

**REPORT OF THE
JOINT SUBCOMMITTEE OF THE
HOUSE AND SENATE GENERAL LAWS COMMITTEES
ON THE
LAWS OF THE COMMONWEALTH DEALING
WITH PUBLIC INFORMATION
TO THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 14

**COMMONWEALTH OF VIRGINIA
DIVISION OF PURCHASES AND SUPPLY
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**Report of the
Joint Subcommittee of the House and
Senate General Laws Committees on the
Laws of the Commonwealth Dealing
With Public Information**

To

The Governor and the General Assembly of Virginia

Richmond, Virginia

January, 1979

To: Honorable John N. Dalton, Governor of Virginia

and

The General Assembly of Virginia

I. INTRODUCTION

The following resolution was passed at the 1978 Session of the General Assembly and requested a joint subcommittee from the House and Senate General Laws Committees to conduct a study of the laws of the Commonwealth dealing with public information. Specifically such study was to deal with the Freedom of Information and Privacy Protection Act.

AMENDMENT IN THE NATURE OF A SUBSTITUTE

FOR HOUSE JOINT RESOLUTION NO. 12

Requesting the Committees on General Laws of the House of Delegates and the Senate to conduct a study of the laws of the Commonwealth dealing with public information.

WHEREAS, it was the intent of the General Assembly, in adopting the Freedom of Information Act, to provide the public free access to the information needed by the electorate and the news media to keep the citizenry informed about the activities of government and of public officials; and

WHEREAS, it was the intent of the General Assembly, in adopting the Privacy Protection Act, to restrict access to and dissemination of personal data, in endeavor to protect personal privacy; and

WHEREAS, in addition to these two major Acts, the General Assembly has, from time to time, enacted other statutes designed either to assure or restrict access to certain kinds of personal information; and

it is highly desirable that citizens, while having access to the information about public officials which is needed to keep government honest, efficient, and responsible, be simultaneously protected from unwarranted intrusions into their private lives; and

WHEREAS, one increasingly encounters instances in which statutory measures designed to guarantee freedom of information and protect individual privacy are apparently in conflict; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Committees on General Laws of the House of Delegates and the Senate are requested to conduct a study of the laws of the Commonwealth dealing with public information.

The Committees are requested to study all present statutory provisions designed to restrict or guarantee access to information about individuals, public officials, and public agencies and bodies, with the goal of formulating such legislative recommendations as will best resolve any conflicts between the Freedom of Information Act and Privacy Protection Act and also serve to strike the proper balance between the public's "need to know" and the individual's right to privacy.

The office of the Attorney General and all other agencies of the State are requested to assist the Committees in their work.

The Committees are requested to meet to begin work no later than April one, nineteen hundred seventy-eight, and to submit their findings and recommendations to the Governor and General Assembly no later than October one, nineteen hundred seventy-eight.

At the initial organizational meeting of the Joint Subcommittee, held on June 27, 1978, it was decided that the scope of the study should be limited to the statutory conflicts between the Freedom of Information and Privacy Protection Act.

Briefly, the Freedom of Information Act and the Privacy Protection Act do the following:

1. The Virginia Freedom of Information Act guarantees, to the public certain rights relative to the conduct of public business by governmental bodies, agencies and institutions. The Act focuses upon the transaction of public business by governmental bodies at two critical points. First, the Act addresses record keeping, guaranteeing in § 2.1-342(a) that all official records, except as provided in the Act itself or other provisions of law, shall be open to public inspection. Secondly, the Act addresses meetings of public bodies, providing § 2.1-343 that all "meetings" shall be open to the public except as provided by specific statutory exception.

2. The Privacy Protection Act establishes "principles of information practice," enforces these principles both by mandating compliance with specific administrative procedures and by creating specified individual rights, and provides a remedy for statutory violations.

The administrative procedures guard against the unwarranted collection, use, maintenance and dissemination of personal information. Information must be obtained, to the greatest extent possible, from the individuals to whom the data pertains. Prior to disseminating records to another information system, the transferor must receive assurances that the transferee intends to comply with specified security and usage requirements. The administrative procedures also require an agency to compile various lists, records and reports concerning the existence of and access to its information systems. Finally, the Act prohibits the collection of certain political and religious data without explicit statutory authorization.

Consistent with the narrow scope of the study as agreed to by the Joint Subcommittee, information relative to existing conflicts between these two Acts was requested. Public hearings were held and a substantive number of persons raised issues for consideration during the deliberations of the Joint Subcommittee.

In addition, the Chairman of the Joint Subcommittee had requested the opinion of the Honorable Marshall Coleman, Attorney General of Virginia in regard to existing conflicts between these two Acts.

