

RECEIVED

NOV 13 2001

OPINION COMMITTEE



COMMITTEE ON HOUSE ADMINISTRATION
P.O. Box 2910 • AUSTIN, TEXAS 78768-2910 • (512) 463-0784

RQ-0464-JC

November 6, 2001

The Honorable John Cornyn
Texas Attorney General
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711

FILE # ML-42286-01
I.D. # 42286

Dear General Cornyn:

Please refer to the attached analysis of Opinion JC-0423 as background for this follow-up Request For Opinion.

My request is for an opinion that addresses the following three questions:

- (1) Is the personal data of Texas residents of legal age that is collected by the Texas Department of Public Safety subject to any protection under the federal Driver's Privacy Protection Act, and if so, what are the restrictions placed on the collection, retention and use of that data?
- (2) Does the State of Texas, by allowing capture and use of the personal data of Texas residents of legal age, by either reading the magnetic stripe on a Texas driver's license or by direct access of a purchased copy of the database of issued licenses from the Department of Public Safety, become liable under Section 2723(b) of the Driver's Privacy Protection Act?
- (3) If an individual or legal entity doing business in the State of Texas uses the magnetic stripe on the Texas driver's license of a person of legal age to capture the driver license number of that person and then uses that number to access the personal data of that person from a purchased copy of the DPS database and then uses that data for the preparation of records required of private clubs operating under a permit issued by the Texas Alcoholic Beverage Commission, is that individual or legal entity in violation of the criminal sanctions of Section 2723(a) of the DPPA and subject to the civil action authorized by Section 2724, even though the TABC has an established rule or practice allowing the retention and use of that personal data?

Thank you for your timely consideration of these questions. Please feel free to contact me if I can be of further assistance to you or your staff.

Sincerely,

Tony Goolsby, Chairman
House Administration

TONY GOOLSBY, CHAIRMAN, VILMA LUNA, VICE-CHAIR
RAY ALLEN, KEVIN BAILEY, WARREN CHISUM, CHARLIE GEREN, HELEN GIDDINGS,
PEGGY HAMRIC, JUDY HAWLEY, DELWIN JONES, GLEN MAXEY

ANALYSIS OF ATTORNEY GENERAL OPINION JC-0423

Opinion Request 0381-JC, was not focused on HB 3016 and was not concerned with the sale of restricted products to underage persons. The request was expressed in three questions:

(1) The first question concerned the possibility of a state penalty for supporting legislation that would enable a club to enroll a person into a club using the DPS database, directly or indirectly. The question presupposes a patron of legal age, as a minor would not be enrolled in the first place.

(2) The second question was concerned with the possibility of civil liability of individuals under the DPPA that might result by reliance on state legislation.

(3) The third question was concerned with the issue of implied consent by a patron that surrenders a personal ID for club enrollment.

Opinion No. JC-0423 relates almost solely to the application of HB 3016 to the activity of carding to prevent underage drinking. Age verification is perhaps an exception permitted under the DPPA, and was not addressed in the request. The request covered other issues of concern with possible improper use of the DPPA protected by individuals data and the permissiveness of state statutes.

Omitting the first point in the Bill Analysis, which is concerned with age verification, the second point concerns application of the bill "to comply with Texas Alcoholic Beverage Commission record keeping rules regarding private club membership". That could have been a point to discuss, at it is probably a misstatement, but it was not a question presented.

Reference Paragraph 2, Page 2: Omitting age verification, the last sentence would be changed to "House Bill 3016 permits the use of magnetic stripe information...to prevent...violations of the Alcoholic Beverage Code", which will not meet any objective analysis. How is the surrender of the personal ID of an adult citizen reasonably necessary to prevent a violation of state law? And what is to be done with the 30% plus of patrons that do not, cannot or will not surrender a Texas ID? Under that definition, those patrons should be denied alcoholic beverage service.

