ALAN WILSON
ATTORNEY GENERAL

April 22, 2019

Director Stephen F. Morris
South Carolina Department on Aging
1301 Gervais St., Suite 350
Columbia, SC 29201

Dear Director Morris:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter reads as follows:

> The S.C. Department on Aging ("Department") would like to request a formal opinion regarding whether the privacy exemption to the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. §§ 30-4-10 et seq., allows the Department to withhold reports from the South Carolina Enterprise Information System ("SCEIS") showing sick and annual leave balances for specific employees within the agency, as well as copies of electronic or written communications, including text messages, between employees and their supervisors and co-workers regarding sick and annual leave.
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> On March 8, 2019, the Department received a FOIA request from an employee ("Employee") seeking:
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> > "SCEIS Report showing (sick and annual) leave balances, leave submitted and approved or rejected, the dates the leave request was submitted, type of leave requested, hours of each request, who created the request, the who made changes to the request, the date it was generated, and the date of leave requested and approved and the individual that approved the leave.... For the following individuals: [...]. For the following dates end of the year balances for 2017, 2018. Monthly reports for the months of March 2017-February 2019."

The request additionally sought copies of, "electronic or written communication to or from each individual stated above and their supervisor, staff or co-workers regarding the leave items and details stated above. In addition, the ability to view or have a copy of any text messages to or from those individuals to or from their staff, coworkers, or supervisor. In particular but not limited to those individuals that reported directly to Darryl Broome during his time as Director."

On March 18, 2019, the Department sent the Employee a Notice of Determination, stating therein that the Department would withhold the requested SCEIS Report and its associated details, as well as the written correspondence requested, because production of the same would constitute an unreasonable invasion of personal privacy, and are thus exempt under Section 30-4-40(a)(2).

The following are exempt from disclosure under Section 30-4-40(a)(2):

> Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses, information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap, and any audio recording of the final statements of a dying victim in a call to 911 emergency services. Any audio of the victim's statements must be redacted prior to the release of the recording unless the privacy interest is waived by the victim's next of kin. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

In issuing its determination, the Department carefully considered the intent and purpose of the FOIA, and the mandate to make it possible for citizens and/or their representatives to learn and report fully the activities of public officials. On March 21, the Employee wrote a letter contesting the determination made by the Department as to the SCEIS Report and correspondence, and entreated that we pursue a formal opinion from the Attorney General as to whether the items sought by the Employee could be withheld under the privacy exemption.

The South Carolina Court of Appeals addressed the conflicting considerations at issue in applying the FOIA privacy exemption and described them as follows in Burton v. York Cntv. Sheriffs Dep't., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004):

> 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. We must, therefore, 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.
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> Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). 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.'" Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)) (emphasis added). Indeed, this Court has held that, as a matter of 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.'" Burton, at 352.

Based on the existing case law, the Department based its determination on whether the information sought was connected to an event or matter of legitimate public interest. The Department concluded that the requested SCEIS Report and its associated details, as well as the written correspondence, do not have a connection to an event or matter of legitimate public interest, and disclosure of those items would not aid the Employee or the public in analyzing the actions of the agency and whether it has served its statutory purposes, either under the federal Older Americans Act, or under S.C. Code Ann. §§ 43-21-10 et. seq. Rather, it is the Department's position that the Employee is attempting to obtain the records to maintain a log of fellow employees' whereabouts and the manner in which they use their accrued leave.

Law/Analysis

It is this Office's opinion that a court would likely find the "privacy exemption" codified in the S.C. Freedom of Information Act (S.C. FOIA), S.C. Code Ann. § 30-4-40(a)(2), does not permit a public body to exempt annual leave requests, sick leave requests, or attendance logs of public employees from disclosure. The South Carolina Supreme Court explained the purpose of the S.C. FOIA and how its exemptions are to be interpreted as follows:

> The purpose of FOIA is to protect citizens from secret government activity. Campbell, 354 S.C. at 280, 580 S.E.2d at 166. FOIA allows the public to "learn and report fully the activities of their public officials at a minimum cost or delay" by providing the public access to public documents or meetings. S.C. Code Ann. § 30–4–15 (2007). Pursuant to FOIA, any person has the right to copy public records, unless an exception applies, at a fee "not to exceed the actual cost of searching for or making copies of records." S.C. Code Ann. § 30–4–30(a), (b) (2007). Any government agency attempting to avail itself of an exemption bears the burden of proving the exemption applies. Evening Post Publ'g Co. v. City of North Charleston, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005). The exemptions to FOIA should be narrowly construed to ensure public access to documents. Id.