FINDINGS IN REGARD TO STATUTORY CONFLICTS

As the result of the public hearings and the response of the Attorney General to the Chairman's request concerning actual conflicts, the Joint Subcommittee finds that few such conflicts exist. Conflicting areas do, however, arise in two instances.

The first of such conflicts deals with letters of recommendation and reference in governmental agency personnel files. Under the Freedom of Information Act, an employee of a state or local governmental body can review his entire personnel file. However, under the Privacy Act, an individual is denied access to letters of recommendation or reference contained in his personnel file. Given, the later enactment of the Privacy Protection Act, its provisions would be controlling and such material would, therefore, be unavailable.

The second area in which the two Acts apparently conflict is with respect to medical and psychological records. Under § 2.1-342(b)(3), in the Freedom of Information Act, an individual has a right to inspect his own medical or psychological records, unless the doctor preparing such records includes in the records a statement that the patient should not see them. Under the Privacy Act, § 2.1-382 A. 3(a), an individual cannot see his medical or psychological records and has only the right to authorize inspection of them by a doctor or psychologist. The Joint Subcommittee acknowledges the existence of these conflicts and lengthy deliberations resulted.

In addition to these actual conflicts, the Subcommittee finds that a great many apparent conflicts exist. The bulk of these apparent conflicts are the result of the honest uncertainty, unfamiliarity or misapplication of the Acts by public officials. The Chairman and other members of the Joint Subcommittee find that a great number of the problems encountered in the utilization and application of the Freedom of Information and Privacy Protection Acts result from an inconsistent application of the Acts from agency to agency and locality to locality.

RECOMMENDATIONS

The majority of the Joint Subcommittee (see dissenting opinion) recommend that the legal conflicts between the Freedom of Information and Privacy Protection be resolved by allowing individual access to letters of recommendation and reference.

The majority of the Joint Subcommittee also recommends that the existing legal conflict in regard to medical and psychological records be resolved by allowing access by individuals to such records with the proviso maintained that doctors may make a notation to the effect that such records be kept confidential in the event that such records may be damaging to the patient.

In order to accomplish these recommendations, the Joint Subcommittee requests the introduction of the legislation attached hereto as Appendix I.

In regard to those other areas of concern addressed by the Joint Subcommittee that result in apparent conflicts, the Joint Subcommittee recommends the adoption of the resolution attached hereto as Appendix II which would request the Department of Management Analysis and Systems Development with the assistance of the Attorney General's office to promulgate a manual setting forth guidelines for the conjunctive use of the Freedom of Information and Privacy Protection Act.

Respectfully submitted,

Senator Clive L. DuVal, 2d

Senator James T. Edmunds

Delegate Arthur R. Giesen, Jr.

Delegate Raymond R. Vickery, Jr.

MINORITY REPORT

JOINT SUBCOMMITTEE OF THE GENERAL

LAWS COMMITTEE STUDYING THE

LAWS OF THE COMMONWEALTH DEALING

WITH PUBLIC INFORMATION

The Virginia privacy protection act specifically excludes recommendations and letters of reference from those portions of an individual's personnel records which he or she has a right to inspect. Section 2.1-382(B). The subcommittee has recommended deletion of this exclusion. This proposed deletion, if adopted, will result in the individual's gaining the right to inspect letters of recommendation in his or her personnel file.

We respectfully oppose this recommendation. The exclusion should remain for good and sufficient reasons.

First, this exclusion has been a part of the Act since 1976. During that time numerous people have doubtlessly written recommendations and letters of reference relying on the fact that the act would protect the contents of the letters. To repeal this provision will make those letters open to inspection by the subject. This would be unfair to those persons who relied on the statutory guarantees of confidentiality.

Secondly, the proposal for repeal was not suggested by any witness who appeared at any of the public hearings held by the subcommittee. There is simply no significant public demand for the repeal of this exclusion. The most serious problem our subcommittee found in the study of conflicts between the Privacy Protection and Freedom of Information Acts was confusion about what the acts were intended to do. This problem arose, in part, from the numerous amendments to these acts. Unless there is a compelling need or demand for amendment, we should not change them.

Finally, the exclusion of confidential letters of reference and recommendation from inspection by their subject encourages a fair and frank appraisal of the strengths and weaknesses of that individual. To repeal the confidentiality of this type of communication will discourage this type of frank appraisal.

The Virginia Advisory Legislative Council recommended this confidentiality in 1976. Report of the Virginia Advisory Legislative Council, Senate Document Number 27 (1976) at pages 9-10. We feel the Council's conclusion was correct then and it is correct today.

