



NCMS, Inc.

The Society of Industrial Security Professionals

A NON-PROFIT ORGANIZATION

BULLETIN

Volume XXXVV, Number 1

ISSN 0738-5099

JANUARY/FEBRUARY 2011

THE ROLE OF THE SECRETARY WITHIN NCMS

By Michelle Peerenboom, ISP, Board of Directors, Secretary

At the beginning of each *Bulletin*, NCMS members are given a message from the NCMS President updating everyone on the state of the Society. Recently, our President suggested that each of the Executive Committee members take an opportunity to fill this space with our perspectives so that members can get an idea of our responsibilities on the Board.

The role of Secretary within NCMS is a bit different than the traditional Secretary role on a board. Typically, this position requires you to take minutes, assemble large quantities of communications and oftentimes update web content. Because NCMS utilizes MMCO, our Executive Director, Sharon Tannahill, takes the brunt of these responsibilities. Therefore, the position of Secretary takes on similar, yet different responsibilities.

The Secretary is currently responsible for accounting for and taking all board votes, is the head of the Communication Committee, which means reviewing and editing all articles for the *Bulletin* and all items posted to our website, and is in charge of assembling the eNews. Finally, I am the “woman behind the curtain” so

to speak and am responsible for reading and responding to all member questions posed via the “Got a Question? Ask Here” link on the NCMS website.

For those of you who have never utilized the Member Questions portion of the website, you can use this link to ask any security-related question you can think of. I read and respond to an average of 1-3 a week and the questions that I can’t answer, I will forward on to other Subject Matter Experts to get you the help you need. I typically try to have an answer back to a member within 24-48 hours. Some of the questions are very simple, while others require a phone call to the individual to truly ascertain the complexity of their problem. This service is free to all members, which is significant, as I have seen other third party companies charge as much as \$65 per question!

Below are some more common questions from recent months that may be of interest to our members:

Q: *Where can I obtain a template for <fill in the blank>?*

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CASE BEFORE THE U.S. SUPREME COURT COULD AFFECT RIGHT TO PRIVACY IN THE SECURITY CLEARANCE CONTEXT

By Brian Kaveney & Molly Thomas, Armstrong Teasdale LLP

In October, 2010, the United States Supreme Court heard oral arguments in *NASA v. Nelson*, a case concerning the Ninth Circuit Court of Appeals' earlier ruling that background checks conducted by NASA for contractor personnel at the Jet Propulsion Laboratory (JPL) in Pasadena, California, were unlawful. At issue is the ability of government employers to conduct background checks involving open-ended questions about an employee's personal life, past substance use, and drug counseling. The case pits the government's interest in security against an employee's right to what has been called "informational privacy."

The right to informational privacy is a derivation of the constitutional right to privacy, as set forth in cases involving freedom from government interference in the private decisions of a person's life. Informational privacy was first discussed in *Whalen v. Roe*, 429 U.S. 589 (1977), which raised the issue of whether the government could store information about people's prescription medications in a record system. The Supreme Court recognized that there is an "individual interest in avoiding disclosure of personal matters," but found in favor of the government, stating that the government had provided adequate security measures to prevent against the possibility of information leaks. *Id.* at 599. While *Whalen* did not explicitly recognize a right to informational privacy, it spawned a series of cases in lower federal courts that discussed the right as if *Whalen* had established it.

In *NASA v. Nelson*, the Ninth Circuit explained that one of the most contentious inquiries performed by NASA is contacting the listed references of prospective employees to determine whether they feel that the applicant is trustworthy or reliable. Form SF-85, for example, seeks information concerning past drug treatment and drug counseling. The Ninth Circuit concluded that the checks were not narrowly tailored to meet a legitimate government interest, and thus, were unconstitutional.

At the Supreme Court, the government argued that, as an employer, it has a right to ask virtually any personal question of its potential employees, provided that information is not given to third parties, and that federal statutes such as the Privacy Act adequately protect the privacy of individuals. The government maintained that practical burdens would be placed on the ability of the government to operate if it had to follow a guidebook to distinguish between allowable questions and those that violate personal privacy.

The JPL employees argued that a prospective employee should be offered the opportunity, rather than be compelled, to disclose personal information to an employer. The employees conceded that the government should be allowed to inquire into issues that are particularly sensitive to an employee's job. The employees argued that questions such as those asked by NASA do not fit that mold and claimed that the government should be able to show a justifiable need to know certain information.

Both the government and the JPL employees noted that this case does not involve governmental background checks for security clearances or other national security reasons. Under existing case law, checks like the ones at issue in the *NASA* case would be constitutional. However, this case could have major implications on the legality and scope of background checks as a whole, including those performed by private employers. Should the Supreme Court go so far as to hold that there is no right of "informational privacy," the ability of both governmental and private employers to gather and store their employees' personal information could expand. Employers could be able to investigate many aspects of their employees' lives, including those that might be unrelated to their work. Without proper safeguards, a stockpiling of sensitive personal information could increase the possibility of security breaches or damaging leaks.

The most likely result of the *NASA* case is that the Court will publish a narrow opinion addressing only whether the questions posed by NASA are allowed. However, there is a possibility that the Court could use this case as an opportunity to rule explicitly on the existence of a right to informational privacy. A ruling is expected by June or July of 2011. ❖

**Don't forget to pay your dues
by February 28, 2011!**