



HENRY McMASTER
ATTORNEY GENERAL

May 17, 2010

The Honorable Joel Lourie
Senator, District No. 22
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Lourie:

In a letter to this office you questioned whether information relating to EMS calls are subject to confidentiality pursuant to S.C. Code Ann. §§ 44-61-160(A) and 40-71-20. You have referenced the following situation:

Mrs. Alison Felschow, who is a constituent, suffered the tragic loss of her father earlier this year. She has endured many unnecessary road blocks in her efforts to obtain basic information regarding response times and decisions that were made the day her father suffered a heart attack and passed away.

Mrs. Felschow met with other members of the staff of this office and myself concerning this situation. In that meeting she expressed her desire to obtain copies of the 911 telephone calls that were made from her family's telephone so she can learn exactly what was said during the course of those conversations as to the condition of her father, Dr. Jonathan Edward Meincke, VMD.

Section 44-61-160 was recently amended by legislation, S.907 (Rat #1084), signed into law by the Governor on May 11, 2010. As amended, such provision states in part as follows:

(A) [t]he identities of patients and emergency medical technicians mentioned, referenced, or otherwise appearing in information and data collected or prepared by emergency medical services must be treated as confidential. The identities of these persons are not available to the public under the Freedom of Information Act nor are they subject to subpoena in any administrative, civil, or criminal proceeding, and they are not otherwise available except pursuant to court order. An individual in attendance at a proceeding must not be required to testify as to the identity of a patient except pursuant to court order. A person, medical facility, or other organization providing or releasing information in accordance with this article must not be held liable in a civil or criminal action for divulging confidential information unless the individual or organization acted in bad faith or with malicious purpose.

However, the name of emergency medical technicians, and information and data collected or prepared by emergency medical services must be released to the patient upon his request. In the event the patient is incapacitated or deceased, the name of emergency medical technicians, information, and data collected or prepared by emergency medical services must be released to the patient's immediate family, the patient's legal guardian, or the patient's legal representative upon their request.

(B) The identity of a patient is confidential and must not be released except that the identity of a patient may be released upon consent of the patient, the patient's immediate family, the patient's legal guardian, or the patient's legal representative.

(C) An official investigation or inquiry shall be conducted by an Investigative Review Committee. The fact of suspension or restriction of a license, and the fact of any subsequent related action taken by the department is public information under the Freedom of Information Act after issuance of an administrative order.

(D) Except as otherwise provided in this section, patient information must not be released except to:

- (1) appropriate staff of the department's Division of Emergency Medical Services and Trauma, the South Carolina Data Oversight Council, and State Budget and Control Board, Office of Research and Statistics;
- (2) submitting hospitals or their designees;
- (3) a person engaged in an approved research project, except that information identifying a subject of a report or a reporter must not be made available to a researcher unless consent is obtained pursuant to this section.

(E) For purposes of maintaining the database collected pursuant to this article, the department and the Office of Research and Statistics may access and provide access to appropriate confidential data reported in accordance with this section.

(F) A person subject to this article who intentionally fails to comply with reporting, confidentiality, or disclosure requirements of this article is subject to a civil penalty of not more than one hundred dollars for a first offense and not more than five thousand dollars for each subsequent violation.

(G) The department, or a person or entity licensed or certified under this section is required to disclose to the solicitor or his designee information received that could aid in the investigation or prosecution of criminal activity. This includes, but is not limited to, information concerning child abuse, felony driving under the influence,

assaults, or other crimes regardless of whether the information is obtained before, during, or after treatment. All information received by the solicitor shall be held confidential by the solicitor or his designee unless such information is necessary for criminal investigation and prosecution.

(H) This section supersedes any other provision of law, with the exception of federal law, which may be contrary to requirements set forth in this section.

As to the provisions of Section 44-61-160(A), as set forth above, it is specifically recognized that

...the name of emergency medical technicians, and information and data collected or prepared by emergency medical services must be released to the patient upon his request. In the event the patient is incapacitated or deceased, the name of emergency medical technicians, information, and data collected or prepared by emergency medical services must be released to the patient's immediate family, the patient's legal guardian, or the patient's legal representative upon their request.

(B) The identity of a patient is confidential and must not be released except that the identity of a patient may be released upon consent of the patient, the patient's immediate family, the patient's legal guardian, or the patient's legal representative.

Therefore, Mrs. Felschow's family may obtain the information as set forth by such provision. I would only add that no reference is made to the confidentiality of 911 EMS telephone calls made in a particular situation.

Section 40-71-20(A) states that

[a]ll proceedings of and all data and information acquired by the committee referred to in Section 40-71-10 in the exercise of its duties are confidential unless a respondent in the proceeding requests in writing that they be made public. These proceedings and documents are not subject to discovery, subpoena, or introduction into evidence in any civil action except upon appeal from the committee action. Information, documents, or records which are otherwise available from original sources are not immune from discovery or use in a civil action merely because they were presented during the committee proceedings, nor shall any complainant or witness before the committee be prevented from testifying in a civil action as to matters of which he has knowledge apart from the committee proceedings or revealing such matters to third persons.