Respectfully submitted,

A. Victor Thomas, Chairman

Calvin W. Fowler

William A. Truban

APPENDIX 1

A BILL to amend and reenact § 2.1-382 of the Code of Virginia, relating to the Privacy Protection Act.

Be it enacted by the General Assembly of Virginia:

1. That § 2.1-382 of the Code of Virginia is amended and reenacted as follows:

§ 2.1-382. Rights of data subjects.—Any agency maintaining personal information shall:

1. Inform an individual who is asked to supply personal information about himself whether he is legally required, or may refuse, to supply the information requested, and also of any specific consequences which are known to the agency of providing or not providing such information.

2. Give notice to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing such information, however documented permission for dissemination in the hands of such other agency or organization will satisfy this requirement.

3. Upon request and proper identification of any data subject, or of his authorized agent, grant such subject or agent the right to inspect, in a form comprehensible to such individual or agent:

(a) All personal information about that data subject ~~except in the case of medical and psychological records, when such records shall, upon written authorization, be given to a physician or psychologist designated by the data subject as provided in § 2.1-342 (b)(3) .~~

(b) The nature of the sources of the information.

(c) The names of recipients, other than those with regular access authority, of personal information about the data subject including the identity of all persons and organizations involved and their relationship to the system when not having regular access authority.

4. Comply with the following minimum conditions of disclosure to data subjects:

(a) An agency shall make disclosures to data subjects required under this chapter, during normal business hours.

(b) The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable standard charges for document search and duplication.

(c) The data subject shall be permitted to be accompanied by a person or persons of his choosing, who shall furnish reasonable identification. An agency may require the data subject to furnish a written statement granting permission to the organization to discuss the individual's file in such person's presence.

5. If the data subject gives notice that he wishes to challenge, correct, or explain information about him in the information system, the following minimum procedures shall be followed:

(a) The agency maintaining the information system shall investigate, and record the current status of that personal information.

(b) If, after such investigation, such information is found to be incomplete, inaccurate, not pertinent, not timely nor necessary to be retained, it shall be promptly corrected or purged.

(c) If the investigation does not resolve the dispute, the data subject may file a statement of not

more than two hundred words setting forth his position.

(d) Whenever a statement of dispute is filed, the organization maintaining the information system shall supply any previous recipient with a copy of the statement and, in any subsequent dissemination or use of the information in question, clearly note that it is disputed and supply the statement of the data subject along with the information.

(e) The agency maintaining the information system shall clearly and conspicuously disclose to the data subject his rights to make such a request.

(f) Following any correction or purging of personal information the agency shall furnish to past recipients notification that the item has been purged or corrected whose receipt shall be acknowledged.

~~B. Nothing in this section or found elsewhere in this chapter shall be construed so as to require an agency to disseminate any recommendation or letter of reference from or to a third party which is a part of the personnel file of any data subject.~~

C. Neither any provision of this chapter nor any provision of Chapter 21 (§ 2.1-340 et seq.) of this title shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of State, local or regional government in this Commonwealth whatsoever; provided, however, that the provisions of this subsection shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is ten thousand dollars or less.

APPENDIX II

HOUSE JOINT RESOLUTION NO.....

Requesting the Department of Management Analysis and Systems Development to prepare a manual setting forth guidelines for the implementation of the Freedom of Information and Privacy Protection Acts.

WHEREAS, the General Assembly enacted Virginia's Freedom of Information Act in order to ensure that no activity of government which ought to be done in public was carried on in secrecy; and

WHEREAS, the General Assembly enacted Virginia's Privacy Protection Act to ensure that no personal information in governmental hands was made public knowledge when it should have been kept confidential; and

WHEREAS, experience has shown a considerable diversity of interpretation of these two Acts among State agencies and units of local government; and

WHEREAS, it is highly desirable that both inconsistencies in these Acts and inconsistencies in their implementation be eliminated to the greatest degree possible; and

WHEREAS, considerable improvement in the uniformity of interpretation of these Acts could be realized if one State agency were to devise and distribute a manual setting forth guidelines for State and local governmental agencies to follow in the implementation of the Commonwealth's Freedom of Information and Privacy Protection Acts; and

WHEREAS, the Department of Management Analysis and Systems Development is already charged with considerable monitoring and reporting duties under the Privacy Protection Act; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Department of Management Analysis and Systems Development is requested to devise and disseminate to all State and local governmental entities covered by the provisions of the Commonwealth's Freedom of Information Act, Privacy Protection Act, either, or both, a manual setting forth guidelines of sufficient scope and detail as to significantly enhance the uniformity of application and interpretation of these Acts. All State and local governmental entities are urged to cooperate with the Department of Management Analysis and Systems Development both in the formulation and in the implementation of these guidelines.

