



ALAN WILSON
ATTORNEY GENERAL

December 06, 2018

Director Lewis J. Swindler, Jr.
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212

Dear Director Swindler:

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

I am requesting clarification of our State's Freedom of Information Act (FOIA) law as it pertains to several South Carolina Criminal Justice Academy ("Academy") Regulations and the Attorney Work product privilege.

The Academy receives and generates numerous documents pertaining to law enforcement officers and their certifications. Additionally, the Academy and the Law Enforcement Training Council ("Council"), the Academy's governing body, regularly communicate regarding certification issues concerning those officers. The communications take place between the Criminal Justice Academy's Office of General Counsel and the Council or between the Office of General Counsel's Misconduct Investigator and the Council, on behalf of the Office of General Counsel. The Criminal Justice Academy's Office of General Counsel serves as the legal consultant and advisor for both me, in my role as Director of the Academy, and the Training Council. I am writing to request clarification regarding the application of two exemptions to the South Carolina Freedom of Information Act (FOIA) as they relate to communications between the Office of General Counsel and the Training Council.

First, South Carolina Code of Laws Section 30-4-40(a) states "A public body may but is not required to exempt from disclosure the following information ... 4. Matters specifically exempted from disclosure by statute or law."

Question 1: Whether the communication contemplated by S.C. Code of Regulations 37-022 B would be considered a matter "specifically exempted from disclosure by statute or law"?

Question 2: Whether the communication contemplated by S.C. Code of Regulations 37-024 E would be considered a matter "specifically exempted from disclosure by statute or law"?

Question 3: Whether the communication contemplated by S.C. Code of Regulations 37-029, set out below, would be considered a matter "specifically exempted from disclosure by statute or law"?

Second, South Carolina Code of Laws Section 30-4-40 (a) states "A public body may but is not required to exempt from disclosure the following information: 7. Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships."

Question 4: Much of the communication, via email, between the Office of General Counsel and the Training Council or between the Office of General Counsel's Misconduct Investigator, on behalf of the General Counsel, and the Training Council, involves information to be considered by the Training Council to make an initial determination on a law enforcement certification an issue. The initial determination of Council on the certification issue is not binding, however, and is subject to being heard in a contested hearing before Council's final agency determination is issued with regards to the particular certification issue. Specifically, I am writing to ask whether the communications between the Office of General Counsel, its Misconduct Investigator, and the Council concerning issues directly related to a contested certification matter, that may foreseeably be the subject of a contested case hearing, enjoy the protection of either the attorney-client privilege, attorney opinion work product rule, or both, for purposes of section 30-4-40(a)(7), so as to preclude their disclosure in response to a request for a public record under the provisions of the South Carolina Freedom of Information Act?

Law/Analysis

I. Can regulations exempt public records from disclosure under the S.C. FOIA as "Matters specifically exempted by statute or law?" S.C. Code Ann. § 30-4-40(a)(4).

It is this Office's opinion that the South Carolina Criminal Justice Academy ("Academy") may rely on its regulations to provide an exemption from disclosure under the South Carolina

Freedom of Information Act (“S.C. FOIA”), S.C. Code Ann. §§ 30-4-10 et seq., to the extent that those regulations do not alter or amend the terms of the agency’s statutorily granted authority. In Burton v. York Cty. Sheriff’s Dep’t, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), the South Carolina Court of Appeals explained how, in enacting the S.C. FOIA, the General Assembly balanced the need for open government with preserving “workable confidentiality in governmental decisionmaking.” The Burton Court described the purpose of the S.C. FOIA and how exemptions to disclosure are narrowly construed, as follows:

The South Carolina Freedom of Information Act is codified as sections 30–4–10 to –165 in the South Carolina Code. See S.C. Code Ann. §§ 30–4–10 to –165 (1991 & Supp.2003). Upon request, FOIA mandates disclosure of records held by a “public body” unless the documents fall within enumerated exemptions. See S.C. Code Ann. §§ 30–4–30 to –40 (Supp.2003). As our Legislature explicitly provided in enacting FOIA, disclosure, not secrecy, is the dominant objective of the Act:

The General Assembly finds 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 persons seeking access to public documents or meetings.

S.C. Code Ann. § 30–4–15 (1991).

