



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 14, 1996

Derrick K. McFarland
Staff Attorney
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29250

RE: Informal Opinion

Dear Mr. McFarland:

By your letter of May 16, 1996, to Attorney General Condon, you have advised that S.C. Code Ann. §38-53-310 (1995 Cum. Supp.) requires professional bail bondsmen to file with the clerk of court of the county of his principal place of business and any other county where he is doing business, a written report regarding all bail bonds on which he is liable as of the first day of each month. A question has arisen as to whether the detailed information contained in the written report should be open to the public, specifically competitors. You have asked for clarification of this issue.

Professional bail bondsmen are regulated by the South Carolina Department of Insurance, pursuant to Chapter 53, Title 38 of the South Carolina Code. A portion of that regulatory scheme, §38-53-310, provides the following:

Each professional bondsman shall file with the clerk of court of the county of his principal place of business and any other county where he is doing business a written report in a form prescribed by the director [of the Department of Insurance] or his designee regarding all bail bonds on which he is liable as of the first day of each month showing:

- (a) each individual bonded;
- (b) the date the bond was given;
- (c) the principal sum of the bond;

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- (d) the state or local official to whom given;
- (e) the fee charged for the bonding service in each instance. The report must be filed before the sixteenth day of each month.¹

The statute does not expressly make the report confidential; indeed, the issue of disclosure is not covered at all by the statute.

The answer to your question may depend upon whether the bondsman reports filed with the clerk of court are considered judicial records; different standards and different reasoning may apply, depending on how the reports are characterized. Because the answer to your question is not free from doubt, legislative or judicial clarification may well be advisable.

In South Carolina, a clerk of court is a public official and a judicial official; as the latter, the clerk of court possesses judicial as well as ministerial powers. Clearly, there are certain records maintained by a clerk of court which are not those of a judicial body in every sense of the word. I am of the opinion that the bondsman reports maintained by the clerk of court would be received by the clerk in his ministerial capacity and would most probably not be considered judicial records in the strictest sense of the word.

Even assuming that these reports, as records, maintained by the clerk of court would be considered those of a court, such would be generally open to inspection under the common law. As is stated in 20 Am.Jur.2d Courts §32, "Court records are generally open to inspection by the public." Further, 76 C.J.S. Records §67 provides: "There is a right of public access to court records, and a presumption in favor of such access. Such a right arises under the common law," Moreover, there exists at common law a right to inspect public records generally, subject to certain limitations. 76 C.J.S. Records §35; see also 66 Am.Jur.2d Records §§12-30.

In addition to the common law, the Freedom of Information Act, S.C. Code Ann. §30-4-10 et seq. (1976 as revised & 1995 Cum. Supp.), probably also extends a general right to inspect these records and others which encompass the clerk of court's judicial, as well as ministerial, functions. The Freedom of Information Act at §30-4-20(a) defines "public body" as

¹It is my understanding from personnel at the Department of Insurance that there is no prescribed form for this monthly report.

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any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions,

There is no express exclusion for the courts or the judicial department of the State. In addition, a "public record" is defined by §30-4-20(c) as

all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act;

The bondsman reports described above appear to fall within the definition of "public record." This Office has concluded that certain court records would come within the definition of "public record": certain coroners' records, by Op. Att'y Gen. No. 83-83, dated November 2, 1983; marriage license applications maintained by probate courts, by Op. Att'y Gen. No. 85-63, dated June 26, 1985; and information relative to the conviction of an individual in a court of law, by Op. Att'y Gen. dated May 27, 1980.

