To: RPIPR Drafting Committee

From: Amy Kristin Sanders, co-reporter

Re: Constitutional Law issues

Date: May 4, 2024

This memo outlines the potential constitutional law issues associated with the drafting of a model act relating to the redaction of judicial officers' personal information from public records. It will outline the key issues, summarize relevant case law and provide an assessment of constitutionality on each issue. Because there are no federal or state cases directly on point, this memo derives its conclusions from an analysis of the most closely related case law available.

Given the federal question involved in a First Amendment challenge, federal case law, where available and when applicable, has been cited first in the analysis that follows. Because the model act would be enacted by state legislatures, state case law, where available and when applicable, has also been cited in this memo.

THE BREAKING NEWS: On April 26, a New Jersey appellate court decided Kratovil v. City of New Brunswick, a case involving the state's version of Daniel's Law in favor of the government. The full opinion is attached. The appellate court ruled that as applied to Mr. Kratovil, a journalist, the law did not violate his First Amendment rights. In the case, Mr. Kratovil was attempting to prove that the Director of Police did not reside in the city in which he was employed by using his address information. A police employee claimed Daniel's law blocked them from releasing the information but eventually Kratovil got the address information from the Cape May Board of Elections. After directly asking whether Caputo lived elsewhere, which garnered no response, Kratovil publicly shared during a city council meeting the street name where Caputo was registered to vote and provided the records, which included a full home address, to city council members.

Caputo notified Kratovil he was invoking Daniel's Law, and Kratovil sought legal redress because he planned to publish an article about Caputo. The Attorney General declined to intervene. At trial, the judge agreed that the distance between where Caputo lived and worked was a matter of public concern, but that his exact address was not. The judge concluded Daniel's Law was constitutional as applied to Kratovil because it was narrowly tailored to achieve a compelling interest: protesting state officials from potential violence and harassment.

Kratovil took an accelerated appeal, and the court reviewed de novo because of the First Amendment issue. In deciding the case, the appeals court construed the U.S. Supreme Court's opinions in *Smith v. Daily Mail* and progeny very narrowly, rather than reading from them a broad First Amendment right to publish lawfully obtained information. Interestingly, the appeals court completely sidestepped the issue of prior restraint. The appeals court defined the matter of public concern as being that Caputo lived in one city while working for the other city. They agreed Kratovil could publish that information without running afoul of

Daniel's Law. They further agreed that protecting public officials from violent attacks and harassment was a compelling interest.

The ACLU, who represents Kratovil, plans to appeal to the New Jersey Supreme Court.

The Key Takeaways

1) At least one state appellate court believes that protecting state officials from violence and harassment is a compelling government interest.
2) The court was not inclined to address the prior restraint issue in this particular case.
3) The Attorney General, who could be tasked with defending the law in court, was unwilling to intervene.

The Key Differences

1) This facts of the Kratovil case dealt with whether information that had been lawfully obtained could be published without violating Daniel's law. It did not address the redaction of that information from public records.

Issue #1: First Amendment Right to Access Government Employee Information

One issue likely to be raised is whether a journalist, data broker or other member of the public has a First Amendment right to access government employee information.

The federal Freedom of Information Act clearly establishes a limited right to access, with a presumption of openness, federal agency records, unless the information falls within one of nine exemptions. In a number of cases, the courts have held that various types of government employee information could be redacted under Exemption 6's protection against unwarranted invasions of privacy. This includes performance appraisals; employee medical records; personally identifiable information such as name, social security number, military service number, home address and telephone number, age, place and date of birth; and payroll information. In these cases, the agency must balance the public's right to know against the significance of the privacy invasion. FOIA, however, creates a statutory right rather than a constitutional right.

The Court has clearly articulated the importance of the First Amendment in ensuring citizens are informed about their government. In Mills v. Alabama, 384 U.S. 214 (1966), the Court wrote:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents

> and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Although it is true that these First Amendment rights of access have most clearly played out in relation to the court system, it not a settled matter as to whether they exist with regard to other government information. Matthew Shafer's memo outlines these issues in great detail with heavy reliance on the case law, so I will direct you to pages 5-7 of that memo rather than reiterating it here.

Sub issue: Whether there's a legitimate interest in public employees' information

At least two courts, one state and one federal, have ruled there's a public interest in certain public employees' information.

In Publius v. Boyer-Vine, 237 F. Supp. 3d 997 (E.D. Cal. 2017), the federal trial court struck down a California statute that was content-based because it applied only to the posting of certain content—here home address or phone number of an elected or appointed official. The court ruled that legislators personal information is a matter of public significance. "Defendant suggests, in a footnote, that it is "questionable" whether the legislators' personal information is "a matter of public significance." For decades, the Supreme Court has broadly held that "[p]ublic records by their very nature are of interest to those connected with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Thus, several cases demonstrate that the First Amendment protects the right to publish highly personal information of private individuals, such as the names of rape victims and juveniles involved in legal proceedings, when they relate to matters of public concern." To support its conclusion, the court cited to *Cox, Florida Star, Daily Mail* and other cases.

