ALAN WILSON
ATTORNEY GENERAL

April 23, 2019

Director Lewis J. Swindler, Jr.
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212-3540

Dear Director Swindler:

We received your request seeking an opinion on whether certain test questions used by the SCCJA to evaluate certification eligibility of LEO candidates must be disclosed in response to a FOIA request. This opinion sets out our Office's understanding of your question and our response.

Issue (as quoted from your letter):

> I am writing to request an opinion regarding whether reusable test questions maintained in a secured database of the South Carolina Criminal Justice Academy (Academy) for purposes of evaluating the certification eligibility of South Carolina law enforcement officer candidates are considered a "public record" that must be disclosed in response to a request under the South Carolina Freedom of Information Act (FOIA), pursuant to S.C. Code Ann. § 30-4-20(C).
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> The Academy recently received a Freedom of Information Act Request from the City of North Charleston seeking a "copy of each LE1/Basic Law Enforcement Training Written Test as administered by the CJA." While we are mindful and respectful of our obligation under the FOIA to promptly provide copies of requested public records, our concern in the present matter that disclosure of secured testing materials which form a fundamental component of the Academy's evaluation of officer candidate suitability for law enforcement certification and the basic law enforcement officer training program would serve to undermine the integrity of the law enforcement certification process prompts this request for your guidance.
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> . . .
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> While neither regulated by the South Carolina Department of Education nor the South Carolina State Board of Education nor subject to the provisions of the South Carolina School Code (S.C. Code Ann. § 56-1-10 et seq.), the Academy

> is classified as an academic institution by CALEA and as a "public school" by the Department of Veterans Affairs . . . .
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> The test questions are developed and maintained based to address State mandated standards and a candidate's performance on testing is critical to the determination of whether certificates will be awarded. Disclosure of the testing database questions to the Public would seriously impair the Academy's ability to objectively assess a candidate's fitness for law enforcement certification and would grossly impair the integrity of the certification process by making the questions available to officer candidates in advance of testing, negating the Academy's efforts to educate law enforcement officers, enforce standards for law enforcement and criminal justice service, and upgrade law enforcement to professional status.
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> By making the testing database questions freely available, the educational process attendant to an officer's certification would be effectively rendered meaningless and the process would foreseeably devolve into an officer's ability to simply "study for the test." That result would be clearly contrary to the intent of the General Assembly in enacting the South Carolina Law Enforcement Training Act to create "a facility and a governing council to maximize training opportunities for law enforcement officers and criminal justice service, all of which are imperative to upgrading law enforcement to professional status." [S.C. Code Ann. § 23-23-10(C)].

Law/Analysis:

It is the opinion of this Office that the reusable test questions maintained in a secured database of the South Carolina Criminal Justice Academy for purposes of evaluating the certification eligibility of South Carolina law enforcement officer candidates are not considered a "public record" under the South Carolina Freedom of Information Act and need not be disclosed in response to a FOIA request. Your request letter describes several policy rationales in support for this result and a court may very well find them compelling. As a matter of law, however, we believe that a court would conclude that the SCCJA certification test qualifies as a "scholastic record" as the term is usually and customarily understood, and therefore the General Assembly excluded the test questions from the definition of a public record in Section 30-4-20(C). Based upon your letter we understand that there is no question whether the SCCJA qualifies as a "public body," and accordingly our opinion here will focus on discussion of the SCCJA test as a "public record."

The SC FOIA provides generally that "A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by

Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a)(1) (Supp. 2018) (emphasis added). "On numerous occasions, in construing FOIA, we have emphasized the Legislature's expression of openness in government, as articulated in § 30-4-15." *Op. S.C. Att'y Gen.*, 2012 WL 3875118 (August 28, 2012). Additionally, our Office has opined previously:

> As with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. *Martin v. Ellisor*, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. *South Carolina Department of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. *News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Op. S.C. Att'y Gen., 1988 WL 383514 (April 11, 1988).

The FOIA contains an extensive definition of what constitutes a public record, which we quote here in relevant part:

> "Public record" includes 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 . . . 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 . . . .

S.C. Code Ann. § 30-4-20(c) (Supp. 2018) (emphasis added). Numerous prior opinions of this Office have addressed this statutory definition, including a few prior opinions addressing a "scholastic record." Generally these opinions have addressed administrative or employment records, and in that context our Office consistently has rejected any argument that a record becomes a "scholastic record" merely because it is created or maintained by a school. For example, in 1976 our Office observed:

> The scholastic records exception to the definition of public records, set out in [the FOIA as then codified] has not been further defined by the legislature or the courts. The traditional definition of scholastic is as follows:
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> Webster's New World Dictionary, 2nd Ed., as 1. of schools, colleges, universities, students, teachers, and studies; educational, academic.
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> This definition, taken to its outer limits would include anything relating to the subject of education. While an argument could be made that the records in question come within the above definition, and are therefore not discoverable, such argument gives little weight to the legislative intent of the Act. The Act was designed to make meetings and records open to the public unless specifically excluded. Therefore the scholastic records exception should be read in a traditional, more limited context, and not in an all-inclusive manner.

