



ALAN WILSON
ATTORNEY GENERAL

October 2, 2018

Marcus K. Gore, Esquire
General Counsel
S.C. Department of Public Safety
P.O. Box 1993
Blythewood, SC 29016

Dear Mr. Gore:

We received your letter dated August 17, 2018 for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"The Office of Highway Safety and Justice Programs ("OHSJP"), a division of the [South Carolina] Department [of Public Safety], serves as the custodian for statewide traffic collision statistics. These statistics are compiled from data reported by law enforcement agencies on the South Carolina Traffic Collision Report Form, commonly referred to as the TR-310. The TR-310 collects specifics about the collision itself, but also documents information regarding the individuals involved in the collision. This data is collected into a large electronic database for statistical and reporting purposes.

For collisions entered into the database, the Department documents the following information regarding the individuals involved in the collision:

- a. First initial of all individuals (drivers, occupants, pedestrians, witnesses);*
- b. Full last name of all individuals (drivers, occupants, pedestrians, witnesses);*
- c. Home addresses of all individuals (drivers, occupants, pedestrians, witnesses);*
- d. Dates of birth of all drivers, occupants, and pedestrians involved in the collision; and*
- e. Complete driver's license numbers of all drivers involved in the collision.*

OHSJP routinely responds to FOIA requests seeking information about traffic collisions themselves, including data regarding the locations of the collisions and the vehicles involved. This type of data does not raise any privacy concerns insofar as it does not provide any information identifying the individuals involved in the collision.

OHSJP recently received several requests that seek information about the collisions themselves as well as information concerning the individuals involved in the collision, specifically their full names, home addresses, dates of birth, and complete/partial driver's license numbers. As discussed above, SCDPS is willing to make available portions of the electronic data related to the collision itself, but has concerns about the release of information related to the individuals involved in the collisions.

FOIA exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code § 30-4-40(a)(2); see also S.C. Code § 30-4-40(a)(3)(C) (exempting "records . . . or other information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . would constitute an unreasonable invasion of personal privacy.")

FOIA also yields to other laws which close particular records to public access. See S.C. Code § 30-4-20(c) ("[R]ecords which by law are required to be closed to the public are not considered to be made open to the public under the provisions of [FOIA].") The South Carolina Family Privacy Protection Act (S.C. Code §§ 30-2-10, et seq.) ("FPPA") provides that a public body may not "intentionally communicate or otherwise make available to the general public . . . personal identifying information." S.C. Code § 30-2-310(A)(1)(e). Personal identifying information, as used in that section, includes but is not limited to: driver's license numbers, dates of birth, and current or former names when the names are used in combination with other identifying information. S.C. Code § 16-13-510(D).

Consistent with the opinion of your office dated February 13, 1986, the Department does not consider traffic collision reports filed by law enforcement officers to be confidential. However, the Department believes that certain elements containing personally identifying information within those reports are confidential, and therefore exempt from disclosure. Some confusion has arisen insofar as the FPPA excludes "information about . . . vehicular accidents . . . [and] driving violations" from its definition of "Personal information." S.C. Code § 30-2-30(1); see also Op. of the Attorney General dated February 24, 2010 (concluding that "there does not exist any basis for preventing boating accident reports filed with DNR from being available under this State's Freedom of Information Act for public release.").

Given the concerns over the unintentional release of the public's private information in a number of well-documented data breaches, the Department believes that it cannot release home addresses, dates of birth, or driver's license numbers (partial or complete) coupled with names without potentially infringing on the privacy of these individuals.

Therefore, the Department is requesting an opinion from the South Carolina Attorney General's Office on whether the foregoing authorities permit SCDPS to release home addresses, dates of birth, or driver's license numbers (partial or complete) in response to a FOIA request seeking information related to traffic collisions. Additionally, does the Family Privacy Protection Act's exclusion of "information about vehicular accident and driving violations" permit the release of all the information recorded on a TR-310?"

