LAW ENFORCEMENT INVESTIGATIVE RECORDS
(AND WHY YOU CAN'T GET THEM)

The Sheriff's Office receives dozens of civil subpoenas for records each month. Most of those are submitted by attorneys who have no idea if the Sheriff's Office actually has any relevant records but are simply making the request to ensure that they are making relevant inquiries to protect their clients' interests. Sometime the request is made simply in the hopes of uncovering something interesting that might be used to help induce a settlement. There are times, however, when something in a criminal investigation may be critical to a civil case. It is the practice of the Sheriff's Office to oppose any subpoena for records, and to require that the interested party obtain an order from the Court directing that the Sheriff's Office turn over investigative records.

Section 12-21-3.1 provides (in part) that "[n]either law enforcement investigative reports nor the testimony of law enforcement officers may be subject to a civil or administrative subpoena … ." The statute is not a blanket prohibition to obtaining investigative law enforcement records, but raises the procedural bar to obtaining them. The exception to the bar is that "[n]oncriminal parties may upon proper motion and order from a court of record: Secure photographs, documents and tangible evidence for examination and copying only by order of a court imposing such conditions and qualifications as may be necessary to protect the chain of custody of evidence; or protect the prosecutors', law enforcement officers', or investigators' work product; or to prevent loss or destruction of documents, objects, or evidence. Such discovery order may be issued by a court of record

upon proof by substantial evidence, that the moving party will suffer undue hardship and that the records, photographs or witnesses are unavailable from any other sources."

In criminal cases, the Sheriff's Office is always going to defer to the District Attorney on discovery issues. The Sheriff's Office is not the arbiter of discovery disputes, and will contest an effort to obtain information from their files in a criminal case. Even in civil cases, if a criminal matter is pending, the Sheriff's Office is likely to request that a court not entertain a motion for investigative material. The statute makes clear that discovery orders are disfavored prior to the conclusion of a criminal case.

Two other points need to be made with respect to these investigative files. The first is the fact that these are not "public records" subject to Alabama's Open Records Act. The statute makes clear that "[l]aw enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure." The second, more salient point, is that the statute provides that "[u]nder no circumstance may a party to a civil or administrative proceeding discover material which is not authorized discoverable by a defendant in a criminal matter."

During a criminal investigation, a lot of information is gathered relating to the criminal defendant, the crime victim, and often to tangential actors who happen to have come in contact with either. Much of that information later turns out to have no bearing on the events which led to the investigation, but was gathered in case it might lead to other relevant information. Our understanding of the statute is that this other, tangential

information is not discoverable under any circumstance. As a result, any motion to seek the complete or entire investigative file will be opposed.

The Sheriff's Office, particularly the Violent Crimes Unit, recognizes that the material they obtain during an investigation might have relevance to some civil action later on. This is particularly true of crime scene photos, which are taken contemporaneously with the initial investigation of the incident. However, because the nature of these crimes is so intensely personal, the investigators feel obligated to try to protect the information as much as possible. Not only does this protect the integrity of the investigator's work, but there is a genuine concern that if the information is freely available it might deter some crime victims from coming forward out of fear that their most private information will later be publicly disclosed.

Other than the information gathered at the initial scene of a crime, very little of what is gathered during an investigation is truly unique to the Sheriff's Office. It is certainly more convenient to obtain the witness statements that the investigator took, but it is rarely impossible for a private investigator to obtain similar statements. Similarly, while the investigative report may have the results of chemical analyses, the test results are not generated by the investigators, and are more appropriately obtained from the testing lab. The statute requires that the movant demonstrate a real undue hardship in obtaining equivalent material, not just inconvenience.

In *Ex parte Alabama Dept. of Mental Health and Mental Retardation*, 840 So.2d 675 (Ala. 2002), the Alabama Supreme Court held that a showing of undue hardship requires more than a conclusory statement by the party seeking the information that he or

she could not obtain the equivalent of the information without undue hardship. "Before the trial court could grant Lambert's motion to compel the production of the BSI investigative report, Lambert was required to show that she had at least tried to interview or depose the witnesses interviewed by BSI investigators. Furthermore, before the trial court granted Lambert's motion to compel production of the BSI report, the trial court should have conducted an *in camera* inspection of that report to determine whether the statements contained in the report are relevant and whether the information is such that it cannot be obtained from another source without undue hardship." (*Id*., at 868-869). *See, also, City of Mobile v. Howard*, 59 So.3d 41 (Ala. 2010).

Another subject of frequent subpoenas to the Sheriff's Office involve recordings of 911 calls. The Alabama Legislature has also restricted the release of these recordings. Section 11-98-12 provides (in part) that "an emergency communications district may not release the audio recording of a 911 telephone call except pursuant to a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any person involved in the facts or circumstances relating to the 911 call."

