

Jim Gibbons
Governor



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Governor Jim Gibbons
State Capitol
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Governor Gibbons:

The Nevada Department of Motor Vehicles is responding to the American Civil Liberties Union's (ACLU) letter of December 7, 2009 addressed to you due to inaccuracies in the letter and the need for clarification.

The ACLU is providing a disservice to the citizens of Nevada by repeating misinformation about changes to the Nevada driver's license and identification card (DL/ID) issuance process both in the cited letter and during the last legislative process. The ACLU has not met with the Department to understand the current or future DL/ID issuance processes. Incorrect information has been advanced without knowing or understanding the internals, infrastructure and security measures already in place to protect all customer data. The ACLU is promoting fear, rather than facts about the state meeting minimum standards of issuing a DL/ID.

The primary goal of Real ID Act (the law) is to ensure that all states are using the same minimum standards when issuing a DL/ID. The Department already has a set of high standards for the issuance of a DL/ID.

The current DL/ID issuance requires that a citizen present documentation proving their name, date-of-birth and Social Security number. This same process is required under the law.

The Department does not keep additional personal information for any DL/ID issuance. Ironically, companies like LexisNexis, Experian, Equifax or TransUnion, all keep much more information about a citizen than the Department requires. The Department does not want nor need any personal information about an individual other than proof of identity, lawful status and proof of residency.

Below is the text of the ACLU's letter and the Department's response.

The ACLU of Nevada has recently learned that emergency regulations attempting to bring Nevada into compliance with the federal REAL ID Act may have been enacted or may be under consideration for enactment. The ACLU has a number of concerns about the possibility of either scenario, and urges you to protect Nevadans' privacy and tax dollars by refusing to enact REAL ID regulations.

The Governor has signed Emergency Regulations that will allow the Department to implement the law. Language added to the Emergency Regulations includes prohibiting radio frequency identification (RFID) chips or other tracking technologies from being included in the card and information relating to the means in which the Department will store and restrict access to personally identifiable information.

Originally passed in 2005, REAL ID is an unfunded federal mandate that puts the privacy rights of all Nevadans at risk.

Nevada has received nearly \$3.8 million in Federal grant money. An additional \$48 million has been announced to assist in the implementation of this program. The Final Rule states the Department must “have protections in place to ensure the security of personally identifiable information” [6 C.F.R § 37.41(b)(2)].

It creates a national identification card that every American will be required to carry in order to fly inter-state on commercial airlines, enter government buildings such as courthouses, open a bank account, and more.

This is not a national identification card. In fact, driver’s license and identification cards are issued by each state, not the Federal government. The law gives states the flexibility in issuing a unique DL/ID based on the state’s own design concepts. The law sets national standards for DL/ID issued by the states.

There is not a central database of information. The law requires Department officials to verify that an applicant holds only one valid card issues under the law’s standards. Nevada law, as it currently exists, requires all applicants to surrender any and all previous DL/ID issued (NRS 483.230). Additionally, the law does not grant the Federal government or law enforcement greater access to Department data, nor does it create a national database of personal information. Access to personal information maintained by the Department is limited to authorities in NRS 481.063.

The Rule does not require a compliant DL/ID for banking purposes. “Official Federal Purposes” is specific to boarding a federally-regulated commercial aircraft, accessing federal facilities where identification is required and entering nuclear power plants.

These requirements do little to address critical public safety issues while putting us at greater risk for invasions of privacy and identity theft.

The law requires states to protect the privacy and confidentiality of personally identifiable information obtained from the issuance of a DL/ID. Nevada has also implemented the facial recognition system to prevent identity theft and fraud. NRS 481.063 provides very specific rules on to whom and how the Department may disseminate information.

REAL ID also creates huge administrative burdens for state governments, with only minimal federal funds for implementing its onerous requirements. As of today, the federal government has still not allocated adequate funds for REAL ID, or any of the other competing measures currently circulating in Washington DC that seek to enact similar national identification measures.

