

17 September 2006

Nebraska State Police  
ATTN: Public Hearing Officer/Steve Shaw  
By Way of FAX to: (402) 479-4002

**SUBJECT:** Public comment in opposition to Social Security Number disclosure requirement in proposed Nebraska State Police concealed handgun permit regulations

Dear Nebraska State Police Hearing Officer:

This public comment urges the Nebraska State Police (“NSP”) to delete the Social Security Number (“SSN”) disclosure requirement in proposed NSP concealed handgun permit regulations.

### **Executive Summary**

Pursuant to the Supremacy Clause of the United States Constitution, the Nebraska State Police may not lawfully issue a state regulation requiring that Nebraska concealed handgun permit applicants disclose federal SSNs as a condition of application because the requirement directly contravenes a valid federal law.<sup>1</sup>

### **Federal Law Control State Actor Elicitation of SSNs**

Neither the federal Social Security Act nor any other act of Congress requires Americans to obtain assignment of an SSN to live, work, or carry a gun in the United States. In enacting Section 7 of the Federal Privacy Act of 1974 (“Section 7”),<sup>2</sup> Congress explicitly barred the several states from denying any right benefit or privilege to any person

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<sup>1</sup> Article VI of the United States Constitution provides that “This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land; and the Judges in every state shall be bound thereby, **any thing in the Constitution or Laws of any state to the contrary notwithstanding** [emphasis added].”

<sup>2</sup> Section 7 of PL 93-579 (the Federal Privacy Act of 1974, 5 USC 552a note) provides as follows: “Sec. 7 (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) 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.  
(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.” A somewhat dated US DOJ overview of case law regarding Section 7 is at <http://www.usdoj.gov/04foia/1974ssnu.htm>.

because such person refuses to disclose her confidential federal SSN, if any, except as statutorily permitted by Congress.<sup>3</sup>

As the United States Supreme Court has said, government agencies may not withhold any right, benefit or privilege from any person refusing to disclose her SSN unless the agency is authorized to do so by a specific federal statute.<sup>4</sup> Furthermore, a meaningful Section 7(b) warning is required each and every time an agency elicits a person's disclosure of an SSN.<sup>5</sup>

A violation of citizen SSN privacy rights under Section 7 can be construed as a felony under 42 USC 408.<sup>6</sup>

### Federal Law Prohibits State Demands for SSN Disclosure in Gun Carry Licensing

Section 7, by way of the Supremacy clause of the United States Constitution precludes the NSP from issuing a regulation in violation of a valid federal law pertaining to federal SSNs. The proposed regulation requiring that Nebraska concealed handgun permit applicants disclose SSNs as a condition of application is unlawful and beyond the lawful authority of the NSP.<sup>7</sup>

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<sup>3</sup> *E.g., Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993)(affirming trial court's enforcement of Section 7 on Virginia voter registration office); *Yeager v. Hackensack Water Co.*, 615 F.Supp. 1087 (D. N.J. 1985); *Schwier v. Cox*, 340 F.3d 1284, 1287 (11th Cir. 2003); *Russell v. Board of Plumbing Examiners of the City of Westchester*, 74 F. Supp.2d 339 (S.D. N.Y. 1999); *Greater Cleveland Welfare Rights Organization v. Bauer*, 462 F.Supp. 1313 (N.D. Ohio 1978); *Doyle v. Wilson*, 529 F. Supp. 1343 (D. Del. 1982); *Libertarian Party of Kentucky v. Bremer Ehrler*, 776 F.Supp. 1200 (E.D. Ky. 1991); *Doe v. Sharp*, 491 F.Supp. 346 (D. Mass. 1980); *McKay v. Altobello*, 1997 WL 266717, 1997 U.S. Dist. LEXIS 7162 (E.D. La. 1997).

<sup>4</sup> *Selective Service v. Minn. Public Int. Res. Gp.*, 468 U.S. 841 (1984)(federal statutory authorization required to collect SSN).

