

Library 0115/6695



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 1, 1999

Buford S. Mabry, Jr., Chief Counsel
South Carolina Department of Natural Resources
P. O. Box 167
Columbia, South Carolina 29202

Re: Informal Opinion

Dear Buford:

You note that recently the Department of Natural Resources has had correspondence with Mr. Ed Dixon concerning a renewal for his watercraft registration. You further state that

Mr. Dixon who is apparently very knowledgeable concerning the Federal Privacy Act asserts that the . . . Act does not require or allow states to collect social security numbers for watercraft registration under the auspices of the 1996 Welfare Reform Act (42 U.S.C. § 666 (A)(13)(16) and that the state law requiring this agency to collect social security number information for watercraft registration is therefore unconstitutional. I have discussed this matter with Virginia [Williamson], Esquire at DSS and she is of the opinion that this agency must collect social security number information for watercraft registration. Please refer to your letter of November 24, 1997 to Janet T. Butcher, General Counsel at DSS and advise me of whether or not the Federal Privacy Act (5 U.S.C. 552(a)) prohibits this agency from requiring social security information or watercraft registrations and applications for renewal of those watercraft registrations as is required currently

by §§ 20-7-941 and 20-7-949.

Law/Analysis

The federal Privacy Act, Public Law 93-579 (codified at 5 U.S.C.A. § 552a), provides in pertinent part that

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his social security number.

(2) The provisions of paragraph (1) of this subchapter shall not apply with respect to –

(A) any disclosure which is required by federal statute, or

(B) The disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such statute was required under state or regulation adopted prior to such date to verify the identification of the individual.

Furthermore, subsequent federal law has made social security numbers confidential in certain instances even where required to be provided by federal law. 42 U.S.C. § 405 (c)(2)(c)(ii) provides that "Social Security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law, enacted on or after October 1, 1990 shall be deemed confidential, and no authorized person shall disclose any such social security number or related record."

A number of authorities have construed these federal provisions in a variety of contexts. For example, the Oregon Attorney General has read the federal Privacy Act to prohibit the mandatory disclosure of an applicant's social security number "as a condition to the grant of a bingo game operator permit." Op. Or. Atty. Gen. OP-6197 (January 11, 1988). In addition, the Texas Attorney General applied the Privacy Act in the context of whether the Texas Probate Code required applicants for the probate of a will to disclose their

Buford Mabry
Page 3
June 1, 1999

Social Security number. The Texas Attorney General observed that

[t]he adoption of Section 7 was prompted by congressional apprehension about the possible development of a material data bank or other information system that would allow speedy retrieval of all personal information about an individual.

Applying this purpose to the literal language of the federal Privacy Act, the Texas Attorney General's Opinion found that "Section 81(a)(9) of the Probate Code is invalid as inconsistent with Section 7 of the Privacy Act to the extent that it requires an applicant for probate of a written will to state his social security number on the application."

Similarly, the Nebraska Attorney General has concluded that "the social security number requirement found in the Nebraska handgun control statutes is in contravention of federal law." Neb. Op. Atty. Gen., No. 94031, 1994 WL 168404 (April 25, 1994). The following advice in this regard was thus rendered by Nebraska's Attorney General:

. . . the Privacy Act provides that if a state or local agency requests an individual to disclose his social security account number, that agency must inform the individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it. 5 U.S.C. 552a Note. In light of this provision, you could indicate on the application form that disclosure of the applicant's social security number is voluntary. The applicant should be made aware of the fact that his refusal to provide a social security number will not serve as a basis for the denial of a handgun certificate. The applicant should also be informed as to what uses will be made of the number. In the alternative, you may wish to simply delete the request for a social security number on the application form.

Other opinions of Attorneys General are in accord. See, Hawaii Op. Atty. Gen., Op. No. 86-18 (August 7, 1986) [Social Security number cannot be demanded for Library Loan]; Tenn. Op. Atty. Gen., No. 84-168 (May 17, 1984) [Board of Law Examiners may not require those applying to take the Bar Exam to give their Social Security number.]

