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Law-Enforcement Records: Some Observations on the New Statute

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In January 1992 the state supreme court decided *News and Observer v. Poole*,[1] holding (among other things) that only the General Assembly could fashion exceptions to the state's public records statute; if no statute exempts a class of records from public access, the records are open to public inspection. After the *Poole* decision, state and local law-enforcement officials and their attorneys became aware that there was no general statutory exemption for records compiled during law-enforcement investigations. Support grew for such an exemption, and the 1993 General Assembly responded by enacting Chapter 461 (Senate Bill 860), a comprehensive treatment of such records. This new law will be codified as G.S. 132-1.4, and becomes effective October 1, 1993. In many ways, the statute codifies what has been the practice in most law-enforcement agencies.

This *Local Government Law Bulletin*, which is being sent to all city and county attorneys and all sheriffs' and police attorneys, does not attempt an exhaustive review of new G.S. 132-1.4. The statute is complicated, and any such attempt would likely fail to foresee or answer many of the questions that will arise under it. Rather, the *Bulletin* offers a number of observations on specific provisions in the statute, in the hope that these observations will be useful as the readers review the legislation.

Coverage

Although police and sheriffs' records were clearly the focus in the drafting of the statute, the statute covers a broader range of records than might be expected from a cursory review of its provisions. The coverage obviously includes the records of police departments and sheriffs' departments, which might be characterized as "standard" law-enforcement agencies, but it also extends well beyond those departments. This becomes apparent from a review of the statutory definitions. To begin with, the statute's concern is with "records of criminal investigations" and "records of criminal intelligence information," and both are defined terms.

Records of criminal investigations are records and information that pertain to a person or group of persons and that are compiled by "public law enforcement agencies" for the purpose of attempting to prevent or solve "violations of the law."

Records of criminal intelligence information are records and information that pertain to a person or group of persons that are compiled by a "public law enforcement agency" in an effort to anticipate, prevent, or monitor possible "violations of the law."

Both of these definitions include other defined terms, and those additional definitions indicate the breadth of the statute.

First, *violations of the law* is defined to mean "crimes and offenses that are prosecutable in the criminal courts of this state or the United States[,] and infractions." Thus if an act exposes the actor to prosecution as having committed a misdemeanor or an infraction, the investigation of that act can generate records covered by this statute. Because G.S. 14-4 makes violation of almost all city or county ordinances either a misdemeanor or an infraction, the investigation of ordinance violations of almost any sort would fall within the statute. (A county or city

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1. 330 N.C. 465, 412 S.E.2d 7 (1992).

does have the option of decriminalizing an ordinance entirely, making it enforceable only with civil remedies. Any records generated through an investigation of the violation of an ordinance with such a provision would not be covered by the statute.)

Many local ordinances that carry criminal or infraction penalties normally are enforced in ways other than through criminal or infraction proceedings, of course. A utility department, for example, is much more likely to cut off service because operating rules have been broken than it is to bring criminal charges, and zoning ordinances are more often enforced by injunctive than by criminal remedies. But the statute does not condition its definitions on the usual enforcement methods or on the enforcement methods in a particular case. Rather, if violation of a statute, ordinance, or regulation can cause the violator to be answerable in criminal proceedings or in an infraction proceeding, it is a violation of the law as defined in new G.S. 132-1.4.

Second, *public law enforcement agency* is defined to include "any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." Thus any unit within a city or county that is responsible for enforcement of a statute or ordinance that carries misdemeanor or infraction penalties is capable of generating records that are criminal-investigationor criminal-intelligence records under the statute. Some of the possible examples of such units, in addition to police and sheriffs' departments, include code enforcement; animal control; fire department, for arson, hazardous materials, etc.; utility departments, if operating rules have been adopted by ordinance; zoning administration; sedimentation control; human relations boards, if they enforce programs adopted by ordinance; sanitarians; and business license tax collection.

Obviously, not all the records of these agencies are covered by the statute, just as not all police records are covered. But if records are compiled in the investigation of possible violations of any laws or ordinances that are the responsibility of such an agency, those records are within the statutory coverage.

