



April 14, 2011

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Secretary Gary D. Maynard
Maryland Department of Public Safety
and Correctional Services
300 East Joppa Road
Suite 1000
Towson, Maryland 21286

Re: April 1 Revision of DOC Social Media Policy

Dear Secretary Maynard:

Thank you for your letter dated April 1,¹ concerning the Division of Corrections' (DOC) recent revision of its policy on social media inquiries for corrections job applicants and employees undergoing recertification. Perhaps it was an inadvertent omission, but we did not receive a copy of the policy itself along with your correspondence. We would greatly appreciate it if you could provide us with a copy of the new policy and a sample of the consent form being provided to interviewees,² so that we can fully understand the revisions.³

¹ Although the letter was dated April 1, I received it both via email and First Class Mail on April 6.

² I requested a copy of the revised policy via email on April 6, but have not yet received a response to that request. If you require a request under the Maryland Public Information Act (MPIA), Md. Code Ann., State Gov't Art., §§10-611 to 628, to produce this policy and a sample consent form, please consider this as a formal request under the MPIA. It is being served by certified mail for this reason.

³ There is confusion about the revisions that the policy itself would help clarify, because the policy described in your response to Officer Robert Collins' complaint differs in significant ways from that described by the DOC in recent interviews with reporters and in the Department's April 6 news releases (available at http://www.dpscs.state.md.us/publicinfo/news_stories/press_releases/20110406a.shtml and http://weblogs.baltimoresun.com/news/crime/blog/2011/04/state_prisons_agency_revises_s.html)

Your letter to the ACLU explains that effective April 1, 2011,

[T]he Department adopted a revised policy on background investigations, including clarification as to the appropriate procedures for inquiring into the use of social media. The applicant will be informed that the portion of the interview dealing with social media is totally

While our views may evolve further as we gain clarity about the scope of the revisions, we did want to respond promptly to your correspondence, and to let you know our initial thoughts.

We appreciate your willingness to reassess the social media policy, and to consider the views of the ACLU and Ofc. Collins as you move forward. Although the new practice of providing written notice to applicants explaining that responses to social media inquiries are voluntary may clarify that for a few, we do not think this revision is adequate to address the full scope of privacy concerns at stake, nor do we understand how a truly voluntary policy serves the purposes of the Department.

DOC Review of Applicant Responses to the DOC Requests for Social Media Access Indicates the Inherent Coerciveness of the Policy

The DOC has stated repeatedly in response to Mr. Collins' complaint that its procedure has always been entirely voluntary on the part of applicants. The revision, it is claimed, merely formalizes and clarifies this "voluntary" policy. In regard to Ofc. Collins specifically, DOC spokesman Richard Binetti contends that the investigator interviewing Collins followed proper policy and made clear that the "request" for his Facebook password was purely voluntary.⁴ That this so-called request, which was understood by

voluntary. This fact will be communicated to the applicant orally by the investigator and in writing. The applicant will be required to verify (by affixation of his or her initials) an understanding that the questions on social media use are voluntary and that he or she may decline further questioning on this topic. The applicant will also be informed that no adverse action will be taken based on his or her refusal to answer questions regarding social media use, or to allow the investigator to view any social media site.

Beyond the description of measures added to clarify that the questioning about social media use is "voluntary", your letter makes no mention of any changes to the procedures by which the DOC's exploration of an applicant's social media activities would take place.

In its statements to the media, however, the DOC has described different revisions to the policy than those explained to the ACLU and Officer Collins. Specifically, the media statement on the DPSCS website describes a new policy under which: "Candidates will be asked to voluntarily participate in the review of any social media applications during the initial interview process... *Candidates will not be asked to share their login and/or password information.*" (emphasis added)

We are perplexed as to why, assuming the DOC media statements are accurate, this information was not provided to Mr. Collins in your response to his complaint. Certainly, it seems relevant to any understanding of how the policy has been revised, and in the absence of our receipt of the policy itself, we remain uncertain as to precisely what the revisions are.

⁴ See, e.g., http://www.hometownannapolis.com/news/reg/2011/04/07-71/form_engagements.html, where the Associated Press reports:

Officer Collins as an absolute prerequisite for his re-certification, would be considered by DOC to be consistent with an optional policy gives us great concern about the Department's definition of "voluntary."

Although no information has been supplied to the ACLU about the specifics of the DOC review, a small amount of data was included in the Department's press materials. Unfortunately, far from offering assurances, the data released by the DOC serves only to reinforce concerns about the coerciveness inherent in requests for social media access made during the job certification process. The limited data made available by the DOC – which the Department claims somehow supports a policy of voluntariness – actually demonstrates that most job applicants do not feel free to refuse a governmental "request" for social media access information.

One DOC statement⁵ indicates that of 80 persons hired by DOC since the social media inquiry policy took effect, *only five* did not or could not provide the DOC with their social media passwords. While it is unclear from the DOC's choice of wording if even a single applicant actually refused the request (as opposed to being unable to recall their password, or perhaps not a user of social media), even in the unlikely event that all five had refused outright, that would still mean 94 percent of applicants did provide their information – a rate that flies in the face of the DOC claim that the process is not coercive, given general public objections to this policy.⁶

As for the DOC's contention that the policy must be optional because applicants were not penalized for refusing DOC password requests, the data made available publicly do not support that conclusion. This is because no information has even been offered about what percentage of those 2,619 applicants NOT hired by the DOC refused the requests. The press statement says five out of 80 hired either declined or could not produce login information; it says nothing about how many of those not hired declined the request. Yet, any fair examination of the effect upon hiring of an applicant's refusal to provide the government with social media login information certainly requires analysis of this information.

