The State of South Carolina

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The Honorable Candy Y. Waites
Member, House of Representatives
310B Blatt Building
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Dear Representative Waites:

A public agency's finance department has in its possession copies of telephone bills received for agency telephone charges, which bills have been paid from agency funds. A constituent has asked to examine these records; the agency wishes to respond to the request consistent with the law but is concerned that release of the records would in some ways be an invasion of privacy. You have asked whether the agency might allow an examination of the telephone bills in its possession.

As acknowledged directly in an opinion of this Office dated June 28, 1977 and implicitly in an opinion of January 8, 1982, such telephone bills would be considered public records as defined by S.C. Code Ann. § 30-4-20(c) and subject to disclosure under the Freedom of Information Act, S.C. Code Ann. § 30-4-10 et seq., unless exempt from disclosure by a statute such as § 30-4-40.

The opinion of January 8, 1982 concluded that the telephone bills in question there would be exempt from disclosure on the basis of § 30-4-40(a)(2), which protects information of a personal nature, the disclosure of which would constitute unreasonable invasion of personal privacy. The opinion observed that

> ... from the bill there is no means of determining who made the call or to whom the call was placed.

Thus, the furnishing of individual numbers called by individual members of the House of Representatives or from their telephones was felt to be an unreasonable invasion of

personal privacy. Exactly whose privacy would be unreasonably invaded would be speculative at best. Rather than promoting openness of records pertaining to public officials and their expenditure of public funds, the approach taken by this opinion is to protect unknown entities or individuals by a shield of confidentiality. Several judicial decisions rendered subsequent to the opinion of January 8, 1982 would make this reasoning questionable. We have been asked on several occasions recently to review these previous opinions.

Whether the Freedom of Information Act established a statutory duty of confidentiality was addressed in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991). Therein, the Supreme Court found that

> the essential purpose of the FOIA is to protect the public from secret government activity. Sections 30-4-40(a)(2) and 30-4-70(a)(1) provide general exceptions to disclosure by exempting certain matters from disclosure. Bellamy, however, urges protection of her rights as an individual while the FOIA protects a clearly identifiable class, the class protected is the public. Nowhere do §§ 30-4-40 and -70 purport to protect individual rights. ...

408 S.E.2d at 221. After discussing the landmark decision relative to the federal Freedom of Information Act, Chrysler Corp. v. Brown, 441 U.S. 281 (1979), our Court continued:

> We find the Supreme Court's analysis of the essential purpose of the federal FOIA applicable by analogy to South Carolina's FOIA. The essential purpose of each is the same. The FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exemptions from disclosure contained in §§ 30-4-40 and -70 do not create a duty not to disclose. The exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act. We hold, therefore, that no special duty of confidentiality is established by the FOIA.

408 S.E.2d at 221. Thus, the Freedom of Information Act does not create a promise of confidentiality with respect to individuals whose telephone numbers might be listed on the telephone bills in question.

It is unquestioned that public funds are used to pay the telephone bills, in the absence of an individual reimbursing the relevant public body (state, county, municipality, etc.) for personal telephone calls. Where the expenditure of public funds is involved, the courts have balanced the competing interests of the public's right to be apprised of how public funds are spent against possible personal privacy interests, the balance being tilted in favor of disclosure. In Perkins v. University of South Carolina, 86-CP-40-3405, in an order dated October 27, 1986, the court observed that

> the public policy in favor of the disclosure of financial information is not to be thwarted because of a claim that disclosure would unreasonably invade personal privacy. ... There is legitimate and general public interest in the expenditure of public funds, and a claimed right of privacy must give way to the legitimate public interest. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313, 315 (1984). Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606, 609 (1956).
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> ....
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> The purpose of the FOIA is to promote disclosure of information of a public nature, and the expenditure of tax dollars is certainly of a public nature. Furthermore, in order to promote the policies underlying the FOIA, the exceptions to the general mandate of disclosure should be construed narrowly. ...

The same reasoning would apply to the instant case.

In addition, the Supreme Court of Georgia in Dortch v. Atlanta Journal, 261 Ga. 350, 405 S.E.2d 43 (1991), held that disclosure of cellular telephone bills paid by the City of Atlanta would be required notwithstanding that unlisted telephone numbers might be revealed. The City argued that deletion from records of telephone numbers called from city cellular telephones would be necessary to protect the privacy interests of individuals who might have unlisted telephone numbers. The court stated that Georgia's exemption for invasion of personal privacy, similar to our § 30-4-40(a)(2), is to be determined by the

standards applicable to the tort of invasion of privacy. The court stated, "However, the exemption is not meant to exclude 'legitimate inquiry into the operation of a government institution and those employed by it.'" 405 S.E.2d at 45.

After reviewing the elements necessary to recover for invasion of privacy, the court concluded:

> Even if we were to hold that publication of unlisted telephone numbers involved disclosure of secret or private facts, we cannot say, in the circumstances presented here, that such disclosure would be so offensive or objectionable to a reasonable man as to constitute the tort of invasion of privacy.

Id. Thus, the Supreme Court of Georgia affirmed the trial court's holding that the cellular telephone bills, complete with telephone numbers called from such telephones, would not be exempt from disclosure under Georgia's equivalent of § 30-4-40(a)(2).

CONCLUSION

Any difference in treatment between telephone billing records and other records, for purposes of the FOI, is without foundation, and we decline to adhere to such a distinction. Where an agency is public, and the public supports its use of a telephone, it makes no sense that the public cannot see how and when that telephone is used. Therefore, due to the continuing evolution of the law concerning freedom of information generally and the legitimate public interest in the accountability of public funds specifically, we must supersede the conclusion reached in the opinion of January 8, 1982. We are of the opinion that § 30-4-40(a)(2) would not present a valid reason, absent some specific showing to the contrary, to withhold the telephone billing records as discussed in the opinion of January 8, 1982.[1]

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[1]Of course, the provisions of § 30-4-40 are still applicable if it might be shown that a disclosure of a specific telephone number would unreasonably invade a particular person's privacy or compromise an on-going law enforcement investigation, as examples. We are not saying that the exemptions contained in § 30-4-40 may not be applicable in a given case, but that § 30-4-40 could not be used to prevent the disclosure of all telephone records, particularly since § 30-4-40(b) requires that exempt records be separated from non-exempt records and the latter disclosed. We believe that good faith effort should be made to disclose all records that are not exempt, keeping in mind that disclosure is the rule and exemptions are to be construed narrowly.

With kindest regards, I am

Sincerely,

T. Travis Medlock
Attorney General

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