



ALAN WILSON
ATTORNEY GENERAL

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Susan M. Boone, Esq.
General Counsel and Deputy Director
South Carolina Department of Labor, Licensing and Regulation
P.O. Box 11329
Columbia, SC 29211-1329

Dear Ms. Boone:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter requests an opinion addressing the following:

LLR has been asked by third-party entities, including professional associations, to disclose licensee email addresses for a number of different purposes. Recently, a professional association has requested licensee email addresses to promote continuing education classes. In response to these types of requests, LLR has provided license rosters to anyone requesting them, including associations. License rosters generally include the following information: a licensee's full name, business name, business address, city, zip code, business phone, issue and expiration date of the license, credential type, credential number, and status of the license.

However, in recognition of the increased utilization of email addresses to communicate information, LLR has sought to balance its responsibilities to protect an individual's private information pursuant to the South Carolina Family Privacy Protection Act with a third-party entity's desire to provide information about continuing education to those individuals. As set forth more specifically below, the contact information LLR collects for its licensees is not guaranteed to be purely business contact information. Thus, if LLR discloses all email addresses of licensees to a third party, then LLR will inevitably be providing personal email addresses to third parties.

...

LLR collects and stores a voluminous amount of personal and private information about its licensees, and because of that, takes very seriously its

responsibility to protect this information and to not release it without the licensee's consent unless clearly required by law. The South Carolina Family Privacy Protection Act requires agencies to develop privacy policies and procedures to ensure that the collection of personal information pertaining to the citizens of the State is limited to such personal information required to fulfill the agency's legitimate public purpose. S.C. Code § 30-2-20. The purpose of each of LLR's Boards is to ensure that applicants for licensure meet the criteria required by law to practice a regulated profession in this state. In order to fulfill that obligation, the Boards are required to collect a significant amount of personal information from applicants and licensees, ... Many licensees work for themselves, maintain their licenses but do not actively practice, and/or simply prefer to utilize their personal phone, personal email address, and home address when dealing with LLR and their respective licensing Boards. Thus, neither LLR nor the Boards require licensees to provide purely "business" information.

Much of the information collected by LLR in order to issue a professional or occupational license constitutes "personal information," as defined in the Family Privacy Protection Act. In recent years, with the increase in technology, personal information can be used alone, or in combination with other collectible data, to steal a licensee's identity and to violate their digital privacy, as well as spoofing, phishing attacks, spam, and account hacking. The information can also be used to locate a licensee, which poses a potential safety risk. South Carolina Code § 30-2-200(3) provides, "When state and local government entities possess social security numbers or other personal identifying information, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public."

The Family Privacy Protection Act anticipates that agencies may release certain information about applicants or licensees upon request and directs that agencies take "reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation." S.C. Code § 30-2-50(C). The Act excludes from the definition of commercial solicitation "notification of continuing education opportunities." S.C. Code § 30-2-30(3)(b). However, given the entirety of Chapter 2, Title 30, entitled "Family and Personal Identifying Information Privacy Protection," LLR has interpreted that to only permit the release of information so long as it does not violate a person's privacy. Additionally, nothing in the text of the Act mandates the release of personal emails even if that information is sought for "notification of continuing education opportunities."

In addition to guidance provided to agencies by the Family Privacy Protection Act, the Freedom of Information Act exempts from disclosure information of a personal nature where the public disclosure thereof would

constitute an unreasonable invasion of personal privacy. See S.C. Code § 30-4-40(a)(2) (“A public body may but is not required to exempt from disclosure the following information: [] (2) [i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy.”).

Significant in this regard is the South Carolina Court of Appeals’ decision in George S. Glassmeyer v. City of Columbia, that home addresses, personal telephone numbers and email addresses are information in which applicants have a privacy interest. 414 S.C. 213, 777 S.E. 2d 835 (Ct. App. 2015). In applying the common law balancing test to determine if the public’s need to know the information outweighed the individuals’ privacy interest, the Glassmeyer Court reminded readers that the purpose of FOIA is to prevent the operation of government in secrecy and concluded, in that instance, that the public’s right to know the home address of an applicant for the city manager’s job did not outweigh the individual’s privacy right in that information. ...

Although the courts are vested with the final authority in applying the privacy balancing test, based on the above authority, LLR believes the law does not mandate that the need for direct notification of continuing education opportunities outweighs an applicant or licensee’s privacy interest in his or her personal email address. This is especially true where certain other information can be released to requestors, such as licensee names and business addresses, where there is no risk of violating the licensee’s privacy or exposing the licensees to potential harm through the release of personal email addresses. Nonetheless, third parties dispute LLR’s interpretation of the laws governing privacy and its position regarding its responsibilities to protect licensee private and personal information. LLR therefore seeks an opinion on whether it must disclose licensee email addresses to third-party entities who purportedly seek the information for the purpose of continuing education notification if the licensee has not consented to the release of his or her email address and has not identified it as a business email address.

Law/Analysis

This Office agrees with the Department’s conclusion that the Family Privacy Protection Act of 2002 (“FPPA”), S.C. §§ 30-2-10 *et seq.*, does not mandate the release of personal information even in circumstances where a requestor’s purported use would fall under one of the exceptions to “commercial solicitation.” S.C. Code § 30-2-30(3) (2011). The FPPA does not contain a production mandate like that established in the S.C. Freedom of Information Act,

("FOIA").¹ Rather, the FPPA requires all state entities to "develop privacy policies and procedures to ensure that the collection of personal information pertaining to citizens of the State is limited to such personal information required ... and necessary to fulfill a legitimate public purpose." S.C. Code § 30-2-20. Each state entity is also directed to display its privacy policy on its website and advise citizens that information collected is "subject to public scrutiny." S.C. Code § 30-2-40. Finally, section 30-2-50 prohibits persons and private entities from "knowingly obtain[ing] or us[ing] personal information obtained from a state agency, a local government, or other political subdivision of the State for commercial solicitation directed to any person in this State." S.C. Code § 30-2-50(A) (emphasis added). Subsection (D) states that a person who "knowingly violat[es] the provisions of subsection (A) is guilty of a misdemeanor." S.C. Code § 30-2-50(D).

The FPPA defines "commercial solicitation" as "contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service." S.C. Code § 30-2-30(3). There are four exceptions to this definition.

"Commercial solicitation" does not include contact by whatever means for the purpose of:

- (a) offering membership in a credit union;
- (b) notification of continuing education opportunities;
- (c) selling or marketing banking, insurance, securities, or commodities services provided by an institution or entity defined in or required to comply with the Federal Gramm-Leach-Bliley Financial Modernization Act, 113 Stat. 1338; or
- (d) contacting persons for political purposes using information on file with state or local voter registration offices.

Id. (emphasis added). Your letter states, "[A] professional association has requested licensee email addresses to promote continuing education classes." In subsequent communications, it was also relayed that these requests were not initiated as public records requests under the S.C. FOIA, but rather directly under the FPPA. Presumably, the request was presented this way because the personal information sought would be used for a purpose that is an exception to the definition of commercial solicitation. While there is an exception from the statutory definition of "commercial solicitation" for "continuing education opportunities," that alone does not require production. S.C. Code § 30-2-30(3)(b). The exceptions merely exclude a person using personal information obtained from a state agency, a local government, or other political subdivision of the State from criminal liability under S.C. Code § 30-2-50 when used for one of those listed purposes.

¹ See S.C. Code § 30-4-30 (outlining the right to inspect or copy public records, establishing public body's authority to collect fees, setting timeline for determination regarding availability of requested public records, and deadlines for production of public records.).

Admittedly, the language in subsection 30-2-50(B) is suggestive of a production mechanism under the FPPA. Subsection (B) states:

Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

Id. (emphasis added). Within this mandate, the statute's plain language describes requesting and obtaining "records pursuant to this chapter." Id. However, the statutes within the FPPA do not direct how a requestor is to make requests, by what method a public body is to produce records, the time for production, costs, etc.² Further, this Office is unaware of an order issued by our state courts compelling document production expressly under the FPPA.

² A statute in a separate article, but still within chapter 2 of Title 30 of the South Carolina Code of Laws, concerning the production of personal identifying information permits the disclosure of social security numbers and identifying information in the following circumstances.