The essential purpose of the FOIA is to protect the public from secret government activity. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct.App.2003); see also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) (“FOIA was enacted to prevent the government from acting in secret.”); Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 535 n. 4, 500 S.E.2d 783, 785 n. 4 (1998) (noting that “[t]he purpose of the FOIA is to protect the public from secret government activity”). The FOIA meets the demand for open government while preserving workable confidentiality in governmental decisionmaking. Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991); Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

“South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government.” Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of

public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221; Campbell, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. Id. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

The exemptions from disclosure under FOIA do not create a duty of nondisclosure. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221. At most, these exemptions simply allow public agencies the discretion to withhold exempted materials from public disclosure. Id. Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed. See Campbell, 354 S.C. at 281, 580 S.E.2d at 166; see also Quality Towing, 345 S.C. at 161, 547 S.E.2d at 864–65 (stating that FOIA is remedial in nature and should be liberally construed to carry out purpose mandated by legislature). Moreover, the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis. City of Columbia v. ACLU, 323 S.C. 384, 475 S.E.2d 747 (1996); Newberry Publ'g Co. v. Newberry County Comm'n on Alcohol & Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992).

358 S.C. 346-348; 594 S.E.2d 892-893; see also Op. S.C. Atty. Gen., 1986 WL 192015 (May 13, 1986) (“As [the S.C. FOIA is] remedial in nature, any exception to the Act's applicability must be narrowly construed.”). In light of the S.C. FOIA's mandate of liberal construction in favor of disclosure, this Office has consistently advised, “when in doubt, a public body should disclose the information requested.” Op. S.C. Atty. Gen., 2015 WL 4699336 (July 27, 2015).

The request letter first asks whether information collected according to three Academy regulations could be construed to fall within the exemption to the S.C. FOIA as “matters specifically exempted from disclosure by statute or law.” S.C. Code Ann. § 30-4-40(a)(4).¹ In Soc'y of Prof'l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984), the South Carolina Supreme Court considered whether a Department of Health and Environmental Control regulation which required death certificates to remain closed to the public prohibited the certificate from disclosure under the S.C. FOIA. The Court concluded that the regulation could not limit disclosure requirements under the S.C. FOIA as follows:

¹ The federal Freedom of Information Act provides a narrower exemption for “matters that are specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). This exemption contains further qualification that such statutes must “require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue” or “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” Id.; see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 121, 100 S. Ct. 2051, 2063 N.18, 64 L. Ed. 2d 766 (1980) (“As stated in the Report of the House Committee on Government Operations on the Sunshine Act, which recommended the amendment: ‘Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information.’”).

Although a regulation has the force of law, it must fall when it alters or adds to a statute. Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943). While we sympathize with DHEC's desire to limit public access to death certificates, we believe that § 61-19-§ 39(a)(2) contravenes FOIA. Code § 44-63-60 (1976) requires a death certificate to be furnished under the seal of DHEC, upon request, and does not limit the class of persons to whom the certificates must be furnished. On the other hand, § 44-63-80 (1983) does limit the class of persons to whom birth certificates can be furnished. We therefore hold that Regulation 61-19 § 39(a)(2) is invalid and repugnant to FOIA. Amending FOIA to restrict the class of persons to whom DHEC must furnish death certificates is a legislative function.

283 S.C. at 567, 324 S.E.2d at 315; see also Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 498-99, 685 S.E.2d 600, 608-09, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009) (“Although regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute.”).

This Office has interpreted the Soc'y of Prof'l Journalists opinion to hold that regulations which allow an agency to limit which records are available to public disclosure under the S.C. FOIA are valid only to the extent that they are supported by statute. See Op. S.C. Atty. Gen., 2007 WL 419417 (January 24, 2007). In a January 24, 2007 opinion to Eric S. Moore, Human Resource Director of the South Carolina Vocational Rehabilitation Department, this Office addressed a similar issue of the S.C. FOIA disclosure requirements in regards to the Teacher and Employee Retirement Incentive (“TERI”) program as follows:

[Y]our letter indicates your concern is not whether the information pertaining to TERI participants employed by the Department is subject to disclosure under the FOIA, but rather the impact of the regulation promulgated by the State Budget and Control Board on information otherwise subject to the FOIA. As quoted in your letter, section 19-903 of the South Carolina Code of Regulations generally prohibits disclosure of records pertaining to members of the South Carolina Retirement System to third parties. S.C. Code Ann. Regs. 19-903. Accordingly, we understand your concern in disclosing the requested information in light of this regulation.

...

