



ALAN WILSON
ATTORNEY GENERAL

February 23, 2011

The Honorable Richard Carter
Chief Deputy Coroner, Colleton County
395 High Cotton Road
Lodge, SC 29082

Dear Deputy Coroner Carter:

In a letter to this Office, you have asked the following questions:

1. Does the Coroner on the scene have the authority to investigate, *i.e.*, question witnesses, coordinate (not being in charge of) law enforcement detective investigations, photograph scene, remove identification and personal items from the deceased and investigate scene but not interfere with law enforcement investigations?
2. Does the Fire Chief of a county have the authority to photograph deceased victims of vehicle wrecks, natural deaths, suicides, homicides, suspicious deaths, including close up pictures of injuries and scene pictures?
3. Does law enforcement have the authority to remove and retain deceased victim's personal belongings which are not evidence, such as jewelry, billfold, pocketbook, etc.?

Each Question will be discussed separately below.

QUESTION 1

In an opinion of this Office dated April 20, 1960, it was stated:

... at common law the powers and duties of a coroner are both judicial and ministerial. His judicial authority relates to inquiries into cases of certain deaths. In his ministerial capacity, a coroner is merely a substitute for the sheriff.

We also indicated in the opinion that while a coroner "is not primarily a law enforcement officer", the relationship of the coroner's office to law enforcement is indicated by "the fact that in this State an inquest is essentially a criminal proceeding, although it is not a trial involving the merits, but rather a preliminary investigation." Acker v. Anderson County, 77 S.C. 478, 58 S.E. 337 (1907).

This Office has addressed the relationship between the duties of law enforcement officers and coroners at the scene of a crime on previous occasions. On October 7, 1976, for example, we considered this question at considerable length.

There is nothing in the law of this State that gives to either coroners or police officers authority to direct or supervise the other in such investigation. Coroners are empowered by statute to conduct preliminary investigations into violent or unexplained deaths . . . and police officers under the common law are empowered to prosecute those found to be criminally responsible. The situation is akin to that in which SLED officers are conducting an investigation into a crime that is also under investigation by a county sheriff. Both have full authority to investigate, but not to the exclusion of the other. Neither does either have authority to direct the other as to methods of investigation.

Former Attorney General McLeod also addressed the issue of jurisdiction at a crime scene in an opinion dated October 31, 1973. There, he stated:

[i]t is my opinion that where law enforcement officers are investigating an incident with a view to establishing whether any violation of law has been committed, the coroner in normal circumstances, should, where immediate action by the police officers is indicated, defer to the investigation by the police officers, and that where no immediate action by the police officers is required, that the law enforcement officers should defer to the coroner to enable him to carry out his duties. There is no precise answer as to which officials have primary jurisdiction, but the circumstances of each case must determine the priority of investigation. The basic answer to the question can only be that the law enforcement officers and the coroner must work together and in cooperation. The findings and determinations of each branch can often materially assist the other in the performance of their respective duties, and therefore the priority of jurisdiction should not arise. If it does arise, the only answer that I can give is that the immediate investigate needs of each must be weighed in the light of the circumstances existing, and one should defer to the other as those circumstances dictate.

To answer the specific question which you ask, we can say only that a coroner is empowered to gather evidence at the scene of a crime to determine the cause of death of an individual, and to preserve it for presentation at an inquest or trial. S.C. Code Ann. §17-5-530 (Supp. 2010). In the absence of cooperation with law enforcement, §17-7-20 (2003) provides for a coroner to complete an investigation separately, including the taking of statements independent of those obtained by law enforcement, to determine the cause of death of an individual. It is the consistent opinion of this Office that no state statute defines or delineates whether a county coroner or law enforcement officers or agencies possess primary jurisdiction in the investigation of a death. Thus, "the circumstances of each case must determine the priority of investigation" and "law enforcement officers and the coroner must work together and in cooperation. See

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Op. Atty. Gen., March 22, 1995; see also Op. Atty. Gen., January 5, 1994 [“ideally there should be cooperation between law enforcement and coroners in investigating a death”].