Reference Page 4, second full paragraph: "For the sake of argument", assuming that there was a violation of the federal law, the opinion states that "a case could be made" that such actions (scanning the magnetic stripe and retention of the data for commercial purposes) would fall within at least two exceptions permitted by the DPPA. Two such exceptions in the DPPA are referenced:

(1) In the normal course of business. The illustration refers to "to verify the accuracy of personal information submitted" but fails to state the restrictions as noted in paragraph (B), Page 3 of the opinion: "but only for the purpose(s) of preventing fraud by ... the individual".

This statement is misleading and a harmful error and is cause for retraction of the opinion.

Analysis, Page 1:

Analysis, Page 2:

Carding everyone is not normal. Carding *where there is some doubt* is normal. That is the procedure in open bars in Texas. It is unreasonable to suggest that carding each person is necessary to prevent fraud. If it is reasonable, then it follows that every patron ordering an alcoholic beverage in an open saloon, as opposed to a private club, should also be carded, and not just young adults.

(2) For "any other use specifically authorized by state law...related... to public safety." This exception is not discussed, and was not submitted, but it would be interesting to read an argument that takes the position that every person of legal age in Texas is to be subjected to a privacy invasion to protect some nebulous issue of public safety. Citizens should not have to prove they are not a public safety threat to enjoy a glass of wine with their meal. And what about the 30% or more of the public mention above? Is that group to be denied service because they cannot first prove they are not a threat to public safety? *It cannot be true that, when considering who shall be allowed to enjoy an alcoholic beverage, that a mature patron without a Texas license is not a threat to public safety, but a mature patron with a Texas license is a threat to public safety!*

Obviously, the state should not attempt to create an exception to the DPPA that applies to the use of information taken directly from the driver's license database, or indirectly from the magnetic stripe, when use of that information is to encourage public consumption of alcohol, as opposed to use of the information to prohibit consumption by minors.

This opinion affects hundreds of businesses, thousands of employees and millions of investment dollars. For instance, any restaurant/club could become subject to a class action lawsuit with liquidated damages specified by the act. Contrary to the opinion indication that the DPPA seeks (only) to regulate dissemination by a state DMV, Page 4, the act also seeks to regulate use and misuse of the protected data. Individuals and businesses are subject to both criminal and civil sanctions for violation of the act. Obviously, that statement in the opinion also is incorrect and misleading.

And, incongruously, the opinion states in the same paragraph that it is not the DPS making the information available, it is the licensee that surrendered the license, ignoring the fact that if the DPS did not "otherwise make available" the data there would be no question of a violation.

The Attorney General should issue a second opinion, or revise the present opinion, to address the true issues. Obviously, time is of the essence, as, under the existing opinion, there will be a general (no pun intended) feeling that the industry has carte blanche to use the state database as a readily available business development tool.

Several businesses in Texas provide a membership service to private clubs in Texas. The state approved system of one service company is described below. However, it is the individual club that is directly responsible under the DPPA. *Private clubs look to the service companies to stay within the law and take the position that if a system is approved by the state then the club is protected from any state or federal action and from class action lawsuits.*

Analysis, Page 3:

Example: A service company provides a credit card type terminal/printer unit to the restaurant/club. A patron of obvious legal age orders a glass of wine and is asked to surrender a driver's license for club enrollment. A Texas license is surrendered and the license is swiped through the unit and an application is printed from the encoded data. Only the ID# number is captured by the service company computer. That ID# is used later to access a purchased copy of the state driver's license database by the service company. The personal data obtained from the database is used to prepare membership records for the club as required by state law. The records are open to club personnel, restaurant management and service company employees and is required to be retained on the club premises indefinitely by rule of the TABC. Club members are contacted under TABC rules about annual meetings and other matters, including advertising. There is no oversight of the personal data in the service company computers. The company will prepare labels addressed to each member as a service to any club upon request and has no authority to deny such a request. The club may change service companies and request that its membership roster be forwarded to another company. That company may not be a purchaser of the database and not under contract to the DPS.