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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

May 16, 2002

The Honorable Converse A. Chellis, III
Member, House of Representatives
308 Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Chellis:

You note that it has come to your attention that state and county agencies may be disclosing information contained in the records of service of military veterans, otherwise known as DD Form 214. These forms, you indicate, "contain personal information, including Social Security Numbers, which was collected in the course of the employment of these veterans and would appear to be confidential."

You reference several opinions previously rendered by this Office relating to the confidentiality of information contained in an employee's personnel file. See, Op. Atty. Gen., 1975-76 No. 4363; Op. Atty. Gen., August 13, 1983. You raise the following questions:

> [d]oes the right of privacy of information contained in personnel files afforded to public employees extend to military personnel? What information contained in DD Form 214 would be considered public information and what would not be subject to disclosure? If the document contains both public and private information, what information should be removed form the form to comply with SC Code Sec. 30-4-40(b)? If the information contained in these forms is not considered exempt from disclosure, would the attached draft legislation exempt this information from being public?

Law / Analysis

The DD Form 214 is also known as the Certificate of Release and Discharge From Active Duty. See, 10 U.S.C.A. § 1168 (1998). The Form contains, among other things, the service member's name, branch of military service, social security number, home address at time of entry, dates of service, military education, type of separation, and character of service.

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Part 45 of title 32 of the Code of Federal Regulations sets forth the method of distribution of DD Form 214. The form serves several purposes including providing the military with "a brief clear-cut record of the member's active service with the Armed Services at the time of transfer, release or discharge, or when the member changes status or component while on active duty." 32 C.F.R. § 45(b)(2). See also 32 C.F.R. § 45.2(b) (3) [provides "appropriate governmental agencies with an authoritative source of information which they require in the administration of Federal and State laws applying to personnel who have been discharged, otherwise released, or transferred to a Reserve component while on active duty."]

We turn now to a discussion of South Carolina's Freedom of Information Act. The FOIA was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions and was amended by Act No. 118, 1987 Acts and Joint Resolutions. The Act's preamble best expresses both the Legislature's intent in enacting the statutes, as well as the public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

> [t]he 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.

On numerous occasions, this Office has emphasized its approach in construing the Freedom of Information Act consistent with the Legislature's above-referenced expression of public policy. In Op. Atty. Gen., Op. No. 88-31 (April 11, 1998), we summarized the rules of statutory construction which this Office follows in interpreting the FOIA thusly:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be

> narrowly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

In essence, the rule of thumb to which this Office has consistently adhered with respect to any Freedom of Information Act question is: when in doubt, disclose.

Moreover, our Supreme Court has rejected the idea that simply because the Freedom of Information Act in Section 30-4-70(a)(2) contains an exemption for "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy ...," such exemption renders a particular record nondisclosable per se. In City of Cola. v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996), the Court concluded that an internal investigation report performed as to certain police officers was not exempt per se under the FOIA either on the basis of the "personal privacy" exemption or as a personnel record. There, the Court stated:

> We disagree with Respondent's contention that the internal investigation reports of law enforcement agencies are per se exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. Newberry Publishing Co., Inc. v. Newberry County Comm'n on Alcohol and Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992). Thus, it remains to be seen whether the report qualifies for an exception under the FOIA.
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> Another basis for the trial court's holding that the report is exempt from disclosure also warrants discussion. Under the FOIA, a public body may hold a meeting closed to the public to discuss among other things, the employment, demotion, or discipline of an employee. Section 30-4-70(a)(1). Respondent analogizes its internal investigation process to a § 30-4-70(a)(1) "discussion", and argues that because Respondent can conduct such a discussion closed to the public, it therefore follows that any report memorializing that discussion should also be exempt from disclosure under the FOIA. The trial court agreed with Respondent, holding that "[i]t is impossible to render a harmonious construction of the Act which makes the Internal Affairs file subject to disclosure."
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> ....
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> The plain language of § 30-4-70(a)(1) does not exempt from disclosure a "public record" as that term is defined by § 30-4-20. Section 30-4-70(a)(1) does no more than to allow public bodies to conduct certain "discussions" closed to the public. Thus, as the report is a public record as defined by § 30-4-20, the question of its exemption must be resolved by reference to § 30-4-40 ("Matters exempt from disclosure").

Accordingly, pursuant to § 30-4-40(b), a public body is required to "separate the exempt and nonexempt material and make the nonexempt material available ... ."