Of course, should a situation develop that one agency withhold evidence from the other in the course of its investigation, and it becomes apparent that reasonable cooperation cannot be attained, the only remedy available is an application to the circuit court for an appropriate order. Further, the sheriff acting as chief law enforcement officer of the county, together with the coroner, “have prime responsibility” for investigating violent or unexplained deaths and that consequently, “[a]ny undue interference by anyone with such investigation could constitute the common-law crime of interfering with an officer in his line of duty (obstructing justice).” Op. Atty. Gen., March 17, 1972.

QUESTION 2

You were not specific in your letter as to the reason for the Fire Chief to be taking such photographs, or if the photographs are gratuitously displayed or released by the Fire Chief or his employees.

I am aware of no statute that absolutely prohibits the taking of pictures by the Fire Chief. Depending on the particular circumstances presented in each case, however, there are several issues that may arise.

If the photographs are taken for purposes of training EMS or rescue squad personnel, the use of such pictures could be an appropriate means of preparing emergency medical personnel for their role at the scene of a fatal accident or emergency.

Note that disclosure may be governed by the State’s Freedom of Information Act (FOIA). Our courts have consistently held the disclosure requirements pursuant to S.C. Code Ann. §§30-4-10 et seq. (2007 & Supp. 2010) are mandatory, unless specifically exempted. See Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163, 168 (Ct. App. 2003). Included in this list of exemptions in §30-4-40(a) is the following:

(18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

Whether any of the above is exempt depends on the particular facts of the case. City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747, 749 (1996); see also Burton v. York County Sheriff’s Dept., 358 S.C. 339, 594 S.E.2d 888, 893 (Ct. App. 2004)[the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis].

Section 17-5-535(B) (Supp. 2010) provides that:

[n]otwithstanding the provisions contained in subsection (A), a photograph, video, other visual image of an autopsy, or an audio recording of an autopsy, or a combination of each of these items, after all information immediately identifying the decedent has been redacted and after making facial recognition anonymous to the extent reasonably possible if lawfully obtained or possessed may be used for:

- (1) legitimate medical scientific teaching or training purposes;
- (2) legitimate teaching or training of law enforcement personnel;
- (3) teaching or training of attorneys or other individuals with a professional need to use or understand forensic science or public health;
- (4) conferring with medical or scientific experts in the field of forensic science or public health; or
- (5) publication in a scientific or medical or legal journal or textbook. [emphasis added].

Logically, when there is no identification of the decedent in any use of autopsy photographs and videos for educational training, no privacy interest would be infringed or violated pursuant to the FOIA. It stands to reason, then, that so long as the photographs at issue in no way identify the decedent, such information may be used as part of a valid training session.

Moreover, such pictures could also have evidentiary value and would be legitimate if taken for purposes of a potential criminal prosecution.

Generally, S.C. Code Ann. §§6-11-1410 et seq. (2004)[Emergency Powers Act] sets forth the power and authority of a "Fire Authority" at the scene of an emergency. A "Fire Authority" is defined as "... any lawfully and regularly organized fire department, fire protection district, or fire company regularly charged with the responsibility of providing fire protection and other emergency services incident thereto." [Emphasis added].

This Office previously addressed questions concerning the application of §§6-11-1410 et seq. and the scope of the word "emergency", in Op. Atty. Gen., April 5, 1984. Construing the Emergency Powers Act as a whole, giving meaning to all of its parts, we determined it is apparent that the Legislature intended the term "emergency" to encompass a broad range of situations. Section 6-11-1420, states:

[n]otwithstanding any other provisions of law, authorized representatives of the Fire Authority having jurisdiction, as may be in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, have the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous

areas, investigate the existence of suspected or reported fires, gas leaks, or other hazardous conditions or situations, and of taking any other action necessary in the reasonable performance of their duty. . . .

Construing this language, we stated the Legislature apparently contemplated that a Fire Authority would have authority in instances involving the protection of life or property or both, but did not choose to limit the scope of emergency to fire or to other specified situations, since the undefined phrase "other hazardous conditions or situations" is included. We concluded, the Emergency Powers Act does not expressly distinguish between situations involving fire or an immediate threat of fire and those in which fire is not a factor.

