DRAFTER'S NOTE LRB–0997/1dn
FROM THE GM/RM/DK/PK/RK/ML/PD:cjs:pg
LEGISLATIVE REFERENCE BUREAU

April 19, 2001

Representative Schneider:

In reviewing this bill you will note that it makes certain changes to 1997 AB–796, which the bill incorporates, to bolster the constitutionality of the draft in the face of a likely challenge that the bill, if enacted, unconstitutionally impairs the freedom of commercial speech of a person who wishes to disclose or receive personally identifiable information for commercial purposes without the consent of the individual who is the subject of the information.

Commercial speech, that is, "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas v. Public Service Commission of N.Y.*, 100 S. Ct. 2343 (1980), is protected under the First Amendment to the U.S. Constitution because 1) the fact that the speaker's interest is purely economic does not disqualify the speaker from protection under the First Amendment; and 2) both the particular recipient of the commercial communication and society in general have a strong interest in the free flow of commercial information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817, 1826–27 (1976).

The U.S. Supreme Court has devised the following four–part analysis to determine whether a state action abridges a person's freedom of commercial speech:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."
>
> *Central Hudson* at p. 2351.

The first two parts of that analysis do not appear to be particularly troublesome. The disclosure of truthful information about an individual is a lawful activity; therefore, that disclosure appears to be protected by the First Amendment. On the other hand, the state appears to have a substantial interest in protecting the privacy of its citizens.

The third part of the *Central Hudson* analysis, that is, whether the regulation directly advances the governmental interest asserted, poses a problem for certain provisions of 1997 AB–796 that the bill incorporates, especially when read in light of a recent U.S.

Court of Appeals case, *United Reporting Publishing Corp. v. California Highway Patrol,* 146 F. 3d 1133 (9th Cir. 1998), which was recently reversed and remanded on other grounds by the U.S. Supreme Court in *Los Angeles Police Department v. United Reporting Publishing Corp.,* 120 S. Ct. 483 (1999). In *United Reporting,* the 9th Circuit held that a California law that prohibited law enforcement agencies from releasing the addresses of arrestees to entities with a commercial purpose, but which provided for numerous exceptions, including private investigators and entities with a scholarly, journalistic, political, or governmental purpose, did not directly advance the state's purported privacy interest and, therefore, violated the First Amendment. The 9th Circuit found that the numerous exceptions so undermined the state's purported privacy interest that the law did not rationally advance that interest.

Similarly, the definition of "commercial purpose" in this bill contains such broad exceptions that arguably the bill does not advance the state's privacy interest. Specifically, that definition excludes the gathering and reporting of news and the communication of information for any political, lobbying, charitable, or religious purpose. Given such broad exceptions, it does not advance the state's privacy interest to prohibit the disclosure without consent of personally identifiable information about a person for a commercial purpose, yet to allow that information to be disclosed without consent for those other broad purposes. Accordingly, this draft deletes the exceptions for the gathering and reporting of news and for the communication of information for political, lobbying, charitable, or religious purposes.

Moreover, the bill arguably does not directly advance the state's privacy interest due to the bill's anomalous dual system with respect to the disclosure of public records. Specifically, the state is prohibited from selling personally identifiable information for a commercial purpose without consent, yet is not prohibited from disclosing the very same information for the very same purpose under the open records law. Instead, the bill places the burden of obtaining consent for the commercial use or disclosure of personally identifiable information obtained under the open records law on the person obtaining the information. Given this anomaly, it does not advance the state's privacy interest to permit a requester to whom the state is prohibited from selling information for a commercial purpose to turn around and obtain the same information for the same purpose under the open records law. Accordingly, this draft permits the state to disclose personally identifiable information, whether under the open records law or a provision permitting the sale of information, but places the burden of obtaining permission for the commercial use or disclosure of that information on the person obtaining the information.

