

Public records, access to social security number

Number: INFORMAL

Date: May 16, 1997

Subject:
Public records, access to social security number

Mr. Patrick F. McCormack
St. Johns Assistant County Attorney
Post Office Box 1533
St. Augustine, Florida 32085-1533

RE: COUNTIES--RECORDS--PUBLIC OFFICERS AND EMPLOYEES--OCCUPATIONAL LICENSES--disclosure of social security numbers of job applicants and holders of occupational licenses; drug test result of public assistance applicants. ss. 205.032, 205.033, 205.0535, Fla. Stat.; ss. 119.07(3)(x), 440.102, Fla. Stat. (1996 Supp.).

Dear Mr. McCormack:

You ask whether section 119.07(3)(x), Florida Statutes, exempts the social security numbers contained in county job applications subject to disclosure when the applicants are not subsequently employed by the county. You also ask whether Chapter 119, Florida Statutes, makes the social security numbers on occupational license applications subject to disclosure. Finally you inquire whether the drug testing results of persons who are required by the county to submit to such tests as a condition of receiving certain types of public assistance are confidential.

Question One

Article I, section 24, of the Florida Constitution, guarantees every person the right of access to public records, the only exceptions being for those records "specifically made confidential by this Constitution" or exempted by general law or court rule in accordance with the terms of section 24(c) or (d). In addition, Chapter 119, Florida Statutes, the Public Records Law, requires that all public records be open at all times for personal inspection by any person.[1]

The courts of this state have recognized that the right of access to public documents "is virtually unfettered, save only the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." [2] You refer to section 7 of the Federal Privacy Act of 1974 [3] and to an Ohio state court decision in which the court found that social security numbers, although not expressly exempt under the state's public records law, were nonetheless exempt due to federal privacy concerns. [4] Section 7 of the Privacy Act states:

"(a)(1) It shall be unlawful for any Federal, State or local government agency 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.

(2) The provisions of paragraph (1) of this subsection 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 disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that 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."

While the above provision appears to preclude a state from requiring an individual to provide a social security number in order to receive a right, benefit or privilege, it does not prevent a state or local governmental agency from requesting such information. Moreover, Florida courts have generally rejected claims that privacy interests operate to shield agency records from disclosure.[5] The Third District Court of Appeal in *Wallace v. Guzman*[6] reaffirmed that neither state nor federal privacy provisions outweigh the disclosure requirements of federal law, stating:

"The legislature has balanced the private/public rights by creating the various exemptions from public disclosure contained in section 119.07, Florida Statutes (1995). Certainly, the legislature is aware of joint returns, financial disclosures, and the like, but it made no exemption for public records containing such information. The people and the legislature have balanced the competing interests. It is not within the scope of our authority to create new exemptions--which is what we would be doing if we, in a balancing process, came down on the side of nondisclosure of non-exempt public documents. *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373 (Fla. 1984)."

In *Housing Authority of the City of Daytona Beach v. Gombillion*,[7] the court ruled that the tenant records of a public housing authority were not exempt, by reason of the Federal Privacy Act, from disclosure otherwise required by the Florida Public Records Law. Similarly, another court has held that unless federal law clearly requires that documents received by a state agency in the course of settlement negotiations to resolve a federal lawsuit be kept confidential, such documents are subject to disclosure under the state Public Records Law.[8]

Although section 7 of the Federal Privacy Act has been in existence since 1974, the Florida Legislature has deemed it necessary on several occasions to adopt exemptions for certain social security numbers. For example, in 1993 the Legislature exempted the "social security numbers" of current or former law enforcement officers or correctional officers from the disclosure provisions of section 119.07, Florida Statutes.[9] In 1994, the Legislature adopted a provision creating an exemption for the social security numbers of state employees contained in state employment records.[10] The following year, the Legislature expanded the exemption to include all government employees.[11] As amended, section 119.07(3)(x), Florida Statutes (1996 Supplement), provides:

"The social security numbers of all current and former agency employees which numbers are contained in agency employment records are exempt from [s. 119.07(1)] and exempt from s.

24(a), Art. I of the State Constitution. As used in this paragraph, the term "agency" means an agency as defined in s. 119.011."

