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**Varying State Approaches to Confidentiality with  
Premises and Animal Identification Systems**

by

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## Varying State Approaches to Confidentiality with Premises and Animal Identification Systems

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Since 2003, after it was discovered that a cow in Washington State had bovine spongiform encephalitis (BSE), the USDA has been making a concerted effort to implement a nation-wide animal identification system.<sup>2</sup> With the aid of state animal health officials, the USDA has proposed a National Animal Identification System (NAIS) that will allow for a 48-hour trace back in the event of an outbreak of disease that threatens animal health.<sup>3</sup> The system is designed to be implemented in three phases, with each step representing a key component that allows for traceability.<sup>4</sup> First, the system calls for the registration of premises where livestock are managed and held.<sup>5</sup> Second, the animals themselves will be identified either by lot, as with commercially produced poultry and other animals that stay together as a group from birth through harvest, or on an individual basis when the production practices are less uniform, such as with cattle.<sup>6</sup> Finally, the premises registration and animal identification phases will be combined to allow for traceability and tracking with central record-keeping systems that utilize a unique premises registration number and the animal identification numbers.<sup>7</sup>

A primary concern facing the livestock industry as it moves toward the implementation of this nationwide animal identification program is the confidentiality of the information used to administer any system on the state and national level.<sup>8</sup> In an effort to comply with this USDA initiative,<sup>9</sup> the various states have undertaken the task of developing their own programs and the statutory authority to authorize the programs.<sup>10</sup> The approaches individual states have

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<sup>2</sup> Michael Roberts and Harrison Pittman, *Legal Issues In Developing an National Plan for Animal Identification*, National Agricultural Law Center, p.1, available at [http://www.nationalaglawcenter.org/assets/articles/roberts\\_animalid.pdf](http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf) (2004).

<sup>3</sup> USDA-APHIS, *(NAIS) National Animal Identification System: A Draft Users Guide and Additional Information*, (November 2006), p.6, available at [http://animalid.aphis.usda.gov/nais/naislibrary/documents/instructions\\_guidelines/NAIS-UserGuide.pdf](http://animalid.aphis.usda.gov/nais/naislibrary/documents/instructions_guidelines/NAIS-UserGuide.pdf).

<sup>4</sup> See *id.* at 3.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> See Michael Roberts and Doug O'Brien, *Animal Identification: Confidentiality of Information*, National Agricultural Law Center, p.1, available at <http://lmic.info/memberspublic/animalID/fs05.pdf> (2004).

<sup>9</sup> See Doug O'Brien, *Animal Identification and the Next Farm Bill*, National Agricultural Law Center, p.3, available at [http://www.nationalaglawcenter.org/assets/articles/obrien\\_animalid-newfarmbill.pdf](http://www.nationalaglawcenter.org/assets/articles/obrien_animalid-newfarmbill.pdf) (2006).

<sup>10</sup> Margaret Rosso Grossman, *Animal Traceability: Background and Issues*, American Agriculture Law Association, Agriculture Law Symposium (2006).

utilized while implementing this first phase of the NAIS have varied considerably when it comes to preserving the confidentiality of information maintained within the system.<sup>11</sup> The manner in which the states attempt to preserve the confidentiality of the information can be broken down into three broad categories. The three approaches include: (1) states that have yet to act upon confidentiality concerns and consequently offer no exemption from the states' open records laws, (2) states that rely on existing exemptions to the open records laws, and (3) states that has specifically addressed confidentiality concerns through specific legislative enactments.

#### *Group One: The Non-Acting*

The first group of states that have yet to act to preserve the confidentiality of information contained in the premises and animal identification systems can be considered the default approach.<sup>12</sup> While these states have not necessarily made a decision to disclose records to the public, they have not taken any proactive steps to exclude the information from the state's open records laws.<sup>13</sup> Many of these states apparently rely upon the fact that participation in their program is voluntary and that voluntary participation somehow serves as a de facto waiver of the participant's right to privacy regarding the included information.<sup>14</sup>

The states that have taken this approach include Arkansas, Iowa, and Mississippi.<sup>15</sup> One reason that has been identified for this more reserved approach is the fact that the current premises identification programs include little more information than that contained in a standard telephone book and less than what can be found in a few minutes in the appropriate county courthouse.<sup>16</sup> At any rate, this group of non-acting states has yet to undertake the task of legislating assurances that the information maintained in their premises and animal identification system will remain confidential.

