

Privacy and Public Records

John Rothermel
Senior Vice President, Texas Agency Services
Manager and Texas Senior Underwriter
Stewart Title Guaranty Company San Antonio Texas

Privacy and the Constitution

- A specific "right of privacy" guarantee is not found in the actual language of the United States Constitution, although the Supreme Court has held that "zones of privacy" may be created by other more specific constitutional guarantees. [Paul v. Davis, 424 U.S. 693, 712-713, 96 S. Ct. 1155, 47 L. Ed. 2d 405 \(1976\)](#). The Supreme Court has held: Personal rights found in this guarantee of personal privacy must be limited to those which are fundamental or implicit in the concept of ordered liberty... The activities detailed as being within this definition were... matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

Forsberg v. Housing Authority of Miami Beach, 455 So. 2d 373

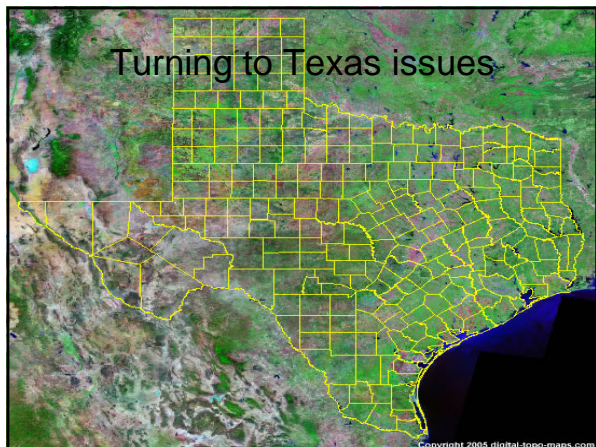
- The United States Supreme Court, in finding that a right of privacy exists under various provisions of the United States Constitution, has, to a limited extent, addressed the right of disclosural privacy. On a case-by-case basis, the Court has balanced the personal right of privacy against the need for governmental intrusion. In applying this balancing test, it recognized a right to disclosural [**13] privacy, but found the protested governmental intrusions to be reasonable. See [Nixon v. Administrator of General Services, 433 U.S. 425, 53 L. Ed. 2d 867, 97 S. Ct. 2777 \(1977\)](#) (limited and controlled disclosure of former President Nixon's presidential papers and tape recordings not violative of right to privacy); [Whalen v. Roe, 429 U.S. 589, 51 L. Ed. 2d 64, 97 S. Ct. 869 \(1977\)](#) (upheld a New York statute which compelled disclosure to government of names of persons receiving certain prescription drugs upon finding that statutory safeguards against public disclosure were sufficient to protect individual privacy interests); [Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 \(1976\)](#) (constitutional right of privacy extended only to matters of intimate or family nature and did not prohibit governmental disclosure of petitioner's arrest record). [Accord, Plante v. Gonzalez, 575 F.2d 1119, 1136 \(5th Cir. 1978\), cert. denied, 439 U.S. 1129, 59 L. Ed. 2d 90, 99 S. Ct. 1047 \(1979\)](#) (although public official financial privacy was matter of serious concern and deserving of strong protection, the "public interests supporting public disclosure for these elected officials [**14] [were] even stronger")

Forsberg v. Housing Authority of Miami Beach, 455 So. 2d 373

- It must be recognized that the question presented by the complaint in this case does not concern records in which there is traditionally no expectation of privacy, e.g., court files and public documents such as deeds, judgments, and marriage records.

[Katz, 389 U.S. at 350-51 88 S. Ct. at 510-11](#)

- Although the United States Supreme Court has recognized a fundamental constitutional right of privacy which applies in certain limited circumstances, that Court has refused to establish a general right of privacy under the federal constitution: "But the protection of a person's *general* right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual States."



Opinion No. GA-05 19
Re : Release and redaction of social security numbers under the Public Information Act, section 552.147 of the Government Code (RQ-0418-GA)

- As early as 1974 with the enactment of the Privacy Act, Congress acknowledged a privacy right in SSNs and sought to “curtail the expanding use of [SSNs] by federal and local agencies” and, consequently, “eliminate the threat to individual privacy and confidentiality of information posed by [the use of SSNs as] common numerical identifiers.” *Doyle v. Wilson*, 529 F. Supp. 1343,1348 (D.C. Del. 1982); see 5 U.S.C.A. 5 552a (West 1996 & Supp. 2006). The Senate Report on the

