

# OVERVIEW OF THE PRIVACY ACT OF 1974, 2004 EDITION

## SOCIAL SECURITY NUMBER USAGE

Section 7 of the Privacy Act (found at 5 U.S.C. § 552a note (Disclosure of Social Security Number)) provides that:

"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." Sec. 7(a)(1).

### Comment:

Note that although this provision applies beyond federal agencies, it does not apply to: (1) any disclosure which is required by federal statute; or (2) any 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. See Sec. 7(a)(2)(A)-(B).

Note also that the Tax Reform Act of 1976, 42 U.S.C. § 405(c)(2)(C)(i), (iv) (2000), expressly exempts state agencies from this restriction to the extent that social security numbers are used "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction." See, e.g., Stoianoff v. Comm'r of the Dep't of Motor Vehicles, 12 Fed. Appx. 33, 35 (2d Cir. 2001) (finding that plaintiff's Privacy Act claim would fail because § 405(c)(2)(C)(i) "expressly authorizes states to require the disclosure of social security numbers in the administration of driver's license programs" and further provides that "any federal law that conflicts with this section is 'null, void, and of no effect'"); Claugus v. Roosevelt Island Hous. Mgmt. Corp., No. 96CIV8155, 1999 WL 258275, at \*4 (S.D.N.Y. Apr. 29, 1999) (considering housing management corporation to be state actor for Privacy Act purposes but finding that Privacy Act does not apply to income verification process for public housing program because of exception created by 42 U.S.C. § 405(c)(2)(C)(i)). Exemption from the social security number provisions of the Privacy Act is also provided for certain other government uses. See, e.g., 42 U.S.C. § 405(c)(2)(C)(ii) (authorizing state use of social security numbers in issuance of birth certificates and for purposes of enforcement of child support orders); 42 U.S.C. § 405(c)(2)(C)(iii) (authorizing use of social security numbers by Secretary of Agriculture in administration of Food Stamp Act of 1977 and by Federal Crop Insurance Corporation in administration of Federal Crop Insurance Act).

"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." Sec. 7(b).

Comment:

Jurisdiction to enforce the social security number provision might appear questionable inasmuch as the Privacy Act does not expressly provide for a civil remedy against a nonfederal agency, or for injunctive relief outside of the access and amendment contexts. In fact, the Court of Appeals for the Ninth Circuit has held that the Privacy Act provides no cause of action against a state licensing entity with regard to its requirement that individuals provide their social security number in order to obtain license renewal, inasmuch as the private right of civil action created by the Privacy Act "is specifically limited to actions against agencies of the United States Government." Dittman v. California, 191 F.3d 1020, 1026 (9th Cir. 1999) (quoting Unt v. Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1981)). In a more recent decision, the Court of Appeals for the Eleventh Circuit when faced with this issue held that the remedial scheme of section 3 of the Privacy Act, which applies strictly to federal agencies, does not apply to section 7, which governs social security number usage. Schwier v. Cox, 340 F.3d 1284, 1292 (11th Cir. 2003). Rather, the Eleventh Circuit concluded "that Congress created an 'unambiguously conferred right' in section 7 of the Privacy Act," and it reasoned that section 7 may be enforced under 42 U.S.C. § 1983, which "provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law" as "the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7." Id. at 1289-90, 1292; cf. Lawson v. Shelby County, Tenn., 211 F.3d 311, 335 (6th Cir. 2000) (holding that "Congress never expressly abrogated state sovereign immunity under the Privacy Act"; however, permitting plaintiffs' request for prospective injunctive relief [to enforce section 7 of the Privacy Act] against [state] officials" under Ex Parte Young, 209 U.S. 123 (1908)); Schmitt v. City of Detroit, 267 F. Supp. 2d 718, 722, 724 (E.D. Mich. 2003) (finding that a city "is not properly subject to the requirements of § 7(b) of the Privacy Act" for "damages or other relief . . . other than for prospective declaratory relief," because "[a]lthough the Privacy Act affords a private right of action to enforce its provisions, the statute does not provide a private remedy against a municipal corporation, or any other state actor for that matter"; granting prospective declaratory relief and ordering the city to include a mandatory disclosure statement in its income tax return forms) (appeal pending).

