The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

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J. P. Strom, Chief
South Carolina Law
Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Chief Strom:

You have asked whether the Freedom of Information Act (FOIA) requires SLED to either disclose or not disclose investigative reports prepared by that agency regarding alleged criminal violations. I am enclosing a copy of an opinion of this office dated July 17, 1984 which provides the basis for answering your question. Such opinion outlines the law in this area and concludes that the FOIA neither requires nor prohibits disclosure in such circumstances. Instead, the FOIA authorizes the custodian of the record in question, in his discretion, to refrain from disclosure if he properly concludes that disclosure is not in the public interest.

The enclosed opinion addressed the question of whether a petition filed with the Governor concerning the possible appointment to the office of magistrate was subject to release under the FOIA. The concern there was that disclosure of the petition would unreasonably invade various privacy interests; the FOIA, in § 30-4-40(a), specifically exempts from disclosure information which, if disclosed, would unreasonably invade personal privacy. In the 1984 opinion, it was recognized that the FOIA was remedial in nature and should be construed liberally toward that end. It was further noted that exemptions from or exceptions to the FOIA should be narrowly construed. The opinion further indicated that there existed a number of cases supporting release of the information in that circumstance. While such

cases recognized the privacy interests of the individuals into whose background investigations were being conducted, these authorities also "clearly indicate that the courts have balanced the competing interests of privacy and public disclosure in favor of disclosure." Op.at 5.

The 1984 opinion thus concluded that, while there existed legal authorities supporting both disclosure and nondisclosure, several factors unique to that particular factual situation probably supported disclosure. Important was the fact that the record in question consisted of a petition which had already been circulated throughout the community. Thus, whatever privacy interests were involved had been considerably lessened by previous disclosure. However, it was specifically noted in the Opinion that § 30-4-20(c) of the FOIA "authorizes the public body to refrain from releasing any material where it concludes ... that the public interest would be served by not disclosing the material."

More significantly, the 1984 opinion, in contrast to your present question, did not involve records connected with a criminal investigation. Without question, there is a considerable difference between the public disclosure of records of a criminal investigation and the release of other records. Undoubtedly, "[t]he results of investigations of alleged criminal activity are by their nature the type of information that the public interest requires to ... [remain confidential]." Black v. Sheraton Corp. of America, 50 F.R.D. 130 (D. D. C. 1970). In marked contrast to the disclosure of many other types of records,

> ... 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.

State ex rel. Shanahan v. Iowa Dist. Ct., 356 N.W.2d 523 (Iowa 1984). As one court has stated, the State has "a compelling need ... to protect its sources of information concerning criminal activity." Grodjesk v. Faghani 487 A.2d 759, 763 (N.J. 1985). Indeed, the various "privacy concerns of law enforcement officials are usually more significant following a criminal investigation." New England Apple Council v. Donovan, 725 F.2d 139, 142 n. 3 (1st Cir. 1984). The FOIA itself reflects the

General Assembly's recognition of the importance of maintaining confidentiality with respect to criminal investigations. See, § 30-4-40(3). 1/

Fundamental public policy considerations underlie this well recognized distinction between records pertaining to a criminal investigation and other types of records. One such reason is the need in combating crime to encourage persons to provide important leads to law enforcement officers. The Court, in State ex rel. Shanahan v. Iowa Dist. Ct., recognized the "sensitivity of all criminal investigation materials":

> Under ordinary circumstances the investigation [of crime] starts on a broad scale and gradually narrows itself as the officers zero in on prime suspects. There is much in the investigating officer's report which is his unsupported theory and much more which is hearsay and rumor. Furthermore the reports are frequently based on material-or tips-from informers, who may be despised

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1/ § 30-4-40(3) exempts

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

> by friend and foe alike but who are nevertheless sometimes indispensable to successful police work. A routine disclosure of their identity ... would instanteously eliminate that necessary source of information.

356 N.W. 2d at 529, quoting State v. Eads, 166 N.W. 2d 766 (Iowa 1969). The case of Bougas v. Chief of Police of Lexington, 354 N.E.2d 872, 876-877 (Mass. 1976) also strongly emphasizes the importance of encouraging informants and private citizens to come forward with information to law enforcement officers without fear of reprisal or revelation of their identity or the content of their statements. The Court stated:

> Police departments must depend upon reports from private citizens concerning possible illegal activity and the collection of such communications is an important and entirely legitimate law enforcement function. Disclosure of [information from] ... persons who volunteer information to police would have a harmful effect in the normal operation of law enforcement investigation.... Even materials relating to an inactive investigation may require confidentiality in order to convince citizens that they may safely confide in law enforcement officials.