The bill arguably passes the fourth part of the *Central Hudson* analysis, that is, whether the regulation is not more extensive than necessary to serve the state's interest, because the regulation applies only to commercial speech and not to noncommercial speech, *so long as there is a logical privacy–based reason for making that distinction.* Specifically, in a previous drafter's note, 1997 LRB–3711/P1dn, I advised that in light of *Rowan v. U.S. Post Office Department,* 90 S. Ct. 1484 (1970), the bill might be found not to infringe on a commercial user's freedom of speech because under the bill it is not the state, but rather the individual, who is determining whether the information may be used or disclosed for a commercial purpose and, therefore, the

state is not infringing on the commercial user's freedom of speech. In *Rowan* the U.S. Supreme Court upheld the constitutionality of a statute that requires the U.S. Postal Service, on the request of an addressee who has received material that the addressee believes to be erotically arousing or sexually provocative, to order the sender to delete the addressee from the sender's mailing list. The Court so held on the grounds that under the statute it is the addressee, not the government, who is making the determination and, therefore, the government is not infringing the sender's freedom of speech.

In light of a recent U.S. Court of Appeals decision, *Pearson v. Edgar,* 153 F. 3d 397 (7th Cir. 1998), I now must advise that, notwithstanding *Rowan* and the fact that under the bill it is the individual and not the state who is determining what commercial uses are permissible, a court might hold that the bill, if enacted, infringes on a commercial user's freedom of speech if the court were to find no logical privacy–based reason for distinguishing in the draft between commercial and noncommercial use. Specifically, in *Pearson*, the 7th Circuit held that an Illinois statute barring real estate agents from soliciting homeowners who have given notice that they do not want to sell their homes is an invalid regulation of commercial speech in part because the statute distinguished between real estate solicitations and other solicitations without a logical privacy–based reason for making that distinction. In so holding, the 7th Circuit distinguished *Pearson* from *Rowan* in that in *Rowan* the addressee made the distinction between offensive and acceptable materials while in *Pearson* the government in the statute made the distinction between real estate solicitation and other solicitation. Similarly, in this bill, although it is the individual who determines what commercial uses are permissible, it is the state that is distinguishing between commercial uses, which the individual may prohibit, and noncommercial uses, which the individual may not prohibit. Accordingly, for this bill to pass muster in light of *Pearson* there must be a logical privacy–based reason for making that distinction between commercial and noncommercial use.

If you have any questions or would like to discuss this drafter's note, please do not hesitate to contact me directly at the e–mail address or telephone number listed below.

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The "invasion of privacy" provisions of this bill that are derived from 1997 AB–796 place burdens on commercial transactions that you may not intend. In many situations, it may be desirable for businesses to disclose personal information about an individual. For example, under current law, a financial institution often may sell portions of its loan portfolio to another financial institution. This type of transaction involves the transfer of numerous pieces of personal information regarding the various borrowers and guarantors and is definitely for a commercial purpose. This draft would

likely make this type of transaction an invasion of privacy, unless the financial institution obtained the consent of each borrower.

In addition, under current law, when a person with an account at financial institution A makes a withdrawal at an ATM operated by financial institution B, financial institution B transfers the transaction information to financial institution A to complete the transaction. This transfer of personal information is for a commercial purpose and may be an invasion of privacy under this draft.

These are only two examples of the burden this draft places on commercial transactions. If you do not intend to create this burden, please call so that I can get a better idea of your intent. Once I clarify what type of disclosure you intend to cover, I will be able to tailor the definition of "invasion of privacy" or "commercial purpose" accordingly.

As previously drafted, the "invasion of privacy" provisions likely would have prohibited certain disclosures by credit reporting agencies and disclosures to affiliates. This bill includes exceptions to permit these types of disclosures, to avoid preemption under the federal Fair Credit Reporting Act. This treatment is consistent with the treatment of the provisions on credit card disclosures derived from 1999 AB–101 (see discussion below). Please let me know if you do not intend to include these additional exceptions.