The staff analysis for the 1995 legislation recognizes that while some states do not disclose social security numbers to the public due to privacy concerns, Florida has required a specific exemption in state law.[12] In providing for an exemption for agency employees, however, section 119.07(3)(x), Florida Statutes (1996 Supplement), refers only to current and former agency employees and not to applicants for government positions who are not or do not become agency employees. This office cannot read words into a statute or expand upon the terms of an exemption created by the Legislature.[13] Accordingly, this office cannot conclude that the provisions of section 119.07(3)(x), Florida Statutes (1996 Supplement), exempts the social security numbers of applicants who are not, or do not become, agency employees.[14]

Question Two

You also inquire about the disclosure of social security numbers contained on occupational licenses applications. Sections 205.032 and 205.033, Florida Statutes, authorize counties to levy an occupational license tax for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. While counties may have requested that an applicant's social security number be supplied to the county when applying for an occupational license, neither section 205.032 nor 205.033 require such disclosure.

In 1993, however, the Legislature adopted section 205.0535, Florida Statutes, authorizing a county to reclassify businesses, professions, and occupations and establish new rate schedules under certain conditions. Subsection (5) of the statute expressly provides that "[n]o license shall be issued unless the federal employer identification number or social security number is obtained from the person to be licensed." In Attorney General Opinion 96-85, this office considered the provisions of section 7 of the Federal Privacy Act and concluded that a local government could require a person to give his social security number in light of 42 United States Code section 405(c)(2)(C)(i) which provides:

"It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, and may require any individual who is or appears to be so affected to furnish to such State (or political subdivision thereof) or any agency thereof having administrative responsibility for the law involved, the social security account number (or numbers, if he has more than one such number) issued to him by the Commissioner of Social Security."

This office concluded that the provisions of the Social Security Act operated as an exception to the general proscription against requiring social security numbers. The opinion, however, did not discuss whether the social security numbers obtained pursuant to section 205.0535 were subject to disclosure.

In 1990, the United States Congress amended 42 United States Code section 405 to provide:

"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 confidential, and no authorized person shall disclose any such social security account number or related record." [15]

The term "authorized person" means

"an officer or employee of the United States, an officer or employee of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990. For purposes of this subclause, the term "officer or employee" includes a former officer or employee." [16]

An examination of the legislative history surrounding the adoption of the above federal provisions reveals that the above provisions were adopted by Public Law 101-624, the Food, Agriculture, Conservation, and Trade Act of 1990. [17] Section 1735 of the act which added the above language addresses the required submission of certain identifying information by retail food stores and wholesale food concerns and is part of a general revision of the federal food stamp program. [18] The language was also added by section 2201 of Public Law 101-624 which addresses the required submission of certain identifying information by participants in the crop insurance and disaster assistance programs and is a part of a general revision of the federal crop insurance program.

It is a fundamental principle of statutory construction that provisions in a statute are not to be read in isolation but are to be construed as a whole. [19] Thus, the above provisions appear to relate to the administration of the federal food stamp act and federal crop insurance program.

Accordingly, unless legislative or judicially clarified, the amendments in 1990 to the Social Security Act by Public Law 101-624 would not appear to constitute a general prohibition to the release of social security numbers by states pursuant to a law adopted after 1990 but rather a more limited prohibition to the release of such identifying information required to be submitted under the federal food stamp program and federal crop insurance program.

Question Three

Your final question concerns the release of drug test results obtained as a condition of participation in certain public assistance programs of the county. You have not, however, provided this office with any details regarding the type of public assistance programs involved. Any comments, therefore, must be general. As noted above, information received by a public agency in connection with the transaction of its official business is subject to disclosure in the absence of a statute making such information confidential or exempt.

You refer to section 440.102(8)(a), Florida Statutes (1996 Supplement), which provides:

"Except as otherwise provided in this subsection, all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced as a result of a

drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter."

This subparagraph must be considered in the context of the statute in which it is found.[20] Section 440.102, Florida Statutes (1996 Supplement), establishes the requirements for a drug-free workplace program established by a person or entity that employs a person and that is covered by the Workers' Compensation Law. As stated in section s. 440.101, Florida Statutes (1996 Supplement), it was the intent of the Legislature in establishing this program

"to promote drug-free workplaces in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees."

Accordingly, the provisions of section 440.102(8)(a), Florida Statutes (1996 Supplement), would not appear to encompass non-county employees. Whether such information may be confidential pursuant to another provision of law would depend on the type of assistance program involved and the statutes governing the program. If the public assistance program is administered through the Department of Children and Family Services, you may wish to contact that agency for assistance on this matter.

I trust the above informal advisory comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See s. 119.011(1), Fla. Stat. (1996 Supp.), defining "public records." *And see, Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), which construed the statutory definition of public records to include "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."

