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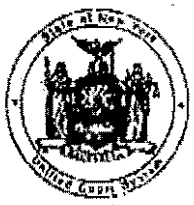

M E M O R A N D U M

March 22, 2007

TO: Judge Pfau

FROM: Michael Colodner

SUBJECT: Restrictions on use of Housing Court electronic database

We have been asked to discontinue selling our Housing Court electronic database to landlord-related groups that apparently are using the data to create a " blacklist" of tenants who have been involved in Housing Court litigation. The database is a record which is presently publicly accessible, for a fee, to any and all members of the public. At present, there is no statutory authority for our withholding access to that database from any particular public entity. Nor is there any existing statutory authority for our withholding access based upon the nature of the purpose for which access is sought.

A.

Preliminarily, we have to address whether OCA has any standing at all to assert a State interest in denying landlord-related groups access to its electronic database. As the custodian of public records, the Judiciary simply does not have any institutional role in discouraging or encouraging any particular use to which the public information contained in those records may be put. To restrict access because we wish to disfavor a particular group or discourage it from engaging in otherwise lawful activities would be inimical to the Judiciary's role as, in essence, a neutral stakeholder. The State, through the Legislature and Executive, may determine that a particular use of public information is harmful and against the public interest, and it is empowered to adopt a public policy against such use and devise a statutory remedy against that harm, subject of course to judicial review of the constitutionality of the measures it adopts. The assertion of a " State interest" is properly undertaken by the Legislature, which is the appropriate body to consider and make findings regarding the use of the electronic database, to examine the

nature and extent of the harm the use allegedly creates, and to promulgate an appropriately proportional response.

B.

As to the law governing this area, the leading case is Los Angeles Police Department v. United Reporting Publishing Corporation, 528 U.S. 32 (1999). That case involved a First Amendment challenge to a California statute that limited public access to the addresses of arrested persons only if the person requesting access qualified by declaring, under penalty of perjury, that the request was being made for one of five prescribed purposes (i.e., scholarly, journalistic, political, governmental or investigatory), and that the address would not be used directly or indirectly to sell a product or service. While the Supreme Court denied the constitutional challenge on procedural grounds (holding that the restriction was not subject to a facial constitutional challenge), the multiple opinions in that case provide some sense of how such questions are analyzed.

In United Reporting, the Supreme Court recognized that a State can constitutionally choose to restrict all access to certain government records, and that such denial of access to information in the government's possession is not an abridgement of speech, commercial or otherwise. If, however, the State chooses to make certain information available in a particular format, then limiting access based on the use to which certain persons intend to put it is clearly constitutionally problematic.

Justice Scalia, joined by Justice Thomas, suggested that such a limitation would properly be viewed as a limitation on speech itself, not just a limitation on access to government information, and would have to be " justified" by a substantial state interest. And Justice Ginsburg, joined by three other members of the majority, indicated that a constitutional line is definitely crossed if access to State information is determined based on whether the recipient agrees or disagrees with the reigning political party's political views. That is, consideration of the viewpoints of recipients is obviously an " illegitimate criterion" for deciding who has access to government information. 528 U.S. at 43. Finally, one other Justice joined in Justice Stevens' dissent, wherein he took the position that the Constitution is violated if the State makes information generally available but prohibits access to a small disfavored class or category of persons, based on their intended use of the information for a constitutionally protected purpose; he likened such a scheme to the "obviously unconstitutional" viewpoint discrimination that Justice Ginsburg condemned. These analyses put significant doubt on our ability to put restrictions on the uses to which our Housing Court database may be put.

A more recent treatment of the accessibility issue is found in Amelkin v. McClure, 330 F.3d 822 (6th Cir.), cert. denied, 540 U.S. 1050 (2003). That case concerned a Kentucky statute that restricted access to and dissemination of motor vehicle accident reports filed with the State Police. The statute sought to protect the privacy of accident victims by limiting access to the reports to the parties to the accident, and their parents, guardians, insurers, or attorneys. An exception permitted the release of the reports to news-gathering organizations solely for the purpose of publishing or broadcasting the news. (The statute specifically prohibited the media from using or distributing such reports, or knowingly allowing their use or distribution, for any commercial purpose other than publication or broadcast). A group of attorneys and chiropractors who were denied access challenged the statute as an impermissible restriction on commercial speech.

The Court looked to United Reporting for guidance in determining the constitutionality of a statute "that treats certain potential speakers more favorably than others." Id. Noting that a majority of the Justices in that case had made clear that a State could not condition release of information upon its feelings about the requestor's political viewpoint or affiliation, the Court observed that here the statute did not make disclosure of the accident reports dependent on the nature of the recipient's speech. Id. at 827-28. Nor did the statute make another distinction deemed constitutionally suspect in United Reporting: singling out a small group for unfavorable treatment based either on the content or the viewpoint of the group's speech.

> If, for example, the statute provided for the disclosure of accident reports to the general public, but prohibited their disclosure to attorneys and chiropractors, this principle would be implicated. See Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 731 (2d Cir. 1985) (holding a state statute unconstitutional that permitted the general public to access a state-maintained database of pending legislation, but denied such access to "those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature").

Id. at 828. The statute did not operate in this manner however, since the discrete group it identified (news organizations and those persons with a personal interest in the accident) was being allowed, not denied, access. Accordingly, the Court found nothing objectionable about the statute from a First Amendment perspective.

It appears clear that the Supreme Court would find constitutionally suspect an attempt to limit access to government information based on either the disfavored viewpoint, political affiliation or identity of the discrete group seeking it (landlord-related groups), or the disfavored but otherwise lawful uses to which such groups seek to put it. Any attempt to impose such restrictions likely would be subject to strict scrutiny and would require a demonstration that our rule was narrowly drawn to achieve a compelling state interest, the usual constitutional standard under which such State-imposed limitations are analyzed. See Turner Broadcasting System, Inc. v. F.C.C, 512 U.S. 622, 657-58 (1994); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). Notably, it might be difficult to assert the substantial state interest in maintaining privacy proffered in other access cases, as the information is otherwise available to the same disfavored group, albeit in a somewhat more difficult-to-obtain format.

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cc: Ron Younkins
John Sullivan