that no special exceptions are made within FOIA for particular categories of requesters. The joint meeting between the PII Subcommittee and the JCOTS subcommittee was adjourned. The next joint meeting is scheduled for Wednesday, August 22, 2007 at 10:00 a.m.

After a short break, the PII Subcommittee discussed the remaining bills referred to it by the 2007 General Assembly². Senator Houck indicated that there would be an opportunity for public comment as each bill was discussed. The PII Subcommittee first considered HB 3097(Cole) and SB 1106 (Chichester).³ Subcommittee member Fifer stated that he was in favor of protecting financial account information, but indicated that the name of the sender should be public. He noted that the provision in the bill that was added by the House of Delegates that attempted to limit the scope of the exemption was hard to apply. The relevant provision read as follows: "unless the correspondence relates to a public matter before such public body." Frosty Landon said that VCOG had opposed the bill during the Session as it would allow anonymous contact with government officials. He noted that an email address can be anonymous anyway. Mike Stollenwerk said he supported the bills because it adds heightened protection of personal information. He noted that currently

² Delegate Griffith had a prior engagement in his district and was to stay for a portion of the second part of the meeting.

³ HB 3097 and SB 1106 were identical and would have exempted the name, physical address, telephone number, e-mail address, social security number, and bank or other financial account information contained in correspondence to and from an individual and a member of a local governing body, school board or other local public body in which the individual is a resident, unless the correspondence relates to a public matter before such public body. The bill also provides, however, that no record, which is otherwise open to inspection under FOIA, shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any such correspondence.

members of the General Assembly enjoy an exemption from release of their correspondence. Mark Dudenhefer stated that he believed that citizens have an expectation of privacy. He averred that high and mighty laws such as FOIA and concepts of open government should shrink as compared to ordinary folks' expectations of personal privacy. Phyllis Errico, VaCo, noted that there is a distinction between what state officials may protect as compared to local officials and questioned the underlying reason for the distinction. She mentioned that generally it is government officials and media representatives that take advantage of FOIA training offered by the FOIA Council. She pondered how to reach citizens to increase their understanding of FOIA. Ginger Stanley, VPA, noted that VPA opposed the correspondence exemption for members of the General Assembly when it was proposed. She indicated that media perform a watchdog role that corresponds with the philosophy behind FOIA, namely, accountability. Ms. Stanley stated that there needs to be a way to question the actions of government and look behind an issue. Delegate May advised the PII Subcommittee that the Supreme Court has already ruled that an individual in the workplace has no expectation of privacy. Mr. Landon pointed out that the identity of the sender is essential for government accountability and transparency. He suggested that of the 110 records exemptions, many protect sensitive information but don't give anonymity. If a "cozy relationship" exists between a citizen and elected officials, let the public know and let the public make its decisions based on the information. Subcommittee member John Edwards reminded the PII Subcommittee that bad facts make bad law. Local government is very personal and that is the reason for openness. Senator Houck suggested that there should be a way to separate correspondence that relates to public business, which should be open and publicly vetted, from strictly personal correspondence. He requested staff to draft a bill that makes the above distinction for the Subcommittee's consideration at their next meeting.

The Subcommittee next considered HB 3161 (Marshall, D.W.) and SB 1404 (Hanger) relating to access to complainant information involving an investigation of a violation of a local ordinance. Delegate Griffith stated that he believed that complainant information should be open. John Edwards agreed and stated that he believed it was a mistake to have the exemption in the first place. He noted that the right to face your accuser is fundamental. Ms. Spencer agreed with both comments. Phyllis Errico, VaCo, told the Subcommittee that VaCo supported the bill because there may be instances where the origins of the complaint may be a personal squabble. She indicated that investigations are complaint driven. Senator Houck stated that he sensed that there was a consensus that the bills were overreaching and moved to table further discussion of these two bills. The motion carried 4 to 0.

Tom Falat, representing the Virginia Information Technologies Agency (VITA), addressed the Subcommittee to provide information regarding access to certain records of the Department of Game and Inland Fisheries (DGIF) that had come up at the May 10, 2007 meeting of the PII Subcommittee. At the prior meeting, DGIF represented that VITA combined and sold databases of DGIF information through VITA and Virginia Interactive. As a follow-up, Mr. Falat related that Virginia Interactive provides access to certain records through a subscription service. VITA itself is not directly involved, but instead Virginia

Interactive (a separate entity) contracts directly with various other agencies, including DGIF, to provide these subscription services.

The Subcommittee next considered the topic of concealed handgun permits. A representative of the Department of State Police (DSP) indicated that pursuant to an opinion from the Office of the Attorney General (OAG) issued in April, 2007, DSP no longer releases information about concealed carry permit holders. Delegate Griffith indicated that he felt that while the OAG opinion addressed the permit records held by DSP, it does not cover similar records held by the local circuit courts. Staff indicated other members of the General Assembly had expressed interest in codifying the OAG opinion. Senator Houck directed staff to prepare a draft limiting access to DSP databases for consideration at the next meeting.

Senator Houck then recapped the status of the many bills and issues that had been referred to this Subcommittee. Regarding HB 2558 (Brink)(release of rabies certificate information), the Virginia Treasurers' Association and the Virginia Veterinarians' Association are working on a form for use state-wide that limits the amount of personal information available to the public. The Subcommittee is waiting to see that form before taking further action on the bill. Regarding HB 3097 (Cole) and SB 1106 (Chichester), as discussed above, staff was directed to prepare a revised draft for consideration at the next Subcommittee meeting. Regarding HB 3118 (Carrico) and SB 883 (Deeds)(DGIF licenses and boat registrations), Senator Houck directed staff to invite the patrons and DGIF back again before the next full Council meeting. HB 3161 (Marshall, D.W.) and SB 1404 (Hanger) were tabled at today's meeting, as discussed above. HB 2821 (Sickles), also as discussed above, will be the subject of the next joint meeting of the PII Subcommittee and the JCOTS Subcommittee. SB 819 (Cuccinelli) may also be considered further at the request of the patron. Again, that meeting is scheduled to be held at 10:00AM on Wednesday, August 22, 2007.

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