Pursuant to §6-11-1450, "[a]ny person who obstructs the operations of the Fire Authority in connection with extinguishing any fire or other emergency, or disobeys any lawful command of the fire official or officer of the Fire Authority who may be in charge at such a scene, or any part thereof, or any police officer assisting the Fire Authority, is guilty of a misdemeanor and, upon conviction, may be fined not more than two hundred dollars or imprisoned for more than thirty days."

In Op. Atty. Gen., November 15, 1991, we construed §6-11-1410 et seq. in the context of whether the Emergency Powers Act "automatically makes the fire chief in charge of a scene even though other public safety officials may be present, and whether a fire chief would have authority over such other emergency services." In responding to this question, we quoted from the opinion of April 5, 1984, which stated:

[i]t would be inappropriate for us to comment on applicability of the section [Section 6-11-1450, which provides a criminal offense for "any person" who obstructs the operations of a fire authority] to a law enforcement officer who may be present at an accident scene in his official capacity, leaving such factual interpretation or application to the courts of this State. It should be noted that, depending on the nature of the emergency and the locality, there may be a number of officials who would have jurisdiction for varying reasons; the Act does not appear to address the manner in which various officials should cooperate when such jurisdictions overlap.

Later in the opinion of November 15, 1991, in response to the question of whether a fire chief can deny admittance by the rescue squad to a scene if the fire department has equal rescue capability and claims authority pursuant to the Emergency Powers Act, we advised:

[a]gain, as stated in the . . . [1984] opinion referenced above, depending on the circumstances, there may be a number of officials who would have jurisdiction at a particular scene depending on the circumstances and the Emergency Powers Act does not specifically detail the manner in which officials should cooperate in instances of overlapping authority. As stated in that opinion, legislative clarification would be advantageous in clarifying questions such as these regarding conflicting authority.

These opinions remain in effect and continue to represent the opinion of this Office.

In Op. Atty. Gen., November 2, 2001, we addressed the question concerning the authority of a fire chief with reference to law enforcement officers at fire and automobile accident scenes, and the scope of the word “emergency.” We concluded “it is likely that a fire authority would have the authority to exercise the powers set out in Section 6-11-1420 at an accident scene as long as the situation dictated (i.e., a true emergency jeopardizing life or property).” [Emphasis added].

As previously noted in Question 1, we have previously concluded that the sheriff, as chief law enforcement officer of the county, together with the coroner “have prime responsibility” for investigating violent or unexplained deaths and that consequently, “[a]ny undue interference by anyone with such investigation could constitute the common-law crime of interfering with an officer in his line of duty (obstructing justice).” Op. Atty. Gen., March 17, 1972.

Further, if these pictures are taken for other than official reasons, there are ways to address such actions. There is a growing area of the law that is expanding liability to officials and agencies for the unauthorized and gratuitous display of photographs of the deceased and unauthorized appropriation of photographs of decedents’ corpses. See Reid v. Pierce County, 136 Wash.2d 195, 961 P.2d 333 (1998), Williams v. City of Minneola, 575 So.2d 683 (Fla. App. 1991). Such cases have recognized that relatives of a decedent have a protectable privacy interest in the improper appropriation of photographs of decedents’ corpses, and that custodians of public records may be subject to tort liability for any intentional communication of photographs outside of an official agency. In Cuttino v. Lenoir, 271 S.C. 447, 247 S.E.2d 815 (1978), a South Carolina case, an *ex parte* order was issued and served on Lenoir directing her to “immediately deliver” to proper authorities any official documents pertaining to the investigation of the murder of Cuttino’s daughter, which included certain documents and pathology reports concerning the deceased that Lenoir persisted to exhibit in public. The lower court found Lenoir in contempt of the *ex parte* order. Although the South Carolina Supreme Court ultimately held the contempt order was void, Chief Justice Ness in his dissent noted the “offensiveness of [Lenoir’s] actions . . . [and that] the irreparable harm suffered by the family of the little girl by the callous display of the documents is beyond question.” We are unaware of any other published South Carolina cases which address liability in these circumstances. In response to the concerns expressed in your letter, as the county council provides funding for the local fire districts, the county council would be interested in any activity that could potentially place the county at risk for litigation.¹

Additionally, the State’s Constitution in Article I, §24 includes a Victim’s Bill of Rights. Such provision states in part:

(A) [t]o preserve and protect victims’ rights to justice and due process . . . victims of crime have the right to:

¹Additionally, §30-4-40(a)(2) exempts “[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy” What would constitute an unreasonable invasion of personal privacy would, in the first instance, be for a public body to determine based on the facts and circumstances and subjective judicial review.