Nevada has not viewed this project as an “administrative burden.” In fact, Nevada is prepared to implement the law in January 2010. Because Nevada is at the fore with information technologies and forward-thinking processes, very few process changes were needed to meet the requirements of the Rule. Additionally, many of the requirements of the law were already in Nevada statutes prior to the Act passing. For example, the documents required to get a compliant DL/ID are merely a subset of documents currently outlined in NRS 483.290. Under current Nevada law, all new customers are required to present a birth

certificate, US passport, or unexpired immigration documents. The Department stopped accepting another state's DL/ID as proof of name and date of birth in 2004 because there was no national standard of identification and because of the number of identity theft and fraud cases that resulted from that lack. With the help of federal funds, the Department has increased the infrastructure to further protect and keep confidential all information obtained during the application process.

In light of these problems, as of October 2009, 24 states had approved either resolutions or binding legislation not to participate in REAL ID. Of those, thirteen states have passed legislation that actually prohibits their participation in the program.

In a survey conducted with all U.S. jurisdictions by the American Association of Motor Vehicle Administrators (AAMVA), of the 42 jurisdictions responding to the survey, only nine states will not meet material compliance. Those states are: Colorado, Connecticut, Idaho, Maine, Missouri, New York, South Carolina, Virginia, and Washington. Twenty states are working towards material compliance and on January 1, 2010 will be meeting anywhere between seven and 17 of the 18 requirements:

Alaska will meet 7 of the 18

Arizona will meet 12.5 of the 18

California will meet 8 of the 18

Delaware will meet 15 of the 18

Hawaii will meet 14 of the 18

Illinois will meet 9 of the 18

Louisiana will meet 10 of the 18

Minnesota will meet "most of them"

Mississippi will meet 17 of the 18

Nebraska will meet 12 of the 18

North Dakota will meet 15 of the 18

Ohio will meet 10 of the 18

Oregon will meet 7 of the 18

Pennsylvania will meet 12 of the 18

Rhode Island will meet 10 of the 18

Tennessee will meet between 12 and 15 of the 18

Texas will meet 9 of the 18

Vermont will meet 9 of the 18

Wisconsin will meet 14 of the 18

Wyoming will meet 14 of the 18

Twelve of the 42 responding states will meet material compliance by January 1, 2010. Those states are: Alabama, Arkansas, District of Columbia, Florida, Indiana, Iowa, Kansas, Maryland, Nevada, South Dakota, Utah, and West Virginia.

Nevadans do not support REAL ID and their elected legislators have refused to adopt it.

Here in Nevada, the 2007 Legislature passed a near-unanimous joint resolution, AJR6, urging Congress to repeal REAL ID. Reasons for passing this legislation ranged from its overwhelming cost to the failure of the Department of Homeland Security to promulgate rules for the implementation of the Act itself. In 2009, the Legislature again declined to adopt REAL ID.

AJR6 was passed when the law was passed prior to the final rules being released in January of 2008. The decision was based on many assumptions and unknowns regarding the Final Rule. Based on the input from states, the Department of Homeland Security drafted final regulations to meet the state's needs and assisted states in implementing this program with minimal impacts. The Final Rule as published on January 8, 2008 is very reasonable and is not difficult for Nevada to comply in the time allotted. The issues and concerns expressed by other states are not shared by Nevada.

Since Nevada's rejection of REAL ID in 2007, the privacy and cost problems have not been resolved. Representatives from the Nevada DMV have intimated that the projected costs of implementing REAL ID have been reduced. Unfortunately, any possible "cost cuts" would come at the expense of privacy.

The largest expense Nevada reported during the 2007 Legislative Session was to increase office staffing to accommodate the strict re-enrollment period of the original Rule. The Final Rule, as published in January

of 2008, allows for an age-based enrollment period thereby removing the need for additional DMV staff. The budget passed by the Governor during the 2009 Legislative Session was \$5.1 million for full implementation. Nevada has received almost \$3.8 million in federal funds and \$325,000 was approved during the 2009 Legislative Session for the next two years. No additional state funds are needed. An additional \$48 million has been allocated over federal fiscal year 2010 to assist states in implementing this program as announced by the Department of Homeland Security December 8, 2009.

Additionally, the Final Rule states the Department must “have protections in place to ensure the security of personally identifiable information” [6 C.F.R § 37.41(b)(2)]. Costs associated to the increased privacy and protection requirements of the Rule are included in the reduced budget as approved by the Governor.