In this instance, like the Court in Society of Professional Journalists, we find regulation 19-903 in contravention with the requirements of the FOIA. We also appreciate the fact that the Retirement System seeks to limit access to the records of its members. However, we believe a court would hold the State Budget and Control Board regulation must fall to the FOIA.

Id.² As the above-referenced opinion demonstrates, this Office has interpreted Soc'y of Prof'l Journalists to stand for the proposition that a public body does not have the authority to withhold public records according to its own power to issue regulations. Rather, the availability of such an exemption to the S.C. FOIA should result from the deliberative legislative process of the General Assembly. Id. Therefore, for the Academy to rely on the cited regulations as the basis for concluding that records collected thereunder are exempt from disclosure as "matters specifically exempted from disclosure by statute or law," the confidential treatment of such public records needs statutory support. Id.

The regulations addressed in the request letter include the following:

37-022 Separation from Law Enforcement Employment.

A. All law enforcement agencies and other employers of law enforcement officers are required to notify the Academy when an officer leaves the employment of the agency/employer, regardless of the reason for the separation within 15 days of separation.

B. Such notification shall take place on a form as prescribed by the Council, contain the facts and circumstances leading to the separation, and be for the Academy and Council's confidential use and subsequent safekeeping.

S.C. Code Ann. Regs. 37-022 (emphasis added).

37-024 Investigation of Events Requiring Withdrawal of Certification;
Notification to Officer.

A. Upon receipt of a report pursuant to R.37-023, the Council shall initiate an investigation into reported events which require withdrawal of the law enforcement officer's certification.

B. The Director and/or Council may suspend the certification of any law enforcement officer pending the outcome of an investigation initiated pursuant to paragraph (A) above.

C. A law enforcement officer who is the subject of an investigation shall be notified of its initiation on a form prescribed by the Council, sent by certified mail

² This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law. See Ops. S.C. Atty. Gen., 2017 WL 3438532 (July 27, 2017); 2013 WL 6516330 (November 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

to the current address on file at the Academy, return receipt requested, as soon as practicable after the investigation is initiated.

...

E. The Council may direct that the investigation, on its behalf, be conducted. The investigation shall be sent to the Council for its confidential use and review.

S.C. Code Ann. Regs. 37-024 (emphasis added).

37-029 Confidentiality of Notification.

All notifications to law enforcement officers and their respective employing law enforcement agencies pursuant to R.37-023, R. 37-024, R.37-027, and R.37-028 shall be handled in a confidential and sensitive manner.

S.C. Code Ann. Regs. 37-029 (emphasis added). The additional regulations referenced in R37-029 concern events related to investigations and withdrawal or denial of certification. See S.C. Code Ann. Regs. 37-023 (“Reporting of Events Requiring Withdrawal of Certification”); S.C. Code Ann. Regs. 37-027 (“Notification of Withdrawal of Certification”); and S.C. Code Ann. Regs. 37-028 (“Notification of Denial of Certification”).

The Academy finds statutory support for confidential treatment of certain materials in its enabling legislation in Title 23, Chapter 23 of the South Carolina Code of Laws. As explained by Judge S. Phillip Lenski of the Administrative Law Court:

Through Act 317, the statutory language creating the Law Enforcement Training Council was amended and recodified from Chapter 6 of Title 23 to Chapter 23 of Title 23. “Upon the signature of the Governor, all functions, duties, responsibilities, accounts, and authority statutorily exercised by the South Carolina Criminal Justice Academy Division of the Department of Public Safety are transferred to and devolved upon the South Carolina Law Enforcement Training Council.” S.C. Code Ann. § 23-23-10(D) (2006). ... The Council's powers and duties are codified in S.C. Code Ann. § 23-23-80 (Supp. 2014), and include the power to “certify and train qualified candidates and applicants for law enforcement officers and provide for suspension, revocation, or restriction of the certification, in accordance with regulations promulgated by the council.” § 23-23-80(6).

Brian E. Kyzer, Appellant, 15-ALJ-30-0374-AP, 2016 WL 869099, at *4 (Feb. 26, 2016).³ The process of certifying law enforcement officer candidates is organized in S.C. Code Ann. § 23-23-

³ See also State Register Volume 39, Issue No. 6, Doc No. 4350, eff. June 26, 2015 which states:

60. Section 23-23-60(B) states that the application documentation for certification of law enforcement candidates is submitted “to the director, for his confidential information and subsequent safekeeping.” It is this Office’s opinion that a court would likely find that by designating these documents as “confidential” as well as directing that they be maintained by the director for “safekeeping,” the General Assembly demonstrated legislative intent to exempt these documents from disclosure. Yet, this statute does not appear related to the regulations cited in the request letter as those regulations broadly deal with the topics of separation from employment, investigations, and withdrawal of certification rather than initial applications of candidates for certification. Therefore, it is this Office’s opinion that a court would likely find S.C. Code Ann. § 23-23-60(B) does not authorize the confidential treatment of documents in the cited regulations.