Such an overriding consideration of public policy is well stated by the United States Supreme Court in Roviaro v. United States, 353 U.S. 53, 59 (1957) in the context of the privilege relating to confidential informants:

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

See also, State v. Blyther, 336 S.E.2d 151 (S. C. App. 1985). In short, the confidentiality of investigative reports

"... encourage[s] persons to come forward with information that might be used to solve crimes and deter criminal activity." State ex rel v. Shanahan v. Iowa Dist. Ct., supra.

A second important reason for preserving the confidentiality of records pertaining to a criminal investigation is to protect the investigative techniques and theories employed by law enforcement officials in the conduct of the investigation. The FOIA expressly permits nondisclosure in this situation. Section 30-4-40(3)(c) specifically exempts from disclosure records of law enforcement agencies compiled in the course of a criminal investigation if disclosure would reveal "investigatory techniques not otherwise known outside the government." As one court has stated, the purpose of confidentiality in this regard is

> to allow fellow officers privately and confidentially to discuss and record their findings and theories about each case which is under investigation.

State ex rel. Shanahan v. Iowa Dist. Ct., supra.

A third fundamental reason for confidentiality with regard to records pertaining to criminal investigations is the protection of the various privacy interests involved. As noted above, courts make sharp distinctions between criminal and civil investigations insofar as personal privacy is concerned. New England Apple Council v. Donovan, supra. In addition to the privacy interests of those who supply law enforcement officials with information, see, Powell v. U. S. Dept. of Justice, 584 F.Supp. 1508 (N. D. Cal. 1984), courts also stress the privacy concerns of those officers conducting the investigation. An investigating agent possesses a significant privacy interest in the nondisclosure of his identity in order to avoid annoyance, harassment and even physical danger to himself. Lesar v. U. S. Dept. of Justice, 636 F.2d 472, 487 (D. C. Cir. 1980).

And, of course, 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. Fund for Const. Govt. v. Nat. Archives and Records Service, 646 F.2d 856 (D. C. Cir. 1981). The Fund case observed that "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. In short, courts and legislatures have consistently recognized that where a criminal investigation is concerned, there is the necessity to afford "broader privacy rights to ... [those being investigated] [as well as] witnesses and investigators...." Best v. U. S. Dept. of Justice, 665 F.2d 1251, 1254 (D. C. Cir. 1981).

Thus, as stated in Fiumara v. Higgins, 572 F.Supp. 1093 (D. N. H. 1983), a case construing the federal FOIA, "[i]nformation in an investigatory file tending to indicate that a named individual has been investigated for suspected criminal activity is, at least as a threshold matter, an appropriate subject for exemption ...". Unlike questions regarding the disclosure of other records, where this Office has consistently stated that public disclosure must be presumed, and all doubts must be resolved in favor of disclosure, the records pertaining to a criminal investigation are, we believe, too sensitive for such a presumption to adhere. While the public's right to know is fundamental, the detection and deterrence of crime is equally important.

Accordingly, as was concluded in the 1984 opinion, the Freedom of Information Act would legally permit SLED to refrain from disclosing criminal investigatory reports if SLED concludes upon examination that "the public interest would be served by not disclosing the material." As stated above, and as referenced in the 1984 opinion, there is ample case authority which concludes with respect to the records pertaining to criminal investigations, that nondisclosure is in the public interest and is thus legally authorized. Such decision must be made by SLED as custodian of the records and must be based "upon evaluation of the particular document or material." Of course, such decision is subject to judicial scrutiny. See, § 30-4-100. 2/

2/ Of course, as noted in the 1984 opinion, nondisclosure is not mandatory under the FOIA. See also, Op. Atty. Gen., May 1, 1986. In this instance, SLED could rely upon § 30-4-40(a) and refrain from disclosing such portion of the requested material which unreasonably invades personal privacy or, of course, could disclose all of the requested material. Consultation with the Circuit Solicitor as to any pending criminal charges would be advisable if disclosure is decided upon. While I can make no recommendation regarding disclosure or nondisclosure, I reiterate my conclusion above that nondisclosure is legally authorized.

If I can be of further assistance, please let me know.

Sincerely yours,

Donald J. Zelenka
Chief Deputy Attorney General

DJZ/an

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions