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Opinion No. 08-147

Public Records

QUESTION

Whether a list of names of individuals whose records were alleged to have been accessed without authorization by a member of the Tennessee Highway Patrol through the Integrated Criminal Justice Web Portal is a public record.

OPINION

The list is a public record as defined under Tennessee's Public Records Act; however, Tenn.R.Crim.P. 16(a)(2) would protect this list from compulsory inspection and disclosure under the Public Records Act to the extent it is relevant to a contemplated criminal prosecution. Moreover, to the extent any of the names on the list were obtained by accessing the state's Drivers License database, those names are confidential under the provisions of the federal Driver's Privacy Protection Act of 1994 and the corresponding state law, Tenn. Code Ann. §§ 55-25-102, *et seq*., and would need to be redacted when the list is no longer protected from disclosure and inspection by Tenn.R.Crim.P. 16(a)(2).

ANALYSIS

A member of the Tennessee Highway Patrol is alleged to have accessed the records of a number of citizens through the Integrated Criminal Justice Web Portal ("ICJSC") without authorization. The ICJSC was created as a result of the Integrated Criminal Justice Act of 2006. Acts 2006, Ch. 917, § 1 (codified at Tenn. Code Ann. §§ 16-3-814 to 820). That Act established a steering committee, the purpose of which is

> to provide the governmental and technical information systems infrastructure necessary for accomplishing state and local government public safety and justice functions in the most effective manner, by appropriately and efficiently sharing criminal justice and juvenile justice information among law enforcement agencies, judicial agencies, corrections agencies, executive agencies and political subdivisions of the state.

Tenn. Code Ann. § 16-3-815. This committee ultimately developed the ICJSC web portal which is managed by the Administrative Office of the Courts and provides access to six different databases: Drivers License; Title and Registration; Tennessee Offender Management Information (TOMIS); Sex Offender Registry; Tennessee Orders of Protection and Tennessee Wanted Persons. Access to the ICJSC portal is limited to law enforcement personnel and court officers with authorized access for criminal justice purposes.

As a result of the allegations that a member of the Tennessee Highway Patrol made unauthorized use of the ICJSC portal, the Tennessee Department of Safety instituted an investigation and during the course of that investigation generated a list of approximately 182 individual names whose records were accessed through the web portal by this individual. You have asked whether this list of names is a public record under Tennessee's Public Records Act.

Tennessee's Public Records Act provides that:

> Except as provided in § 10-7-504(f), all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Tenn. Code Ann. § 10-7-503. A "public record" is defined under the Act as:

> All documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Acts of 2008, Ch. 1179, § 1.

The list of names compiled by the Department of Safety during the course of its investigation into the state trooper's alleged unauthorized use of the ICJSC web portal is clearly a record that was made in connection with the transaction of official business of the Department. Accordingly, that list is a public record subject to inspection unless another state law provides otherwise.

The Tennessee Supreme Court has long recognized that the Tennessee Rules of Civil and Criminal Procedure are state laws that can provide otherwise with respect to the openness of public records. *See Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987) (rules of criminal procedures) and *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996) (rules of civil procedure). Rule 16(a)(2) of the Rules of Criminal Procedure provides:

> Information Not Subject to Disclosure – Except as provided in paragraphs (A), (B) and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or

> *other internal state documents made by* the district attorney general or *other state agents or law enforcement officers in connection with the investigation* or prosecution of *the case,* or of statements made by state witnesses or prospective state witnesses. (Emphasis added).

The Supreme Court has held that the provisions of Rule 16(a)(2) provide an exception to the disclosure and inspection requirements of the Public Records Act "where the files are open and are relevant to pending or contemplated criminal action." *Appman v. Worthington*, 746 S.W.2d at 166. *See also Schneider v. City of Jackson*, 226 S.W.3d 332, 345 (Tenn. 2007) (information relevant to an ongoing criminal investigation would clearly have been exempt from disclosure under Rule 16(a)(2)) and *Swift v. Campbell*, 159 S.W.3d 565, 573-74 (Tenn. Ct. App. 2004) (Tenn.R.Crim.P. 16(a)(2) protects records of an investigation while the investigation is in progress).

We have been informed that the list at issue here, as well as other evidence developed during the Department's investigation, has been turned over to the office of the district attorney general to determine whether any violations of criminal statutes warranting prosecution may have occurred. To the extent that any criminal prosecutions are in fact contemplated by the district attorney general arising out of this incident, the list would qualify as an "internal state document" made by "state agents" that is relevant to a "contemplated criminal action" and, thus, would be shielded from compulsory disclosure under the Public Records Act by Rule 16(a)(2) of the Rules of Criminal Procedure as interpreted in the cases discussed above.

This exception from disclosure and inspection provided by Tenn.R.Crim.P. 16(a)(2) does not apply to investigative files in the possession of state agents or law enforcement officers where the files have been closed and are not relevant to any pending or contemplated criminal action. *See Swift v. Campbell*, 159 S.W.3d at 573; *Appman v. Worthington*, 746 S.W.2d at 166. Thus, upon the completion of the ongoing criminal investigation and any prosecution, the list of names would no longer be protected from disclosure by Rule 16(a)(2).

It is further our understanding that some of the names on the list prepared by Department of Safety Investigators were not initially known by the state trooper at the time he accessed the ICJSC web portal; rather, these names were obtained by the state trooper when he accessed the Drivers License database. Tenn. Code Ann. § 55-25-104 provides that "[n]otwithstanding any other provision of the law to the contrary, . . . the department [of safety], and any officer, employee, agent or contractor thereof, shall not disclose personal information about any person obtained by the department in connection with a motor vehicle record." "Personal information" is defined as information that identifies a person, including "an individual's photograph or computerized image, social security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information." Tenn. Code Ann. § 55-25-103(8). These state statutes implement federal law, the federal Driver's Privacy Protection Act of 1994. *See* 18 U.SC. §§ 2721, *et seq*.

Both the federal and state statutes provide exceptions for when such personal information may be disclosed; however, disclosure in response to a public records request is not one of the authorized disclosures. Thus, to the extent that any of the names on the list were

obtained by accessing the state's Drivers License database, those names may not be disclosed consistent with the provisions of the federal Driver's Privacy Protection Act of 1994 and the corresponding state law, Tenn. Code Ann. §§ 55-25-102, *et seq*., and would have to be redacted if the list is not protected from disclosure and inspection by Tenn.R.Crim.P. 16(a)(2).

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