Opinion No. GA-05 19

Adoption of the Privacy Act described the universal use of SSNs as identifiers as “one of the most serious manifestations of privacy concerns.” *Greidinger v. Davis*, 988 F. 2d 1344, 1353 (4th Cir. 1993) (citing Elizabeth Neuffer, *Victims Urge Crackdown on Identity Theft*, **BOSTON GLOBE**, July 9, 199 1, at 13,20). Indeed, it is universally agreed that SSNs are at the heart of identity theft and fraud, and in today’s Internet world where information-including public government information-can be instantly and anonymously obtained by anyone with access to the worldwide web, the danger is even greater identity theft, without question, is becoming one of the fastest growing criminal offenses in the twenty-first century. The Federal Trade Commission estimates that in a five-year period prior to early 2003 in the United States alone, there were 27.3 million reported cases of identity theft. (Thomas Fedorek, *Computers + Connectivity = New Opportunities for Criminals and Dilemmas for Investigators*, 76-Feb. N.Y. St. B.J. 10, 15 [February, 2004]).

Aside: Does anyone else find it amazing that a legal opinion issued by the Texas Attorney General would quote the Boston Globe?

Opinion No. GA-05 19

- The general statutory rule for county clerk records is that “[a] records belonging to the office of the county clerk to which access is not otherwise restricted by law or by court order shall be open to the public at all reasonable times.” TEX. Lot. GOV’T CODE ANN. § 191.006 (Vernon 1999) (emphasis added). Section 552.147 restricts access to the SSNs in the clerk’s records that are subject to the PIA. See TEX. GOV’T CODE ANN. § 552.147(a) (Vernon Supp. 2006). Thus, as a general rule, SSNs of living persons in all county clerk records are confidential.

Opinion No. GA-05 19

- AG's staff could have been correct on the law, but they had no clue as to the way the world actually works. It is reported that one of the authors of the opinion expressed shock over the outcry and said something to the effect that "All we are saying is that before the clerk hands over a copy to a person at the counter that they mark out the SSN".

Opinion No. GA-05 19

- An unofficial study has indicated that about 80-85% of all documents filed with the typical county clerk office are filed by title companies.
- The young assistant AGs also had no concept that most of the purchases of county records are done in bulk and primarily by title companies and credit reporting agencies.

Opinion No. GA-05 19

- Without expensive and sophisticated software to automatically redact such information, the Opinion would have slowed the availability of public records to a crawl. Each document would have to be individually reviewed by hand and indeed a black marker would need to be applied to the SSN if any.
- It would undoubtedly have taken much time and effort to do this job so that the currency of the public records would have been week or months instead of the current few days in most counties.

Results of the AG opinion

- Confusion at best



Results of the AG opinion

- Courthouses all over Texas shut down, many with crime scene tape
- Records not available to the public or title companies.
 - In some cases, like El Paso, for weeks.
 - Clerks choosing whether to violate on law (no SSN) or another (can't shut down public records) for the same penalty!
- Commerce came perilously close to shutting down in Texas. Where would that have led?
- You don't have to allow your SSN and DLN to be on recorded documents anyway.
- Most documents don't contain that personal information anyway.



You don't have to allow your SSN and DLN to be on recorded documents, anyway

- **Confidentiality Notice - SB 461** (effective 5/13/05): This bill amends §11.008, Property Code. Amended §11.008, Property Code, and 191.007, Local Government Code, recognize that if a notice is placed on the deed or deed of trust pursuant to §11.008, then the notice is placed above the heading of the instrument, which otherwise appears at the top of the instrument. Amended §11.008(b), Property Code, provides that an instrument disclosing an individual's social security number or driver's license number must include substantially the following (modified) notice in 12-point boldfaced type or 12-point uppercase letters:
 - NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.
- **The notice is not required on a deed or deed of trust that contains neither the social security number nor driver's license number.**
- **The county clerk may not reject an instrument that fails to contain this required notice.**

You don't have to allow your SSN and DLN to be on recorded documents, anyway

- This section of the law gives a person the opportunity to "opt out" if for some reason the drafter of a document put the SSN or DLN into the document. If the person doesn't want that information public, then he can simply mark it out.
- The law also provides support for the clerks by not making the clerks the "warning police" and allowing documents without the warning and containing SSN and DL to be recorded.