In King County v. Sheehan (57 P.3d 307 (2002)), the Washington Court of Appeals ruled the plaintiff had a right to access names of law enforcement related employees as a matter "of legitimate public interest" given the legislature had not specifically exempted them from the public records law. "But police officers are public employees, paid with public tax dollars. They are granted a great deal of power, authority, and discretion in the performance of their duties. *Amici* Media Associations provide examples of investigative reporting based in significant part on information obtained from public records containing the names of police officers, including news stories about the high cost of overtime pay to deputy sheriffs and jail custodians employed by Snohomish County, Washington, the high cost of settlement of claims of excessive use of force by police in Boise, Idaho, and a massive investigation by the Washington Post comparing the incidence of police shootings in Washington, D.C., with that in other large cities—including information obtained from public records reflecting that a disproportionately high number of shootings were by new recruits following a crash hiring program mandated by Congress in which 1,500 new officers were graduated from the police academy and placed on the streets, admittedly without adequate screening, training, and post-academy supervision. The legitimate media utilize lists containing names of police officers to track over time how well individual officers are performing their jobs, whether they participate in continuing police training and education programs, and to safeguard against corruption and abusive use of authority. These actions are undoubtedly related to

governmental operations and a legitimate matter of public concern." *Id.* at 346. The Court acknowledged that plaintiffs could use names to access other personally identifying information from other government records.

Sub issue: Right to public records once published or online

I could find nothing in the case law about this. However, I did find a report by the Sunlight Foundation that this happened during the Trump Administration.

Conclusions and Questions

Based on my research, I would offer the following conclusions and related questions about a First Amendment Right of Access:

- It's certainly not clear there is no First Amendment right of access to government information. As Shafer outlines in his memo, half the federal circuits seem to favor a *Houchins* approach that there is no guaranteed right of access while the other half have taken the more pro-access approach of *Richmond Newspapers/Globe Newspapers* to address whether the public has a right of access to a wide variety of information outside the context of the courts, including voter lists, agency records, police operations, a town planning meeting, etc.
- Given this, is the ULC willing to tread into what seems to be uncharted waters if a news organization, data broker or member of the public attempts to assert a First Amendment right to online access to unredacted records?

Issue #2: Establishment of a Compelling Government Interest

In United States v. Playboy Entertainment Group (529 U.S. 803 (2000), the U.S. Supreme Court made clear that a content-based restriction on speech is subject to strict scrutiny review, meaning the government must show the restriction is "narrowly tailored to promote a compelling Government interest." *Id.* at 813.

But that is no small task. The Supreme Court noted in *Burson v. Freeman* (504 U.S. 191 (1992)) that "it is the rare case" in which the state can demonstrate a restriction on speech passes constitutional muster under the strict scrutiny standard, but it is not impossible.

Sub issue: Physical safety as a compelling government interest

Several lower federal court decisions seem to indicate the acceptance of physical safety as a compelling government interest. In New Alliance Part v. Dinkins (743 F.Supp. 1055 (SDNY 1990), the federal district court agreed that "The need to ensure the physical safety of the Mayor of New York and his family at Gracie Mansion constitutes a significant and compelling government interest." *Id.* at 1065 In the case, the court upheld limited restrictions but not a complete ban on a group's right to protest within sight and sound of Gracie Mansion.

Yet, the Supreme Court in Florida Star v. BJF, 491 U.S. 524 (1989) ,stopped short of calling the following a compelling government interest:

- the privacy of victims of sexual offenses
- the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants

- the goal of encouraging victims of such crimes to report these offenses without fear of exposure.

Instead, it noted "it is undeniable that these are highly significant interests." *Id.* at 537. In that case, the Court held unconstitutional a Florida statute that criminalized the publication of rape victims' names.

A note of caution: The Supreme Court has articulated a difference between a "compelling government interest"—sometimes referred to as a "state interest of the highest order"—and a "significant" or "important" government interest. Some opinions seem to conflate the two standards or lack precision in word choice. That said, it is clear that strict scrutiny requires the first while a content-neutral restriction on speech would only be subject to the lesser standard.

At least one federal trial court has ruled that protecting law enforcement officials from physical harm is not a compelling interest. In Sheehan v. Gregoire (272 F. Supp. 2d 1135 (WD Wash. 2003)), the judge ruled a Washington state law prohibiting the publishing, selling, etc. of court officials' information was unconstitutional. The judge said: "Defendants argue that the statute represents a need to further a state interest of the highest order protecting law enforcement-related, corrections officer-related, and court-related employees from harm and intimidation. The court *disagrees*."

Similarly, another federal trial court skirted the issue by finding the statute unconstitutional on other grounds. In Brayshaw v. City of Tallahassee (709 F. Supp. 2d 1244 (ND Fla 2010)), the judge ruled a Florida statute criminalizing the publication of police officer's address unconstitutional on its face. It should be noted that the judge was not willing to agree that it served a compelling interest: "While the state interest of protecting police officers from harm or death may be compelling…" Id. at 1249. The judge found the statute was both underinclusive and overinclusive: "It is underinclusive both in its failure to prohibit dissemination of the same information by other entities to third-parties who do intend to harm or intimidate officers, and in its failure to punish parties who actually wish to harm or intimidate police officers and obtain the officer's identifying information."

