



Maricopa County Attorney

BILL MONTGOMERY

301 WEST JEFFERSON STREET, SUITE 800
PHOENIX, ARIZONA 85003
WWW.MARICOPACOUNTYATTORNEY.ORG

PH. (602) 506-1260
TDD (602) 506-4352
FAX (602) 506-8102

May 8, 2018

This letter addresses several areas of concern related to the release of evidence in an ongoing criminal investigation pursuant to a public records request (PRR), the possibility of a legitimate law enforcement purpose to release specific evidence in the absence of a PRR, and the consequences of an unauthorized release of evidence.

Background

Decisions regarding the release of evidence in a pending criminal investigation begin with our mutual duty and obligation to protect the Due Process rights of an accused, as well as the rights of a victim of a crime to justice and due process under the Arizona Constitution's Crime Victims' Bill of Rights. Accounting for the implication of statutes concerning the release of public records, which this evidence clearly falls within, is another ever present factor along with explicit restrictions on the release of certain types of information under Arizona law. Prosecutors must also take into account specific restrictions on the release of information under the Rules of Professional Conduct set forth at ERs 3.6 and 3.8.

Arizona laws specifically restricting the release of information provide:

A.R.S. § 39-121.04. Public access to law enforcement records depicting certain witnesses or crime victims; victim rights.

A. In a special action brought pursuant to this article for the release of any record created or received by or in the possession of a law enforcement or prosecution agency that relates to a criminal investigation or prosecution and that visually depicts the image of a witness under eighteen years of age or a victim as defined in § 13-4401, the petitioner shall establish that the public's interest in disclosure outweighs the witness's or victim's right to privacy.

B. A victim whose image is depicted in a record described in subsection A of this section has the right to be present at and to be heard in any action brought pursuant to this article for the release of records described in subsection A of this section.

A.R.S. § 39-123.01. Personal identifying information of crime witnesses; confidentiality; definition

A. The personal identifying information of a witness to a crime contained in a record that is created or received by a law enforcement or prosecution agency and that is related to a criminal investigation or

prosecution may not be disclosed by a public body pursuant to this article unless any of the following applies:

1. The witness consents in writing to the disclosure.
2. A court of competent jurisdiction orders the disclosure.
3. The witness's address is the location where the crime occurred.

A.R.S. § 39-124. Releasing information identifying an eligible person; violations; classification; definitions

A. Any person who is employed by a state or local government entity and who, in violation of § 39-123, knowingly releases the home address or home telephone number of an eligible person with the intent to hinder an investigation, cause physical injury to an eligible person or the eligible person's immediate family or cause damage to the property of an eligible person or the eligible person's immediate family is guilty of a class 6 felony.

C. For the purposes of this section:

...

4. "Eligible person" means a . . . peace officer, spouse of a peace officer, spouse or minor child of a deceased peace officer, . . . **person who is protected under an order of protection or injunction against harassment, . . . victim of domestic violence or stalking who is protected under an order of protection or injunction against harassment.**

With respect to the ethical considerations involved in analyzing the release of evidence pursuant to a PRR, ER 3.6 provides at the outset that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." ER 3.6.a. Comments to ER 3.6 call out for special discussion the nature of criminal proceedings and identify certain subjects, such as "the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented", ER 3.6, Comment 5.2, that "are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration." ER 3.6, Comment 5.

In addition to the general prohibitions of pretrial publicity covered by E.R. 3.6, E.R. 3.8 goes even further in prohibiting communications and extends the duty beyond just the prosecutor:

[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and *exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the*

prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

ER 3.8.f.

Comment 5 of ER 3.8 further states:

Paragraph (f) supplements ER 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with ER 3.6 (b) or (c).

Care, therefore, must be taken to assess the nature of the evidence requested and the impact, potential or otherwise, to the release of the evidence on the Due Process rights of all involved.

Process for Review

The following process has been in effect, though not having been reduced to writing, for at least the last three years, enabling MCAO and LEAs to review a PRR and the evidence requested and assess how best to address the PRR and safeguard the integrity of an ongoing investigation, charging review, and subsequent prosecution.

1. Upon receipt of a PRR for evidence in an ongoing criminal investigation, the investigating LEA contacts the MCAO Law Enforcement Liaison and/or the assigned Deputy County Attorney, if known.
2. In the event that a fair and full review of the PRR and applicable legal and ethical requirements does not permit release of the requested evidence, the requesting media outlet is notified that the evidence cannot be released. If possible, MCAO will work with the LEA to secure a protective order from the Court. Should the media outlet file a lawsuit and seek judicial review, MCAO will indemnify the investigating LEA for fees and costs awarded by a Court for not releasing the evidence.
3. If there is a legitimate law enforcement purpose to releasing video evidence in response to a PRR, MCAO will work with the investigating LEA to identify what could be released and in what form that would satisfy the PRR request while maintaining fidelity to the legal and ethical requirements involved.

Release in absence of a PRR

Recognizing there may be instances in which a release of evidence may further a legitimate law enforcement purpose, MCAO will work with the LEA to identify what may be released and in what manner to accomplish the law enforcement purpose and also abide by applicable legal and ethical requirements. Specific examples could include efforts to prevent imminent civil unrest or

the need to clarify or correct false or misleading information that has been broadcast through traditional media or social media platforms. With respect to video evidence, steps could include release of a transcript detailing what the video shows, release of portions of video to address specific concerns, or permitting a select group of community representatives to review a specific portion of video.

Unauthorized release of evidence

If evidence is released contrary to this process for reviewing a PRR or contrary to an agreed upon release pursuant to an otherwise legitimate law enforcement purpose, MCAO will take steps to establish a clear record that it “exercis[ed] reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule. “ E.R. 3.8.f. MCAO will notify counsel for a suspect or defendant, any victim or their designated representative or next of kin, and, if applicable, the court. Additionally, in the event of litigation over a change of venue arising from the unauthorized release of evidence and any subsequent cost due to a change of venue, MCAO will seek recoupment of those costs from the investigating LEA.

The desires of the public and media to view firsthand evidence of criminal conduct, particularly video evidence, will remain unabated. Equally so is our continuing duty to protect the rights of the accused, any victim, and the integrity of a criminal investigation and prosecution. Our criminal justice system deserves no less to maintain our community’s trust and confidence.