Additionally, the General Assembly recently passed 2018 Act No. 215 which established a framework for the adjudication of allegations of misconduct of a law enforcement officer and for conducting a contested case hearing, if one is requested. S.C. Code Ann. § 23-23-150. Section 23-23-150(L) clearly exempts the allegations of misconduct and information which must be reported to the Academy regarding the use of excessive force from disclosure as follows:

In addition to the allegations of misconduct specified in this section, any finding by a law enforcement agency as to the use of excessive force by a law enforcement officer must be reported to the academy by the appropriate law enforcement agency or department within thirty days of the finding, the information of which must be maintained by the academy for investigative and personnel hiring purposes. This information is not a public document and not subject to disclosure other than to a law enforcement or prosecution agency, or attorneys representing a law enforcement or prosecution agency, except by court order. This exemption does not preclude the disclosure of any information contained in these records from another source or by another provision of law.

S.C. Code Ann. § 23-23-150(L) (emphasis added). It is this Office’s opinion that a court would find the language “not a public document and not subject to disclosure” clearly and

The General Assembly passed Act 317 and Act 335 (South Carolina Code §23-23-10, et seq.) separating the South Carolina Criminal Justice Academy from the Department of Public Safety. The Act allows the Criminal Justice Academy to promulgate regulations as are necessary for the administration of Act 317. As part of this separation, the regulations must be removed to a new chapter titled “Law Enforcement Training Council.” Additionally, for ease of use, the regulations order should be reorganized.

Id. Due to the restructuring described above, as well as the State Government Restructuring Act of 1993, 1993 Act No. 181, § 343(A), this Office has endeavored to retrace the prior Criminal Justice Academy regulations which were formerly codified in S.C. Code Ann. Regs. 38-1 through 38-028. This has proved difficult and as a result, there may be further statutory support for the confidential treatment of the documents under the regulations cited in the request letter beyond that discussed in this opinion.

unambiguously demonstrates legislative intent to exempt such documents from disclosure under the S.C. FOIA. While it is this Office's opinion that Section 23-23-150(L) provides an exemption from the S.C. FOIA's disclosure requirements, a court would likely construe this exemption narrowly to apply only to the specific information described therein. Burton, supra. Thus, a court would likely find that only the allegations of misconduct and findings of a law enforcement agency as to the use of excessive force by an officer which are reported to and maintained by the Academy are exempted from disclosure. Further, the statute also makes clear that this exemption only extends to the Academy and does not extend to other public bodies, such as an employing law enforcement agency, who may also have possession of these documents. S.C. Code Ann. § 23-23-150(L).

While Sections 23-23-60(B) and 23-23-150(L) could be interpreted by a court to exempt certain documents from disclosure under the S.C. FOIA, they likely do not provide support to withhold all documents which could be collected under the regulations cited in the request letter. Yet, to the extent that these statutes do support the confidential designations in the regulations, the Academy can likely withhold such documents as exempt under S.C. Code Ann. § 30-4-40(a)(4). The Academy may find further statutory support for its regulations confidential designations beyond those discussed in this letter. If that is the case, a court would likely authorize the additional exemptions to the extent authorized by statute.

II. Exemptions from the S.C. FOIA disclosure requirements as "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." S.C. Code Ann. § 30-4-40(a)(7).

The determination of whether a communication between the Office of General Counsel, a Misconduct Investigator, and the Law Enforcement Training Council ("Council") is protected by the attorney-client privilege or the attorney work product doctrine requires factual findings which are beyond the scope of this Office's opinions. See Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (2010) ("The determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances."). The South Carolina Supreme Court explained the purpose and elements of the attorney-client privilege as follows:

The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." State v. Owens, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor...." Id. In State v. Doster, this Court explained the attorney-client privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981) (citation omitted).

