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# THE ATTORNEY GENERAL OF MARYLAND
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May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

***Re: House Bill 1409***

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, House Bill 1409, "Insurance - Fraud - Intentional Motor Vehicle Accidents, Creation of Documentation of Motor Vehicle Accidents, and Reports." In reviewing the bill, we have concluded that it does not present a facial violation of the First Amendment.

House Bill 1409 relates to the prevention of insurance fraud. It provides that it is a fraudulent insurance act for a person to organize, plan or knowingly participate in an intentional motor vehicle accident or a scheme to create documentation of a motor vehicle accident that did not occur, with the purpose of submitting a claim under a policy of motor vehicle insurance. The bill further places limitations on access to a report compiled by a law enforcement agency concerning a motor vehicle accident. Specifically, for the 60 days following the filing of the report, access is limited to the individuals involved in the motor vehicle accident, the legal representatives of individuals involved in the motor vehicle accident, the insurers of individuals involved in the motor vehicle accident, a State's Attorney or other prosecutor, a representative of a victim's services organization, an employee of a radio or television station licensed by the Federal Communications Commission, an employee of a newspaper, and a unit of local, State, or federal government that is otherwise authorized to have access to a report in furtherance of the unit's duties. A person who is granted access under these provisions must present a valid driver's license or other State-issued identification card, prove that the person is authorized to access the report, and present a statement that, during the 60 days that

access to the report is restricted, the person will not use the report for commercial solicitation of an individual listed in the report and will not knowingly disclose the information in the report to a third party for commercial solicitation of an individual listed in the report. The bill further specifies that it "does not prohibit the dissemination or publication of news to the general public by any legitimate media entitle to access reports." A person who obtains a report in violation of the bill is guilty of a felony and subject to a fine not exceeding $10,000 and imprisonment not to exceed 15 years or both. An officer of a law enforcement agency who knowingly discloses a report to a person who is not entitled to access the report is guilty of a felony and is subject to a fine of up to $10,000 or imprisonment not exceeding 15 years or both. No penalty is provided for a person who uses a report for commercial purposes, or for a person who is not an officer of a law enforcement agency who discloses information in the report to a third person for the purposes of commercial solicitation.

The bill defines the term "newspaper" to include a newspaper of general circulation that is published at least once a week, includes stories of general interest to the public, and is used primarily for the dissemination of news. It further states that "newspaper" does not include a publication that is intended primarily for members of a particular profession or occupational group, with the primary purpose of advertising, or with the primary purpose of publishing names and other personal identifying information regarding parties to a motor vehicle accident.

This portion of the bill, including the definition of newspaper, comes from a proposed amendment to the Automobile Insurance Fraud Model Act, which already places a 60 day limitation on the availability of accident reports. The amendment proposes a new Section 5C, the draft of which, dated February 28, 2007, provides:

> Motor vehicle accident or crash reports, held by any law enforcement, state or local agency ... may be made immediately available to the parties involved in the crash, their legal representatives, their licensed insurance agents, their insurers or insurers to which they have applied for coverage, persons under contract with such insurers to provide claims or underwriting information, prosecutorial authorities, state licensed or state authorized victim services programs, radio and television stations licensed by the Federal Communications Commission, newspapers qualified to publish legal notices under applicable state law published once a week or more often, available and of interest the public generally for the dissemination of news. For the purposes of this section, the following

> products or publications are not newspapers as referred to in this section: those intended primarily for members of a particular profession or occupational group; those with the primary purpose of distributing advertising; and those with the primary purpose of publishing names and other personal identifying information concerning parties to motor vehicle crashes.

Many cases have addressed the constitutionality of limits on access to information designed to prevent its use for commercial purposes. In *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Supreme Court addressed a constitutional challenge to a California statute that required a law enforcement agency to restrict access to the names and addresses of persons arrested by the agency and the names and addresses of victims of crimes. California Government Code § 6254(f)(3). The statute required the requester to declare under penalty of perjury that the request was made for a scholarly, journalistic, political or governmental purpose, or that the request was made for investigative purposes by a licensed private investigator. The statute further stated that information obtained under the provision could not be used, or furnished to a third person, to sell a product or a service to any person, and required a declaration to that effect to be made under penalty of perjury.

In the decision of the Court, Justice Rehnquist held, joined by six other justices, held that the statute was not subject to facial challenge. The Court accepted the State's characterization of the statute as "a law regulating access to information in the hands of the police department," and noted that the State "could decide not to give out arrestee information at all without violating the First Amendment." *Id*. at 40. Thus, where plaintiff had not attempted to qualify for access to the information, and was not subject to threat of prosecution, cutoff of funds, or other harm, the Court took the view that a facial challenge was not viable.

While the decision of the Court leaves open the possibility that an as applied challenge to the statute could be successful, the concurring opinions give some reason to believe that an as applied challenge would also face significant hurdles. Justice Ginsburg, joined by three other justices, suggested that a limitation of this sort is legitimate so long as the determination of who gets access was not based on some illegitimate factor, such as persons whose political views agreed with the party in power, and described the statute as placing no prohibition on the use of the information to speak to or about arrestees. They also noted that, as a practical matter, a constitutional interpretation allowing selective disclosure made it less likely that a state would choose to allow no disclosure at all.

