

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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March 18, 2013

Opinion No. 13-23

Public Access to Governmental Handgun Carry Permit Information

QUESTION

Does Senate Bill 76/House Bill 388 of the 108th Tennessee General Assembly as originally filed (hereinafter “SB76”) or as proposed to be amended (hereinafter “SB76 Amendment”) violate the United States Constitution?

OPINION

The General Assembly has the constitutional authority to exempt handgun carry permit information from the requirements of the Public Records Act. To the extent that SB76 and SB76 Amendment would impose broad limits on the distribution or publication of handgun carry permit information that has been opened to public access, such legislation is likely susceptible to facial challenge under the First Amendment and the Equal Protection Clause of the United States Constitution.¹

ANALYSIS

SB76 would amend the Tennessee Public Records Act, codified at Tenn. Code Ann. §§ 10-7-101 to -702, to restrict the production, distribution, and publication of records related to applications or renewal applications for handgun carry permits issued pursuant to Tenn. Code Ann. § 39-17-1351.

The Tennessee Public Records Act makes all state records open for personal inspection by any citizen of this state unless otherwise provided by state law. Tenn. Code Ann. § 10-7-503(a)(2)(A). There is at present no state law providing that state handgun carry permit records are confidential.

¹ This Office cannot anticipate all possible factual situations in which SB76 or SB76 Amendment, if enacted, might be applied or “as applied” constitutional challenges that might develop. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between “as applied” and “facial” constitutional challenges). Accordingly, such “as applied” challenges are outside the scope of this opinion.

Tenn. Code Ann. § 10-7-504, designates certain governmental records as confidential. SB76, Section 1, amends Tenn. Code Ann. § 10-7-504 by adding the following new subsection relating to state handgun carry permit records:

(o)

(1) Except as provided in subdivision (o)(2), the following documents, and the information contained in such documents, shall be available for copying and distribution pursuant to subdivision (o)(3):

(A) The application or permit renewal application for a handgun carry permit issued pursuant to § 39-17-1351, and the information contained therein;

(B) Other materials submitted to the department to obtain a handgun carry permit and the information contained in such materials;

(C) Materials provided to a governmental agency, or employee thereof, for the purpose of the agency conducting an investigation into an applicant for a handgun carry permit and the information contained in such materials; and

(D) Whether a person has or has not been issued a handgun carry permit.

(2)(A) All documents, and the information contained in such documents, unless otherwise protected by state or federal law, pertaining to a handgun carry permit which has been revoked pursuant to § 39-17-1352, shall be open records and, upon written request to the department of safety and homeland security, shall be made available for public inspection as provided in this part.

(B) If a permit has not been renewed pursuant to § 39-17-1351, the department of safety and homeland security shall not provide any information in response to a request for information pursuant to this subsection (o).

(3) Any information or other records in subdivision (o)(1) may be copied or reproduced, provided that not more than fifteen (15) records may be copied or reproduced by one (1) person in one (1) day. For the purposes of this subsection (o), one (1) record shall be the complete file maintained by the department of safety and homeland security relative to a handgun permit for one (1) person.

(4) A compilation of information or other records, including names and addresses of permit holders, may be provided if the recipient of such information or records signs a statement that such recipient will not publish such information or records nor will such recipient allow others to publish such information or records. A violation of this subdivision (4) is a Class C misdemeanor. Each publication event of such compilation of information or other records in violation of this subdivision is a separate offense.

(5) Any information or other records regarding an applicant or permit holder may be released to a law enforcement agency for the purpose of conducting an investigation or prosecution, or for determining the validity of a handgun carry permit, or to a child support enforcement agency for purposes of child support enforcement, but shall not be publicly disclosed except as evidence in a criminal or child support enforcement proceeding.

(6) Nothing in this subsection (o) shall prohibit the release of handgun carry permit statistical reports authorized by § 39-17-1351(s).

