ALAN WILSON
ATTORNEY GENERAL

September 6, 2016

W. Eric Emerson, Ph.D.
Director and SHPO
South Carolina Department of Archives & History
8301 Parklane Road
Columbia, SC 29223

Dear Dr. Emerson:

You have requested our opinion regarding "two sections of the South Carolina Public Records Act, specifically Section 30-1 -10 (C and D) and Section 30-1-90 (A)." You note that "[t]hese two sections are pertinent to the approval process for Records Retention Schedules as promulgated by this agency." By way of background, you further state:

> In the past this agency has produced records retention schedules for sheriff's departments in various counties throughout the state. Those retention schedules have been approved by three parties: The sheriff's department; the county council for the county in which the sheriff serves; and the director of this agency. This is in keeping with our reading of Section 30-1-90 (A), last sentence, which reads, "These schedules must be approved by the governing body of each subdivision or the executive officer of each agency or body having custody of the records and by the Director of the Archives."
>
> We have interpreted that sentence to read that the governing body pertinent to the creation of retention schedules for any sheriff's department is the county council, since counties are subdivisions of the state. Our interpretation is drawn directly from definitions found in Section 30-1-10 (C), which stales "'Agency' means any state department, agency, or institution," and Section 30-1-10 (D), which states "'Subdivision' means any political subdivision of the State."
>
> Based upon the definitions found in the above listed sections of South Carolina code, we believe that a sheriff s department from a South Carolina county does not qualify as an "Agency," but instead falls under the definition of a "Subdivision." Therefore, the governing body of a political subdivision of the State, in this case the county council, is the second approving body for a retention schedule.
>
> We are requesting an opinion from your office concerning these definitions. Does a sheriff's department qualify as an "Agency" or a "Subdivision" as defined by Section 30-1-10 (C and D)? A ruling on this definition will dictate whether this

> agency categorizes and treats the records produced by a sheriff's department as local government records or state government records.

Law/Analysis

The broad purpose of the Public Records Act [Code of Laws of South Carolina §§ 30-1-10 et seq., 1976 as amended] is best expressed in § 30-1-10. This provision states in pertinent part:

> [p]ublic records [defined in § 30-1-10] shall be protected against deterioration, theft, loss or destruction and shall be kept secure in rooms having proper ventilation, or in fire resistant safes or vaults, in such arrangement as to be easily accessible for convenient use. . . . Records shall be copied or repaired, renovated, rebound or restored if worn, mutilated, damaged or difficult to read.

The Act provides for criminal penalties. Section 30-1-140 states:

> [a] public official or custodian of public records who refuses or willfully neglects to perform any duty required of him by Sections 30-1-10 through 30-1-140, including the transfer or records to storage facilities approved by the Archives, is quietly of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars nor more than five thousand dollars.

Moreover, pursuant to § 30-1-10,

> [a]ny person who unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates, scratches or destroys it is guilty of a misdemeanor and, upon conviction, must be fined not less than two hundred dollars nor more than five thousand dollars.

We have previously advised that "[t]hese statutes and criminal penalties should be taken into account" by public officials responsible for the custody of public records. See Op. S.C. Att'y Gen., 1995 WL 803345 (March 24, 1995).

We have also concluded that the Public Records Act "designated the South Carolina Department of Archives and History as the agency responsible for the implementation of the [Act's] clear legislative purpose, i.e. the maintenance and care of public records." In that regard, Section 30-1-80 of the Act states:

> A records management program for the application of efficient and economical management methods and the creation, utilization, maintenance, retention, preservation and disposal of public records shall be administered by the Archives. It shall be the duty of that Department to establish standards, procedures, techniques and schedules for effective management of public records. . . . The head of each agency, the governing body of each subdivision and every public records custodian shall co-operate with the Archives in conducting surveys and to establish and

> maintain an active, continuing program for the economical and efficient management of the records of the agency or subdivision. (emphasis added).

It is evident that this provision of the Public Records Act defines the "records management program" to include the "maintenance, retention, preservation and disposal" of public records. Further, the provision explicitly empowers the Department of Archives and History to "establish standards, procedures, techniques and schedules for effective management of public records...." This broad authority is further reinforced by § 30-1-100, which empowers the Archives to "establish and maintain a program for the selection and preservation of public records considered essential to the operation of government, for the protection of the interests of the public and for the preservation of the State's documentary heritage." (emphasis added).