Justice Scalia, joined by Justice Thomas, disagreed that the statute was necessarily immune from an as applied challenge, but did not address the issue on the merits. Only two justices would have found the statute facially unconstitutional, stating that while the State could refuse access altogether or allow access to a limited group of users with a special and legitimate need for the information, where it allowed access to most and denied it to a small group it would constitute "unconstitutional discrimination."

Following the decision in *Los Angeles Police Department*, the Supreme Court summarily vacated a decision that had found a Kentucky statute restricting access to accident reports to be invalid. *Amelkin v. McClure,* 528 U.S. 1059 (1999). That statute, Ky.Rev.Stat.Ann. § 189.635, made accident reports confidential except when produced pursuant to a subpoena or court order, to the parties to the accident, to the parents or guardians of a minor who was a party to the accident, and to the insurers and attorneys of the parties to the accident. The statute also permitted the report to be made available to a news-gathering organization "solely for the purpose of publishing or broadcasting the news." On remand, the Sixth Circuit upheld the statute as applied to chiropractors and lawyers seeking access for purposes of solicitation. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003), *cert. denied*, 540 U.S. 1050 (2004). The Court found that the statute, "insofar as it applies to the plaintiffs, does not restrict or even regulate expression. Rather, it simply restricts *access* to confidential information possessed by the government." *Id.* at 827. Deciding that the statute did not violate the First Amendment, the Court ultimately applied rational basis scrutiny under the Equal Protection Clause, holding that the provision was rationally related to the State's interest in protecting the privacy of accident victims.

In *Spottsville v Barnes*, 135 F.Supp.2d 1316 (N.D.Ga. 2001) *affirmed* 2002 WL 369911 (11th Cir. 2002) a federal district court upheld a Georgia statute, Ga.Code Ann. § 50-18-72(4.1) which restricted access to motor vehicle accident reports to a person whose name or identifying information appears in the report, an attorney or representative of that person, or a person who could show that he or she has a personal, professional or business connection with a person in the accident, own or lease an interest in property alleged to have been damaged in the accident, was injured in the accident, was a witness to the accident, is the insurer of a party to the accident, is a prosecutor or a publicly employed law enforcement officer, is alleged to be liable to another party as a result of the accident, is an attorney who needs the report for an investigation of a criminal matter or of a potential claim that the roadway, railroad crossing or intersection is unsafe, is gathering information as a representative of a news media organization, or is conducting research in the public interest for such purposes as accident prevention, prevention of injuries or

damages in accidents, or other similar purposes.

The Court held that the Act is "at most nothing more than a governmental denial of access to information." *Id.* at 1322. As a result, the Court found that the statute did not implicate First Amendment rights, and that a "private investigator seeking information for commercial solicitation has no First Amendment constitutional right of special access to motor vehicle accident reports." *Id.* at 1323. Some cases decided prior to the decision in *Los Angeles Police Department* had reached similar conclusions. *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994) (Barring access to criminal justice files where access sought for purpose of soliciting business for pecuniary gain); *DeSalvo v. Louisiana*, 624 So.2d 897 (1993), *cert. denied*, 510 U.S. 1117 (1994) (Prohibition on disclosure of accident records to any other than a party the press and certain contractors).

House Bill 1409 is significantly similar to the provisions of the California law that were held not to be susceptible to facial challenge in the *Los Angeles Police Department* case. It bars access except to certain persons for certain purposes, and requires a statement that the material will not be used for solicitation or provided to others for that purpose. Thus, it is our view that this provision, like the one involved in *Los Angeles Police Department*, is not susceptible to facial challenge. It is also our view that the law could be upheld in many of its possible applications. We note, however, that the definition of newspaper in the bill would prevent the Maryland Bar Journal from obtaining access to an accident report for the purpose of preparing an obituary concerning the death of a member. This type of application could lead to a successful challenge to particular applications of the statute, but would not render it facially invalid.

Moreover, it is our view that the definition of "newspaper" is not irrational in light of the interest in preserving the availability of this information for publications that are focused on the dissemination of timely news. *Cf. Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967) (Drawing distinction in level of care required for publication of "hot news."). Therefore, it is our view that the bill may be signed into law.[1]

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[1] In *Ficker v. Utz*, Civil Action No. WN-92-1466 (D.Md. September 30, 1992), Judge Nickerson granted a preliminary injunction against enforcement of State Government Article § 10-616(h), which then required a custodian to deny inspection of a record relating to police reports of traffic accidents and traffic citations filed in the Maryland Automated Traffic System to any attorney who was not the attorney of record of a person named in the record or a person employed by, retained by, associated with, or

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Dereck Davis

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acting on behalf of an attorney who is not an attorney of record, if the purpose of the request was to solicit or market legal services. The State did not appeal from this decision. It is our view that the decision in *Ficker v. Utz* does not indicate that the provisions of House Bill 1409 must be found invalid as the section in that case worked a much more focused discrimination against specific commercial speech than is the case here. However, we also note that the subsequent cases raise significant questions about the continued viability of the decision in *Ficker v. Utz*.