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May 1, 2006

The Honorable Robert L. Ehrlich
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: House Bill 1625 and Senate Bill 1040

Dear Governor Ehrlich:

We have reviewed House Bill 1625 and Senate Bill 1040, identical bills entitled "State Government - Public Records - Personal Information About Individuals with Disabilities," and approve them for constitutionality and legal sufficiency. We write to point out certain interpretive issues that the General Assembly may wish to clarify in future legislation.

House Bill 1625 and Senate Bill 1040 amend the Maryland Public Information Act ("PIA"), State Government Article ("SG"), §10-611 *et seq.*, to restrict the disclosure of certain categories of information about individuals who have a disability or who are "perceived to have a disability." The bills incorporate the definition of "disability" set forth in the State's anti-discrimination law relating to housing.¹ New SG §10-617(b)(1). The bills

¹ That statute defines "disability" as follows:

(k)(1) "Disability" means for an individual:

- (i) A disability that substantially limits 1 or more of an individual's major life activities;
- (ii) A record of having a disability that substantially limits 1 or more of an individual's major life activities; or
- (iii) Being regarded as having a disability that substantially limits 1 or more of an individual's major life activities.

The Honorable Robert L. Ehrlich, Jr.

May 1, 2006

Page 2

essentially create a new exemption for personal information related to such individuals and modifies existing exemptions that relate to medical information and information concerning individual licensees.

First, under the bills, a custodian of public records must deny inspection of any part of a record that contains "personal information" about an individual who has a disability or is perceived to have a disability. New SG §10-617(b)(2)(ii). The PIA defines "personal information" to include:

(1) "Personal information" means information that identifies an individual including an individual's address, driver's license number or any other identification number, medical or disability information, name, photograph or computer generated image, Social Security number, or telephone number.

(2) "Personal information" does not include an individual's driver's status, driving offenses, 5 digit zip code, or information on vehicular accidents.

SG §10-611(f).

The bills also provides that the existing PIA exemption relating to medical and psychological information, as well as the new exemption relating to personal information about individuals with a disability, do not apply to nursing homes or assisted living programs. New SG §10-617(b)(4). This provision could be interpreted in at least two ways. First, it could be interpreted to mean that public facilities that function as nursing homes or assisted living facilities do not have the benefit of those exemptions and thus could not assert those exemptions in response to a PIA request. On the other hand, it may be interpreted more narrowly to mean that a public agency that possesses medical information or personal information derived from nursing homes or assisted living facilities may not assert those

(2) "Disability" does not include current illegal use of or addiction to:

(i) A controlled dangerous substance defined in §5-101 of the Criminal Law Article; or

(ii) A controlled substance defined in §102 of the Federal Controlled Substances Act (21 U.S.C. 802).

Annotated Code of Maryland, Article 49B, §20(k).

exemptions in response to a PIA request.² In our view, the narrower construction should be adopted as it appears that this provision was designed to carve out a limited exception to a bill otherwise intended to enhance the privacy of individuals with disabilities.³ The General Assembly may wish to consider clarifying the scope and application of this provision.

The second aspect of the bills concerns an exemption that relates to certain types of licensing records. Currently, the PIA generally prohibits a custodian from disclosing records that contain “information about the licensing of an individual in an occupation or profession.” SG §10-617(h). Examples of such licensing records include those related to investment advisers, architects, nurses, and other occupations and professions. However, that exemption is subject to certain qualifications. A custodian is to permit inspection of certain basic information about the individual licensee – name, business address (or home address, if no business address is available), business telephone number, educational and occupational background of the licensee, professional qualifications, disciplinary orders, and evidence provided to the licensing agency to meet financial responsibility requirements. SG §10-617(h)(2). A custodian may permit inspection of other information about licensees if it finds a “compelling public purpose” and incorporates that determination in its regulations. SG §10-617(h)(3). Finally, a “person in interest” – usually the licensee himself or herself – is generally entitled to inspect his or her own licensing records. SG §10-617(h)(4).

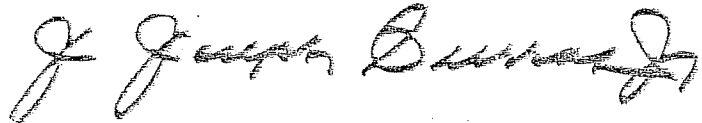
² It is not completely clear that the nursing home exemption was intended to reach medical and psychological information, or whether this was a drafting error. This change is not included in the title of the bill. In any event, some records in these categories may remain confidential under other laws. For example, if the Office of Health Care Quality were to obtain copies of medical records relating to residents of a nursing home during an inspection, those records could not be disclosed to the general public in response to a PIA request, even if the medical information exemption in the PIA no longer covered such records. Another PIA exemption, SG § 10-615(1), requires a custodian of records to deny inspection of a record if the record is made confidential by another law, as is largely the case for medical records. *See, e.g.*, Health-General Article, §4-301 *et seq.* (Maryland Confidentiality of Medical Records Act); 45 C.F.R. § 164.500 *et seq.* (Regulations issued under the federal Health Insurance Portability and Accountability Act of 1996).

³The sponsor of House Bill 1625 testified that these bills were intended to restrict disclosure of addresses of community residences and group homes funded by the Developmental Disabilities Administration and Mental Hygiene Administration. *See* Testimony of the Honorable James W. Hubbard concerning House Bill 1625 before Health and Government Operations Committee (March 22, 2006).

The Honorable Robert L. Ehrlich, Jr.
May 1, 2006
Page 4

These bills limit the information that would normally be available about the home address of the licensee if there is information in that record that indicates that the address is also the home address of an individual with a disability. New SG §10-617(h)(2)(ii). On its face, this provision appears to apply to situations where the licensee or members of the licensee's household have a disability and that fact is reflected in the licensing records. The amendment of SG §10-617(h)(2)(ii) might be read to also apply to instances in which the *business address* of the licensee is the home address of an individual with a disability. However, the title of the bills describes this portion of the bills as "requiring certain custodians of public records to permit the inspection of the part of a public record that gives the *home address of a certain licensee* after the custodian redacts certain information from the record under certain circumstances." (Emphasis added). The title of the bills thus appears to limit the reach of the amendment to the home address of the licensee. The General Assembly may wish to consider whether to clarify this provision in the future as well.

Very truly yours,



J. Joseph Curran, Jr.
Attorney General

JJC,Jr./RNM/kmr
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cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable James W. Hubbard
The Honorable Nathaniel Exum