In addition, the Archives is fully empowered by § 30-1-100 to implement its broad authority in this area. Section 30-1-100 states that "[t]he Archives may make such rules and regulations as may be necessary to carry out the provisions of § 30-1-10 to 30-1-140." Moreover, enforcement of the Act and the implementing rules and regulations promulgated under the authority of § 30-1-100 is made possible by the criminal provisions contained in §§ 30-1-150 and 30-1-140, as well as by the Archives in seeking injunctive relief. See § 30-1-50; State ex rel. McLeod v. Holcomb, 245 S.C. 63, 138 S.E.2d 707. Op. S.C. Att'y Gen., 1981 WL 158050 (November 20, 1981).

In particular, as relates to your question regarding who must approve records retention schedules for records of the Sheriff's Office, you reference Section 30-1-10 (subsections C and D), as well as § 30-1-90, which sets forth certain duties of the Archives, particularly as relates to record schedules. Subsection (A), which you particularly cite, provides as follows:

> (A) The Archives may examine the condition of public records and give advice and assistance to public officials in the solutions of their problems in creating, filing, preserving, and making available the public records in their custody. When request by the Archives, agencies and subdivisions must assist the Archives in preparing an exclusive inventory of records in their custody and establishing records schedules mandating a time period for the retention of each series of records. These schedules must be approved by the governing body of each subdivision or the executive officer of each agency or body having custody of the records and by the Director of the Archives.

(emphasis added).

In order to answer your question, we must determine, in the context of records of the Sheriff, whether the approval of the records retention schedule is required to be made by the "governing body of each subdivision" (i.e. county council) or only by "the executive officer of each agency or body having custody of the records." It is evident from a fair reading of the statute that it is one or the other. Thus, it is necessary to analyze the status of the Sheriff in South Carolina and whether the Sheriff is under the auspices of county council, or is independent

thereof, and stands on its own as "the executive officer of the agency," meaning a State agency. If a Sheriff is a state officer, in other words, as opposed to a county officer, then the Sheriff's records retention schedule would obviously not need to be approved by county council. This determination of whether a Sheriff is a county or state officer is thus crucial to the resolution of your question. The case law in South Carolina, as well as the opinions of this Office, make it clear that the Sheriff is a state officer, and thus would fall into the category of the "executive officer of each agency." Accordingly, the Sheriff would possess the approval authority given by § 30-1-90(A) and approval by county council would not be required. Our discussion of these decisions and opinions follows.

In Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 524-25 (1992), our Supreme Court discussed at length the Office of Sheriff in the context of liability for money damages pursuant to 42 U.S.C. § 1983 and Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989). In Will, the United States Supreme Court held that neither the State, nor state officials, are "persons" for purposes of § 1983 liability. The Court in Cone stated as follows with respect to the question of "whether sheriffs and deputies are state officials":

> [w]e find relevant and persuasive the Federal District Court's decision in Gulledge v. Smart, 691 F.Supp. (D.C.S.C. 1988), aff'd. 878 F.2d 379 (4th Cir. 1989). In Gulledge the Court concluded that in South Carolina sheriffs and deputies are state, not county, officials noting that:
>
> (1) the South Carolina constitution establishes the office of sheriff and the term of office. S.C. Const. art. V, § 24;
>
> (2) the duties and compensation of sheriffs and deputies are set forth by the General Assembly;
>
> (3) their arrest powers are related to state offenses;
>
> (4) the Governor of South Carolina has the authority to remove a sheriff for misconduct and fill the vacancy.
>
> Based upon these factors, the court found that the state has the "potential power of control" over the office of sheriff, qualifying the sheriff as a state official. Moreover, a deputy, as an agent of the sheriff, is also "more closely connected to the state than the county," hence, a state official. 691 F.Supp. at 955.
>
> Further, in Heath v. County of Aiken, 295 S.C. 416, 368 S.E.2d 904 (1988), this Court held that deputies are not employees of the county and, accordingly, not covered by county personnel policy and procedure.
>
> Given this authority, we hold that Deputy Frier is a state official and pursuant to Will, supra is not liable in his official capacity for monetary damages pursuant to 42 U.S.C. § 1983.

