

2009 Guide to Investigative Services

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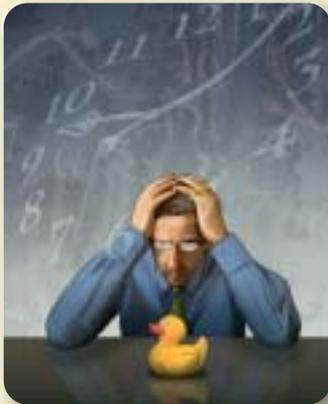
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Making Private Investigators Do More with Less

IF SOME POLITICIANS AND PRIVACY ADVOCATES have their way, private investigators and the attorneys who hire them may soon face a severe professional challenge. Legislation before the U.S. House and Senate aims to restrict access to consumer information. If it passes, civil plaintiff and criminal defense attorneys can look forward to dramatic increases in the cost of locating witnesses. Insurance companies and prosecutors, who may be exempt from the proposed restrictions, will enjoy a new advantage. Attorneys who hire investigators can also expect less likelihood of recovering funds in child support matters and greater dependence upon the diminishing resources of law enforcement to investigate claims of theft, burglary, fire, and embezzlement.

Recent concerns over so-called data breaches of consumer information have placed scrutiny and pressure upon data brokers to stop selling aggregated information to private investigators. Most of this aggregated data is tied to Social Security numbers. The SSN has become a unique personal identifier linked to property, residence histories, and public transactions. As such, the SSN has become a critical tool for private investigators.

Three recent bills have sought to limit access to SSN information. H.R. 3046, sponsored by former representative Michael McNulty, sought to prohibit the sale of SSNs to the public but allow access to law enforcement and taxing authorities. The Social Security Number Protection Act of 2007 (H.R. 948), sponsored by Representative Edward Markey, sought to outlaw the display of an individual's SSN on a Web site and ban the sale of SSN information without the written permission of the number's holder. Finally, S.B. 2915, introduced by Senator Charles Schumer, calls for the Commissioner of Social Security to issue uniform standards for the truncation of SSNs in an effort to reduce fraud and identity theft.

The theft of consumer information has become epidemic. The statistics are staggering. According to the Federal Trade Commission, in 2006 the total cost to victims of identity theft was \$15.6 billion. Measures must be taken to combat the problem, but keeping SSNs from private investigators is not likely to help. While many may assume that identity theft is largely the result of relatively solitary criminal acts involving, for example, dumpster diving, in fact massive numbers of consumer records have been hijacked through large-scale data breaches. Victims of data-breach theft include the U.S. Veteran's Administration, Ohio State University, FEMA, the Royal Bank of Scotland, Pulte Homes, and the Pentagon. Class action lawsuits have already been filed against TJX, Lending Tree Mortgage, and Certegy. In early 2008, ChoicePoint settled a class action (in connection with the 2004 theft of over 163,000 personal information records) for \$10 million.

Privacy activists argue that private investigators have been directly involved in the theft of information, citing the recent Hewlett-Packard case and the conviction of Anthony Pellicano. They cite those cases as reason enough to bar investigators from access to consumer infor-

mation. In fact, private investigators have been involved in very few data breaches, and many large organizations have improperly guarded data. Furthermore, taking away access to SSNs will cripple investigative efforts in a number of ways. For example, in cases involving fraud prevention, the recovery of stolen goods, gray market activity, theft of intellectual property, casualty claims, missing persons, and locating witnesses, the identifying information provided by data brokers can be critical.

Privacy advocates, for all their passion for individual rights, ought to think carefully about some of the unintended consequences that

The proposed bills contain exemptions for law enforcement and, in some instances, insurance companies.

could be unleashed if some of these restrictive bills are passed. Investigative expenses will become much higher if the door to certain consumer data is barred. For example, confirming identities and finding witnesses with common surnames will likely have to begin without the residential starting points that data with SSNs typically provides. As a result, investigators may return to the days of wearing out shoes and knocking on doors. Such labor-intensive work would probably be a prohibitive expense for all but the wealthiest clients.

Another consideration is that the proposed bills contain exemptions for law enforcement and, in some instances, insurance companies. When criminal defense attorneys and their investigators have no access to information that a prosecutor can obtain with one call, what are the implications for due process? Do we want government to enjoy sole access to information that might exonerate innocent defendants?

Nor will civil attorneys escape consequences. If insurance companies maintain access to proprietary databases from which private investigators are barred, how will plaintiffs be operating on a level playing field? These questions must be addressed before passage of one of these bills creates unanticipated consequences.

In the Old Testament Book of Exodus, Moses, speaking for the children of Israel, asks Pharaoh for time off to worship. Pharaoh responds by dismissing the request and adding to the children of Israel's burdens while scaling back their resources. "You shall no more give the people straw to make brick," says Pharaoh. "Go therefore now, and work; for there shall no straw be given you, yet shall you deliver the tale of bricks." Those of us who work in the justice system ought to be gravely concerned over what unintended consequences may result from asking investigators to make their bricks with no straw. ■

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