The "invasion of privacy" provisions raise two additional preemption issues. First, to the extent that they apply to financial institutions, the provisions may be preempted by the federal Gramm–Leach–Bliley Act. See 15 USC 6807 (a). Although this federal law permits states to regulate financial privacy of financial institution records, certain state regulations may be preempted to the extent that they improperly conflict with the federal law. A provision that affords any person greater protection than that provided under the federal law is not preempted. See 15 USC 6807 (b). This determination is made by the federal trade commission (FTC). It is unclear what standards the FTC will apply in making this determination.

Second, even if these provisions are not preempted, individuals may be prevented from enforcing them against federally chartered financial institutions. It is possible that the appropriate federal regulator of a federally chartered financial institution may have the sole authority to enforce these provisions against that institution. See *The National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980) (although the state anti–redlining law applied to national banks, the federal comptroller of the currency had sole authority to enforce the state law against national banks).

This bill contains a redraft of 1999 AB–101 (disclosures from credit card records), except that this bill permits disclosures by credit reporting agencies and disclosures to affiliates. These exceptions are necessary to avoid an argument that the provisions of this bill are preempted by the federal Fair Credit Reporting Act. Please let me know if you do not intend to include these additional exceptions. You may also want to include exceptions permitting disclosures to a law enforcement agency or governmental agency and disclosures pursuant to a court order.

To the extent that the provisions derived from 1999 AB–101 apply to banking institutions that issue credit cards, they may be preempted by the federal

Gramm–Leach–Bliley Act. See the discussion of 15 USC 6807 (a) above. Also, even if these provisions are not preempted, the department of justice may be prevented from enforcing them against federally chartered financial institutions. See the discussion of *The National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3rd Cir. 1980) above.

Please feel free to call if you have any suggested changes to the bill or would like to discuss any of these issues.

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Representative Schneider:

We have delayed the effective date for ss. 146.833, 610.75, and 632.75 (2) (d) (which prohibit the use by health care providers and insurers of social security numbers as patient identifiers) for six months, in order to provide time for health care providers and insurers such as health maintenance organizations to comply.

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Please note that the prohibition in this draft as it relates to receipts printed for credit card purchases made at a motor fuel pump also applies to debit card purchases. If this is not consistent with your intent, please let me know and I will redraft as required. Also, there is no penalty specified for a violation of s. 134.92, as created in this bill. Consequently, the general penalty provisions under s. 939.61, stats., will apply to a violation of s. 134.92. Under s. 939.61, stats., a person who violates s. 134.92, as created in this bill, will be subject to a forfeiture of up to $200. If you would like to create a different penalty or if you would like to create a private right of action, please contact me and I will redraft accordingly.

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Under this bill, the policy adopted by the educational institution follows the team. In other words, the institution's policy applies to its athletic teams regardless of whether they are playing at home or away. Please note, however, that if teams from different schools need to share a locker room, there may be conflicting policies, and the bill does not indicate which policy would be controlling.

If you wish, the bill could be reworked so that an institution's policy would apply to any locker room at the institution being used by a team representing the institution or by a team engaged in competition with that team. However, this may result in the absence of any policy being in effect under certain circumstances, such as when a high school team uses a university's facilities.

If you have questions or need more information, please let me know.

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This bill contains 1999 AB–23 updated. Does the initial applicability section meet your intent? 1999 AB–23 provided that the act first applied to bills introduced in the 2001–03 legislative session.

The language of proposed s. 13.0991 (7) to the effect that a bill for which a privacy impact statement is required or requested may not be heard or reported by a standing committee to which the bill is referred until the statement is received creates a rule of procedure under article IV, section 8, of the constitution. The supreme court has held that the remedy for noncompliance with this type of provision lies exclusively within the legislative branch. See *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 363–369 (1983). In other words, while this type of provision may be effective to govern internal legislative procedure, the courts will not enforce this type of provision and it does not affect the validity of any enactment resulting from a procedure that may be viewed as contravening the provision.

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