Seago v. Horry Cty., 378 S.C. 414, 422–23, 663 S.E.2d 38, 42 (2008). Further, the Supreme Court of South Carolina has held that "the determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed." Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011); Burton, 358 S.C. at 348; Op. S.C. Att'y Gen., 2007 WL 4284629 (November 6, 2007).

The request letter states that the Department determined the privacy exemption, S.C. Code Ann. § 30-4-40(a)(2), allows it to withhold the requested public records because they are not connected to an event or matter of legitimate public interest. The privacy exemption permits a public body to exempt "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." Id. However, the South Carolina Supreme Court has explained that this "right of privacy ... does not prohibit the publication of matter which is of legitimate public or general interest." Soc'y of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press., 230 S.C. 330, 95 S.E.2d 606, 609 (1956)). The South Carolina Court of Appeals has ruled that "the manner in which [public employees] prosecute their duties [is] a large and vital public interest that outweighs their desire to remain out of the public eye." Burton, 358 S.C. at 352, 594 S.E.2d at 895. Therefore, if leave requests are found to relate to the manner in which public employees

fulfill their duties, our state courts would likely find that the public interest in disclosure outweighs the privacy interest of public employees in these documents.

While this Office has not identified a definitive statement from our state courts regarding whether leave requests or attendance logs relate to the manner in which public employees conduct their duties, several other state and federal cases have found they are related and must be disclosed according to their respective freedom of information act statutes. In Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R–1, 2016 COA 10, 378 P.3d 835 (Jan. 14, 2016), the Colorado Court of Appeals concluded that sick leave records were not exempt from disclosure "because a teacher's absence is directly related to the teacher's job as a public employee. The fact of a teacher's absence from the workplace is neither personal nor demographic; it is conspicuous to coworkers, to students, and to parents." Id. at 839 (emphasis added).[1] Moreover, the Supreme Court of Connecticut analyzed whether sick leave requests could be exempt from disclosure under Connecticut's FOIA statute using a similar balancing test as that articulated by the Burton Court:

> [T]he plaintiff cannot possibly prove that disclosure of the numerical data in her sick leave records would be highly offensive to a reasonable person. Thus, it does not have to be determined if the disclosure of such records is of legitimate concern to the public. The plaintiff has not met her burden under the statute and, therefore, she may not prevent disclosure of the requested records by virtue of the exemption contained in § 1-19(b)(2).
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> Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are

[1] The Jefferson City Court noted court that all cases it identified from other jurisdictions reached the same conclusion under their respective public records disclosure statutes:

> The language of statutes in other states is often significantly different from the language of CORA. But our research indicates that other jurisdictions have uniformly reached the same conclusion that we do in this case: sick leave records that do not otherwise contain information that should be kept confidential, such as descriptions of specific medical conditions, are not protected from disclosure. See, e.g., Dobronski v. FCC, 17 F.3d 275, 279 (9th Cir.1994) (the Freedom of Information Act required the disclosure of sick leave records); Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 48 (Iowa 1999) (statute did not bar the disclosure of sick leave records)).

Id.; see also Del. Op. Att'y Gen., 06-IB11 (2006) at 5-6 (opining that "[i]n light of the overwhelming authority" the courts in Delaware would hold that Delaware's FOIA does not exempt attendance records and time sheets from disclosure because it would not constitute an invasion of personal privacy).

> and are not performing their duties. We conclude that a records request under the FOIA for disclosure of the numerical data concerning an employee's attendance records, including or limited to sick leave, does not constitute an invasion of personal privacy within the meaning of § 1-19(b)(2). Disclosure in this instance is required.

Perkins v. Freedom of Info. Comm'n, 228 Conn. 158, 177, 635 A.2d 783, 792 (1993); see also Jafari v. Dep't of the Navy, 728 F.2d 247, 249 (4th Cir. 1984) (holding that disclosing absences from reserve drills and training programs as well as the date of absences without disclosing the reasons for such absences did not constitute a "clearly unwarranted invasion of personal privacy."). Both the Perkins and Jefferson Cty. Courts concluded that sick leave requests must be disclosed. Yet, the courts ruled in favor of disclosure according to opposite ends of the Burton balancing test. The Perkins Court concluded that there is no privacy interest in sick leave data, while the Jefferson Cty. Court found that there is a legitimate public interest in sick leave requests. It is this Office's opinion that our state courts would similarly find that the S.C. FOIA does not permit a public body to exempt annual leave, sick leave, or attendance logs according to the privacy exemption because these records relate to how public employees prosecute their duties and this interest outweighs public employees' privacy interest in numerical records of their attendance.