- (1) Be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal . . . process . . . [Emphasis added].

For purposes of this provision, §(C)(2) states the term “victim . . . also includes the person’s spouse, parent, child, or lawful representative of a crime victim who is deceased, who is a minor or who is incompetent or who was a homicide victim or who is physically or psychologically incapacitated.” Consistent with these provisions, in our opinion the unofficial disclosure of a victim’s photograph could conflict with the “victim’s” right to be free from abuse and would deny the “victim” the dignity guaranteed in the State’s Constitution. Thus, every effort must be made to protect the privacy interests of the “victim.”

Finally, this Office has consistently opined that autopsy records, including photographs, are confidential under State law. Op. Atty. Gen., July 24, 2002; Op. Atty. Gen., March 6, 2001; Op. Atty. Gen., October 27, 1981. These opinions rest on the premise that public access to autopsy records invades the privacy of those persons having a property interest in the dead body itself and that it would be detrimental to the public interest to permit such access. While pictures taken by the Fire Chief are not part of the autopsy records necessarily, since the Fire Chief may necessarily represent the first responder to such a scene, any pictures the Fire Chief takes might have significant evidentiary and investigative value and have the potential to be included as part of the autopsy record. If included in the record, such pictures must remain confidential. Even if not included as part of the autopsy records, however, the same rationale that underlies the prohibition on disclosure of autopsy records to the public should apply to any public disclosure of pictures taken at the scene by the fire authority. Such disclosure would be prohibited, because it “unreasonably invades the personal privacy of relatives and next of kin.” Op. Atty. Gen., October 27, 1981.

This assertion should in no way effect a valid request under FOIA pursuant to §17-5-535(A) (Supp. 2010)²; see National Archives and Records Admin. v. Favish, 541 U.S. 157 (2004)[holding FOIA recognizes

²(A) Photographs, videos, or other visual images and audio recordings of or related to the performance of an autopsy shall only be viewed by or disseminated to:

- (1) the coroner or the medical examiner, or both, and their staff;
- (2) members of law enforcement agencies, for official use only;
- (3) parents of the deceased, surviving spouse, children, guardian, personal representative next of kin, and any other person given permission or authorization to view or possess the visual images by the personal representative of the deceased’s estate;
- (4) those involved in a judicial or administrative proceeding related to the death of the subject of the photograph, video, other visual image or audio recordings including, but not limited to:
 - (a) parties to a civil suit arising from, related to, or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings, and the attorneys for the parties and the staff of the attorneys;
 - (b) a person charged with a crime arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings, and the person’s attorney and the staff of the attorney;
 - (c) staff of the prosecutor’s office considering or prosecuting criminal charges arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;

surviving family members' right to personal privacy with respect to their close relative's death-scene images, and that decedent family's privacy interest outweighed public interest in disclosure of the photographs].

In an opinion dated August 8, 2001, this Office addressed similar concerns about a local rescue squad taking photographs of deceased individuals at accident scenes. The opinion is attached for your review.

Question 3

In Op. Atty. Gen., October 12, 2010, this Office addressed whether the coroner's office is responsible for compensating the next of kin of a deceased individual if the personal belongings, *i.e.*, jewelry, money, vehicles, etc., of the deceased cannot be returned to them in a timely manner.

In the opinion, we noted that pursuant to S.C. Code Ann. §17-28-320(A) (Supp. 2010) of the recently-enacted "Preservation of Evidence Act" ("the Act"), "a custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for. . . [the designated offenses]. . . ." Subsection (B) of the provision states that

[t]he physical evidence and biological material must be preserved: (1) subject to a chain of custody as required by South Carolina law; (2) with sufficient documentation to locate the physical evidence and biological material; and (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

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- (d) lay and expert witnesses conferred with, consulted or retained by a party or an attorney considering or involved in a legal or administrative proceeding arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;
 - (e) judges and administrative hearing officers, as well as their staff, involved in a judicial or administrative proceeding arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings; and
 - (f) members of any jury, including grand juries, petit juries and coroner's juries, empanelled to hear or decide any issue arising from, related to or relevant to the death or autopsy of the subject of the photograph, video, other visual image or audio recordings;
- (5) physicians and other persons consulted by or supervising the physicians or persons who were involved in the performance of the autopsy of the subject of the photograph, video, other visual images, or audio recordings; and
- (6) a person who receives such photographs, videos, or other visual images pursuant to a validly issued court order, after notice and opportunity to object are provided to the personal representative of the deceased's estate.

