

Opinion No. 2013-147

March 10, 2014

The Honorable Uvalde Lindsey
State Senator
2257 Gentle Oaks Lane
Fayetteville, Arkansas 72703

Dear Senator Lindsey:

This is in response to your request for my opinion on a question arising from the following reported background facts:

Washington County implemented 911 services, pursuant to A.C.A. § 12-10-301 *et seq.*, approximately twenty years ago. A question has arisen as to who has the authority to release 911 recordings. There are five PSAP (public safety answering points) in Washington County, one of which is located at the Sheriff's office. It appears all of these PSAPs also fall within the definition of "911 public safety communication centers."

Against this backdrop, you ask:

Must all requests for release of 911 recordings be authorized by the Director of Emergency and 911 Services, [who is] an employee of the County Judge, or does each individual PSAP, particularly the Sheriff, have the authority to release such information?

RESPONSE

In my opinion, the release of 911 recordings is within the authority of the head of each agency (or his or her designee) that operates a 911 public safety communications center in Washington County. I believe each such agency head could agree to coordinate requests for 911 recordings through the Washington

County's Director of Emergency and 911 Services (assuming compliance is otherwise had with the Arkansas Freedom of Information Act). But in my opinion, there is no basis in state law for requiring such a procedure.

DISCUSSION

The Arkansas Public Safety Communications Act of 1985 ("911 Act" or "the Act," A.C.A. §§ 12-10-301 – 324) does not address the matter of the release of 911 recordings.¹ Generally, however, such recordings are subject to inspection and copying under the Arkansas Freedom of Information Act (FOIA).² The FOIA states that "[a] citizen may make a request to the custodian to inspect, copy, or receive copies of public records."³ The "custodian" is defined as "the person having administrative control of that record."⁴

For the reasons explained below, it is my opinion that the head of the agency that operates a 911 public safety communications center (the "operating agency"), or his or her designee, is the person having administrative control of 911 recordings for purposes of being the custodian of those records under the FOIA. Some discussion of the 911 Act is necessary to fully explain this response.

This Act provides for the establishment and operation of emergency dispatching systems by the state's political subdivisions. The chief executive of the political subdivision is authorized to "direct establishment and operation of 911 public safety communications centers," and "designate the location of the center and agency which is to operate the center."⁵ This latter agency is called the "operating agency," which is defined as "the public safety agency authorized and designated by the chief executive of the political subdivision to operate a 911 public safety

¹ As discussed further below, such recordings must be made maintained pursuant to A.C.A. § 12-10-310 (Repl. 2009).

² Op. Att'y Gen. Nos. 2003-043, 95-018, 94-100, 93-126, 90-236.

³ A.C.A. § 25-19-105(a)(2)(A) (Supp. 2013).

⁴ A.C.A. § 25-19-103(1)(A) (Supp. 2013).

⁵ A.C.A. § 12-10-302(e)(2) (Repl. 2009). *See also* A.C.A. § 12-10-304(a) (Repl. 2009) ("The chief executive of each political subdivision shall determine if a 911 public safety communications center should be created and, if such a center is created, will designate the operating agency for the political subdivision.").

communications center.”⁶ “Operating agencies” are limited to “offices of emergency services, fire departments, and law enforcement agencies of the political subdivisions.”⁷

The Act defines “911 public safety communications center” (hereinafter “911 Center”) as follows:

“911 public safety communications center” means the communications center operated on a twenty-four (24) hour basis by one (1) of the operating agencies defined by this subchapter and as designated by the chief executive of the political subdivision which includes the [PSAP] and dispatches one (1) or more public safety agencies.⁸

It is clear from this definition that each 911 Center includes the PSAP,⁹ the latter being the “location at which 911 calls are initially answered.”¹⁰ I assume this is why you report that all the PSAPs in Washington County also fall within the definition of 911 public safety communication centers.¹¹ The 911 Act speaks in terms of the operation of the 911 Centers, but those operations necessarily include the PSAPs.¹²

⁶ A.C.A. § 12-10-303(16)(A) (Supp. 2013).