Having concluded that the bondsman reports would appear to be public records, and thus potentially subject to disclosure pursuant to common law or the Freedom of Information Act, it must then be decided whether such records, on an individual basis, may be exempt from disclosure for some reason. For example, while §30-4-30 provides that "[a]ny person has a right to inspect or copy any public record of a public body," that

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Code section continues "except as otherwise provided by §30-4-40..." Records relative to executive sessions of a public body would also be protected by §30-4-70, as well. Of particular concern to your request would be §30-4-40(a)(2), which exempts from disclosure

[i]nformation 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

While it would be within the province of the clerk of court receiving the request for disclosure of bondsman reports pursuant to the Freedom of Information Act to determine whether the particular record should be disclosed, I would observe that such disclosure could potentially involve an unreasonable invasion of personal privacy. Using the analogy of "information as to gross receipts," I observe that it would be possible to calculate or at least approximate the gross receipts of a given bail bondsman or bond service from the information contained in the monthly report, if one were to add together all the fees charged for the bonding service for each bond which was written. In addition, I observe that the bonding service, outside court proceedings in which the amount of the bond is set, is a matter between the defendant and the bail bondsman, in other words a contract between those two parties; neither the public nor the clerk of court is a party to that contract. In such instances, an unreasonable invasion of personal privacy could occur if such information as is contained in the monthly report should be disclosed; such a determination would be within the province of the clerk of court upon receipt of an appropriate request, however.²

If the bondsman reports should be considered judicial records, it might be possible to withhold such records from disclosure. As is stated in 20 Am.Jur.2d Courts §33:

Generally, any right to inspect a court record is not absolute, but is subject to substantial limitations or qualifications. The purpose of a request to inspect court records is important with regard to whether such a request will be granted; generally, a member of the public may have access to a

²Section 30-4-40(b) requires that if a public record contains material which is not exempt from disclosure under §30-4-40(a), the public body is to separate the exempt from the non-exempt materials and make the non-exempt materials available as required by the Freedom of Information Act.

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judicial record only where it is shown that he or she has a proper or legitimate purpose in viewing the record. ...

A court has the power to prevent improper use of its records by imposing reasonable regulations limiting access to them. The court may restrict access to its record to protect the privacy rights of third parties, or the victim of a crime. ...

Consideration is given to the impact of disclosure of certain court records on private parties in judicial decisions such as State ex rel. Bingaman v. Brennan, 98 N.Mex. 109, 645 P.2d 982 (1982), and News-Press Publishing Company, Inc. v. State of Florida, 345 So.2d 865 (Fla. Dist. Ct. App. 1977); one distinguishing factor between these judicial decisions and the records under consideration here, however, is the fact that the bondsman reports have not been received in evidence in a specific court action (in the ordinary use and maintenance of the records in question). In South Carolina, the right of a court to seal a record is also recognized; in Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991), the Supreme Court stated:

"The courts of this country recognize a general right to inspect and copy public records and documents including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 579 (1978). This presumption of access, however, may be rebutted where "countervailing interests outweigh the public interests in access." Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988). "The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption." Bank of America National Trust v. Hotel Rittenhouse, 800 F.2d 339, 344 (3rd Cir. 1986).

....

Hereafter, when a protective order sealing the record is sought, the trial court shall make specific factual findings, on the record, which weigh the need for secrecy against the right of access. Factors to be considered may not be limited to, but should include: the ensuring of a fair trial; the need for witness cooperation; the reliance of the parties upon confidentiality; the public or professional significance of the lawsuit; and the harm to parties from disclosure. ...

Id., 405 S.E.2d at 603-604. Whether sealing a record (here, the bondsman reports) would be appropriate would be a decision left to the appropriate court, upon an appropriate proceeding therefor; I offer no comment as to whether the bondsman reports should or

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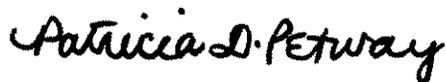
could be sealed, though as observed, those reports are not being received as evidence in a judicial proceeding in the ordinary case.

To summarize the foregoing, there are several theories under which the bail bondsman reports might be sought from a clerk of court: as judicial records, pursuant to common law, or pursuant to the Freedom of Information Act. Whether the reports must be disclosed, or should be disclosed, is not entirely free from doubt; while arguments can be made to reach either result, and ultimately the question of disclosure will fall to the clerk of court receiving the request, I have some concerns, as expressed above, that a potential for invasion of privacy exists should certain of the information contained in the reports be disclosed. To resolve the issue with finality, legislative or judicial clarification would be advisable.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I am

Sincerely,



Patricia D. Petway
Senior Assistant Attorney General