Likewise, this Office has concluded that a person cannot be denied a residential

Buford Mabry

Page 4

June 1, 1999

classification because of such person's refusal to disclose his Social Security number. Op. Atty. Gen., Op. No. 79-52 (March 15, 1979), and, in Op. Atty. Gen., July 5, 1996, we advised that a policy of the Department of Corrections which asked for the Social Security number of a person visiting an inmate conflicted with the federal Privacy Act. We concluded that we had

... not located a statute or regulation concerning the providing of social security numbers by those who wish to visit such inmates. It would appear that the federal Privacy Act would require the Department of Corrections to advise potential visitors as to whether disclosure of social security numbers would be mandatory or voluntary (as the case may be), by what statutory or other authority the number is being requested, and to what uses the social security number will be put . . . [We are not] aware of a federal statute which would be applicable in this instance. Because neither of the two exceptions specified in section 7(a)(2) would appear to be applicable to this situation, section (a)(1) of the federal Privacy Act would make it unlawful for an agency of state government to "deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."

Furthermore, in McKay v. Altobello, 1997 WL 266717 (E.D. La. 1997), the plaintiff attempted to register to vote in a federal election and refused to provide his social security number on the voter registration form as was required by Louisiana law. Because of such refusal, the registrar's office declined to process plaintiff's partially completed voter registration form. The Court concluded that the federal Privacy Act protected the plaintiff from being required to submit his social security number as a condition for registering to vote. Concluded the Court,

[a]fter reviewing the evidence submitted by the parties, it is the conclusion of this Court that defendants have simply not provided adequate proof that there was a system of records in existence and operating before January 1, 1975, wherein social security numbers were utilized. Although the form in Act 622 contains a space for the applicant's social security number, at no point does the law state that it is mandatory that every space be

filled in. Further, the evidence submitted by defendant does not support the contention that the information was actually provided by the applicants. Thus, assuming there was a system in existence prior to January 1, 1975, this Court has been presented with insufficient evidence to demonstrate that it was in fact operational.

Also, this Court would note that under the exemption, the social security number must be given "to verify the identification of the individual." The "establishment of identity" provision at § 35 of Act 622 makes no mention of a social security number for identification purposes. Current Louisiana law, LSA-R.S. 18:105, also provides for the establishment of the identity of the individual. It states that the registrar "shall require the applicant to submit his current Louisiana driver's license, if he has one, or his birth certificate, or other documentation which reasonably and sufficiently establishes the applicant's identity age." Once again, a social security number is not specifically mentioned. Thus, this Court finds that the exemptive provision in the Privacy Act has not been met. As a result, the commissioner of elections is not entitled to require prospective voters to submit their social security numbers as a prerequisite to registering to vote. Instead, this Act precludes the commissioner from doing so.

Thus, it is clear that the federal Privacy Act prohibits a person from being forced to reveal his or her social security number unless a specific exception as set forth in the Act is applicable.

The question thus becomes what effect the 1996 Welfare Reform Act of 1996 -- P.L. 104-193 -- has upon this issue. Public Law 104-193 added, among other provisions, 42 U.S.C. § 666(a)(13) and (a)(16). These provisions require that States, in order to qualify for various types of welfare funding, must have in place a number of procedures to facilitate the collection of overdue child support payments. These procedures include:

42 U.S.C. § 666(a)(13):

Procedures requiring that the social security number of --

Buford Mabry

Page 6

June 1, 1999

(A) any applicant for a professional license, commercial driver's license, occupational license, recreational license, or marriage license be recorded in the application;

(B) any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter, and

(C) any individual who has died be placed in the records relating to the death and be recorded on the death certificate.

42 U.S.C. §666 (a)(16)

Procedures under which the State has (and uses in appropriate cases) authority to withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational licenses of individuals owing overdue support or failing . . . to comply with subpoenas or warrants relating to paternity or child support proceedings.

