1984 WL 249935 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 17, 1984

***1** Helen T. Zeigler
Special Assistant for Legal Affairs
Office of the Governor
State House
Columbia, South Carolina

Dear Ms. Zeigler:
You have asked us to advise you whether a petition filed with the Governor concerning the possible appointment to the office of magistrate is releasable under the Freedom of Information Act. It is our understanding that the petition was voluntarily submitted and the views of those signing it were not solicited by your office in any way. No express promise of confidentiality was made to those signing. Although we have not actually seen the petition, we understand it to have been widely circulated in the local community and contains many names. We further understand that there is concern as to how the release of this information might affect the privacy rights of certain individuals.

Your question is difficult and there are authorities supporting non-release, as well as release of the information. While the question is not free from doubt, we would advise that, based upon the information provided, the petition would probably be considered public information. However, we would add that the final decision as to whether to release or not release this particular record depends in part upon its own contents and involves the exercise of discretion on the part of your office as custodian of the record. We will elaborate upon this point more fully below.

South Carolina's Freedom of Information Act is presently codified as Section 30-4-10 et seq., Code of Laws of South Carolina (1973 Cum.Supp.). In enacting the FOIA in its present form in Act No. 593, 1978 Acts and Joint Resolutions, the General Assembly found
that it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business 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, this act is adopted, making it possible for citizens or their representatives, to learn and report fully the activities of their public officials.

Act No. 593 of 1978, Section 2. 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). With that general introduction, we turn to the applicability of the Act to your specific question.

***2** Section 30-4-20(c) defines a ‘public record’ to include
all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of or retained by a public body . . .. [T]he definition of public records . . . [shall not] include those records concerning which the public body, by favorable public vote of three-fourths of

the membership taken within fifteen working days after receipt of written request, concludes that the public interest is best served by not disclosing them.

Section 30-4-20(a) defines a 'public body' to include' . . . any department of the State, board, commission, agency and authority, any public or governmental body . . . of the State . . . supported in while or part by public funds or expending public funds . . ..' Based upon these definitions, we assume that the Governor's office represents a 'public body' as defined and that the document in question constitutes a 'public record.'

Section 30-4-30(a) provides that
Any person has a right to inspect or copy and 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. (emphasis added).

The exemptions to complete disclosure are found in Section 30-4-40(a); the following exemption would appear to be relevant here:
(a) The following matters may be exempt from disclosure under the provisions of this chapter:
. . . (2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy . . ..

In addition, pursuant to Section 30-4-20(c), where it is determined by the public body that 'the public interest is best served by not disclosing' the record, the public body is not required to release it. We will now examine the relevant case law to determine the applicability of these exceptions to the situation you have presented.

We have not found any case precisely on point with the situation presented here. However, we have located a number of decisions which offer considerable guidance. These cases have balanced the public right to know against the privacy interests of the individuals concerned, as well as the protection of the free and candid flow of information submitted to the government. A number of courts have tipped that balance in favor of disclosure.

For example, in Excise Comm. v. State, 179 Ala. 654, 60 So. 812 (1912), the Court held a petition submitted to a public official pursuant to a statutory requirement and which favored the grant of a liquor license to a particular individual to be public information. Expressly, the Court considered the privacy interests of those signing the petition and concluded that public policy mandated disclosure. Stated the Court,
In the present case, however, whatever personal embarrassments might result from the disclosure of the names of those who have signed this recommendation must be regarded as matters of private interest; and although they might become, in some sense matters of public concern, even so they are wholly subordinate to that paramount public interest—the maintenance and enforcement of public law. Our conclusions are supported by high authority.

***3** 60 So. at 814. The Court in the Excise case cited Ferry v. Williams, 41 N.J. Law 332, 32 Am.Rep. 219 where it had been held that an individual possessed a common law right to inspect letters of recommendation upon which pending liquor licenses were granted. Moreover, in State ex rel. Tindel v. Sharp, 300 So.2d 750 (1974), it was held that where a college board made recommendations concerning applicants for the position of superintendent, such recommendations were held to be public information. In Phila. Newspapers v. U.S. Dept. of Justice, 405 F.Supp. 8 (E.D.Pa. 1975), the Court concluded that the release of letters voluntarily written supporting an application for parole constituted neither a clearly unreasonable or an unreasonable invasion of privacy. Volusia v. Eubank (Fla.), 151 So.2d 37 (1963) held that a petition calling for the relocation of a county seat was public information.

