The Connecticut Council on Freedom of Information

Testimony before the Joint Committee on Government Administration and Elections regarding House Bill 7392, An Act Concerning Voter Privacy

March 25, 2019

Representative Daniel Fox
House Chair
Senator Mae Flexer
Senate Chair
Government Administration and Elections Committee
Connecticut General Assembly
Legislative Office Building, Room 2200
Hartford, CT 06106

Dear Chairman Fox and Chairwoman Flexer, Ranking Members France and Sampson and Members of the Government Administration and Elections Committee:

My name is Michael Savino, I am President of the Connecticut Council on the Freedom of Information (CCFOI) and I am testifying on House Bill 7392, "An Act Concerning Voter Privacy."

The Connecticut Council on Freedom of Information advocates, on behalf of the news media and other open government advocates, for the preservation of Connecticut's Freedom of Information Act. Our organization has been leading the way in the fight for transparency since 1955.

The Connecticut Council on Freedom of Information strongly opposes HB 7392, and we urge the committee to reject it. Our opposition to this bill is based on several concerns.

First and foremost is transparency. Our democracy relies on voters having trust and faith in the election results, even when their chosen candidate loses. Since George Washington was first elected president in 1788, our current form of government has thrived as a beacon for the rest of the world to follow. This stability is the result of several safeguards, but also relies on voters trusting that the outcome was fair and honest and that the electoral process will continue to operate in such a way. Eliminating transparency would be a major blow to that earned trust.

The trust doesn't come from a belief that bad actors don't exist. Instead, it's earned by a belief that the process is structured in a way to ferret out those bad actors and punish them accordingly. Former state Rep. Christina Ayala's voter fraud in Bridgeport was discovered and resulted in criminal charges. The wrongdoing was discovered and exposed by the media, in this case the Connecticut Post, relying on public records that include voter registration information. Catching and punishing Ayala and others acting in a similar manner is critical to ensuring trust in our democracy.

In recent years, though, we've seen trust in our system wane, increasing the possibility that the public will lose trust in election results. Critics have alleged voter or election fraud even without pointing out specific examples. Add in situations like North Carolina's recent absentee ballot scandal, which now requires that an entirely new Congressional election be held, or the purging of voter rolls in Georgia, and voters from all political ideologies could feel the system is rigged against them. One safeguarded against those claims is maintaining access to records that allows the public to see for themselves whether fraudulent activity exists. Taking that access away will only allow speculation to further undermine trust.

But our objection isn't just based on principle. We have serious questions about whether a bill like this, even with modifications, would be legal.

Hawaii's state legislature adopted into law a similar piece of legislation in the mid-1990s. In *Donrey Media Group v. Ikeda*, a federal judge struck down the law on the grounds that it violated both the Hawaii and U.S. constitutions. Specifically, a judge found that the law violated equal protection rights under both constitutions. It's important to note that electioneering is not a function of government. It is something done by members of the public who wish to serve in government. A law such as this would give access to information to some members of the public but not others based solely on whether they are a candidate or a representative of a candidate committee or political committee. For example, a journalist working for such a committee could then gain access not available to a journalist who does not meet that requirement.

Other states, including Michigan, Virginia, and Maryland, have all passed laws that, in same way, only allowed select groups of people to access voter registration information. Although those laws weren't necessarily the same as the one adopted in Hawaii or HB 7392, those three laws have also been struck down in court. History has shown us that restricting access in this way is not legal.

Since Connecticut cannot limit access to voter registration data in the manner proposed in HB 7392, the Connecticut Council for Freedom of Information also has concerns about provisions in this bill limiting how this information could be used. The U.S. Supreme Court has ruled, notably in *Smith v. Daily Mail Publishing Co.*, that the the government cannot bar the news media from publishing information that is obtained through lawful purposes. Subsection (d)(a) of this bill, though, would prohibit the use of this information for commercial purposes under language that is incredibly broad and could very well include the news media.

Even if the state were to carve out an exemption for the news media, academics, and other groups, the Connecticut Council on Freedom of Information has serious questions about whether the state can bar the use of this information for certain commercial purposes. The U.S. Supreme Court, in *City of Cincinnati v. Discovery*

Network, Inc., makes it difficult to distinguish commercial speech from other forms of speech in the way proposed in HB 7392. In *Discovery Network*, the court overturned a city ban on dispersing commercial handbills through newsstands on public property, a rule aimed at reducing litter. The Supreme Court, though, found this was unconstitutional because it was not applied evenly to other forms of speech, including newspapers and magazines that can also be tossed aside as litter. The ruling further determined that Cincinnati could not separate handbills or other commercial speech as being of lesser importance than the press, and thus must be treated equally.

Furthermore, the Supreme Court ruled that restrictions on commercial speech are typically intended to guard against harm caused by content, such as misleading ads or advertisements that wrongfully harm a competitor. In *Discovery Network*, the court determined, based on pass rulings, that that "speech that does no more than propose a commercial transaction is protected by the First Amendment." Restrictions on the manner, time, or place of engaging in protected speech must be applied evenly and without regard for content.

HB 7392, as written, appears to be an effort to preserve privacy by limiting the sale of voter data and prohibiting the use of this information for the use of solicitation. Yet the proposal doesn't evenly apply this rule. Political candidates, candidate committees, and political committees would still be able to purchase this information, presumably for the purpose of electioneering. This type of activity typically includes mailers, door-to-door interactions, and even cold-calling. Per *Discovery Network*, a law cannot allow or tolerate activity for certain kinds of protected speech and not others without additional justification. One's interest in voting can't be seen as a desire to receive unsolicited mailers or calls from campaigns. Additionally, Connecticut now automatically registers eligible voters through the Department of Motor Vehicles, so the mere presence on a voter list isn't a sign that someone is interested in voting. Thus, we cannot assume that the public's frustration in receiving mailers and other solicitations is limited to commercial activity.

We urge the Committee to reject this bill.

Sincerely,

Michael Savino
President
Connecticut Council on Freedom of Information