



Elsevier
LexisNexis
Reed Business

October 8, 2009

The Honorable Larry Bliss
The Honorable Charles Priest
Joint Standing Committee on the Judiciary
c/o OPLA
13 State House Station
Augusta, Maine 04333

Dear Chairman Bliss and Chairman Priest:

On behalf of Reed Elsevier and its division LexisNexis, I appreciate the efforts being taken by the Maine legislature and the Joint Standing Committee on Judiciary (the Committee) to analyze and modify LD 1183, which was recently passed to prevent predatory marketing practices against minors. While we support efforts to prevent predatory marketing to minors, the law goes much further and would have a chilling effect on a broad range of important information products and services.

LexisNexis is a recognized leader in the legal information field and plays a vital role in supporting government, law enforcement and business customers who use our information services for important purposes including: detecting and preventing identity theft and fraud, locating suspects, finding missing children, and preventing and investigating criminal and terrorist activities. LexisNexis is also a primary provider of information to the insurance industry, including driver's license information.

As you are aware, the U.S. District Court for the District of Maine found that the Plaintiffs have met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment. As such, we believe the statute violates the First Amendment rights of entities like LexisNexis to collect and to transfer important, factual information about Maine citizens and to use that information for purposes that serve a range of important societal needs. It is important that the Committee understand these Constitutional rights in order to avoid adopting a second law with the same Constitutional infirmities.

I. Freedom of Speech is Protected through the First and Fourteenth Amendments to the U.S. Constitution

Factual information lawfully collected by a business or by a government agency in the fulfillment of its official duties receives First Amendment protections under the concept of freedom of speech.¹ These protections apply to the databases compiled and used by LexisNexis and must be upheld by the state.²

The LexisNexis databases compile factual information, much of it derived from public sources, which is made available in a searchable fashion for businesses, government agencies, law enforcement, academics and others who use the information for lawful and legitimate purposes that have significant benefits for individuals in Maine and beyond. For example, Maine law enforcement entities use our information to find criminals and witnesses and to prevent crimes. We compile and make searchable court records from Maine and other jurisdictions. Our databases also provide information to insurance companies about drivers within a household for underwriting purposes. LexisNexis also distributes news reports compiled from journalistic and newspaper sources. These databases often contain information about minors. A blanket prohibition from conveying this information, with significant liability for failure to comply, could be the result of this law, with some information potentially being suppressed to avoid inadvertent violations of the law.

II. To Justify Contravention of First Amendment Rights, the State Must Show a Compelling Interest and a Narrowly Crafted Solution

In our view, the statute is vague and content-discriminatory because it targets extremely amorphous categories of information. As a content discriminatory statute, LD 1183 receives strict judicial scrutiny: the state must ensure that the underlying law is narrowly tailored to serve a compelling state interest and uses the least restrictive means available. We believe that LD 1183 goes well beyond the prohibition of marketing based on health-related information of minors. Although we believe that the state has a strong, even compelling, interest in protecting minors, the statute affects the transfer of health-related and personal information generally. It is not clear how these broad preclusions can be corrected under the applicable standard of judicial review for statutes that affect First Amendment rights.

¹ The U.S. Constitution states in its First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [Emphasis added.]

² Under the Due Process clause Fourteenth Amendment of the Constitution, the protection to the people regarding free speech is applied to the states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

III. The Prohibition on Collecting or Receiving Personal Information for Marketing Purposes Does Not Serve a Narrow, Compelling Interest

The statute is overly broad in its restrictions on the transfer of personal information. In this case, the definition of "personal information" is as follows:

"Personal information" means individually identifiable information, including:

- A. An individual's first name, or first initial, and last name;
 - B. A home or other physical address;
 - C. A social security number;
 - D. A driver's license number or state identification card number; and
- Information concerning a minor that is collected in combination with an identifier described in this subsection. §9551.4.

Under this definition, personal information could be as simple as a name. When this broad definition is applied to the prohibitions set forth in §9552.2, truthful, public information in a myriad of types of records would no longer be available for important societal uses, including one as fundamental as ensuring that minor drivers in a household are considered when issuing an insurance policy. The statute provides:

A person may not sell, offer for sale or otherwise transfer to another person health-related information or personal information about a minor if that information:

- A. Was unlawfully collected pursuant to subsection 1;
- B. Individually identifies the minor; or
- C. Will be used in violation of section 9553. §9552.2.

When the definition of personal information is applied to the prohibitions in §9552.2, the outcomes are drastic. Death notices for minors could not be published. Databases used to prevent frauds and crimes would be unavailable. LexisNexis receives data from the Maine Bureau of Motor Vehicles, and this information is used by insurance companies to help them identify drivers and eliminate fraud. Under this section of the law, the drivers' license data of minors could not be shared with the insurance companies that require reliable current information to underwrite the policies for drivers. Additionally, news reports compiled by LexisNexis that contain information on minors could be illegal. The following information, published in the October 8th issue of the Kennebec Journal, is typical:

Alonzo Connor expected to some day become a featured tailback on the Gardiner Area High School football team. Over the last three games for the Tigers (4-1), the 15-year-old sophomore has rushed for about 500 yards and four touchdowns.

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This information identifies Alonzo as a minor and, using the current definition of personal information, this innocuous story may well be prohibited under the current law. All of these uses of personal information are important to society and protected under the First Amendment.

IV. Dormant Commerce Clause Issues Should be Examined

The Committee would also need to analyze LD 1183 with a view to its Dormant Commerce Clause implications. The Dormant Commerce Clause is an expansion of the Commerce Clause in the US Constitution, and it would prevent state from passing laws that impede the free flow of commerce between states.³ As the LexisNexis goods and services described herein flow to entities freely across state lines, actions that prevent the compilation of information such as ours on a regional or national basis could be seen to unreasonably impede interstate commerce. The corrections to this law should be examined to resolve these issues, as well.

V. Conclusion

We recommend that the state analyze the reasons for enacting the underlying law and how those specific goals could be more narrowly met. Given the prevalence of personal information on minors, the severity of the penalties, and the absence of additional data to conclusively establish whether data pertains to minors, absent repeal it may be necessary to discontinue use of legitimate public records and news reports to avoid the risk of liability for an inadvertent violation.

We stand ready to help this Committee draft legislation addressing this issue, but it is difficult to determine why the underlying law added the personal information of minors to its goal of limiting health-related marketing to minors. In the absence of that information, it is difficult for us to propose specific amendments to the law which will both help it meet its goals and comply with the First Amendment's free speech requirements. As such, we suggest that this constitutionally flawed law be repealed in its entirety, to allow the law to be redrafted with a clear vision and the most narrow scope needed to meet its goals.

³Under Article 3, Section 8, the U.S. Constitution states:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
To borrow money on the credit of the United States;
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes [Emphasis added.]

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Reed Elsevier intends to remain a part of the ongoing discussion on this law and its future versions to ensure we are all working together to meet the state's goals within constitutional parameters. We thank you for your time and attention to this matter, and we welcome the ability to provide additional information.

Sincerely,

A handwritten signature in black ink, reading "Teresa L. Jennings". The signature is written in a cursive style. To the right of the signature is a vertical red line.

Teresa L. Jennings
Senior Director & State Government Affairs Team Leader
Reed Elsevier