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May 2, 2008

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

RE: Senate Bill 796 and House Bill 488

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency Senate Bill 796 and House Bill 488. While the bills are both entitled "Motor Vehicle Accident Reports - Access," and the third reader versions were identical, a change in the enrolled version of House Bill 488 makes them substantially different. While we approve both bills, it is our view that Senate Bill 796 is more likely to survive constitutional challenge.

Senate Bill 796 amends Business Occupations and Professions Article § 10-604 to provide that a person who does not have an existing relationship or interest in an issue "may not, for personal gain, access [an accident] report for the purpose of soliciting another person to sue or to retain a lawyer to represent the other person." House Bill 488 contains a similar provision, but provides that the restriction does not apply to a person who is a lawyer.

In a letter to The Honorable Brian Frosh on an earlier version of House Bill 488,¹ this office noted that the Supreme Court had found that a statute restricting access to public records for commercial purposes was not subject to facial challenge where the 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. *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999). Since that decision, other courts have upheld similar statutes against both First Amendment and Equal Protection challenges. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003), *cert. denied* 540 U.S. 1050 (2004); *Spottsville v. Barnes*, 135 F.Supp.2d 1316 (N.D.Ga. 2001), *affirmed* 2002 WL 369911 (11th Cir. 2002). The letter further noted, however, that the bill worked differently than the statutes that had been upheld in the *Los Angeles Police Department* case. That is because House Bill 488 did not generally prohibit access to records except in limited instances, but instead permitted access to records except for a specific use. Our analysis concluded that despite

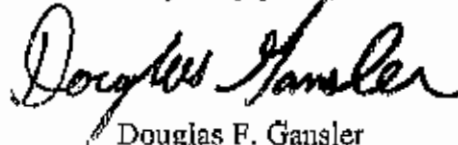
¹ At that time, House Bill 488 and Senate Bill 796 were identical and applied to any person, including a lawyer.

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this difference, the bill should survive constitutional challenge because "the restriction of access for the purpose of soliciting a person to sue or to hire an attorney is not an 'illegitimate factor,' but one that is directly related to the State interests" in the protection of privacy, and "lessening the danger of solicitor abuse and relatedly, maintaining public confidence in our system of justice." Letter of Advice to the Honorable Brian E. Frosh from Kathryn M. Rowe, Assistant Attorney General, April 1, 2008 citing *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994).

This continues to be our view. House Bill 488 was amended, however, and now effectively permits attorneys to use information in accident reports to solicit people to sue or to hire an attorney. It would also permit a business to hire attorneys to access accident reports in order to create lists to sell to other attorneys. Thus, House Bill 488 would be significantly less effective at protecting privacy and lessening the danger of solicitor abuse than would Senate Bill 796, which bars access for this purpose by any person, including a lawyer. As a result, it is our view that House Bill 488 would be more vulnerable to legal challenge by a non-lawyer who is in the business of collecting information in accident reports for sale to attorneys, and would be more difficult to defend against such a challenge than would Senate Bill 796. It is for this reason that we advise that you sign Senate Bill 796 in preference to House Bill 488, or if both bills are signed, that you sign Senate Bill 796 after House Bill 488.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John C. Astle
The Honorable Dereck E. Davis
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro