

PLEASE BE AWARE

This publication was updated with a supplement in 2008. The supplement contains amendments to the code sections in this volume and more recent cases and Attorney General's opinions interpreting the code sections contained in this volume. The supplement must also be consulted when using this volume.

FREEDOM OF INFORMATION HANDBOOK

**FOR
COUNTY GOVERNMENT
2006 Edition**



**Published by
South Carolina
Association of Counties**

WHAT IS THE SOUTH CAROLINA ASSOCIATION OF COUNTIES?

The South Carolina Association of Counties, chartered on June 22, 1967, is the only organization dedicated to statewide representation and improvement of county government in South Carolina. A non-partisan, non-profit organization with a full time staff in Columbia, it represents county governments, not county employees. The Association is governed by a 29-member Board, which is selected by county officials at the annual conference.

PURPOSE:

- To promote more efficient county governments;
- To study, discuss and recommend improvements in government;
- To investigate and provide means for the exchange of ideas and experiences between county officials;
- To promote and encourage education of county officials;
- To collect, analyze and distribute information about county government;
- To cooperate with other organizations;
- To promote legislation which supports efficient administration of local government in South Carolina.

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WHAT SERVICES DOES THE SOUTH CAROLINA ASSOCIATION OF COUNTIES PROVIDE ITS MEMBERS?

LEGISLATIVE INFORMATION

The South Carolina General Assembly convenes each January in Columbia and adjourns sine die in June. During that six-month period, approximately one in every four bills introduced affects county government operations. The SCAC monitors each bill as it is introduced, keeping its membership up-to-date on all legislative activity with a weekly legislative overview known as the Friday Report. The Association also distributes Legislative Alerts when necessary to notify the membership of imminent action on crucial bills.

MEETINGS

Annual Conference - Held in late summer, this conference is open to all elected and appointed officials. The conference includes a business session, general session, workshops, group meetings, and exhibits of county products and services.

Legislative Conference - Held in December, this conference allows members of the Legislative Committee to discuss and adopt a legislative program for the upcoming year. The committee is made up of the council chairman from each county along with the Association's Board of Directors.

Mid-Year Conference - Held in late winter in Columbia, this conference enables all county officials to become better informed about the Association's legislative program. The Association also hosts a reception for all members of the legislature during this conference.

County Council Coalition - Held in October: Coalition reviews and discusses initial draft of the policy positions by the Association's four policy steering committees. The input by the County Council Coalition will be incorporated into the policy position papers by the steering groups when they meet in November. These recommendations will be taken to the Legislative Conference for action.

Steering Committees - SCAC's four Steering Committees meet in September and November to discuss legislative policy to recommend to the Legislative Committee.

RESEARCH

SCAC provides technical assistance in many areas to those counties which request it. The Association develops technical research bulletins and conducts surveys on a variety of subjects on an as-needed basis. Regular publications such as the Annual Wage and Salary Report, Legislative Review, Home Rule Handbook, Revenue Resources, Acts Affecting Counties, Case Law Affecting Counties and Handbook for South Carolina County Officials are made available to county officials.

PUBLICATIONS

Each year, the SCAC publishes a Directory of County Officials which lists addresses and telephone numbers of all elected and many appointed county officials in each of the state's 46 counties. Specific information is also provided on each county such as form of government, method of election and population. The SCAC publishes Carolina Counties newsletter five times per year (four times when the General Assembly is in session) to keep the Association's membership informed concerning legislative matters. The newsletter includes news items of interest to county officials and county governments. In 1990, the SCAC introduced County Focus Magazine. This quarterly provides in-depth feature articles on subjects of interest to county officials and includes a section called "County Update," which describes what's happening in South Carolina's counties.

EDUCATION

In August 1989, the SCAC, in cooperation with the Institute of Public Affairs at the University of South Carolina and The Strom Thurmond Institute at Clemson University, established the Institute of Government for County Officials. This certificate program provides county officials the opportunity to enhance their skills and abilities so that they can function more effectively. Level II was added in August 1992, and the Advanced Institute was added in August 1994. Also, the SCAC, in cooperation with the South Carolina Education Television Network, sponsors periodic teleconference training opportunities for county officials such as land use planning certification courses. In addition, SCAC has prepared an educational video for the General Assembly and the public, entitled South Carolina Counties: Government that Works!