#### *Group Two: Reliance on Existing Exceptions*

A second group of states that are relatively few in number rely upon pre-existing exemptions to state open records laws.<sup>17</sup> Without enacting any new legislation, these states are attempting to protect the confidentiality of their premises and animal identification data by relying upon statutory exemptions already included in the state's open records scheme.<sup>18</sup> These pre-existing exemptions are broad exclusions that allow the state government to avoid

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<sup>11</sup> Compare Arkansas, which has not implemented any measures, statutory or otherwise, to protect the confidentiality of the information compiled with its premises registration program to Hawaii, which utilizes its general open records exemption found at Haw. Rev. Stat. § 92F-13(3) to protect its premises and animal identification programs, and Kansas, which specifically preserves the confidentiality of similar information with K.S.A. § 47-674(g).

<sup>12</sup> The analysis of these groups is based upon responses to an email sent to state animal identification coordinators whose contact information was correctly and properly posted in the USDA website. A copy of the email and responses are on file with the author (hereinafter State Survey).

<sup>13</sup> These open records laws in the individual states are generally the state's version of the federal Freedom of Information Act 5 U.S.C.A § 552

<sup>14</sup> State Survey *supra* note 13.

<sup>15</sup> State Survey *supra* note 13.

<sup>16</sup> This line of reasoning was identified by Charles Gann of the Arkansas Livestock and Poultry Commission.

<sup>17</sup> State Survey *supra* note 13.

<sup>18</sup> For example, see Haw. Rev. Stat § 92F-13 (3) and 5 Ill. Comp. Stat. 140/7.

disclosing the information necessary to perform a legitimate government function integral to the operation of state activities.<sup>19</sup> The states that are known to be taking this approach are Illinois and Hawaii.<sup>20</sup> As an example, the state of Hawaii plans to rely upon Haw. Rev. Stat § 92F-13 (3) to refuse the disclosure of the information contained within its premises and animal identification systems.<sup>21</sup> Under this theory, these premises and animal identification records would be exempt from disclosure because they are “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.”<sup>22</sup> It should be noted, however, that this application of the exception and others similar to it has not been tested in court.<sup>23</sup> Yet, this distinct group of states have chosen to approach the preservation of the confidential nature of their premises and animal identification programs with general and pre-existing exceptions to their open records laws.<sup>24</sup>

### *Group Three: Specific Enactments*

The third and final group consists of states that have taken a proactive approach to preserve the confidentiality of its premises and animal identification data.<sup>25</sup> This classification can be further broken down into two sub-classifications, with one class of states enacting separate statutes and rules specifically addressing premises and animal identification issues, and another class of states addressing confidentiality concerns through amendments to the state’s general open records law.<sup>26</sup>

States in the first group have chosen to address confidentiality concerns with separate and distinct legislative action that specifically implicates the premises and animal identification programs. These states include Alabama,<sup>27</sup> Arizona,<sup>28</sup> Kansas,<sup>29</sup> Maryland,<sup>30</sup> Oklahoma,<sup>31</sup> North Dakota,<sup>32</sup> Texas,<sup>33</sup> Vermont,<sup>34</sup> West Virginia,<sup>35</sup> and Wisconsin.<sup>36</sup> Each of these states

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<sup>19</sup> *Id.*

<sup>20</sup> State Survey *supra* note 13.

<sup>21</sup> State Survey *supra* note 13.

<sup>22</sup> See Haw. Rev. Stat § 92F-13 (3).

<sup>23</sup> State Survey *supra* note 13.

<sup>24</sup> State Survey *supra* note 13.

<sup>25</sup> State Survey *supra* note 13.

<sup>26</sup> State Survey *supra* note 13.

