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Robert K. Corbin

August 6, 1985

M. L. Risch, Captain
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Re: I85-097 (R85-047)

Dear Captain Risch:

You have asked three questions regarding staff reports prepared for the Arizona Law Enforcement Office Advisory Council (ALEOAC). Pursuant to ALEOAC's regulatory authority, its staff inspects records of law enforcement agencies and prepares reports on their findings for consideration by the council. A.R.S. § 41-1822 and A.C.C.R. R13-4-05.A.2. Specifically, you ask:

1. May the reports be considered confidential and thus not open to public inspection?
2. May the Council take action based upon the content of reports discussed in executive session?
3. If the Council takes action based upon the contents of a report discussed in executive session, does such action make the report available for public inspection?

With regard to your first question, Arizona's public records law requires that public officers who maintain records shall make them available for inspection by any person. A.R.S. § 39-121. However, a document may be considered confidential (not available for public inspection) either as required by statute or by designation by its custodian. Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); Mathews v. Pyle,

Captain M. L. Risch
August 6, 1985
Page 2

75 Ariz. 76, 251 P.2d 893 (1952); Ariz. Atty. Gen. Op. Nos. 183-006 (addendum), 180-217, 179-215, 76-43.

No statute confers confidential status on ALEOAC staff reports.

Our inquiry, therefore, must be whether you, as custodian of the reports in question, may designate the reports or portions thereof as confidential.

When discussing the disclosure of public records the Supreme Court in Carlson said:

In light of our statutory policy favoring disclosure, we think that the best procedure is that all records required to be kept under A.R.S. § 39-121.01(B), are presumed open to the public for inspection as public records. While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian may refuse inspection.

Id., 687 P.2d at 1246.

Subsequently, in Mitchell v. Superior Court In and For Pima County, 142 Ariz. 332, 690 P.2d 51 (1984), the Supreme Court discussed the balancing of the interest of the public in knowing the disposition of offenders versus an offender's right of privacy, saying:

While confidentiality may be preserved on a case-by-case basis, we recognize that the public's need for information about the disposition of offenders is compelling, and that it is the public policy of this state to fulfill that need. Thus, when a newspaper seeks information as a member of the

Captain M. L. Risch
August 6, 1985
Page 3

public, and a convicted offender wishes to bar disclosure on the ground of infringement of his privacy, the rights involved are not coequal, and any decision about which claim is to prevail must ordinarily favor the public's right of access. The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.

Id., 690 P.2d at 54 (emphasis in original).

From the foregoing, we emphasize that, as the custodian of public records, you are authorized to withhold inspection of the records only if you can demonstrate a probability that disclosure will result in specific, material harm to private persons or to the best interests of the state that outweighs the need of the public for information contained in the reports.

If a court determines that a custodian wrongfully denied access and that the custodian acted in bad faith or in an arbitrary or capricious manner in withholding access and inspection, the court may award legal costs, including reasonable attorney's fees, to person seeking inspection of the record. A.R.S. § 39-121.02(B). Also, if the person suffers any damages, he can recover those damages from the public officer who wrongfully denied him access. A.R.S. § 39-121.02(C). See, Carlson v. Pima County, supra; Ariz. Atty. Gen. Op. No. 183-006 (addendum).

Finally, doubts regarding whether a public record should be made available for public inspection should be resolved in favor of disclosure. Ariz. Atty. Gen. Op. No. R75-781.

If a staff report is a proper subject for consideration in executive session, ALEOAC is not prohibited from taking "legal action"¹ based on the contents of the report in a

1. A.R.S. § 38-431.2 provides: "'Legal action' means a collective decision, commitment or promise made by a majority of the members of a public body pursuant to the constitution, their charter or bylaws or specified scope of appointment or authority, and the laws of this state."

Captain M. L. Risch
August 6, 1985
Page 4

subsequent open meeting. Whether a staff report is a proper subject for consideration during an executive session is governed by A.R.S. § 38-431.03(A).

A.R.S. § 38-431.03(A) sets forth seven purposes for which a public body may hold an executive session. Only two provisions appear to apply to the staff reports mentioned in your letter, which are A.R.S. § 38-431.03(A)(1) and A.R.S. § 38-431.03(A)(2):

[A] public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that such discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with such notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether such discussion or consideration should occur at a public meeting.

2. Discussion or consideration of records exempt by law from public inspection.

Even if the reports could be discussed in executive session, any legal action based upon such discussions must be taken at an open meeting. A.R.S. § 38-431.03(D).

In our opinion, however, taking legal action based on a confidential report does not change the confidential character of the report and, therefore, the report would not have to be disclosed. Some of the information contained within the report may have to be disclosed, however.

As noted, although the report remains confidential, if legal action on the report is required, such action includes

Captain M. L. Risch
August 6, 1985
Page 5

more than the mere formal act of voting. As stated in Ariz. Atty. Gen. Op. No. 75-8:

[I]t is our opinion that all discussions, deliberations, considerations, or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body, constitutes "legal action" and must be conducted in an open meeting, unless an executive session is authorized. . . .

In Karol v. Board of Education Trustees, 122 Ariz. 95, 593 P.2d 649 (1979), the Supreme Court of Arizona dealt with the problems presented when a public body takes action in a public meeting based on discussions held in prior executive sessions. Regarding the amount of information which must be released in the public meeting, the Court held as follows:

We do not believe, in order to conduct a meeting openly, the public body need disclose every fact, theory, or argument pro or con raised in its deliberations, or every detail of the recommended decision on which a vote is about to occur. On the other hand, we would not find acceptable a public body calling for vote a recommended action designated only by number, thereby effectively hiding its actions from public examination. We believe therefore that the stated intent of the statute requires that all legal actions be preceded both by disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting, and by an indication of what information will be available in the minutes pursuant to A.R.S. § 38-431.01(B) so that the public may, if it desires, discover and investigate further the background or specific facts of the decision.

122 Ariz. at 98 (emphasis in original).

Captain M. L. Risch
August 6, 1985
Page 6

Accordingly, if a report is designated as confidential and is considered in executive session, taking subsequent action based on the contents of a report in a public meeting is proper and does not require public disclosure of the report. The minutes of the public meeting in which legal action is taken on the report would require only a statement of the general nature of the report, what action was taken on the report, and that the report was considered confidential. See, Ariz. Atty. Gen. Op. No. I83-006.

While the public records law does not automatically require the disclosure of a document that has been designated confidential merely because the public body has taken legal action based upon its contents, the law does require a re-examination of the document in light of the legal action taken. As noted in Ariz. Atty. Gen. Op. No. R75-781: "If only a small portion of a record is important and harmful, then that portion alone should be deleted and the remainder released for public inspection. Additionally, a notation should be made in the released information indicating that portions have been deleted." In our opinion, that analysis should be undertaken by the public body with respect to the document in question after legal action has been taken (and the character of the document possibly altered thereby).

Sincerely,



BOB CORBIN
Attorney General

BC:FWS:lfc:tb