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The State of South Carolina

Office of the Attorney General

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Nancy E. Shealy, Staff Attorney
South Carolina Court Administration
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Dear Ms. Shealy:

In a letter to this Office you questioned the applicability of this State's Freedom of Information Act (FOIA) to prefiled indictments. You stated that prefiled indictments are indictments which are submitted by a solicitor to a clerk of court prior to presentment to a grand jury. You further stated that indictments may be prefiled in two circumstances: after an arrest warrant has been issued and served but prior to presentment to a grand jury and where a solicitor makes a direct presentment to the grand jury prior to the issuance of an arrest warrant.

South Carolina's Freedom of Information Act is codified as Sections 30-4-10 et seq of the Code. In amending the FOIA pursuant to Act No. 118 of 1987, the General Assembly 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.

Section 1 of Act No. 118 of 1987. As with any statute, the primary guideline to be used in construing the FOIA 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). One obvious purpose of the FOIA is to protect the public. Toward that end, the Act is remedial in nature and must be construed liberally to carry out the purpose mandated by the General Assembly. See, 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). Moreover, Section 30-4-30(a) specifically provides that

> (a)ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

I would further advise that this Office has strongly favored a policy of disclosure when in doubt.

As noted in an opinion of this Office dated September 22, 1986, there is a considerable difference between the public disclosure of records pertaining to a criminal investigation and the release of other records. The opinion quoted from the decision by the Iowa Supreme Court in State ex rel. Shanahan v. Iowa District Court, 356 N.W.2d 523 (Iowa, 1984) where it was stated

> ... the State has a very real interest in protecting the relative ... (confidentiality) ... of the information its agents gather, analyze and record during their investigations of criminal activity and crimes.

Similarly, in Grodjesk v. Faghani, 487 A.2d 759 at 763 (1985) the New Jersey court noted that the State has "a compelling need ... to protect its sources of information concerning criminal activity." Moreover, as noted in the opinion, the FOIA itself reflects recognition by the General Assembly of the importance of maintaining confidentiality with respect to criminal investigations. Pursuant to Section 30-4-40(a)(3)

> (r)ecords of law enforcement and public safety agencies not otherwise available by law that were compiled in the process of detecting and investigating crime ... (are exempt from disclosure) ... if the disclosure of the information would harm the agency by:
>
> (A) Disclosing identity of informants not otherwise known;

(B) The premature release of information to be used in a prospective law enforcement action;

(C) Disclosing investigatory techniques not otherwise known outside the government;

(D) By endangering the life, health, or property of any person.

Several prior opinions of this Office have dealt with questions regarding disclosure of matters relevant to law enforcement. In an opinion of this Office dated June 12, 1983, it was stated that

> an arrest warrant becomes a matter of public record upon its being signed and served on the person charged under the warrant ... (and) ... remains a matter of public record unless and until the warrant is expunged...

An opinion of this Office dated April 4, 1983 similarly referenced that incident reports and arrest warrants generally are disclosable unless such reports contain information otherwise exempt from disclosure by law. The opinion noted that the State Supreme Court ruled in Florence Morning News v. Building Commission of the City and County of Florence, 265 S.C. 389, 218 S.E.2d 881 (1975) that a jail book and log are matters of public record. See also: Opinion of the Attorney General dated July 24, 1984 (incident reports). Also, in an opinion dated November 4, 1983 this Office determined that supplementary homicide reports, which are listings of all homicides reported to SLED and which are statistical in nature, should be disclosed under the Freedom of Information Act. The opinion of this Office dated September 22, 1986 noted previously held that as to criminal investigative reports,

> ... the Freedom of Information Act would legally permit SLED to refrain from disclosing ... (such reports) ... if SLED concludes upon examination that "the public interest would be served by not disclosing the material." ... Such decision must be made by SLED as custodian of the records and must be based "upon evaluation of the particular document or material." 1/

1/ An opinion of this Office dated June 2, 1988 noted that while the "public interest" exception to disclosure has been deleted from the FOIA, the exemptions relating specifically to law enforcement and the rationale of the 1986 opinion were unchanged.