Social security numbers and identifying information may be disclosed:

- (1) to another governmental entity or its agents, employees, or contractors, if disclosure is necessary for the receiving entity to perform its duties and responsibilities, including a debt collected pursuant to the Setoff Debt Collection Act, Section 12-56-10, and the Governmental Enterprise Accounts Receivable Collections program, Section 12-4-580. The receiving governmental entity and its agents, employees, and contractors shall maintain the confidential and exempt status of those numbers;
- (2) pursuant to a court order, warrant, or subpoena;
- (3) for public health purposes;
- (4) on certified copies of vital records issued by the director of the Department of Health and Environmental Control as the state registrar, pursuant to Section 44-63-30 and authorized officials pursuant to Section 44-63-40. The state registrar may disclose personal identifying information other than social security number on an uncertified vital record;
- (5) on a recorded document in the official records of the county;
- (6) on a document filed in the official records of the courts; and
- (7) to an employer for employment verification or in the course of administration or provision of employee benefit programs, claims, and procedures related to employment including, but not limited to, termination from employment, retirement from employment, injuries suffered during the course of employment, and other such claims, benefits, and procedures.

Subsections (B) and (C) of section 30-2-50 refer to a public record or public records. “Public records” is not a defined term in the FPPA, but it is defined in the S.C. FOIA. A rule of statutory construction counsels that where statutes deal with the same subject matter, they “are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Here, because section 30-2-50 and the S.C. FOIA both address requesting and obtaining public records, a court would likely address the vagueness of the FPPA’s mention of requesting records by reading it in combination with the S.C. FOIA. The S.C. FOIA provides, “A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access.” S.C. Code § 30-4-30. The professional association could request email addresses from the Department using this process, and, if the public records are produced, and the Department would provide the notice regarding the prohibition on commercial solicitation as required by S.C. Code § 30-2-50(B).

As noted in your letter, the Glassmeyer Court found individuals have a privacy interest in their email addresses. See Glassmeyer v. City of Columbia, 414 S.C. 213, 223, 777 S.E.2d 835, 840 (Ct. App. 2015). The Department may then choose to exempt personal email addresses under section 30-4-40(a)(2) as “an unreasonable invasion of personal privacy.” A court would balance “the privacy interest of the [licensees] against the interest of the public’s need to know this information.” Id. This Office cannot anticipate how the professional association might articulate the public’s need to know the requested information. However, a court is unlikely to find merely citing an exception from the statutory definition of “commercial solicitation” categorically outweighs the privacy interests in “personal information” as defined in the FPPA.³

S.C. Code § 30-2-320. This statute does not appear broadly applicable to the request at issue. Aside from this statute, there does not appear to be another relevant statute within the chapter addressing disclosure or production of documents.

³ “Personal information” is a broadly defined to mean:

information that identifies or describes an individual including, but not limited to, an individual’s photograph or digitized image, social security number, date of birth, driver’s identification number, name, home address, home telephone number, medical or disability information, education level, financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports.

S.C. Code § 30-2-30(1) (emphasis added).

Conclusion

As discussed more fully above, this Office agrees with the Department's conclusion that the FPPA does not mandate the release of personal information even in circumstances where a requestor's purported use would fall under one of the exceptions to "commercial solicitation." S.C. Code § 30-2-30(3). Instead, the FPPA limits the collection of personal information, requires the development of privacy policies, and prohibits the use of personal information obtained from state agencies and political subdivisions of the state for commercial solicitation. While there is an exception from the statutory definition of "commercial solicitation" for "continuing education opportunities," this exception does not require production. S.C. Code § 30-2-30(3)(b). The exceptions merely exclude a person or private entity using personal information obtained from a state agency, a local government, or other political subdivision of the State from criminal liability under S.C. Code § 30-2-50 when used for one of those listed purposes. Because section 30-2-50 and the S.C. FOIA both address requesting and obtaining public records, a court would likely address the vagueness of the FPPA regarding records requests by reading it in combination with the S.C. FOIA. See S.C. Code §§ 30-4-10 *et seq.*

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General