ALAN WILSON
ATTORNEY GENERAL

November 28, 2012

W. Kevin Bronson, City Manager
City of Camden
P.O. Box 7002
Camden, South Carolina 29021

Dear Mr. Bronson,

We received your letter requesting an opinion of this Office concerning a request under the Freedom of Information Act ("FOIA") for certain financial records related to the Camden City Drug Fund. By way of background, you provide the following information:

> The former City Attorney ... has recently been accused of misconduct in office regarding alleged actions taken by him in the administration and prosecution of certain criminal cases, particularly driving under the influence ("DUI"). Allegations in an arrest warrant initiated by the South Carolina Law Enforcement Division ("SLED") state that:
>
> > [O]n or between January 1, 2005 and December 31, 2011, in Kershaw County, one Charles V.B. Cushman did commit the crime of Misconduct in Office (Common Law) in that he did fail to properly and faithfully discharge the official duties imposed upon him by the law as City Prosecutor/Attorney for the City of Camden, South Carolina, to wit: he did breach said duties by intentionally dismissing and/or Nolle Prossing criminal charges under the condition that a "donation" be made by the defense to the Camden City Drug Fund, all of which has been corroborated by financial records, statements, and documents.
>
> The City has recently received a request from the local newspaper under [FOIA] for "[a]ll financial records during the request period [January 1, 2005 to December 31, 2011] related to the Camden City Drug Fund."
>
> In reviewing the newspaper's request, the City is aware of the provisions of S.C. Code 17-1-40 which generally provide that "[a] person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, *files*, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained

> by the municipality[1] ...." (emphasis added). As noted above, Mr. Cushman is accused of dismissing and/or discharging cases in exchange for a "donation" to the City's Drug Fund. Regardless of the merits of Mr. Cushman's actions, many charges against accused individuals were dismissed or discharged in exchange for the payment of the donation[s].

In discussing the matter further, you explain that the City maintains the Drug Fund account and has in its possession the relevant financial records. However, it is our understanding such records are not kept, maintained, or compiled by the City in the regular course of business. Instead, they were created or compiled in response to requests from SLED as part of their investigation into the allegations of misconduct against the City Attorney. Furthermore, you express concern as to the privacy interests of individuals who made donations to the City Drug Fund as their identities and other personal information are included in these financial records.

In light of the above information, you ask the following questions:

(1) Financial records regarding the payment of the "donation[s]" to the City's Drug Fund still exist. Under Section 17-1-40, do the financial records constitute "files" that should have been destroyed?

(2) To the extent any documentation or information has been retained by the City (unintentionally) that otherwise should have been destroyed pursuant to Section 17-1-40, including the financial records to the extent they constitute "files," is there any basis to compel the disclosure of such documentation or information under FOIA or should such materials be destroyed?

(3) Assuming the financial records are not "files," Section 17-1-40 additionally provides that certain information may be retained by the municipality. Particularly, "local ... detention and correctional facilities may retain booking records, identifying documentation and materials, and other institutional reports and files under seal, on all persons who have been processed, detained or incarcerated ... to manage their statistical and professional information needs ...." The statute further provides that any information retained by the local detention or correctional facility is not a public document and is exempt from disclosure. Therefore, (a) does either City Hall or the Police Department (or both) constitute a local detention or correctional facility, and (b) do the financial records constitute documentation, materials or files that are otherwise exempt from disclosure?

Law/Analysis

The statutory section you reference provides, in its entirety:

> (A) **A person who after being charged with a criminal offense and the charge is discharged,** proceedings against the person are dismissed, or the person is

[1] As noted in the analysis that follows, the language of the actual statute states that "no evidence of the record pertaining to the charge may be retained by any *municipal*, county, or state law enforcement agency." § 17-1-40(A) (emphasis added). It does not refer to a *municipality*.

> found not guilty of the charge, **the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal**, county, or state **law enforcement agency**. Provided, however, that local and state detention and correctional facilities may retain booking records, identifying documentation and materials, and other institutional reports and files under seal, on all persons who have been processed, detained, or incarcerated, for a period not to exceed three years from the date of the expungement order to manage their statistical and professional information needs and, where necessary, to defend such facilities during litigation proceedings except when an action, complaint, or inquiry has been initiated. Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such information only may be disclosed by judicial order, pursuant to a subpoena filed in a civil action, or as needed during litigation proceedings. A person who otherwise intentionally retains the arrest and booking record, files, mug shots, fingerprints, or any evidence of the record pertaining to a charge discharged or dismissed pursuant to this section is guilty of contempt of court.
>
> (B) A municipal, county, or state agency may not collect a fee for the destruction of records pursuant to the provisions of this section.
>
> (C) This section does not apply to a person who is charged with a violation of Title 50, Title 56, an enactment pursuant to the authority of counties and municipalities provided in Titles 4 and 5, or any other state criminal offense if the person is not fingerprinted for the violation.
>
> (D) The State Law Enforcement Division is authorized to promulgate regulations that allow for the electronic transmission of information pursuant to this section.

