

Personal Identifying Information Subcommittee  
of the Freedom of Information Advisory Council

June 8, 2009 Meeting Summary

The Personal Identifying Information (PII) Subcommittee of the Freedom of Information Advisory Council held its first meeting of the 2009 interim to (i) review bills referred to it for further study, (ii) continue the study of the Government Data Collection and Dissemination Practices Act (GDCDPA), and (iii) set a study plan for its work.<sup>1</sup>

Staff briefed the Subcommittee on the four bills referred by the 2009 Session of the General Assembly to the FOIA Council for study that fell within the purview of the PII Subcommittee<sup>2</sup>. No patrons, however, were able to attend the meeting to discuss their bills. By consensus, the subcommittee agreed to the following actions concerning the four bills.

With regard to SB 880, staff advised that similar bills had been introduced during the 2007 and 2008 Session of the General Assembly and were also referred to the FOIA Council for further study. The Subcommittee discussed the impact of the passage of HB 2427 (May), which created the Protection of Social Security Numbers Act. Staff advised that while SB 880 is broader, it could be read together with HB 2427 to give both bills effect. The result being that the first five digits of a SSN would be deemed confidential and not releasable;

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<sup>1</sup> Subcommittee members Delegate Griffith, Mary Yancey Spencer, Courtney Malveaux, and George Whitehurst were present at the meeting. Subcommittee members Senator Houck, Roger Wiley, and Sandra Treadway were absent.

<sup>2</sup> **SB 880 (Stuart); Department of Game and Inland Fisheries; disclosure of official records; exceptions.** Provides that records of the Department shall be subject to the disclosure provisions of the Freedom of Information Act, except that personal information, as defined in § 2.2-3801, of individual applicants for or holders of any hunting, fishing, boating, or trapping license issued by an agent of the Department shall be withheld from public disclosure, provided that such individuals have requested that the Department not disclose such information. However, statistical summaries, abstracts, or other records containing information in an aggregate form that does not identify individual applicants or licensees shall be disclosed. The bill provides, however, that such information may be released (i) in accordance with a proper judicial order, (ii) to any law-enforcement agency, officer, or authorized agent thereof acting in the performance of official law-enforcement duties, or (iii) to any person who is the subject of the record.

**HB 2471 (Hugo); Freedom of Information Act; salary records of teachers.** Provides that the disclosure of the names of individual teachers is not required under FOIA in response to a request for the official salary or rate of pay of employees of a local school board.

**HB 2630 (Crockett-Stark); Law-Enforcement Officers' Privacy Protection Act.** Allows a law-enforcement officer to request that personal information about the officer be withheld from disclosure on public records. For purposes of the Act, "personal information" includes the officer's name, social security number, address, phone number, and any other information that could be used to physically locate the officer.

**SB 1332 (Cuccinelli); Private entities operating, managing, or supervising any portion of the state highway system.** Provides that a private entity that operates, manages, or supervises any portion of the state highway system and receives funding from the Commonwealth or any of its political subdivisions shall be considered a public body for purposes of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia as it relates to that portion of the private entity's business operations responsible for operating, managing, or supervising the portion of the state highway system.

however, the last four digits could be released if the individual applicants for or holders of any hunting, fishing, boating, or trapping license have requested that the Department of Game and Inland Fisheries (the Department) not disclose such information. Craig Merritt representing the Virginia Press Association (VPA) noted that beyond SSN, no other information on these applications were sensitive enough to warrant protection. Megan Rhyne, executive director of the Virginia Coalition for Open Government (VCOG) advised that the affirmative statement in SB 880 that the Department was subject to FOIA was not advisable because it creates the impression that the Department is not subject to the requirements of FOIA. The Department is in fact a public body as defined in FOIA. Delegate Griffith inquired of Council member Malveaux whether the Office of the Attorney General had reviewed the bills for potential conflict and requested that further consideration of SB 880 be postponed until the next Subcommittee meeting. The Subcommittee also requested staff to work on a redraft of SB 880 given the passage of HB 2427.

Next discussing HB 2471 (Hugo), Delegate Griffith noted that in the Roanoke valley, 10 employees received raises, but no others. He suggested that without the names of the employees being disclosed, it is impossible to assess who did and did not receive the raise. Council member Spencer questioned the wisdom of excluding the names of one type of public sector employee but no others. Phyllis Errico, representing the Virginia Association of Counties concurred. The Subcommittee agreed to give Delegate Hugo another opportunity to present his bill at the next Subcommittee meeting and deferred consideration until that time.

The Subcommittee then discussed HB 2630 (Crockett-Stark). Delegate Crockett-Stark had discussed her bill with the FOIA Council at its April meeting where she indicated that there is a similar law in place in Ohio. The Ohio law was enacted because a family member of a law enforcement officer was murdered after personal information about the officer was made available. She stated that her sheriff had requested a similar law in Virginia. Staff advised the Subcommittee that it had discussed this issue with the sheriff who requested the bill. The sheriff advised that gang members are using the internet to locate law-enforcement officers and their families. The sheriff had advised that it was the online disclosure of home address information that was the source of his concern. The bill, however, limits protection to state and local law-enforcement officials. The Subcommittee noted that attorneys for the Commonwealth as well as federal law-enforcement officials are also part of the law-enforcement community, but were not included in the bill. The Subcommittee agreed that overall issue was of some concern and requested staff to identify the laws that require online disclosure of home address information to focus the Subcommittee's future deliberations on this bill.

