

**OP. NO. 03-078**

**MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW.**

**CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.**

**POLICE (STATE): BASIC STATE POLICE COMMUNICATION SYSTEM.**

**Broad powers of Governor, in event of declared emergency, to require state agencies to work together with private sector to protect citizens of Commonwealth. Sharing of information and intelligence collected by Intelligence and Information 'Fusion' Center with public and private entities. Discretionary dissemination of matter that is not law-enforcement sensitive by custodian to necessary parties when no emergency has been declared. Certain law-enforcement data may be disseminated only to criminal justice agencies. Immunity available to participating private entities in event of formally declared emergency. Determination whether sovereign immunity applies to private entities in absence of formally declared emergency depends on capacity in which entities were acting and whether acts are performed under direction and control of Commonwealth, based on nature of, and state's interest in, function to be performed.**

The Honorable John W. Marshall  
Secretary of Public Safety  
December 1, 2003

#### **Issues Presented**

You inquire concerning the provision of certain sensitive information to specific private entities that will participate in the proposed Intelligence and Information "Fusion" Center, a facility funded, owned, and operated by the Commonwealth. Specifically, you inquire whether the Center may provide limited public safety and health-related information to predetermined private entities that may play an active role in ensuring the security of the Commonwealth. You also inquire whether state or sovereign immunity extends to such private entities acting in furtherance of the Center's operations.

#### **Response**

It is my opinion that when an emergency has been declared, the Governor has broad powers to require state agencies to work in cooperation with the private sector to provide for the safety and security of the Commonwealth. Thus, some information and intelligence collected by the Intelligence and Information "Fusion" Center may be shared with the private sector in the event of a formally declared emergency. If an emergency has not been declared by the Governor, most data that is not law-enforcement sensitive may be disseminated, at the discretion of the custodian, to necessary parties. Irrespective of a formal declaration of an

emergency, certain law-enforcement data, including most criminal history data, may be disseminated only to criminal justice agencies.

It is further my opinion that participating private entities have certain immunity from liability in the event of a formally declared emergency in Virginia. If no such emergency exists, private entities may enjoy sovereign immunity in certain circumstances. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of, and the state's interest in, the function to be performed. Since such relationships will vary significantly and will depend on the circumstances of each case, I am unable to opine on this issue as a general matter.

### **Background**

You relate that the Commonwealth, as part of the Secure Virginia Initiative, is moving forward with plans for an Intelligence and Information "Fusion" Center. The Department of State Police and State Department of Emergency Management will operate the Center jointly. The Center will serve as a clearinghouse for information and intelligence gathering and analysis. A broad spectrum of information and intelligence involving public safety and health will be "fused" into a usable format at the Center. This information will be shared with relevant public institutions and certain private entities that play a role in the safety and security of the Commonwealth.

### **Applicable Law and Discussion**

The Commonwealth of Virginia Emergency Services and Disaster Law of 2000, §§ 44-146.13 through 44-146.28:1, enables the Governor and the executive branch of the Commonwealth, in the event of an emergency,<sup>1</sup> to deal with natural or man-made disasters.<sup>2</sup> This statutory framework provides for specific emergency powers to ensure the maximum coordination possible between federal and state authorities and private entities in the event of such disaster.<sup>3</sup> Provided that an emergency exists, the Governor, by and through the executive branch of state government, has broad authority under the Emergency Services and Disaster Law to control and direct the functions of the public and private sectors to protect the citizens of the Commonwealth.

Section 44-146.22(B) limits dissemination to private entities or the public of sensitive information in the custody of government, in the event of a declared emergency. Specifically, § 44-146.22(B) prohibits the disclosure of information submitted by public or nonpublic entities in accordance with § 2.2-3705(A)(57),<sup>4</sup> unless the information is requested (1) for a specific law-enforcement purpose, (2) in compliance with a court order, or (3) with the written consent of the entity voluntarily submitting it. In situations where no emergency has officially been declared, decisions whether to disseminate information, absent specific disclosure authority, often are left to the judgment of the governmental entity involved. Each decision likely would be made on a case-by-case basis, considering such factors as the existence of a specific statutory limitation, the sensitivity of the information, the private sector's right and need to know, and the ramifications on public safety and welfare of such information inadvertently becoming public. An important consideration regarding the dissemination of information is its treatment under The Virginia Freedom of Information Act.<sup>5</sup> While private citizens may be permitted physical access within the Intelligence and

Information "Fusion" Center, access to the information and intelligence collected by the Center is controlled by the same limitations imposed on its dissemination.

Irrespective of the official declaration of an emergency, certain law-enforcement information, including criminal information obtained through the National Crime Information Center, the federal criminal database maintained by the Federal Bureau of Investigation, is restricted.<sup>6</sup> The collection, storage and dissemination of this information and intelligence, which may be accessed through the Virginia Criminal Information Network maintained by the Department of State Police,<sup>7</sup> is limited by federal and state law to entities involved in the administration of criminal justice.<sup>8</sup> Thus, not only would this information be unavailable to the private sector, but also to any public entity that is not a criminal justice agency.<sup>9</sup> Additionally, it is a criminal offense to knowingly use or permit another to use, for any purpose not consistent with state law, information contained within any report or record relating to an ongoing criminal investigation by the State Police given in confidence to any person employed by a governmental agency within the Commonwealth.<sup>10</sup>

Virginia criminal records maintained by the Central Criminal Records Exchange<sup>11</sup> are available to criminal and noncriminal justice agencies, as well as to certain public service companies.<sup>12</sup> Thus, many utility companies and public transportation providers are entitled to limited criminal record information in the Commonwealth.<sup>13</sup> Most information available through the Virginia Criminal Information Network, which includes criminal records from the federal government and other states, as well as various law-enforcement intelligence bulletins posted on the Network, is only available to criminal justice agencies and could not be freely disseminated to certain entities participating in the Intelligence and Information "Fusion" Center.<sup>14</sup>

Whether nongovernmental personnel are entitled to sovereign immunity for acts or omissions in the operation of the Center is impacted by whether the Governor has made a formal declaration of an emergency. Section 44-146.23 provides immunity from liability, except in the case of willful misconduct by certain parties, for public or private entities engaged in emergency service activities initiated pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of and the state's interest in the function to be performed.<sup>15</sup> Since such relationships will vary significantly and are dependent upon the circumstances of each case, I am unable to opine on this issue as a general matter.