These photographs and videos must be released and disseminated only as authorized by this section.

The term "physical evidence" is defined pursuant to subsection (9) of the provision as

... an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

Section 17-28-310(2) defines the term "custodian of evidence" as used in the Act as

... an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

Section 17-28-320(C) mandates:

[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

Therefore, all physical evidence and biological material related to a criminal conviction, whether by trial or guilty plea, must be preserved as stated. As set forth in §17-28-320(B)(3), such evidence must be preserved "under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material."

Moreover, §17-28-350 states that

[a] person who willfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

In an opinion dated September 15, 2010, this Office concluded that a coroner's office would be included within the definition of "custodian of evidence" for purposes of the Act and its mandate for the preservation of physical evidence and biological material pursuant to §17-28-320(A).

We further noted that the State has enacted legislation detailing the rights of a victim as set forth in S.C. Code Ann. §§16-3-1505 et seq. (2003 & Supp. 2010). The term "victim" is defined by §16-3-1510(1) as

. . . any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense . . . "Victim" also includes any individual's spouse, parent, child, or the lawful representative of a victim who is: (a) deceased; (b) a minor; (c) incompetent; or (d) physically or psychologically incapacitated.

Pursuant to §16-3-1535(E),

[a] law enforcement agency and the summary court must return to a victim personal property recovered or taken as evidence as expeditiously as possible, substituting photographs of the property and itemized lists of the property including serial numbers and unique identifying characteristics for use as evidence when possible. [Emphasis added].

However, again, as set forth by §17-28-320(C),

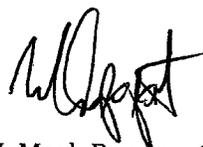
[t]he physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

In the opinion of October 12, 2010, we concluded the mandate of §17-28-320(C) prevails over §16-3-1535(E), and that the coroner's office would not be responsible for compensating the next of kin of the deceased individual if the personal belongings cannot be returned more expeditiously than authorized by the Act.

In answer to your question, normally, evidence in a criminal case must be retained in the custody of law enforcement pursuant to the Act "under conditions reasonably designed to preserve the forensic value of . . . [the] . . . physical evidence. . . ." This Office cannot comment specifically on the forensic value of any particular piece of evidence retained by law enforcement, such as jewelry, a billfold, or a pocketbook. Whether a piece of evidence would be considered "physical evidence" in that it would be an object "that is or is about to be produced or used or has been produced or used in a criminal proceeding" would be a matter for review by local authorities, including the local solicitor or prosecutor. Also, the exculpatory value, if any, would have to be considered as to any question regarding the return of such evidence by law

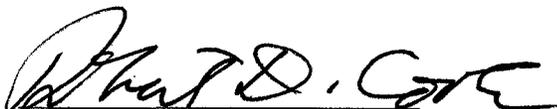
enforcement. Consistent with the above, in the opinion of this office, it would be sufficient under the Act for law enforcement as a "custodian of evidence", as defined in the Act, to utilize normal, customary, and contemporary forensic science techniques in the investigation and retention of evidence gathered and/or used in a criminal prosecution in order to comply with the Act. Moreover, in the opinion of this office, it would be permissible and consistent with the intent of the Act that the gathering and retention of such evidence allows for the substitution and/or conversion of such original evidence later used as admissible evidence through the techniques of sampling, swabbing, photographing or the use of other forensic science techniques so long as care is taken to preserve the evidence in compliance with the rules of evidence and chain of custody. Thus, while §16-3-1535(E) provides for the return of certain items "as expeditiously as possible," the mandate of §17-28-320(C) for preserving any physical or biological material is clear.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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