The State of South Carolina

Office of the Attorney General

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The Honorable Robert M. Stewart
Chief, South Carolina Law
Enforcement Division
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Dear Chief Stewart:

Referencing a recent decision of the United States Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U. S. ___, 109 S. Ct. ___, 103 L. Ed. 2d 774 (1989), you have asked for the opinion of this Office as to whether the decision would be applicable to the South Carolina Law Enforcement Division (SLED) as a central records repository and how the decision might affect certain record screenings and dissemination of conviction data. The Reporters Committee decision concerned the disclosure of computerized "rap sheets" of the Federal Bureau of Investigation and certain privacy considerations relevant thereto.

You advise that SLED has been designated the central repository for all criminal records in this State. Requests for disclosure of criminal records are made to SLED on a daily basis, including routine background screenings for employers on prospective employees, which service is provided for a fee of ten dollars ($10.00) per search. In addition, SLED has routinely disseminated prior arrest records where there are conviction data only, as directed by the Privacy and Security amendment to the Omnibus Crime Control and Safe Streets Act (a federal law). Rules and regulations pertaining to this act were promulgated by the United States Department of Justice for criminal justice information systems, as well, in 1976.

To respond to your question, it is necessary to examine state and federal laws and regulations relating to criminal justice information systems, in addition to the aforementioned decision of the United States Supreme Court.

South Carolina Code of Laws

In accordance with federal law (42 U. S. C. §3701 et seq.), a department was created within SLED to serve as a statewide criminal information and communication system, pursuant to Section 23-3-110 et seq., Code of Laws of South Carolina (1976, as revised). As to the reporting of criminal justice data to SLED, Section 23-3-120 provides:

> All law-enforcement agencies and court officials shall report to the system all criminal data within their respective jurisdictions and such information related thereto at such times and in such form as the system through the State Law-Enforcement Division may require.

See also Section 14-17-325 of the Code (clerk of court is to report to SLED the disposition of each case in the Court of General Sessions).

As to dissemination of information so collected, at least two statutes (as well as the Freedom of Information Act, discussed infra) must be considered. In relevant part, Section 23-3-130 provides:

> The State Law-Enforcement Division is authorized to determine ...the methods by which such information [compiled pursuant to §23-3-120] shall be... disseminated. ...
>
> The South Carolina Law-Enforcement Division shall disseminate criminal history conviction records upon request to local school districts for prospective teachers and to the State Department of Social Services for personnel of child day care facilities. This service must be provided to the local school districts without charge.

Additionally, Section 23-3-140 provides:

> The provisions of [Article 3 of Chapter 3 of Title 23] shall not be construed to require or permit the disclosure or reporting of any information in the manner prohibited by existing law.

SLED is authorized by Section 23-3-130 to promulgate rules and regulations relative to collection and dissemination of criminal history records.

SLED Regulations

Pursuant to the statutory authorization cited above, SLED has adopted Regulation 73-20 et seq. relative to criminal information and communications. Of importance to your opinion request is the distinction between conviction data and nonconviction data as those terms are defined in R 73-20. Conviction data is "any information which indicates that an individual has been convicted" and relates to "a judgment of conviction, and the consequences arising therefrom, in any court." R 73-20F. Nonconviction data is defined in R 73-20G to mean

> arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as acquittals and all dismissals.

Dissemination of nonconviction data is limited by R 73-24 except in the following circumstances:

A. Criminal justice agencies for purposes of the administration of criminal justice and criminal justice agency employment.
B. Individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate state or local officials or agencies.
C. Individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, ensure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violation thereof.
D. Individuals and agencies for the express purpose of research, evaluative, or statistical activities pursuant to an agreement with a criminal justice agency. The agreement

> shall specifically authorize access to data, limit the use of data to research, evaluative, or statistical purposes, ensure the confidentiality and security of the data consistent with these regulations and section 524(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and any regulations implementing section 524(a) and provide sanctions for the violation thereof.

The language in R 73-24 is virtually identical to the limitations specified in 28 C.F.R. §20.21(b).

R 73-23 provides for the dissemination of criminal history record information. The Criminal Justice Information System of SLED, in subsection A,

> will make available, upon request, to bona-fide city, county or state criminal justice agencies any information which will aid these agencies in the performance of their official duties; provided that the dissemination of such information would not be a violation of state or federal laws and regulations restricting its use for reasons of privacy and security. This will include conviction and nonconviction data.

See 42 U.S.C. §3789g(c) as to federal privacy concerns.