LEGAL ASSISTANCE

SCAC provides legal assistance to county governments by helping county attorneys in rendering legal opinions, preparing amicus briefs, drafting ordinances, and consulting with county attorneys and other county officials. The SCAC Legal Assistance Program, coordinated through the Legal Advisory Committee, provides special assistance to a county involved in litigation which may impact other counties. In addition, the Association annually sponsors the South Carolina Local Government Attorneys' Institute, which provides six hours of C.L.E. credit in local government law for county attorneys.

FINANCIAL SERVICES

The SCAC offers a number of financial services to its member counties. SCAC sponsors two self-funded insurance trusts, designed specifically to meet the needs and requirements of local government agencies, including the Workers' Compensation Trust and the Property and Liability Trust. The Trusts Risk Management staff conducts numerous seminars, safety audits, and other activities designed to reduce the probability of accidents and liability exposure for members. And, in cooperation with the National Association of Counties Financial Services Center, SCAC is now offering purchase cooperative agreements with several companies.

SETOFF DEBT COLLECTION

The **Setoff Debt Collection Act**, Chapter 56 of Title 12 of the South Carolina Code (1976), authorizes local governments to participate in the state's Setoff Debt Collection Program. In this program, counties submit delinquent debts for possible matches against state income tax refunds due their debtors. The SCAC acts as a clearinghouse between county governments and the S.C. Department of Revenue for the processing of these debts. Monies, which otherwise would have gone uncollected, are returned to the counties this way.

TABLE OF CONTENTS

Preface	i
Practice Pointers	ii
Exceptions from FOIA	iii
Balancing FOIA and the Public Records Law	iii
Responding to a FOIA Request	iv
FREEDOM OF INFORMATION ACT	1
§30-4-10. Short title	1
§30-4-15. Findings and purpose	1
§30-4-20. Definitions	3
§30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice	14
§30-4-40. Matters exempt from disclosure	21
§30-4-45. Information which could increase the risk of acts of terrorism	42
§30-4-50. Certain matters declared public information; use of information for commercial solicitation prohibited	43
§30-4-55. Public bodies to disclose economic incentives upon request	47
§30-4-60. Meetings of public bodies shall be open	47
§30-4-65. Governors cabinet meetings subject to open meeting requirement	50
§30-4-70. Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly	51
§30-4-80. Notice of meetings of public bodies	60
§30-4-90. Minutes of meetings of public bodies	63
§30-4-100. Injunctive relief; costs and attorney's fees	65

TABLE OF CONTENTS CONTINUED

§30-4-110.	Penalties	67
§30-4-160.	Sale of Social Security number or driver’s license photograph or signature	67
§30-4-165.	Privacy of driver’s license information	68
APPENDIX	69
§4-9-110.	Council shall select chairman and other officers; terms of office; appointment of clerk; frequency and conduct of meetings; minutes of proceedings	69
§4-9-130.	Public hearings on notice must be held in certain instances; adoption of standard codes or technical regulations and furnishing copies thereof; emergency ordinances ...	69
§6-1-80.	Budget adoption	71
§6-1-120.	Confidentiality of county or municipal taxpayer information	72
§6-1-330.	Local fee imposition limitations	73
§8-13-700.	Use of official position or office for financial gain; disclosure of potential conflict of interest	74
§30-2-10.	The Family Privacy Protection Act of 2002	76

PREFACE

This handbook contains a complete text of the South Carolina Freedom of Information Act, FOIA, appearing at Section 30-4-10, *et seq.*.

This publication is not designed or intended to be the final word on FOIA. The statutes, practice pointers, case notes and summaries of Attorney General's opinions are not a complete source of the law. Because the Act continues to evolve through legislative amendment including substantial revisions in 1978, 1985, 1987 and 1998, we have included "editor's notes" after some Attorney General's Opinions and case notes. For these reasons, it is important to consult your county attorney when you have a question regarding the application of the law to a particular set of facts.

This publication is intended to give you a readily available reference book with which to begin your research. Should you need additional assistance, the South Carolina Association of Counties' staff is available to help all county officials and employees. Whether your question involves a matter requiring the interpretation of law, obtaining information and data from other counties, or proposed legislation, the Association's staff is available to serve you. Please call, write or e-mail the Association at the numbers and addresses included in this handbook.

PRACTICE POINTERS

In addition to this practice pointer, a practice pointer appears after each statute. The practice pointers are comments written to provide guidance about some of the basic rules concerning FOIA and address some of the most commonly asked questions about the application of FOIA. The practice pointers are written without resort to legalisms and err on the side of disclosure in accordance with the recommendations from the Attorney General's Office stating:

When in doubt, disclose.
When in doubt, post the meeting.
When in doubt, open the meeting.
When in doubt, release the document.¹

However, there are exceptions to FOIA in other parts of the South Carolina law. Other laws may embellish or supersede FOIA in particular situations. For example, while council meetings are subject to FOIA in general, there is a special statute applicable to council meetings found at §4-9-130. And, when adopting the county budget, §6-1-80 supersedes FOIA concerning the public notice requirements. These statutes are reprinted in the Appendix.

The Federal Privacy Act of 1974, 5 U.S.C. §552a (note)², provides that a local, state, or federal government agency cannot require an individual to submit a social security number unless (1) the records system for which the social security number is being solicited antedated 1975 or (2) the entity has received specific permission from Congress to require submission of a social security number. If neither of those two conditions are satisfied, then the entity may still request that an individual submit his or her social security number voluntarily. In either case, a requirement of or request for the number, the agency must fully disclose what use will be made of the number.

Notwithstanding the Federal Privacy Act, federal, state and local government agencies may require

¹ Letter from the Honorable Charles W. Condon, South Carolina Attorney General, to the S.C. Press Association, undated.

² This provision of the Privacy Act was never codified but is instead set out as a historical note to 5 U.S.C. §552a (West 1996). The full text states the following:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his social security account number. (2) The provisions of paragraph (1) of this subsection shall not apply with respect to (A) any disclosure which is required by Federal statute, or (B) the disclosure of a social security number to any Federal, State or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual. (b) Any Federal, State or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

disclosure of a social security number for certain purposes. For example, government agencies may lawfully require the furnishing of a social security number: (1) when required by federal statute; (2) if the individual's disclosure of the number was required under statute or regulation adopted on or before January 1, 1975, provided that the agency maintained a system of records in existence and operating before January 1, 1975; (3) to the extent that social security numbers are used in the administration of any tax, general public assistance, drivers license, or motor vehicle registration law within the agency's jurisdiction³; (4) in connection with the issuance of birth certificates and in the enforcement of child support orders⁴; and (5) in the administration of the Food Stamp Act and the Federal Crop Insurance Act.⁵

Although the Federal Privacy Act did not restrict an agency's disclosure of an individual's social security number, 1990 amendments to the Social Security Act now make an individual's social security number confidential when the number is obtained by an agency pursuant to any provision of law enacted after October 1, 1990. 42 U.S.C. §405(c)(2)(C)(ii), (viii) (I).

EXCEPTIONS FROM FOIA

The Act contains a list of records which are not required to be disclosed pursuant to a FOIA request. §30-4-40. In this statute is a provision stating that records specifically made exempt from disclosure by statute or law are not subject to disclosure under FOIA. If a statute or law outside of FOIA states that a particular record is confidential or subject to disclosure only under specified circumstances, then the record should not be provided pursuant to a FOIA request. Some of these statutes require disclosure only under certain conditions and some of the statutes prohibit disclosure to the public entirely.

It is impossible to provide an exhaustive list of all the laws making particular records confidential. Some, but not all, of the statutes making certain records confidential are annotated under §30-4-40. This list is not exhaustive and any questions about your particular matter should be directed to your attorney. All references here are to the South Carolina Code unless otherwise specifically stated.

BALANCING FOIA AND THE PUBLIC RECORDS LAW

The Public Records Act, Section 30-1-10, *et seq.*, imposes specific duties on public officials who create, use, or manage public documents. Section 30-1-70 requires the legal custodian of public records to "protect them against deterioration, mutilation, theft, loss or destruction." This statute is intended to preserve records which have historical value, are important for the provision of services, protect the interests of the public, or have commercial importance as records. Thus, only copies of records are required to be provided under FOIA. Public bodies may elect to adopt an office policy designed to preserve public records from loss and destruction. The policy may require a custodian of records to be present when public records are being inspected pursuant to a FOIA request.

³ 42 U.S.C. §405(c)(2)(C)(i) & (iv).

⁴ 42 U.S.C. §405(c)(2)(C)(iii).

⁵ *Id.*

RESPONDING TO A FOIA REQUEST

Any written or verbal request for documents, records, or information coming into a public body's office should be considered a FOIA request. Here are some simple tips on how to structure office operations in anticipation of a request under FOIA.

