Records--Law Enforcement Officers--Booking photographs

Number: INFORMAL

Date: June 11, 2012

Subject:
Records--Law Enforcement Officers--Booking photographs

The Honorable Don R. Amunds
Chair, Okaloosa County Board
of County Commissioners
1804 Lewis Turner Boulevard, Suite 100
Fort Walton Beach, Florida 32547

Dear Commissioner Amunds:

On behalf of the Okaloosa County Board of County Commissioners, you ask whether Okaloosa County may release a photograph of a current or former municipal law enforcement officer exempt from public records production in accordance with section 119.071(4)(d)1.a., Florida Statutes, once the law enforcement officer has requested that his photograph remain exempt pursuant to section 119.071(4)(d)2., Florida Statutes. You also ask about the county's liability if it releases the photograph in response to a public records request, notwithstanding the officer's request that the photograph remain confidential.

According to your letter, a municipal police officer was recently arrested on felony charges and a booking photograph or "mug shot" was taken upon his being booked in the county detention facility. The officer requested in writing that his booking photograph not be released. The county has received a public records request for the photograph but has refused to release it based upon its review of section 119.071(4)(d)1.a. and 2, Florida Statutes, and previous opinions of this office which have stated that exempt information protected under section 119.071(4)(d)1.a. and 2. should only be released if there is a statutory or substantial policy need to do so.[1]

Section 119.071(4)(d)1.a., Florida Statutes, provides in pertinent part:

"The home addresses, telephone numbers, social security numbers, and photographs of active or former law enforcement personnel . . . the home addresses, telephone numbers, social security numbers, photographs, and places of employment of the spouses and children of such personnel; and the names and locations of schools and day care facilities attended by the children of such personnel are exempt from s. 119.07(1)."[2]

You recognize that the statute makes the photograph of a current or former law enforcement officer exempt from the disclosure provisions of the Public Records Act rather than confidential. You are also aware that the courts of this state have recognized that a distinction exists between records which are confidential and records which are only exempt from the mandatory disclosure requirements in section 119.07(1), Florida Statutes. For example, the court in *WFTV, Inc. v. School Board of Seminole*,[3] stated:

"There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute. . . . If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information."

This office on several occasions has considered the nature of the exemption now contained in section 119.071(4)(d)1., Florida Statutes, recognizing that the purpose of the exemption is to protect the safety of law enforcement officers and their families by removing certain information relating to such individuals from the mandatory disclosure requirements of Chapter 119, Florida Statutes. For example, in Attorney General Opinion 90-50, this office recognized that while the Legislature apparently chose to place the release of this information within the discretion of the agency,[4] in light of the underlying purpose of the enactment, *i.e.*, the safety of law enforcement officers and their families, the exercise of any such discretion by the agency must be exercised in light of that legislative purpose. Thus this office stated that an agency, in determining whether such information should be disclosed, should determine whether there is a statutory or substantial policy need for disclosure and in the absence of a statutory or other legal duty to be accomplished by disclosure, an agency should consider whether the release of such information is consistent with the purpose of the exemption. This position was reiterated in Attorney General Opinion 2007-21.[5]

In Attorney General Opinion 94-90, this office addressed whether the statute[6] permitted the release of the booking photographs of law enforcement and correctional officers in the custody of their employing agency from the disclosure requirements of section 119.07(1), Florida Statutes. Under the facts presented in that opinion, the deputy had been charged with lewd and lascivious acts with a child and booked into the county jail. The deputy was not an undercover officer whose identity would otherwise be protected and there was nothing to indicate that the deputy's acts were in any way connected to his duties as a deputy sheriff, nor did it appear that the purpose for the exemption, to ensure the personal safety of the deputy, was applicable under the circumstances presented. This office, therefore, concluded that the exemption did not preclude the release of the booking photograph.

You are concerned, however, about section 119.071(4)(d)2., Florida Statutes,[7] which states:

"An agency that is the custodian of the information specified in subparagraph 1. and that is not the employer of the officer, employee, justice, judge, or other person specified in subparagraph 1. shall maintain the exempt status of that information only if the officer, employee, justice, judge, other person, or employing agency of the designated employee submits a written request for maintenance of the exemption to the custodial agency."

