The State of South Carolina

Office of the Attorney General

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George A. Markert, Assistant Director
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Dear George:

In a letter to this Office you requested clarification as to the authority of clerks of court, magistrates and municipal court judges to release search warrants, arrest warrants and bench warrants. I am interpreting your request as whether such documents are accessible under this State's Freedom of Information Act.

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 to your question regarding the release of arrest warrants, in a prior opinion of this Office dated July 12, 1983 it was stated

> (a)n arrest warrant becomes a matter of public record upon its being signed and served on the person charged under the warrant. The arrest warrant remains a matter of public record unless and until the charge under the warrant is expunged as required by South Carolina Code of Laws Section 17-1-40 ... .

See also: Atty. Gen. Op. dated April 4, 1983 (arrest warrants are generally disclosable unless they contain information otherwise exempt from disclosure by law citing Sections 30-4-20(c), 30-4-40 and 30-4-70). Therefore, an arrest warrant is generally disclosable upon service of the warrant.

As to the release of bench warrants, this Office has recognized that a bench warrant is a form of process issued by a court to bring an individual back before the court after the court has already acquired jurisdiction of the individual. Although not a charging document, it is similar to an arrest warrant in that it authorizes the arrest of an individual. See: Ops. Atty. Gen. dated May 16, 1984; April 27, 1982; October 31, 1978. Consistent with the conclusion reached as to arrest warrants, a bench warrant would generally be disclosable upon being served on the individual named in the warrant. However, if the bench warrant was issued in open court, it appears that there would be no basis to deny access to the document even prior to service. As to bench warrants issued by a clerk of court at the direction of the court but not served, such warrant would generally be disclosable upon being served on the individual named in the warrant. I am assuming that such bench warrants do not contain information otherwise exempt from disclosure by statute.

You have also questioned the release of search warrants which have been issued but not returned to the issuing judge and the release of search warrants which have been issued and returned but the investigating agency has requested that information not be released because the investigation is still pending or because of the personal nature of the evidence seized.

Federal courts have recognized the general accessibility of the public to judicial records and documents. See, e.g., Nixon v. Warren Communications Inc., 435 U.S. 589 (1978); U. S. v. Criden, 648 F.2d 814 (3rd Cir. 1981). However, in a previous opinion of this Office dated February 23, 1989 it was stated

> ... there is a considerable difference between the public disclosure of records pertaining to a criminal investigation and the release of other records ... (An earlier opinion of this Office) ... 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
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> > ... 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.

Such is consistent with the holding of the New Jersey court in Grodjesk v. Faghani, 487 A.2d 759 at 763 (1985) where the court determined that the State has "a compelling need ... to protect its sources of information concerning criminal activity." Also, the FOIA itself notes the 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.

This Office has dealt with questions regarding the disclosure of matters relevant to law enforcement in several opinions. Also courts in this State have dealt with such questions in certain instances. An opinion of this Office dated April 4, 1983 stated that incident reports generally are disclosable unless such reports contain information otherwise exempt from disclosure by law. The opinion noted that the State Supreme Court held 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. Also, in an opinion dated November 4, 1983 it was 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. An opinion of this Office dated September 22, 1986 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/

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

In an opinion dated May 12, 1981 it was determined that a certain investigatory file maintained by SLED was disclosable. However, in light of the provisions of Section 30-4-40(b) authorizing the

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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.

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 with any 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. 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 reasons for preserving the confidentiality of particular records dealing with criminal investigations. As stated in that opinion, confidentiality encourages individuals to come forward with information which is useful in a criminal investigation, it protects investigative techniques and theories used by law enforcement officials, a point particularly addressed by Section 30-4-40(3)(c), and protects various privacy interests involved.

In the case of In Re Search Warrant for Secretarial Area-Gunn, 855 F.2d 569 at 572-573 (8th Cir. 1988) the Eighth Circuit Court of Appeals citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) stated

> (t)he Supreme Court has ... recognized that the public and the press have a first amendment right of access to certain pretrial proceedings in criminal cases ... In determining whether the first amendment right of public access extends to a particular type of proceeding, the Supreme Court considers "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question."

In Seattle Times v. Eberharter, 713 P.2d 710 (1986) the Washington Supreme Court, recognizing that search warrants "do not have a tradition of public access", concluded that public access to a search warrant affidavit in an unfiled criminal case was not required. Recognizing the general right of access of the public to judicial proceedings, the court stated

> (t)he distinction developed in case law between the investigatory and accusatory stages is supported by the separate interests involved in these two phases of the criminal justice system. Publicity at the trial or pretrial hearing stage of a criminal proceeding safeguards other constitutional rights, including a defendant's fair trial rights ... In contrast, publicity at the investigatory phase runs counter to the policy embodied in ... the fourth amendment to the United States Constitution ... Not only is the privacy interest of the subject of the search threatened by disclosure, but the public interest in discovering and capturing the perpetrator of a criminal act is compromised ... Thus, publicity in the investigatory process has repercussions that are not present once charges have been filed.

713 P.2d at 716-717. The Court in In Re Search Warrant for Secretarial Area-Gunn, similarly concluded that the right of access to courts did not authorize access to certain affidavits prepared in support of search warrants where there was a substantial probability that an ongoing investigation would be compromised by disclosure. See also: Newspapers of New England v. Clerk-Magistrate, 531 N.E.2d 1261 (Mass. 1988); Op. Ala. Atty. Gen. dated October 10, 1984 (unexecuted search warrants are not public documents.)

In summary, as was stated in the September 22, 1986 opinion, the records of a criminal investigation, of which search warrants are an integral part, are "too sensitive" for the presumption of disclosure to adhere. As was stated in that opinion, "[w]hile the public's right to know is fundamental, the detection and deterrence of crime is equally important."

Accordingly, following the rationale of the 1986 opinion, the Freedom of Information Act would legally permit a public official to refrain from disclosing criminal investigatory records such as search warrants. Of course, such decision regarding disclosure must be made by the custodian of the record and must be based "upon evaluation of the particular document or material." Such decision is

then subject to judicial scrutiny. See, Section 30-4-100. Moreover, the custodian is free to disclose search warrants to the public if he or she deems it would not harm law enforcement or a criminal investigation. Law enforcement officials would be in the best position to assess any harm to an investigation.

With best wishes, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

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