1. Develop a written office policy to address how the office responds to a FOIA request.

By developing specific office policies which anticipate how the office will respond to a FOIA request, one can assure compliance with the Act.

2. Designate one person. Designate one person in the office to receive, log, and process written FOIA requests and to respond to requests made "in-person." This may be the same person, the office receptionist and /or a public information officer. Whoever is authorized to interact with the public and respond to written and verbal FOIA requests should be designated and receive training.

3. Provide training. Provide training to anyone authorized to respond to a request for records. The office receptionist should know how to respond to a request made by someone appearing in person. Office personnel should know to whom to direct requests for records in the event they receive a FOIA request. The office should anticipate requests for records made in person, what records are required to be immediately available without a written request, and how to respond to the in-person request.

4. Include a written policy specifying costs for searching for and making copies of records. FOIA allows recovery of costs "not to exceed the actual cost of searching for and making copies of records." The costs must be uniform and the lowest possible cost. The policy may allow waiver of costs under specified circumstances. FOIA provides that costs may be waived if it is determined that waiver or reduction of costs is in the public interest because the information is considered as primarily benefitting the general public. Another reason to waive costs arises when the number of copies is small compared to the expense of preparing a receipt and accounting for a small amount of money coming into the office.

Fees may not be charged for examination and review of documents to determine if they are subject to disclosure. However, the office policy may establish a reasonable hourly rate for making records available for inspection. This is premised on the underlying concept that inspection of records will be made in the presence of a staff member acting as the custodian of the records. A reasonable deposit against anticipated costs may be required under the Act. There should be written guidance for determining when a deposit is required.

The existence of a written policy on costs charged pursuant to FOIA and staff training is fundamental to FOIA compliance. These issues are discussed in more detail under §30-4-30 dealing with records, fees, and costs.

WRITTEN AND VERBAL REQUESTS

5. When a written request is received, write the date of receipt down. Write the date a FOIA

request is received on the letter, office tickler, or calendar. The date of receipt will be used to establish the date a response is due.

6. Count 15 working days from the date the FOIA request is received and write the date down.

Record the date on which 15 working days expires on the letter, office tickler or calendar. Fifteen working days from the date a written FOIA request is received is the response date. The response date is the date when a response must be given in writing to the requestor. FOIA allows 15 “working days” in which to respond. The term “working days” excludes Saturdays, Sundays, and legal public holidays occurring between the date the FOIA request is received and the date the response is due.

7. Determine if the request is for specific documents, a request to inspect documents or both.

Some requests simply ask for copies of readily available public documents. Other requests may ask to “inspect” records. A request to inspect records is asking for an opportunity to look at a particular group of records in the office.

8. Determine if there will be fees and costs. A fee for the actual cost of searching for and making copies of public records may be charged. If a request entails research to determine which records apply to the request, charges for staff time devoted to research may be charged. Fees may not be charged for examination and review to determine if the documents sought are subject to disclosure. The specific provision applicable to fees and costs is developed more fully under the practice pointer appearing after §30-4-30.

9. Write back before the end of the 15-day response period. A letter sent before the end of the 15-day response period may be necessary to clarify a vague request, to advise of fees, costs or deposits, or confirm an agreement to extend the 15-day response period in order to search for records and determine a record’s availability under the Act. This letter should (a) acknowledge receipt of the FOIA request; (b) confirm your understanding about the specific records sought or request clarification of vague requests; (c) provide information about fees, costs, and a deposit, if any; and (d) give a time for document production or the date, time, and place where the records will be made available for inspection.

10. FOIA requires a written response within 15 working days. The Act requires a written response within 15 working days from the date of receipt of a verbal or written FOIA request. This will be referred to as the 15-day letter. The 15-day letter is deemed, under the Act, to be a determination about the release of records or the right to inspect them and the letter must state the reasons for the determination. The 15-day letter is, according to the Act, the final opinion of the public body regarding the public availability of the requested records. If the 15-day letter is not mailed or personally delivered to the person making the FOIA request, the request for records is considered approved by operation of the statute.

The 15-day letter is a significant legal statement by the office because it is considered the final opinion of the office about the public availability of requested records. However, FOIA does not prohibit asking for clarification of vague requests or requesting an extension of time in which to provide the 15-day letter. Thus, if an attorney’s opinion is needed on an issue related to the availability of records, ask for an extension of time in which to respond and document the agreement by letter. If any agreement is made that varies the requirements of the Act, it must be made in writing with a copy delivered to the requestor acknowledging the agreement. Provide a copy of this letter to the attorney preparing an opinion, if any.

