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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

February 4, 2004

Donald Wilcox, Chief
Hanahan Police Department
1255 Yeamans Hall Road
Hanahan, South Carolina 29406

Dear Chief Wilcox:

You have asked whether "disciplinary actions taken by the, in this case, police department are subject to open copying of that form by the press?" By way of background you state:

> I do not have a problem with releasing information such as that the disciplinary action was taken for an accidental firearm discharge, but I wonder if the name of the officer disciplined, the penalty imposed or the name of the person injured by an accidental discharge is not an unreasonable invasion of privacy.

Law / Analysis

The Freedom of Information Act 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. The Act's preamble best expresses both the Legislature's intent in enacting the statutes, as well as the public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

> [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 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.

On numerous occasions, this Office has emphasized its approach in construing the Freedom of Information Act consistent with the Legislature's above-referenced expression of public policy. In Op. Atty. Gen., Op. No. 88-31 (April 11, 1998), we summarized the rules of statutory construction which this Office follows in interpreting the FOIA thusly:

> [a]s 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 liberally 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).

In essence, the rule of thumb to which this Office has consistently adhered with respect to any Freedom of Information Act question is: when in doubt, disclose.

Your question is addressed in part by a decision of the South Carolina Supreme Court in City of Columbia v. American Civil Liberties Union, 323 S.C. 384, 475 S.E.2d 747 (1996). In that case, the appellants, ACLU and Gray, requested under the Freedom of Information Act a copy of the City of Columbia's internal investigation report which had found no wrongdoing on the part of several police officers in response to a complaint by Gray that the officers had briefly detained he and others as part of an alleged year-end campaign to execute outstanding arrest warrants. The City refused the FOIA request and filed an action seeking a declaratory judge that the report was exempt under FOIA.

The City contended that the report did not have to be disclosed under S.C. Code Ann. Sec. 30-4-40(a)(2) of the FOIA which provides that

> (a) [t]he following matters are 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 ... .

The Supreme Court, however, refused to find that § 30-4-30(a) provided a blanket exemption to disclosure. In the Court's opinion

> [w]e disagree with Respondent's contention that the internal investigation reports of law enforcement agencies are per se exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. Newberry Publishing Co., Inc. v. Newberry County Comm'n on Alcohol and Drug

> Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992). Thus, it remains to be seen whether the report qualifies for an exception under the FOIA.
>
> Another basis for the trial court's holding that the report is exempt from disclosure also warrants discussion. Under the FOIA, a public body may hold a meeting closed to the public to discuss, among other things, the employment, demotion, or discipline of an employee. Section 30-4-70(a)(1). Respondent analogizes its internal investigation process to a § 30-4-70(a)(1) "discussion", and argues that because Respondent can conduct such a discussion closed to the public, it therefore follows that any report memorializing that discussion should also be exempt from disclosure under the FOIA. The trial court agreed with Respondent, holding that "[i]t is impossible to render a harmonious construction of the Act which makes the Internal Affairs file subjec tto disclosure."
>
> ... The plain language of § 30-4-70(a)(1) does not exempt from disclosure a "public record" as that term is defined by § 30-4-20. Section 30-4-70(a)(1) does no more than to allow public bodies to conduct certain "discussions" closed to the public. Thus, as the report is a public record as defined by § 30-4-20, the question of its exemption must be resolved by reference to § 30-4-40 ("Matters exempt from disclosure.").

475 S.E.2d at 749.

In Doe v. Berkeley Publishers, 329 S.C. 412, 496 S.E.2d 636 (1998), the South Carolina Supreme Court held that "[t]he issue in an invasion of privacy claim is whether the occurrence is a matter of legitimate public or general interest." There, the Supreme Court reversed the Court of Appeal's conclusion that the trial court had erred in directing a verdict for the defendant as to plaintiff's claim that his privacy had been invaded by the defendant newspaper's truthful reporting that he was the victim of a sexual assault by an inmate while incarcerated. The Supreme Court concluded that

> [t]he Court of Appeals erred in separating the plaintiff's identity from the event. Under state law, if a person, whether willingly or not, becomes an actor in an event of public or general interest, "then the publication of his connection with such an occurrence is not an invasion of his right to privacy." Meetze [v. The Associated Press,] 230 S.C. [330, 95 S.E.2d 606 (1956)] at 337, 95 S.E.2d at 609. Accordingly, Doe's invasion of privacy claim fails as a matter of law, and the trial court's directed verdict was proper.

