COMMONWEALTH of VIRGINIA

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February 5, 2015

The Honorable Jim O'Sullivan
Sheriff, City of Chesapeake
Post Office Box 15125
Chesapeake, Virginia 23328

Dear Sheriff O'Sullivan:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-205 of the *Code of Virginia*.

Issue Presented

You inquire whether adult arrestee photographs - commonly known as "mug shots" - are subject to disclosure under the Virginia Freedom of Information Act ("FOIA")[1] once the prisoner has been released.

Background

You advise that the Chesapeake Sheriff's Office operates the Chesapeake City Jail. One element of jail operation is maintaining a database of information on inmates in an Offender Management System. The database includes mug shots, which are usually taken by your office. The mug shots are maintained indefinitely, and none have been deleted since the system was installed almost ten years ago. They are provided to the Chesapeake Police Department from time to time so that the Police Department may conduct photo lineups and respond to FOIA requests from news media.

Applicable Law and Discussion

The Freedom of Information Act

FOIA "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees . . . ."[2] The primary purpose of the law "is to facilitate openness in the administration of government."[3] To that end, "[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked."[4] Moreover, "[a]ny exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld . . . unless specifically made exempt pursuant to this chapter or other specific provision of law."[5]

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[1] VA. CODE ANN. §§ 2.2-3700 through 2.2-3714 (2014).

[2] VA. CODE ANN. § 2.2-3700(B).

[3] Am. Tradition Inst. v. Rector & Visitors of the Univ. of Va., 287 Va. 330, 339 (2014).

[4] Section 2.2-3700(B).

[5] *Id.*

The requirements of FOIA apply to records maintained by law-enforcement agencies,[6] and photographs fall within the types of records subject to disclosure.[7] An amendment to FOIA adopted by the 2013 General Assembly requires release of "[i]nformation relative to the identity of any individual, other than a juvenile, who is arrested and charged, and the status of the charge or arrest[,]"[8] and it specifically directs that

> All public bodies engaged in criminal law-enforcement activities *shall provide* . . . *[a]dult arrestee photographs* taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation . . . .[9]

Applying the plain language of these FOIA provisions,[10] I conclude that the General Assembly clearly mandated in 2013 that adult mug shots be released upon proper request, subject to the restriction about jeopardizing an investigation. This 2013 amendment does not differentiate between mug shots of prisoners whose cases are pending and mug shots from ended cases.

Criminal History Record Information

In addition to FOIA, laws governing disclosure of criminal history record information must be considered to determine what restrictions, if any, they place on releasing mug shots. Criminal history record information is maintained pursuant to the Criminal Justice Information System (the "CJIS") and the Central Criminal Records Exchange (the "CCRE").[11]

CJIS applies to "original or copied criminal history record information, maintained by a [state or local] criminal justice agency."[12] The term "criminal history record information" is defined in relevant part as "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions. . . ."[13] While mug shots are not specifically mentioned, this definition can reasonably be interpreted to encompass them, for they are "identifiable descriptions" of individuals. Laws concerning the CCRE, discussed below, restrict the release of criminal history record information so that it may be released only to certain authorized persons.[14]

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[6] FOIA applies only to "public bodies." As an "agency" of a "political subdivision of the Commonwealth," the Sheriff's Department of the City of Chesapeake is a public body subject the provisions of FOIA. *See* § 2.2-3701 (defining "public body"); *see also* 2005 Op. Va. Att'y Gen. 13, 16 (noting that a "sheriff's office . . . is also a public body subject to the disclosure requirements of the Act").

[7] *See* § 2.2-3701 (defining "public record" to include recordings that are set down by photography).

[8] Section 2.2-3706(A)(1)(c).

[9] Section 2.2-3706(A)-(A)(1)(b) (emphasis added); 2013 Va. Acts ch. 695.

[10] When statutory language is clear and unambiguous, its plain meaning will be given effect. *See* Brown v. Lukhard, 229 Va. 316, 321 (1985) (citing School Bd. of Chesterfield County v. School Bd. of the City of Richmond, 219 Va. 244, 250 (1978)).

[11] *See* VA. CODE ANN. § 9.1-127 (2012).

[12] Section 9.1-126 (2012).

[13] Section 9.1-101 (Supp. 2014).

[14] *See* VA. CODE ANN. § 19.2-389 (Supp. 2014).

Although the release of criminal history record information is restricted,[15] "nothing contained in this article shall be construed as prohibiting a criminal justice agency from disclosing to the public factual information concerning . . . the apprehension, arrest, release, or prosecution of an individual . . . which is related to the offense for which the individual is currently within the criminal justice system."[16] Mug shots, which fall within the meaning of criminal history record information (*i.e.*, restricted release) also fall within the meaning of the term "factual information concerning . . . arrest" (*i.e.*, unrestricted release).

