

LEGISLATIVE COUNCIL

MEMO

September 26, 2008

TO: Liz Hill
Assistant Ombudsman—Public Access

FROM: Kenneth C. Behringer
General Counsel

RE: Effect of Identity Theft Legislation (R-48-43)

BACKGROUND

In 2006, the legislature enacted the government identification procedures contained in Arizona Revised Statutes (A.R.S.) title 41, chapter 39, article 2. The article requires governmental agencies to develop:

[C]ommercially reasonable procedures to ensure that entity identifying information or personal identifying information that is collected or obtained by the governmental agency is secure and cannot be accessed, viewed or acquired unless authorized by law.

A.R.S. section 41-4172.

QUESTION

Did this legislation modify what is considered a public record in regard to personal identifying information?

ANSWER

No, the legislation did not modify what is considered a public record.

DISCUSSION

A.R.S. title 42, chapter 39, article 2 requires government agencies to develop procedures to ensure that identifying information cannot be accessed unless authorized by law. The sponsor of the legislation noted that while some government agencies were addressing identity theft, not all were. The purpose of the bill was to ensure that identity theft was addressed by all agencies uniformly. (Testimony of Representative Bob Robson, House Committee on Government Reform and Government Finance Accountability (GRGFA), January 11, 2006.)

Although the original bill allowed access to identifying information as provided by law, the GRGFA committee addressed the effect of the legislation on access to public records by adding language to provide:

Nothing in this article shall be construed to restrict, diminish or otherwise affect the provisions of title 39.

A.R.S. section 41-4172.

As enacted, the legislation directs government entities to develop procedures for the protection of identifying information consistent with law. However, these procedures cannot restrict or diminish the public's access to public records as prescribed in A.R.S. title 39.

It has been suggested that by defining personal identifying information to include some information that has been considered public, such as names, that the legislature intended to modify what is considered to be public information. This interpretation focuses on the definition without considering all the language of the article.

Under the statute, government agencies must develop procedures to protect the identifying information that it receives and stores, including names. But the statute does not mandate that the agencies withhold this information, if its release is allowed by law. More particularly, if a city or town develops procedures that prevent public access to public records, including identifying information that is currently considered public, the procedures are contrary to statute.

Nothing in the legislative history suggests that the legislature intended to change what is considered to be a public record. The testimony of Representative Robson and the addition of the public record language indicate that the legislation was meant to combat identity theft within the framework of the current public records law. This conclusion is supported by the Senate fact sheet for the legislation, which summarized the bill as follows:

Requires government agencies to establish procedures ensuring that collected entity identifying information and personal identifying information, except public records, cannot be accessed by unauthorized persons.

Arizona State Senate, Fact Sheet for H.B. 2024 (2/13/06) (emphasis added).

Because I believe the language of the statute is clear that it does not affect what is considered a public record, it is difficult to identify clarifying language. However, if you wanted to emphasize this point further, the last sentence in A.R.S. section 41-4172 could be amended to read as follows:

Nothing in this article shall be construed to restrict, diminish or otherwise affect the provisions of title 39 OR CHANGE WHAT IS CONSIDERED TO BE A PUBLIC RECORD.

CONCLUSIONS

The enactment of A.R.S. title 41, chapter 39, article 2 did not modify what is considered to be a public record. The procedures adopted by agencies pursuant to this article cannot diminish access to public documents as provided by the public records law.