You note that two circuit courts have held that booking photographs of law enforcement officers could not be released when the officer had made a written request that such photograph be kept confidential. In *Sarasota Herald-Tribune Company v. Sarasota County Sheriff's Office*,[8] the court held that the booking photograph of the Charlotte County deputy sheriff could not be released by the Sarasota County Sheriff's Office when the deputy sheriff had filed a written

request for confidentiality pursuant to section 119.071(4)(d), Florida Statutes. Subsequently, in *Fraternal Order of Police, Consolidated Lodge 5-30, Inc. v. City of Jacksonville*,[9] the court concluded that the Duval County Sheriff was prohibited from releasing the booking photograph of one of his deputy sheriffs who had been arrested, but who had filed a written request to maintain such information as confidential pursuant to the statute, then numbered as section 119.07(3)(i)2., Florida Statutes (2001).[10] The parties had stipulated that the only issue to be decided by the court was whether the release of a "mug shot" was appropriate when a law enforcement officer, pursuant to the statute, had requested that such information not be released.

At the time these two decisions were rendered, however, the statute provided that an agency that was the custodian of the personal information set forth in the paragraph, but not the employer of the officer, "shall maintain the *confidentiality* of the personal information only if" the officer "submits a written request for *confidentiality* to the custodian agency."[11] (e.s.) In 2004, the Legislature amended the statute removing any reference to confidentiality by substituting "exempt status" and "maintenance of the exemption," respectively, for "confidentiality."[12]

It is a fundamental principle of statutory construction that the Legislature is not to be presumed to have enacted useless or meaningless legislation.[13] While the general presumption is that when Legislature amends a statute, it intends to accord the statute a meaning different from that before the amendment,[14] when an amendment is enacted after a controversy arises regarding the original act, the amendment may be a legislative interpretation of the original law rather than a substantive change to the statute.[15] In either case, the Legislature's removal of a reference to "confidentiality" and the insertion of a reference to "exempt status" and "exemption" appears to reflect the Legislature's intent to clarify that the information is exempt from the mandatory disclosure provisions of Chapter 119, Florida Statutes, rather than confidential. In light of such a legislative change, I cannot conclude that the above circuit court decisions would control the resolution of this issue.

Thus, section 119.071(4)(d), Florida Statutes, exempts the photographs of a current or former law enforcement officer, whether held by the employing agency or by a nonemploying agency which has received a written request to maintain the exempt status of the record, from the disclosure provisions of section 119.07(1), Florida Statutes. Accordingly, the county is not required to produce the photograph pursuant to a public records request. However, while the statute makes photographs of law enforcement personnel exempt rather than confidential and therefore would not appear to preclude the release of such information, the purpose of the exemption must be considered in determining whether to release the photograph. Thus, as this office has previously advised, a custodian of such information, who has received a written request pursuant to section 119.071(4)(d)2., Florida Statutes, should determine whether there is a statutory or substantial policy need for disclosure before releasing the photograph.[16]

You also ask about the liability of the county should it release the photograph in response to a public records request. Any question of liability will depend upon the particular facts of a given situation and thus would necessarily involve mixed questions of law and fact which this office cannot resolve.[17] Accordingly, this office must decline to comment upon your second inquiry.

I hope, however, that the above informal comments may be of assistance to the county in

resolving these issues.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

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[1] Your letter specifically refers to Attorney General Opinions 2007-21, 2008-24, and 2010-37.

[2] Section 1, Ch. 2012-149, Laws of Fla., effective October 1, 2012, renumbers this subparagraph as s. 119.071(4)(d)2.a. and amends the language to refer to "*sworn or civilian* law enforcement personnel" and includes the "dates of birth" for such personnel and their spouses and children within such exemption; the new s. 119.071(4)(d)1. defines the term "telephone numbers" for purposes of the paragraph to include "home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices," while s. 119.071(4)(d)4. provides that the "exemptions in this paragraph apply to information held by an agency before, on, or after the effective date of the exemption."

[3] 874 So. 2d 48, 53-54 (Fla. 5th DCA 2004). The court held that the confidentiality and exemption provisions in then s. 228.093(3)(d), Fla. Stat. (2001), applied to the requested records.