Exceptions to the General Rule of Confidentiality

The statute begins with a statement that the records of criminal investigations and criminal-intelligence operations are not public records under G.S. Chapter 132. It then, however, excepts certain specific information from that opening provision, making that information public. The list of exceptions comprises six kinds of information, which will be discussed in three separate groups. The first group includes three of the six kinds of information:

1. The time, date, location, and nature of a violation reported to an agency. This describes the standard incident or complaint report in law-enforcement agencies; other units falling within the broad coverage of the statute have comparable forms.
2. The name, sex, age, address, employment, and alleged violation of a person arrested, charged, or indicted.
3. The circumstances surrounding an arrest, ranging from its time and place, to such matters as whether there was resistance or a pursuit. In addition, a list of any items seized in connection with an arrest is also public.

The fact that all of the above items are public information does not, in and of itself, require a law-enforcement agency to collect each item. This statute does not mandate what information an agency gathers but simply deals with whether information, once gathered, is or is not open to public inspection. Most standard forms related to these matters, however—incident or investigation reports, arrest records, etc.—also include information that is *not* included in the list of information required to be open to the public; and agencies have been routinely supplying that additional information to the press and others. Although the additional information is not public record, there does not seem to be any bar to an agency's releasing it, and most agencies will presumably continue to do so.

The second group of exceptions to new G.S. 132-1.4 includes two further kinds of information:

4. The contents of 911 or other emergency telephone calls made to agencies, except to the extent that the information might identify the caller, victim, or witnesses.
5. The contents of communications between or among agency employees, when those communications are broadcast over the public airways.

Both of these exceptions are phrased in terms of the "contents" of the communications in question, rather than of a physical recording tape. Therefore, especially with a 911 communication, the exception may cover both any tape made of the communication and any contemporaneous written record of it. Both

the tape and the written record will contain the contents of the communication itself.

The phrasing of the fourth exception does permit one possibly odd interpretation. Most communications to standard law-enforcement agencies now are made through 911 systems, but other agencies falling within the definition of *law-enforcement agency* probably receive the bulk of their complaints either through written communication or nonemergency telephone calls. These forms of communication are not included in the list and therefore the contents of such letters and calls are not automatically public. Of course, much of the contents of such communications may be public under the first exception—time, date, location, and nature of reported violations—but other information will not be public.

As will be seen below (under Restrictions on Access to Excepted Information), the statute treats the final exception to G.S. 132-1.4 somewhat differently than it does the others. The exception itself follows:

> 6. The name, sex, age, and address of a *complaining witness*, defined as an alleged victim or other person who reports a real or apparent violation to an agency.

One comment is in order here. As with the first three exceptions, the statute does not mandate that an agency collect each item of information about a complaining witness, but only that if any of the four listed items is collected, then it is public. Indeed, the statute does not require that an agency collect even the name of a complaining witness, and there are some local governments that do accept anonymous complaints about certain sorts of violations (such as animal-control violations).

Restrictions on Access to Excepted Information

Information about Complaining Witnesses

Although the name, sex, age, and address of a complaining witness are items of information that are, in general, public, the statute directs that this information be held confidential in certain circumstances. If release of the information is "reasonably likely" (1) to endanger the mental or physical health of the witness or the witness's personal safety, or (2) to "materially compromise" a continuing or future investigation, then the statute states that the agency "shall temporarily withhold" the witness's name and address (but apparently not the witness's age and sex). If an agency takes that step, any person denied access to the information may seek a court order compelling disclosure. In such a case, the judge is to balance the interests of the public in disclosure against the interests of the agency and the witness in confidentiality. Beyond the general standard, the statute gives no assistance to a judge attempting to weigh the competing interests.

The way this portion of the statute is drafted may increase the chance of liability to a law-enforcement agency that releases the name and address of a complaining witness. If the statutory preconditions exist, the agency is not simply *permitted* to deny access to the information, it is *directed* to deny access. This raises the question of whether an agency that releases the information, particularly after being asked not to do so by the complaining witness, might be liable to the witness should harm come to the witness under circumstances that in some fashion connect the harm to the release of the information. For example, a rape victim might ask that her name not be made public, in order to avoid the embarrassment and anguish that often accompany publicity about rape; if the agency releases the name anyway, the victim might be able to demonstrate some mental or physical harm that results from the publicity. Or a defendant might learn the witness's name and address, go to that address, and in some way physically injure the witness. In either case, the victim or witness might seek damages from the agency.