496 S.E.2d at 637.

Moreover, in Dortch v. Atlanta Journal, 261 Ga. 350, 405 S.E.2d 43 (1991), the Georgia Supreme Court recognized that the "personal privacy" exemption in FOIA is to be determined by the standards applicable to the tort of invasion of privacy. In that court's view, this exemption is not meant to exclude "legitimate inquiry into the operation of a government institution and those employed by it." 405 S.E.2d at 45.

Several decisions from other jurisdictions involving the applicability of the "personal privacy" exemption of that jurisdiction's FOIA are also relevant here. For example, in Bradley v. Board of Education, 455 Mich. 285, 565 N.W.2d 650 (1997), the Supreme Court of Michigan concluded that performance evaluations, disciplinary records and complaints filed against public school teachers and administrators were not exempt under Michigan's FOIA. The Michigan statute permits non-disclosure if the information is "of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." In concluding that the exemption did not apply, the Court reasoned as follows:

> [s]ignificantly, none of the documents contain information of an embarrassing, intimate, private or confidential nature, such as medical records or information relating to the plaintiffs' private lives. Moreover, the appellants have not alleged specific private matters that would be revealed by the disclosure of their personnel records. Instead, the requested information consists solely of performance appraisals, disciplinary actions, and complaints relating to the plaintiffs' accomplishments in their public jobs. Because the requested information does not disclose intimate or embarrassing details of the plaintiffs' private lives , we held that the requested records do not satisfy the personal-nature element of the privacy exemption.

565 N.W.2d at 655.

Moreover, in Department of Children and Families v. Freedom of Information Commission, et al., 48 Conn. App. 467, 710 A.2d 1378 (1998), the Appellate Court of Connecticut held that the personal privacy exemption in that state's FOIA did not bar disclosure of information related to disciplinary action taken against employees of the Department of Children and Families. In concluding that the "personal privacy" exception was inapplicable to records concerning discipline of employees for failure to protect a child in the Department's custody, the Court stated:

> [t]he invasion of personal privacy exception precludes disclosure only when the information sought does not pertain to legitimate matters of public concern, and is highly offensive to a reasonable person. "'When [the] intimate details of [one's] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of [the individual's] privacy, unless the matter is one of legitimate public interest.'" Perkins v. Freedom of Information, 228 Conn. 158, 173, 635 A.2d 783 (1993), quoting 3 Restatement (Second), Torts § 652 D, comment (b) (1977). Once it has been established that the

> information is of legitimate public concern, however, the degree to which intimate details will be revealed will not prevent disclosure.

710 A.2d at 1381. The Court affirmed the decision below that the disciplinary action taken against the employees was a matter of legitimate public concern and, therefore, the release of the employees' names did not constitute an invasion of their privacy.

Conclusion

Based upon the foregoing authorities, it is our opinion that a court would conclude that the records concerning the discipline of a police officer are generally not exempt from disclosure under the Freedom of Information Act's "personal privacy exemption" contained in § 30-4-40(a)(2). Such records, including the names of those officers, disciplined would relate to matters of "legitimate public concern" rather than "personal privacy" in one's private life and are, therefore, not exempt. While a particular exemption might be applicable in a given instance (such as the protection of one's Social Security Number), as a general rule, there is no blanket exception afforded to records of disciplinary action taken by a law enforcement agency or other public body. In our opinion, all doubt concerning the disclosure of a particular record of such action should be resolved in favor of disclosure.[1]

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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[1] We note that the South Carolina Constitution in Article I, § 10 expressly protects against "unreasonable invasions of privacy." Moreover, the Family Privacy Protection Act of 2002, codified at § 30-2-10 et seq also provides certain protections to the citizen against invasions of personal privacy by state agencies. See, Op. S.C. Atty. Gen., September 17, 2002. We do not deem the conclusions expressed above as being altered or modified by these other provisions of law.