

1983 WL 181864 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 26, 1983

***1 SUBJECTS**

The provision in the recently passed bill authorizing the South Carolina Wildlife and Marine Resources Commission to sell the South Carolina Wildlife Magazine subscribers list, when it determines that such a sale would serve the best interests of the magazine and its lawful purposes, may violate Article I, Section 8 and [Article III, Section 1 of the South Carolina Constitution](#) in that it is an improper delegation of power. Furthermore in the administration of the power conferred by this provision, the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution may require the Commission to demonstrate that the refusal to sell the list to certain persons or parties is necessary to promote a compelling governmental interest.

The Honorable Richard W. Riley
Governor of South Carolina

QUESTION:

1. Does the provision in the recently passed bill authorizing the South Carolina Wildlife and Marine Resources Commission to sell the South Carolina Wildlife Magazine subscribers list, when it determines that such a sale would serve the best interest of the magazine and its lawful purposes, violate any provisions of the United States and South Carolina Constitutions?

STATUTES AND CASES:

First and Fourteenth Amendments, United States Constitution; Article I, Sections 3, 8, [Article III, § 1, South Carolina Constitution](#); [Massachusetts Board of Retirement v. Murgia](#), 427 U.S. 307 (1976); [Pell v. Procunier](#), 417 U.S. 817 (1974); [American Trust Company, Inc. v. South Carolina State Board of Bank Control](#), 381 F.Supp. 313 (C.S.C. 1974); [Quad-City Community News Service, Inc. v. Jebens](#), 334 F.Supp. 8 (S.D.Iowa 1971); [State ex rel McLeod v. Riley](#), 276 S.C. 323, 278 S.E.2d 612 (1981); [Marley v. Kirby](#), 271 S.C. 122, 245 S.E.2d 604 (1978); [Bauer v. South Carolina Housing Authority](#), 271 S.C. 219, 246 S.E.2d 869 (1978); [South Carolina State Highway Department v. Harbin](#), 226 S.C. 585, 86 S.E.2d 466 (1955).

DISCUSSION:

The bill you have inquired about provides as follows:

Notwithstanding any other provisions of law, the South Carolina Wildlife Magazine subscriber list is confidential and may be sold only as prescribed by the South Carolina Wildlife and Marine Resources Commission (the Commission) to protect the subscribers of the list.

Any South Carolina Wildlife Magazine subscriber not wishing his name disseminated must be provided a means of so indicating his preference.

Only purchases by those persons whom the Commission or its designated agent determines would serve the best interests of South Carolina Wildlife Magazine and its lawful purposes may be approved.

Each sale of subscriber list must be for a fee of not less than the fair market value of the list, and must be paid to South Carolina Wildlife Magazine for one-time-use only as set forth in an agreement signed by the list purchaser and the Commission or its designated agent.

*2 This Office cannot conclude that an act or bill is unconstitutional unless there is no reasonable doubt as to its invalidity. See, e.g., [State ex rel McLeod v. Riley](#), 276 S.C. 323, 278 S.E.2d 612, 615 (1981). Although our review and research has led us to conclude that these are two potential major constitutional defects with the bill referred by you, which are discussed hereinbelow, this Office has not resolved all reasonable doubts as to the invalidity of the bill and therefore, cannot conclude that it is unconstitutional.

In seeking to protect the confidentiality of subscribers to the South Carolina Wildlife Magazine, the bill has a proper legislative purpose, but potential defects arise when it vests the Wildlife and Marine Resources Commission with the power to sell the subscribers list when it determines that the sale to the purchaser 'would serve the best interest of the South Carolina Wildlife Magazine and its lawful purposes.' The potential constitutional defects concern whether in delegating this power to the Commission the bill sets forth the primary standards necessary to guide the Commission in accomplishing the purpose of the bill and whether the Commission in selecting to whom to sell the subscribers list will violate the constitutional provisions dealing with equal protection of the laws and freedom of speech and the press.