A proposed amendment to SB76, which was submitted with this opinion request, (“SB76 Amendment”) contains substantially similar language in proposed subsections (o)(1), (2), (5) and (6), but would delete subsections (o)(3) and (4), substituting the following language which includes a new subsection (7):

(3)(A) No person obtaining information or other records pursuant to this subsection, including the entire database of handgun permit holders, shall reproduce, publish, make available to another for the purpose of reproducing or publishing, or permit another to reproduce or publish any information obtained pursuant to this subsection unless the records and information obtained indicate that:

(i) A person who has formally been charged with a felony has a handgun carry permit;

(ii) A person who has been issued a handgun carry permit has engaged in conduct which prohibits such person from being eligible to have a permit;

(B) If subdivision (3)(A)(i) and (3)(A)(ii) apply to a person or persons in the handgun carry permit database, the person obtaining such information may republish, make available to another to republish, or allow another to republish up to fifteen (15) such names per day.

(4) Any person seeking information concerning handgun carry permit holders pursuant to this subsection shall be, prior to release of the information, required to sign a statement that the recipient will not reproduce, publish, make available to another for the purpose of reproducing or publishing, or permit another to reproduce or publish any information obtained pursuant to this subsection.

....

(7) Each handgun carry permit holder whose name or identifying information is released in violation of this subsection shall have a cause of action for invasion of privacy against the person who requested the information and

signed the statement pursuant to subdivision (4) and the person who actually publishes the information.

Copies of both SB76 and SB76 Amendment are attached to this Opinion.

The General Assembly has the authority to designate governmental records as confidential. *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999); *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital Board of Directors*, 621 S.W.2d 763, 765 (Tenn. Ct. App. 1981). As the Tennessee Court of Appeals observed, “[i]t was the legislature that opened the door making records public in the first place. Certainly, . . . the legislature could decide that its policy was too broad and close the door on certain records.” *Thompson v. Reynolds*, 858 S.W.2d 328, 329 (Tenn. Ct. App. 1993).

Nor would the General Assembly’s decision to declare certain governmental records confidential implicate the free speech guarantee of the First Amendment of the United States Constitution. The United States Supreme Court “has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978). See also *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 181-82 (3rd Cir. 1991); *Martin v. United States Environmental Protection Agency*, 271 F.Supp.2d 38, 48 (D. D. C. 2002).

Accordingly, the General Assembly may make confidential and never subject to production all records and information related to handgun carry permits.² Such a decision would survive a rational basis challenge under the equal protection clause, as the State would assert that it has an interest in protecting the privacy of permit holders. SB76 and SB76 Amendment would make confidential only those handgun carry permits records related to permits that have not been renewed. See SB76, Section 1, (o)(2)(B); SB76 Amendment, Section 1, (o)(2)(B). This more narrow class of confidential documents would also likely survive a rational basis challenge.

Other than records related to handgun carry permits that have not been renewed, SB76 and SB76 Amendment do not appear to remove any other governmental records from the scope of the Public Records Act. Accordingly, all other state records related to handgun carry permits would remain open for personal inspection under Tenn. Code Ann. § 10-7-503(a)(2)(A). Both bills, however, place limits on the availability and use of certain permit records that remain open to the public.

SB76 provides that only fifteen records (defined to be the complete file maintained by the state relative to a handgun permit for one person) can be copied or reproduced by one person in one day. Section 1, (o)(3). SB76 further provides that a compilation of information or other records, including names and addresses of permit holders, may be provided only if the recipient

² House Bill 9/Senate Bill 108 of the 108th Tennessee General Assembly as originally filed would make all information contained in or related to a handgun carry permit application or renewal application confidential and not subject to public inspection. The only exception is that such records may be released to law enforcement or a child enforcement agency for specified official purposes. See House Bill 9/Senate Bill 108, 108th Tenn. Gen. Assembly, 1st Sess. (2013).

signs a written statement that the recipient will not publish the information or allow others to do so, a violation of which is a Class C misdemeanor. Section 1, (o)(4).

SB76 Amendment prohibits a person who obtains permit records or information, including the entire database of handgun permit holders, from reproducing or publishing any of the information unless the records and information indicate that permit holder has been charged with a felony or has engaged in conduct which prohibits such person from being eligible to have a permit; in those limited cases, the person obtaining the information may republish up to fifteen names a day. Section 1, (o)(3). SB76 Amendment requires that any person seeking permit information must sign a statement that the recipient will not reproduce, publish or provide to others for those purposes any of the information. Section 1, (o)(4). SB76 Amendment also creates a cause of action for invasion of privacy against the requester and publisher of permit information. Section 1, (o)(7).