Binetti said compliance with such requests was always voluntary and not a condition of employment, and that the investigator who interviewed Correctional Officer Robert Collins acted properly. The department lacked a written policy, though, until the revisions were approved Friday.

⁵ Available at:

http://weblogs.baltimoresun.com/news/crime/blog/2011/04/state_prisons_agency_revises_s.html

⁶ As you likely are aware, hundreds of news stories, columns and blogs have been written about Mr. Collins' complaint and the DOC practice, generating many thousands of comments from the public, the overwhelming majority of which describe governmental requests to access job applicants' social media accounts highly objectionable and offensive. The notion that 94 percent of DOC job applicants hold the opposite view of the practice seems incongruous.

For these reasons, nothing made public about the DOC's internal review reassures us that governmental requests for access to an applicant's social media accounts can ever be perceived as truly voluntary. The situation is inherently a coercive one, placing pressure on the applicant to accede to this privacy violation or risk being viewed as someone with something to hide. The age-old police officer's inquiry "If you have nothing to hide, why not let me search?" cannot help but leap to the mind of every law enforcement job applicant. Requiring an applicant to initial a consent form does nothing to remove that pressure.

Job Applicants Cannot Properly Consent to Government Privacy Violations on Behalf of Facebook "Friends" and the DOC Policy Fails to Address This

Even assuming, *arguendo*, that the procedure DOC is now proposing truly could ensure that only applicants who freely volunteer to share their social media accounts with the government actually were persuaded to do so, there remains unaddressed the serious issue of privacy violations of third parties who interact with the applicants via social media. These third parties are offered no opportunity to object to the government's intrusion, yet their private electronic correspondence with the applicant, their photographs and postings will be exposed to government scrutiny, just as are the applicant's communications. This violates their privacy.

Facebook's Terms of Use expressly prohibit users from revealing their password to third parties. The purpose of this contractual provision is to protect the privacy of third parties who communicate with the user via Facebook, and the original DOC policy plainly induced applicants to violate their contract with Facebook, without advising them that they were doing so. If – as suggested in the DOC press statements -- the revised DOC policy asks applicants to themselves log onto their Facebook accounts to permit DOC viewing, rather than asking them to hand over their passwords to the DOC, this seems a blatant attempt to circumvent the purposes of the Facebook contract, while enabling the government to continue its violation of third party privacy rights. Such a policy is highly inadvisable and could subject both the DOC and even job applicants who reveal third party confidences to legal liability.⁷

A Truly Voluntary Social Media Inquiry Policy Serves No Valid Purpose Justifying the Privacy Violations it Entails

In view of the DOC position that requests to view applicants' social media accounts are intended to be purely voluntary, we see no purpose served by these requests that can justify violations of third-party privacy rights of the sort at issue here. If the requests are voluntary, and the DOC actually intends that no adverse action will attend a refusal to comply, what purpose does the DOC think the request serves? Any applicant who has any damaging or controversial information on their social media account surely would decline the request, assuming they understood and believed that disclosure was truly voluntary. So the only thing that would be accomplished is violation of the privacy rights of third party non-applicants, whose materials the DOC can access once logged in to the applicant's account. A purely voluntarily policy does not even arguably serve a sufficiently important purpose to justify such violations.

⁷ We are unaware of any case where this type of policy has been tried before, so can only speculate about the legal ramifications it carries with it.

The line the DOC has drawn is, in many respects, arbitrary. The DOC's rationale for this policy is that the government's need to screen job applicants justifies the "voluntary" forfeiture of privacy rights in social media use. But this same rationale could be used to justify asking for optional production of all recent correspondence, or suggesting that applicants voluntarily log into their email accounts, to permit review of those communications. DOC could just as easily ask if the applicants are willing to turn over their cell phones for investigators to search calls, photos, videos and texts, or even seek consent for voluntary home visits, so DOC investigators could search applicants' houses for contraband. Presumably such measures would be equally or even more effective in ferreting out potentially bad employees. Yet, we cannot imagine the DOC or any employer asking such questions; they would be met with universal condemnation as an appalling invasion of privacy. To the ACLU, however, the DOC social media policy, even as revised, is equally intolerable.

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The Maryland Division of Correction's unprecedented efforts to explore the social media use of applicants for employment and employees undergoing recertification constitute a troubling new approach to employment screening that the ACLU opposes as a serious threat to privacy rights. As you may know, we are exploring both state and national legislative initiatives to address these issues, and we have also recently reached out to Facebook's Director of Public Policy to ensure that the company is aware of the DOC policy.

Given the privacy issues at stake, and the worrisome national precedent being set by the Maryland policy, we propose that – once we have had an opportunity to review the actual DOC policy – we convene a meeting of interested parties. In addition to Officer Collins, the ACLU, Public Safety officials, and representatives from the Attorney General's Office, invitations to such a meeting could be extended both to Maryland AFSCME and to Facebook representatives, whose members are significantly affected by the policy.

We very much appreciate your attention to this matter, and look forward to further discussion.

Sincerely,



Deborah A. Jeon
Legal Director

ec: Stuart M. Nathan, Esq.
Mr. Patrick Moran, AFSCME
Mr. Timothy Sparapani, Facebook
Ofc. Robert J. Collins