Law/Analysis:

I. The South Carolina Freedom of Information Act (S.C. Code Ann. § 30-4-10 et seq.)

As you are likely aware, the General Assembly decreed the purpose of the South Carolina Freedom of Information Act within the Act as follows:

The 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 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 persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (1976 Code, as amended). Furthermore, “public record” is defined within the Act to include “other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” S.C. Code Ann. § 30-4-20(c). The South Carolina Department of Public Safety is an agency of the State government supported by public funds and as such would be a public body subject to the South Carolina Freedom of Information Act. S.C. Code Ann. § 30-4-20; § 23-6-20 *et seq.* Its powers and duties are:

- (1) carry out highway and other related safety programs;
- (2) engage in driver training and safety activities;
- (3) enforce the traffic, motor vehicle, commercial vehicle, and related laws;
- (4) enforce size, weight, and safety enforcement statutes relating to commercial motor vehicles;
- (5) operate a comprehensive law enforcement personnel training program;
- (6) promulgate such rules and regulations in accordance with the Administrative Procedures Act and Article 7 of this chapter for the administration and enforcement of the powers delegated to the department by law, which shall have the full force and effect of law;
- (7) operate such programs and disseminate information and material so as to continually improve highway safety;
- (8) receive and disburse funds and grants, including any donations, contributions, funds, grants, or gifts from private individuals, foundations, agencies, corporations, or the state or federal governments, for the purpose of carrying out the programs and objectives of this chapter; and
- (9) do all other functions and responsibilities as required or provided for by law.

S.C. Code Ann. § 23-6-30 (1976 Code, as amended) (emphasis added).

The South Carolina Freedom of Information Act specifically permits public bodies to exempt from disclosure (among other things):

- (2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. ...
- (3) Records, video or audio recordings, or other information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:
 - (A) would interfere with a prospective law enforcement proceeding;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) would constitute an unreasonable invasion of personal privacy;

...

(F) would endanger the life or physical safety of any individual;

(G) would disclose any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial.

(4) Matters specifically exempted from disclosure by statute or law.

S.C. Code Ann. § 30-4-40(a)(2)-(4) (1976 Code, as amended). Thus, the information you describe in your letter could be excluded from disclosure pursuant to the Freedom of Information Act if a court finds it to be “information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy” or if it is compiled for “law enforcement purposes” and meets one of the criteria in (3) such as “would constitute an unreasonable invasion of personal privacy.” S.C. Code Ann. § 30-4-40. Furthermore, the South Carolina Freedom of Information Act prohibits use of the Act for commercial solicitation for police incident reports and home addresses and phone numbers of employees and officers of public bodies for commercial solicitation. S.C. Code Ann. § 30-4-50. Furthermore, South Carolina Code Ann. § 56-5-1275 prohibits the examination or release of an accident report for commercial solicitation. S.C. Code Ann. § 56-5-1275. The determination of whether an exemption to the Freedom of Information Act applies is made on a case-by-case basis. See Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (2005). The South Carolina Supreme Court explained that:

Under FOIA, “[a]ny person has a right to inspect or copy any public record of a public body,” unless that record is exempt from disclosure. S.C. Code Ann. 30-4-30(a) (1991).⁵ Whether a record is exempt depends on the particular facts of the case. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). Underlying each case, however, is the principle that the exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA ... “to guarantee the public reasonable access to certain activities of the government.” *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); S.C. Code Ann. 30-4-15 (1991); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). To further advance this purpose, the government has the burden of proving that an exemption applies.

Evening Post Pub. Co. v. City of N. Charleston, 363 S.C. 452, 456–57, 611 S.E.2d 496, 499 (2005) (citations omitted). The South Carolina Court of Appeals has stated regarding the South Carolina Freedom of Information Act and similar issues to yours that:

The essential purpose of the FOIA is to protect the public from secret government activity. *Perry*, 409 S.C. at 141, 761 S.E.2d at 253. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the General Assembly. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864–65 (2001).

...

South Carolina Code section 30-4-40(a)(2) (2007), known as the “privacy exemption,” exempts from disclosure “[i]nformation of a personal nature where

the public disclosure thereof would constitute unreasonable invasion of personal privacy.” As this court noted, “Section 30–4–40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure.” *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct.App. 2004). Thus, we must “resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.” *Id.* The right to privacy is defined as the right of an individual to be let alone and to live a life free from unwarranted publicity. *Id.* “However, ‘one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest.’ ” *Id.* (quoting *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984)).