[4] *See* Audio tape of hearing of the Senate Committee on Governmental Operations, April 23, 1979, tape 1 of 2; and Senate Staff Analysis and Economic Impact Statement on HB 1531, April 20, 1979, noting that "[i]f the information was confidential it could not be revealed under any circumstances," but recognizing a distinction between exempt and confidential information, stating that "thus exempt information could be revealed at the discretion of the agency."

[5] *Accord* Op. Att'y Gen. Fla. 08-24 (2008). *Cf. Delaurentos v. Peguero*, 47 So. 3d 879 (Fla. 3d DCA 2010) (Public Records Act did not preclude the discovery of police officer's pre-employment psychological evaluation in estate's wrongful death action against officer and county; while Act provided an exemption from public disclosure for medical information, the act did not preclude the discovery of records in litigation); *Rameses, Inc. v. Demings*, 29 So. 3d 418 (Fla. 5th DCA 2010), *review denied*, 47 So. 3d 1290 (Fla. 2010) (disclosure of videotapes showing the faces of undercover officers to criminal defendant pursuant to rules of criminal procedure did not bar sheriff from redacting the videotapes to obscure the officers' faces before providing them pursuant to a public records request).

[6] Then s. 119.07(3)(k)1., Fla. Stat. (1993).

[7] As noted in n.2, *supra*, s. 119.071(4)(d), was amended by s. 1, Ch. 2012-149, Laws of Fla. Effective October 1, 2012, s. 119.071(4)(d)2. is renumbered as s. 119.071(4)(d)3.

[8] Case No. 96-1026-CA-01 (Fla. 12th Jud. Cir., Sarasota County, March 13, 1996).

[9] Case No. 2000–4718-CA (Fla. 4th Jud. Cir., Duval County, December 21, 2001).

[10] *See Final Order, Fraternal Order of Police, Consolidated Lodge 5-30, Inc. v. City of Jacksonville, supra* at p. 2.

[11] *See* s. 119.07(3)(i)2., Fla. Stat. (1995) and s. 119.07(3)(i)4., Fla. Stat. (2001).

[12] *See* s. 7, Ch. 2004-335, Laws of Fla.

[13] *See, e.g., Smith v. Piezo Technology and Professional Administrators*, 427 So. 2d 182 (Fla. 1983) (it must be assumed that a provision enacted by the Legislature is intended to have some useful purpose); *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (in construing legislation, courts should not assume Legislature acted pointlessly); Op. Att'y Gen. Fla. 00-46 (2000) (Attorney General's Office will not presume that the Legislature intended to enact purposeless or useless legislation).

[14] *See, e.g., Sam's Club v. Bair*, 678 So. 2d 902 (Fla. 1st DCA 1996) (by enacting a material amendment to a statute, Legislature is presumed to have intended to alter a law unless the contrary is made clear).

[15] *See, e.g., Asphalt Pavers, Inc. v. Department of Revenue*, 584 So. 2d 55 (Fla. 1st DCA 1991) (mere change in language of statute does not necessarily indicate intent to change law; intent may be to clarify what was doubtful and to safeguard misapprehension as to existing law); *Williams v. Hartford Accident and Indemnity Company*, 382 So. 2d 1216 (Fla. 1980) (timing and circumstance of legislative enactment may indicate it was formal only and served as legislative clarification or interpretation of existing law); Op. Att'y Gen. Fla. 95-77 (1995) (amendment of a statute does not necessarily indicate that the Legislature intended to change the law).

[16] *See, e.g.,* Inf. Op. to Reese, dated April 25, 1989 (city may disclose home address of its former police officer to the State Attorney's Office when requested for purposes of serving a criminal witness subpoena).

[17] *Cf.* Ops. Att'y Gen. Fla. 97-09 (1997) (determination of liability of a law enforcement agency in releasing or disseminating nonexempt and nonconfidential information contained in its public records relating to sexual offenders without a request presents mixed question of law and fact which must be resolved by a court of law in an appropriate judicial proceeding); 97-03 (1997); 93-70 (1993); 91-30 (1991); and 86-99 (1986). *And see* this office's statement concerning Attorney General Opinions, available online at: http://myfloridalegal.com/opinions, stating that Attorney General Opinions are intended to address only questions of law, not questions of fact, mixed questions of fact and law, or questions of executive, legislative or administrative policy.