
Coates' Canons Blog: Are Mug Shots Public Records?

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This may seem like a silly question. Mug shots (more formally, “booking photographs”) are everywhere, posted for free, searchable on line, sold in magazines at convenience stores, and regularly provided by law enforcement agencies. I never considered the question of whether North Carolina law enforcement agencies could withhold mug shots until a lawyer at the North Carolina Justice Center asked me to look at an analysis he prepared, arguing that mug shots are not subject to public access. There is no North Carolina case on this point, but now that I have looked into it, I believe that mug shots are criminal investigation records and that local law enforcement agencies have the authority to deny access to them. I’m not arguing that agencies *should* deny access, but I think it’s important for public agencies to understand that they can. I also think agencies have the authority to release some photographs and not others, if there is a legitimate law enforcement purpose for doing so.

As I’ve discussed in this post, records made or received in the transaction of public business are subject to public access under our broad public records law, unless an exception allows or requires the public agency to deny access. A broad exception, G.S. 132-1.4, allows (but does not require) law enforcement agencies to withhold records of criminal investigations and records of criminal intelligence information. Criminal investigation records include all records “compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements.” GS. 132-1.4(b)(1).

Although it might be possible to argue the point, it seems to me that mug shots meet the definition of “criminal investigation records.” Arguments to the contrary are that the photograph is not obtained for the purpose of solving or preventing crimes – after all, at that point, a crime has already been committed and presumptively solved. Perhaps the photographs are “jail records” or “booking records” that document the results of law enforcement efforts, rather than constituting records of the efforts themselves. These are reasonable points, but upon review of the statute and case law, I don’t find them to be persuasive.

Law enforcement agencies use mug shots to solve crimes in many ways following the initial booking of a person who is alleged to have committed a crime. First of all, the person photographed has not yet been convicted. The law enforcement agency may still have to strengthen its case. Law enforcement agencies may also use the photographs to identify witnesses to or collaborators in the alleged crime. Mug shots may serve as a deterrent to future criminal activity by the suspect and others, and may be used to prevent or solve a future crime committed by the same person.

A review of the whole statute also suggests that mug shots are a type of record that is within the scope of the exception. Subsection (c) of the statute lists information that is subject to public access. This list creates an exception to the criminal records exception. Mug shots are not on the list of information that must be released to the public, but that list includes types of information that are similar to mug shots. Subsection (c)(2), for example, includes the name, sex, age, address, and employment of a person arrested, charged, or indicted. This information seems akin to a photograph in the sense that it simply documents information about the person. David Lawrence notes in his book on North Carolina’s Public Records law that “the listing of investigative material that is public also offers assistance in determining the kinds of records that are excluded from public access by the statute.” He also includes mug shots as an example of records that have been held to be law enforcement records under comparable statutes in other states. See, Lawrence, *Public Records Law For North Carolina Local Governments*, p. 199. Since mug shots are similar to things that are listed as law enforcement records, but are not on the list of such records that must be made public, I conclude that they are law enforcement records that are within the exception and need not be made public.

Cases decided under the federal Freedom of Information Act (FOIA) have consistently held that mug shots are law enforcement records. For example, in *World Publishing Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012), a

federal appeals court held that booking photos of pretrial detainees fall within the section 7(C) exception in FOIA for “records or information compiled for law enforcement purposes.” In *Times Picayune Publishing Corp. v. U.S. Dep’t of Justice*, 37 F.Supp.2d 472, (E.D. La. 1999), a federal district court held that the booking photographs of a well-known businessman were law enforcement records even though the suspect had pleaded guilty and been sentenced. The processing of individuals charged with federal crimes, the court held, is clearly a law enforcement function.

I reviewed the legal issue of whether mug shots *may* be withheld from public access, but I haven’t studied the policy issue of whether they *should* be withheld. In doing research on the legal issue, I noted that there is significant case law about the admissibility of mug shots in criminal trials, which reflects their potential to be prejudicial to the defendant. And under the federal FOIA exception, law enforcement records may be withheld only if their release “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” It appears that the stigma associated with mug shots has generally satisfied the test under the exception. [The Sixth Circuit, in *Detroit Free Press, Inc. v. Dep’t of Justice*, 73 F.3d 93, 97 (6th Cir.1996) has held to the contrary, in a case involving defendants whose names had already been divulged and who had already appeared in open court.]

Businesses, public access advocates, and some law enforcement agencies, which regularly make mug shots widely available, argue that it helps solve crimes, provides transparency, and operates as a deterrent. For example, in support of proposed legislation that would guarantee public access to mug shots, the company mugshot.com says:

Public access to mugshots is undoubtedly in the public interest. Publishing mugshots helps avoid confusion and misidentification of who has been arrested, alerts residents to who is living in their community, helps law enforcement keep people safe, and helps hold government accountable.

Press organizations also advocate for public access, recently urging a probe of the United States Department of Justice policy of denying access under the 7(C) FOIA exception.

Yet another dimension of the issue arises when companies who publish mug shots also provide the service of removal, for a fee. Concerns about this practice are discussed in a *Wired* article here. These concerns are part of a broader discussion about the extent to which private companies should be allowed to use public information for profit. As to records that are clearly public, however, North Carolina’s statute does not allow consideration of privacy concerns, and prohibits a public agency from requiring a person to disclose the purpose or motivation behind a request for public records.

This brings me to a few final questions for law enforcement agencies to consider. If mug shots are indeed law enforcement records, agencies are allowed, but not required, to withhold them from public access. Could an agency decide to release them only selectively, on a case-by-case basis? And could an agency release them only for certain uses, for example, for media use but not commercial use for mass release?

I think a law enforcement agency may selectively release some mug shots and withhold others for reasonable, law enforcement purposes. An agency may certainly face pressure to release mug shots for other reasons, for example, in high profile arrests, but I’m not aware of any limitation on the agency’s discretion to refuse to release records when it has no law enforcement reason for doing so. Lawrence notes, in his public records book, that courts have imposed liability for selective release of records that are not open to public access, but the cases cited involve invasion of privacy and tort liability based on the impact of the release on individuals who were the subject of the records. See, *Public Records Law* at p. 110-111. Agencies should be careful to consider these interests in making decisions about whether and when to release specific mug shots.

Selective release of particular records to some members of the public but not others is probably not allowed under our statutory scheme. Given the strong policy of open access, and the prohibition on consideration of purpose or motive, I would be wary of a policy that allows release of the same material to one requester and denies it to another. Cases have held that a public agency waives its ability to withhold a record from public access if the record is released to some but not all members of the public. See, *City of Riverdale, v. Diercks*, 806 N.W.2d 643,658 (Iowa 2011)(“It is untenable for Riverdale to play the video for a reporter covering the dispute between the parties and yet withhold the same video from the defendants who requested it...It is axiomatic that disclosure to a third party waives confidentiality.”)

Law enforcement agencies have choices. They may routinely release all mug shots, they may release none, or they may choose to release some, when necessary or appropriate for law enforcement purposes. Agencies that wish to release



some but not all mug shots should develop a policy outlining the justifications for withholding or releasing them.

Links

- canons.sog.unc.edu/?p=2592
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=132-1.4
- www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition
- mugshots.com/Blog/MUGSHOTS-COMS-RESPONSE-TO-NEW-JERSEY-BILL-A-4083.57907981.html
- www.rcfp.org/reporters-committee-asks-senate-judiciary-committee-probe-justice-departments-mug-shots-policy
- www.wired.com/threatlevel/2011/08/mugshots/