Op. S.C. Att'y Gen., 1976 WL 25249 (June 4, 1976). Following this analysis we concluded that a public body "could be required to disclose the year in which a teacher is certified, the date the certificate expires, the letter grade of the certificate and the pay group and class of the teacher, under the Freedom of Information Act." *Id.; see also Op. S.C. Att'y Gen.*, 2015 WL 992702 n.2 (February 19, 2015) ([S]cholastic records protected from release by law do not appear to be inclusive of teacher evaluations or an internal investigation regarding the same."). This author's research has not identified any reported South Carolina case or statutory amendment which would cause us to revise the statement quoted from our 1976 opinion.

The opinion of the South Carolina Supreme Court in *Perry v. Bullock* provides some additional guidance on this question, in that the "scholastic record" exclusion appears in the same sentence with the term "medical record" in Section 30-4-20(c). *See Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014); S.C. Code Ann. § 30-4-20(c) (Supp. 2018). In *Perry v. Bullock*, the Court considered whether an autopsy qualified as a "medical record" such that it was excluded from mandatory disclosure under FOIA. *Id.* The Court concluded that it was such a record, and opined:

> The FOIA requires public bodies to disclose public records upon request and defines public records 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." S.C. Code Ann. § 30-4-20. However, "[r]ecords such as ... medical records ... 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 [the FOIA] ...," *Id.*
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> The phrase "medical records" is not defined within the statute and therefore, we turn to its normal and customary meaning. *See, e.g., Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000) ("When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning."). Merriam-Webster defines a medical record as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)." Merriam-Webster Online, http://www.merriam-webster.com/medical/medical%20records. Thus, plainly stated, medical records are those records containing medical information.
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> We find autopsy reports fit neatly within that general understanding of medical records. Section 17-5-5(1) of the South Carolina Code (2014) defines an autopsy as "the dissection of a dead body and the removal and examination of bone, tissue, organs, and foreign objects for the purpose of determining the cause of death and manner of death." Although the objective of an autopsy is to determine the cause of death, as the statute indicates, the actual examination is comprehensive. Thus, the medical information gained from the autopsy and indicated in the report is not confined to how the decedent died. Instead, an autopsy, which is performed by a medical doctor, is a thorough and invasive inquiry into the body of the decedent which reveals extensive medical information, such as the presence of any diseases or medications and any evidence of treatments received, regardless of whether that information pertained to the cause of death. Accordingly, we find an autopsy report falls within the definition of a medical record as that term is commonly understood.

409 S.C. at 141-42, 761 S.E.2d at 253.

Following the decision of the Court in *Bullock*, our Office considered whether toxicology reports also should be deemed to be "medical records" for the purposes of FOIA. *Op. S.C. Att'y Gen.*, 2016 WL 1167292 (February 24, 2016). There we opined:

> We readily acknowledge that the Supreme Court's *Bullock* analysis is much different from that of our prior opinions and even from the Court's earlier decision in *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991). Like our prior opinions, *Bellamy* had concluded that FOIA does not mandate confidentiality in a given circumstance. Instead, the *Bellamy* Court concluded that

> FOIA is a remedial statute and that exemptions in FOIA do not mandate nondisclosure. . . .
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> Nevertheless, regardless of our previous analysis, the Court's decision in *Bullock* is now the governing law. Thus, we are constrained by this decision. Accordingly, while not free from doubt, we believe the Court is likely to adhere to its *Bullock* analysis in a case involving toxicology reports, deeming such reports to be "medical records" and therefore confidential.

Op. S.C. Att'y Gen., 2016 WL 1167292 (February 24, 2016).

Turning to the question presented in your letter, we observe that the record requested is the SCCJA test itself. The test is administered following a course of study conducted by the SCCJA for the purpose of educating law enforcement officers and evaluating whether they should be certified pursuant to South Carolina law. *See* S.C. Code Ann. § 23-23-10 et seq. Unlike an employment record or other administrative record, the test serves no purpose except to assess whether the student received the education sought to be taught in the course of the SCCJA training. Such a test is quintessentially educational material. Therefore, consistent with the guidance of the South Carolina Supreme Court in *Perry v. Bullock*, we believe the test is fairly characterized as a "scholastic record" in the usual and customary use of the term.[1]

Additionally, we note that the FOIA's "scholastic record" exception does not include any requirement that the record be created by a particular institution, such as a public high school or university. Indeed, our Office historically has rejected the argument that a record is scholastic in nature merely because it is created by a school. The General Assembly did not place any express legislative restrictions on which institutions are capable of creating scholastic records in Section 30-4-20(c). By contrast, in the same sentence the General Assembly did undertake to specify an exception for "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 . . . ." In the absence of such a restriction which modifies the scholastic record exception, we believe a court would decline to read any such requirement into the statute.

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[1] For the sake of clarity, we note that this author's research has not identified any positive definition of what a "scholastic record" is for the purposes of the FOIA; neither does this opinion undertake to establish one. Indeed, it appears that when the definition of a "scholastic record" has been at issue in the past, our prior opinions universally have approached the question through negation by saying what a scholastic record is not. *See, e.g., Op. S.C. Att'y Gen.*, 1976 WL 25249 (June 4, 1976).

Conclusion:

Therefore, consistent with the guidance of the South Carolina Supreme Court in *Perry v. Bullock* and prior opinions of this Office, it is the opinion of this Office that the reusable test questions maintained in a secured database of the South Carolina Criminal Justice Academy for purposes of evaluating the certification eligibility of South Carolina law enforcement officer candidates are not considered a "public record" under the South Carolina Freedom of Information Act and need not be disclosed in response to a FOIA request.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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