And finally, in Intl. Union v. Gooding, 29 N.W.2d 730 (1947) the Court concluded that a petition requesting the State Board of Employment Relations to order an election of striking employees to determine if such employees were willing to settle a strike was public information. There, it was specifically noted that the motive in seeking the petition was to procure the names of the signers for purposes of retribution. Nevertheless, the Court reasoned that the signers of the petition
sought to induce action by the defendants as public officers and must be deemed to have contemplated a public proceeding before the commission. They are in no position to insist that any public interest will be served by keeping this document secret. The union was interested in the subject matter of the petition and we know of no common law rule or policy that would preclude it from inspection of the petition.

29 N.W.2d at 730. Thus, the foregoing cases, which we believe are analogous, clearly indicate that the courts have balanced the competing interests of privacy and public disclosure in favor of disclosure.

We would caution however that several other courts have resolved the balance in favor of the protection of privacy interests and the public policy favoring the free and candid flow of information to government officials. For example, the Court in Nero v. Hyland, 136 N.J. Super. 537, 347 A.2d 29 (1975), held that a person had no right to access of a character investigation of himself. The investigation had been conducted under the discretion of the Attorney General in order to provide the Governor with information to assist him in deciding whether to appoint the individual to a position in State Government. Under the relevant statutes, the Governor possessed the authority to declare by executive order certain records to be confidential where their disclosure would jeopardize the public interest. Pursuant to such authority, the Court was of the view that the Governor acted properly in withholding the record.
The documents sought herein involve public policy considerations. Background checks of potential government officers are routine and are essential to the maintenance of integrity of government. The police agencies charged with this important task must depend on reports from private citizens. In order to gather this necessary information investigatory files such as the one before this court of necessity must be kept confidential in order to convince citizens that they may safely confide in law enforcement officials.

***4** 347 A.2d at 32.

And similarly in People v. Keane, 17 Ill.App.3d 1090, 309 N.E.2d 362 (1974), the Court concluded that certain financial records filed with the city by applicants for cable television franchises were free from disclosure. Stated the Court,
The people's right to know, however must be balanced by the practical necessities of governing. Public officials must be able to gather a maximum of information and discharge their official without infringing on rights of privacy. Certain information possessed by the government is often supplied by individuals and enterprises that have no strict legal obligation to report but do so on a voluntary basis, with the understanding the information will be treated as confidential. Therefore, it is important to consider whether disclosure would constitute an invasion of privacy . . . whether it would discourage frankness; and whether it cuts off sources of information upon which a government relies.

309 N.E.2d at 364.

Likewise, Runyon v. Bd. of Prison Terms and Paroles, 26 Cal.App.2d 183, 79 P.2d 101 (1938) held that letters and other communications and documents sent voluntarily by various individuals to the state parole board in connection with a prisoner's application for parole were not public information. The Court recognized that ‘public policy demands that certain communications and documents shall be treated as confidential and therefore are not open to indiscriminate inspection notwithstanding that they are in the custody of a public officer or board and are of a public nature.’ 79 P.2d at 101. Based upon this exception, the Court concluded:
. . . it would seem quite clear that the letters and documents here sought to be inspected fall within [that] class . . . because it is a matter of common knowledge that in order to impartially and intelligently discharge the functions of the state board of prison

terms and paroles it is essential to secure all possible information bearing upon applicants for parole; and necessarily much of the information thus obtained can be had only upon the understanding that the persons furnishing the same will be protected and that the information imported will be treated as confidential.

79 P.2d, supra. Courts in other jurisdictions have likewise recognized these same policy considerations. See, City Council of Santa Monica v. Sup. Ct. of Los Angeles, 21 Cal. Reptr. 896, 901 (1962); Ryan v. Dept. of Justice, 617 F.2d 781 9d.c. Cir. 1980); Grassetti v. Weinberger, 408 F.Supp. 142 (N.D.Cal. 1976); Wu v. Nat. Endowment for Humanities, 406 F.2d 1030 (5th Cir. 1972); Washington Research Project v. HEW, 504 F.2d 238 (D.C. Cir. 1974); Johnson v. Winter, 179 Cal. Reptr. 585 (1979). See also, Op. Atty. Gen., September 8, 1983 [references submitted in confidence with regard to professional licensing may be protected as their disclosure could constitute an unreasonable invasion of privacy; Op. Atty. Gen., February 3, 1977 [records of other writings which are the result of an executive session or are eligible for executive session status (as personnel records) are not subject to public disclosure]. Thus, a number of courts have generally concluded that the submission of information to public officials is deemed confidential and thus not releasable under the FOIA. [1]