However, §30-4-40(4) of the FOIA must also be examined. The General Assembly has provided therein that "matters specifically exempted by the statute or law" may be withheld from disclosure. The question thus becomes whether any provision of either federal or state law makes the Certificate of Release or Discharge (DD Form 214) exempt from disclosure. I have located an opinion rendered by the Ohio Attorney General which concludes that the DD Form 214 is exempt from disclosure as a matter of federal law.

In 2000 Ohio Op. Atty. Gen. Op. No. 2000-036 (September 20, 2000), the Ohio Attorney General concluded that DD Forms 214 "may not be released without the written consent of the service member who is the subject of the DD Form 214." The Attorney General of Ohio noted that the initial distribution of the original and copies of DD Form 214 is governed by 32 C.F.R. § 45.3(e). This provision requires that the original (copy 1) of the Form be given to the service member, copy 2 be retained by the appropriate service, and copy 3 be sent to the Department of Veterans Affairs. Copy 5 must be sent to the Louisiana UCX/UCFE Claims Control Center, Louisiana and copy 6 is to be sent to the appropriate state director of veterans affairs. Distribution of copies 7 and 8 is governed by regulations of the military services. Pursuant to 32 C.F.R. § 45.3(b)(1)(A), "Copy 4, containing the statutory or regulatory authority, reentry code, SPD code, and narrative reason for separation also will be physically delivered to the separatee prior to departure, if he/she so requested."

32 C.F.R. § 45.3(e)(4) further provides for the provision of copies of DD Form 214 after a service member's separation as follows:

> [a]gencies maintaining a separatee's DD Form 214 will provide a copy only upon written request by the member. Agencies will provide the member with 1 copy with the Special Additional Information section, and 1 copy with that information deleted. In the case of DD Form 214 issued prior to July 1, 1979, agencies will provide the member with 1 copy containing all items of information completed, and narrative reason for separation reenlistment eligibility code, and separation program designator/number.

The Ohio Attorney General noted that the term "agencies" as used in the applicable Regulation is ambiguous. The question, in the Attorney General's mind, was thus "whether the Governor's Office of Veterans Affairs, as an entity to which a copy of DD Form 214 may be sent in accordance with 32 C.F.R. § 45.3(e) is one of the 'agencies' that is subject to the prohibition in 32 C.F.R. § 45.3(e)(4) against the distribution of copies of DD Form 214 without the written consent of the service member who is the subject of the form."

The Attorney General of Ohio concluded that the prohibition of the Regulation did apply. Using the following analysis, the Ohio Attorney General concluded:

> Examination of the remaining provisions of 32 C.F.R. Part 45 reveals that the word "agencies" is used elsewhere therein with clear reference to entities other than the military services. See, e.g., 32 C.F.R. § 45.3(d) (3) (stating in part, "[c]opies of DD Form 214 transmitted to various governmental agencies shall be legible, especially those provided to the Veterans Administration (Department of Veterans Affairs, effective March 15, 1989, in accordance with section 18(a), Public Law 100-527 [)] and the Department of Labor" (emphasis added)) ...; 32 C.F.R. § 45.4(e) (2) ("[a]gencies or individuals who come into the possession of [lists of separation program designator codes] are cautioned on their use because a particular list may be outdated and not reveal correctly the full circumstances relating to an individual's separation or discharge"). It appears, therefore, that the use of the word "agencies" in 32 C.F.R. § 45.3(e) (4) was not intended to refer to only those entities expressly made subject to Part 45 of Title 32 of the Code of Federal Regulations by 32 C.F.R. § 45.2(a).
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> In addition, we note that 32 C.F.R. § 45.4 emphasizes the value of the forms in validating the eligibility of veterans for benefits and the vulnerability of the forms to fraudulent use. See, e.g., 32 C.F.R. § 45.4(a) (stating in part, "[t]he DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and government agencies to validate veteran eligibility for benefits. As such, they are valuable forms and, therefore, vulnerable to fraudulent use. Since they are sensitive, the forms must be safeguarded at all times. They will be transmitted, stored, and destroyed in a manner which will prevent unauthorized use"). Moreover, 32 C.F.R. § 45.4(a) requires all of the military services to issue instructions to assure the security of DD Forms 214, both prior to and after their preparation and distribution. It would be reasonable, therefore, to conclude that 32 C.F.R. § 45.3(e) (4) includes as "[a]gencies" all of the entities to which copies of DD From 214 are submitted under 32 C.F.R. § 45.3(e), including state directors of veterans affairs.
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> Although no cases of which we are aware have expressly addressed the possible application of 32 C.F.R. § 45.3(e) (4) to state directors of veterans affairs, the distribution and subsequent use of DD Forms 214 has been the subject of comment in a number of cases, which suggest that DD Forms 214 are not disclosed without the consent of the service member who is the subject of the particular form. See, e.g., Karr v. Castle, 768 F. Supp. 1087, 1099-1100 n.5 (D.Del. 1991) (describing the entities to which copies of DD Form 214 are distributed, and stating, "[t]hese agencies cannot further disclosure the form without the individual's consent"); Nethery v. Orr, 566 F. Supp. 804, 806 n. 3 (D.D.C. 1983) ("[u]pon discharge from the armed forces, a service member is issued a discharge certificate called a 'DD-