Any agreement altering the time line required by FOIA should be sent to the requestor along with a restatement of any discussions about fees, costs, deposits, if any, and the date, time and place for inspection of records. The final determination letter must be mailed or personally delivered on the date agreed to or within 15 working days of receipt of the FOIA request.

“IN PERSON” REQUESTS

11. Anyone may appear in person, look at, and receive copies of certain records. Meeting minutes for the last 6 months; law enforcement records for the last 14 days; and jail, detention center and prison records identifying confined persons for the last 3 months must be available for public viewing and copying by any person appearing in person. A written request is not required nor should one be requested. These particular records for the periods specified should be available for public viewing during the public body’s hours of operations. For some offices this will be between 8:30 a.m. and 5:00 p.m. For other offices this may mean 24 hours a day. Section 30-4-30(d).

Section 30-4-30(d) requires the following documents be made available on demand:

- (1) minutes of the meetings of the public body for the preceding 6 months;
- (2) all reports identified in §30-4-50(A)(8) for at least the fourteen-day period before the current day. The “14 day reports” in §30-4-50(A)(8) are “reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. When a report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the report.”
- (3) documents identifying persons confined in any jail, detention center, or prison for the preceding 3 months.

CONCLUSION

12. Anticipate FOIA requests before they arrive. Anticipating a response to a FOIA request before it is made, developing written office procedures and implementing staff training will ease the process and ensure compliance with the law.

FREEDOM OF INFORMATION ACT
S.C. Code §30-4-10, *et seq.*

§30-4-10. Short title.

This chapter shall be known and cited as the “Freedom of Information Act.”

HISTORY: 1978 Act No. 593, §1.

§30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

HISTORY: 1987 Act No. 118, §1.

PRACTICE POINTERS

The statement of “findings and purpose” indicates the far reaching scope of the Act. In cases where a Court is asked to construe the statute, note that the statute requires the Court to construe FOIA to require disclosure if possible. Therefore, one should assume that the Court will require disclosure unless the information sought is specifically made exempt from disclosure (confidential) by FOIA or another statute or law.

CASE NOTES

Meetings may be conducted outside of municipal boundaries. The Court of Appeals in construing the “minimal cost or delay” provision in §30-4-15 adopted a balancing test weighing the interests of the public against the government’s need to conduct a meeting at a distant site. The Supreme Court affirmed the use of a balancing test but reversed and remanded the case for further findings. To determine if a meeting complies with the “minimum cost or delay” requirements in §30-4-15, the interests of the municipality in conducting a meeting outside the municipal limits should be weighed against the cost or delay to the public. *Wiedemann v. Town of Hilton Head*, 326 S.C. 573, 486 S.E. 2d 263 (Ct. App. 1997); affirmed in part but reversed with directions to take additional evidence to determine if the test was met. Opinion No. 24789, Filed May 18, 1998.

The Act was designed to guarantee to the public reasonable access to certain information concerning the activities of the government. The Act creates the right to such information, specifies the remedy for the enforcement of such right, and also specifically designates the court in which such remedy may be pursued. *Martin v. Ellisor*, 264 S.C. 202, 213 S.E. 2d 732 (1975).

Substantial compliance with the Act will satisfy its requirements where technical violation has no demonstrated effect on complaining party. *Multimedia, Inc. v. Greenville Airport Comm.*, 287 S.C. 521, 339 S.E. 2d 884 (Ct. App. 1986).

ATTORNEY GENERAL’S OPINIONS:

A public body is precluded from taking formal action or a vote except in a public session. Because the distinction between purely procedural matters and "formal action" is often not clear, a public rather than secret vote should be taken if any doubt exists. Ad hoc committees or task forces appointed by the Mayor and City Council for information-gathering or advisory functions would be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-5.

Out-of-court settlement records maintained by a public agency, where the settlement involves the expenditure of public monies, are ordinarily "public records" subject to disclosure under the Act unless the information contained in the settlement documents is specifically exempt from disclosure under the Act. Judicial records that contain settlement information are generally accessible by the public; however, a court has an inherent authority to seal the records in an appropriate case. 1988 Op. Atty. Gen. No. 88-32.