However, other courts have recognized implied remedies for violations of this provision's requirements. See Ky. Rest. Concepts, Inc. v. City of Louisville, Jefferson County, Ky., 209 F. Supp. 2d 672, 687 (W.D. Ky. 2002) (appeal pending); McKay v. Altobello, No. 96-3458, 1997 WL 266717, at \*\*1-3, 5 (E.D. La. May 16, 1997); Yeager v. Hackensack Water Co., 615 F. Supp. 1087, 1090-92 (D.N.J. 1985); Wolman v. United States, 501 F. Supp. 310, 311 (D.D.C. 1980), remanded, 675 F.2d 1341 (D.C. Cir. 1982) (unpublished table decision), on remand, 542 F. Supp. 84, 85-86 (D.D.C. 1982); Greater Cleveland Welfare Rights Org. v. Bauer, 462 F. Supp. 1313, 1319-21 (N.D. Ohio 1978).

For other discussions of this provision, see: Schwier, 340 F.3d at 1288-89 (explaining that although section 7 is uncodified, it is still present in the Statutes at Large and therefore is not "a dead letter"); McKay v. Thompson, 226 F.3d 752, 755 (6th Cir. 2000) (finding that Tennessee law requiring disclosure of social security number for voter registration fell within section 7(a)(2)'s exception for systems of records in existence prior to January 1, 1975, where disclosure was required under statute or regulation); Crawford v. United States Tr., 194 F.3d 954, 961-62 (9th Cir. 1999) (rejecting government's argument that because disclosure of plaintiff's social security number was expressly required by federal statute, section 7 was wholly inapplicable, stating that "§ 7(a)(2)(A)'s exclusion for federal statutes only pertains to the limitation recited in § 7(a)(1)"; holding that section 7(b) had "no bearing on the public disclosure of [plaintiff's] social security number[] by the government," which was the only issue in dispute); Alcaraz v. Block, 746 F.2d 593, 608-09 (9th Cir. 1984) (section 7(b)'s notice provision satisfied where agency informed "participants of the voluntariness of the disclosure, the source of authority for it and the possible uses to which the disclosed numbers may be put"); Brookens v. United States, 627 F.2d 494, 496-99 (D.C. Cir. 1980) (agency did not violate Privacy Act because it maintained system of records "before January 1, 1975 and disclosure of a social security number to identify individuals was required under [executive order]"); McElrath v. Califano, 615 F.2d 434, 440 (7th Cir. 1980) (because disclosure of social security number required by Aid to Families with Dependent Children program under 42 U.S.C. § 602(a)(25) (2000), regulations that give effect to that requirement are not violative of Privacy Act); Green v. Philbrook, 576 F.2d 440, 445-46 (2d Cir. 1978) (same); Lynn v. Comm'r, 80 T.C.M. (CCH) 31 (2000) (holding that agency did not violate Privacy Act, because section 151(e) of the IRS code "is a Federal statute that requires the disclosure of a dependent's Social Security number"); Russell v. Bd. of Plumbing Exam'rs, 74 F. Supp. 2d 339, 347 (S.D.N.Y. 1999) (finding violation of section 7 and ordering injunctive relief where defendants neither informed applicants that providing social security number was optional nor provided statutory authority by which number was solicited, and no statutory authority existed); Johnson v. Fleming, No. 95 Civ. 1891, 1996 WL 502410, at \*\*1, 3-4 (S.D.N.Y. Sept. 4, 1996) (no violation of either section 7(a)(1) or section 7(b) where, during course of seizure of property from plaintiff, an unlicensed streetvendor, plaintiff refused to provide police officer with his social security number and officer "seized all of Plaintiff's records rather than only 'a bagful' as other officers allegedly had done" on previous occasions); In re Rausch, No. BK-S-95-23707, 1996 WL 333685, at \*7 (Bankr. D. Nev. May 20, 1996) (Privacy Act "inapplicable" because 11 U.S.C. § 110 (2000) "requires placing the SSN upon 'documents for filing'"); In re Floyd, 193 B.R. 548, 552-53 (Bankr. N.D. Cal. 1996) (Bankruptcy Code, 11 U.S.C. § 110(c) (2000), required disclosure of social security number, thus section 7(a) inapplicable; further stating that section 7(b) also inapplicable "even assuming the [U.S. Trustee] or the clerk of the bankruptcy court were agencies" because no "request" had been made; rather, because disclosure of social security number is required by statute, "the [U.S. Trustee] is enforcing a Congressional directive, not 'requesting' anyone's SSN" and "[t]he clerk receives documents for filing but does not police their content or form or request that certain information be included"); Krebs v. Rutgers, 797 F. Supp. 1246, 1256 (D.N.J. 1992) (although state-chartered, Rutgers is not state agency or government-controlled corporation subject to Privacy Act); Greidinger v. Davis, 782 F. Supp. 1106, 1108-09 (E.D. Va. 1992) (Privacy Act violated where state did not provide timely notice in accordance