...

Similarly, the U.S. Supreme Court found disclosure of employees' addresses would not appreciably further “the citizens' right to be informed about what their government is up to” and “would reveal little or nothing about the employing agencies or their activities.” *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994). It held, “Because the privacy interest of bargaining unit employees in nondisclosure of their home addresses substantially outweighs the negligible FOIA-related public interest in disclosure, we conclude that disclosure would constitute a ‘clearly unwarranted invasion of personal privacy.’ ” *Id.* at 502, 114 S.Ct. 1006 (citation omitted).

...

Home addresses and telephone numbers are information our General Assembly has recognized as entitled to protection for personal privacy. In legislation enacted subsequent to the FOIA, the General Assembly recognized, “Although there are legitimate reasons for state and local government entities to collect social security numbers and other personal identifying information from individuals, government entities should collect the information only for legitimate purposes or when required by law.” S.C. Code Ann. § 30–2–300(2) (Supp.2014). It thus provided, “When state and local government entities possess social security numbers *or other personal identifying information*, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public.” S.C. Code Ann. § 30–2–300(3) (Supp.2014) (emphasis added).

...

In balancing the interests of protecting personal information against the public's need to know the information, we find no evidence in the record demonstrates disclosure would further the FOIA's purpose of protecting the public from secret government activity. Accordingly, we hold the applicants' home addresses, personal telephone numbers, and personal email addresses are “[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy” and are exempt from disclosure under section 30–4–40(a)(2).

Glassmeyer v. City of Columbia, 414 S.C. 213, 219-220, 222-23, 777 S.E.2d 835, 839, 840-841 (Ct. App. 2015) (emphasis added). Thus, the Court concluded that personal information on the applications was not being withheld for secret government activity but to protect the privacy of the applicants. The Court in Glassmeyer quoted the Supreme Court as follows regarding personal information:

It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but “[i]n an organized society, there are few facts that are not at one time or another divulged to another.” *Reporters Comm.*, *supra*, at 763, 109 S.Ct., at 1476. The privacy interest protected by Exemption 6 “encompass[es] the individual's control of information concerning his or her person.” 489 U.S., at 763, 109 S.Ct., at 1476. An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.

Glassmeyer v. City of Columbia, 414 S.C. 213, 221–22, 777 S.E.2d 835, 840 (Ct. App. 2015) (quoting U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 500, 114 S. Ct. 1006, 1015, 127 L. Ed. 2d 325 (1994)).

II. Constitutional Privacy Protections (S.C. Const. art. I, § 10)

The South Carolina Constitution pledges its citizens the right to be secure against unreasonable invasions of privacy in Article I, Section 10 where it states that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained. (1970 (56) 2684; 1971 (57) 315.)

S.C. Const. art. I, § 10. Thus, the citizens of South Carolina have a Constitutional protection against unreasonable invasions of privacy. This Office has previously opined that South Carolina's Constitution provides more protection for one's privacy than the Fourth Amendment to the U.S. Constitution. *See, e.g., Op. S.C. Att'y Gen.*, 2011 WL 6120332 (S.C.A.G. November 7, 2011).

III. Reporting Requirements (S.C. Code Ann. § 56-5-1270 et seq.)

South Carolina Code of Laws requires written reports of certain accidents and investigations. *See* S.C. Code Ann. § 56-5-1270; § 56-5-1300. Nevertheless, the law prohibits traffic reports made pursuant to § 56-5-1270 from being used as evidence as follows:

All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department of Motor Vehicles, Department of Public Safety, or other State agencies having use for the records for accident prevention purposes. The Department of Motor Vehicles may disclose the identity of a person involved in an

accident when such identity is not otherwise known or when such person denies his presence at such accident and may upon request disclose to any person who has suffered injury to his person or property any information contained on any report regarding the existence of insurance. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the Department of Motor Vehicles shall furnish, upon demand of any person who has, or claims to have, made such a report or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the Department of Motor Vehicles solely to prove a compliance or a failure to comply with the requirement that such a report be made to the Department of Motor Vehicles.