With regard to SB 1332 (Cuccinelli), staff reminded the Subcommittee that at the April 27, 2009 FOIA Council meeting, members of the Council agreed that the issue behind this bill was unclear. Delegate Griffith had directed staff to re-invite Senator Cuccinelli to address the Council at its next meeting. Therefore no action was taken by the Subcommittee at this time.

Staff then briefed the Subcommittee on the collection and dissemination of SSNs and the Government Data Collection and Dissemination Practices Act (GDCDPA). First discussing the disclosure of SSNs and HB 2427 (May),<sup>3</sup> staff reminded the Subcommittee that in past meetings the Subcommittee and the FOIA Council have debated the merits of this and other protective schemes limiting the disclosure of SSNs. The Act's passage in 2009 raises the question of whether any further action regarding disclosure of SSNs is necessary at this time, and if so, what form should that action take. The Subcommittee by consensus decided to adopt a wait and see approach to this new law, adding that if there are problems, the Subcommittee would revisit the issue.

Regarding the collection of SSNs, staff reminded the Subcommittee that it had already indicated its intent to continue studying this area, which will coincide with the analysis of the results of last year's survey regarding collection and use of SSNs. Study in 2009 will focus on identifying and eliminating the unnecessary collection of SSNs by government. Staff advised that federal law<sup>4</sup> prohibits the denial of any service, right or privilege if an individual refused to provide a SSN. However, an agency may ask for an SSN, but could not require it or deny a right or privilege as noted above. One issue before the Subcommittee is how to address current collection of SSN practices where there is no authorization. Staff advised that the analysis of the SSN survey conducted last year should be completed in the fall and staff will make recommendations for the Subcommittee's consideration at that time. The remaining issues involve the voluntary disclosure of SSNs as well as the transfer of records already containing SSNs between government entities.

Finally, staff advised the Subcommittee of the amendment to SB 1318/HB 2426 recommended to the Governor by the Office of the Attorney General (OAG). Staff advised that it had met with several attorneys from the OAG to further clarify the language of the amendment at the direction of the FOIA Council. The Subcommittee voted unanimously to recommend the language suggested by staff<sup>5</sup>.

Staff summarized for the Subcommittee the most recent holding of the federal district court in the case brought by B.J. Ostergren against Attorney General McDonnell as follows:

- B.J. Ostergren/ Virginia Watchdog website: advocate to remove SSNs from public records available online, by publishing public records that contain SSNs of public officials

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<sup>3</sup> HB 2427 (May) establishes the Protection of Social Security Numbers Act (the Act), which will become effective July 1, 2009. In brief, the Act exempts from FOIA the first five digits of SSNs except under certain limited circumstances, thereby making them confidential. HB 2427 provides penalties for improper disclosure. The final four digits of SSNs found in public records will remain open to public disclosure under FOIA.

<sup>4</sup> 5 U.S.C. § 552a Note ("Section 7" refers to § 7 of Pub. L. No. 93-579, 88 Stat. 1909 (1974)).

<sup>5</sup> Pages 2 and 3 of Chapter 849 of the 2009 Acts of Assembly in § 2.2-3808 A 1 to read as follows:

1. After the words "such number is specifically required by", ~~Strike~~ "federal or;" and
2. After the words "prior to January 1, 1975" Insert "or federal statute."

- Personal Information Privacy Act (PIPA), § 59.1-443.2, as amended effective July 1, 2008, would punish such publication of public records containing SSNs with fines up to \$2500 per violation, investigative demands, and injunctions
- B.J. sued the Attorney General in federal district court (EDVA) to enjoin enforcement of PIPA against her
- August 22, 2008 the court issued a memorandum opinion which concluded "that Virginia Code § 59.1-443.2 is unconstitutional as applied to Ostergren's website as it presently exists. However, given the significant public interest issues presented by the spreading of SSNs on the Internet, the Court will require further briefing on the propriety and scope of an injunction other than with respect to Ostergren's website as it exists."
- June 2, 2009 the court issued a permanent injunction.
- A. Four-factor test whether permanent injunction appropriate:
  - Irreparable injury - yes, the loss of a constitutional right (freedom of speech)
  - Inadequate remedy at law - yes, continual injury (threat to constitutional rights), monetary damages impossible to ascertain, injury is irreparable
  - Balance of harms - favors B.J. - state: enjoining enforcement of unconstitutional law is no hardship, B.J.: faces fines and civil penalties
  - Public interest - freedom of speech v. identity theft (craft remedy to address both concerns)(ID theft addressed further later re: scope of injunction)
- B. determining scope of injunction
  - Partial invalidation of statute rather than total, but court cannot rewrite statute (legislative function, not judicial)
  - Scope of the right - Florida Star analysis (another four-factor test)
  - Watchdog website/advocacy equivalent to newspaper
  - B.J. will continue to publish lawfully obtained records (lawfully obtained truthful information)
  - ID theft, publicly available SSNs = continue to be matters of public significance
  - Protecting SSNs NOT a state interest of the highest order (failure to fund redaction by clerks or otherwise prohibit SSNs from being published online in records publicly available - even when done, will be errors leaving ~60,000 SSNs in public records available online) --- even if highest order state interest, statute not narrowly tailored (prohibiting publication in the first place by the state is more narrowly tailored than punishing publication of public records by others).

Public Comment was requested by the Subcommittee and none was received. Staff to the Subcommittee will poll for the next meeting of the Subcommittee, which will be a joint meeting with the Joint Commission on Technology and Science.

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