Subsection E of R 73-23 authorizes SLED to disseminate

> certain criminal history record information to private persons, authorized governmental entities, businesses and commercial establishments or their designated representatives. The [Criminal History Record Information] disseminated shall be exclusively limited, without exception, to records of adjudications of guilt. An adjudication of guilt shall mean a judgment or sentence that determines the defendant is guilty of a violation or a criminal statute. It shall include the notation of arrest and conviction, and if known, the sentence or fine imposed, and all available probation, parole and release information pertinent to the charge.

> Criminal history record information concerning an arrest shall not be disseminated if an interval of one year has elapsed from the date of that arrest and no disposition of the charge has been recorded and no indictment or accusation has been returned. ...

Federal Regulations

The aforementioned state regulations are based upon requirements found in 28 C.F.R. §20.1 et seq. These federal regulations are made applicable to state agencies which collect, store, and disseminate criminal history records, by virtue of 28 C.F.R. §20.20(a). The regulations are not applicable to criminal history record information contained in original records of entry maintained in chronological order which by law or custom are made public; court records of public judicial proceedings; published court or administrative opinions; public judicial or administrative proceedings; and other records specified in 28 C.F.R. §20.20(b). In addition, a criminal justice agency may release information "related to the offense for which an individual is currently within the criminal justice system," as well as specified information upon request of the news media or any other person, according to the provisions of 28 C.F.R. §20.20(c). Reference must be made to the regulation for more specific guidance.

As noted above, 28 C.F.R. §20.21(b) contains limitations on dissemination of data, virtually identical to R 73-24 of our state regulations. Subsection (b) specifically states, however, that "[t]hese dissemination limitations do not apply to conviction data." Subsection (c)(3) specifically provides: "States and local governments will determine the purposes for which dissemination of criminal history record information is authorized by State law, executive order, local ordinance, court rule, decision or order." 28 C.F.R. §20.33(a)(3) governs the use of criminal history record information for certain purposes such as licensing and employment if the requirements therein are followed; other provisions of 28 C.F.R. §20.33 govern dissemination of this type information for other purposes.

Most instructive is an appendix to part 20 of 28 C.F.R. entitled "Commentary on Selected Sections of the Regulations on Criminal History Record Information Systems." It is noted that

> Section 20.20(b) and (c) exempts from regulations certain types of records vital to the apprehension of fugitives, freedom of the press, and the

> public's right to know. Court records of public judicial proceedings are also exempt from the provisions of the regulations.

The appendix continues:

> The regulations distinguish between conviction and nonconviction information insofar as dissemination is concerned. Conviction information is currently made available without limitation in many jurisdictions. Under these regulations, conviction data and pending charges could continue to be disseminated regularly. No statute, ordinance, executive order, or court rule is necessary in order to authorize dissemination of conviction data. ...
>
> After December 31, 1977, dissemination of nonconviction data would be allowed, if authorized by a statute, ordinance, executive order, or court rule, decision or order. ... When a State enacts comprehensive legislation in this area, such legislation will govern dissemination by local jurisdictions within the State. It is possible for a public record law which has been construed by the State to authorize access to the public of all State records, including criminal history record information, to be considered as statutory authority under this subsection. [Emphasis added.]

Similarly, in construing 28 C.F.R. §20.21(c)(3), the appendix notes that "[t]he State could... enact laws authorizing any member of the private sector to have access to non-conviction data."

It is clear that the drafters of these federal regulations intended that state laws be considered in determining what criminal history record information could be disseminated. The potential impact of public records or freedom of information statutes was specifically mentioned. Thus, the impact of South Carolina's Freedom of Information Act and our opinions relative thereto must be considered.

Freedom of Information Act

South Carolina's Freedom of Information Act is codified in Section 30-4-10 et seq. of the Code. In Section 30-4-15 of the

Code, the General Assembly has found

> ... 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 person seeking access to public documents or meetings.

As with any statute, the primary guideline to be used in construing the Freedom of Information Act or any provision thereof is the intention of the legislature. Adams v. Clarendon Co. School Dist. No. 2, 270 S. C. 266, 247 S. E. 2d 897 (1978). The Act is remedial in nature and must be construed liberally to carry out the purpose mandated by the General Assembly. South Carolina Dept. of Mental Health v. Hanna, 270 S. C. 210, 241 S.E.2d 563 (1978). Exemptions from or exceptions to the Act's applicability are to be narrowly construed. News and Observer Pub. Co. v. Interim Bd. of Ed. for Wake Co., 29 N. C. App. 37, 223 S.E.2d 580 (1976). This Office has strongly favored a policy of disclosure should any doubt exist in that regard.

"Rap sheets" contain "certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject." Reporters Committee, supra, 103 L. Ed. 2d at 782. This Office has not opined previously as to disclosure of an individual's complete "rap sheet," but has opined as to the disclosure of some of the individual components of a "rap sheet."

