9254-9804

ALAN WILSON
ATTORNEY GENERAL

August 4, 2014

Mr. Robert L. McCurdy, Assistant Director
South Carolina Court Administration
South Carolina Supreme Court
1015 Sumter Street
Suite 200
Columbia, SC 29201

Dear Mr. McCurdy:

In your letter, dated July 9, 2014, you seek an opinion regarding the following: "[a] County Clerk of court recently received a request pursuant to the S.C. Freedom of Information Act ("FOIA") from a citizen asking for names and contact information of County grand jurors." You also state that:

> [t]he fundamental principle of secrecy in grand jury proceedings in encompassed with the basic legal principles governing the operation of the County grand jury in this state. See: Ex Parte McLeod, 252 S.E. 2d 126, 272 S.C. 373 (S.C. 1979). That legal tenet, as well as the privacy exemption contained in FOIA at S.C. Code Ann. 30-4-40(2), would be relevant factors in determining whether such release could be appropriate. However, the request has raised several questions concerning accessibility of court records to County grand juries. . . .

Specifically, you pose the following questions:

> *Should names and contact information of a seated County grand jury be released to a citizen upon request pursuant to FOIA, or to any other request?*
>
> *Should names and contact information of a previous County grand jury be released to a citizen upon request pursuant to FOIA, or to any other request?*

Law/Analysis

The Freedom of Information Act ("FOIA") was adopted in its present form by Act. No. 593, 1978 Acts and Joint Resolutions, and was amended by Act No. 118, 1987 Acts and Joint Resolutions. Other amendments have followed. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble, set forth at § 30-4-15, provides:

> [t]he General Assembly finds 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 leaked 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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

On numerous occasions, in construing the Freedom of Information Act, we have emphasized the Legislature's expression by public policy, as articulated in § 30-4-15. In Op. [S.C.] Atty. Gen. Op. No. 88-31 (April 11, 1998), for example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA:

> [a] with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E. 2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E. 2d 732 (1975). The Act is a statute remedial in nature and must be literally construed to carry out the purpose mandated by the General Assembly. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E. 2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. For Wake Co., 29 N.C. App. 37, 223 S.E. 2d 580 (1976).

See also, Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E. 2d 496 (2005) (FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA – to guarantee the public reasonable access to certain activities of government).

In addition, as you note in your letter, the secrecy of grand jury proceedings in South Carolina is longstanding. As was stated by our Supreme Court in State v. Rector, 158 S.C. 212, 155 S.E. 385, 390 (1930):

> "It has long been the policy of the law, in furtherance of justice, that the investigation and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes all its proceedings are legally sealed against divulgence. The grand jurors are sworn to keep secret the state's, their fellows' and their own counsel . . . And, apparently aside from the violation of any oath, it has been declared that the disclosure of the proceedings before the grand jury in a certain state of the case might render a grand jury liable to a criminal charge as an accessory after the fact. So it seems that the duty of secrecy is not founded primarily on the oath of the juror, but on deep-seated principles of public policy of which the common form of oath is merely an expression." Quoting 12 R.C.L. 1037.

See also, State v. Sanders, 251 S.C. 431, 437, 163 S.E. 2d 220, 224 (1968) [" 'No one, not even the presiding judge, may invade the secrecy of the grand jury's deliberations, to inquire what influences

moved them in their acts, or to ascertain how any member may have voted.' " (quoting State v. Rector, 158 S.C. supra at 212, 155 S.E., supra at 390 (1968); State v. Williams, 263 S.C. 290, 296, 210 S.E. 2d 298, 301 (1974) ["The long-established secrecy of grand jury actions and the nature of its operations makes Sixth Amendment rights inapplicable to its proceedings."]

Moreover, in Evans v. State, 363 S.C. 495, 505-06, 611 S.E. 2d 510, 515-16 (2005), our Supreme Court quoted with approval the United States Supreme Court decision in United States v. Sells Engineering, Inc., 463 U.S. 418, 424 (1983), regarding the important reasons for maintenance of grand jury secrecy:

> [w]e consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

The county grand jury procedures are governed by provisions contained in Title 7 of Chapter 14 of the code. In State v. George, 323 S.C. 496, 506-07, 476 S.E. 2d 903, 909-10 (1996), our Supreme Court summarized the mechanism for selection of county grand jurors as follows:

> [g]rand juries in South Carolina are selected as follows. Each county receives a list of individuals who reside within that county, who are over eighteen years of age, who hold a South Carolina driver's license and identification card, and who are United States citizens. This list is merged with the county list of registered voters to establish the roll of eligible jurors for that county. S.C. Code Ann. § 14-7-130 (Supp. 1995). The grand jury venire is then selected from these eligible jurors pursuant to S.C. Code Ann. §§ 14-7-1510 to 1570 (Supp. 1995). The names of eligible jurors are placed in a jury box from which a pool of fifty potential grand jurors are randomly drawn. . . . On the first day of the term of court of general sessions for the calendar year, the presiding judge qualifies these potential grand jurors. The names of the qualified jurors are placed in a container from which twelve are randomly chosen to serve as grand jurors. These twelve jurors serve together with six grand jurors held over from the previous year.