[2] See *Times Publishing Company, Inc. v. City of St. Petersburg*, 558 So. 2d 487, 492 (Fla. 2d DCA 1990). *And see Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979); Op. Att'y Gen. Fla. 80-78 (1980) ("policy considerations" do not, standing alone, justify nondisclosure of public records).

[3] 88 Stat. 1897, effective December 31, 1974. See also Historical and Statutory Notes, 5 U.S.C.A. Sec. 552a.

[4] See *State ex rel. Beacon Journal Publishing Company v. Akron*, 640 N.E. 2d 164 (Ohio 1994). The court held that disclosure would violate the individual's federal constitutional right of privacy and that, utilizing a balancing test, the employees' expectation of privacy in their social security numbers under the federal privacy act outweighed the public's need to know. *But see State ex rel. Veale v. City of Boca Raton*, 353 So. 2d 1194, 1197 (Fla. 4th DCA 1977), *cert. denied*, 360 So. 2d 1247 (Fla. 1978) (absent an exemption, court is not free to balance public's interest in disclosure against the harm resulting to an individual by reason of such disclosure; this policy determination was made by the Legislature when it enacted the statute).

[5] See *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), holding that the state constitution "does not provide a right of privacy in public records" and that a state or federal right of disclosural privacy does not exist. See also, *Forsberg v. Housing Authority of City of Miami Beach*, 455 So. 2d 373 (Fla. 1984); *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980); *Mills v. Doyle*, 407 So. 2d 348 (Fla. 4th DCA 1981).

[6] 687 So. 2d 1351 (Fla. 3d DCA 1997).

[7] 639 So. 2d 117 (Fla. 5th DCA 1994).

[8] *Florida Sugar Cane League, Inc. v. Florida Department of Environmental Regulation*, Case No. 91-2108 (Fla. 2d Cir. Ct. September 20, 1991), *affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992).

[9] See s. 3, Ch. 93-404, Laws of Florida.

[10] See Ch. 94-130, Laws of Florida.

[11] See s. 3, Ch. 95-170, Laws of Florida.

[12] See Staff Bill Analysis & Economic Impact Statement on HB 409 (companion bill to SB 890), Florida House of Representatives, Committee on Governmental Operations, dated March 7, 1995.

[13] See Ops. Att'y Gen. Fla. 91-32 (1991), 86-32 (1986), 82-80 (1982) (Attorney General is not free to add words to a statute to support a conclusion that the plain wording of the statute does not supply); see generally *Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974) (court in construing statute cannot invoke a limitation or add words to statute not placed there by the Legislature).

[14] Such information may, however, be exempt under some other statute. See, e.g., s. 119.07(3)(i), Fla. Stat., which exempts the social security numbers of active or former law enforcement personnel, including correctional and correctional probation officers, certain personnel of the Department of Health and Rehabilitative Services (now the Department of Children and Family Services, see s. 5, Ch. 96-403, Laws of Florida), certain personnel of the Department of Revenue or local government, and the spouses and children of such personnel, current or former state attorneys, assistant state attorneys, statewide prosecutors, or assistant statewide prosecutors and their spouses and children.

[15] 42 U.S.C. s. 405(c)(2)(C)(viii)(I).

[16] 42 U.S.C. s. 405(c)(2)(C)(viii)(III).

[17] See the title to the act stating that it is

"An Act to extend and revise agricultural price support and related programs, to provide for agricultural export, resource conservation, farm credit, and agricultural research and related programs, to ensure consumers an abundance of food and fiber at reasonable prices, and for other purposes."

And see title to s. 1735 of the act ("Required Submission of Certain Identifying Information by Retail Food Stores and Wholesale Food Concerns).

[18] See 42 U.S.C. s. 1781(a), which provides that the provisions of this title (which includes 42 U.S.C. s. 1735 "shall become effective and implemented the 1st day of the month beginning 120 days after the publication of implementing regulations. Such regulations shall be promulgated not later than October 1, 1991." Cf. 7 C.F.R. s. 278.1 address submission of information, including social security numbers, by certain food stores under the federal food stamp program.

[19] See generally *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992) (all parts of statute must be read together in order to achieve consistent whole); *Escambia County v. Trans Pac*, 584 So. 2d 603 (Fla. 1st DCA 1991) (to determine legislative intent, reviewing court is required to consider the statute as a whole).

[20] *Id.*