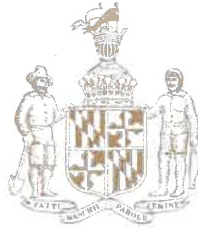


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February 3, 2020

The Honorable Alonzo T. Washington  
Maryland General Assembly  
131 House Office Bldg.  
Annapolis, MD 21401

**Re: House Bill 376 – Election Law - Campaign Finance – Protection of Contributor Information**

Dear Delegate Washington:

You asked for advice about House Bill 376. You asked whether the bill is, as one opponent claims, “unconstitutional on its face.” As explained below, it is my view that the bill does not violate the First Amendment.

House Bill 376 proposes to add to the State’s Election Law:

(a) A person may not use any contributor information from any report or statement required under this title for commercial solicitation purposes.

(b) A person may not publish any contributor information from any report or statement required under this title in newspapers, magazines, books, or other similar media for the purpose of facilitating commercial solicitation.

Similarly, federal law directs the Federal Election Commission (“FEC”) to

within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, *except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using*

*the name and address of any political committee to solicit contributions from such committee.*

52 U.S.C. § 30111(a)(4) (emphasis added).

The FEC's implementing regulations further provide:

(a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committee.

(b) For purposes of 11 CFR 104.15, soliciting contributions includes soliciting any type of contribution or donation, such as political or charitable contributions.

(c) The use of information, which is copied or otherwise obtained from reports filed under 11 CFR part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.

11 CFR 104.15.

The federal statute has been upheld against a facial challenge based on the First Amendment. The Court of Appeals for the D.C. Circuit applied intermediate scrutiny when analyzing whether the statute violated the First Amendment. "Under this standard, the statute survives constitutional challenge if the restriction further[s] an important or substantial government interest unrelated to the suppression of expression and [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Federal Election Com'n v. Int'l Funding Inst., Inc.*, 969 F.2d 1110, 1114 (D.C. Cir. 1992) (citations omitted). The court identified the important government interests served, in light of the compelled disclosure of contributor information, as protecting political committees' intellectual property and preserving the level of political discourse. *Id.* at 1116. As another federal court later described it,

[the ban on use of contributor information for commercial solicitation]  
was enacted as a means to encourage citizens to participate in electoral

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campaigns by assuring them that the disclosure required by [federal campaign disclosure law] of their identities, addresses, contributions, and employers would not result in the addition of their names to lists that could be used for solicitation or exploited commercially. Simply put, the prohibition on list-selling and solicitation contained in the statute (and implemented through the FEC regulation) furthers substantial government interest unrelated to the suppression of expression.

*Federal Election Com'n v. Legi-Tech Inc.*, 967 F. Supp. 523, 533 (D.D.C. 1997).

The court in *Legi-Tech* also rejected that the FEC was suppressing truthful information. "The fact that [the defendant] is not allowed to do all that it wishes in connection with that information, does not make the statute constitutionally infirm." *Id.* at 534. *Accord Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (holding that there is no First Amendment right to copy recordings of criminal trials for broadcasting and sale).<sup>1</sup>

In light of the foregoing, it is my view that House Bill 376 does not violate the First Amendment on its face.

Sincerely,



Sandra Benson Brantley  
Counsel to the General Assembly

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<sup>1</sup> An opponent of the crossfile, Senate Bill 129, relied on the Supreme Court's decision in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) to argue the bill would violate the First Amendment. That case involved a newspaper who lawfully obtained the name of a rape victim and published it. State law prohibited the release of victim names but the police department inadvertently included the name on its publicly released incident report. The Court held that the information was truthful and lawfully obtained, thus the newspaper could not be held liable for publishing the name. The Court, however, left open the possibility that privacy interests could outweigh any First Amendment interests.