Section 14-7-130 provides that the computerized drawing and summoning of jurors involving grand jurors, "must take place in the office of the clerk of court as a public event to ensure the absolute integrity of the random selection process."

Whether Grand Jury Is Subject to FOIA

We turn now to your question regarding the applicability of FOIA, and whether release to the public of the names of grand jurors and their identifying information is required. For purposes herein, we assume that FOIA is generally applicable in this instance, although such a conclusion is not at all clear. There is no question that the grand jury and its acts are under the general supervision of the courts. See Evans v. State, 363 S.C., supra at 506, 611 S.E. 2d, supra at 516 (2005) (" ' (a)s long as the grand jury has been known to our judicial system, and that body came with the organization of our first courts, their acts and proceedings have been regarded as almost sacredly secret. . . .' " (quoting State v. Rector, 158, supra at 225, 155 S.E., supra at 390).

However, it is not at all clear that the court system is included within the reach of FOIA. The definition of a "public body" in FOIA does not expressly mention the courts or any part thereof. See, § 30-4-20(a). Moreover, courts in other jurisdictions have concluded that the judicial branch is not a "public body" for purposes of FOIA. In Newman, Raiz and Shelmadine v. Brown, 915 N.E. 2d, 782, 785-6 (Ill. 2009), for example, the Illinois Appellate Court held:

> [i]t further appears that the Circuit Clerk is not subject to FOIA even when examined outside of any relationship to the county. As stated above, we have agreed with the reasoning of Drury [v. County of Mclean, 89 Ill. 2d 417, 60 Ill Dec. 624, 433 N.E. 2d 666 (1982)] and found that the Circuit clerk constitutes a member of the judicial branch of the state government. Section 2(a) of FOIA provides, in pertinent part, that a "public body" constitutes "any legislative, executive, administrative, or advisory bodies of the State . . . which are supported in whole or in part by tax revenue, or which expend tax revenue. . . ." Notably absent is any reference to the judicial branch. The legislature provided specifically for both the legislative and executive branches and we interpret this lack of reference to indicate an intent to exclude the judiciary from the relevant disclosure requirements. See Copley Press, Inc. v. Administrative Office of The Courts, 271 Ill. App. 3d 548, 553, 207 Ill. Dec. 868, 648 N.E. 2d 324 (1995) (holding that the omission of any reference to the courts and judiciary in Section 2(a) of FOIA excludes the judiciary from disclosure requirements of FOIA). As such, the Circuit Clerk, as a component of the judicial branch, is excluded from the definition of a "public body" as it is defined in Section 2(a). (emphasis added).

Other authorities are in accord. See In the Matter of Trust, 2010 WL 5644675 (Del 2011) (unpublished) ["the FOIA has been interpreted as not applying to the judicial system, on the basis that a court is not a 'public body' under the act."]; Del. Atty. Gen. Op. No. 07-IB02 ["The statutory language and legislative history of FOIA evidence the General Assembly's intent to respect the inherent authority of the judiciary – as a co-equal branch of government – to control access to court records and proceedings."].

Our Supreme Court has not yet addressed the question of whether the judiciary or a court is a "public body" for purposes of FOIA's applicability. However, the court has stated that restrictions upon public access to judicial records "may be based on a statute or the court's inherent power to control its own records." Ex Parte Capital U-Drive It, Inc. v. Beaver, 396 S.C. 1, 10, 630 S.E. 2d 464, 469 (2006) (emphasis added). Thus, based upon the foregoing authorities, our courts might well conclude that the records of the judicial branch are not subject to FOIA.

Regardless, even assuming FOIA's general applicability, we must still determine whether any exemption under FOIA is applicable. The FOIA exemptions are set forth at § 30-4-40. Section 30-4-40(2) exempts "[i]nformation of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy." Subsection (3) also excepts:

> [r]ecords of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:
>
> . . . (D) by and angering the life, health or property of any person. . . .

Moreover, Subsection (4) provides an exemption for "[m]atters specifically exempted from disclosure by statute or law." (emphasis added).

The question thus is whether any of these exemptions or any other exception contained in § 30-4-40 is applicable to the names of current or past members of county grand juries. We believe so.

Courts in other jurisdictions, as well as federal courts, have concluded that the names and identifying information regarding grand jurors are not subject to disclosure. These decisions are based upon the overriding necessity for grand jury secrecy. For example, in Ex Parte State of Alabama v. Matthews, 724 So. 2d 1140 (Ala. 1998); aff'd., Ex Parte Matthews, 724 So. 2d 1143 (Ala. 1998), the Court concluded that in indictee was not entitled to discovery of the names and addresses of grand jury members. The Respondent argued, among other things, that grand jury secrecy did not encompass the identity of grand jurors. The Alabama Court of Appeals rejected this claim as follows:

> "The Rule of Secrecy concerning matters transpiring in the Grand Jury room is designed for the protection of the grand jurors in the furtherance of public justice. . . The cloak of secrecy that has from time immemorial surrounded the grand jury is not only for the protection of jurors and witnesses, but for the protection of the State, the accused, and for society as a whole. Secrecy in the Grand Jury proceedings must be maintained so that grand jurors will be protected from being subjected by persons involved in the action. . . ."
>
> The ramifications of disclosing the names of grand jury members are too great to comprehend. It is safe to conclude that the number of indictments would decrease drastically and the function of the grand jury would be greatly hindered if the grand jurors' names were not secret. The secrecy of the grand jury is well-grounded in this country's jurisprudence and has protected the grand jury system. Matthews is not entitled to this information.

