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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

July 14, 2005

The Honorable Roy P. Dyson
P.O. Box 229
Great Mills, Maryland 20634-0229

Dear Senator Dyson:

You have asked for advice concerning the propriety of the restrictions placed on the downloading and use of photos from the Governor's web site. It is my view that the restrictions in question raise significant legal issues under the Maryland Public Information Act ("MPIA") and under the First Amendment.

Your question involves the Photographs section of the Governor's web site.¹ The site, entitled The Governor's Office Photo Gallery, states that it is "An Archives of Maryland electronic publication." It shows thumbnails of photos of the Governor and others taken at various official events. Clicking on a thumbnail brings up a notice stating that "prior to downloading a photo, you must agree to the following terms," the terms and a check off stating "I agree to the above terms." Agreement permits the individual to go on to a page that permits downloading of the image as a JPEG or a PDF file. The terms are as follows:

These photographs are intended only for the private use of the individual or entities in the photographs. If you are not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any digital alteration, manipulation, dissemination, distribution, or copying of these photos for other than PERSONAL use is strictly prohibited. Unauthorized reproduction, distribution, or exhibition for commercial or political purposes may violate federal laws and incur prosecution and severe penalties. Prior to downloading, the recipient should check each photograph file for the presence of viruses.

The State of Maryland accepts no liability for any damage caused by viruses transmitted via the downloading of photographs or by the receipt of E-mails sent with photograph files downloaded from the Governor's Photo Gallery.

It is my understanding from the Archivist that the photos may also be downloaded for

¹ <http://www.govpics.maryland.gov/>

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personal and educational purposes, but not for any commercial or illegal purpose.²

The MPIA states a policy in favor of public access to information about the affairs of government and the official acts of public officials and employees. State Government Article, § 10-612(a). Under the MPIA, unless the law creates a specific exception, a custodian of a public record shall permit inspection of that record at any reasonable time. State Government Article § 10-613(a)(1). The term "public record" means the original or any copy of any documentary material that "is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business and is a ... photograph." SG § 10-611(g)(1).

It seems clear that the photographs on the Governor's web site are public documents. As a result, they are required to be available for inspection and copying without restrictions as to whether the person doing the copying is in the photograph, or as to whether their use would be personal, political or commercial.³

The Archivist has taken the position that providing the thumbnails is adequate compliance with the MPIA and that charges may be imposed to download the high resolution versions of the photos. The Office of the Attorney General has taken the position that the MPIA does not give the requester the right to pick the format in which a document is provided. Maryland Public Information Act Manual at page 10 (9th Edition, February 2004). This option has ordinarily been used to allow an agency to provide a printout of electronic databases and similar matters rather than a disc with the data and related software. Moreover, the Manual states that "in furtherance of the PIA's general purposes, agencies should voluntarily accede to the requester's choice of format unless doing so imposes a significant, unrecoverable cost or other burden on the agency." *Id.* In this case, providing a hard copy of the photo would most likely present greater cost and burden for the agency than permitting download. At least until this issue is settled under Maryland law, the agency presumably could decide to provide hard copies of the photo instead of permitting download. However, the web site does not offer that option.⁴ Providing a low resolution photo instead of a high resolution photo, presents a somewhat different question, since the cost and effort are identical whichever is provided. However, I cannot say with certainty that making the thumbnail available is not adequate to comply

² Despite the language of the restriction, I am not aware of any use of this document that would be "illegal."

³ I note that similar photographs from the President's web site can be downloaded without restriction. <http://www.whitehouse.gov/president/gallery/photoessay/>

⁴ It is my view that clicking the thumbnail for download constitutes a request under the MPIA.

with the MPIA.⁵

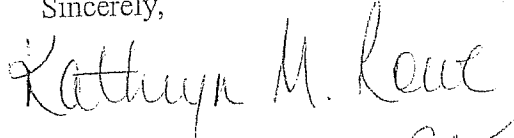
Discriminatory access to this material may raise First Amendment problems completely apart from the requirements of the MPIA. In *Ficker v. Utz*, Civil Action No. WN-92-1466 (D.Md. September 30, 1992), an attorney challenged a law that barred disclosure of traffic reports that were generally available to the public to persons who would use the information to solicit or market legal services. The State moved to dismiss the case on the grounds that the statute did not limit any speech, but only restricted access to government information. The Court denied the motion, finding that limiting access to information based solely on the intended use was a content-based restriction subject to strict scrutiny. Since that time, the Supreme Court has held that a commercial user does not have standing to challenge a limitation on commercial users' access records, stating that such a limit does not abridge anyone's right to engage in speech, be it commercial or otherwise, but that simply regulates access to information in hands of police department. *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32 (1999), *see also*, *McClure v. Amelkin*, 528 U.S. 1059 (1999). Subsequent cases have upheld restrictions on commercial use against challenge by commercial users. However, in each of these cases, the relevant statute restricted access generally but exempted interested parties and the press from the restriction. Moreover, the exemption for the press was applicable only so long as the press was using the material for news, rather than for more traditionally commercial uses. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir.) *cert. denied* 540 U.S. 1050 (2003); *Spottsville v Barnes*, 135 F.Supp.2d 1316 (N.D.Ga. 2001) *affirmed* 2002 WL 369911 (11th Cir. 2002). In the *Amelkin* case, the Court expressly stated that the answer might be different if the accident reports in question were made available to the public generally, and withheld only from attorneys and chiropractors.

Currently, high resolution photographs from the Governor's web site are available to any member of the public, so long as they will not be put to commercial or illegal use. Thus, this situation is more like that in *Ficker v. Utz* than in later cases concerning statutes allowing access only by specified persons. Moreover, the restriction here applies not only to ordinary commercial use, which is subject to a lower standard of review, but also to use by the press, which is expressly protected by the First Amendment. I have found no case addressing a situation where documents available to the general public were denied to the press. However, it seems that such a denial would be of questionable constitutional validity.

⁵ This advice is dependent on the ability to download the thumbnail, that is, to get a copy. Currently, this is possible, though difficult. If the ability to download them were blocked, then it is my view that the requirement that an applicant who is authorized to inspect a public record may have a copy, printout, or photograph of the public record or be permitted to make one would not be met. SG § 10-620.

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Sincerely,

A handwritten signature in cursive script that reads "Kathryn M. Rowe". The signature is written in dark ink and is positioned above the typed name.

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
dyson09a.wpd