



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

April 18, 2000

The Honorable John D. Hawkins
Member, House of Representatives
314-A Blatt Building
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Representative Hawkins:

By your letter of April 17, 2000, you have asked for this Office's opinion as to the constitutionality of House Bill 4534, an act that would prohibit a public body from selling, providing or furnishing to a private person or entity a public record for use in a commercial solicitation. Due to the pressing and urgent nature of your request, I am constrained to answer your question as succinctly as possible though there are undoubtedly other cases which could be addressed by an opinion of this Office.

The bill bearing House Number 4534 would amend the 1976 Code of Laws by adding §30-4-170 which would provide as follows:

Without limiting the meaning of other sections of this chapter, a public body may not sell, provide, or furnish to a private person or entity a public record, for the use by that private person or entity for commercial solicitation which is directed to a resident of this State.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

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First, it is noteworthy that the prohibition contained in H.4534 is quite similar to language that is already present in the South Carolina Freedom of Information Act. In relevant part, §30-4-50(B) provides, “[n]o information contained in a police incident report or in an employee salary schedule revealed in response to a request pursuant to this chapter may be utilized for commercial solicitation.” In an Attorney General’s Opinion dated September 22, 1995, this Office found no constitutional issue with §30-4-50(B) and concluded that “[a]s ‘police incident reports’ fire incident reports would thus be subject to the prohibitions ... such that information contained therein may not be used for commercial solicitation.”

Furthermore, the case of Walker v. South Carolina Dept. of Highways and Public Transportation, 320 S.C. 496, 466 S.E.2d 346 (1995) supports the position that restrictions such as those found in H.4534 may be upheld since they do not restrict protected speech. In Walker, an attorney challenged the constitutionality of S.C. Code Ann. §56-5-1275, which prohibits the disclosure of motor vehicle accident reports if sought for commercial solicitation. In affirming the circuit court’s ruling, the South Carolina Supreme Court held that §56-5-1275 did not abridge the attorney’s commercial free-speech rights since the statute did not prohibit attorneys from making direct mailing or from learning the identities of accident victims in a variety of alternate ways. Similarly, H.4534 does not prohibit commercial free- speech, it merely restricts access to government information.

Finally, in the recent case of Los Angeles Police Dept. v. United Reporting Pub. Corp., 120 S.Ct. 483 (1999), the Supreme Court considered the constitutionality of a statute that prohibited the disclosure of arrestees’ addresses by law enforcement agencies to persons who intended to use the addresses to sell a product or service. The case was ultimately decided on procedural grounds, but six Justices in two concurring opinions stated the statute could be upheld on its merits because it served only “as a restriction on access to government information, not as a restriction on protected speech.” 120 S.Ct. At 490 (Ginsburg, J., concurring). See also, id. At 489 (“the fact that it is formally nothing but a restriction upon access to government information is determinative.”) (Scalia, J., concurring).

Based on the foregoing, it is this opinion of this Office that H.4534 limits access to government information, but does not abridge freedom of speech. Thus, it is entitled to at least a presumption of constitutionality, especially since similar restrictions have consistently been upheld on the merits.

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This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,

A handwritten signature in cursive script that reads "Zeb Williams".

Zeb C. Williams, III
Deputy Attorney General