1981 S.C. Op. Atty. Gen. 91 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-64, 1981 WL 96590

Office of the Attorney General

State of South Carolina
Opinion No. 81-64
July 7, 1981

***1 SUBJECT: Freedom of Information request—Failure to respond—Availability of correspondence and work product—Purpose of request irrelevant—Medical records-Federal legislation.**
(1) Any written request is sufficient under the South Carolina Freedom of Information Act.

(2) Failure to respond to a written request may be remedied by resort to injunctive relief, so long as sixty (60) days has not elapsed from the expiration of the statutory fifteen (15) day response period.

(3) An attorney's work product and any correspondence generated by that attorney for the public body which he represents may be removed from records to be disclosed, along with any other material violative of the attorney-client relationship.

(4) That information is sought in furtherance of a civil law suit has no effect on the requirement for disclosure mandated by the Freedom of Information Act.

(5) Medical records in the possession of a public body should not be disclosed absent consent or a court order.

(6) There is no federal legislation prohibiting the disclosure of arrest records and criminal investigation reports.

TO: Dudley Saleeby, Jr.
Solicitor
Twelth Judicial Circuit

DISCUSSION:

You have referred to this Office several questions concerning the requirements of the South Carolina Freedom of Information Act, Section 30–4–10, et. seq. of the South Carolina Code of Laws (1976) as amended. These questions have arisen from a written request received by your office pursuant to § 30–4–30 for records concerning the arrest and criminal investigation of a certain individual, plus all correspondence with the South Carolina State Hospital dealing with that individual's judicial confinement in that institution. The request in question is made under the Freedom of Information Act but the information sought is for use in a civil suit and this is clearly shown in the requesting letter.

The questions which you raised are considered in the order presented by your letter.

QUESTION:

1. Under § 30–4–30(c), is any written request for records made public by § 30–4–10, et. seq. sufficient?

OPINION:

Yes. § 30–4–30(c) requires a public body to notify a party making a written request for records within fifteen (15) days (excepting weekends and holidays) informing the requesting party as to the public availability of the record sought. The request need only be in writing to render the statute operational. No particular form for the request is required or necessary.

QUESTION:

2. Under § 30–4–30(c) what are the consequences for a failure by a public body to respond within fifteen (15) days?

OPINION:

Under § 30–4–100, the requesting party, after the expiration of the fifteen (15) days (excepting Saturdays, Sundays and legal public holidays), may apply to the circuit court for injunctive relief to enforce the provisions of the Act. But, unless the relief is sought within sixty (60) days following the expiration of the fifteen (15) days, this remedy has been waived. § 30–4–100(b) allows for the recovery of reasonable attorney's fees and costs if the injured party prevails. Under § 30–4–110, a willful violation of the Act is a misdemeanor.

QUESTION:

***2** 3. Under § 30–4–30(a)(7) can correspondence and work product such as trial preparation notes, outlines of witnesses' testimony, and the trial notes themselves, be extracted from a criminal file before that file is provided to the requesting party for review?

OPINION:

Yes. While the central theme of the Act is disclosure, the files of Law Enforcement agencies are not per se declared public information under § 30–4–50. Under § 30–4–30(a)(3), whether or not disclosure is to be made seems to center on the likelihood of harm to an individual or to the agency itself. But § 30–4–40(a)(7) does specifically exempt from disclosure the correspondence and work product of the legal counsel for a public body and any other material that would violate the attorney—client relationship. Therefore, if your office produces the file for inspection or copying, counsel's work product and correspondence may be removed from the file, along with any other items detrimental to the attorney-client relationship.

QUESTION:

4. Does the fact that the Freedom of Information Act request is in furtherance of a civil law suit have any bearing upon the duties and responsibilities imposed by the Freedom of Information Act?

OPINION:

No. While the Freedom of Information Act was not intended as a discovery tool, it has come to be an important means for discovery purposes. § 30–4–30(a) states that any person has the right to inspect or copy any public record, unless that public record falls within the exceptions listed in § 30–4–30. The first question is then whether or not a record, specifically in this case, a record file on a certain individual dealing with an arrest and criminal investigation of that individual in the possession of the Solicitor's Office, is a ‘public record’ as defined under § 30–4–20(c). ‘Public record’ is defined under § 30–4–20(c) as including, among other things, all papers, photographs and documents, prepared, owned, used, in the possession of or retained by a public body. Arrest records are not by law required to be closed to the public and, therefore, these records must be deemed to be ‘public records'. The second question is whether or not there are any exceptions listed in § 30–4–30 to prevent disclosure. There is no exception for a refusal to disclose due to the likelihood that a record is being sought for use in prospective or existing litigation not concerning the public body in possession of the public record requested. However, information which would constitute an unreasonable invasion of personal privacy may be exempt from disclosure under § 30–4–30(a)(2). It might well be good policy

to contact the individual whose record is being sought and inform that person so as to put the individual on notice and to obtain either a consent to disclosure or to allow the party whose privacy is in issue to obtain legal assistance to enjoin disclosure.

QUESTION:

5. Does a Solicitor have the authority to release the personal medical records of a defendant which were provided either by the defendant or by a state agency?

OPINION:

***3** No. Under § 30–4–20(c), medical records, hospital staff reports, and all other records which by law are required to be closed to the public are not deemed to be open to the public through the Freedom of Information Act. Additionally, unless the subject of the medical reports consented to disclosure, the personal privacy exemption could apply. To disclose medical records without consent or without a court order might render your office open to an invasion of privacy suit by the affected individual.

QUESTION:

6. Is there any federal legislation establishing rights of personal privacy which would prohibit the release of any information sought by counsel in this case?

OPINION:

No. A review of the Federal Privacy Act of 1974 and other legislation discloses no such prohibitions. Under 5 U.S.C.A, § 552(a), a criminal record is specifically included under the definition of ‘record’ and disclosure is prohibited absent the written request of the person to whom the record pertains or with a prior written consent. The Federal Acts pertain only to Federal agencies, however, and South Carolina does not have any similar statute protective of an individual's right to privacy.

Judith Evans Finuf
Assistant Attorney General

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