See also Thompson v. Dorchester County, 2009 WL 9541466 (November 9, 2009) (unpublished opinion of the South Carolina Supreme Court) ["In light of our settled law that the sheriff and the sheriff's deputies are state officers and not county employees, see Const. art. V, § 24 (establishing the sheriff as an elected office), S.C. Code Ann. § 23-13-10 (Supp. 2008) (granting the sheriff authority to hire deputies and holding the sheriff responsible for the neglect or misconduct of his deputies); Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 525 (1992) (holding that a sheriff's deputy is a state official; Heath v. Aiken County, 295 S.C.416, 418, 368 S.E.2d 904, 905 (1988) (holding that sheriff's deputies are not county employees)"].

Our opinions are in accord, concluding that the Office of Sheriff is a state officer and is not under the control of county council. In Op. S.C. Att'y Gen., 2007 WL 3317615 (October 26, 2007), we reaffirmed an earlier opinion, (Op. S.C. Att'y Gen., 1985 WL 166052, (No. 85-82) (August 14, 1985)), wherein we concluded that "the hiring and discharge of a deputy sheriff are matters solely within the prerogative of a sheriff." In the 1985 opinion, we stated:

> Section 23-13-10 of the code provides that the appointment of a deputy sheriff shall continue during the pleasure of the sheriff. Our Supreme Court has held that this provision gives a sheriff absolute authority as to the discharge of his deputies. Thus, county grievance procedures are inapplicable to the discharge of a deputy sheriff by the sheriff. Rhodes v. Smith, 273 S.C. 13, 254 S.E.2d 538 (1985) wherein the Court noted that § 4-9-30(7) of the 'home rule' act, which provides grievance procedures for county employees, is inapplicable to employees of a solicitor. Instead, the Court determined that Section 1-7-405 of the code, which states that employees of a solicitor serve at his pleasure controls. In its decision the Court noted that Section 23-13-10 provided similar power to sheriffs. See also: Op. Att'y Gen., dated January 24, 1985.
>
> Citing the decision of the South Carolina Supreme Court in Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943), the United States District Court in Allen v. Fidelity and Deposit Company of Maryland, 515 F.Supp. 1185 (D.S.C. 1981), stated that a deputy sheriff pursuant to both common law and statutory law has been considered an agent of a sheriff, not an employee of a county. See also: Trammel v. Fidelity and Casualty Co. of N.Y., 45 F.Supp. 366 (D.S.C. 1942); Ex Parte Hanks, 15 S.C. Eq. (Cherv. Eq.) 203 (1840). In Allen the court noting the decision of the South Carolina Supreme Court in Barkdsdale v. Posey, 20 S.C.L. (2 Hill) 647 (1835) also stated that a deputy '. . . serves at the sheriff's 'pleasure', not that of the county.' 515 F.Supp. at 1190. Citing the decision of the supreme Court in State v. Goldsmith, 96 S.C. 484, 81 S.E. 147 (1913) which construed Section 23-13-10 as giving virtual unlimited removal powers to a sheriff, the court in Allen further determined that '. . . it is abundantly clear that historically in South Carolina the deputy sheriffs are answerable only to the sheriff and not to the county government.' 515 F.Supp. at 1190. . . .

In reaffirming the 1985 opinion, our 2007 opinion thus concluded:

> . . . it remains clear that where grant funds have been utilized to hire additional deputies, it is extremely doubtful whether action could be taken by a county council to discontinue funding for those positions. As stated in the referenced August 1985 opinion,"[s]uch would be construed as indirectly terminating a particular deputy's position which is a position the county council is not empowered to abolish directly. Therefore, consistent with such, it appears that the Council would be required to pick up where the grant ended. Such would similarly be the advice as to special revenue funds that were utilized to fund deputy positions even if the purpose for which the deputies were hired may no longer exist and the county did not provide the original funding for their positions.

And, in Op. S.C. Att'y Gen., 1998 WL 993664 (November 7, 1998), we referenced the decision which held that a Sheriff is a "state officer." In this 1998 opinion, we noted, however, that the territorial jurisdiction of the Sheriff is limited to the county in which the Sheriff serves. See also, State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) [sheriff is an officer of the court and may be required to perform duties as an officer of the court where the court is presiding even if in another county].