Public Records Are Key to the Economy and Our Way of Life

- "Public record keepers administer files that contain all of the economically useful descriptions of assets, whether land, buildings chattels, ships, industries, mines or airplanes. These files will alert anyone eager to use such an asset about things that may restrict or enhance its realization, such as encumbrances, easements, leases, arrears, bankruptcies, and mortgages." Hernando DeSoto (Mystery of Capital, Basic Books, 2000 p.59).
- "Today, to a great extent, the difference between advanced nations and the rest of the world is that between countries where formal property is widespread and countries where classes are divided into those who can fix property rights and those who cannot." (DeSoto op cit p.215).

Public Records Are Key to the Economy and Our Way of Life

- "In the West, the law is less concerned with representing the physical reality of buildings or real estate than with providing a process or rules that will allow society to extract potential surplus value from those assets. Property is not the assets themselves but a consensus between people as to how those should be held, used and exchanged (DeSoto op cit. p157).
- If enough people are allowed to opt out of the system, the entire concept of public records and the economic system that is based on public records could be jeopardized.

It is a balancing act!

- The need for individual privacy (and protection from identity theft) is clearly important both the person and to society. However, the need for public records relative to property is essential for the Texas and US economies.

Balancing Act

- Picture a world where a police officer can opt out of having his ownership of a home in the public records.
 - What does this accomplish?
 - His property and perhaps his family have some protection from liens or worse done by perpetrators for revenge or harassment.
 - He cannot obtain an improvement loan, a home equity loan or sell the home and buy another because he has no simple way of proving his ownership.

It is a balancing act!

- Folks will always say that there are ways to work around this issue. And of course they are correct. However, the process has been slowed way down and the integrity of the public records has been compromised.
- If enough people were accorded the right to opt out of the system, it could have devastating effects of the economy.

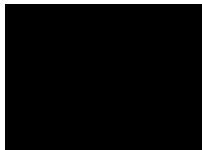
It's A Balancing Act

- There are approximately 5324 police department personnel in the Houston, 2977 in Dallas, 2200 in Austin and 2085 in San Antonio along with approximately an additional 25% of the total in civilian police department jobs. The approximate total for the 4 largest Texas Cities is 12,586 plus 3147 civilians. (The New York Police Department has about 37,000 officers) [source: their respective websites]
- While taking just their documents out of the public records may not jeopardize the integrity of the system, these numbers do not include all of the other public officials who might like to opt out of the system if such an option were available.
 - Should the 7 members of the Windcrest Planning and Zoning Commission be allowed to opt out? What about the parks board in your city? Where would it end?

Balancing Act

- The smooth transfer of title to real property requires that buyers (and title companies) know whether or not the seller owns the property and has the right to sell it without liens following the title.
- Because courts haven't enforced the law (Chapter 30, Civil Practice and Remedies Code) requiring SSNs or DLs on abstracts of judgment, a vast majority of AJs are filed without such information. County Clerks simply don't have access to the information in the cases where they produce the Abstract of the Judgment.

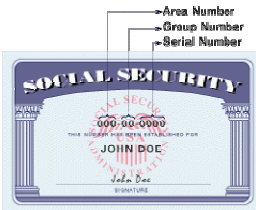
Some people are well-meaning but not very informed



SB 699 2007 session

- **SB 699 addresses the need for title companies to have sufficient information in abstracts of judgment to determine if a party to the transaction is the same party against whom the abstract was filed.** A large percentage of AJs do not contain any identifying information. This bill requires that all AJs have the last 3 numbers of the judgment debtor's social security number and last 3 numbers of the driver's license number. Partial numbers provide a significant measure of certainty when reviewing AJs while still providing arithmetic certainty against disclosing the full social security and driver's license numbers. Obtaining the numbers from defendants will be done by contempt orders brought by the other party or by the court. See Chapter 30, Civil Practice and Remedies Code Section 30.014
- Effective September 1, 2007.

3 numbers aren't a SSN



- SB699 is a case of balance
 - SSN consist of 9 numbers in the following sequence: xxx-xx-xxxx.
 - The first 3 numbers represent the zip code where the applicant lived at the time of the application (with different groups of numbers assigned to states)
 - The 2nd series of number is a computer generated control number
 - The final 4 numbers are computer generated in the order the application is processed.

