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February 28, 2000

The Honorable John A. Giannetti, Jr.
217 Lowe House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Giannetti:

You have asked for advice concerning the constitutionality of House Bill 931, which restricts access to arrest records and to certain investigatory files that disclose the address of an arrested individual or a victim of a crime unless the applicant makes certain representations. It is my view that the proposed bill is constitutionally defensible.

House Bill 931 amends the Public Information Act to provide that a custodian shall deny access to a record of arrest or complaint conducted by certain units of government that discloses the current address of an arrested individual or victim of a crime unless the applicant declares under penalty of perjury that the inspection is made for scholarly, journalistic, political, governmental or investigative purposes and that the address information obtained will not be used, directly or indirectly, to sell a product or service to any individual or group of individuals. This bill is based on a statute that was recently before the Supreme Court in the case of *Los Angeles Police Department v. United Reporting Publishing Corporation*, 120 S.Ct. 483 (1999). In that case, the Court reversed a lower court finding that the statute was unconstitutional and concluded that the statute was not within the class that is subject to facial challenge. *See also*, *Amelkin v. McClure*, 120 S.Ct 630 (1999), which vacated and remanded 168 F.3d 893 (6th Cir. 1999) for reconsideration in light of the *United Reporting* decision. The latter case has already been remanded to the district court for consideration of as-applied challenges to the statute in question. *Amelkin v. McClure*, ___ F.3d ___, 2000 WL 205359 (6th Cir. 2000).

Cases that have addressed limitations on access to public documents for commercial purposes have met with varying responses on the part of the courts. In 1992, the General Assembly enacted State Government Article, § 10-616(h), which provides that a custodian is required to deny access to police reports of traffic accidents, criminal charging documents prior to service on the defendant, and traffic citations to an attorney who is not attorney of record and to any person employed by or associated with such an attorney. That provision is currently not enforced pursuant to a consent decree entered into by the State in the case of *Ficker v. Utz*, after a federal court ruled that it implicated First Amendment interests and that the Plaintiff had stated a claim for which relief could

be granted. The court stated that the provision implicated the First Amendment because it restricted access to information based on the content of the speaker's proposed message and because the State "ha[d] not offered any interest justifying its restrictions on Ficker's speech."

Since the time of the decision in *Ficker v. Utz*, some courts have upheld similar restrictions, while some have struck them down. It is my view that the most convincing analysis on this issue is that of the court in the case of *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), which upheld a statute limiting public access to criminal justice and official action records containing individual names, addresses and telephone numbers where access is sought for the purpose of directly soliciting business for pecuniary gain. After noting that there is no constitutional right, and specifically no First Amendment right, to access to government records, the Court held that the provision implicated the First Amendment because it drew a regulatory line based on the speech use of such records. However, the court found that the restriction was supported by the State's substantial interest in the protection of the privacy of its citizens and in "lessening the danger of solicitor abuse and, relatedly, maintaining public confidence in our system of justice." The Court refused to hold that this interest was not served due to the availability of the information to other entities, including the press, stating that "the state's interest in not aiding in the dissemination of the information for commercial purposes remains," and also that "[w]e presume that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue." *Id.* at 1514.[1] The court also found that the interests of the State in lessening the danger of solicitor abuse and maintaining confidence in the justice system were directly served by the bill. In doing so, the Court differentiated other cases that had rejected the constitutionality of limits on lawyer solicitation, noting that this case did not involve a bar on any type of communications by attorneys, but had simply established an indirect barrier to commercial speech by not making certain public records available for that purpose. *Id.* at 1515. Similarly, a state court upheld a statute that prohibited disclosure of state motor vehicle records to anyone except parties, their agents, certain contractors and the press in *DeSalvo v. Louisiana*, 624 So.2d 897 (1993), *cert. denied*, 510 U.S. 1117 (1994). The Court in that case also noted that the statute left open all forms of lawyer advertising and furthered the state interest in protecting privacy.

Other cases, however, have held that restrictions on access to public documents designed to prevent commercial use of the information in them violated the First Amendment. In *Innovative Data Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), the Court rejected a law that provided that a person who had crime victim information of motor vehicle accident information obtained from a law enforcement agency may not use the information to contact a person directly for the purpose of soliciting business and may not sell the information for financial gain. The Court expressly recognized that the protection of attorney ethical standards, the prevention of fraud and

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[1]. The privacy analysis for this law is thus different than that in *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997) where the Court rejected privacy as a justification on a prohibition of targeted solicitation by attorneys of persons who had been arrested, saying that the invasion of privacy occurred when the attorney obtained the information necessary to make the solicitation, not when the solicitation was received. House Bill 931 is directed at the point that the court held that the invasion occurred.

misrepresentation by professionals and protection of the public from inflated insurance rates were substantial state interests, but further found, essentially without analysis, that the law was not narrowly tailored to serve those interests. This holding was adopted by the Court in *Speer v. Miller*, 15 F.2d 1007 (11th Cir. 1994), to reject a law that barred the inspection and copying of law enforcement records for commercial purposes.

A similar approach to that adopted in the *Innovative Data Systems* and *Speer* cases was also adopted by the courts in *Amelkin v. McClure,* 168 F.3d 893 (6th Cir. 1999), which involved a statute allowing access to accident reports filed with the Department of State Police to certain entities but providing that they could not be used for commercial purposes, and *United Reporting Publishing Co. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), which involved the statute on which House Bill 931 is based. However, when those cases reached the Supreme Court, that Court reversed, holding that the statutes were not subject to facial challenge on behalf of plaintiffs that had not attempted to qualify to obtain the documents and therefore been denied access. The Court held that for the purpose of facial analysis "what we have before is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment. Cf., *Houchins v. KQED, Inc.*, 438 U.S.1 (1978)." More importantly, four justices indicated in concurrence their view that the statute was a constitutional restriction on information in the possession of the government, while only two indicated a view that the statute was facially unconstitutional.

Given the more convincing rationale used by the Tenth Circuit in *Lanphere* and the fact that four justices on the Supreme Court expressed the view that the statute is constitutional even though that issue was not reached by the full court, it is my view that the restrictions imposed by House Bill 931 are constitutionally defensible.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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