

1979 WL 43575 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 7, 1979

***1 Re: Release of driver's license photographs to law enforcement agencies**

E. P. Austin, Jr.
Director
Motor Vehicle Division
Department of Highways and Public Transportation
P. O. Box 191
Columbia, SC 29202

Dear Mr. Austin:

On August 12, 1975 you requested that this office look into the propriety of providing photographs to law enforcement agencies from the driver license negative film file. Pending a response from our office, you were advised to require a subpoena from law enforcement agencies prior to providing them with these photographs. That memo is dated September 15, 1975 and is the basis for the current Department policy requiring subpoena of law enforcement agencies requesting these photographs.

On July 18, 1978 the old Freedom of Information Act, first passed in 1972, was repealed and replaced with the new Freedom of Information Act. One of the major differences between the old act and the new act is the definition of public record. The old act defined public record to include 'the records of meeting of all public agencies and . . . all other records which by law are required to be kept or maintained by any public agency . . .'. Under the new act, however, public records is defined as those records, including photographs, 'prepared, owned, used, in the possession of or retained by a public body.' Obviously the new definition is substantially broader than the old definition. The fact that a record is not required to be maintained is no longer significant in determining whether or not it should be released to the public.

It is clear, then, that the S. C. Freedom of Information Act would require the release of the photographs to any requester, unless the photographs were exempted from the provisions of the Act. Section 30-4-40 exempts certain matters from disclosure. The only exemption which might be applicable in this case is found in subparagraph (a)(2). This subparagraph exempts from disclosure 'information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy . . .'

There is no South Carolina case law which defines an unreasonable invasion of personal privacy. The Federal Freedom of Information Act has adopted a similar exemption but has used slightly different terminology, prohibiting the disclosure of 'personnel and medical files and similar files the disclosure of which constitutes a clearly unwarranted invasion of personal privacy.' 5 U.S.C.A. § 552(b)(6). In deciding whether specific information ought to be released from personnel files or similar files, the federal courts have adopted a balancing of interest approach. In [Department of Air Force vs. Rose](#), 425 U.S. 352 (1976), the Supreme Court held that the intent of the exemption would require a balancing of an individual's right of privacy against the preservation of the basic purpose of the section. In deciding whether or not files were similar to personnel or medical files, the Fourth Circuit Court of Appeals has held that the files must have the same characteristics of confidentiality that ordinarily attach to information found in medical or personnel files. [Robels vs. Environmental Protection Agency](#), 484 F.2d 843 (4th Cir. 1973).

*2 Items, the release of which have been held to constitute an unwarranted invasion of personal privacy, include: Case summaries from a service academy honor and ethics code of adjudication, even with identifying information deleted, Department of Air Force vs. Rose, *supra*; a detailed synopsis of an individual's career within an agency, data about family relationships, and financial information, Tuchinsky vs. Selective Service System of U. S., 294 F.Supp 803 (D.Ill. 1969), *aff'd*, 418 F.2d 155 (7th Cir. (1969)); Deering Milikin, Inc. vs. Erving, 548 F.2d 1131 (4th Cir. 1977); information concerning an employee's promotion prospects, job performance evaluations, personal preferences and goals, and reasons for his termination, Metropolitan Life Insurance Company vs. Usery, 426 F.Supp 150 (D.D.C. 1976).

On the other hand, the following have been held not to be subject to the exemption: a letter of reprimand to an employee of an agency, the existence of which was known by all parties concerned, Chamberlane vs. Alexander, 419 F.Supp. 235 (D.Ala. 1976); affidavits, statements, notes, and investigative reports and recommendations prepared in connection with an unfair labor practice charge, Marathon LeTourneau Co., Marine Division vs. NLRB, 414 F.Supp. 1074 (D.Miss. 1976); employees' authorization cards presented by a union to the NLRB as evidence of employee interest in being represented by the union, Committee on masonic Homes of R. W. Grand Lodge, F. and A.M. of Pennsylvania vs. NLRB, 414 F.Supp. 426 (D.Penn 1976); the identities of writers of letters to aboard of parole recommending parole for an inmate, Philadelphia Newspapers, Inc. vs. U.S. Department of Justice, 405 F.Supp. 8 (D.Pa. 1975); the age, address, marital status, employment status, circumstances of arrest, scope of investigation leading to arrest or indictment and other background material on persons arrested or charged with violations of federal criminal statutes when such information had traditionally and routinely been disseminated to news media, Tennessean Newspaper, Inc. vs. Leavy, 403 F.Supp. 1318 (D.Tenn. 1975).

The essential question, then, under the federal system is whether or not the information has traditionally been of a personal or a private nature, and, if it has been, whether the public interest in favor of disclosure outweighs the private interest against disclosure. While the federal decisions are not controlling, in the absence of South Carolina case law, they are instructive. Under the federal cases, it is clear that the information included in this exemption is only that kind of information ordinarily thought of as personal information about a person's private life which would not ordinarily be open to public scrutiny. It is equally clear that such information may be revealed whenever the public interest outweighs the subject's privacy interest.

In the case in question, the subjects of the photographs have little or no claim that photographs are personal information or that the release of the photographs would constitute an unreasonable invasion of their privacy. A person's physical appearance is manifest whenever the person appears in public. Any person may make a photograph of any other person so long as the subject of the photograph has no reasonable expectation of privacy. Furthermore, a person's application for a driver's license waives whatever privacy rights he may have as to the State taking his picture because of the requirement of S. C. Code § 56-1-140 (1976), which requires that each driver's license shall contain a laminated color photograph of the licensee.

*3 There being no reasonable expectation of privacy concerning one's physical appearance, it is the opinion of this office that the release of duplicate photographs from the driver's license negative file would be required under the S. C. Freedom of Information Act, providing the purpose of the request was reasonable. It is further the opinion of this office that a request from a legitimate law enforcement agency for such a photograph constitutes a reasonable request.

It is recommended that the Department adopt some procedure to account for requests by law-enforcement agencies, and it is suggested that the Department consider the adoption and use of a form such as the one used by the State of Florida. (See attachment). As to any such requests from the general public, it is recommended that they be handled on an individual basis, with consideration given to the purpose for which they are requested. Of course, the Department may charge the requester for any cost it incurs in providing the photograph.

If you have any further questions concerning this matter, please feel free to contact me.

Sincerely,

William L. Todd
State Attorney

Form to be used by Law Enforcement Agency Requesting Print from DRIVER LICENSE NEGATIVE FILM FILE
Mail requests in DUPLICATE TO:

DIRECTOR, FLORIDA HIGHWAY PATROL

KIRKMAN BUILDING

TALLAHASSEE, FLORIDA 32304

DATE _____

Previously requested by teletype: YES NO

(Date Previously Requested)

PRINT OF DRIVER LICENSE REQUESTED ON FOLLOWING SUBJECT:

NAME: _____ (Complete name, if available)

ALIAS: _____

DRIVER LICENSE NUMBER _____

ISSUING OFFICE NO: _____

DATE OF BIRTH: _____

DESCRIPTION: _____

STATEMENT OF CASE: _____ (Type Investigation)

AGENCY'S CASE NO. _____

The Print is Requested for: _____ (Name of Officer)

REQUESTING AGENCY: _____ (Name)

_____ (Address)

_____ (City)

SIGNATURE: _____

Head of Requesting Enforcement Agency

This is to certify that the above-named is a suspect or subject in a FELONY investigation, being conducted by this Department, and photo will be used for law enforcement purposes only.

DEPARTMENT USE ONLY

Approved by: _____

Date: _____

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