As reported by the Department of Homeland Security in the final regulations on REAL ID in 2008, one cost-saving measure that was taken was “not to encrypt the data that will be stored on the card.” Regardless of whether REAL ID can be made less expensive than originally projected, if implemented, it will cost Nevadan taxpayer significant monies because, while the federal government is attempting to impose the program on states, it is not providing states with enough funding to cover the costs.

As a point of clarification, if data on the actual card were encrypted, the identification would not be usable without decryption methods or technologies. The cost of a DL/ID will not change from the current cost of \$22 with the implementation of the law. As stated before, the budget passed by the Governor during the 2009 Legislative Session was \$5.1 million for full-implementation. Nevada has received almost \$3.8 million in federal funds and \$325,000 was approved during the 2009 Legislative Session for the next two years. No additional state funds are needed. An additional \$48 million has been allocated over federal fiscal year 2010 to assist states in implementing this program.

Not only is REAL ID a bad idea that will violate the civil rights of Nevadans and impose very significant burdens on Nevada taxpayers, but the propriety of emergency regulation is questionable at best. At the end of last month, the Nevada Legislative Committee to Review Regulations declined to approve the DMV’s proposed regulation that would have attempted to bring Nevada into compliance with this federal mandate. In any case, given the extensive and failed history of REAL ID at the Nevada Legislature, it is difficult to imagine how compliance with this unwise federal mandate has become an “emergency.”

The Real ID Act is a federal law and the state must meet material compliance by January 1, 2010. Not implementing this program will impose significant burdens on Nevada taxpayers when those that don’t have a compliant DL/ID or a valid U.S. passport will be subject to additional scrutiny and screening when identification for federal purposes is required.

During the 2009 Legislative Session, Senate Bill 52 was passed by the Senate at 9:00 am on June 1, 2009, the last day of session. Based on conversations with Assembly leadership and LCB staff held throughout the day, and the tight time lines to sine die, the Department was told that the language in existing statute (passed during the 2007 Legislative Session) would allow the Department to adopt the Federal requirements by regulation. The Assembly did not hold hearings on SB52 and the bill subsequently died with no further action. At the direction of Legislative staff, the Department pursued the adoption of new permanent regulations, following the procedures mandated by Chapter 233B of the NRS; After regulation workshops and hearings were held by the Department on the proposed regulations, Legislative Commission’s Subcommittee to Review Regulations (“Committee”) deferred the proposed regulations, for the second time on October 26, 2009, to the next commission meeting. The Committee recommended the Department pursue Emergency Regulations on November 24, 2009, thereby allowing additional time to further review the proposed language.

On December 8, 2009, the Governor signed Emergency Regulations that will allow the Department to implement the law. Language added to the Emergency Regulations includes prohibiting of radio frequency identification (RFID) chips or other tracking technologies to be included in the card and information relating to the means in which the Department will store and restrict access to personally identifiable information. The access and restriction to information maintained by the Department is currently outlined in NRS 481.063.

Indeed, according to our understanding of the Nevada Revised Statutes 223.210, your office may be given the authority to deal with federal mandates, only “with the approval of the Legislative Commission.”

The standing Nevada Legislature’s 2007 Joint Resolution urging Congress to repeal REAL ID and reasons outlined therein; the position taken by 24 states to entirely opt out of enacting REAL ID; the 2009 Legislature’s inability to pass any meaningful legislation considering the federal government’s waiving on the issue as a result of continued pressure from states around the country; and the recent refusal of the Nevada Legislative Committee to Review Regulations to approve the DMV’s proposed regulation, should be reasons enough for you to not rush through any such sweeping REAL ID-related regulation.

The Department will begin Administrative Rulemaking process to adopt permanent regulations within the 120 day time frame. Normal processes of public workshops and public hearings will take place. The Department has also committed to working closely with the Legislative Commission.

It’s not the intention of Department to enter into a public dispute with the ACLU. However, the Department would be doing the citizens of Nevada a disservice by not correcting the misinformation and misunderstandings that are the basis of the ACLU’s opinion on the Real ID Act.

Respectfully,

Edgar J. Roberts
Director
Nevada Department of Motor Vehicles

