

MEMORANDUM

TO: Uniform Law Commission Scope and Program Committee

FROM: ULC Study Committee on the Redaction of Personal Information from Public Records

Vincent C. DeLiberato, Chair

Keith Pickard, Vice Chair

Barbara Bintliff, Reporter

DATE: June 15, 2023

SUBJECT: Supplemental Response to Study Committee Recommendation

The Scope and Program Committee has asked the Study Committee on the Redaction of Personal Information from Public Records (“RPIPR”) to address two issues raised during the consideration of the Study Committee’s recommendation to proceed to a drafting committee:

(1) whether redacting certain information from government records constitutes prior censorship or otherwise implicates First Amendment issues, particularly in light of *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) and,

(2) how the opposition of certain stakeholders to a uniform law might be addressed by a drafting committee.

The Commissioners on the Study Committee met on June 9 to consider these issues. In brief, the committee concluded that redacting certain information from government records did not constitute prior censorship or necessarily implicate First Amendment issues. The basis of this conclusion is presented below. Further, the committee reiterates its initial statements regarding stakeholder opposition but offers a series of recommendations and observations in this supplemental response that should go far in addressing the concerns of dissenting stakeholders.

1. Prior Censorship and First Amendment Issues

A state’s limitation of access to information in the possession of the state does not restrict freedom of expression. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (“*Sorrell*”); *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32, 40-41 (1999); R. Rotunda, *Treatise on Constitutional Law*, § 20.31(i) (2013). However, a state’s limitation on access to information which is in the possession of a private person is a targeted, content-based burden on freedom of expression. *Sorrell, id.* at 572; R. Rotunda, *id.* The RPIPR project deals with the former, not the latter and, therefore, does not constitute prior censorship.

Further, *Sorrell* dealt with the collection and sale of “prescriber-identifying information” by retail pharmacies (e.g., information that revealed both the prescribed drug and the name of the prescribing physician). The pharmacies sold the information to a “data miner,” a data

collection firm, which combined and analyzed the information and leased it to pharmaceutical manufacturers, which used it for marketing and other purposes. Vermont passed a Prescription Confidentiality Law, 18 V.S.A. § 4631(d), that prohibited the manufacturers from obtaining or using this information for marketing or promoting their prescription drugs generally, and to physicians specifically, without the prescriber's permission.

An association of brand-name pharmaceutical manufacturers and a data collection firm brought suit in federal court, challenging Vermont's law. The federal district court upheld Vermont's statute. The Second Circuit reversed. The Supreme Court affirmed the Second Circuit and, as summarized by SCOTUSblog, held that:

Vermont's Prescription Confidentiality Law, which absent the prescriber's consent prohibits the sale of prescriber-identifying information, as well as the disclosure or use of that information for marketing purposes, is subject to heightened judicial scrutiny because it imposes content- and speaker-based burdens on protected expression.

Vermont's justifications for the prohibition cannot withstand such heightened scrutiny. SCOTUSblog, <https://www.scotusblog.com/case-files/cases/sorrell-v-ims-health-inc/>.

Sorrell was a First Amendment/commercial speech decision. It dealt with information collected legally by private entities and then sold to other private entities who used it for lawful purposes.

Compare RPIPR, which is situated in state FOIA/Open Records/Sunshine Act statutory law and is intended to become an exception to the default release of information via those laws. RPIPR deals with state-collected and -maintained information available in public-facing databases. Under the RPIPR proposal, not all information may be visible in public-facing databases because certain information may be redacted from a database using narrowly defined statutory criteria and processes. However, full information is retained in the government's records. The full, unredacted information can be accessed by all with a legitimate interest in the data; thus, the information is not ultimately withheld from interested parties. The committee envisions that commercial interests, journalists, open government organizations, and others with legitimate interests would have access to the unredacted records using procedures determined by the enacting states.

In addition, as proposed by the Study Committee, RPIPR does not impose restrictions on the use of any information retrieved from the databases, further distinguishing it from *Sorrell*. The committee believes that a reasonable, well-drafted uniform law would be content-neutral and otherwise generally avoid First Amendment issues.

2. Addressing the Opposition of Certain Stakeholders

The strongest and most significant opposition to a uniform law came from the open government organizations and stakeholders with a commercial interest in access to public records ("the associations"). In recommending that the project proceed to a drafting committee, the Study Committee stated that it believes these concerns can be addressed by a drafting committee that

takes into account both the need for personal safety and the importance of legitimate and socially beneficial access to public records. The Study Committee reiterates this as its recommendation.

After deliberating at the June 9 meeting, the Study Committee concluded that a better balance of comments and opinions should be encouraged during a drafting committee's deliberations. The purpose of the Study Committee's deliberations was to investigate whether a uniform law to increase personal safety and security was feasible. However, very little input was received from those who might be impacted by or who would be in favor of a uniform redaction law. There were no observers who, for example, represented organizations of judges, police officers, or other law enforcement personnel, all of whom might have members who would benefit from a redaction law. Rather, a significant amount of time during the committee's meetings was focused on extensive discussions of the associations' concerns and their opposition. It was helpful to understand the associations' positions but a more robust representation of the impacted parties themselves would add to the discussion and result in a fuller exploration of the importance of the potential uniform law in securing personal safety.

The committee believes that, during drafting, a wider range of viewpoints would be critical in more fully articulating the issue of why a redaction law would be beneficial. Representatives from organizations representing those who might be personally impacted should be identified and invited to participate in a drafting committee's work. There was agreement on the committee that a well-reasoned redaction law that was the product of contributions from many stakeholders and that ultimately addresses and respects the valid concerns of all stakeholders should be broadly acceptable. Several existing state redaction laws that were considered effective were mentioned during Study Committee meetings and could be the basis for an effective uniform law.

Similarly, more emphasis could be placed throughout drafting discussions on the Study Committee's recommendation that the full, unredacted public records remain available for legitimate purposes. Many of those in most vocal opposition to the Study Committee's recommendation are groups that have a pecuniary interest in access to data. Any process to request access to unredacted records would incur expense and extra time by those groups' members. A drafting committee that acknowledges these concerns and works closely with stakeholders to develop a process with the fewest additional steps for accessing the unredacted data—ideally a straightforward process only requiring one or two additional steps—should minimize or eliminate this stakeholder concern.

The Study Committee expresses its appreciation to the Scope and Program Committee for the opportunity to present this supplemental information. At its June 9 meeting, after considering the above information, the Study Committee voted unanimously in favor of its previous recommendation to proceed to a drafting committee. With the additional information presented here, the committee believes its recommendation is even stronger and encourages Scope and Program to act favorably on the recommendation.