In most circumstances, a lawsuit against a law-enforcement agency would founder on the public duty doctrine. Under that doctrine, accepted into North Carolina law in *Braswell v. Braswell*,[2] an agency is not liable for its failure to furnish police protection to specific individuals. The duty of police protection, rather, is owed to the public in general. New G.S. 132-1.4, however, might be read as creating a specific duty toward an individual—the complaining witness. If it is reasonably likely that that person's health or safety would be endangered by release of his or her name and address, the statute imposes a duty on the agency not to release the information. It seems apparent that the statute's purpose is to protect that particular person, and not the general public. The practical effect of this possibility is that if there is any doubt whatsoever about release of the information, the agency should come down on the side of confidentiality.

It should also be noted that the statute's protection is temporary, and even more temporary than is immediately apparent. The subsection that allows an

2. 330 N.C. 363, 410 S.E.2d 897 (1991).

agency to deny access to the name and address of a complaining witness specifically states the restriction on access is to last only so long as the underlying justification continues. How long will differ from case to case, but if a victim is worried about retaliation from a defendant, that concern would probably not end simply because the defendant was arrested. In most cases, after all, a defendant can be released pending trial. But another section of the statute[3] specifically states that arrest warrants, once returned by a law-enforcement agency, are public records. The charging language in an arrest warrant, in the usual case, names the victim of the alleged crime. Therefore once this warrant, which is a court record rather than a law-enforcement record, is returned, the victim's name will be public information—regardless of what the law-enforcement agency does with its own records that show the victim's name.

Other Exceptions

An agency may deny access to a record otherwise public under one of the other five classes of exceptions only with a court order. Presumably this would arise if an agency denied access to the record and the seeker of the record brought suit under the act. (It does not seem likely that an agency would bring some sort of ex parte action to close a record, without having had a request for the record.) Then the agency could file a motion in the cause, seeking court sanction for the denial of access.

Although the statute says nothing in this regard, presumably some part of such a proceeding might be in camera. At the least, the judge may need to examine the record in question, and doing so in open court would defeat the purpose of the motion. Public records statutes in other states give courts a comparable role in deciding whether law-enforcement and other sorts of records should be made public, and the courts have frequently developed standard procedures for in camera examination of the subject records.

Some Miscellaneous Points

Police procedures manuals. Law-enforcement agencies often prepare elaborate procedures manuals, setting out their plans for dealing with a broad range of situations. Such a manual, for example, might set out how the agency will deal with a hostage-taking or when it will set up roadblocks. The agencies frequently have strong reasons for wanting these manuals kept confidential, to avoid advance notice to those against whom the procedures will be used. The new statute, however, provides no basis for denying public access to such a manual. Because the manuals do not pertain to a particular person or group of persons, they do not seem to fall within the definitions of either criminal-investigation records or criminal-intelligence records. There is no other statute that closes these manuals to public access.

Closed investigations. In a number of other states, public records statutes keep law-enforcement investigations confidential while they are still active but make them public once the investigation is closed, particularly if there has been a prosecution. New G.S. 132-1.4 makes no distinction between active and closed investigations; therefore it appears that investigations do not lose their confidentiality simply because they have been completed and the case prosecuted.

Discovery and the statute. Subsection (h) of the new statute contains an odd provision regarding the interrelation of this statute and the rules of criminal discovery. It provides that nothing in the new statute is to be construed as requiring disclosure of "information that would not be required to be disclosed under Chapter 15A of the General Statutes." The apparent meaning of this language is that if information is not discoverable under Chapter 15A, it is not public under new G.S. 132-1.4, regardless of other provisions in the new statute. The difficulty with this reading of the provision, however, is that none of the items included in the six exceptions discussed above are in fact discoverable under Chapter 15A.[4] If the provision is to be taken literally, then the exceptions have no meaning. The only sensible reconciliation is to ignore the provision of subsection (h) with respect to the six classes of excepted records.

Court orders to open records. There is one other ambiguous provision in the new statute. In subsection (a), after stating that criminal-investigation and criminal-intelligence records are not public records, the statute states that such records "may be released by order of a court of competent jurisdiction." Unfortunately, the statute establishes no standard under which a court might issue such an order.

3. Subsection (k).

4. The rules about what is discoverable are found in G.S. 15A-903.

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