The opinion noted, however, that any such decision as to nondisclosure would be "subject to judicial scrutiny."

In an opinion dated May 12, 1981 this Office concluded that a particular investigatory file maintained by SLED was disclosable. However, in light of the provisions of Section 30-4-40(b) authorizing the separation of exempt material it was recommended that SLED review the file and remove the identity of informants unknown to the general public and remove material revealing investigatory techniques which were secret in nature, along any with other information that might endanger the life, health or property of any person. In Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (1986) the State Court of Appeals referencing Section 30-4-40(a)(3)(B) determined that certain tape recordings and written files maintained by a city police department of telephone complaints or reports were exempt from disclosure. In that case, the chief of police noted that included in the tapes were sensitive police communications, calls from regular informants, and Crimestopper calls from citizens. Also, a case involving an individual who was referred to in the tapes was pending indictment and prosecution. However, in an opinion dated December 1, 1981 this Office concluded that a tape of a particular videotaped conversation should be disclosed where the tape had become part of the record in two trials and no anonymous informant, investigative technique or danger to the life, health or property of any person was cited. See also, Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) (a death certificate was not exempt from disclosure under the FOIA where the suspects in a particular murder case had been arrested and tried, the relevant investigation had concluded and no further criminal investigation was ongoing.)

The September 22, 1986 opinion noted previously set forth three main reasons for preserving the confidentiality of records pertaining to criminal investigations. As stated in the opinion, confidentiality encourages individuals to come forward with information useful in a criminal investigation, protects investigative techniques and theories used by law enforcement officials in their investigation, a point particularly addressed by Section 30-4-40(3)(c), and protects the various privacy interests involved. Of particular relevance to your inquiry regarding the applicability of the FOIA to prefiled indictments is the statement in the opinion that

> ... it is well established that the release of information with respect to the investigation of possible criminal offenses, where the individual investigated is not indicted or prosecuted, seriously affects the privacy interest of these individuals ... 'There is no clearer example of

> an unwarranted invasion of personal privacy' than the release by a law enforcement agency of information concerning the criminal investigation of one who is not prosecuted.

Several courts have specifically held that material and information relevant to an investigation where indictments had not yet been obtained is not disclosable. See: Anchorage Building Trades Council v. Department of Housing and Urban Development, 384 F.Supp. 1236 (D. Alaska 1974); Yon v. I.R.S., 671 F.Supp. 1344 (S.D.Fla. 1987); Hatcher v. U.S. Postal Service, 556 F.Supp. 331 (D.C. 1982). However, as stated by the Arkansas Supreme Court in City of Fayetville v. Rose, 743 S.W.2d 817 (1988), once an investigation is completed and an indictment returned there is no longer an "undisclosed investigation", which by Arkansas law is not open to the public, and therefore law enforcement records relevant to the case are subject to disclosure.

Consistent with the above, a strong argument exists against the release of information concerning prefiled indictments in all instances. While arrest warrants are disclosable, due to the nature of the information contained in an indictment which in some cases may exceed that contained in a warrant and also be associated with an ongoing investigation, this Office cannot categorically conclude that all prefiled indictments are disclosable. This would especially be the situation where the solicitor makes a direct presentment to a grand jury prior to the issuance of an arrest warrant. As referenced, personal privacy considerations also argue against unlimited disclosure of prefiled indictments. Therefore, consistent with prior opinions of this Office, the custodian of the recording question may conclude that disclosure is not appropriate. In making such a determination the clerk of court may choose to consult with appropriate law enforcement officials. Of course, any such determination is subject to judicial scrutiny. See: Section 30-4-100.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

CHR:sds

REVIEWED AND APPROVED BY:

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