Sub issue: Judicial integrity as a compelling government interest

It would seem that, subject to a claim of underinclusiveness, courts should be willing to accept the public's confidence in judicial integrity as a compelling government interest that would meet the requirements of strict scrutiny analysis.

In *Williams-Yulee v. Florida Bar* (575 U.S. 443 (2015)), the U.S. Supreme Court upheld a prohibition on judges personally soliciting campaign donations, ruling the provision survived strict scrutiny under the First Amendment. In that case, the Court found that upholding the public's perception of judicial integrity was "a state interest of the highest order." *Id.* at 446. It went on to say: "The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling." However the Court cautioned, "Underinclusiveness can also reveal that a law does not actually advance a compelling interest." *Id.* at 449.

Conclusions and Questions

Based on my research, I would offer the following conclusions and related questions about a Compelling Government Interest:

- It's certainly not clear that the U.S. Supreme Court would accept physical safety as a compelling government interest. Further, lower courts have, in at least a few instances, ruled that it was not a compelling government interest or that the public has a legitimate interest in the information.
- Given this, is the ULC confident it can make a strong enough argument in favor of the integrity of the judiciary as its compelling government interest to overcome any potential challenges to the physical safety justification?

Issue #3: Requirement for Narrow Tailoring

In many contexts, the Supreme Court has articulated that content-based restrictions on speech must be narrowly tailored. In *Playboy,* the Court said "With respect to narrow tailoring, [courts] require the government to prove that no 'less restrictive alternative' would serve its purpose." *Id.* at 318. The Court articulated a similar test in *Ashcroft v. ACLU,* 542 U.S. 656 (2004), when it noted that narrow tailoring in the strict scrutiny context requires the statute to be "the least restrictive means among available, effective alternatives." *Id.* at 666.

In *Playboy,* the Court noted that even if the restriction were narrowly tailored, it must be effective. It made clear the burden is on the government to demonstrate the restriction would be effective. "The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. The Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban." *Id.* at 805. Other courts have come to similar conclusions.

The First Circuit, applying strict scrutiny to a New Hampshire law that prohibited voters from taking selfies with their completed ballots at the polls, found the law was not narrowly tailored. It said the state had "too readily forgone options that could serve its interests just as well, without substantially burdening" speech. The court noted that the law reached all voters, "not just those motivated to cast a particular vote for illegal reasons. New Hampshire does so in the name of trying to prevent a much smaller hypothetical pool of voters who, New Hampshire fears, may try to sell their votes." *See* Rideout v. Gardner, 838 F.3d 65, 74 (1st Cir. 2016).

The court goes on to say that the state hasn't shown that other laws "prohibiting vote corruption are not already adequate to the justifications it has identified." *Id.* at 74. The court suggested that the state could achieve its means by passing a law preventing voters from buying and selling votes rather than a statute that implicates the First Amendment.

Conclusions and Questions

Based on my research, I would offer the following conclusions and related questions about Narrow Tailoring:

- The federal courts have established a high bar for the narrow-tailoring prong of strict scrutiny. It would seem some of their concerns in *Playboy* and *Rideout* may be applicable by analogy in our situation.
- Given this, is the ULC confident that a state could demonstrate the effectiveness of this statute at accomplishing its compelling government interest?
- Further, It is possible to address the *Rideout* court's concern that other laws, in our instance those specifically addressing the physical safety and harassment, wouldn't serve the same interests just as well without burdening speech?

Issue #4: The Issue of Underinclusivity

The issue of underinclusiveness is anything but clear cut. In a leading First Amendment case on the issue, the Supreme Court found that a California law targeting the sale of violent video games to minors was underinclusive. The Court noted "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *See* Brown v. Entertainment Merchants Assn., 564 U.S. 786 (2011). The Court pointed out that the law didn't target booksellers or movie producers, and the state provided no persuasive justification for the distinction. The Court also took issue with the section of the law that allowed one parent to consent to their child having access to the content. "The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one addresses a serious social problem." *Id.* at 802.

Conclusions and Questions

Based on my research, I would offer the following conclusions and related questions about a Underinclusivity:

- The Supreme Court has made clear that underinclusivity raises constitutional issues. It would seem some of their concerns in *Brown* may be applicable by analogy in our situation.
- Given this, is the ULC confident in a distinction that only protects judges and not other members of the court/law enforcement communities?
- Further, is the ULC comfortable with the possibility that someone might raise the issue underinclusivity given that the redactions only occur 1) when requested by the judge and 2) only to online records?

Overall Recommendations

If the Uniform Law Commission decides to move forward on this project, I would encourage that the provision be drafted in a manner that:

1) Clearly articulates the compelling government interest or interests that it seeks to advance. It would seem the strongest compelling interest might be in protecting the public's perception of judicial integrity.
2) Attempts to employ the least restrictive means of achieving that interest while not overlooking the potential downfall of being underinclusive. It would seem that limiting the redaction to judges' personal information on public-facing databases and requiring regular renewal of the redaction could potentially meet the narrow-tailoring standard but leave open a challenge based on underinclusivity.