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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 1 1993
DEPT. OF JUSTICE

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: June 1, 1993

SUBJECT: Use of State Employees' Social Security Numbers Contained in Records of Nebraska Department of Personnel to Obtain Motor Vehicle Records Information From Department of Motor Vehicles

REQUESTED BY: Yvonne Norton Leung
Office of Risk Management/State Claims Board

WRITTEN BY: Don Stenberg, Attorney General
Lynne R. Fritz, Assistant Attorney General

This is in response to your request for the opinion of this office regarding the legality of using social security numbers of state employees to obtain their motor vehicle records from the Nebraska Department of Motor Vehicles. You explained that under the proposed system the Department of Personnel would provide to the Department of Motor Vehicles a tape from its computer data base containing the social security numbers of all state employees. The Department of Motor Vehicles would then run this information against the social security numbers on current motor vehicle records to identify state employees who have six or more points on their driving records. These names would then be forwarded by the Department of Personnel to the employing state agency for unspecified review and action.

Initially, we note that driver record information maintained by the Department of Motor Vehicles is available to the public. Neb. Rev. Stat. § 60-412 (1988) provides in part that, "[a]ny person requesting such driver record information shall furnish to the department the name of the person whose record is being requested and, when the name alone is insufficient to identify the correct record, the department may request additional identifying

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information." Therefore, the issue you raise involves only the method of obtaining driver record information by using the social security numbers of state employees provided by the Nebraska Department of Personnel.

The Nebraska Public Records Act, Neb. Rev. Stat. §§ 84-712 through 84-712.09 (1987), generally provides that all state records are open to the public unless there is an express statutory provision to the contrary or unless specifically enumerated in Neb. Rev. Stat. § 84-712.05 (1987). Section 84-712.05 gives the custodian of public records the discretion to withhold certain enumerated documents including: "(7) Personal information in records regarding personnel of public bodies other than salaries and routine directory information." Thus, while salaries and routine directory information regarding state employees must be disclosed to the public, the agency with custody of personnel records may decide what other employee information it chooses to retain as confidential.

The Nebraska Classified System Personnel Rules, 273 NAC 11, § 001, further defines the public accessibility of personnel records as follows:

> Subject to state law, the records of the Department of Personnel are public and open to public inspection during regular office hours at such times and following such procedures as may be prescribed by the Director of Personnel. ***All personnel data maintained by the Department of Personnel and agency personnel offices in computer data bases, microfilm files and personnel folders shall be secured in strict conformance with state law governing the confidentiality of information. Information concerning an employee's or former employee's name, position, gross salary, date of hire, date of separation and agency where employed shall be considered public information. Non-public information may be released to the employee, the employee's supervisory chain of command, agency administrative personnel and to other state agencies performing a civil or criminal law enforcement investigation authorized by law.*** The Director of the requesting agency shall identify in writing what is sought and the purpose of the request. ***In addition, non-public information shall be released to any requesting party provided the employee has signed a release authorization,*** or a legal warrant is served requesting such information.

(Emphasis added).

The definition of "public information," set forth in the above-quoted rule, does not include an employee's social security number. Thus, as "non-public information," an employee's social security number may not be released by the Personnel Department to another state agency such as the Department of Motor Vehicles absent compliance with this regulation. We do not believe the Department of Motor Vehicles is performing a civil or criminal law enforcement investigation authorized by law in this context. Therefore, the Department of Personnel may not provide state employees' social security numbers from its computer data base to the Department of Motor Vehicles unless each employee has signed a release authorization.

Since the above-quoted personnel rule could be amended to permit the proposed disclosure of an employee's social security account number, it becomes necessary to consider whether such disclosure would violate federal laws which regulate the use of social security numbers. Two federal statutory provisions are pertinent to your inquiry: Section 7 of the Privacy Act of 1974, 5 U.S.C. § 552a Note, and a 1976 Amendment to the Social Security Act, codified at 42 U.S.C. § 405(c)(2)(C).