Arrest warrants have been deemed disclosable under the Freedom of Information Act. See, for examples, Ops.Atty.Gen. dated August 1, 1989; July 12, 1983; April 4, 1983; and others. This Office has advised in these opinions that information contained in an arrest warrant which would be exempted from disclosure by statutes such as Sections 30-4-40, 30-4-70, or others, may be deleted prior to disclosure. The basis for disclosure of arrest warrants generally is that an "arrest warrant becomes a matter of public record upon its being signed and served on the person charged under the warrant." Op.Atty.Gen. dated July 12, 1983. As a practical matter, it may be noted that an arrest warrant would contain the criminal charges therefor.

By Section 30-4-50(8) of the Code, the Freedom of Information Act has specifically declared incident reports to be public information, subject to the restrictions and limitations of Sections 30-4-40 and 30-4-70 of the Code:

> Incident reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. Where an incident report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the incident report.

Thus, certain information on a "rap sheet" will have been made available as public information early in the criminal prosecution process.

Additionally, the South Carolina Supreme Court has specifically declared that the jail book and log are public information. In Florence Morning News, Inc. v. Building Comm'n of the City and County of Florence, 265 S. C. 389, 218 S.E.2d 881 (1975), the court affirmed the lower court's finding that the jail book was a public record within the meaning of the Freedom of Information Act, 265 S. C. at 394, and directed that an interested person had a statutory right to inspect and copy the original jail book rather than a copy of the daily entries. Thus, information as to arrest and charges of a given individual would be available to the public in this fashion. Exceptions to disclosure could be limited in certain circumstances, as when records have been expunged by order of the court, see, Section 17-70-40 of the Code and Ops.Atty.Gen. dated April 4, 1983 and May 18, 1978, or when criminal proceedings have been dismissed or an entry of nolle prosequi has been made. Op.Atty.Gen. dated May 18, 1978.

Finally, convictions and sentences are matters of public record specifically subject to disclosure under Section 30-4-50(3) of the Code, as interpreted in an opinion of this Office dated May 27, 1980. That Code section declares to be public information: "Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases [.]" This Office concluded in the opinion of May 27, 1980:

> It is submitted that the conviction of an individual in a court of law is a final order within the purview of the aforementioned statutory provision. Furthermore, the exemptions classified under §30-4-40 do not include information pertaining to the conviction of an individual in court. The public is entitled to know of the

> disposition of an individual's case which has resulted in conviction, thus such information is not exempt. ...

It is noted that pronouncements of a verdict and sentence, upon conviction, are made in open court in the presence of the defendant and others, media and the public included. Such information would be readily available from the appropriate clerk of court in the Journal of the Court of General Sessions. See Section 14-17-540(2) of the Code, as well as Section 14-5-10 ("the circuit courts herein established shall be courts of record, and the books of record thereof shall, at all times, be subject to the inspection of any person interested therein.").

To summarize the foregoing, this office has opined previously that arrest warrants, jail books and logs, incident reports, and information relative to convictions would be deemed public information, except where exempted from disclosure by statute or by such circumstances as expungement or nolle prosequi. Of course, these opinions would be applicable to records of the criminal process in this State. Thus, it may well be that most, if not all, of the information on an individual's "rap sheet" could be available under the Freedom of Information Act, if not under SLED's regulations. (Arguably, too, SLED's R 73-24B would incorporate the Freedom of Information Act.)

Additionally, certain exemptions from disclosure must also be noted. Section 30-4-40(a)(2) exempts from disclosure such information which is "of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy ... ." Determinations must be made on a case-by-case basis that personal privacy would be unreasonably invaded by a particular disclosure. Additionally, the Freedom of Information Act exempts from disclosure those matters "specifically exempted from disclosure by statute or law." Section 30-4-40(a)(4).

Reporters Committee Decision

The Supreme Court's decision in Reporters Committee, supra, must now be considered. The Supreme Court construed a provision of the federal Freedom of Information Act, 5 U.S.C. §552, which exempted from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy... ." 5 U.S.C. §552(b)(7)(C). Construing that exemption and federal regulations (some of which were cited to earlier in this opinion) which

would be specifically applicable to the Federal Bureau of Investigation and criminal history records maintained by that agency, the court held as a categorical matter that

> a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

103 L. Ed. 2d at 800. Two justices concurred in the judgment but did not join in the court's opinion, stating that they would not adopt such a "bright-line approach," preferring a more flexible standard which would permit disclosure of "rap sheets" in some instances. 103 L. Ed. 2d at 801. Thus, the majority protected "rap sheets" from disclosure under the federal Freedom of Information Act, concluding that the subject of the "rap sheet" would suffer from an "unwarranted invasion of personal privacy" protected by 5 U.S.C. §552(b)(7).