⁷ *Id.* at (B). The concurrence of the county sheriff is required if he or she is to be designated to operate a 911 communications center. A.C.A. § 12-10-302(e)(2). *See* Op. Att’y Gen. 2000-321 (noting that the Communications Act “requires the concurrence of the sheriff if he or she is named to operate the system.”)

⁸ A.C.A. § 12-10-303(13) (Supp. 2013).

⁹ *See also* A.C.A. § 12-10-304(c) (Repl. 2009) (“The 911 public safety communications center shall be the public safety answering point of the political subdivision....”).

¹⁰ *Id.* at (20).

¹¹ You have stated that there are five PSAPs in Washington County, one of which is located at the Sheriff’s office. You have not identified the other PSAP locations, but I assume they fall under the above definition of “operating agencies.” I further assume that the Judge of Washington County designated the operating agencies in this case, given that the 911 system in question is a county system, and the County Judge is the “chief executive” of the political subdivision. A.C.A. §§ 12-10-302 and -304 (*supra* n. 8); Ark. Const. amend. 55, § 3.

¹² A 911 center is the PSAP for public and private safety agencies that are dispatched in response to 911 emergency calls. *See* A.C.A. § 12-10-323(a)(1)(F) (authorizing the use of 911 revenues for 911 communications center operations “for the purpose of coordinating or forwarding calls, dispatch, or

With regard to your specific question concerning 911 recordings, the 911 Act requires that 911 calls received at each PSAP must be recorded and retained for at least thirty-one days.¹³ The record must include the date and time of the call, the nature of the problem, and the action taken.¹⁴ The Act does not address the public release of 911 recordings.¹⁵ That is a matter governed by the FOIA, in my opinion. Accordingly, the answer to the question you have posed depends upon which officer or employee has “administrative control” sufficient to render that person a “custodian” for purposes of the FOIA.¹⁶ The FOIA does not define the term “administrative control.” However, the Arkansas Supreme Court has approved the following characterization of the term: “... one who has administrative control is that public official or employee who is charged with the *responsibility to manage or execute the public affairs or conduct of their office, department or agency.*”¹⁷

In my opinion, the relevant agency for purposes of the FOIA is the operating agency. That agency, by definition under the 911 Act, is responsible for operating the 911 Center. And the 911 Center, which includes the PSAP where calls are initially answered, is responsible for ensuring that the 911 calls are properly recorded and retained. Responsibility for those calls is thus squarely within the operating agency’s purview. It reasonably follows that the person responsible for managing the operating agency (either the head of the agency or his or her designee) is the person having administrative control of those recordings, and hence the custodian for purposes of the FOIA.

recordkeeping of public safety and private safety agencies for which the 911 public safety communication center is the [PSAP]....”).

¹³ A.C.A. § 12-10-310(a) and (b) (Repl. 2009) (“The 911 public safety communications center shall develop and maintain a system for recording 911 calls received at the [PSAP].”).

¹⁴ *Id.* at (b).

¹⁵ It does require, however, the release of “any information in [the 911 center staff’s or supervisor’s] custody or control” to a prosecuting attorney in compliance with a subpoena. A.C.A. § 12-10-306 (Repl. 2009).

¹⁶ A.C.A. § 25-19-103(1)(A) (provision in FOIA defining “custodian”).

¹⁷ *Fox v. Perroni*, 358 Ark. 251, 263, 188 S.W.2d 881 (2004) (emphasis added). In *Fox*, the court held that a circuit judge was the “public official charged with the responsibility of managing the affairs and conduct of his office” and thus was the custodian of a check written by his law clerk. *Id.* at 264.

