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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 28, 1983

The Honorable Rodney S. Quinn
Secretary of State
State House
Augusta, Maine 04333

Dear Secretary Quinn:

This will respond to your inquiry about the constitutionality of certain aspects of picture operator licenses. You asked whether the maintenance of a central repository for the negatives of the picture licenses and, therefore, the possible disclosure of such negatives to any person, would violate the right to privacy guaranteed by the United States Constitution. For the reasons outlined below, it is the opinion of this Department that the system is constitutional.

I

Maine has amended its motor vehicle laws to provide for the issuance of picture operator licenses. P.L. 1981, c. 506, enacting 5 M.R.S.A. § 89, amending 28 M.R.S.A. § 1060, and amending 29 M.R.S.A. § 540. The Secretary of State began implementing the picture operator license requirement in July, 1982. See P.L. 1981, c. 506, § 6.

The statute neither requires nor forbids the maintenance of a central repository for negatives. The Secretary of State, however, is permitted to adopt rules and regulations to effectuate the purposes of the statute. See P.L. 1981, c. 506, § 2. See also 29 M.R.S.A. § 51 (Supp. 1982). The Secretary of State therefore has the discretion to implement a system which requires the maintenance of a central repository for the negatives.

The maintenance of a central repository could lead to the disclosure of the negatives. The picture operator license statute does not prohibit disclosure. See generally P.L. 1981, c. 506. Furthermore, because the photographic negatives should be considered "public records," see 1 M.R.S.A. § 402(3) (1979), they are subject to disclosure under Maine's Freedom of Access Law. See 1 M.R.S.A. § 401, et seq. (1979 & Supp. 1982). See also Op.Me.Att'y Gen. 80-93 (driver registration information subject to disclosure under Maine's Freedom of Access Law); Op.Me.Att'y Gen. 79-161 (computer print-out of driver registration information subject to disclosure under Maine's Freedom of Aceess Law). Therefore, it should be concluded that the maintenance of a central repository could lead to the disclosure of the negatives. It must be determined further whether such possible disclosure would violate a constitutional right of privacy.

II

A

No other state has concluded that either the picture driver license or the maintenance of a central repository of negatives would violate a constitutional right of privacy. According to the American Association of Motor Vehicle Administrators ("Association"), forty states currently have picture operator licenses.1/ Approximately half of the states that have picture operator licenses maintain a central negative file. Although both the use of picture operator licenses and the maintenance of a central repository for the negatives have been challenged as violations of the constitutional right of privacy, these challenges have been unsuccessful. See, e.g., Stackler v. Department of Motor Vehicles, 105 Cal.App.3d 240, 245, 164 Cal.Rptr. 203, 206 (1980).2/

1/ This information is the result of a telephone conversation between the Attorney General's Office and the Association. Four states, Kansas, Mississippi, Pennsylvania and Vermont, are currently implementing this program. Five other states, New Jersey, New York, Tennessee, West Virginia and Wisconsin, do not have picture operator licenses. Massachusetts is considering abandoning the picture operator licenses as a cost-saving measure.

2/ Massachusetts, however, abandoned its plan to maintain a central repository of photographic negatives of persons with Hispanic surnames. This program was challenged under the Equal Protection Clause, U.S.CONST. amend XIV, § 1, and therefore is not relevant to the question of whether Maine's program violates a constitutional right of privacy.

B

Although there is no specific mention of a constitutional right to privacy in the United States Constitution and therefore no explicit guarantee of such a right, J. P. v. DeSanti, 653 F.2d 1080, 1087 (6th Cir. 1981), the United States Supreme Court in recent years has recognized a "zone of privacy" worthy of constitutional protection.3/ See Griswold v. Connecticut, 381 U.S. 479 (1965); Whalen v. Roe, 429 U.S. 589 (1977). No Maine decisions, interpreting the Maine Constitution, have either recognized or rejected this constitutional "zone of privacy." Cf. B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham, 297 A.2d 607, 616 (Me. 1971), appeal dismissed, 411 U.S. 924 (1971) (State's refusal to grant a liquor license does not violate a federal constitutional right of privacy under the United States Constitution).4/ This "zone of privacy," however, is not infringed by all legislation which has some effect on individual liberty or privacy. On the contrary, unless the legislation substantially affects a protected privacy interest, it is not unconstitutional. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 455-65 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 79-81 (1976); Paul v. Davis, 424 U.S. 693 (1976).

3/ The constitutional "zone of privacy" should be distinguished from the common law tort of invasion of privacy, which is recognized in Maine, see, e.g., Nelson v. Maine Times, 373 A.2d 1221, 1223 (Me. 1977), and elsewhere, see W. Prosser, Law of Torts, ch. 20 (1971). A tortious invasion of privacy occurs when a defendant appropriates the name or likeness of the plaintiff for the defendant's benefit, when a defendant intrudes upon the plaintiff's solitude or seclusion, when a defendant places the plaintiff in a false light in the public eye, or when a defendant discloses private facts about the plaintiff to the public. See MacKerron v. Madura, 445 A.2d 680, 682 (Me. 1982). By contrast, the Constitutional "zone of privacy" is invaded when the government, as distinguished from private individuals, either discloses personal information to the public or interferes with an individual's independence in making certain kinds of important decisions. See Whalen v. Roe, 429 U.S. 589, 598-600 (1977).

4/ Although the Maine Supreme Judicial Court has considered the constitutional expectation of privacy inherent in the constitutional prohibition against unlawful searches and seizures, see State v. Kidder, 341 A.2d 1, 5-6 (Me. 1975); State v. Gallant, 308 A.2d 274, 280 (Me. 1973), the United States Supreme Court has noted specifically that this expectation of privacy is different from the constitutional "zone of privacy." Whalen v. Roe, 429 U.S. at 604 n.32.

It must therefore be determined as a threshhold matter whether the maintenance of a central repository of photographic negatives coupled with the possibility of disclosure of the negatives to other persons substantially impinges upon a protected privacy interest. "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interest. One is the individual interest in avoiding disclosure of personal matters and another is the interests in independence in making certain kinds of importance decisions." Whalen v. Roe, 429 U.S. at 598-600 (footnotes omitted). Since the maintenance of a central repository would not threaten an individual's independence in making important decisions,[5/] the maintenance of a central repository is unconstitutional only if it results in the disclosure of "personal matters."

Although there is a threat to privacy implicit in the vast accumulation of personal information by the State, it is not at all clear that a photographic negative constitutes personal information. If it is not personal information, then no constitutional question is presented. See Whalen v. Roe, 429 U.S. at 605. In another context, the Maine Supreme Judicial Court observed that "certainly it could not be argued that a person's normal facial appearance is of private concern only." Nelson v. Maine Times, 373 A.2d at 1225 (tortious invasion of privacy). Therefore, this Department concludes that a photographic negative is not personal information protected by the constitutional "zone of privacy."

III

In light of this conclusion that a photographic negative is not personal information, it is unnecessary to determine whether the maintenance of a central repository would result in excessive disclosure, thereby rendering the scheme unconstitutional. It should be noted, however, that to render the scheme unconstitutional, there not only must be the threat of excessive disclosure, but there must be evidence of actual disclosure and a resulting infringement upon an individual's right to privacy. Whalen v. Roe, 429 U.S. at 601 n.27. In conclusion, the maintenance of a central repository for

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5/ Cf. Roe v. Wade, 410 U.S. 113, 152-55 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 452 (1972) (contraceptives).

photographic negatives should not infringe upon a constitutional right to privacy.6/

I hope that you find this information helpful. If we may be of any further assistance, please do not hesitate to contact us.

Sincerely,

JAMES E. TIERNEY
Attorney General

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6/ There have been, however, other types of constitutional challenges to the picture operator license procedure. Some individuals, contending that they are unable to have their pictures taken for religious reasons, have sued certain states, alleging that the picture operator license violates the Free Exercise Clause of the First Amendment. U.S.CONST. amend I. Compare Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363, cert. denied 444 U.S. 885 (1979) (constitutional) with Bureau of Motor Vehicles v. Pentacostal House of Prayer, 269 Ind. 361, 380 N.E.2d 1225 (1978) (unconstitutional). Although it is difficult to predict how a similar claim would be evaluated by Maine courts, compare Flynn v. Maine Employment Security Commission, 448 A.2d 907 (Me. 1982), cert.denied, 51 U.S.L.W. 3309 (U.S. Jan. 11, 1983) (No. 82-5711) with Dotter v. Maine Employment Security Commission, 435 A.2d 1368 (Me. 1981), this hypothetical constitutional challenge should not upset the current state scheme since a successful challenge would provide, at most, an exception for the small minority of individuals who sincerely hold such religious beliefs.