§ 17-1-40 (Supp. 2010) (emphasis added).[2]

With regards to your questions concerning § 17-1-40, we must first determine whether the relevant provisions of that section are applicable to any files or records in the possession of a municipal government. The first sentence of subsection (A) concerning the destruction of records, files, etc., related to a dismissed charge states that "no evidence of the record pertaining to the charge may be retained by any *municipal*, county, *or* state *law enforcement agency*." § 17-1-40(A) (emphasis added). Although the plain meaning of "law enforcement agency" as used in that sentence clearly includes, *inter alia*, a municipal police department, the term cannot be construed to include a *municipality*. See Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) ("[courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation"); see also Black's Law Dictionary (9th ed. 2009) (definition of "law enforcement" includes "[t]he detection and punishment of violations of the law" and "[p]olice officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law"). Therefore, the first sentence of § 17-1-40(A) has no application to any files or records of the City itself and does not require the destruction of any of the files or records in question.

[2] Act No. 167 of 2010 added subsections (C) and (D) to § 17-1-40.

Nor do we believe that the remaining provisions of § 17-1-40(A) have any application to the financial records of the City Drug Fund. Those provisions generally provide that "*local and state detention and correctional facilities*" may retain and withhold from disclosure certain files and records for up to three years from the date of an expungement order. Id. (emphasis added). While a city hall may house a jail or local detention facility, we do not believe this fact expands the meaning of "local ... detention and correctional facilities" as used in the statute to include a municipal government. See Harris, supra. Under such circumstances, the applicability of those provisions would be limited in scope to the relevant files and records of the jail or detention center itself. Therefore, we are of the opinion § 17-1-40(A) provides no basis upon which the City may withhold the records in question.

With the above conclusions in mind, we turn to the issue of whether the financial records of the City Drug Fund are subject to disclosure under FOIA, S.C. Code §§ 30-4-10 et seq. Under FOIA, "[a]ny person has a right to inspect or copy any public record of a public body" unless an exception applies. § 30-4-30(a). The General Assembly has stated the following with regards to the findings and purpose behind the FOIA:

> [I]t 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.

§ 30-4-15; see also Burton v. York County Sheriff's Dept., 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct.App. 2004) ("disclosure, not secrecy, is the dominant objective of the Act"). "[T]he essential purpose of the FOIA is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). "The purpose of the Act is to protect the public by providing for the *disclosure* of information." Id. The FOIA "is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161-62, 547 S.E.2d 862, 864-65 (2001).

The definition of "public record" includes "all books, papers ... or other documentary material regardless of physical form or characteristics prepared, owned, used, or in the possession of, or retained by a public body...." § 30-4-20(c). The financial records of the City Drug Fund are clearly in the possession of the City and thus meet the definition of a public record. Therefore, such records are subject to disclosure unless some exception applies.

Matters that are specifically exempt from disclosure under FOIA are generally set forth in § 30-4-40(A). "The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis," City of Columbia v. ACLU of Columbia, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996), and exemptions "should be narrowly construed to ensure public access to documents." Seago v. Horry County, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008). "The exemptions impose no duty *not* to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure." S.C. Tax Comm'n v. Gaston Cooper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994).

As we have previously stated, only a court, and not an opinion of this Office, can determine whether particular records or information are subject to disclosure under South Carolina's FOIA. See Op. S.C. Att'y Gen., 2011 WL 6959371 (Dec. 5, 2011). Based on the information provided, however, we are not aware of any exemption in § 30-4-40 or elsewhere that would allow the City to wholly refuse to disclose the financial records of the City Drug Fund. In addition, § 30-4-50(A) specifically makes certain categories of information public to the extent not otherwise restricted or limited by §§ 30-40-20, -40, and -70. One such category is "*information in or taken from any account*, voucher, or contract *dealing with the receipt* or expenditure *of* public or *other funds by public bodies....*" § 30-4-50(A)(6) (emphasis added). The financial records at issue certainly contain information taken from the City Drug Fund concerning the receipt of funds by the City, a public body. Thus, regardless of the fact these records were only created or compiled in response to requests from SLED, we believe a court would find such records are generally subject to disclosure on the basis they contain information that is expressly made public pursuant to statute.

Even though the financial records may be public documents, there may still be some exempt information in these records that should be redacted or otherwise withheld. See § 30-4-40(b) ("If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available"). Relevant to your concern that the release of these records may invade the privacy rights of the individual donors, § 30-4-40(a)(2) specifically exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy...." A balancing test is used to determine whether the "public's need to know" outweighs the individual's privacy interest in nondisclosure. Burton v. York County Sheriff's Dept., 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004).

It is impossible for us to comment on exactly what information in the financial records of the City Drug Fund may or should be redacted without having the opportunity to review such records in their entirety. Regardless, we note that we do not believe the privacy exemption of § 30-4-40(a)(2) applies to the identities of the individual donors in this case. It is our opinion that the public's right to information concerning the source of the City's funds outweighs the interests of the individual donors in keeping their identities private.

