

PII Subcommittee
October 8, 2007
Meeting Summary

The Personal Identifying Information Subcommittee (PII Subcommittee)¹ of the Freedom of Information Advisory Council (FOIA Council) held its third joint meeting with the Social Security Number Subcommittee of the Joint Commission on Technology and Science (JCOTS Subcommittee)² to continue their deliberations on public access to social security numbers (SSNs) contained in public records (HB 2821, 2007, Delegate Sickles).

Staff reminded the PII Subcommittee of the disposition of the bills referred to the FOIA Council for study by the 2007 Session of the General Assembly, which had been examined by the PII Subcommittee at previous meetings. Specifically:

- HB 2821 (Sickles)--*Still under consideration.*
- SB 819 (Cuccinelli)--*Tabled pending reconsideration request by patron.*
- HB 2558 (Brink)--*Awaiting final agreement between Virginia Veterinary Association and Treasurer's Association concerning development of uniform dog license application.*
- HB 3097 (Cole)/SB 1106 (Chichester)--*Tabled.*
- HB 3118 (Carrico)/SB 883 (Deeds)--*Patrons and DGIF invited to full FOIA Council meeting on December 3, 2007 for further discussion.*
- HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--*Tabled.*³

¹ Senator Houck, Delegate Griffith, and Messrs. Edwards and Malveaux were present at the meeting. Mary Yancey Spencer and Sandra Treadway were absent. J. Stewart Bryan no longer serves on the PII Subcommittee as he declined reappointment to the FOIA Council.

² Delegates May and Alexander and Senator Watkins were present.

³ **HB 2821 (Sickles)**--Exempts from the mandatory disclosure requirements of the Freedom of Information Act those portions of records containing an individual's social security number; except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any such record and who is 18 years of age or older may waive, in writing, these protections. If the protections are so waived, the public body shall open such records for inspection and copying.

SB 819 (Cuccinelli)--Exempts 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; except that access shall not be denied to the person who is the subject thereof. Any person who is the subject of any such record and who is 18 years of age or older may waive, in writing, these protections. If the protections are so waived, the public body shall open such records for inspection and copying.

HB 2558 (Brink)--Exempts the identification of breed of a vaccinated animal and any personal identifying information relating to the animal owner that is not made a part of an animal license application from the mandatory disclosure provisions of the Freedom of Information Act..

HB 3097 (Cole)/SB 1106 (Chichester)--Exempts 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.

The PII Subcommittee directed staff to contact the Virginia Veterinary Association and Treasurer's Association to ascertain the status of their undertaking to develop a uniform dog application license. As passed into law, the provisions of HB 2558 will expire on July 1, 2008 and thus the need for a final recommendation from the FOIA Council.

The PII Subcommittee next continued its consideration of access to information about holders of concealed weapons permits, which information was published in March 2007 by the Roanoke Times. The PII Subcommittee had previously heard from a representative of the Department of State Police (DSP) who 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. At that time, staff indicated other members of the General Assembly had expressed interest in codifying the OAG opinion. The PII Subcommittee reviewed a staff draft limiting access to DSP databases and invited comment from the JCOTS Subcommittee and the public. Essentially, with a limited exception for law-enforcement, the draft would require the DSP to withhold from public disclosure permittee information submitted to the DSP for purposes of entry into the Virginia Criminal Information Network. The Virginia Press Association offered technical amendments to the draft that would incorporate language used in FOIA for uniformity. The Subcommittees discussed the amendments and suggested further technical changes. FOIA Council staff remarked that it would be preferable to use tried and true language used in FOIA that was familiar to public employees and to the courts alike. It was the consensus of the Subcommittees to adopt the draft with the technical amendments, noting that these same issues will be debated during the 2008 Session. Senator Houck indicated that before further action is taken on the draft, it should be posted on the FOIA Council website for additional public comment.

The Subcommittee then considered a staff draft amending the Personal Information Privacy Act (§ 59.1-442 et seq.) to clarify that it is not a violation of that act for an individual to release his own SSN. Additionally, the draft attempted to limit secondary use (or republication) of a public record that contained a SSN. The Subcommittees discussed this latter issue in depth and were concerned about the unintended consequences of limiting secondary use of a public record. It was the consensus of the Subcommittees that secondary use/republication of a public record containing a SSN is not objectionable if done in accordance with lawful means. The Subcommittees discussed specific examples of lawful republication of SSN. For instance, a funeral director is required by law to send a death certificate that contains the decedent's SSN and that of the decedent's next-of-kin to the

HB 3118 (Carrico)/SB 883 (Deeds)--Exempts personal information concerning individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department of Game and Inland Fisheries, including social security or other identification numbers appearing on a driver's license or other form of identification, credit card or bank account data, home address, phone number, and date of birth, provided the individual has requested in writing that the Department not release such information .