3 numbers aren't a SSN

- The laws of probability state that the number of available combinations of numbers in a series of numbers (N) is computed as 10^N . So there are 10^1 or 10 possibilities of single digit numbers 0-9.
- If you have 3 numbers, the available combination of numbers is 1000.
 - (10^3 or $10 \times 10 \times 10$)

3 numbers aren't a SSN

- SB 699's math re: SSN
- $xxx-xx-xxxx = 10^9$ or
- $10 \times 10 \times 10 \times 10 \times 10 \times 10 \times 10 \times 10 \times 10 = 1,000,000,000$
 - That's right 1 billion. There are 1 billion combinations of numbers to guess at a complete SSN.
 - With the last 3 numbers, you have a 1:1000 chance of the person whose last 3 SSNs in an AJ having the same last 3 numbers as your person.
 - You would also have to guess an additional 1 million combinations of numbers to get back to the complete SSN.

Is it that hard to understand?



3 numbers aren't a TX DLN either

- SB 699's math re: DLNs
- There are 8 digits to the Texas Drivers License. That means that there are 10^8 or 100 million combinations of numbers. Using the last 3 numbers, you again have a 1:1000 chance that the person claiming an AJ isn't against him will have the same last 3 numbers.

Combining the probabilities

- With a 1:1000 chance of the SSN and a 1:1000 chance of the TXDL being the same as the person in question, the combination produces 1000x1000 or a 1:1,000,000 chance that a person will have exactly the same last 3 numbers in both the SSN and the TXDL.

Common Names

- The most common last name in the US is Smith and one of the most common first names is James. Together James Smith makes up 3% of the US population.
- If you have a James Smith who claims that an AJ isn't against him and his last 3 SSNs and last 3 TDLNs are the same as set out on the AJ, you have a 1:3 million chance that it isn't him!. 1 million x 3%= 3 million.
- Obviously the odds can be affected by communities with many people with the same last name. In such cases your odds may fall back to the 1: 1 million range.

Balance

- Now we have balance.
- It is virtually impossible to guess at either a person's SSN or TXDLN.
- So having the last 3 numbers means that the best odds you have that the person in front of you disputing the AJ is 1 in a million and with an uncommon last name, the odds are much greater that it really is him.
- And yet, we have identified the judgment debtor without any information being of record that will allow an identity thief or terrorist to steal his identity.

Other documents with full SSNs...

Child support liens

- 42 USCS § 666 requires notice of the non-custodial parent's social security account number (or numbers, if he has more than one such number) and home address shall be furnished to the State agency requesting the refund offset, and to the State agency enforcing the order.
- 231.302 Family Code allows use of full SSN to collect child support lien.
- Quare: where is the concern with privacy here?

AJs

- Some attorneys who prepare their own Abstracts of Judgment have included full SSNs and TXDLNs. Some pick one or the other. There has been little uniformity other than that few AJs have complied with the law ("not reasonably available" language relied upon).

Homesteads

- **SB 512 relating to the attachment of a judgment lien to homestead property.** This bill amends **Section 52.001, Property Code**, to specify that a judgment lien does not attach and does not constitute a lien against a debtor's exempt real property, such as a homestead residence. This bill also specifies that a judgment lien would only become a lien against the homestead when the property no longer constitutes the debtor's homestead. A judgment debtor may, at any time, file an affidavit in the real property records of the county in which the judgment debtor's homestead is located that substantially complies with Subsection (f). A copy of the affidavit is attached to this bulletin. The AJ lien will not have retroactive effect since the property was homestead and exempt at the time the AJ was recorded. Effective September 1, 2007.
- No full SSN or TxDLN is required in either of the affidavits.

Electronic Recording Authorized

- **SB 335** (effective 9/1/05): This bill adopts the Uniform Real Property Electronic Recording Act (URPERA), Chapter 15, Property Code. Electronic document is defined by §15.001, Property Code, as a document that is received by a county clerk in an electronic form. **The URPERA authorizes the filing of electronically generated documents and scanned (originally paper) documents.** New §15.004(c), Property Code, provides that a requirement of an acknowledgment is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical image of a stamp or seal need not accompany an electronic signature. New §15.005(a), Property Code, provides that a county clerk who implements any of the functions shall act in compliance with the rules adopted by the Texas State Library and Archives Commission under Chapter 195, Local Government Code. **Authorized filers of electronic documents are established by §195.003, Local Government Code, and include certain institutional lenders, governmental agencies, government-sponsored entities, attorneys, title insurance companies, and title insurance agents.** The filing fees for electronic documents may not vary from the costs for paper documents pursuant to §195.006, Local Government Code. **The county clerk may, but is not required to, accept electronic documents or records. §195.002, Local Government Code.** An authorized filer and a participating county clerk must enter an agreement of understanding containing the terms of participation in the county clerk's electronic filing and recording program. Tex. Adm. Code Ch. 13, Section 7.142. The county clerk must confirm or reject the electronic filing no later than the first business day after the date the electronic document or other instrument is filed.