The Privacy Act of 1974, 5 U.S.C. § 552a, generally applies only to federal agencies, as defined in 5 U.S.C. § 552(e), incorporating 5 U.S.C. § 551(1). However, Section 7 of the Privacy Act of 1974, 5 U.S.C. § 552a Note, provides as follows:

> (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.

As stated in *AFSCME v. City of Albany*, 81 Or.App. 231, 725 P.2d 381, 383 (1986), the apparent purpose of this provision is to define the circumstances in which a government agency may require individuals to disclose their social security numbers, to allow individuals to make informed choices about whether to disclose their numbers, and to protect individuals who decide not to make voluntary disclosures. Nothing in this section expressly prohibits state government from disclosing social security numbers once they are in its possession. Further, your proposed inquiry does not appear to involve the denial of rights, benefits, and privileges within the meaning of subparagraph (a)(1) quoted above.

However, Section 7(b) does require that the State inform individuals who are requested to disclose their social security numbers about whether the disclosure is mandatory or voluntary, by what statute or regulation it is authorized, and the uses which will be made of the social security numbers provided. As explained in *Doe v. Sharp*, 491 F.Supp. 346, 349 (D. Mass. 1980):

> The legislative history of the Privacy Act, S-93-1183 (1974), 1974 U.S. Code Cong. and Administrative News, pp. 6916-6999, leaves little doubt that in the enactment of various disclosure requirements in the Privacy Act, Congress intended advance notice and disclosure to the public. The Report lists as a primary purpose of the Act that "agencies . . . give detailed notice of the nature of their personal data banks and information systems and their computer resources". *Id.*, 1974 U.S. Code Cong. and Admin. News at 6917. The Report recites the need for agencies to apprise citizens of the uses to be made of information collected, in part because and here the legislative history quotes with approval the report of a committee commissioned by HEW itself "(if) the SSN is to be stopped from becoming a de facto Standard Universal Identifier, the individual must have the option not to disclose his number . . . ." *Id.*, U.S. Code Cong. & Admin. News 1974 at 6945.
>
> Notice to the public and public choice to consent to, or refuse to, disclose an SSN is crucial to the principal echoed throughout the report, see, e.g., *id.*, U.S. Code Cong. & Admin. News 1974, at 6917; 6945, that the necessary protection of individual privacy requires that disclosure of information to the government be premised upon a choice informed by the knowledge of uses to be made of disclosed information. *Id.*, U.S. Code Cong. & Admin. News 1974 at 6917.

We presume that the Personnel Department has the names of all state employees and their social security numbers on its computer data base as part of its statutory role in supervising the employment process. We are unaware of the notification given by the State of Nebraska to employees when hired regarding the uses to which their social security numbers may be put. To avoid abridging the requirements of Section 7(b) of the Privacy Act, the notification would need to have been broad enough to encompass the proposed disclosure to the Department of Motor Vehicles. Similarly, the Department of Motor Vehicles must review the notification it gave to applicants for driver's licenses when requiring disclosure of social security numbers, pursuant to Neb. Rev. Stat. § 60-403 (1988), to determine whether it was broad enough to encompass the proposed use. If the notifications given in either instance did not inform the individual who was asked to disclose their social security number of the use you are proposing then in our opinion, the proposed use may not be implemented consistent with section 7(b) of the Privacy Act.

The other federal law regulating the use of social security numbers which is relevant to your inquiry, 42 U.S.C. § 405(c)(2)(C), provides in pertinent part as follows:

> (C)(i) 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 Secretary 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 Secretary.
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> . . . .
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> (v) For purposes of clause (i) of this subparagraph, an agency of a State (or political subdivision thereof) charged with the administration of any general public assistance, driver's license, or motor vehicle registration law which did not use the social security account number for identification under a law or regulation adopted before January 1, 1975, may require an individual to disclose his or her social security number to such agency solely for the purpose of administering the laws referred to in clause (i) above . . . .