387 S.C. at 293, 693 S.E.2d at 529-530. The related attorney work product doctrine protects documents prepared in anticipation of litigation from discovery. See 387 S.C. at 294, 692 S.E.2d at 530. The S.C. FOIA recognizes the attorney-client privilege and provides an exemption for attorney work product. S.C. Code Ann. § 30-4-40(a)(7). The Court has interpreted this exemption narrowly to enable disclosure to the public while also protecting privileged communications:

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. ... However, the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to “guarantee the public reasonable access to certain activities of the government.”

Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 82–83, 708 S.E.2d 745, 748 (2011) (citations omitted). A public body which seeks to withhold a public record based on this exemption bears the burden of establishing the privilege applies. Id.; see also Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008).

The request letter asks “whether the communications between the Office of General Counsel, its Misconduct Investigator, and the Council concerning issues directly related to a contested certification matter, that may foreseeably be the subject of a contested case hearing enjoy the protection of either the attorney-client privilege, attorney opinion work product rule, or both, for purposes of section 30-4-40(a)(7)?” As discussed above, this Office cannot say that these communications are categorically permitted to be withheld as these determinations “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., supra. The Academy’s Office of General Counsel would be in best position to advise whether one of its communications is protected by the attorney-client privilege or any portion of the documents it authors would be included within the work product doctrine.

Conclusion

It is this Office’s opinion that the South Carolina Criminal Justice Academy ("Academy") may rely on its regulations to provide an exemption from disclosure under the South Carolina

Freedom of Information Act (“S.C. FOIA”), S.C. Code Ann. §§ 30-4-10 et seq., to the extent that those regulations do not alter or amend the terms of the agency’s statutorily granted authority. The request letter first asks whether information collected according to three Academy regulations could be construed to fall within the exemption to the S.C. FOIA as “matters specifically exempted from disclosure by statute or law.” S.C. Code Ann. § 30-4-40(a)(4). This Office has interpreted Soc’y of Prof’l Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), to stand for the proposition that a public body does not have the authority to withhold public records according to its own power to issue regulations. See Op. S.C. Atty. Gen., 2007 WL 419417 (January 24, 2007). Rather, the availability of such an exemption to the S.C. FOIA should result from the deliberative legislative process of the General Assembly.

This Office has identified two statutes codified in Title 23, Chapter 23 of the South Carolina Code which appear to exempt certain documents from disclosure under the S.C. FOIA in the limited circumstances described. S.C. Code Ann. § 23-23-60(B) states that the application documentation for certification of law enforcement candidates is submitted “to the director, for his confidential information and subsequent safekeeping.” It is this Office’s opinion that a court would likely find that by designating these documents as “confidential” as well as directing that they be maintained by the director for “safekeeping,” the General Assembly demonstrated legislative intent to exempt these documents from disclosure. Further, Section 23-23-150(L) clearly exempts the allegations of misconduct and information which must be reported to the Academy regarding the use of excessive force from disclosure. S.C. Code Ann. § 23-23-150(L) (“This information is not a public document and not subject to disclosure other than to a law enforcement or prosecution agency, or attorneys representing a law enforcement or prosecution agency, except by court order.”). While it is this Office’s opinion that Section 23-23-150(L) provides an exemption from the S.C. FOIA’s disclosure requirements, a court would likely construe this exemption narrowly to only apply to the specific information described therein. Burton v. York Cty. Sheriff’s Dep’t, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). Thus, a court would likely find that only the allegations of misconduct and findings of a law enforcement agency as to the use of excessive force by an officer which are reported to and maintained by the Academy are exempt from disclosure. Further, the statute also makes clear that this exemption only extends to the Academy and does not extend to other public bodies, such as an employing law enforcement agency, who may also have possession of these documents. S.C. Code Ann. § 23-23-150(L).

The request letter also asks “whether the communications between the Office of General Counsel, its Misconduct Investigator, and the Council concerning issues directly related to a contested certification matter, that may foreseeably be the subject of a contested case hearing enjoy the protection of either the attorney-client privilege, attorney opinion work product rule, or both, for purposes of section 30-4-40(a)(7)?” As discussed above, this Office cannot say that these communications are categorically permitted to be withheld as these determinations “must

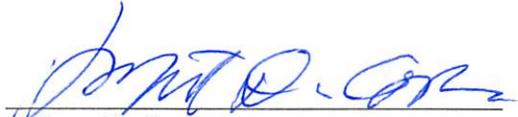
be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed.” Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011). The Academy’s Office of General Counsel would be in best position to advise whether one of its communications is protected by the attorney-client privilege or any portion of the documents it authors would be included within the work product doctrine.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General