More and more notices

- **HB 1919** (effective 1/1/06): New §5.014, Property Code requires the seller of residential real property located in a public improvement district that consists of not more than one dwelling unit to give the purchaser a written notice substantially as follows:

NOTICE OF OBLIGATION TO PAY PUBLIC IMPROVEMENT DISTRICT ASSESSMENT
TO (municipality or county levying assessment) CONCERNING THE
PROPERTY AT (street address)

As a purchaser of this parcel of real property you are obligated to pay an assessment to a municipality or county for an improvement project undertaken by a public improvement district under Chapter 372, Local Government Code. The assessment may be due annually or in periodic installments. More information concerning the amount of the assessment and the due dates of that assessment may be obtained from the municipality or county levying the assessment.
The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

Date: _____
Signature of Purchaser _____

- The contract may be given separately, as part of the contract, or as part of any other notice. If included in the contract, the title to the notice, reference to the street address and date of notice and purchaser's signature may be omitted.

More and more notices

- **Certificated Service Notice - HB 2876** (effective 9/1/05): Amended §13.257, Water Code, establishes the notice for a certificated water or sewer service area. If a person proposes to sell or convey land in a certificated service area of a utility service provider, the person must provide the purchaser with a written notice. The revised notice must be executed by the seller and must state:

The real property, described below, that you are about to purchase may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the properties in the certificated area. If your property is located in a certificated area there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to your property. You are advised to determine if the property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to your property.

The undersigned purchaser hereby acknowledges receipt of the foregoing notice at or before the execution of a binding contract for the purchase of the real property described in the notice or at closing of purchase of the real property.

Date _____
Signature of Purchaser _____

- The notice must be executed by the seller and purchaser unless the notice is included in or as an addendum to the purchase contract. The utility service provider must record in the real property records a certified copy of the map of the certificate of public convenience and necessity and any amendment as contained in the commission's records, and a boundary description of the service area.

Others getting to Opt out

- **HB 1237 by Farabee - *Relating to the confidentiality of certain information of a person licensed to practice law held by the State Bar of Texas.***
 - Upon written request, licensed attorneys could make confidential their home addresses, phone numbers, email addresses, SSNs and dates of birth. This applies to the State Bar website and other records.
 - Filings with the county or district clerk are exempt.
- **Effective date: Sept. 1, 2007**

I am not an inmate!

- **HB 2566 by Madden - *Relating to a document or instrument filed by an inmate with a court concerning real or personal property.***
 - This bill prohibits a prison inmate or a person filing on behalf of an inmate from recording a real property instrument unless the document reflects the fact that the beneficiary is an inmate. As introduced, the bill would have required every real property instrument recorded to state whether the beneficiary was a prison inmate, but that requirement was changed due to TLTA's lobbying efforts.
- **Effective date: Sept. 1, 2007**



“I am not an inmate!”

- The initial version of this bill would have made every person who is a party to a document swear that they were not an inmate.
- Thanks to objections by TLTA, TAR and County Clerks, this was changed to “I am an inmate.”

What does the future hold?

- If experiences in the past 3 or 4 Legislative Sessions is any indication, we will have more groups seeking to opt out of the public records system that has served us well.
- We may face additional attempts to place the burden of balancing privacy and public records by requiring (but not funding) computer programs to redact personal information.
- Shouldn't we see a movement to not put child support information and visitation schedules into divorce decrees?

What does the future hold?

Those of us involved in the business of real estate will need to be vigilant that the pendulum doesn't swing too far in favor of the zealots on privacy. If we are too protected, we will find that our economic opportunities have been protected away from us. And then the “bad guys” will have won as surely as if they had stolen identities or worse.

What does the future hold?

- “Stability in property rights and consistent enforcement of those rights are important ingredients in a healthy economy. If the structure changes too frequently or capriciously, this reduces our ability to forecast the future and inhibits our willingness to invest because of greater uncertainty about recovering our investment and capturing the benefits of our investment. Because economic growth depends critically on the sustained flow of investment in new capital goods, permanence and stability in the structure of property rights are essential to economic growth and prosperity.”

(John W. Allen: Private Rights to Property, Real Estate Center, Texas A&M University, 1986 p.36)

And SO, Texas' system is working



Thank you!

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