<sup>5</sup> *E.g., Doe v. Sharp*, 491 F. Supp. 346, 347-50 (D. Mass. 1980) (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); *Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F. Supp. 1313, 1319-21 (N.D. Ohio 1978).

<sup>6</sup> 42 USC 408 provides in part that "(a) In general Whoever — . . . (8) discloses, uses, or **compels the disclosure of the social security number of any person in violation of the laws of the United States** [emphasis added]; shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both."

<sup>7</sup> *E.g., Stollenwerk v. Miller*, Slip Copy, 2006 WL 463393, (E.D. Pa. 2006)(Pennsylvania statute requiring persons to disclose an SSN to buy a gun or obtain a gun carry license violates Section 7 of the Federal Privacy Act; state police and local police agencies must provide Section 7(b) Federal Privacy Act SSN privacy warning when eliciting SSNs from gun purchasers and gun carry license applicants)(see opinion and order at <http://www.paed.uscourts.gov/documents/opinions/06D0225P.pdf>); *Camp v. Cason*, Temporary Restraining Order, Civil Action No. 1:06-CV-1586-CAP (Ga. 2006)(" . . . the Probate Court of Carroll County shall accept and process the plaintiff's applications regardless of the omission of the plaintiff's Social Security Account Number") (see order at [http://www.georgiapacking.org/SSN\\_TRO.pdf](http://www.georgiapacking.org/SSN_TRO.pdf)). See *Shackelford v. Albo*, No. CV 98-90736 (Ariz. Ct. App. 1999)(suggesting that Section 7 of the Federal Privacy Act may preclude denial of Arizona

## Recommendations

1. The NSP should modify the proposed regulation to note that SSNs of applicants will be elicited pursuant to the Statutes of Nebraska as amended by LB 454 in 2006, but that pursuant to Section 7, no application will be rejected or denied because an applicant did not disclose her SSN, if any.
2. The NSP should modify the proposed regulation to specify the precise written Section 7(b) SSN privacy warning which will appear upon the NSP concealed handgun permit application so as to lawfully inform the applicant that SSN disclosure is voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it if voluntarily disclosed.

## Conclusion

The Nebraska Legislature has placed the NSP in the uncomfortable position of issuing a regulation pursuant to a state statute which is invalid with regard to the requirement that concealed handgun applicants disclose her SSN as a condition of application. Nonetheless, federal law pertaining to federal SSNs is the supreme law of the land, and the NSP cannot lawfully issue a regulation in contravention of the United States Constitution.<sup>8</sup> The NSP must therefore delete the SSN disclosure requirement in proposed NSP concealed handgun permit regulations.

Sincerely,



Mike Stollenwerk  
Co-founder, [www.OpenCarry.org](http://www.OpenCarry.org)  
(703) 945-0824

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concealed weapons permits on the basis of applicant refusal to disclose SSN, if any, but holding that Plaintiff waived this argument on appeal). *See also* Tenn. Op. Att’y Gen. (9 Sept. 2002) (Section 7 of the Federal Privacy Act precludes state denial of gun purchase for refusal to disclose SSN despite Tennessee statute requiring SSN disclosure to purchase a gun)(see opinion at [http://www.tennesseefirearms.com/law\\_regs/agopinions/op01-023.pdf](http://www.tennesseefirearms.com/law_regs/agopinions/op01-023.pdf)).

<sup>8</sup> Finding state and local agencies caught between supreme federal SSN law and recent legislative enactments creating concealed handgun permits requiring applicants to disclose SSNs, the attorneys general of Ohio and Nebraska have issued directives clarifying that federal law invalidates state SSN requirements and that applications shall not be denied because an applicant fails to disclose her SSN, if any (see directives at [http://www.ag.state.oh.us/le/prevention/pubs/cc\\_personal\\_info.pdf](http://www.ag.state.oh.us/le/prevention/pubs/cc_personal_info.pdf) and [http://www.accesskansas.org/ksag/Concealed\\_Weapon/FAQ\\_7\\_20\\_2006.htm](http://www.accesskansas.org/ksag/Concealed_Weapon/FAQ_7_20_2006.htm)).