

PII Subcommittee
December 3, 2007
Meeting Summary

The Personal Identifying Information Subcommittee (PII Subcommittee)¹ of the Freedom of Information Advisory Council (FOIA Council) held its fifth 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.). As with the prior draft, this version clarifies that an individual may disseminate his or her own SSN without violating PIPA. By striking certain language in the law as it is currently enacted, this version would also apply its prohibitions on the dissemination of SSNs to those obtained from public records. This version is not limited to publication of SSNs online as was the previous draft. Following up on concerns raised at the last joint meeting, staff presented an outline of the constitutional issues that may come into play should the draft be passed into law. Staff discussed two relevant lines of jurisprudence. First, staff presented a series of cases where laws restricting the publication of truthful information lawfully obtained were consistently struck down as unconstitutional infringements upon citizens' freedoms of speech. Second, staff set forth cases and statutes highlighting the importance of SSNs and the compelling privacy interest in protecting individuals' SSNs. Under the first line of cases, the Supreme Court of the United States has consistently refused to set forth a blanket rule, but has instead held out the possibility that a law restricting the publication or dissemination of truthful information lawfully obtained might be constitutional if it serves to protect a sufficiently compelling interest. However, in every specific case that has come before it, the Court has struck down such laws as unconstitutional restraints violating the First Amendment right to freedom of speech. None of these cases have specifically addressed the publication or dissemination of SSNs obtained from public records. Other cases from various courts have consistently held that there is a compelling privacy interest in protecting individuals' SSN information. By contrast, there is relatively little public interest in disseminating SSN information from public records that do not otherwise reveal government conduct. In assessing all these cases together, staff concluded that while the draft presented today could be challenged as an improper prior restraint on freedom of speech under the first line of cases, because of the compelling interest in protecting SSNs, there is nevertheless an even chance that a court would find the law constitutional. Senator Houck then inquired whether other states had passed similar laws providing "blanket protection" of SSNs, whether those laws had been challenged in court, and if so, what were the results of those challenges. Staff indicated that while several states have passed such laws, research revealed no legal challenges to date. Specifically, Maryland passed such a law two years ago and staff at the Maryland Attorney

¹ Senator Houck, Delegate Griffith, John Edwards, Courtney Malveaux, Mary Yancey Spencer, and Dr. Sandra Treadway were present at the meeting. Mr. Roger Wiley, who is a member of the FOIA Council but not a member of this subcommittee, also attended.

² Delegate Alexander and Senator Watkins were present. Delegate May was absent.

General's Office indicated there have been no challenges to that law or inquiries as to its constitutionality.

Next, the subcommittees considered a revised draft amending the Government Data Collection and Dissemination Practices Act (GDCDPA)(§ 2.2-3800 et seq.). As with the version presented at the last joint meeting, 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 technical changes 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 requires state 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. This version of the draft also contains a fourth enactment clause providing for the gathering of similar information about the use and collection of SSNs by cities, counties and towns with a population greater than 15,000. This clause was designed to address concerns raised at the last meeting regarding the volume and redundancy of collecting such information from all localities, and directs staff of the FOIA Council and JCOTS to work with the Virginia Municipal League (VML) and the Virginia Association of Counties (VACO) to develop a form for the efficient collection of such information. 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 was issued November 8, 2007 to notify affected parties about the proposed draft.

The subcommittee members raised several concerns and points of clarification about the draft. Senator Watkins indicated his concern about the venue provisions as they would apply to persons who are not citizens of Virginia, such as hunters from out of state who purchase a Virginia hunting license. The draft indicates suit could be brought "where the aggrieved person resides or where the agency made defendant has a place of business," leading to the question whether someone from out-of-state could attempt to bring suit against a Virginia agency in another state's courts. Staff indicated venue would be where the defendant agency in question has a place of business, as other states' courts would lack jurisdiction to enforce Virginia state law. Roger Wiley indicated a concern that the draft with its enactment clauses "put the cart before the horse" by passing a prohibition on the collection of SSNs before conducting the study to determine exactly how and why government agencies are currently collecting and using SSNs. In the interest of making sure the enforcement provisions match the intent of the law, Courtney Malveaux pointed out that while FOIA provides for civil penalties to be assessed against individuals who commit knowing and willful violations of FOIA, the enforcement provisions of this draft do not contain an equivalent "knowing and willful" standard for individual violators. Discussion among the members and staff also clarified that federal law indicates that local and state governments may not start collecting SSNs after January 1, 1975, unless they already were doing so before that date or are specifically authorized by law to do so. This draft is meant to comply with the federal law, and would not prohibit collection and use of SSNs that are allowed under the federal law. Mr. Wiley's inquiries clarified that the draft law would not suddenly prohibit any collection of SSNs that is currently lawful.