(B) Confidentiality provisions do not prevent committees appointed by the Department of Health and Environmental Control from issuing reports containing solely nonidentifying data and information.

(C) Nothing in this section affects the duty of a facility or activity licensed by the Department of Health and Environmental Control to report accidents or incidents pursuant to the department's regulations. Provided, however, anything reported pursuant to the department's regulations shall not be considered to waive any privilege or confidentiality provided in subsection (A).

Section 40-71-10 refers to a "committee" as "...a member of an appointed committee which is formed to maintain professional standards of a state or local professional society as defined in this section or an appointed member of a committee of a medical staff of a licensed hospital...."

As to Section 40-71-20, this State's peer review statute, in Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760 (2004), the State Supreme Court stated that

[t]he overriding public policy of the confidentiality statute is to encourage health care professionals to monitor the competency and professional conduct of their peers to safeguard and improve the quality of patient care...The underlying purpose behind the confidentiality statute is not to facilitate the prosecution of civil actions, but to promote complete candor and open discussion among participants in the peer review process.

360 S.C. at 646. Based upon such characterization and a review of the statute itself, it does not appear to be applicable to Mrs. Felschow's situation.

As to 911 calls, I am unaware of any absolute statutory prohibition to the release of such telephone calls to the public. It is my general understanding that such calls are typically first requests for assistance, whether it be for law enforcement, fire or ambulance assistance, with the type of assistance made available dependent upon the nature of the call.

This office has dealt with the applicability of this State's Freedom of Information Act ("FOIA"), codified as S.C. Code Ann. §§ 30-4-10 et seq., to such calls. An opinion of this office dated March 30, 1988 stated that

[i]n amending the FOIA pursuant to Act No. 118 of 1987, the General Assembly found

... 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 person seeking access to public documents or meetings.

Section 1 of Act No. 118 of 1987. As with any statute, the primary guideline to be used in construing the FOIA or any provision thereof, is the intention of the legislature. Adams v. Clarendon Co. School Dist. No. 2, 270 S.C. 266, 247 S.E.2d 897 (1978). One obvious purpose of the FOIA is to protect the public. Toward that end, the Act is remedial in nature and must be construed liberally to carry out the purpose mandated by the General Assembly. See, South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Exemptions from or exceptions to the Act's applicability are to be narrowly construed. News and Observer Pub. Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C.App. 37, 223 S.E.2d 580 (1976). Moreover, Section 30-4-30(a) specifically provides that

[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

It was further stated that "...this Office has strongly favored a policy of disclosure when in doubt."

This office has dealt with the applicability of the FOIA to 911 telephone calls in certain situations. The March, 1988 opinion dealt with the question of the release of the tape of a 911 telephone call to a sheriff's department and whether this State's FOIA required the release of the tape or its contents to the news media. That opinion noted that pursuant to Section 30-4-40(a)(3),

(r)ecords of law enforcement and public safety agencies not otherwise available by law that were compiled in the process of detecting and investigating crime ... (are exempt from disclosure) ... if the disclosure of the information would harm the agency by:

- (A) Disclosing identity of informants not otherwise known;
- (B) The premature release of information to be used in a prospective law enforcement action;
- (C) Disclosing investigatory techniques not otherwise known outside the government;
- (D) By endangering the life, health, or property of any person.

The opinion noted that

...generally, the public has the right of access to any public record. Moreover, as stated, this Office strongly supports the policy of disclosing public records. Therefore, records of any public agency, including a law enforcement agency, should generally be disclosed. However, as noted, Section 30-4-40(a)(3) provides exemptions to disclosure for certain records maintained by a law enforcement agency...Section 30-4-40(a)(3)(B) provides an exemption for certain law enforcement records if the disclosure of the records would be harmful to the agency by “(t)he premature release of information to be used in a prospective law enforcement action.” Therefore, an exemption from disclosure is available in circumstances where an investigation is being conducted and the investigation is not yet complete.

Moreover, we would add that Section 30-4-40(a)(2) provides an exemption for “[i]nformation of a personal nature where the public disclosure would constitute unreasonable invasion of personal privacy ...”. This Office has consistently concluded that this exemption should be narrowly construed and that the balance should be tilted in favor of disclosure in doubtful cases. See, Op.Atty.Gen., Op. No. 84-53 (May 10, 1983). It has also been noted that the exemption may be warranted if a record contains “ ‘intimate details’ of a ‘highly personal nature.’ ” One court has recognized that the right of privacy protects one's thoughts and emotions. Roberts v. Gulf Oil Corp., 147 Cal.App.3d 770, 195 Cal.Reptr. 393 (1983).

The opinion further stated that

...it would be the responsibility of...(the)...agency to make a determination as to whether the tapes of the 911 conversation are records exempt from disclosure pursuant to the provisions of Section 30-4-40 because of the contents of the tape or any other relevant considerations...(The)...agency, therefore, would have to make the determination as to whether the release of such information would be harmful. Whether any of the exemptions set forth above would be applicable would be a decision for your agency to make. Of course, as referenced above, any decision as to nondisclosure would be subject to possible judicial review....