In response to your specific question, I find no basis in either the 911 Act or the FOIA for requiring that all requests for the release of 911 recordings be authorized by Washington County's Director of Emergency and 911 Services (hereinafter "Director"). I assume the Director was appointed by the County Judge as the "emergency management coordinator," pursuant to the Arkansas Emergency Services Act of 1973 (A.C.A. § 12-75-101 *et seq.*).¹⁸ In that position, he acts for and on behalf of the County Judge "to manage and coordinate the functions, duties, and activities of the established local office of emergency management."¹⁹ The latter office performs or coordinates functions as necessary for response to, and recovery from, disasters and major emergency occurrences, and for the operation of public safety information networks.²⁰

The contingencies addressed by the Emergency Services Act are plainly distinct from the emergency aid that is the focus of the 911 Act. The Director consequently would appear to have no supervisory or operational authority over Washington County's 911 operating agencies by virtue of his position as coordinator under the Emergency Services Act.²¹

I have also considered whether the Director's authorization for the release of 911 recordings might be required by virtue of some assignment of authority from the County Judge. The Director serves under the County Judge's "direction and

¹⁸ A.C.A. § 12-75-118(i)(1)(A). I note that pursuant to Act 165 of 2009, the term "management" was substituted for "services" throughout the various provisions of the Emergency Services Act.

¹⁹ *Id.* at (C).

²⁰ A.C.A. § 12-75-118(a)(2) (Supp. 2013). The term "information networks" has reference to the information systems established by the Arkansas Department of Emergency Management, which, at a minimum, include "voice and data links" with federal and state agencies, other states, and local offices of emergency management. A.C.A. § 12-75-112(a) (Supp. 2013). The local offices must operate and maintain a link to these systems. A.C.A. § 12-75-118(j)(1).

²¹ I note that under the Emergency Services Act, a local office of emergency management may be authorized by the political subdivision's chief executive to operate a public safety communications center for the purposes of dispatch for law enforcement, fire, or emergency medical services. *Id.* at (2). This is consistent with the 911 Act which, as noted above, limits "operating agencies" to "offices of emergency services, fire departments, and law enforcement agencies...." A.C.A. § 12-10-303(16)(B). It thus seems that a coordinator of emergency services might also serve as the head of a 911 operating agency, in which case the coordinator would, in my opinion, be the custodian of 911 calls received at that 911 Center's PSAP. According to my understanding, however, Washington County's local office of emergency management is not a 911 Center.

control,”²² and it appears that the County Judge has some degree of authority over Washington County’s 911 Centers.²³ The precise nature and extent of that authority is not specified, but presumably it includes ensuring that the 911 system is properly established and operating, and that any specific requirements of the Act are met.²⁴ This would seemingly include the requirement that 911 calls be recorded and retained. But the County Judge is not charged with primary duties or responsibility in that regard. Rather, it clearly falls to the 911 Center – and hence the operating agency – to develop and maintain a system for those recordings. I believe it reasonably follows that the administrator of the 911 Center has administrative control of the 911 recordings for purposes of the FOIA, and that neither the County Judge nor his appointee has authority over the recordings’ release in response to FOIA requests.

While I thus conclude that the release of 911 recordings is within the authority of the head of the operating agency, or his or her designee, I will note that I see no obstacle to each agency head agreeing to coordinate requests for 911 recordings through the Washington County’s Director of Emergency and 911 Services. One important caveat attends this observation, however. Any such agreement or procedure in this respect may not in any fashion constrict rights granted by the FOIA.²⁵

²² A.C.A. § 12-75-118(a)(2).

²³ A.C.A. § 12-10-306(a)(4) (“The staff and supervisors of the 911 public safety communications center and systems shall be ... [s]ubject to the authority of the [County Judge] through their agency.”).

²⁴ *Accord* Op. Att’y Gen. 89-377 (opining that the chief executive is responsible for oversight and enforcement of the requirement in A.C.A. § 12-10-309 that each 911 Center be equipped with a system for processing requests from persons who are speech-impaired and hearing-impaired).

²⁵ *See* Op. Att’y Gen. 94-225 (citing John J. Watkins, *The Arkansas Freedom of Information Act* 158 (2d ed. 1994), in support of agencies adopting policies regarding FOIA requests, and Op. Att’y Gen. 94-225, which opined that a standard so-called “three-day policy” for responding to FOIA requests would be contrary to the FOIA, but that an agency could develop an administrative policy requiring the review of requests by the agency’s legal counsel, so long as the custodian complies with the FOIA “in an orderly fashion.”).

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Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion,
which I hereby approve.

Sincerely,

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Attorney General

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