Article I, Section 8 and [Article III, Section 1 of the South Carolina Constitution](#) have been interpreted by our Supreme Court to require that in delegating powers to executive officials and agencies, the General Assembly must set forth, or reasonably imply, in their acts the primary standards and intelligible principles to which the officials and agencies must conform. [Bauer v. South Carolina Housing Authority](#), 271 S.C. 219, 246 S.E.2d 869 (1978); [South Carolina State Highway Department v. Harbin](#), 226 S.C. 585, 86 S.E.2d 466 (1955). It is difficult to find or reasonably infer the primary standards or the intelligible principles to which the Commission must conform in exercising the discretion given it by the bill. The bill does state that its purpose is to protect the confidentiality of subscribers to the South Carolina Wildlife Magazine, but it offers no other discernable standards or principles to guide the Commission in exercising its discretion to sell the subscribers list, except the broad statement that the sale should 'serve the best interests of the South Carolina Wildlife Magazine and its lawful purposes.' This Office through its research and review has not been able to define further what standards, if any, were intended or implied by this language.

While the Supreme Court has recognized that there is no fixed or precise formula for determining when a delegation of power by the General Assembly contains sufficient primary standards for its execution, it has struck down two provisions similar to the bill with respect to the discretion vested in the executive officials or agency. In [South Carolina State Highway Department v. Harbin](#), *supra*, the Court held unconstitutional a provision which authorized the Highway Department to revoke or suspend drivers licenses 'for cause satisfactory to it.' The Court in a 1981 recent decision, [State ex rel McLeod v. Riley](#), *supra*, struck down a provision which conferred certain discretion upon the Budget and Control Board with respect to a portion of a program for the development of alcohol fuels. In doing so, the Court noted that the provision placed

*3 an undefined discretion in the Board to set the direction and scope of the governmental loan program. Standing alone, the language in this portion of the act fails to state those primary standards necessary to accomplishing the stated purpose of the section. S.E.2d, 616.

The equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution require that the General Assembly in enacting laws and state officials and agencies in administering those laws must treat all persons alike 'under like circumstances and conditions, both in the privileges conferred and liabilities imposed.' [Marley v. Kirby](#), 271 S.C. 122, 245 S.E.2d 604, 605 (1978); [American Trust Company, Inc. v. South Carolina State Board of Bank Control](#), 381 F. Supp. 313, 324 (D.S.C. 1974). Where a law or administrative decision or action subjects persons or other parties to differential treatment so as to interfere with the fundamental rights of freedom of speech and the press guaranteed by the First Amendment, the differential treatment is subject to strict judicial scrutiny, and the state or agency must

demonstrate that the differential treatment is necessary to promote a compelling governmental interest. [Massachusetts Board of Retirement v. Murgia](#), 427 U.S. 307, 312-313, n. 3 (1976).

The Commission in choosing whom to sell and not to sell the subscribers list to will be conferring a benefit of access to governmental information upon some, while denying it to others. Although the public nor the press has a direct constitutional right of access to governmental information [[Pell v. Procunier](#), 417 U.S. 817, 833-834 (1974)], once a state or an agency thereof confers upon some a right of access to such information which may be used in the exercise of the freedom of speech or the press, it should not be able to deny the same access to others unless it demonstrates a compelling justification for the denial of access.¹ A situation like this was considered in [Quad-City Community News Service v. Jebeus](#), 334 F.Supp. 8 (S.D. Iowa 1971). In that case, a police department had engaged in the practice of allowing certain media representatives access to some of its records, while denying the same access to a certain 'underground' newspaper. The district court concluded that this practice served to penalize or restrain the exercise of a First Amendment right and thus had to be shown to be necessary to promote a compelling governmental interest. *Id.*, at 15. Because this could not be done, the challenged practice was enjoined as being violative of the equal protection clause of the Fourteenth Amendment. The broad discretionary power conferred upon the Commission by the bill referred by you places the Commission in a similar predicament.

CONCLUSION:

The provision in the recently passed bill authorizing the South Carolina Wildlife and Marine Resources Commission to sell the South Carolina Wildlife Magazine subscribers list, when it determines that such a sale would serve the best interests of the magazine and its lawful purposes, may on its face violate Article I, Section 8 and [Article III, Section 1 of the South Carolina Constitution](#) in that it is an improper delegation of power. Furthermore in the administration of the power conferred by this provision, the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution may require the Commission to demonstrate that the refusal to sell the list to certain persons or parties is necessary to promote a compelling governmental interest.

*4 James M. Holly
Assistant Attorney General

Footnotes

- 1 It should be noted that the United States Supreme Court recently has brought 'commercial speech' within the First Amendment so that it is protected from unwarranted government regulation. See, e.g., [General Hudson Gas and Electric Corporation v. Public Service Commission](#), 447 U.S. 557 (1980).

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