### **Conclusion**

Accordingly, it is my opinion that when an emergency has been declared, the Governor has broad powers to require state agencies to work in cooperation with the private sector to provide for the safety and security of the Commonwealth. Thus, some information and intelligence collected by the Intelligence and Information "Fusion" Center may be shared with the private sector in the event of a formally declared emergency. If an emergency has not been declared by the Governor, most data that is not law-enforcement sensitive may be disseminated, at the discretion of the custodian, to necessary parties. Irrespective of a formal declaration of an emergency, certain law-enforcement data, including most criminal history data, may be disseminated only to criminal justice agencies.

It is further my opinion that participating private entities have certain immunity from liability in the event of a formally declared emergency in Virginia. If no such emergency exists, private entities may enjoy sovereign immunity in certain circumstances. In the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of, and the state's interest in, the function to be performed. Since such relationships will vary significantly and will depend on the circumstances of each case, I am unable to opine on this issue as a general matter.

<sup>1</sup>Section 44-146.17(7) empowers the Governor to "declare a state of emergency" whenever he believes "the safety and welfare of the people of the Commonwealth require the exercise of emergency measures due to a threatened or actual disaster." "'Emergency' means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law, because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof[.]" Va. Code Ann. § 44-146.16(2a) (LexisNexis Repl. Vol. 2002).

<sup>2</sup>See § 44-146.16(1), (2) (LexisNexis Repl. Vol. 2002) (defining "natural disaster," "man-made disaster").

<sup>3</sup>See § 44-146.14(b) (LexisNexis Repl. Vol. 2002); 2002 Op. Va. Att'y Gen. 202, 203-04.

<sup>4</sup>Section 2.2-3705(A)(57) of The Virginia Freedom of Information Act generally prohibits the disclosure, among others, of public records containing tactical plans, the disclosure of which would jeopardize public safety.

<sup>5</sup>Va. Code Ann. §§ 2.2-3700 to 2.2-3714 (LexisNexis Repl. Vol. 2001 & Supp. 2003).

<sup>6</sup>See National Crime Information Center Project 2000, Pub. L. No. 101-647, 1990 U.S.C.C.A.N. (104 Stat.) 4823; see *also* 28 U.S.C.A. § 534(e)(3)(A) (West Supp. 2003); Pub. L. No. 104-132, § 811(b)(1)(A), 1996 U.S.C.C.A.N. (110 Stat.) 1214, 1312 (codified at 28 U.S.C.A. § 531 note (West Supp. 2003)).

<sup>7</sup>See Va. Code Ann. tit. 52, ch. 2, §§ 52-12 to 52-15 (LexisNexis Repl. Vol. 2002) ("Basic State Police Communication System").

<sup>8</sup>Federal regulations governing criminal justice information systems state that the purpose of such systems "is to assure that criminal history record information ... is ... disseminated in a manner to ensure the ... security of such information and to protect individual privacy." 28 C.F.R. § 20.1 (2003). The regulations define "criminal justice agency" to include courts and governmental agencies that perform, and allocate a substantial portion of their annual budget to, "the administration of criminal justice." *Id.* § 20.3(g).

Section 9.1-101 defines "criminal justice agency" to include courts, governmental agencies and other agencies that perform "the administration of criminal justice," as well as private and public entities that employ, for the purpose of performing "criminal justice activities," special conservators of the peace or special police officers appointed under § 15.2-1737 or §§ 19.2-12 and 19.2-13.

The term "administration of criminal justice" means the "[d]etection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders," and includes "criminal identification activities and the collection, storage, and dissemination of criminal history record information." 28 C.F.R. § 20.3(b); *see also* Va. Code Ann. § 9.1-101 (LexisNexis Supp. 2003).

<sup>9</sup>See Va. Code Ann. § 19.2-389(A)(1) (LexisNexis Supp. 2003).

<sup>10</sup>Section 52-8.3 (LexisNexis Repl. Vol. 2002).

<sup>11</sup>Sections 19.2-387 to 19.2-390.3 comprise the statutory scheme governing the Central Criminal Records Exchange, a criminal record-keeping agency operating within the Department of State Police. *See* § 19.2-387(A) (LexisNexis Supp. 2003).

<sup>12</sup>Section 19.2-389(A) (LexisNexis Supp. 2003).

<sup>13</sup>See Va. Code Ann. § 56-1 (LexisNexis Repl. Vol. 2003) (defining "public service company" as "gas, pipeline, electric light, heat, power and water supply companies, sewer companies, telephone companies, telegraph companies, and all persons authorized to transport passengers or property as a common carrier").

<sup>14</sup>See § 19.2-389(A)(1).

<sup>15</sup>See *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001) (holding that licensed physician providing consultant services for state agency was independent contractor excluded from sovereign immunity with regard to medical malpractice claim). *But see Wesley v. Mercy Ambulance Corp.*, 37 Va. Cir. 354 (1995) (holding that ambulance service "employed" by city of Richmond was sufficiently under control of city to be covered by sovereign immunity).

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