724 S. 2d at 1142.

And, in The Matter of the Search of 14416 Coral Gables Way, 946 F.Supp. 2d 414, 427 (D.Md. 2011), the District Court noted:

> "[t]he Fourth circuit has stated that [t]he substantive content of 'matters occurring before the grand jury' can be anything that may reveal what has transpired before the grand jury." In re Grand Jury Subpoena (Four Cases), 920 F.2d 235, 241 (4th Cir. 1990), (quoting In re Grand Jury Matter (Catania), 682 F.2d 61, 63 (3rd Cir. 1982)). This protection prevents "those disclosures that reveal the identity of grand jurors or expected witnesses. . . . ."

(emphasis added). See also, United States v. Jack, 2009 WL 435124 (E.D. Cal. 2009) (unpublished) ["The courts which have addressed the issue suggest that protection from public disclosure extends to both records reflecting matters occurring before the grand jury, and records documenting non-substantive incidents of grand jury proceedings (such as names of grand jurors) which would inhibit the freedom and integrity of the deliberative process."]; U.S. v. Brown, 2006 WL 2990463 (D.N.H. 2006) (unpublished) ["Although there is an unqualified right to inspect the master jury lists, courts have denied disclosure of names and addresses of grand jurors to protect and maintain the confidentiality and privacy rights of seated grand jurors. See United States v. McLernon, 746 F.2d 1098, 1122-23 (6th Cir. 1984)."].

Moreover, courts have also addressed the disclosability of grand jury records to the media and have found that grand jury secrecy protect these records, including names of grand jurors from disclosure to the public. For example, the D.C. Circuit Court in In re Motions of Dow Jones & Co., 142 F.3d 496, 499-500 (D.C. Cir. 1998), concluded:

> [t]he secrecy of grand jury proceedings is today measured through Fed. R. Crim. P. 6(e). Grand jurors, prosecutors, stenographers and others are forbidden from disclosing "matters occurring before the grand jury. . . ." This phrase – "matters occurring before the grand jury" – includes not only what has occurred and what is occurring, but also what is likely to occur. Encompassed within the rule of secrecy are the identities of witnesses or jurors, the substance of testimony "as well as actual transcriptions, the strategy or direction of the investigation, the deliberations or questions of jurors and the like." SEC v. Dresser Indus. Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc); Fund for Constitution Govt. v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981). (emphasis added).

Thus, there are numerous decisions which conclude that the names and identifying information of past and present grand jurors constitute "non-substantive incidents of grand jury proceedings," thereby making such names and identifying information subject to grand jury secrecy requirements.

Conclusion

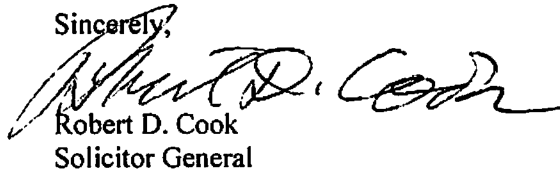
Courts in other jurisdictions have concluded that a court is not a "public body" for purposes of FOIA. While our courts have yet to address this issue, and we thus assume FOIA applicability for purposes herein, we believe a court would, nevertheless, conclude that the names and identifying information of county grand jurors, both current and past, are exempt from disclosure under FOIA. Numerous authorities elsewhere have concluded that such names and identifying information are covered by the longstanding secrecy requirements of matters occurring before a grand jury. It has been concluded in these cases that it is essential to the operation and effectiveness of the grand jury that the names of grand jurors not be subject to public disclosure. Moreover, issues of safety and privacy interests are also intricately involved. As one court has reasoned, " . . . names and addresses of grand jurors" must remain

secret "to protect the confidentiality and privacy rights" of the grand jury. Thus, a court would likely conclude that one or more exemptions contained in § 30-4-40 are applicable.

Finally, the case of State v. Evans, supra, is distinguishable. In that case, our Supreme Court concluded that, based upon due process, grand jury documents may be released to a defendant, following indictment and before trial. The names of grand jurors or their identifying information was not discussed in Evans. Moreover there, FOIA, involving public disclosure, as opposed to disclosure to the defendant, was not at issue.

Accordingly, for the reasons set forth herein, notwithstanding that § 14-7-130 provides that the drawing and summoning of grand jurors is a "public event," we believe a court is likely to conclude that names and identifying information concerning both current and past grand jurors are subject to exemption under FOIA. The longstanding secrecy of the grand jury, as well as privacy, protects these names.

Sincerely,



Robert D. Cook
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