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HENRY MCMASTER
ATTORNEY GENERAL

May 23, 2006

The Honorable P. J. Tanner
Sheriff, Beaufort County
Post Office Box 1758
Beaufort, South Carolina 29901

Dear Sheriff Tanner:

We received your letter expressing concern regarding disclosure of sheriff's office internal affairs investigations under the South Carolina Freedom of Information Act ("FOIA") and the demand by the media for "full disclosure." In your letter, your informed us:

> The trend among news media appears to demand **full disclosure** citing the most recent case of Ray B. Burton, III and East Coast Newspapers, Inc. v. York County Sheriff's Department and Bruce Bryant, York County Sheriff. This is a potentially dangerous interpretation of this action given the fact that upon review, the trial court's order was AFFIRMED IN PART, REVERSED IN PART and REMANDED for further disposition. We have concerns that a "carte blanche" ruling favoring full disclosure will tend to obstruct or jeopardize the employees' constitutional privileges.
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> As you are aware, Internal Affairs Investigations are administrative in nature and contain **compelled** and **unprotected** testimony from our employees that is evaluated and used in disciplinary, employment and management decisions. Police officers under internal affairs investigations do not voluntarily give statements pertaining to the subject matter under investigation. There is no Fifth Amendment protection as they are **compelled** to give statements (which may be self-incriminating) and are required to submit to polygraph examinations because of the employment relationship; and if there is a refusal to comply, the employee can be dismissed under Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967).
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> Furthermore, there is no Sixth Amendment Right to counsel when employees are being questioned under Garrity; as the courts have held

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> that the right to counsel applies to "criminal" proceedings not disciplinary proceedings.
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> Keeping the above in mind, it must be noted that we afford employees full constitutional protection under Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L Ed. 694 (1966) when criminal activity is alleged, to include affording them the right against self incrimination, the right to counsel and the right to remain silent. Moreover, an employee may choose to remain silent under Miranda and nothing would be subject to documentation and probable publication or distribution by the news media subsequent to an FOIA request. On the contrary, under Garrity, an employee who chooses to comply with an order to testify must face probable disclosure and publication of compelled, unprotected and incriminating testimony by the news media as a result of an FOIA request. This comparison prima-facie appears to be unreasonable.

In addition to these concerns, you also expressed your concern that by releasing information, the sheriff's office may be subject the to civil suits under section 1983 of title 42 of the United States Code. Thus, you request an opinion of this Office as to "our liability and responsibility in protecting our employees' constitutional and civil rights. More specifically, what protection is there for an employee from the news media gaining access to and publicizing unprotected and compelled testimony that is acquired from employees, who under risk of termination, must disclose?"

Based on the Court of Appeals' decision in Burton v. York County Sheriff's Department, 358 S.C. 339, 348, 594 S.E.2d 888, 893 (Ct. App. 2004), a sheriff's office is required under FOIA to disclose internal investigation reports that contain information as to the performance of public duties by sheriff's office employees. The Court of Appeals found such information is not exempt from the disclosure requirements. Thus, regardless of the potential for lawsuits as a result of the disclosure of such information, we opine that a sheriff's office must comply with the disclosure requirements.

Law/Analysis

The General Assembly expressed the intended purpose of FOIA in section 30-4-15 of the South Carolina Code (1991). This section provides:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their

> public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Id. Several South Carolina Supreme Court cases discuss the purpose of FOIA. In one opinion, the Court stated: "The purpose of the FOIA is to protect the public from secret government activity." South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994). In another opinion, the Court determined: "South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996).

With regard to interpreting statutes contained in FOIA, our Court of Appeals stated: "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003). Generally, FOIA requires public bodies to disclose their records unless such records fall within the enumerated exemptions provided in FOIA. S.C. Code Ann. § 30-4-30(a) ("Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access."). Section 30-4-40 of the South Carolina Code (1991 & Supp. 2005) lists the enumerated exceptions in which a public body may, but is not required to disclose under FOIA. Included in this list of exceptions is the following:

> Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

S.C. Code Ann. § 30-4-40(a)(2) (1991).

"[C]onsistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed." Burton v. York County Sheriff's Dep't, 358 S.C. 339, 348, 594 S.E.2d 888, 893 (Ct. App. 2004). Moreover, with regard to the exemptions from disclosure contained in FOIA and specifically the exemption provided above, our Supreme Court held these exemptions do not created a duty of confidentiality. South Carolina Tax Comm'n, 316 S.C. at 169, 447 S.E.2d at 846. The Court determined: "The purpose of the FOIA is to protect the public from secret government activity. The exemptions impose no duty not to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure." Id.