with section 7(b) when collecting social security number for voter registration), rev'd & remanded on other grounds, 988 F.2d 1344 (4th Cir. 1993); Libertarian Party v. Bremer Ehrler, Etc., 776 F. Supp. 1200, 1209 (E.D. Ky. 1991) (requirement that voter include social security number on signature petition violates Privacy Act); Ingerman v. IRS, No. 89-5396, slip op. at 3-5 (D.N.J. Apr. 3, 1991) (section 7(b) not applicable to IRS request that taxpayers affix printed mailing label containing social security number on tax returns; no new disclosure occurs because IRS already was in possession of taxpayers' social security numbers), aff'd, 953 F.2d 1380 (3d Cir. 1992) (unpublished table decision); Oakes v. IRS, No. 86-2804, slip op. at 2-3 (D.D.C. Apr. 16, 1987) (section 7(b) does not require agency requesting individual to disclose his social security number to publish any notice in Federal Register); Doyle v. Wilson, 529 F. Supp. 1343, 1348-50 (D. Del. 1982) (section 7(b)'s requirements are not fulfilled when no affirmative effort is made to disclose information required under 7(b) "at or before the time the number is requested"); Doe v. Sharp, 491 F. Supp. 346, 347-50 (D. Mass. 1980) (same as Green and McElrath regarding section 7(a); section 7(b) creates affirmative duty for agencies to inform applicant of uses to be made of social security numbers -- "after-the-fact explanations" not sufficient); and Chambers v. Klein, 419 F. Supp. 569, 580 (D.N.J. 1976) (same as Green, McElrath, and Doe regarding section 7(a); section 7 (b) not violated where agency failed to notify applicants of use to be made of social security numbers as state had not begun using them pending full implementation of statute requiring their disclosure), aff'd, 564 F.2d 89 (3d Cir. 1977) (unpublished table decision). Cf. Doe v. Herman, No. 297CV00043, 1999 WL 1000212, at \*9 (W.D. Va. Oct. 29, 1999) (magistrate's recommendation) (although not citing section 7 with regard to issue, citing Doe v. Sharp and subsection (e)(3) for proposition that "when agency solicits a social security number it shall inform the individual of what use will be made of it"), adopted in pertinent part & rev'd in other part (W.D. Va. July 24, 2000), aff'd in part, rev'd in part, & remanded, on other grounds sub nom. Doe v. Chao, 306 F.3d 170 (4th Cir. 2002), aff'd, 124 S. Ct. 1204 (2004).

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