Another relevant exemption to FOIA provides that "[i]nformation relative to the identity of the maker of a gift to a public body if the maker of the gift specifies that his making of the gift must be anonymous and that his identity must not be revealed as a condition of making the gift...." § 30-4-40(a)(11). Arguably, this provision may protect the identities of individuals who donated money to the City Drug Fund on the condition of anonymity. However, we believe a court would find that individuals who paid money to the City Drug Fund on the condition of the dismissal of charges did not make a "gift" to the City for purposes of § 30-4-40(a)(11) on the basis such individuals received something in exchange for such payments. Therefore, we do not believe the identities of such individuals are protected regardless of whether they gave money on the condition of anonymity.

If the City has any doubt as to whether or not to redact certain other information, we advise the City, as we have consistently advised public bodies, to err on the side of disclosure. See Op. S.C. Att'y Gen., 2011 WL 6959371 (Dec. 5, 2011) ("In light of our State FOIA's mandate of liberal construction in favor of disclosure, and the fact that the law imposes no duty on public entities to withhold exempt materials, we ... [advise] public entities ... that, 'when in doubt, disclose the information to the public'").

There may be some information in the financial records of the City Drug Fund which the City must redact or otherwise withhold which are not specifically listed amongst the exemptions of § 30-4-40(a). See § 30-4-40(a)(4) (exempting "[m]atters specifically exempted from disclosure by statute or law"). S.C. Code § 30-2-310(A)(1) provides that, except in certain limited circumstances, a public body may not, *inter alia*:

> (e) **intentionally communicate or otherwise make available to the general public** an individual's social security number or a portion of it containing six digits or more or **other personal identifying information. "Personal identifying information,"** as used in this section, **has the same meaning as "personal identifying information" in Section 16-13-510**, except that it does not include electronic identification names, including electronic mail addresses, or parent's legal surname before marriage ....

§ 30-2-310(A)(1)(e) (emphasis added). As stated in § 16-13-510:

> **"Personal identifying information" means the first name or first initial and last name in combination with and linked to any one or more of the following data elements** that relate to a resident of this State, when the data elements are neither encrypted nor redacted:
>
> (1) social security number;
>
> (2) driver's license number or state identification card number issued instead of a driver's license;
>
> (3) **financial account number**, or credit card or debit card number in combination with any required security code, access code, or password **that would permit access to a resident's financial account**; or
>
> (4) **other numbers or information which may be used to access a person's financial accounts** or numbers or information issued by a governmental or regulatory entity that uniquely will identify an individual.
>
> The term does not include information that is lawfully obtained from publicly available information, or from federal, state, or local government records lawfully made available to the general public.

§ 16-13-510(D) (emphasis added).

In light of the above provisions, we advise the City to redact any financial account numbers or information which, when combined with an individual's name, would allow access to that individual's financial account.

Conclusion

This Office is of the opinion that S.C. Code § 17-1-40 has no application to any files or records in the possession of the City. The plain meaning of "municipal ... law enforcement agency" as used in the

first sentence of § 17-1-40(A), which provides that certain records or files related to a dismissed charge may not be retained or must be destroyed by such agencies, cannot be construed to include a *municipality*. Nor do we believe the City may withhold such records pursuant to the remaining provisions of § 17-1-40(A) which generally provide that "local ... detention and correctional facilities" may retain and withhold certain files and records for up to three years from the date of an expungement order. As used in those provisions, the meaning of "local ... detention or correctional facilities" simply cannot be expanded to include a municipal government. This is true even if the city hall houses a local jail or detention center, in which case the applicability of those provisions would be limited in scope to the relevant files and records of the actual jail or detention center. Therefore, we believe § 17-1-40(A) provides no basis upon which the financial records of the City Drug Fund may be destroyed or withheld from disclosure.

In any event, we are of the opinion the financial records of the City Drug Fund are generally subject to disclosure under FOIA. Under FOIA, public records in the possession of a public body are subject to public disclosure unless an exception applies. § 30-4-30(a). The financial records at issue are in the possession of the City and thus clearly meet the definition of a "public record" for purposes of § 30-4-20(c). Furthermore, such records contain information taken from an account dealing with the receipt of funds by the City and thus are expressly made public information pursuant to § 30-4-50(A)(6).

While we are aware of no statutory provision which would provide a basis upon which the City could wholly refuse to disclose the financial records of the City Drug Fund, such records may contain some exempt information which should be redacted or separated from that which is nonexempt. It is impossible for us to comment on exactly what information should be redacted without having the opportunity to review such records in their entirety. Regardless, we note that we do not believe the identities of the individuals who "donated" money to the City Drug Fund in exchange for the dismissal of charges may be redacted or withheld pursuant to the privacy exemption of § 30-4-40(a)(2) or any other provision. If the City has any doubt as to whether certain other information should be redacted under FOIA, we advise the City, as we have consistently advised public bodies, to err on the side of disclosure. However, in light of § 30-2-310(A)(1)(e) and § 16-13-510(D), we advise the City to redact or otherwise withhold any financial account numbers or other information which, when combined with an individual's name, would allow access to that individual's financial account.

Very truly yours,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General