The above-quoted provisions authorize the Department of Motor Vehicles to require applicants for driver's licenses to disclose their social security numbers. But the provision prohibits further disclosure of social security numbers for any purpose other than its administration of the motor vehicle registration law or driver's license law, unless it used social security account numbers for identification under a law adopted before January 1, 1975. Thus, since the proposed use at issue by the Department of Motor Vehicles is not for its administration of the driver's license or motor vehicle registration laws, the use would violate the above-quoted provision unless social security numbers were statutorily authorized for use by the Department of Motor Vehicles before 1975.

Neb. Rev. Stat. § 60-403 (1988) was amended in 1986 by LB 878 to include an applicant's social security number among the information required by the Department of Motor Vehicles on a driver's license application. However, prior to its repeal in 1986 by LB 878, Neb. Rev. Stat. § 68-633 provided that, "[a]fter July 6, 1972, each motor vehicle operator's license issued by the state and each identification card or other form of personal identification issued by any agency of the state or any political subdivision of the state shall set forth the holder's social security number." We conclude that the Nebraska Department of Motor Vehicles did use the social security numbers for identification purposes in administering its driver's license program pursuant to state statute prior to 1975. The limitation on the disclosure of social security numbers set forth in 42 U.S.C. § 405(c)(2)(C)(v) prohibiting use of social security numbers for any purpose other than administering the specific enumerated program would not appear to apply to the Nebraska Department of Motor Vehicles.

However, Neb. Rev. Stat. § 60-403 (1988) includes its own limitation on the Department of Motor Vehicles' further use of social security numbers obtained from a motor vehicle operator's application. Said statute provides in pertinent part as follows:

> . . . such social security number shall not be printed on the operator's license and shall only be used . . . with the permission of the director in connection with the verification of the status of an individual's driving record in this state or any other state . . . .

Neb. Rev. Stat. § 60-403 (1988). The use of an employee's social security number proposed in your inquiry is arguably within the statutory limitation defined as "verification of the status of an individual's driving record." Therefore with the Department of Motor Vehicles Director's permission, in our opinion, Neb. Rev. Stat. § 60-403 does not prohibit the computer comparison with the Department of Personnel records you have proposed.

In summary, in our opinion, the use of employee social security numbers you have proposed in your correspondence violates the current personnel rule codified at 273 NAC 11, § 001. Social Security numbers are not included within the definition of public information contained therein. Said rule provides that non-public information may be released for specific purposes not relevant to your inquiry or with an employee's written permission. Absent an employee release, his or her social security number from personnel records may not be used as you propose.

If 273 NAC 11, § 001 were to be modified to specifically permit the proposed use of social security numbers, compliance with the disclosure provisions of subparagraph (b) of Section 7 of the Privacy Act of 1974, 5 U.S.C. § 552a, Note would be necessary. As set forth above, this provision requires, among other things, notification of the use to which the individual's social security number may be put in order to ensure informed disclosure. If notifications which are broad enough to encompass the proposed use have been given, in our opinion, the Federal Privacy Act would pose no additional barrier to your proposed use of employee social security numbers.

Finally, in our opinion, Neb. Rev. Stat. § 60-403 (1988) permits the Department of Motor Vehicles to use the social security numbers provided by motor vehicle operators' applications for the proposed computer comparison. The purpose of the proposed use is to "verify the status of an individual's driving record." Therefore, it appears to be within the limitation set forth in Neb. Rev. Stat. § 60-403 (1988).

Sincerely,

DON STENBERG
Attorney General

Lynne R. Fritz
Assistant Attorney General

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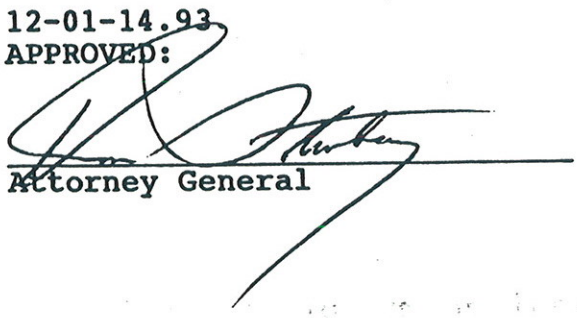
APPROVED:



Attorney General