Public Records -- Undercover Personnel

Number: AGO 2015-02

Date: January 30, 2015

Subject:
Public Records -- Undercover Personnel

Mr. Jeffrey A. Chudnow
Chief of Police, City of Oviedo
400 Alexandria Boulevard
Oviedo, Florida 32765

Dear Chief Chudnow:

As Chief of Police of the City of Oviedo, you have asked substantially the following question:

Do the provisions of section 119.071(4)(c), Florida Statutes, which exempt "[a]ny information revealing undercover personnel of any criminal justice agency" authorize the City of Oviedo to exempt from public disclosure the names of law enforcement officers of the city who are assigned to undercover duty when a request is made for a personnel roster of any type (pay roster, etc.) or a listing of all law enforcement officers of the city when the record does not identify the officers as being assigned to undercover duty?

In sum, it is my opinion that:

Pursuant to section 119.071(4)(c), Florida Statutes, information regarding law enforcement officers of the city who are assigned to undercover duty and whose names appear on personnel rosters or other lists of all law enforcement officers of the city without regard to whether the record reveals the nature of their duties may constitute "[a]ny information revealing undercover personnel of any criminal justice agency[.]" The Legislature's determination that such information is exempt from disclosure and copying under the Public Records Law, rather than making such information confidential, conditions the release of exempt information upon a determination by the custodian that there is a statutory or substantial policy need for disclosure.

Additional information contained in your request states that the rosters or listings would not indicate that undercover activities are being assigned by particular law enforcement officers or that particular law enforcement officers perform undercover duty. However, the names of undercover law enforcement officers are included in the general roster or general listing of all city law enforcement officers.

The general purpose of Florida's Public Records Law "is to open public records to allow Florida's citizens to discover the actions of their government."[1] While the Public Records Law is to be liberally construed in favor of open government, exemptions from disclosure are to be narrowly construed and limited to their stated purpose.[2]

Section 119.071, Florida Statutes, provides general exemptions from the inspection and copying requirements of Florida's Public Records Law. The statute containing the exemption about which you have inquired, section 119.071(4)(c), Florida Statutes, provides:

"Any information revealing undercover personnel of any criminal justice agency is *exempt* from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." (e.s.)

The exemption's applicability to "*any* information" suggests a broader application of the exemption rather than a narrow one.[3] Clearly, the names of undercover personnel would come within the scope of "any information." However, the information must "reveal" undercover personnel of the criminal justice agency. The word "reveal" is generally defined as "to make known; disclose;"[4] but the Legislature has provided no additional direction as to what "reveal" may mean.

Thus, the question becomes whether the names of undercover personnel, without any reference to the nature of the duties performed by those officers would reveal the officers as undercover personnel. The governmental agency claiming the benefit of the exemption has the burden of proving its entitlement to that exemption.[5]

Florida courts and this office 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.[6] As the court in *WFTV, Inc. v. School Board of Seminole* ,[7] 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."

Thus, the exemption provided in section 119.071(4)(c), Florida Statutes, does not absolutely prohibit the production of information revealing undercover personnel under all circumstances.

In Attorney General Opinion 90-50, this office considered those circumstances under which information exempted pursuant to what is now section 119.071(4)(d)2.a., Florida Statutes (providing an exemption for home addresses, etc., of law enforcement personnel), may be released by an agency.[8] Although the Legislature apparently chose to place the release of this information within the discretion of the agency by making it subject to an exemption rather than confidentiality, in light of the underlying purpose of the enactment, *i.e.*, the safety of law enforcement officers and their families, any such discretion by the agency must be exercised in light of that legislative purpose. Accordingly, the opinion concluded that in determining whether such information should be disclosed, an agency should consider whether there is a statutory or substantial policy need for disclosure. 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.[9]

Likewise, section 119.071(4)(c), Florida Statutes, *exempts* any information revealing undercover personnel of any criminal justice agency from the disclosure provisions of section 119.07(1), Florida Statutes. By making it the subject of an exemption, the Legislature apparently chose to place the release of this information, once it has been determined to "reveal" undercover personnel, within the discretion of the agency. Whether particular information may "reveal" undercover personnel is a determination which must be made in a case-by-case consideration of the particular situation. Once the information is determined to be exempt, the chief of police or the city is not *required* to produce this information pursuant to a public records request. The statute makes the information revealing undercover personnel exempt rather than confidential and therefore would not appear to preclude the release of such information, however, the purpose of the exemption, *i.e.*, the safety of undercover personnel, must be considered in determining whether such information should be released. Thus, as this office has previously advised, a custodian of such information should determine whether there is a statutory or substantial policy need for disclosure before releasing any information revealing undercover personnel.

In sum, it is my opinion that pursuant to section 119.071(4)(c), Florida Statutes, information regarding law enforcement officers of the city who are assigned to undercover duty and whose names appear on personnel rosters or other lists of all law enforcement officers of the city without regard to whether the record reveals the nature of their duties may constitute "[a]ny information revealing undercover personnel of any criminal justice agency[.]" The Legislature's determination that such information is exempt from disclosure and copying under the Public Records Law, rather than making such information confidential, conditions the release of exempt information upon a determination by the custodian that there is a statutory or substantial policy need for such disclosure.

Sincerely,

Pam Bondi
Attorney General

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[1] *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

[2] *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010); *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom., Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

[3] The word "any" is defined to mean "one, a, an, or some; one or more without specification or identification; . . . every; all[.]" Webster's New Universal Unabridged Dictionary (2003), p. 96.

And see Op. Att'y Gen. Fla. 74-311 (1974).

[4] *See* Webster's New Universal Unabridged Dictionary (2003), p. 1646; *and see* The American Heritage Dictionary (office edition 1987), p. 589.

[5] *See Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1367 (Fla. 4th DCA 1997); *Barfield v. City of Ft. Lauderdale Police Department*, 639 So. 2d 1012, 1015 (Fla. 4th DCA, 1994), *review denied*, 649 So. 2d 869 (Fla. 1994); *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128, 1130 (Fla. 1st DCA 1985).

[6] *See, e.g.,* Ops. Att'y Gen. Fla. 07-21 (2007) (Legislature recognized a distinction between "exempt" and "confidential;" confidential information could not be revealed under any circumstances, exempt information could be revealed at discretion of agency); and 90-50 (1990).

[7] 874 So. 2d 48, 53-54 (Fla. 5th DCA 2004).

[8] The exemptions in what are now ss. 119.071(4)(d)2.a. and 119.071(4)(c), Fla. Stat., were amendments added to the statute by Ch. 79-187, Laws of Fla., and would appear to be directed to the same purpose – the protection of law enforcement personnel. *See* Title, Ch. 79-187, Laws of Fla., "providing that certain . . . information . . . relating to . . . law enforcement personnel . . . are exempt from disclosure provisions of the public record law" and Inf. Op. to Amunds, dated June 8, 2012, discussing the purpose of the exemption currently designated in s. 119.071(4)(d)2.a., Fla. Stat.

[9] For example, in an Inf. Op. to Chief Lee Reese, Lake Worth Police Department, dated April 25, 1989, this office stated that the personnel files of the City of Lake Worth Police Department which revealed the home addresses of former law enforcement personnel could be disclosed to the State Attorney's Office for the purpose of serving criminal witness subpoenas by mail pursuant to s. 48.031, Fla. Stat.