> 214.' The DD-214 is a 7-ply [now 8- ply] form, only 4 copies of which provide information regarding the statutory or regulatory authority for discharge. These copies are not available to the public ... ."
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> While the wording of these cases suggests that no entity to which a copy of DD Form 214 is sent may release a copy thereof without the written consent of the service member who is the subject of the form, none of these cases identifies specifically the provision of law pursuant to which copies of DD Form 214 are made unavailable to the public. ... Rather, the cases reflect a common understanding that copies of DD Form 214 generally are not, without the written consent of the subject service member, disclosed by the entities to which the copies are distributed under 32 C.F.R. § 45.3(e).
>
> We conclude, therefore, that, as an agency to which a copy of DD Form 214 may be sent in accordance with 32 C.F.R. § 45.3(e) (vi), the Governor's Office of Veterans Affairs is subject to the prohibition in 32 C.F.R. § 45.3(e) (4) against the distribution of copies of DD Form 214 in its possession without the written consent of the service member who is the subject of the form.

Moreover, in Neal v. Secretary of the Navy, 472 F.Supp. 763 (U.S.D.C.E.D. Pa. 1979), revd. on other grounds, 639 F.2d 1029 (3d Cir. 1981), the Court concluded that certain information contained in the DD Form 214 was confidential as a matter of federal law. The Court stated the following:

> [t]he DD Form 214 (MC) is a standard form designed to provide source of information relating to former personnel. It is available to the Marine Corps and other departments within the Department of Defense. ... It is also available to the individual as a brief record of his tour of duty. ... The copy provided to the individual (which he might be asked to furnish to a prospective employer) does not contain the reenlistment code or the reason for separation, nor is this information available to government agencies or the public generally. ... Thus the information contained in Neal's Marine file is required by law to be kept confidential, unavailable to prospective employers or others in the community at large ... .

472 F. Supp. at 785.

There is contrary authority, however. An opinion of the Arkansas Attorney General, Ark. Op. Atty. Gen. No. 2001-080, (March 22, 2001) concluded that 32 C.F.R. §45.3 only regulated the maintenance and dissemination of DD Form 214 by the military. This opinion concluded that personal information such as social security numbers, addresses, "blood groups" and insurance information "must be redacted." In my opinion, however, the opinions of the Ohio Attorney General is better reasoned and is more consistent with the above-referenced case law.

In conclusion, it my opinion that 32 C.F.R. § 45.3 makes the DD Form 214 confidential as a matter of federal law, except where dissemination is authorized by the written consent of the service member. This being the case, this form would be exempt under § 30-4-40(4) of the FOIA as a matter "specifically exempted from disclosure by statute or law."

Notwithstanding my opinion, however, if the General Assembly is concerned that these forms are being improperly distributed and that individual service members' privacy is being invaded thereby, the corrective legislation which you enclosed would insure that such distribution no longer occurs. Moreover, if my conclusion herein - that the DD Form 214 is confidential pursuant to federal law (32 C.F.R. § 45.3) - is incorrect, then, as noted above, the DD Form 214 would not be exempt per se under the South Carolina FOIA. See, City of Cola v. ACLU, supra. Each entry on the form would have to be scrutinized individually to determine if the invasion of personal privacy of the service member in disclosing that particular information was "unreasonable." In that event, redaction of entries such as social security numbers, medical information, possibly insurance information, and certainly the reason for separation from the service would be advisable, but the document would not be exempt per se under the theory that as a whole such document's release constitutes an unreasonable invasion of personal privacy. Accordingly, as a precaution you may still wish to seek passage of the legislative amendment which you have included.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

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