There have been very few cases interpreting this statute, and we have not tested the definitions of some of the terms used in the statute. Digital audio recordings of these calls are retained for many months, but it is our understanding that we can only release them upon a proper order from a court. We do not transcribe the calls, nor do we have the personnel to prepare transcriptions. In order to find any particular recording, the Sheriff's Office will need the approximate time of the call and the general location of the incident

the call concerns. Each of the digital audio recordings is date and time stamped. In association with the call, but separate from it, the Sheriff's Office will usually be able to generate a log of the activity of the officers responding to the incident. This will not be provided unless specifically included in the order from the court. Most requests don't include this, because the recording itself has the time stamp on it, but it might be helpful in establishing what time a particular officer was notified or arrived on the scene.

As most of you know, 911 and Emergency Management are in the process of moving into a new building. That means that we will be in a state of flux for several months. Over the next year, the various agencies will be relocating their dispatching services to a joint facility, in a phased manner. While there will be no disruption in service to the public, this may make it more difficult to obtain recordings. If you are going to be seeking an order for any of these records, but mindful that there may be a delay in getting those.

Ala.Code 1975 § 12-21-3.1

§ 12-21-3.1. Subpoena of law enforcement officers and investigative reports; disposition of criminal matters.

Currentness

(a) Neither law enforcement investigative reports nor the testimony of a law enforcement officer may be subject to a civil or administrative subpoena except as provided in subsection (c).

(b) Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure.

(c) Under no circumstance may a party to a civil or administrative proceeding discover material which is not authorized discoverable by a defendant in a criminal matter. Noncriminal parties may upon proper motion and order from a court of record: Secure photographs, documents and tangible evidence for examination and copying only by order of a court imposing such conditions and qualifications as may be necessary to protect a chain of custody of evidence; or protect the prosecutors', law enforcement officers', or investigators' work product; or to prevent the loss or destruction of documents, objects, or evidence. Such discovery order may be issued by a court of record upon proof by substantial evidence, that the moving party will suffer undue hardship and that the records, photographs or witnesses are unavailable from other reasonable sources.

(d) Discovery orders prior to the disposition of the criminal matter under investigation are not favored and should be granted only upon showing that the party seeking discovery has substantial need of the materials and is unable, without undue hardship, to obtain the substantial equivalent by other means.

(e) Nothing in this section shall preclude the disclosure of investigative reports, including the testimony of law enforcement officers, to a state administrative agency authorized by law to investigate or conduct administrative contested case hearings in any matter related to the suspension, revocation, or restriction of a professional license or registration for the protection of the public health and safety.

(f) For purposes of this section, a criminal matter is disposed of in any of the following ways:

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(1) When the prosecuting authority has presented the matter to a grand jury and a no bill or true bill has been returned.

(2) After a written statement by the chief law enforcement officer of the agency conducting the investigation that the matter under investigation is closed.

(3) When the entity or individual under investigation has been tried and final judgment entered.

Credits

(Act 98-507, p. 1184, §§ 1, 2.)

Notes of Decisions (10)

Ala. Code 1975 § 12-21-3.1, AL ST § 12-21-3.1
Current through Act 2018-124, Act 2018-126 through Act 2018-151, and Act 2018-153 through Act 2018-351

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Code of Alabama
Title 11. Counties and Municipal Corporations. (Refs & Annos)
Subtitle 3. Provisions Applicable to Counties and Municipal Corporations. (Refs & Annos)
Chapter 98. Emergency Telephone Service. (Refs & Annos)

Ala.Code 1975 § 11-98-12

§ 11-98-12. Release of audio recording; public records; transcript.

Currentness

(a) After April 21, 2010, an emergency communications district may not release the audio recording of a 911 telephone call except pursuant to a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any person involved in the facts or circumstances relating to the 911 call. This section shall not apply to law enforcement personnel conducting an investigation where the 911 telephone call is or may be relevant to the investigation.

(b) An audio recording may be released without a court order to the caller whose voice is on the 911 audio recording or, in the event that the caller is deceased or incapacitated, to the legal representative of the caller or the caller's estate, provided the person seeking the 911 audio recording submits a sworn affidavit to include sufficient information so that the emergency communications district director may verify the statements which attest to the following facts:

(1) That the person signing the affidavit is the caller or that the caller is deceased or incapacitated and the person signing the affidavit is the legal representative of the caller or the caller's estate.

(2) That release of the 911 audio recording is pertinent to the investigation of a legal matter resulting from the events necessitating the making of the 911 call at issue.

(c) Notwithstanding subsection (a), any written or electronic record detailing the circumstances, response, or other events related to a 911 call which is kept by the emergency communications district in its regular course of business shall be deemed a public writing under Section 36-12-40, and subject to public inspection as otherwise provided by law.

(d) Upon payment of a reasonable fee, not to exceed the actual cost of transcription, an emergency communications district shall provide a transcript of any requested audio recording of a 911 telephone call which is retained by the emergency communications district.

Credits

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(Act 2010-502, p. 806, § 1.)

Ala. Code 1975 § 11-98-12, AL ST § 11-98-12
Current through Act 2018-124, Act 2018-126 through Act 2018-151, and Act 2018-153 through Act 2018-351

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