Discussion

The statute upon which the court in Reporters Committee relied is a federal statute of which there is no equivalent in this State's Freedom of Information Act. SLED, as a division of state government (specifically the executive department), would be subject to the requirements of this State's Freedom of Information Act as a "public body" defined in Section 30-4-20(a) of the Code, see Op.Atty.Gen. dated September 22, 1986; SLED may not be an agency subject to the requirements of the federal act, however, see 5 U.S.C. §§551, 552. Federal regulations have contemplated, apparently approvingly, that the state's public records laws might compel more disclosure of ordinarily-protected criminal records that the federal regulations would permit; this Office has determined such to be the case in a number of prior opinions concerning nonconviction data. Too, the South Carolina Supreme Court has taken a more lenient stance on invasion of privacy than the United States Supreme Court did in Reporters Committee. Society of Professional Journalists v. Sexton, 283 S. C. 563, 324 S.E.2d 313 (1984); Meetze v. Associated Press, 230 S. C. 330, 95 S.E.2d 606 (1956).

In Society of Professional Journalists v. Sexton, supra, a regulation of the South Carolina Department of Health and Environmental Control requiring death certificates to remain closed to the public was held to contravene the Freedom of Information Act and was thus invalid. In the present case, however, it would appear that SLED's regulation may well be consistent with the Freedom of Information Act in light of the United States Supreme Court's interpretation of privacy vis-a-vis the federal Freedom of Information Act. See Section 30-4-40(a)(4) and relevant portions of part 20 of 28 C.F.R., as well.

Apparently the United States Supreme Court considered South Carolina law in reaching its decision in Reporters Committee. The court stated:

> Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited. Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. That possibility, however, is present in only three States [Florida, Wisconsin, and Oklahoma]. All of the other 47 States place substantial restrictions on the availability of criminal-history summaries even though individual events in those summaries are matters of public record. ...

103 L.Ed.2d at 783. In light of the United States Supreme Court's ruling, which must be read to include South Carolina among "the other 47 States," this Office would be hard-pressed to suggest that the Court's mandate in Reporters Committee be ignored. This language further suggests that SLED's regulation has at least implicitly been found to be consistent with the law controlling in Reporters Committee.

For the reasons in the preceding paragraph, it must be concluded that the Supreme Court's ruling in the Reporters Committee decision should be followed in this State. We do note that the General Assembly would be authorized, by terms of the federal law cited above, to adopt a statute which would permit greater disclosure of

criminal history records, either as an amendment to the Freedom of Information Act or as general law amending or supplementing other provisions of the Code. Such legislative enactment would then effectively modify the impact of the Reporters Committee decision as to South Carolina. We further note that much of the information contained in a rap sheet would still be available at its original source, in the form of arrest warrants, indictments, conviction records, and the like, even if the rap sheet itself could not be disclosed.

We apologize for the time taken to formulate the response to your request. We have exhaustively researched the issues and have spent much time grappling with the detailed federal law, comparing it to our own laws. This Office is not usually called upon to interpret federal law as such relates to a matter of state concern, and developing familiarity with the relevant federal law is sometimes a difficult task, as in this instance.

Conclusions

In response to your specific questions and in reliance on the foregoing, we would advise as follows:

1. The United States Supreme Court in Reporters Committee has construed federal law relative to criminal history records maintained by the Federal Bureau of Investigation.

2. In our opinion, the Supreme Court decision concludes that each state may, if it so desires, enact legislation authorizing the disclosure of "rap sheets" to the public. SLED's regulation as to the particular data to be disseminated is consistent with the Supreme Court ruling and present South Carolina law. In essence, the Supreme Court has concluded that "rap sheets" may continue to be treated as they have in the past by SLED, in accordance with SLED's regulation. The General Assembly could, pursuant to the Supreme Court ruling, specifically authorize by legislation disclosure of "rap sheets" to the public.

3. Documents at their original sources, such as arrest warrants, would not be affected by the Supreme Court's ruling and would be available to the public.

4. The decision to disclose a particular record or document in a given instance remains with the custodian of the document or record. The foregoing constitutes a discussion of the ruling by the United States Supreme Court in Reporters Committee and is not intended to usurp the authority of the custodian to determine whether disclosure is appropriate in a particular instance. This Office

continues to favor a strong policy of disclosure under the Freedom of Information Act and continues to advise that in doubtful cases, the doubt should be resolved in favor of disclosure.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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PDP/nnw

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