In response to this federal statute, the General Assembly enacted S. C. Code Ann. Sec. 20-7-940 et. seq., which requires the revocation of licenses for failure to pay child support. The term "license" is defined by § 20-7-941 (4) as

(a) a certificate, license, credential, permit, registration, or any other authorization issued by a licensing entity that allows an individual or is required of an individual to engage in a business, occupation, or profession and includes, but is not limited to, a medical license, teaching certificate, commission and certificate of training from the South Carolina Criminal Justice Academy for a sworn law enforcement officer, and a hunting, fishing, or trapping license for commercial use and the privilege to hunt, fish, or trap or hold a hunting, fishing, or trapping license for commercial use;

(b) a driver's license and includes, but is not limited to, a beginner's or instruction permit, a restricted driver's license, a motorcycle driver's license, or a commercial driver's license;

Buford Mabry

Page 7

June 1, 1999

(c) a hunting, fishing, or trapping license for recreational purposes and the privilege to hunt, fish, or trap or hold a hunting, fishing, or trapping license for recreational purposes;

(d) a watercraft registration.

Section 20-7-949 further provides that “[a]n applicant for a license or for renewal of a license shall submit the applicant’s social security number to the licensing entity which must be recorded on the application.” Thus, since the Legislature has included watercraft registration within the term “license,” there is little question that § 20-7-949 requires applications for watercraft registration to include the applicant’s Social Security number as part thereof.

The issue here is whether the federal Privacy Act permits the State to require disclosure of the Social Security number of an applicant for watercraft registration as part of such application. Any authority for this requirement necessarily would have to exist pursuant to one of the two exceptions to the federal Privacy Act. See, 5 U.S.C. § 552 (a)(2). In other words, for the State to require disclosure of a watercraft applicant’s Social Security number, such disclosure either would have to be made pursuant to a federal statute or as part of a statute or regulation existing on January 1, 1975.

I am unaware of any requirement in South Carolina law existing on January 1, 1975 that applicants for watercraft registration must have submitted their Social Security number in applying for registration. I have been unable to locate any statute or regulation to this effect. See, Wolman v. U.S., 501 F. Supp. 310 (D. D. C. 1980) [5 U.S.C. § 52 (a)(2) mere agency practice to be insufficient; such Section requires a statute or regulation].

Thus, the issue here is whether the Welfare Reform Act of 1996 imposed such a requirement. For the reasons which follow, in my view, this is doubtful.

The literal language contained in 42 U.S.C. § 666(a)(13) enumerates five specific instances where an applicant's Social Security number must be provided: an application for a professional license; an application for a commercial driver's license; an application for an occupational license; an application for a recreational license; and an application for a marriage license. No mention is made in this provision of a watercraft or boat registration.

The legislative history of this provision confirms that the intent of Congress was a literal reading of Subsection (a)(13). For example, the Report of the House Ways and

Means Committee offered the following explanation of this and accompanying provisions:

Present law

Federal law requires that in the administration of any law involving the issuance of a birth certificate, States must require each parent to furnish their Social Security number for the birth records. The State is required to make such numbers available to child support agencies in accordance with Federal or State law. States may not place Social Security numbers directly on birth certificates.

Explanation of provision

States must have procedures for recording the Social Security numbers of applicants on the application for professional licenses, commercial drivers' licenses, occupational licenses, or marriage licenses. States must also record Social Security numbers in the records of divorce decrees, child support orders, and paternity determination or acknowledgment orders. Individuals who die will have their Social Security number placed in the records relating to the death and recorded on the death certificate. There are several conforming amendments to title II of the Social Security Act.