The opinion concluded in stating

[g]enerally speaking, the public has the right of access to any public record pursuant to the Freedom of Information Act. Moreover, this Office strongly favors the policy of public disclosure in case of doubt. Sections 30-4-40(a)(2) and (a)(3) provide for limited exemptions from disclosure in certain respects. Therefore,...(an)...agency should carefully examine the record in question and make the determination as to

whether the potential harms specifically set forth in Sections 30-4-40(a)(2) and (a)(3) in this instance override the general rule of disclosure.

In its decision in Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (2005), the State Supreme Court determined that the City was required to prove particular harm under the FOIA exemption for records of law enforcement and public safety agencies which had been compiled in the process of detecting and investigating offenses and it was not entitled to a presumption of harm in the disclosure of a 911 tape. The Court stated that

[u]nder 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...Whether a record is exempt depends on the particular facts of the case...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.”...To further advance this purpose, the government has the burden of proving that an exemption applies.

363 S.C. at 456-457.

In Turner v. North Charleston Police Department, 290 S.C. 511, 351 S.E.2d 583 (Ct.App. 1986), it was determined that the 911 tape at issue “contained very sensitive police communications and included calls from regular informants as well as Crimestopper calls from citizens.” 290 S.C. at 513. The sensitive nature of that information was the basis for determining an exemption from disclosure pursuant to Section 30-4-40(a)(3)(B).

The Arkansas Attorney General in an opinion dated March 13, 2003 dealt with the issue of public access to tape recordings of 911 telephone calls. The opinion stated that “...recordings are generally subject to public inspection and copying under the FOIA...While a separate, specific exemption could conceivably apply depending upon the particular facts...(such as the law enforcement exemption)...there is generally no applicable exemption for 911 recordings.” But see: In re The New York times Co. et al v. City of New York Fire Department, 835 N.Y.S.2d 92 (S.Ct., App.Div., 1st Dept., N.Y. 2007) (FOIA privacy exception should be applied to protect from disclosure certain identifying information of individuals who had made 911 calls related to the 9/11 attacks on the World Trade Center finding that “...the survivors’ compelling interest in preserving the privacy of their loved ones’ final moments outweighs any countervailing public interest in disclosure.” 835 N.Y.S.2d 94.

As noted, this State’s FOIA, pursuant to Section 30-4-40(a)(2), exempts from disclosure “[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy”. An opinion of this office dated November 14, 2007 determined, for instance, that public access to a social security number could constitute an unreasonable invasion of privacy under the FOIA. An opinion of this office dated April 11, 1988

indicated that information contained in a court settlement may be exempt from disclosure under the FOIA if the settlement documents would identify a party as a mental health patient or otherwise contain information personal in nature that if disclosed would be an unreasonable invasion of personal privacy. See also: Op. Atty. Gen. dated September 26, 2002 (distinguished between the lack of a privacy interest triggered by disclosure of a business address and a person's privacy in providing a home address). An opinion of this office dated May 16, 2002 indicated that

...our Supreme Court has rejected the idea that simply because the Freedom of Information Act in Section 30-4-70(a)(2) contains an exemption for "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy..." such exemption renders a particular record nondisclosable per se. In City of Cola. v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996), the Court concluded that an internal investigation report performed as to certain police officers was not exempt per se under the FOIA either on the basis of the "personal privacy" exemption or as a personnel record. There, the Court stated:

We 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.

An opinion of this office dated May 18, 2005 indicated that

[t]he courts have concluded that where personal privacy interests are implicated, only the individual who owns such interest, may validly waive it...The privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information. (emphasis added).

Moreover, as stated in Asbury Park Press v. Ocean County Prosecutor's Office, 864 A.2d 446 (SupCt.N.J., 2004),

[t]o be excluded under...(a personal privacy exemption)..., the person seeking to withhold release of the public record must demonstrate that the record does not pertain to a matter of legitimate public concern and that it is highly offensive to a reasonable person.

CONCLUSION

In the opinion of this office, any “information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy” associated with the 911 telephone calls being requested by the Felschow family could be waived by the family. Therefore, inasmuch as there is no absolute prohibition in this State’s FOIA to the release of 911 telephone conversations, especially where there is no other statutory basis for exemption in a given situation, such as the referenced law enforcement exception, in the opinion of this office the Felschow family could request and should receive copies of the 911 telephone conversations regarding the father’s situation. Such conclusion is consistent with this office’s longstanding view of the FOIA, that an agency should, when in doubt, disclose information to the public.

With kind regards, I am,

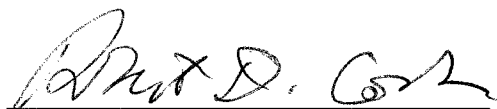
Very truly yours,

Henry McMaster
Attorney General



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