<sup>27</sup> Ala. Code § 2-1-11 (c)

<sup>28</sup> Ariz. Rev. Stat. § 3-1207

<sup>29</sup> K.S.A. § 47-674 (g)

<sup>30</sup> Md. Code Ann., Agriculture § 3-101 (d)

<sup>31</sup> 2 Okl. St. Ann. § 4-20 (F)

<sup>32</sup> ND ST § 36-09-28

<sup>33</sup> Tex. Agric. Code Ann. § 161.056 (e)

<sup>34</sup> 6 Ver. Stat. Ann. § 61

has animal identification laws that include language prohibiting the dissemination of personal information necessary for its implementation and maintenance.<sup>37</sup> Each of the state laws allows for the disclosure of the information maintained within the system to preserve the health of the state's livestock herds or flocks.<sup>38</sup> A concise example of this type of law can be found in §2-1-11 of the Alabama Code:

- (a) The Department of Agriculture and Industries may develop and implement an animal identification program that is consistent with the United States Department of Agriculture's National Animal Identification System.
- (b) The department may request all persons subject to the identification program to voluntarily provide all information necessary as determined by the department to implement and maintain the program. Participation in the program will not be required until such time as same is mandated under federal laws or regulations.
- (c) All information collected by the department pursuant to this section is confidential and shall not be subject to public disclosure except by order of a court of competent jurisdiction or as authorized by rule of the department.<sup>39</sup>

The second group of states with specific statutory enactments addressing confidentiality consists of those who have chosen to address the issue through its open records statute.<sup>40</sup> States taking this approach include Maine,<sup>41</sup> Minnesota,<sup>42</sup> Missouri,<sup>43</sup> South Dakota,<sup>44</sup> Tennessee,<sup>45</sup> Utah,<sup>46</sup> and Wyoming.<sup>47</sup> Whether specifically within the state's open records provisions or with a stand-alone enactment, these states have addressed their confidentiality concerns with a statute that is separate and apart from the law that authorizes the state's animal and premises identification system.<sup>48</sup> The language used by the states of this group varies widely. An example of a broad provision that prevents disclosure of NAIS information can be found in Utah, which states:

Records of the Department of Agriculture and Food relating to the National Animal Identification System or any other program that provides for the identification, tracing, or

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<sup>35</sup> W. Va. Code § 19-9-7a

<sup>36</sup> Wis. Stat. Ann. § 95.51 (5)

<sup>37</sup> See *supra* notes 27-36.

<sup>38</sup> *Id.*

<sup>39</sup> Ala. Code § 2-1-11.

<sup>40</sup> State Survey *supra* note 13.

<sup>41</sup> Me. Rev. Stat. Ann. Tit. 7, § 20.

<sup>42</sup> Minn. Stat. § 13.643 (6).

<sup>43</sup> Mo. Ann. Stat. § 268.063.

<sup>44</sup> S.D. Codified Laws §§ 40-3-27 to 40-3-29.

<sup>45</sup> Tenn. Code Ann. § 10-7-504(a)(9).

<sup>46</sup> U.C.A § 63-2-304 (49).

<sup>47</sup> Wyo. Stat. Ann. § 11-19-117.

<sup>48</sup> See *supra* notes 41-47.

control of livestock diseases, including any program established under Title 4, Chapter 24, Utah Livestock Brand and Anti-theft Act or Title 4, Chapter 31, Livestock Inspection and Quarantine;<sup>49</sup>

On the other hand, an example of a confidentiality provision that only relates to the premises registration program is exemplified by the Missouri statute:

Any information related to premises registration shall be confidential information, to be shared with no one except state and federal animal health officials, and shall not be subject to subpoena or other compulsory production.<sup>50</sup>

As with the other group of states that utilize specific statutory authority to protect confidentiality, the states in this group also allow for the disclosure of the information that is necessary to protect animal health in accordance with the implied and specific intent of the NAIS.<sup>51</sup>

### *Conclusion*

Little uniformity exists within the three general and widely varying approaches to the confidentiality concerns that have been identified— inaction, reliance on existing law, and passage of new statutory exemptions. Some states have chosen not to implement untested legislation; others have relied on existing laws to provide the desired protection; and another set has implemented laws specifically providing for the confidentiality of NAIS information. While no one of these approaches is necessarily better than any of the others, the variation itself poses an interesting situation where different tools have been used to address a common concern. As the NAIS develops and further implementation takes place, time will tell how each of these three approaches accomplishes the goal of preserving the confidentiality of animal identification information while addressing the concerns of the livestock industry.

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<sup>49</sup> U.C.A § 63-2-304 (49).

<sup>50</sup> Mo. Ann. Stat. § 268.063.

<sup>51</sup> See *supra* notes 41-47.