

LETTER OPINION
97-L-13

January 29, 1997

Honorable Gerald O. Sveen
State Representative
House Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative Sveen:

Thank you for your January 21, 1997, letter requesting clarification of the requirement for notice to the public of the procedure for contacting the state to prohibit disclosure of personal information under the Federal Drivers Privacy Protection Act of 1994.

The Federal Drivers Privacy Protection Act of 1994 is found at 18 U.S.C. § 2721. The Act generally prohibits states from disclosing personal information contained in records regarding motor vehicle record titles, motor vehicle registrations, motor vehicle operator's permits or licenses, or other identification card records issued by the state department of motor vehicles. Disclosure of the information for specific listed purposes is allowed under Section 2721(b)(1)-(10) of the Act. Section 2721(b)(11) provides that the state may disclose personal information for uses in addition to those specifically authorized if:

the motor vehicle department has provided in a clear and conspicuous manner on forms for issuance or renewal of operator's permits, titles, registrations, or identification cards, notice that personal information collected by the department may be disclosed to any business or person, and has provided in a clear and conspicuous manner on such forms an opportunity to prohibit such disclosures.

Likewise, subsection (b)(12) provides information may be disclosed for "bulk distribution for surveys, marketing or solicitations if the motor vehicle department has implemented methods and procedures to ensure that . . . individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses."

Title XXX, Section 300003, which contains the effective date for the Act, further provides:

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After the effective date, if a State has implemented a procedure under section 2721(b)(11) and (12) of title 18, United States Code, . . . for prohibiting disclosures or uses of personal information, and the procedure otherwise meets the requirements of subsection (b)(11) and (12), the State shall be in compliance with [that subsection] even if the procedure is not available to individuals until they renew their license, title, registration, or identification card, so long as the State provides some other procedure for individuals to contact the State on their own initiative to prohibit such uses or disclosures.

The question you raise is whether the state must provide notice to individuals of the procedure for contacting the state on their own initiative prior to receiving the clear and conspicuous notice on their renewal forms.

No requirements are contained in the Act for notice of the procedures which have been developed for individuals to contact the state on their own initiative prior to license or registration renewal. The conference report indicates when notice is required:

The opportunity to prohibit disclosure of personal information under (b)(11) and (12) does not have to be provided each time a request for such information is made. Instead, the opportunity to prohibit these disclosures should be provided at the time an individual registers for or renews his or her driver's license, title registration or identity card and at any other time an individual contacts the State on his or her own initiative to prohibit such disclosures.

H.R. Rep. No. 711, 103d Cong., 2d Sess. 371 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1889. The expression of one thing in a statute generally implies the exclusion of another. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). The presence of specific notice requirements for new and renewed licenses and registrations implies that no notice is required for the procedure allowing individuals to contact the state on their own initiative.

The opt out provisions of subdivisions 11 and 12 of section 2721(b) do not change the way in which records are disclosed unless an individual notifies the state motor vehicle department that no disclosure of personal information shall be made except where disclosure is mandated by the Act. Currently all registration and

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licensing records of the motor vehicle department are public records and must be open to inspection by the public. N.D.C.C. § 39-02-05. Therefore, no current right exists to have the information protected from disclosure. Because no current right of the individual is being limited or denied, it is my opinion that an individual's rights would not be violated if the state does not provide notice of the procedure to allow individuals to contact the state agency on their own initiative to request that personal information not be disclosed prior to the next renewal of their automobile title, registration, permit, license, or identification card.

You express concern over possible liability of the Department of Transportation if individuals do not receive notice of the opportunity to prohibit disclosure of the information. 18 U.S.C. § 2724 provides a private cause of action against any person who knowingly obtains, discloses, or uses personal information from motor vehicle records for a purpose not allowed under the Act. The civil action may be brought in a federal district court. The remedies allowed include actual damages, liquidated damages, attorney's fees and costs, preliminary and equitable relief and punitive damages upon proof of willful or reckless disregard of the law. It is my further opinion that the Department of Transportation could not be found liable legally for failure of an individual to receive notice of the procedures developed for that individual to contact the state agency to request that personal information not be disclosed prior to the next renewal of a registration, title, permit or license because no notice provisions are required by law and no existing right of the individual regarding disclosure of the information exists. See generally Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996) (there is no liability where the defendant does not owe a duty toward the plaintiff).

18 U.S.C. § 2723(b) provides that any state department of motor vehicles which "has a policy or practice of substantial noncompliance with [the Act] shall be subject to a civil penalty . . . of not more than \$5000 a day for each day of substantial noncompliance." The state may provide public notice to fulfill the statutory purpose of having a procedure in place for an individual to contact the agency to request that information not be disclosed. The type and degree of public notice to be given would be up to the agency responsible for carrying out the program. However, if notice is not given in a clear and conspicuous manner on the forms for issuance or renewal of operator permits, licenses, titles, registrations, or identification cards after the effective date of the bill, the state will not be in compliance with the Act, and if an individual's personal information

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is given out, the Department of Transportation could face liability both under 18 U.S.C. § 2724 and § 2723.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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