Courts have recognized that a legislature can place certain restrictions on access to governmental records. The United States Supreme Court rejected a constitutional challenge to access restrictions in the case of *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). In that case a publishing company challenged a California public records law that required a person requesting the names and addresses of recently arrested individuals from state and local law enforcement agencies to declare under penalty for perjury that the request was being made for one of five statutorily prescribed purposes (scholarly, journalistic, political, governmental, or investigatory) and to not use the address directly or indirectly to sell a product or service. *United Reporting Publishing Corp.*, 528 U.S. at 34-35, 37-41. The publishing company provided arrest records to customers including attorneys, insurance companies, drug and alcohol counselors, and driving schools. The Court rejected the argument that the public records law facially violated the company's First Amendment rights, stating:

[The government] contends that the section in question is not an abridgment of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department.

We believe that, at least for purposes of facial invalidation, [the government's] view is correct. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). The [state] statute in question merely requires that if [a person] wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. [The government] could decide not to give out arrestee information at all without violating the First Amendment. *Cf. Houchins v. KQED, Inc.*, 438 U.S. [at 14].

United Reporting Publishing Corp., 528 U.S. at 40 (footnote omitted). *See also id.* at 43 (Ginsburg, J., concurring) (noting that a state may "constitutionally decide not to give out

arrestee address information at all” and that “[i]t does not appear that the selective disclosure . . . that [a state] has chosen instead impermissibly burdens speech.”); *Amelkin v. McClure*, 330 F.3d 822, 829 (6th Cir. 2003) (upholding a Kentucky public records restriction on the release of accident victim information except to certain types of parties who would not use the information for commercial purposes in part due to the legitimate state interest in protecting the privacy of the accident victims). *But see Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994) (“A first amendment challenge is appropriate where a state prohibits the use of public records by one who wishes to engage in non-misleading, truthful commercial speech.”)

As to restrictions on the use of government records, the Supreme Court upheld the ability of the federal government to enforce a contract requiring a former CIA agent to submit all writings about the Agency for prepublication review, even when the writings did not disclose classified information. *See Snepp v. United States*, 444 U.S. 507, 511 (1980).

The restrictions on access and publication contained in SB76 and SB76 Amendment are much broader, however, than more narrowly tailored access and use restrictions that focus on preventing commercial use of government records or preserving the trust relationship between the CIA and its agents. *Cf. United Reporting Publishing Corp.*, 528 U.S. at 40 (“This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.”); *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2666 (2011) (invalidating a state law restriction of the sale, disclosure, and use of pharmacy information that the speaker already possessed and distinguishing *United Reporting Publishing Corp.*, noting that “restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment.”) Rather, SB76 and SB76 Amendment leave almost all handgun permit records open for public inspection but prohibit most or all reproduction or publication for any purpose of those same records. Governmental attempts to limit the ability of citizens to publish or disseminate public information for any purpose raise significant First Amendment concerns. *See United States v. Playboy Entertainment Group, Inc.* 529 U.S. 803, 812 (2000) (“Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”). The scope of this legislative ban on speech related to public records is so broad that the legislation could be characterized as a prior restraint, which would be prohibited by the First Amendment absent the government’s ability to sustain the “heavy burden of showing justification for the imposition of such a restraint.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). *See also Amelkin*, 330 F.3d at 827 (upholding the Kentucky restrictions on who may access accident information by finding that the law restricts access but not expression).

A restriction on publication of the breadth found in SB76 and SB76 Amendment would likely be subject to strict scrutiny as an infringement on First Amendment protections on speech. Under strict scrutiny, the State would have to show that the legislation advances a compelling state interest and is narrowly tailored to achieve that interest. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 506 U.S. 377, 382 (1992). The State interest underlying the proposed legislation is to protect the privacy of persons who have been issued handgun carry permits. Even assuming, however, that this interest would be deemed compelling, a court would likely conclude that it is not narrowly tailored to achieve that interest. Because the permit holder’s privacy interest has already been compromised by the State’s decision to maintain the permit information as a public

record, a court would likely find that the privacy protection achieved by a broad ban on publication would not outweigh the ban's significant burden on First Amendment rights.