Finally in Op. S.C. Att'y Gen., 2006 WL 1207277 (April 20, 2006), we addressed the question of whether "Dorchester County Sheriff's Department may maintain a fully independent information technology network separate from that of the County." The opinion stated as follows:

> The determination that certain records of a sheriff are to be kept separate from those of other county officials is in keeping with the provisions of S.C Code Ann. § 23-15-20 which requires that the sheriff maintain certain books of record, namely, a "writ book", an "execution book", and a "sale book". Pursuant to subsection (B) of such provision.
>
> Any public records required to be kept by the sheriff in separate books under the provisions of this section may be maintained in a computer system or may be transferred to a microfilm system provided that a second or back-up copy of the records is maintained in the event of destruction or unavailability of the records maintained by the computer or microfilm system.
>
> As to a county's control over a sheriff's department, generally, a sheriff is considered the chief law enforcement officer of a county. See; Ops. Atty. Gen, dated March 1, 2005; May 8, 1989. A prior opinion of this office dated August 6, 1991 recognized that "the internal operation of the sheriff's office . . . is a function which belongs uniquely to the chief law enforcement officer of the county."
>
> The office of sheriff is also recognized as an elected, constitutional office. See: Article V, Section 24 of the State Constitution ("There shall be elected in each county by the electors thereof . . . a sheriff. . . ."). In an opinion dated May 13, 1980. this Office stated that

> [t]he office of sheriff is a constitutional office and can be regulated only in a manner prescribed by the State Constitution. Article V. Section 20, South Carolina Constitution, [now Section 24]. That section provides that the General Assembly shall provide by law for the duties and compensation of the county sheriff. Therefore, it must be said that the duties and powers of the sheriff may be varied, abridged or increased only at the pleasure of the Legislature.

A county council is generally considered as having only limited authority in dealing with the authority or duties of an elected official, such as a sheriff. See: Op. Atty. Gen. dated August 6, 1991 (the authority of a county pursuant to S C, Code Ann § 4-9-160 to provide for a centralized purchasing system for the procurement of goods and services which would be applicable to an elected official such as a sheriff). Moreover, it is specifically recognized pursuant to S.C, Code Ann. § 4-9-650 that

> [w]ith the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected officials of the county whose offices were created by the Constitution or by the general law of the State. . . .

As set forth, Section 4-9-33 specifically states that ". . . access to criminal records databases and other similar restricted databases relating to law enforcement functions must remain under the supervision of the sheriff. . . ." Such supervisory requirement by a sheriff is in keeping with other provisions that restrict public accessibility to certain law enforcement records and documents. Also, a sheriff's control of criminal records databases and other databases relating to law enforcement is in keeping with other examples of the paramount authority and power of a sheriff as an elected, constitutional office holder as set forth above and the limited authority of a county as to the duties of that office. Therefore, in my opinion, a sheriff's department would be authorized to maintain a fully independent information technology network separate from that of the county.

Conclusion

Based upon the foregoing authorities, it is our opinion that a court would most likely interpret § 30-1-90(A), when applied to the records of a Sheriff, as requiring approval of the records retention schedules by the Sheriff only, as opposed to county council. As demonstrated above, our courts have concluded that a Sheriff is a state officer, not a county officer. While the county council appropriates funds for the Sheriff's Office, decisions by our Supreme Court have consistently concluded that the Sheriff is independent of county council. Likewise, our own opinions have concluded that the Sheriff is generally independent of county council. The Sheriff hires deputies and may terminate them at his pleasure and the county grievance system is inapplicable to deputy sheriffs. Indeed, using this same reasoning, we have concluded that the Sheriff may have an information technology system independent of or separate from the county.

Accordingly, we interpret § 30-1-90(A) as requiring approval by the Sheriff of records retention schedules for the Office of Sheriff, as opposed to any approval by county council. Section 30-1-90(A) states that records retention schedules must be approved either by the governing body of a political subdivision or by "the executive officer of each agency or body having custody of the records. . . ." Inasmuch as the Sheriff is a state official, he is an "executive officer of [an] agency. . . ." Thus, we believe a court would conclude that the records retention schedule for Sheriff's records must be approved by the Sheriff and the Archives pursuant to § 30-1-90(A), but that approval of county council is not required or authorized by the statute.

Sincerely,

Robert D. Cook
Solicitor General

cc: Sheriff Michael Hunt