***5** Although as can be seen, the question you have raised is a close one, there are a number of factors which, in our judgment, militate toward disclosure in the circumstances which you have described. First, is the general principle recognized in several of our previous opinions that where there exists any doubt regarding disclosure, such doubt should be resolved in favor of public disclosure. Cf., Op. Atty. Gen., August 8, 1983. And we have stated that any doubts concerning the applicability of the personal privacy exemption of the FOIA should be decided in favor of the information being made public. Op. Atty. Gen., May 15, 1984. This is consistent with the doctrine that FOIA exemptions should be narrowly construed. Op. Atty. Gen., August 8, 1983.

Secondly, we note that the record in question is in the form of a petition which was apparently widely circulated throughout the community and signed by a large number of interested individuals. Accordingly, since the petition has been widely disseminated, it is difficult to believe a court would conclude that the petitioners now possess any significant expectation of privacy, or at least that they possess the same expectation as those who submit a similar communication by individual letter. A petition widely circulated throughout the community constitutes public speech in its most basic form. See, Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981). We note that each of the cases cited above involving petitions to the government were held to be public information.

Moreover, as we understand it, no assurance of confidentiality was given those persons submitting the petition. And the petition was submitted to the Governor voluntarily. To us, the situation is different from one where the government actively seeks information as part of its own investigation. Compare, Johnson v. Winter, supra.

Third, it is generally recognized that petitions seeking the redress of grievances made to an officer or body are entitled at least to a qualified privilege. See, 50 Am.Jur.2d Libel and Slander, §§ 216 and 217. The right to petition the government for redress of grievances is both a federal and state constitutional right, see United States Constitution, Amendment I; Constitution of South Carolina, Article I, § 2, and courts have long recognized the importance of providing immunity from liability for those who do so in order to encourage the free flow of information and to secure the execution of the laws. State v. Kerekes, 357 P.2d 413 (1960), corrected on rehearing 358 P.2d 523 (1961). Where the law already affords adequate protection from liability for the exercise of constitutional rights to those who petition the government, the need for additional protection in the way of confidentiality is considerably lessened.

While we conclude that the delicate balance between privacy and freedom of information is generally tipped in favor of disclosure, we would add that the final decision must rest with the custodian of the record. It is the nature of the record itself which is controlling, New York Post Corp. v. Moses, 204 N.Y.S.2d 44 (1960) and each case must be decided upon its own facts upon evaluation of the particular document or material. Again, Section 30-4-20(c) authorizes the public body to refrain from releasing any material where it concludes, within its discretion, that the public interest would be served by not disclosing the material.

***6** If the particular record in question contains material which in the judgment of the public body would, because of its contents, unreasonably infringe upon the privacy of some individual or possibly subject one to liability, there would, under the case authority enumerated above, exist grounds for nondisclosure. See, Matthews v. Pyle, 251 P.2d 893, 896 (1952). Unless such is clearly the case, however, we would advise that, based upon the information provided to us, a court would conclude that the record in question is releasable under the FOIA. [2]

If we can be of further assistance, please let us know. With kindest regards, I remain
Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 At first blush, it would appear that the South Carolina case, Cooper v. Bales, 268 S.C. 270, 233 S.E.2d 306 (1977) is supportive of the general principle that information submitted to the government to assist in decision-making is confidential. Indeed, Cooper espouses the basic proposition of the need for confidentiality in such circumstances. However, Cooper makes it clear that the case is only applicable for keeping such information confidential prior to decision. The Court noted that the 'short interval during which these materials are not made public' was important to its decision. 268 S.C. at 273-274.

2 We would add that even if the document in question falls within an exemption, it is not mandatory that the record be withheld. Tobin v. Mich. Civil Service Comm., 416 Mich. 661, 331 N.W.2d 184 (1982); Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The record still may be disclosed, within the discretion of the custodian.

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