Accordingly, the proposed restrictions in SB76, Section 1, (o)(4), which makes publication of any compilation of handgun permit information a criminal offense, and in SB76 Amendment, Section 1, (o)(3), which allows publication only of handgun permit records related to permit holders charged with a felony or who have engaged in conduct which prohibits persons from eligibility to hold a permit and allows only fifteen such records to be published each day, are of suspect constitutionality.

SB76, Section 1, (o)(4) is constitutionally suspect on two further grounds. First, this subsection would only apply the restrictions on dissemination of handgun permit information to persons obtaining a compilation of such information – it does not apply to requestors who seek and receive handgun carry permit information for individual permit holders. *See* SB76, Section 1, (o)(2) & (3). If the individual handgun carry permit holder information may be received by someone who does not have to state that the information will not be reproduced or published, then a substantial and legitimate state interest in protecting privacy does not seem to be advanced by placing this requirement only on someone who receives the information in compilation form. *See, e.g., Amelkin*, 330 F.3d at 828 (quoting *Romer v. Evans*, 517 U.S. at 631). *See also United Reporting Publishing Corp.*, 528 U.S. at 38 (statutes that impose criminal sanctions on speech are particularly susceptible to facial challenge for overbreadth).

SB76, Section 1, (o)(4) is also constitutionally suspect under federal due process standards as being “void for vagueness” since this provision fails to adequately define its prohibitions (such as what comprises a “compilation”) and what constitutes a violation. As the United States Supreme Court observed:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108-10 (1972). *See also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

The civil cause of action created by SB76 Amendment is of suspect constitutionality for similar reasons. *See* SB76 Amendment, Section 1, (o)(7). This remedy creates a civil cause of action “for invasion of privacy” against any person who obtains or disseminates handgun carry permit information in violation of the provisions of SB76 Amendment. However, as the State has designated as public the information that is the subject of the civil cause of action, it is difficult to assert that the State has a legitimate, much less compelling, interest in protecting privacy that would justify the chilling effect on speech created by this cause of action. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 533 (1975) (holding that a newspaper that “lawfully obtains truthful information about a matter of public significance” cannot be held

liable for invasion of privacy “absent a need to further a state interest of the highest order”). *See also Bartnicki v. Vopper*, 532 U.S. 514, 526-29 (2001) (holding that, in the context of speech concerning a matter of public concern, a radio station could not be subjected to penalties under the laws prohibiting wiretapping for publicly publishing illegally intercepted private cell phone information, which the radio station had lawfully received from a stranger); *Snyder v. Phelps*, 131 S.Ct. 1207, 1215-20 (2011) (holding that, in light of its content, form, and context, the speech of church members who picketed near the funeral of a military service member was of public concern and entitled to protection under the First Amendment such that the speech at issue could not serve as a basis for a judgment for state law tort claims for intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion).

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Requested by:

Honorable Brian Kelsey
State Senator
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SENATE BILL 76

By Campfield

AN ACT to amend Tennessee Code Annotated, Title 10, Chapter 7, Part 5 and Title 39, Chapter 17, Part 13, relative to certain records pertaining to handgun carry permits.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 10-7-504, is amended by adding the following new subsection:

(o)

(1) Except as provided in subdivision (o)(2), the following documents, and the information contained in such documents, shall be available for copying and distribution pursuant to subdivision (o)(3):

(A) The application or permit renewal application for a handgun carry permit issued pursuant to § 39-17-1351, and the information contained therein;

(B) Other materials submitted to the department to obtain a handgun carry permit and the information contained in such materials;

(C) Materials provided to a governmental agency, or employee thereof, for the purpose of the agency conducting an investigation into an applicant for a handgun carry permit and the information contained in such materials; and

(D) Whether a person has or has not been issued a handgun carry permit.

(2)

(A) All documents, and the information contained in such documents, unless otherwise protected by state or federal law, pertaining to a handgun carry permit which has been revoked pursuant to § 39-17-1352, shall be open records and, upon written request to the department of safety and homeland security, shall be made available for public inspection as provided in this part.

