

PII Subcommittee
November 9, 2007
Meeting Summary

The Personal Identifying Information Subcommittee (PII Subcommittee)¹ of the Freedom of Information Advisory Council (FOIA Council) held its fourth 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).

The meeting began with consideration of a revised draft amending the Personal Information Privacy Act (PIPA)(§ 59.1-442 et seq.). The revised draft clarifies that an individual may disseminate his or her own SSN without violating PIPA. Additionally, draft language would have prohibited publication on the Internet of other individuals' SSNs obtained from public records. However, concerns were raised regarding whether (i) limiting the prohibition to online publication would be too narrow and (ii) the retroactive effective of such a prohibition, especially in regard to already existing and already published public records that contain SSNs would be feasible. Additionally, staff expressed the need for further legal analysis to be conducted because preliminary research had revealed potential conflicts between the proposed prohibition and constitutional freedom of speech protections. The subcommittees agreed that further analysis of the constitutional and other issues would be needed before the subcommittees recommend any further action on the draft. The subcommittees directed staff to research the issues for presentation at the next joint meeting.

Next, the subcommittees considered a revised draft amending the Government Data Collection and Dissemination Practices Act (GDCDPA)(§ 2.2-3800 et seq.). This draft adds certain specific categories to the definition of personal information, prohibits agencies from requiring SSNs unless such collection is both authorized by law and essential to the agencies duties, strengthens the remedies provisions of the GDCDPA by adding civil penalties matching those in FOIA, and makes a technical change to allow general district courts to hear GDCDPA cases. Additionally, the draft has enactment clauses giving it a delayed effective date of July 1, 2009, and requiring agencies to study their own collection and use of SSNs and report to the FOIA Council and JCOTS on such collection and use by October 1, 2008. The draft also sets forth protections for the information so received (which might otherwise reveal means of obtaining unprotected SSNs in public records). A press release about this draft was issued to the Office of the Governor and his Secretaries, the Virginia Municipal League, the Virginia Association of Counties, the FOIA Council and JCOTS mailing lists, and other interested parties on November 8, 2007 in order to apprise them of the subcommittees' work and potential legislation.

Subcommittee members inquired whether the draft as worded would require lists from every entity of local government as well as state government. Because the definition of "agency"

¹ Senator Houck, Delegate Griffith, Mary Yancey Spencer, and Dr. Sandra Treadway were present at the meeting. Messrs. Edwards and Malveaux were absent.

² Delegate Alexander and Senator Watkins were present.

in § 2.2-3801 includes units of local government, the draft as written would require lists to be compiled by local governments. Roger Wiley³ expressed his belief that requiring lists regarding the collection of SSNs to be submitted by every unit of local government would be excessive in scope and redundant in result. He suggested that alternative means be used to gather this information on localities, rather than having every individual locality respond separately. Senator Watkins suggested examining Title 15.2 to find approved and required uses of SSNs by localities. Mary Yancey Spencer observed that the GDCDPA generally excludes courts from its provisions, which was confirmed by staff. Senator Watkins suggested changing the draft wording from "authorized by law" to "authorized by statute" in order to avoid any questions of whether a locality could itself authorize collection of SSNs by ordinance. Senator Watkins also suggested adding a limitation to the same effect in Title 15.2. There were no other suggested changes by the subcommittees' members.

Senator Houck then requested public comment on both the PIPA and GDCDPA drafts, beginning with the PIPA draft. Mike Stollenwerk, speaking on behalf of the Fairfax County Privacy Council, observed that certain constitutional issues had been recognized during the last session of the General Assembly that resulted in HB 2060⁴ being tabled in committee. He noted, however, that allowing SSNs in the public domain is still a problem. He related a story whereby a private investigator provided personal information obtained from a commercial data aggregator and other sources to a person who used it to stalk and harm someone else. Mr. Stollenwerk expressed the view that the public availability of SSNs is a continuing harm that should be eliminated. A representative of Virginia Issues expressed concerns regarding provisions of another law concerning secure remote access to court records. Audrey Robinson, on behalf of Lexis-Nexis and its parent company, Reed Elsevier, suggested replacing the word "publish" on line 29 of the PIPA draft⁵ with "publicly post" or "publicly display," defined to mean "to communicate to the general public." She indicated that such a change would comport with other states' practices and help with continuity in usage by commercial businesses. Marc Greidinger, a private attorney, stated that Delegate Sickles' bill providing a FOIA exemption for SSNs merits further consideration, as it makes no sense to discuss republication of SSNs by others when government still releases SSNs to any requester. Delegate Sickles stated his belief that his bill would have given agencies the ability to say "no" to requests for SSNs, and right now agencies do not have that ability. Delegate Sickles further opined that addressing overcollection is good, but there is also a need to address the issue of SSNs that the government already has in public records.

³ Mr. Wiley spoke as a member of the FOIA Council and representative of the Virginia Municipal League; he is not a member of the PII Subcommittee.

⁴ HB 2060; Public dissemination of social security numbers. Proscribes under the Personal Information Privacy Act and the Government Data Collection and Dissemination Practices Act the intentional communication to the general public of another's social security number regardless of whether the social security number was obtained from a public record or from a private source. The bill adds a punishment for violation of the Personal Information Privacy Act subjecting a violator to civil penalties of \$1,000 per day, with each day being a separate violation.