S.C. Code Ann. § 56-5-1340. Certainly the law requires the Department of Public Safety to keep statistics based on the accident reports and make those reports available to the public. See S.C. Code Ann. § 56-5-1350 (“The Department of Public Safety must tabulate and may analyze all accident reports as required in Section 56-5-1270 and shall publish annually or at more frequent intervals statistical information based thereon as to the number and circumstances of traffic accidents.”).

IV. South Carolina Family Privacy Protection Act (S.C. Code Ann. § 30-2-10 et seq.)

Within the Act, the law states that:

All state agencies, boards, commissions, institutions, departments, and other state entities, by whatever name known, must develop privacy policies and procedures to ensure that the collection of personal information pertaining to citizens of the State is limited to such personal information required by any such agency, board, commission, institution, department, or other state entity and necessary to fulfill a legitimate public purpose.

S.C. Code Ann. § 30-2-20 (1976 Code, as amended) (emphasis added). However, the Family and Personal Identifying Information Privacy Protection Act specifically excludes information about boating and vehicular accidents from its definition of “personal information.” S.C. Code Ann. § 30-2-30. It defines “personal information” as:

(1) “Personal information” means information that identifies or describes an individual including, but not limited to, an individual's photograph or digitized image, social security number, date of birth, driver's identification number, name, home address, home telephone number, medical or disability information, education level, financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports. “Personal information” does not mean information about boating accidents, vehicular accidents, driving violations, boating violations, or driver status, or names and addresses from any registration documents filed with the Department of Revenue as a business address which also may be a personal address.

S.C. Code Ann. § 30-2-30(1) (1976 Code, as amended) (emphasis added). Thus, any “personal information” as defined in § 30-2-30(1) would not apply to information collected regarding vehicular collisions. See also Op. S.C. Att’y Gen., 2010 WL 928443 (S.C.A.G. February 24, 2010). Nevertheless, the General Assembly does present findings within the Family Privacy Protection Act regarding protection of social security numbers and other personal identifying information as follows:

(1) The social security number can be used as a tool to perpetuate fraud against an individual and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to the individual. While the social security number was intended to be used solely for the administration of the federal Social Security System, over time this unique numeric identifier has been used extensively for identity verification purposes and other legitimate consensual purposes.

(2) Although there are legitimate reasons for state and local government entities to collect social security numbers and other personal identifying information from individuals, government entities should collect the information only for legitimate purposes or when required by law. An entity that provides employee benefits has a legitimate need to collect and use social security numbers and personal identifying information as part of its administration and provision of employee benefits programs.

(3) When state and local government entities possess social security numbers or other personal identifying information, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public.

S.C. Code Ann. § 30-2-300 (emphasis added).

V. Drivers’ Privacy Protection Act of 1994 (18 U.S.C. § 2721 *et seq.*)

Moreover, this Office has previously opined regarding some federal law and protection of personal information that:

The federal Drivers' Privacy Protection Act of 1994 instructs state departments of motor vehicles to not disclose personal information¹ or highly restricted personal information. 18 U.S.C. § 2721 *et seq.* However, if an exception applies to the above mentioned law, then such information may be shared in certain circumstances. For example, the Act permits use of personal driver information “by any government agency, including any court or law enforcement agency, in carrying out its functions.” 18 U.S.C. § 2721(b)(1).

Op. S.C. Att’y Gen., 2011 WL 1740736, at *1 (S.C.A.G. Apr. 6, 2011) (footnotes omitted). We trust that the Department of Public Safety is collecting such personal information concerning the citizens of this State and other states in good faith. The request letter mentions the personal information is collected “for statistical and reporting purposes.” Thus, we must also caution you not to violate any other State or federal laws in the potential release of this information.

Conclusion:

First and foremost, this Office supports the South Carolina Freedom of Information Act policy of transparency in government. S.C. Code Ann. § 30-4-15 *et seq.* This Office has consistently advised public bodies that “when in doubt, disclose.” Conversely, the protection of families and the privacy of individuals found in the State and Federal Constitutions is of critical importance. *See, e.g.,* S.C. Const. art. I, § 10. It is our opinion that a court will make a similar ruling to that in the Glassmeyer case. *See Glassmeyer v. City of Columbia*, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015). There, the South Carolina Court of Appeals concluded that personal information on the applications were not being withheld for secret government activity but to protect the privacy of the applicants. The Court stated that:

[H]ome addresses, personal telephone numbers, and personal email addresses are “[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy” and are exempt from disclosure under section 30-4-40(a)(2).

Glassmeyer v. City of Columbia, 414 S.C. 213, 219-220, 222-23, 777 S.E.2d 835, 839, 840-841 (Ct. App. 2015). Furthermore, it is this Office’s opinion that a court would likely find the South Carolina Freedom of Information Act does not require the disclosure of private individuals’ dates of birth in response to a Freedom of Information Act request as described in the request letter because the interests of protecting personal information would outweigh the public’s need to know such information. It is this Office’s opinion that your agency would comply with the South Carolina Freedom of Information Act by limiting the disclosure to the information that would be available from the incident report with redactions as required. Such disclosure should be consistent with our prior opinions (*see, e.g., Ops. S.C. Att’y Gen.*, 2013 WL 5955672 (S.C.A.G. October 24, 2013); 2000 WL 655473 (S.C.A.G. April 18, 2000 (citing Walker v. S.C. Dep’t of Highways and Transportation, 320 S.C. 496, 466 S.E.2d 346 (1996)); 1996 WL 599445 (S.C.A.G. September 24, 1996); 1999 WL 1893881 (S.C.A.G. June 17, 1999); 1986 WL 191985 (S.C.A.G. February 13, 1986)) regarding the personal information that is redacted from incident reports and Glassmeyer. Moreover, we believe releasing driver license numbers and other information pursuant to a Freedom of Information Act request could also violate the Drivers’ Privacy Protection Act of 1994 depending on the scenario. *See* 18 U.S.C. § 2721 *et seq.*

Additionally, the South Carolina Freedom of Information Act prohibits use of information gathered from police incident reports and home addresses and phone numbers of employees and officers of public bodies for commercial solicitation. S.C. Code Ann. § 30-4-50(B). In our opinion, it is possible a court could interpret the Freedom of Information Act to prohibit commercial solicitation of a TR-310 based on the data as a collection of data reported by law enforcement agencies pursuant to the policing power of the State, consistent with the prohibition against commercial solicitation for police incident reports and home address and phone numbers of employees and officers of public bodies, in addition to South Carolina Code Ann. § 56-5-1275’s prohibition on the examination or release of an accident report for commercial solicitation. S.C. Code Ann. § 30-4-50; § 56-5-1275. Nevertheless, all of these conclusions are also intended to be consistent with our previous opinions and court rulings regarding the Freedom of Information Act. However, outside the scope of the Freedom of Information Act, every State agency with a copy of the record of an accident must comply with the applicable laws, such as South Carolina Code Ann. § 56-5-1340, which requires an accident report “be for the confidential use” of the agency and may not be used as evidence in any “trial, civil or criminal, arising out of an accident... except to prove a compliance or failure to comply with the requirement that such a report be made to the

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Page 10

October 2, 2018

Department of Motor Vehicles.” S.C. Code Ann. § 56-5-1340; see also Ellison v. Pope, 290 S.C. 100, 348 S.E.2d 367 (Ct. App. 1986); Branham v. Leaphart, 311 S.C. 231, 428 S.E.2d 707, 311 S.C. 231 (1993); S.C. Code Ann. § 56-5-1275.

As we stated above, the entire purpose of the South Carolina Freedom of Information Act is to protect the public from secret government activity, which seems to be exactly what the heart of this opinion is addressing. S.C. Code Ann. § 30-4-15. Therefore, we trust there is a good faith legal purpose for the collection of this personal information such as the names and birth dates of those involved in collisions into a database such as pursuant to South Carolina Code Ann. § 56-5-1350. We must also caution you to proceed prudently so as not to violate any other State or federal laws in the potential release of this information. Furthermore, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. This opinion only addresses some of the sources in the subject area, but we can address other authority or additional questions in a follow-up opinion. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code Ann. § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita (Mardi) S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



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