Reason for change

The Social Security number is the key piece of information around which the child support information is constructed. Not only are new hire and support orders at the State and Federal level based on Social Security numbers, but so too are most data searches aimed at locating nonpaying parents. Thus, giving child support offices access to new sources for obtaining Social Security numbers is important to successful functioning of several other components of the committee proposal. To promote privacy in keeping Social Security numbers confidential, the provision does not require States to place the numbers directly on the face of the licenses,

Buford Mabry
Page 9
June 1, 1999

decrees, or orders. Rather, the number must simply be kept in applications and records that, in most cases, are stored in computer files.

In requiring use of Social Security numbers, the committee does not intend to alter current law concerning confidentiality of records containing such numbers. Present law provides that Social Security numbers can be used in nonconfidential, public records if those records were nonconfidential and public under State law prior to October 1, 1990.

The only reasonable possibility that § 666 (a)(13) might be deemed to capture watercraft registration applications would be by virtue of the language "recreational license," contained therein. However, in my view, it is doubtful that a court would construe a watercraft registration as a "recreational license."

In interpreting any statute, it is well-recognized that the true guide is the statute as a whole considered in light of its manifest purpose. City of Cola. v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967). A statutory provision should be given a reasonable and practical construction which is consistent with the purpose and policy expressed therein. Jones v. S. C. State Highway Dept., 247 S.C. 132, 146 S.E.2d 166 (1966). Words used in an enactment should be given their plain and ordinary meaning. Smith v. Eagle Constr Co., 282 S.C. 140, 318 S.E.2d 8 (1984). When the Legislature (or Congress) has enumerated particular things in a statute, such excludes the idea of including others. ("expressio unius est exclusio alterius"). Pa. Nat. Mut. Cas. Ins. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). These same basic principles of statutory construction are also applicable when construing a federal enactment.

In addition, "courts have held that the Privacy Act's protection is to be broadly construed." Martin v. U.S., 1 Ct. Cl. 775 (U. S. Claims Ct. 1983). In this regard, the Fourth Circuit Court of Appeals in Greidinger v. Davis, 988 F.2d 1344, 1353 (4th Cir. 1993) commented that

[s]ince the passage of the Privacy Act, an individual's concern over his SSN's confidentiality and misuse has become significantly more compelling. For example, armed with one's SSN, an unscrupulous individual could obtain a person's

Buford Mabry
Page 10
June 1, 1999

welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck.

Moreover, from the perspective of state law, Art. I, Sec.10 of the South Carolina Constitution protects against an "unreasonable invasion of privacy." Thus, this State Constitutional provision must be given appropriate deference so that the citizen's state constitutional right to privacy is fully protected and not impaired.

Based upon the foregoing, I am not convinced that the Welfare Reform Act of 1996 went so far as to require an applicant for a watercraft registration to provide his or her social security number in order to register a boat or other watercraft. Congress had the opportunity on at least two occasions to include watercraft registrations in § 699 (a) (13), yet it did not. While it is true § 699 (a)(13) mentions "recreational licenses," it is not at all obvious that such term includes or encompasses watercraft registrations. Typically, the term "recreational license" means hunting, fishing or trapping licenses and is issued as a permission by the state to engage in particular recreational activity. See, e.g., Ak. St. §09.50.020; NM St. § 40-5A-3(G); Ohio St. § 2301.375 (A); Ok. St. T. 43§139.1 (A)(5). On the other hand, a watercraft registration, as I understand it, is simply a record that an individual owns the particular watercraft and has paid his or her taxes thereupon. The State is not "licensing" the individual to engage in recreational activity such as is the case with boating, fishing or trapping.

Of course, this Office strongly supports the enforcement of child support obligations. However, we do not believe in this instance that the federal Privacy Act, the Welfare Reform Act of 1996, or the State Constitution allow the Legislature to require disclosure of Social Security numbers as part of the application for watercraft registration. Accordingly, it is my opinion that even though § 20-7-945 **requires** an applicant for a watercraft registration to provide his or her Social Security number as part of such application, this requirement is not consistent with the federal Privacy Act. I would thus agree with Mr. Dixon's analysis in this regard.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Buford Mabry

Page 11

June 1, 1999

With kind regards, I am

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/ph