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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 26, 2002

Ronald W. Urban, Chief Counsel for Revenue Litigation
Department of Revenue
Law and Compliance Division
P. O. Box 125
Columbia, South Carolina 29214

Dear Ron:

You have requested an opinion concerning applications of the newly-enacted Family Privacy Protection Act of 2002. By way of background, you provide the following information:

[s]ome of the information reported to the Department of Revenue does not come within the secrecy provisions of S.C. Code Ann. Section 12-54-240 (Supp. 2001). As a result, third parties have often used freedom of information requests to acquire such information for purposes of commercial solicitations.

The recent enactment of the Family Privacy Protection Act of 2002 now prohibits the release of certain personal information if such will be used for commercial solicitation purposes. Included within this prohibition are the home addresses of South Carolina citizens. The act, however, does not preclude the release of a citizen's business address.

The situation facing the Department is that some taxpayers report and use their home address as their business address. Moreover, there is often no way for the Department to determine when this has occurred. Accordingly, an opinion is sought as to whether the Department can release an address reported to it as a taxpayer's business address when there is the possibility such might also be the taxpayer's home address. The question assumes the address will be used for commercial solicitation purposes.

Law / Analysis

Act No. 225 of 2002 added to Title 30 of the Code "The Family Privacy Protection Act of 2002," codified at S.C. Code Ann., Section 30-2-10 et seq. The clear and overriding purpose of the Act is the protection of the citizen's personal privacy. In that regard, Section 30-2-20 provides that

[a]ll state agencies, boards, commissions, institutions, departments, and other entities, by whatever name known, must develop privacy policies and procedures to insure the collection of personal information pertaining to citizens of the State is limited to such personal information required by any such agency, board, commission, institution, department or other entity and necessary to fulfill a legitimate public purpose.

Moreover, Section 30-2-30 defines various terms as used in the Act, including the terms "personal information," "legitimate public purpose," "commercial solicitation," and "medical information." The term "personal information" is defined in § 30-2-30 (1) as

... information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number, medical or disability information, education level, financial status, bank account(s) number(s), account or identification number issued by and/or used by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports.

'Personal information' does not mean information about boating accidents, vehicular accidents, driving violations, boating violations or driver status.

Section 30-2-30(2) defines "legitimate public purpose" to mean "a purpose or use which falls clearly within the statutory charge or mandates of an agency, board, commission, institution, department or other state entity." (emphasis added).

The thrust of the Act is contained in Section 30-2-50. That Section states:

- (A) A person or private entity shall not knowingly obtain or use any personal information obtained from a public body for commercial solicitation directed to any person in this State.
- (B) Every public body shall provide a notice to all requestors of records under this chapter and all persons who obtain records under this chapter that

obtaining or using public records commercial solicitation directed to any person in this State is prohibited.

- (C) All state agencies shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.
- (D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and upon conviction must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both. (emphasis added).

The term "commercial solicitation" is defined by Section 30-2-30(3) as

... contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service. 'Commercial solicitation' does not include contact by whatever means for the purpose of:

- (a) offering membership in a credit union;
- (b) notification of continuing education opportunities sponsored by a not-for-profit professional associations;
- (c) selling or marketing banking, insurance, securities, commodities services provided by an institution or entity defined in or required to comply with the Federal Gramm-Leach-Bliley Financial Modernization Act, 113 Stat. 1338; or
- (d) contacting persons for political purposes using information on file with state or local voter registration offices.

Section 30-2-50(D) makes a violation of the Act a misdemeanor punishable by a fine of not more than \$500 or imprisonment not to exceed one year, or both.

Several principles of statutory construction are pertinent. First and foremost, the elementary and cardinal rule of statutory construction is to ascertain and effectuate the actual intent of the General Assembly. Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 415 S.E. 2d 634 (1992). A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. See, Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words used must be given their plain and ordinary meaning without resort to

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subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Chas., 295 S.C. 408, 368 S.E.2d 899 (1988).