HB 3161 (Marshall, D.W.)/SB 1404 (Hanger)--Exempts certain personal identifying information of a complainant with respect to an investigation of a violation of a local ordinance may be withheld. Currently, such information may only be withheld with respect to an investigation of an individual zoning enforcement complaint.

Social Security Administration. Additionally, with real estate transactions, a title company shares such information with the entity providing the financing, whether it is a refinance of an existing mortgage or the purchase of a house. In both examples, such secondary use/republication should be permissible. The Subcommittees agreed that one goal of the draft should be to capture misuse. The choice to be made is either to include a provision addressing republication done with malice or other bad intent, or to limit republication of a SSN on an internet website. Staff recommended language that would prohibit disseminating a public record containing a SSN without redaction of the SSN on the Internet or other publicly accessible website. The Subcommittees preferred this narrower approach offered by staff. They requested that a new draft reflecting the above discussions be presented at the next meeting of the Subcommittees.

The Subcommittee next reviewed a staff draft, part of which would amend the definition of "personal information" contained in the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.) (GDCDPA). At previous meetings, staff had suggested to the Subcommittee that the definition of "personal information" may be somewhat archaic given it was drafted in 1976. Staff advised that it had done a survey of other states' statutory definitions of "personal information" and had found some similarity with the language in the GDCDPA. There was consensus among the Subcommittees that the definition of personal information was not central to the issue currently under discussion and further, there did not appear to be a compelling reason to radically change the current definition, except to list SSN, driver's license numbers, and agency-issued identification specifically in the definition.

The remainder of the draft concerned a three-part approach to the issue of collection of SSNs by state agencies. Specifically the draft (i) would prohibit the collection of SSNs by state and local public bodies unless the collection is (a) expressly authorized by law or (b) essential for the performance of that agency's duties and such need is clearly documented in writing; (ii) would require agencies to review their current SSNs collection practices by October 2008; and (iii) to provide for damages for any person aggrieved by the action of an agency in contravention of the law. In addition, the draft would contain a delayed effective date to allow for the required agency review and to give agencies sufficient notice of the proposed statutory change. The draft reflects the Subcommittees' steadfast belief, repeatedly expressed during the course of its work, that the widespread inclusion of SSNs in public records is precipitated by the practice of over collection of SSNs by government in the first instance. With regard to prohibiting the collection of SSNs unless it is authorized by law or essential to the government's mission, the Subcommittees agreed that giving a government agency the authority to collect SSNs if it is essential to its mission, but not legally authorized, was too broad a grant of authority. Instead the Subcommittees preferred the standard for collection to be legal permission *and* that collection is essential to the mission of the agency. Further discussion led to expanding the prohibition against collection of SSNs to agency-issued identification numbers. The Subcommittees next focused on the requiring agencies to review their collection and use of SSNs by October 1, 2008. They questioned whether there would be sufficient time to complete the review and whether the draft should allow for more time. It was noted that this issue would be likely debated during the Session and could be resolved then. In connection with the required review and reporting to the

FOIA Council and JCOTS, the Subcommittees considered the provision in the draft, which provides that "[T]he chairmen of the Council and the Commission may withhold from public disclosure any such lists or portions of lists as legislative working papers, if it deems that the public dissemination of such lists or portions of lists would cause an potential invasion of privacy." Staff explained the reason for this inclusion stating that there may be concern that the agency reports would reveal vulnerabilities and other databases for which there are no exemptions from public access. It was the consensus of the Subcommittee to keep the language as drafted to allow more time for further public comment. Finally, on the issue of damages, the Subcommittees agreed to keep the language as drafted for further public comment. In the meantime, however, staff will look further into the issue whether the remedy should be the award of damages versus a civil penalty which would go to the Literary Fund (as currently is done in FOIA). The revised draft will be posted on the FOIA Council website for additional public comment.

In preparation for the next meeting of the Subcommittees, staff was asked to conduct a Code of Virginia search to identify the instances where the collection of SSNs is specifically authorized or required. Anticipating strong reaction to the draft discussed above, staff suggested that the Subcommittees may want to issue something like a press release about the contents of the draft and inviting comment.

Senator Houck invited further public comment on the subjects discussed at the meeting and no comments were offered. The Subcommittees decided to continue their joint consideration of access to SSNs in 2008 to follow through on any recommendations made this year. It was also noted that because of the complexity of the issue, a thorough examination would require more than several months of study.

The next meeting of the Subcommittees is scheduled for Friday, November 9, 2007 at 10:00 a.m. in the Sixth Floor Conference Room in the General Assembly Building in Richmond.

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