(B) If a permit has not been renewed pursuant to § 39-17-1351, the department of safety and homeland security shall not provide any information in response to a request for information pursuant to this subsection (o).

(3) Any information or other records in subdivision (o)(1) may be copied or reproduced, provided that not more than fifteen (15) records may be copied or reproduced by one (1) person in one (1) day. For the purposes of this subsection (o), one (1) record shall be the complete file maintained by the department of safety and homeland security relative to a handgun permit for one (1) person.

(4) A compilation of information or other records, including names and addresses of permit holders, may be provided if the recipient of such information or records signs a statement that such recipient will not publish such information or records nor will such recipient allow others to publish such information or records. A violation of this subdivision (4) is a Class C misdemeanor. Each publication event of such compilation of information or other records in violation of this subdivision is a separate offense.

(5) Any information or other records regarding an applicant or permit holder may be released to a law enforcement agency for the purpose of conducting an investigation or prosecution, or for determining the validity of a handgun carry permit, or to a child support enforcement agency for purposes of

child support enforcement, but shall not be publicly disclosed except as evidence in a criminal or child support enforcement proceeding.

(6) Nothing in this subsection (o) shall prohibit the release of handgun carry permit statistical reports authorized by § 39-17-1351(s).

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it, and shall apply to all Tennessee handgun carry permits.

Amendment No. _____

[Handwritten Signature]

Signature of Sponsor

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____

AMEND Senate Bill No. 76*

House Bill No. 388

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 10-7-504, is amended by adding the following new subsection:

(o)

(1) Subject to the limitations set out in this subsection, the following documents, and the information contained in such documents, shall be available for inspection and copying:

(A) The application or permit renewal application for a handgun carry permit issued pursuant to § 39-17-1351, and the information contained therein;

(B) Other materials submitted to the department to obtain a handgun carry permit and the information contained in such materials;

(C) Materials provided to a governmental agency, or employee thereof, for the purpose of the agency conducting an investigation into an applicant for a handgun carry permit and the information contained in such materials; and

(D) Whether a person has or has not been issued a handgun carry permit.

(2)

(A) All documents, and the information contained in such documents, unless otherwise protected by state or federal law, pertaining to a handgun carry permit which has been revoked



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pursuant to § 39-17-1352, shall be public records and, upon written request to the department of safety, shall be made available for public inspection as provided in this part.

(B) If a permit has not been renewed pursuant to § 39-17-1351, the department of safety shall not provide any information in response to a request for information pursuant to this subsection

(o).

(3)

(A) No person obtaining information or other records pursuant to this subsection, including the entire database of handgun permit holders, shall reproduce, publish, make available to another for the purpose of reproducing or publishing, or permit another to reproduce or publish any information obtained pursuant to this subsection unless the records and information obtained indicate that:

(i) A person who has formally been charged with a felony has a handgun carry permit;

(ii) A person who has been issued a handgun carry permit has engaged in conduct which prohibits such person from being eligible to have a permit;

(B) If subdivisions (3)(A)(i) and (3)(A)(ii) apply to a persons or persons in the handgun carry permit database, the person obtaining such information may republish, make available to another to republish or allow another to republish up to fifteen (15) such names per day.

(4) Any person seeking information concerning handgun carry permit holders pursuant to this subsection shall be, prior to release of the information, required to sign a statement that the

recipient will not reproduce, publish, make available to another for the purpose of reproducing or publishing, or permit another to reproduce or publish any information obtained pursuant to this subsection.

(5) If information described in this subsection is requested by a law enforcement agency for the purpose of conducting an investigation or prosecution, for determining the validity of a handgun carry permit, or by a child support enforcement agency for purposes of child support enforcement such information shall not be publicly disclosed except as evidence in a criminal or child support enforcement proceeding.

(6) This subsection shall not be construed to prohibit the publication of information for handgun carry permit statistical reports authorized by § 39-17-1351(s).

(7) Each handgun carry permit holder whose name or identifying information is released in violation of this subsection shall have a cause of action for invasion of privacy against the person who requested the information and signed the statement pursuant to subdivision (4) and the person who actually publishes the information.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it, and shall apply to all Tennessee handgun carry permits.