In addition, a statute will be construed to avoid an absurd result. Any statute must be interpreted with common sense to avoid absurd consequences or unreasonable results. U.S. v. Rippetoe, 178 F.2d 735 (4th Cir. 1950). A sensible construction, rather than one which leads to irrational results, is always warranted. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Moreover, we must remain sensitive to the requirements of disclosure contained in the Freedom of Information Act. See, § 30-4-10 et seq. Accordingly, there must be a balance between the competing interests of disclosure and the protection of personal privacy – weighing the individual's right to protection of privacy against the public's disclosure of government information. Cochran v. U.S., 770 F.2d 949 (11th Cir. 1985). Our Supreme Court has held that the protection of citizen's privacy from using records for commercial solicitation is a reasonable governmental interest. Walker v. S.C. Dept. of Highways and Public Transportation, 320 S.C. 496, 466 S.E.2d 346 (1996). On the other hand, courts will carefully scrutinize legislation which bans the use of public information for commercial solicitation because of the First Amendment interests which are affected thereby. See, Speer v. Miller and Bowers, 864 F.Supp. 1294 (N.D. Ga. 1994); State v. Casino Mktg. Group, Inc., 491 N.W.2d 882 (Minn. 1992); Tenn. Op. Atty. Gen., No. 98-091 (April 15, 1998).

The question of whether the release of a citizen's home address might constitute an unreasonable invasion of privacy has not been definitively resolved in South Carolina prior to passage of the Family Privacy Act of 2002. Typically, over the years, this Office has concluded that a person's home address is public information because such information is readily available through other sources such as the telephone book or City Directory. In an opinion dated July 16, 1987, for example, we stated that the release of home addresses would generally not constitute an unreasonable invasion of personal privacy inasmuch as "[r]esidence addresses and telephone numbers have been deemed disclosable since the same are often ascertainable by reference to many publicly attainable books and records." See, Michigan State Employees Assn. v. Dept. of Management and Budget, 135 Mich. App. 248, 353 N.W.2d 496 (1984); Hechler v. Casey, 333 S.E.2d 799 (W.Va. 1985); Op. Atty. Gen., October 2, 2000 [customer home addresses for Seneca Light and Water Company]. Our 1987 opinion cautioned, however, that "if an individual has an unlisted or unpublished telephone number or there are reasons such as the need for security which mandate personal privacy, such a release could constitute an unreasonable invasion of personal privacy. Thus, a determination as to disclosure must be made on a case-by-case basis. ..."

Other courts have reached a contrary conclusion, holding that the disclosure of a person's home address is *per se* an unreasonable invasion of privacy. In Wine Hobby U.S.A., Inc. v. U.S.

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Internal Revenue Service, 502 F.2d 133 (3d Cir. 1974), for example, the Court observed that "there are few things which pertain to an individual in which his privacy has traditionally been more respected than his home." 502 F.2d at 136. The Court, in concluding that the release of home addresses constitutes an invasion of privacy, went on to add:

[d]isclosure of the requested lists would involve a release of each registrant's home address, information that the individual may fervently wish to remain confidential or only selectively released One consequence of this disclosure is that a registrant will be subject to unsolicited and possibly unwanted mail from Wine Hobby and perhaps offensive mail from others.

502 F.2d at 137.

In that same regard, courts have carefully distinguished between the lack of a privacy interest triggered by disclosure of a business address and a person's privacy in providing a home address. In American Broadcasting Companies, Inc. v. Siebert, 110 Misc.2d 744, 442 N.Y.S.2d 855 (1981), the Court recognized such distinction by holding that:

Under FOIL [Freedom of Information Law], the public has a right of access to the names and business addresses of principals of applicants for license to operate a check cashing business, which seeks public patronage. ... However, disclosure of their home or residence addresses could, in the nature of the business they conduct, expose applicants and their families to danger to life or safety and should be withheld.

442 N.Y.S.2d at 859.

Turning now to the express language of the newly-enacted Family Privacy Protection Act of 2002, the definition of "personal information" contained in § 30-2-30(1), expressly includes "home addresses" therein. Thus, the Act prohibits the disclosure of "home addresses" where such are obtained or used for commercial solicitation. State agencies are required to "take reasonable measures to ensure that no person or private entity obtains or distributes" such addresses for commercial solicitation. As you indicate, business addresses are not included in the definition of "personal information."

You note also that the home address, in some instances, serves as a person's business or commercial address. Thus, the question here is whether, in such cases, the Family Privacy Protection Act of 2002 continues to apply. In other words, are those home addresses which also function as business addresses protected information under the Act?