⁵ The relevant sentence from lines 28 through 30 reads as follows: "However, a person who receives a public record that contains another individual's social security number shall not intentionally publish the social security number on an Internet website."

The subcommittees then heard public comment on the GDCDPA draft. Nicole Bocra, a private investigator, suggested adding language to allow for the collection of SSNs to confirm identities. She further opined that licensed and regulated private investigators should have greater access to SSNs and other identifying personal information than the general public, and that she hopes government continues to collect such information because she uses it in her work. Mark Glaser of the Fairfax County Federation of Teachers indicated that his organization uses SSNs to identify individual employees of the school system, especially when two employees share the same name. Jennifer Perkins of the Virginia Coalition for Open Government expressed concern that there may be a huge barrage of legislation to allow individual uses of SSNs, leading to a situation where the exceptions swallow the rule. Marc Greidinger stated that under § 7A of the Privacy Act it is already unlawful in most cases for government to collect, use and disseminate SSNs unless it was allowed prior to 1975. Roger Wiley stated that much SSN collection at the local level, both in government and in the private sector, carries on by force of habit rather than need (for example, writing one's SSN on a check at the grocery store or when filling out a shipping label). Mr. Wiley further stated that it is a good idea to limit collection and to allow redaction of SSNs as a FOIA exemption, but (in regard to the study proposed under the draft enactment clauses) it would not be good to create impossible mandates for local government. Instead, Mr. Wiley expressed the better approach to be to examine what all units of local government can and cannot do, rather than ask what each and every one individually does. Audrey Robinson commented that there are no known cases of identity theft based on agency-issued identification numbers, and that such numbers are very useful for things such as looking up malpractice cases, enabling professionals licensed in one state to help with disaster relief in other states, and that limitations on the disclosure of such numbers may limit interagency communications. She also opined that the use of the word "and" in line 43 of the draft⁶ established too high of a threshold standard that may cause problems with legitimate business usage. Eric Ellman, Consumer Data Industry Association (CDIA), expressed his support for Ms. Robinson's comments, and especially that the "and" in line 43 should be changed to "or." Delegate Griffith indicated he supported the use of "and" on line 43. Mike Stollenwerk expressed that the bill is well intended, and he supports the "and" clause, but that a FOIA exemption for SSNs is still necessary. Additionally, he suggested that the draft be changed so that aggrieved individuals may collect damages as allowed under the PIPA damages provisions.

The subcommittees' members then discussed the various suggestions and proposed changes to the drafts. The subcommittees directed staff to perform additional legal research regarding the constitutional freedom of speech issues identified in relation to the PIPA draft. The members also agreed generally that the GDCDPA draft was headed in the right direction, but not ready to be introduced. The subcommittees directed staff to reexamine the language concerning agency-issued identification numbers, as the real interest was in protecting drivers' license numbers specifically, not necessarily all agency-issued

⁶ The relevant sentence from lines 41 through 43 reads as follows: "No agency shall require an individual to furnish or disclose his social security number or agency-issued identification number unless the furnishing or disclosure of such number is (i) expressly authorized by law and (ii) essential for the performance of that agency's duties."

identification numbers. Additionally, staff was directed to reexamine the last enactment clause of the GDCDPA as it would be applied to local government, keeping in mind the magnitude of the undertaking if every unit of local government must generate a list of all of its uses of SSNs and the relevant legal authority for each such use. The joint meeting of the two subcommittees then adjourned.

The PII Subcommittee then reconvened to discuss the final matter on its agenda, the concealed carry handgun permits draft. Lisa Wallmeyer, Division of Legislative Services, presented the revised draft as incorporating the changes suggested by the subcommittee at its last meeting. In essence, the draft as presented would allow the Department of State Police (DSP) to withhold records concerning concealed carry permits held by Virginia residents (although such records would remain available at the clerk of court's offices where the permits are issued), while permitting access to nonresident's permit information (permits originally issued by DSP) and to statistical information that does not identify individual permittees. Senator Houck then requested comments.

Mike Stollenwerk, on behalf of the Virginia Citizens Defense League, stated that the draft was headed in a good direction but he would like to see the committee consider alternatives because the lists are useful for membership and political activism. To this end he suggested that the draft should allow the release of permittees' names and mailing addresses with use limitations. Audrey Robinson indicated that Lexis-Nexis receives concealed weapons permit information from various states which it compiles for use by law enforcement agencies. Currently such information is provided by contract with DSP, and Lexis-Nexis would like to continue this practice, but the draft as written might interfere. To address this issue, Delegate Griffith suggested adding law enforcement agencies to the draft and the subcommittee generally agreed. In further discussion Mr. Stollenwerk suggested providing access to lists of permittees in a fashion similar to the access currently provided for voter registration lists, which received mixed reactions from the committee members. The subcommittee directed staff to research this suggestion and prepare an alternative draft incorporating appropriate language for consideration at the next meeting. The subcommittee then adjourned.

The next meeting of the Subcommittees is scheduled for December 3, 2007 at 10:00 a.m. in the Sixth Floor Conference Room in the General Assembly Building in Richmond.

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