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TO: The Honorable Melony Griffith, Chair
Finance Committee

FROM: Hanna Abrams, Assistant Attorney General

RE: Senate Bill 698 – Consumer Protection – Online and Biometric Data
Privacy (SUPPORT)

The Consumer Protection Division of the Office of the Attorney General supports Senate Bill 698 (“SB 698”), sponsored by Senator Augustine. Senate Bill 698 provides Marylanders with control over who can collect, share, and use their personal information and information collected based on their online activities and behaviors.

The issues surrounding the use of personal data reach well beyond traditional notions of privacy – to issues like discrimination, algorithmic fairness, and accountability.¹ Right now, companies are collecting and selling increasing amounts of sensitive information about our lives without our knowledge or consent. Unlike consumers in California, Colorado, Connecticut, or even Europe, Maryland consumers have no way of knowing when this occurs and no ability to protect themselves. Businesses have previously raised concerns about interoperability and implementation challenges. Senate Bill 698 ensures that Maryland consumers have privacy rights while simultaneously ensuring interoperability with the privacy laws that have been enacted in Connecticut, Colorado and other states.

Companies are collecting information that gives strangers personal information about us including mental health, gender, religious beliefs, sexual preferences, and even our precise locations. The adtech industry regularly collects, shares, sells, and processes consumer data. At least 70% of mobile apps share data with third parties, and 15% of the apps reviewed were connected to *five or more* trackers.² For example, digital health companies and mobile apps

¹ See *Algorithmic Bias Detection and Mitigation* (Brookings, May 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>

² Lee Matthews, *70% Of Mobile Apps Share Your Data with Third Parties*, Forbes, (June 13, 2017), <https://www.forbes.com/sites/leemathews/2017/06/13/70-percent-of-mobile-apps-share-your-data-with-third-parties/#562270ce1569>.

share user health data with third parties for advertising purposes.³ The extraction of personal information, particularly because it is done frequently without consumer knowledge, poses a significant threat to both our privacy and our safety.

Once collected, this sensitive information is frequently sold to third parties with whom consumers have no relationship. Recently, a Duke University study found that data brokers were selling everything from a list of individuals suffering from anxiety to a spreadsheet entitled “Consumers with Clinical Depression in the United States.”⁴

There are real consequences to the collection of information. Personal information, collected and shared without consumer knowledge, has caused the loss of jobs⁵ and has led to threats to personal safety.⁶ The personal information collected also feeds into algorithms used for advertising and eligibility decisions that frequently produce discriminatory outcomes and restrict access to housing,⁷ employment,⁸ credit,⁹ and education.¹⁰

Senate Bill 698 provides individuals with some transparency into and control over how their data is used. This transparency, coupled with giving users the ability to access, correct, or delete their data, empowers individuals to protect themselves. They can reduce their data footprint, or remove their data from insecure third parties, minimizing the risk of fraud, identify theft, and exploitation.

We do, however, have concerns about the breadth of the exemptions in SB 698 that could serve to dilute the effect of the law, which we have shared with the sponsor. For example, page 11, lines 12 and 15-16, exempt “covered entities [and] business associates [under HIPAA]” and “an entity, or an affiliate of an entity, subject and in compliance with the federal Gramm-Leach-Bliley Act [GLBA]” respectively. While we acknowledge that there are other statutes that govern certain information, it is critical that sensitive information be governed by some form of privacy regulation. As drafted, SB 698 exempts *entities* that operate under the GLBA and

³ *FTC Enforcement Action to Bar GoodRx from Sharing Consumers’ Sensitive Health Info for Advertising* (Feb. 1, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising>.

⁴ Drew Harwell, *Now For Sale: Data on Your Mental Health*, Washington Post (Feb. 14, 2023), <https://www.washingtonpost.com/technology/2023/02/13/mental-health-data-brokers/>.

⁵ Molly Omstead, *A Prominent Priest Was Outed for Using Grindr. Experts Say It’s a Warning Sign*, Slate (July 21, 2020), <https://slate.com/technology/2021/07/catholic-priest-grindr-data-privacy.html>.

⁶ See Technology Safety, *Data Privacy Day 2019: Location Data & Survivor Safety* (Jan. 28, 2019), <https://www.techsafety.org/blog/2019/1/30/data-privacy-day-2019-location-data-amp-survivor-safety>.

⁷ Julia Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users By Race*, ProPublica (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>.

⁸ Julia Angwin et al., *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. Times (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html>.

⁹ A Berkeley study found that biases in “algorithmic strategic pricing” have resulted in Black and Latino borrowers paying higher interest rates on home purchase and refinance loans as compared to White and Asian borrowers. This difference costs them \$250 million to \$500 million every year. Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Haas School of Business at the University of California, Berkeley, (Nov. 13, 2018), <http://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/>; Upturn, *Led Astray: Online Lead Generation and Payday Loans*, (Oct. 2015), <https://www.upturn.org/reports/2015/led-astray/>.

¹⁰ Yeshimabeit Millner and Amy Traub, *Data Capitalism and Algorithmic Racism, Data for Black Lives and Demos* (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf

HIPAA entirely, even if the personal information they collect is not governed by those laws. Advocates for financial institutions will claim that the industry is highly regulated and therefore they do not need additional privacy regulations, but financial institutions regularly collect information that is not governed by the GLBA. For example, when a financial institution collects information from non-customers or obtains information from a third-party or an affiliate outside of the context of providing a joint product or service, that personal information is not governed by federal privacy regulations.¹¹ Similarly, entities that provide healthcare services may be governed by HIPAA when providing those services, but may collect personal information that is not personal health information and therefore not regulated by HIPAA. To exempt these entities in their entirety would leave significant gaps in the privacy protections that SB 698 provides consumers. The Division believes it is important that personal information be governed by a privacy regulation, whether state or federal, and recommends that these exemptions be stricken and any carve-outs be limited to the *personal information* collected “pursuant and in accordance with” the applicable federal law.

We also have concerns about the exemptions to the definition of “targeted advertising” on page 10, lines 1-4, because they permit targeted advertising based on consumer activities on specific websites without a consumer request. Moreover, because the definition of “affiliate” includes all entities with common branding (page 3, line 9), the Division is concerned that large businesses with many affiliates will take this as permission to advertise about any of their affiliates without regard to whether the consumer has ever visited any of the affiliates’ websites.

Finally, we think it is important to ensure that definitions be consistent across related statutes. Maryland’s Personal Information Protection Act includes a definition of “personal information” that is similar, but not identical to the definition of “confidential data” in SB 698.

We also would like the Committee to consider whether lower thresholds might be appropriate in Maryland for example, in California, a much larger state, the threshold is lower: it is only 50,000 consumers, households, or devices.

Senate Bill 698 incorporates the separately introduced Biometric Data Privacy bill (SB 169) which ensures that immutable identity traits – biometrics – are not collected without consent and are never sold. Biometrics, because of their unchanging nature, make a person particularly vulnerable to identity theft and when stolen, cannot be altered like financial information. Companies’ unfettered collection of this information is a security threat and it is particularly important for companies to obtain consent and for consumers to be aware of which companies hold their biometrics. The Division previously submitted support for SB 169.

We urge the Finance Committee to issue a favorable report on SB 698.¹²

cc: Members, Finance Committee
The Honorable Malcolm Augustine

¹¹ 16 CFR § 313.1(b).

¹² The Division has been in contact with industry representatives and understands that a workgroup may be in the works to address the concerns of both consumers and industry. We have also been in contact with law enforcement agencies and have proposed language to avoid impacting their work pursuant to Title 17 of the Criminal Proc. Code.