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It could be argued, of course, that once a person establishes his or her home address as their business address, such information could not, under any reasonable analysis, continue to be "personal information." If an individual opens up his home to the commercial world, there is no protected privacy interest, in other words.

One example of a court's reasoning along these lines is found in the case of Lorig v. Medical Board, 78 Cal.App.4th 462, 92 Cal.Reptr.2d 862 (2000). There, certain state-employed physicians and dentists used their home addresses as their "address of record" for purposes of medical licensure. Such addresses were posted on the California Medical Board's Internet Web site. California law makes the home addresses of state employees confidential. At the same time, however, California law also requires each physician licensed to practice in the State to file a current mailing address with the Medical Board. All business mail, including renewal notices and renewal licenses, is sent by the Board to that given address.

When the Medical Board announced its intention to post physicians' addresses of record on the Internet, the Board gave all doctors the opportunity to change that address in view of the fact that, theretofore, many physicians used their home address as their business address for purpose of meeting the Board's address of record requirement. Against this background, the Court rejected the physicians' argument that they maintained a substantial privacy interest in their home addresses. The Court reasoned that

[a]ppellants' argument under [the confidentiality statute] ... fails, however, because the Board is not proposing to disclose any physician's home address. The Board has long required physicians to maintain a current, accurate address of record for mailing from the Board and for disclosure to the public upon request. The required information is, in essence, a business address. Once a physician elects to designate a home address as his or her address of record, in full knowledge that it will be disclosed – whether in response to a telephonic address or an inquiry at the Board's Web site – the Board is justified in treating it as public record information.

92 Cal.Reptr. at 865-866.

You indicate in your letter that "some taxpayers report and use their home address as their business address" and that "there is often no way for the Department to determine when this has occurred." The General Assembly made no exception to the Privacy Act for those "home addresses," which are also used as business addresses. Moreover, the Act requires all state agencies to take "reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for personal solicitation." In our opinion, the Act does not require a state agency to attempt to determine which home addresses also function as business addresses. To the contrary, the law requires state agencies to use reasonable means to protect the

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privacy of all "home addresses" when such would be obtained for commercial solicitation purposes. Thus, for the Department of Revenue to treat all home addresses alike for purposes of commercial solicitation would, in our opinion, comport with the express language of the Family Privacy Protection Act of 2002.

In a similar situation, the Attorney General of Hawaii advised that a public body was not required to release home addresses which also served as business addresses. 1999 WL 33327214, Op. No. 99-6 (October 25, 1999). Previously, the Hawaii Attorney General had concluded that "home addresses carry significant privacy interests." No such protection was deemed to extend to commercial or business addresses, however. In the situation addressed by the 1999 Hawaii Attorney General's opinion, a database contained "mailing addresses" which included home addresses, business addresses or post office box numbers. The Attorney General concluded in that instance that the privacy interest in protecting home addresses outweighed the interest in disclosing those commercial addresses which also served as the individual's home address. Concluded the Hawaii Attorney General,

[t]he OIP has also opined that when "mailing" addresses cannot be differentiated from home addresses, mailing addresses should not be disclosed, in order to protect individual privacy interests Here, the Database contains a "mailing address" for each Senior. The OEA cannot determine from the Database whether an address given as a "mailing address" is also a "residence address" because only the mailing address is put in the Database. Therefore, based on our prior opinions, mailing addresses that cannot be distinguished from home addresses need not be disclosed. Mailing addresses that are clearly business addresses must be disclosed, as there is no significant privacy interest in business addresses.

Conclusion

The Family Privacy Protection Act of 2002 protects as personal information an individual's home address which is sought for commercial solicitation. The Act also requires all state agencies to take reasonable measures to ensure that no person or private entity obtains or distributes personal information, such as home addresses, for commercial solicitation. Thus, if the Department of Revenue cannot ascertain those situations in which the taxpayer uses his or her home address also as a business address, it is reasonable and in accord with the literal language of the Act for the Department not to disclose such home address where this information is sought for commercial solicitation. Indeed, such protection of the home address information would likely be deemed by a court as necessary to protect the citizen's privacy interest under the Privacy Protection Act.

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I understand that a number of amendments to the Family Privacy Protection Act may be proposed next session in order to clarify ambiguities. Clarification of this issue may need to be explored as part of these amendments.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'RDC', written over the printed name.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an