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The State of South Carolina

Opinion No 88-29
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Office of the Attorney General

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The Honorable Larry D. Smith
Sheriff, Spartanburg County
Post Office Box 771
Spartanburg, South Carolina 29304

Dear Sheriff Smith:

In a letter to this Office you referenced a situation where a young boy shot and killed two individuals who had broken into the child's home. Immediately after the shooting the boy called the 911 number to report what had occurred. This conversation was taped by your department. You indicated that the news media has requested release of the tape or its contents for publication. Your letter indicates that your department is opposed to the release of the tape or its contents for a variety of reasons set forth in your letter. You have questioned whether this State's Freedom of Information Act requires the release of the tape or its contents.

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

> Any 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.

Several prior opinions of this Office have dealt with questions regarding disclosure of matters relevant to law enforcement. An opinion dated April 4, 1983 referenced that incident reports and arrest warrants generally are disclosable unless such reports contain information otherwise exempt from disclosure by law. The opinion also 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: Opinions of the Attorney General dated July 24, 1984 (incident reports) and July 12, 1983 (arrest warrants). 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. An opinion of this Office dated September 22, 1986, which referenced a prior 1984 opinion, 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."

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

As noted, certain materials are expressly exempt from disclosure pursuant to Section 30-4-40 of the Code. Pursuant to subsection(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.

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 particular 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 the tapes "... contained very sensitive police communications and included calls from regular informants as well as Crimestopper calls from citizens." 290 S.C. at 513. Also, a case involving an individual who was referenced in the tapes was pending indictment and possible 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.)

As stated above, generally, the public has the right of access to any public record. Moreover, as stated, this Office strongly supports the policy of disclosing public records. Therefore, records of any public agency, including a law enforcement agency, should generally be disclosed. However, as noted, Section 30-4-40(a)(3) provides exemptions to disclosure for certain records maintained by a law enforcement agency. In your letter you outlined several reasons your agency opposed the release of the referenced tapes. You particularly noted that the tapes have certain evidentiary value as to what transpired on the day of the shootings. As noted, Section 30-4-40(a)(3)(B) provides an exemption for certain law enforcement records if the disclosure of the records would be harmful to the agency by "(t)he premature release of information to be used in a prospective law enforcement action." Therefore, an exemption from disclosure is available in circumstances where an investigation is being conducted and the investigation is not yet complete.

Moreover, we would add that Section 30-4-40(a)(2) provides an exemption for "[i]nformation of a personal nature where the public disclosure would constitute unreasonable invasion of personal privacy ...". This Office has consistently concluded that this exemption should be narrowly construed and that the balance should be tilted in favor of disclosure in doubtful cases. See, Op. Atty. Gen., Op. No. 84-53 (May 10, 1983). It has also been noted that the exemption may be warranted if a record contains "'intimate details' of a 'highly personal nature.'" One court has recognized that the right of privacy

protects one's thoughts and emotions. Roberts v. Gulf Oil Corp., 147 Cal. App. 3d 770, 195 Cal. Reptr. 393 (1983).

Referencing the above, it would be the responsibility of your agency to make a determination as to whether the tapes of the 911 conversation are records exempt from disclosure pursuant to the provisions of Section 30-4-40 because of the contents of the tape or any other relevant considerations. Your agency, therefore, would have to make the determination as to whether the release of such information would be harmful. Whether any of the exemptions set forth above would be applicable would be a decision for your agency to make. Of course, as referenced above, any decision as to nondisclosure would be subject to possible judicial review. As to your further question regarding the procedure for disclosing any requested information, Section 30-4-30(c) of the Code states:

> (e)ach public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

CONCLUSION

Generally speaking, the public has the right of access to any public record pursuant to the Freedom of Information Act. Moreover, this Office strongly favors the policy of public disclosure in case of doubt. Sections 30-4-40(a)(2) and (a)(3) provide for limited exemptions from disclosure in certain respects. Therefore, your agency should carefully examine the record in question and make the determination as to whether the

potential harms specifically set forth in Sections 30-4-40(a)(2) and (a)(3) in this instance override the general rule of disclosure.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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