

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

February 14, 2001

Opinion No. 01-023

Ability of the Tennessee Bureau of Investigation to Require Firearm Purchaser to Supply His/Her Social Security Number

QUESTION

Can the Tennessee Bureau of Investigation pursuant to Tenn. Code Ann. § 39-17-1316 and federal law require a person who is purchasing a firearm to provide his/her social security number in order to purchase the firearm?

OPINION

No. While the Tennessee Bureau of Investigation can request an individual to provide his/her social security number in an application for approval of a firearm purchase under certain conditions, the Bureau may not deny approval of a firearm purchase solely upon the individual's refusal to supply a social security number.

ANALYSIS

Tenn. Code Ann. § 39-17-1316 regulates the ability of persons to sell firearms in the State of Tennessee. Tenn. Code Ann. § 39-17-1316(c) governs the ability of gun dealers to sell firearms to persons who are not licensed dealers. One of the provisions of Tenn. Code Ann. § 39-17-1316 requires a gun dealer to collect and transmit to the Tennessee Bureau of Investigation the social security number of an individual who is attempting to purchase a firearm, if a social security number has been assigned to him/her. Tenn. Code Ann. § 39-17-1316(c)(4)(G). Therefore under state law, before a person who is not a licensed gun dealer can purchase a firearm from a gun dealer, he/she is required to provide a social security number if the person has one.

However, Section 7 of the Privacy Act of 1974, Pub. L. 93-579 S 7, 88 Stat. 1896, 1909 (1974), as codified at 5 U.S.C. § 552a provides that:

(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny to an 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) the 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.

In order to determine if the provisions of the Privacy Act apply to the TBI's requirement of submission of a social security number by persons attempting to purchase a firearm, a court would have to determine whether such activity affects a "right, benefit, or privilege" of the purchaser. The Privacy Act does not specifically define what is to be considered a "right, benefit, or privilege." There do not appear to be any federal cases which clearly address the issue of what shall be considered a "right, benefit, or privilege" under the Privacy Act. In *Woman v. United States*, 501 F.Supp. 310, the court briefly noted that a requirement that persons signing up for the Selective Service System supply their social security number affected a "right, benefit, or privilege" since "citizens have a duty to serve in the Armed Forces and a correlative right to register unimpeded by invasion of their privacy unless statutorily authorized." In *Deeds vs. County of Fairfax*, 151 F.3d 1028 (4th Cir. 1998), the court held that the Privacy Act applied to applications for handgun carrying permits. In *Wolman*, the court noted that the Privacy Act was, as noted by Senator Percy, enacted "to block any further expansion of the use of Social Security number as a 'universal identifier.'" *Id.* at 310. A court would likely interpret the provisions of Tenn. Code Ann. § 39-17-1316 as creating a statutorily generated "right, benefit, or privilege" to be able to purchase a firearm from a firearm dealer if he/she meets the conditions of the statute. Therefore, a court would likely apply the provisions of the Privacy Act to the statute's requirement that a social security number be supplied.

Under the Privacy Act, the Tennessee Bureau of Investigation is not prohibited from requesting that individuals submit their social security numbers on a voluntary basis when filling out the form. However, Section 7(b) of the Privacy Act of 1974 requires state agencies that request the disclosure of social security numbers inform the individual "whether that disclosure is mandatory or voluntary, by what statutory authority such a number is solicited, and what uses will be made of it." Therefore provided there is appropriate disclosure, the Tennessee Bureau of Investigation may request that a person completing the application voluntarily provide a social security number.

However, the Privacy Act forbids the Tennessee Bureau of Investigation from denying approval of a gun purchase on account of nondisclosure of a social security number, unless one of the statutory exceptions to the prohibition quoted above applies. Exceptions to the act include disclosures required by Federal statute or disclosure of the 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 a disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual. *See* Section 7 of the Privacy Act of 1974, Pub. L. 93-579 S 7, 88 Stat. 1896, 1909 (1974).

Prior to 1998, Tennessee law did not provide that a person attempting to purchase a firearm had to supply a social security number. Tenn. Code Ann. § 39-17-1316 (1997). No state agency existed in 1975 which maintained a system of records and was operating for this purpose. Therefore, this exception would not be applicable.

The other exception does not apply either. 18 U.S.C.A. § 922(s)(3), the federal statute which lists the information required to be submitted to receive approval to purchase a firearm, does not require a person to provide a social security number. Under the Department of Justice regulations concerning searches of the NICS data base, the federal data base created to provide a means of doing background checks of individuals purchasing firearms, it is noted that to comply with the Privacy Act requirements, a Social Security number will not be required by the NICS to perform any background check. 28 C.F.R. 25.7. Therefore such an exemption is not provided pursuant to 18 U.S.C.A. § 922(s)(3). Neither do the provisions of 42 U.S.C. § 666(a)(13) or 42 U.S.C. § 405(c)(2)(C)(i) allow the states to deny approval of the purchasing of a firearm only upon the basis of the person attempting to purchase the firearm not supplying his/her social security number.

There are currently no federal or state cases directly addressing the issue of whether the state agency approving the sale of a handgun to an individual can require that person to provide a social security number. In *Deeds vs. County of Fairfax*, 151 F.3d 1028 (4th Cir. 1998), the Fourth Circuit Court of Appeals dealt with the manner in which an agency treated a person's social security number once it was voluntarily provided to the agency.¹ However, not at issue in the case was the ability of an agency to deny a handgun carrying permit or gun sale to a person who refused to provide his social security number. A court would most likely interpret current federal law to prohibit the Tennessee Bureau of Investigation from denying approval of a firearm purchase based solely on the individual's refusal to supply his social security number.

Therefore, it appears that a court would find that federal law conflicts with the state law at issue here. By virtue of the Supremacy Clause, U. S. Const. art. XI § 2, lawful federal statutes control over conflicting state laws. Currently, no federal cases directly address the point of whether Section 7 of the

¹In *Deeds*, the court held that the county complied with Section 7 of the Privacy Act by providing a document along with the application for a handgun carrying permit which detailed the reason a request was made for a person's social security number and the state law provision necessitating the request.

Privacy Act of 1974, Pub. L. 93-579 S 7, 88 Stat. 1896, 1909 (1974) as applied to the states violates the Tenth Amendment of the United States Constitution. However, in light of the United States Supreme Court's ruling in *Reno v. Codon*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.3d 587 (2000), a court would most likely uphold the constitutionality of the provisions of Section 7 of the Privacy Act as applied to the states. In *Reno*, the court upheld a federal statute regulating the sale of information obtained from driver license applicants by states to commercial entities. *Id.* at 668. Since Section 7 of the Privacy Act regulates state activities rather than seeking to control the manner in which states regulate private entities, a court would most likely interpret its provisions not to violate the Tenth Amendment of the United States Constitution. *Id.* at 671. Therefore, a court would likely hold that the TBI may not require a person's social security number as a condition of approval of a gun purchase, notwithstanding state law to the contrary.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

WILLIAM C. BRIGHT
Assistant Attorney General

Requested by:

Honorable Larry Wallace
Director of Tennessee Bureau of Investigation
901 R.S. Gass Boulevard
Nashville, Tennessee 37216-2639