Senator Houck then opened the meeting to public comment. B.J. Ostergren, representing the Virginia Watchdog, indicated she felt that these bills were specifically directed at her and her website, which publishes public records containing social security numbers on the Internet. She further indicated that a federal case declared a similar Washington state law unconstitutional, that there were United States Supreme Court cases holding such laws unconstitutional, that two similar bills were withdrawn by their patrons in the 2006 Session of the General Assembly over constitutional concerns, and she believed this draft would be unconstitutional as well. Mike Stollenwerk, representing the Fairfax County Privacy Council, indicated that he supports the direction of both bills, but felt that in addition there should be legislation providing a FOIA exemption for SSNs and that the state should move to redact SSNs from existing public records. Also, under the GDCDPA draft, Mr. Stollenwerk felt that the enforcement provision should be amended to award damages to the plaintiff rather than to the Literary Fund, as an incentive to enforcement. Craig Merritt, on behalf of the Virginia Press Association, made a technical point about the use of the word "list" in the enactment clauses of the GDCDPA draft. Jennifer Perkins, Executive Director of the Virginia Coalition for Open Government, requested clarification about the differences in the damages provisions of the GDCDPA draft as compared to the PIPA draft and FOIA. FOIA and the GDCDPA generally contemplate violations committed by government entities, and so damages are awarded to the Literary Fund instead of to individual plaintiffs due of sovereign immunity issues. PIPA violations, by contrast, are generally committed by individuals; sovereign immunity is not an issue in these instances, and so damages are awarded to the plaintiff. Marc Greidinger, a private attorney, commended the GDCDPA draft as a step in the right direction, but indicated he did not believe the draft goes far enough. Mr. Greidinger expressed support for Delegate Sickles' original bill that would add a FOIA exemption for SSNs, and indicated that he believes that for-profit data aggregators contribute to problems with identity theft and fraud, as do public officials selling individuals' personal information (Mr. Greidinger clarified that he meant situations such as online subscription access to court records and did not mean to allege improper private sales of public records for profit by individual public officials). Others pointed out that neither the PIPA draft nor the GDCDPA draft, as presented today, would apply to court records. Chris Whyte, representing Lexis-Nexis, expressed agreement that the draft "put the cart before the horse" and urged the subcommittee to consider the use of "or" rather than "and" on line 43 of the draft (regarding the requirement that collection be authorized by law *and* essential to the agency's duties), while recognizing the subcommittee had made a policy choice favoring "and" as a higher standard. Phyllis Errico, representing VACO, requested clarification about whether and why the draft refers to driver's license numbers as well as SSNs; staff responded that the draft includes driver's license numbers because those numbers are unique identifiers that are being used and may be subject to misuse just as are SSNs. In reference to Mr. Greidinger's comments, B.J. Ostergren stated that clerks in Texas and Nevada had been removed from office for selling individuals' personal information for profit, but she had not heard of a Virginia case where that had happened. Mike Stollenwerk spoke against the suggestion of using "or" instead of "and" on line 43 of the GDCDPA draft because it would effectively allow a loophole for agencies to collect SSNs any time the agency deemed it essential, regardless of whether such collection was authorized by law. In response to a question from Fred Norman of Commonwealth of Virginia Consulting, it was

further clarified that the GDCDPA draft addressed collection of SSNs in all formats, whether paper or electronic.

The subcommittees then voted unanimously by voice vote to recommend the PIPA draft to the FOIA Council and JCOTS. After further discussion of the use of the term "lists" in the enactment clauses of the GDCDPA draft, it was agreed that the clauses were acceptable as written. The subcommittees then voted unanimously by voice vote to recommend the GDCDPA draft to the FOIA Council and JCOTS. At this point, the joint meeting of the PII and JCOTS subcommittees was adjourned.

The PII Subcommittee then reconvened to consider the concealed carry handgun permits (CHPs) draft. As previously discussed by the subcommittee, the draft would restrict access to the statewide list of Virginia citizens who hold CHPs compiled by the Department of State Police (DSP), but would allow access to the lists of permittees held by individual court clerks, the lists of out-of-state permittees held by DSP, and any aggregate or statistical information that does not identify individual permittees. The latest draft also contains a provision (subsection K2) to allow certain groups access to the statewide list of Virginia permittees for political advocacy and similar purposes, drafted to correspond to laws allowing access to voter registration lists. This addition was requested at the last subcommittee meeting for consideration by the subcommittee. Delegate Griffith questioned both whether such a limited access provision is constitutional (answer: probably) and whether it is fair to others. Senator Houck noted that previously the Free Lance-Star published the list of CHP holders in its local jurisdiction, and that he had heard from constituents who did not know that their personal information entered the public domain because they held CHPs. Further, he questioned how we could tell constituents that there will be a distinction in the access granted; instead, access should be an all or nothing proposition. Mr. Edwards agreed, stating that he appreciated Senator Houck and Delegate Griffith's sentiments. As a possible solution, Senator Houck suggested an "opt-out" provision allowing citizens to choose whether to grant access to their own information, keeping in mind the paramount policy consideration in this instance is the privacy of the individual. He then opened the meeting to public comment.

B.J. Ostergren commented against such an "opt-out" provision, stating that she has gotten "sealed" court records through online subscriber access, and that mistakes are made. She agreed there should be protection for abused persons and other vulnerable populations. Mike Stollenwerk, speaking as a member of the Virginia Citizens Defense League (VCDL), stated that he is a permit holder but he is served by being able to be contacted by interested groups (such as VCDL), and that the real privacy invasion occurs at DSP. Phillip Van Cleave, President of the VCDL, stated that in publishing the list of CHP holders on the Internet the Roanoke Times had acted irresponsibly. He indicated he generally likes this bill, and pointed out that his organization has been very careful in how it uses permittee information. Mr. Merritt indicated that the bill would be stronger if the first part (subsection K1) was kept but the second part removed (subsection K2, granting certain political advocacy groups and others limited access to the statewide CHP holder list). The subcommittee moved to strike subsection K2; the motion carried unanimously. The

subcommittee then moved to recommend the draft as amended to the full FOIA Council; this motion also carried unanimously. The meeting was then adjourned.

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