However, if the annual leave and sick leave records contain information in addition to "the numerical data in ... leave records," it is this Office's opinion that our state courts would likely allow redactions to prevent disclosure of information that "would constitute [an] unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2). In Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), the South Carolina Court of Appeals held that the City of Columbia met the S.C. FOIA's disclosure requirements when the City disclosed the applications of finalists for the position of city manager with redactions of the applicants' home addresses, personal telephone numbers, and personal email addresses. After finding that the applicants had a privacy interest in their home addresses, personal telephone numbers, and email addresses, the Court balanced that interest against the public interest in this additional information in the context of what the City had already disclosed.

> We find the trial court was mistaken in stating the public's interest would be served by disclosure of the applicants' home addresses because "[t]he public has a right to know whether the applicants live in the city of Columbia, the area over which the city manager has authority." The City only redacted the street name and number of the applicants' home addresses. It provided Glassmeyer with the city name and zip code. Thus, the public could determine the city in which the applicants lived through the materials the City provided. ...

> Glassmeyer asserts the disclosure of the information would serve the public's interest by demonstrating whether the applicants were truthful in their applications. Other than the home addresses, telephone numbers, and email addresses, the City has disclosed the applicants' entire applications, including their educational backgrounds and employment histories. We fail to see how disclosure of the limited information the City seeks to protect would serve to establish the veracity of the applicants more than the information already provided.

Glassmeyer, 414 S.C. at 223, 777 S.E.2d at 840–41. The Glassmeyer Court's analysis demonstrates that if a record contains sufficient information to satisfy the public interest in disclosure without including information in which a person has a privacy interest, a court may well permit redaction of information in which there is a privacy interest.

The cases discussed above clarify that the sick leave and annual leave records which must be disclosed do not include medical information or other items which could disclose a medical condition. See Jefferson Cty., 2016 COA 10, ¶ 24 (ordering the disclosure of "records that do not otherwise contain information that should be kept confidential, such as descriptions of specific medical conditions"); Jafari, 728 F.2d at 249 ("The only information released concerned Jafari's absence from reserve drills and training programs and the dates of such absences. No information was released relating to the official nature of those absences, nor to any reasons that may have been assigned for them by Jafari."); Del. Op. Att'y Gen., 06-IB11 (2006) at 6 ("We agree with the authorities in other jurisdictions, however, that a public body may redact from the attendance records or time sheets of a public employee information regarding the specific nature of his or her illness or medical treatment or the name of the doctor."). Similarly, it is this Office's opinion that our state courts would likely hold that the limited redaction of information related to medical conditions or information which could disclose a medical condition is permitted in accordance with the privacy exemption if the public interest in disclosure is otherwise satisfied. See Glassmeyer, supra.

Finally, this Office notes that the Department stated a specific concern about the S.C. FOIA request originating from an employee. This Office is not aware of precedent interpreting the S.C. FOIA to treat public employees' requests differently from those of the public generally. If a record is required to be disclosed under the S.C. FOIA, the requestor's employment with a public body does not compel a contrary result.[2] Only a court can decide whether the information

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[2] See U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 496–97, 114 S. Ct. 1006, 1013, 127 L. Ed. 2d 325 (1994).

> Because "Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document],' " ibid. (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 1516,

which the Department seeks to protect is subject to disclosure under the FOIA. Yet, in light of our State FOIA's mandate of liberal construction in favor of disclosure, this Office has consistently advised public bodies concerning FOIA requests that, "when in doubt, disclose ..." Op. S.C. Atty. Gen., 2015 WL 4699336 (July 27, 2015).

Conclusion

It is this Office's opinion that a court would likely find the "privacy exemption" codified in the S.C. Freedom of Information Act, S.C. Code Ann. § 30-4-40(a)(2), does not exempt annual leave requests, sick leave requests, or attendance logs of public employees from disclosure. However, if the annual leave and sick leave records contain information in addition to "the numerical data in … leave records," our state courts would likely allow redactions to prevent disclosure of information that "would constitute [an] unreasonable invasion of personal privacy." Id. Our state courts would likely hold that limited redactions are permitted for information related to medical conditions or information which could disclose a medical condition where the public interest in disclosure is otherwise satisfied. See Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015); Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) ("[T]he exempt and non-exempt material shall be separated and the nonexempt material disclosed.").

Sincerely,

Matthew Houck
Assistant Attorney General

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44 L.Ed.2d 29 (1975)), except in certain cases involving claims of privilege, "the identity of the requesting party has no bearing on the merits of his or her FOIA request," 489 U.S., at 771, 109 S. Ct., at 1481.

Id. at 496-497; cf. Seago v. Horry County, supra (holding, in certain circumstances, restrictions on subsequent disclosures may be consistent with S.C. FOIA requirements as long as there is an initial public disclosure).

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General