Criminal history record information is maintained by local law enforcement agencies, and it is also entered into a central database, as set forth in Chapter 23 of Title 19.2. That database, the CCRE, is maintained by the State Police as "the sole criminal record-keeping agency of the Commonwealth."[17] Its duties are "to receive, classify and file criminal history record information as defined in § 9.1-101 and other records required to be reported to it . . . ."[18] For numerous offenses, local law enforcement officers are required to submit to the CCRE arrest information required by the CCRE.[19] As noted above, mug shots reasonably can be deemed to be within the statutory definition of "criminal history record information," and there is also a separate statutory requirement that they be included in the CCRE database.[20] Thus, mug shots are included in the CCRE.

Chapter 23 of Title 19.2 restricts dissemination of criminal history record information. It may be disseminated only to forty-four named requesters. Persons seeking criminal history record information pursuant to FOIA are not authorized requesters or recipients.[21] While mug shots are included in the CCRE database,[22] Chapter 23 explicitly does not preclude a local law enforcement agency "from maintaining its own separate photographic database."[23] I note that the restrictions on releasing CCRE information dates from 2001 or earlier, several years prior to the 2013 FOIA amendment requiring the release of mug shots,[24] which lends support to the conclusion that the FOIA amendment requires the release of mug shots that are in a "separate photographic database."

Your inquiry thus involves the relationship between two competing sections of the *Code of Virginia*. FOIA, as amended in 2013, evinces a clear and unmistakable legislative intent that mug shots must be released to the public upon proper request, without differentiating between active and closed cases. In contrast, laws related to CJIS and CCRE that predate the FOIA amendment evince an equally clear legislative intent that CJIS records, which are maintained in, but not exclusively in, the CCRE, and which include mug shots, be confidential and *not* accessible by the general public. However, this strict mandate against release is tempered by one statutory provision that allows the release of factual

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[15] *Id.*

[16] Section 9.1-126(C).

[17] Section 19.2-387 (2008).

[18] Section 19.2-388 (2008).

[19] Section 19.2-390 (Supp. 2014).

[20] Section 19.2-390(A).

[21] Section 19.2-389.

[22] Section 19.2-392 (2008).

[23] Section 19.2-390(A)(1)(d).

[24] *See* 2001 Va. Acts 844 (amending, upon recodification of Title 9, the predecessor statute to § 9.1-128 to insert current § 9.1-128(A), thereby explicitly applying the restrictions of § 19.2-389 to all "criminal history record information").

information concerning arrests and another statutory provision that allows a local law enforcement agency to maintain its own database of mug shots.

Conflicting laws should be construed "in *pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation."[25]

Exemptions to FOIA must be narrowly construed,[26] and a later enactment is presumed to prevail over an earlier enactment if they are inconsistent.[27] The FOIA amendment explicitly requiring disclosure of mug shots is more recent than the CJIS and CCRE laws requiring the confidentiality of criminal history record information. Further, while CJIS law takes precedence if it conflicts with other laws,[28] CJIS law can be interpreted in such a way that it does not conflict with FOIA.

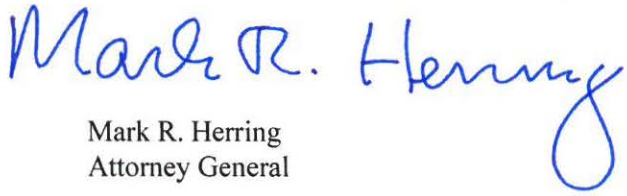
Therefore, reconciling discordant laws in such a way as to make them harmonious and to honor legislative intent, it is my opinion that adult mug shots should be deemed "factual information concerning . . . the apprehension, arrest, release, or prosecution of an individual" and thus subject to release by local law enforcement agencies under FOIA so long as they exist in a photographic database maintained by the local law enforcement agency, and so long as their release will not jeopardize a felony investigation. It is my further opinion that mug shots contained in the CCRE are fully subject to the restrictions against disseminating CCRE information, and those restrictions do not allow mug shots to be drawn from the CCRE pursuant to a FOIA request.

Conclusion

For the foregoing reasons, it is my opinion that local law enforcement agencies must disclose adult arrestee photographs pursuant to a valid FOIA request if they are contained in a database maintained by the local law enforcement agency, regardless of whether the defendant is still incarcerated or has been released, unless disclosing them will jeopardize a felony investigation. However, photographs may not be drawn from the Central Criminal Records Exchange for disclosure at any time to comply with a FOIA request.

With kindest regards, I am

Very truly yours,



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[25] Waller v. Commonwealth, 278 Va. 731, 737 (2009) (internal quotation marks and citations omitted).

[26] Section 2.2-3700(B).

[27] Standard Drug v. General Electric, 202 Va. 367, 378 (1960).

[28] "In the event any provisions of this article conflict with other provisions of law, the provisions of this article shall control. . . ." Section 9.1-137(A) (2012).