As you mentioned in your letter, the South Carolina Court of Appeals recently addressed the employment of the "privacy exemption," as cited above, with respect to a sheriff's office internal investigation. Burton, 358 S.C. at 339, 594 S.E.2d at 888. In that case, a newspaper and a reporter for the newspaper brought a declaratory judgment action seeking information from the York County Sheriff's Department about alleged illegal and unethical conduct on the part of four of its deputy sheriffs. Id. Specifically, the newspaper requested information about the internal investigation which resulted in the suspension of the four deputies. Id. Relying on the fact that "the office of the sheriff was created by our state constitution, which grants the General Assembly authority to determine their duties, qualifications, training, and compensation" and the fact that "the Sheriff's Department is supported exclusively by public funds," the Court determined the sheriff's department is a public body as defined under section 30-4-20(a) of FOIA and accordingly, is subject to FOIA's disclosure requirements. Id. at 349, 594 S.E.2d at 893.

The Court then addressed the sheriff's department's argument that the information sought fell under the purview of the invasion of privacy exception. The Court stated:

> Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure. We must, therefore, resort to general privacy principles, which examination involves a balancing of conflicting interests--the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.
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> Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. However, one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest. Indeed, the Court has held that, as a matter of law, if a person, whether willingly or not, becomes an actor in an event of public or general interest, then the publication of his connection with such an occurrence is not an invasion of his right to privacy.

Id. at 352, 594 S.E.2d at 895 (citations and quotations omitted). The Court found "the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye." Id. In addition, concluding that "the access to information they sought and the trial court granted was focused on the performance of public duties by the Sheriff and his deputies and the response of the Department to allegations of misconduct by the deputies," the Court found the newspaper has "a legitimate need to access the records [the reporter] requested." Id. The Court also addressed the sheriff's department's concern that disclosure of the information in question would violate the officers' right to privacy under the Fourteenth Amendment to the United States Constitution. Id. The Court noted the recognition of

a right to privacy under the Fourteenth Amendment has been "narrowly defined and limited to specific situations." Id. at 353, 594 S.E.2d at 896. Keeping this precedent in mind, the Court decided it would "not to expand the 'right of privacy' under the Fourteenth Amendment beyond those situations which the Court has ruled bear on the most intimate decisions affecting personal autonomy - - namely reproductive rights, familial and marital relations." Id. at 354, 594 S.E.2d at 896. Thus, it found no specific Fourteenth Amendment right of privacy for deputies in this situation. Id.

Given the purposes of FOIA and the plain language used in FOIA, our courts have consistently held the disclosure requirements under FOIA are mandatory unless specifically exempted. See eg., Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 284, 580 S.E.2d 163, 168 (Ct. App. 2003) ("The FOIA provides that any person has a right to inspect or copy 'any public record of a public body' unless an exemption listed in § 30-4-40 applies."). Burton clearly holds internal investigation reports relating to the performance of a sheriff and his deputies performance of their public duties are not exempt from the FOIA disclosure requirements and therefore, must be disclosed. Burton, 358 S.C. at 339, 594 S.E.2d at 888. Even assuming this type of information is exempt from disclosure under FOIA, our courts recognize FOIA does not impose a duty of confidentiality on a public body. South Carolina Tax Comm'n, 316 S.C. at 169, 447 S.E.2d at 846. Thus, a sheriff's office has the responsibility to comply with the mandated disclosures pursuant to FOIA regardless of possible claims that may be made by its employees.

In your letter, you express concern over your office's responsibility and liability in protecting your employees rights. Because FOIA does not provide for a right of confidentiality and because the Court of Appeals' decision in Burton requires this information to be disclosed, we find no avenue by which your office can escape its duties under FOIA. Furthermore, you allude to the fact that your employees' rights may be comprised as a result of the disclosure of such information. We find this assertion puzzling. If, as you say, these employees are not under a criminal investigation when their statement as taken, but rather they are simply the subjects of a personnel investigation, and the intent of the statements is not to be used against the employees in a criminal proceeding, we are unsure how their rights may be violated by your office's compliance with FOIA. Moreover, section 1983 of title 42 of the United States Code "allows a civil action to recover damages for deprivation of a constitutionally protected right." Moore v. Florence School Dist. No. 1, 314 S.C. 335, 444 S.E.2d 498 (1994) (emphasis added). Thus, if the employees are not afforded constitutional protection in the circumstances of an internal investigation, we presume such suits would be without merit.

You also express concern over the potential for civil liability if your office complies with the disclosure requirements. Although we are not apprised of the type of liability to which you refer we

can offer that generally, the South Carolina Tort Claims Act protects governmental entities from claims arising out of their compliance with the law.[1]

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General

[1]Section 15-78-60 of the South Carolina Tort Claims Act (2005), provides: "The governmental entity is not liable for a loss resulting from: . . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies . . . ."