

SUPPLEMENTAL STATEMENT ON THE CONSTITUTIONALITY OF THE DISCLOSURE
OF NAME AND ADDRESS INFORMATION FROM PUBLIC RECORDS

Before the New Jersey Privacy Study Commission

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Thank you very much for forwarding me Professor Dan Solove's response to my testimony before the New Jersey Privacy Study Commission. I respect Dan and in fact had sent him my testimony and he was good enough to send me his.

I don't have time before the Commission next meets to draft, and I doubt if the Commission has any interest in reading, a line-by-line rejoinder to Dan's response. I do think, however, that one value in this give and take that should not be lost is to help hone the precision with which we articulate various points about the constitutional right to privacy and its impact on the Commission's work. My own impression is that we don't disagree in our views as much as our testimony might suggest on first reading.

In my testimony of November 12, 2003, I tried to correct what I believed then—and continue to believe now—was a misimpression created by the Special Directive Subcommittee, namely, that the Constitution in any way required New Jersey to protect home addresses in public records from disclosure. Specifically, I testified:

The September 8, 2003, draft report posted on the Commission's website concludes that "the Special Directive Subcommittee believes the United States Constitution explicitly protects the home as a refuge from governmental action, and that this protection extends to the disclosure of home addresses and home telephone numbers." Under the heading "Constitutional Support," the report asserts that "[t]he New Jersey Supreme Court and the United States Court of Appeals for the Third Circuit (the federal court that governs New Jersey) have held that citizens have a constitutional right to privacy in their home address." "Therefore," the Subcommittee writes, "disclosure of home addresses under OPRA may violate a constitutionally protected right to privacy."

I believe these assertions are incorrect as a matter of law. (Cate, p. 2)
(citations omitted)

Dan's very clear statement before the Committee of March 19, 2004, in no way contradicts this conclusion. In fact, it only addresses it in two places. First, he cites to *Kallstrom v. Columbus*, 136 F.3d 1055 (6th Cir. 1998), in which the Sixth Circuit held that police officers had a right to protect personal information about themselves and their families—including their home addresses—from disclosure to members of a violent drug conspiracy ring. But in this case,

as Dan acknowledges, “the information extended beyond addresses” (Solove, p. 3), and, in any event, I asserted in my own testimony that certain categories of address information (the example I gave was undercover police officers) raised serious issues and could clearly be exempted from disclosure.

Second, Dan cites to *Los Angeles Police Department v. United Reporting Publishing Company*, 528 U.S. 32 (1999). This case involved a constitutional challenge to whether California could discriminate in its access laws against requesters that desired public record information, including the addresses of arrestees, for the purpose of selling a product or service to an individual. The Court held that California could. This case has nothing to do with whether a state is constitutionally *required* to withhold address information.

Dan concludes that “the law in the Third Circuit clearly demonstrates that there is a privacy interest in a person’s address and phone number.” (Solove, p. 4) I think this is an overstatement. It is based exclusively on cases that either did not involve address information at all or involved disclosures of address information only in connection with sensitive information—either medical records or highly stigmatizing information about sex offense convictions. As I testified in November: “Whatever privacy interest was at issue either did not concern address information at all or was not in address information alone, but in address information connected with the knowledge that the resident had previously been convicted of a sex offense. These cases thus provide a tenuous basis from which to argue about the privacy interests applicable to run-of-the mill address and telephone information found in property tax records, voting records, and hunting and fishing permit application files.” (Cate, p. 4)

More to the point, and as Dan himself acknowledges, in all of the cited cases, the court *upheld* the disclosure requirements in spite of the privacy interests identified.

More importantly, despite Dan’s assertion about the law in the Third Circuit (which, as I have said, I believe is misleading), he still concludes that the Constitution does *not* mandate New Jersey to withhold address information. “It would be too strong to say that disclosure of addresses would definitely violate the Constitution, but it would be fair to say that it *could* trigger a balancing right under *Whalen*.” (Solove, p. 3) (emphasis added) I could not agree more.

Finally, I mentioned at the end of my original testimony that access to addresses serves many publicly valuable purposes. In his statement, Dan takes exception to this assertion. I am not quite certain why, since even the most strident privacy advocates recognize that this information has value. Dan himself acknowledges this when he writes that “[t]here are certainly many interests in support of access to government records containing personal information.” (Solove, p. 5)

The examples I provided in my testimony all involved using addresses to locate an individual for a news story, or to identify a pattern of behavior based on geographic location (e.g., do police investigate rapes where the victims live in poor neighborhoods or certain police precincts as vigorously as they should), or to match data from disparate sources (e.g., using the address to determine whether the “John Smith” who is reporting bankruptcy is the same “John Smith” who is city treasurer).

These are all important uses of address information and they only scratch the surface of ways in which that information may have value. As I testified on November 12, the fact that such information has value does not mean that it should always be made publicly available. Disclosure may be overridden in certain categories of cases by other interests. To date, courts have found very, very few such interests (apparently only when police officers—but only police officers, not sex offenders—were threatened with bodily harm and the information at issue involved far more than mere address data). But in balancing those interests it is critical that the Special Directive Subcommittee not create the mistaken impression that the Constitution favors—much less mandates—secrecy.

I deeply appreciate the opportunity to contribute these additional comments, I look forward to continuing this productive dialogue with Dan Solove and other privacy scholars, and I wish you well in the difficult decisions ahead of you.