An advisory committee whose assigned task is information-gathering or advisory functions should not meet in an executive session to discuss proposed contractual arrangements unless they are directly involved in the actual negotiation of a contract. 1988 Op. Atty. Gen. No. 88-31.

§30-4-20. Definitions.

(a) "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self evaluation, are not public bodies for the purposes of this chapter.

(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the

provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law. Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body, other than amounts expended for adoption, implementation, or installation of these plans and devices, is required to be closed to the public and is not considered to be made open to the public under the provisions of this act

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

(e) "Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

HISTORY: 1978 Act No. 593, §3; 1985 Act. No. 108, §3; 1987 Act. 118, §2; 2002 Act No. 339, §17, 2003 Act No. 86, § 7.

PRACTICE POINTERS

Public body: The Act extends to any “public body.” A public body, subject to FOIA, is any entity that is supported in whole or in part by public funds or expends public funds. Study committees, ad hoc committees, advisory committees, and special committees by whatever name are covered by FOIA. The only statutory exception to the definition of a “public body” is given to committees of health care facilities for medical staff disciplinary proceedings and other actions specified under §30-4-20(a).

The Attorney General’s Office stated, in a letter dated October 22, 2004 to the Executive Director of Common Cause of South Carolina, that “...the law is clear. Any entity which receives or has received taxpayer funds - federal, state or local - is subject to the Freedom of Information Act. This would include the Friends of the Hunley,” a non-profit group created by the Hunley Commission to raise funds for the Hunley project.

FOIA applies to all arms of local government. The local governmental entity and its constituent parts are covered by FOIA and should have written procedures to assist in compliance with FOIA. A procedure for receipt of FOIA requests, routing written FOIA requests to the proper person, and appropriate action when a requestor appears in person should be in writing and provided to the employees. This is discussed more fully in the section entitled “Responding to a FOIA Request” in the Preface.

Procurement practices should be reviewed in light of the decision in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C.156, 547 S.E.2d 862, (2001). The Court held that a review committee, composed of city staff members organized by the city manager to evaluate RFPs and advise the city manager in the award of a contract, was a public body (advisory committee) within the meaning of “public body” in FOIA. Thus, some procurement committees will be required to provide a FOIA notice of meetings and conform the meeting to the requirements of the FOIA.

Public records: The definition of “public record” in the Act is exceptionally broad. It is safe to assume that records, including computer data, prepared by or in the possession of the governmental entity are “public records” unless made confidential by §30-4-20(c), §30-4-40, or another statute or law. Section 30-4-20(c) makes certain records closed to the public. The records which are not made public records under FOIA include (1) income tax returns, (2) medical records, (3) hospital medical staff reports, (4) scholastic records, (5) adoption records, (6) records related to registration and circulation of library materials to the extent they identify library patrons, and (7) other records which by law are required to be closed to the public. Only these records are considered to be “exempt” under FOIA meaning they need not be disclosed.

In addition to the records made public under this section as “public records,” §30-4-30 (d) (1), (2) & (3) makes the prior 6 months of meeting minutes, the prior 14 days of law enforcement reports and the prior 3 months of jail, detention center, and prison records identifying confined persons subject to public inspection on demand by a person appearing in person. “In-person” requests for inspection and copies of these designated records do not require a written request.

If a public record contains information that is not required to be disclosed under FOIA, like social security numbers, the Act requires that the record be provided after eliminating the non-public information. This may be done by striking out non-public information from a public record and providing the copy, as modified, to the requestor. There is no special method for modifying records to protect confidential information from disclosure. FOIA simply requires the public body “separate the exempt and nonexempt material and make the nonexempt material available.” §30-4-40 (b).

Meetings: The definition of “meeting” is very broad under the Act and all types of meetings are covered including telephone conference calls and other meetings facilitated by electronic means. Under FOIA, a “meeting” occurs upon convening a quorum to discuss or act on matters over which the body has supervision, control, jurisdiction, or advisory power. A quorum means a simple majority of the body. When a meeting is convened, the public notice and open meeting requirements

§ 30-4-20

of the Act apply. Provisions relative to public notice of meetings are discussed in §30-4-80; open meetings are discussed in §30-4-60; and closed meetings are discussed in §30-4-70.

One distinction between a meeting under FOIA and a social gathering is whether the members are gathered for the purpose of discussing public business and taking official action on matters within their supervision, control, jurisdiction, or advisory power. Thus, social gatherings are not meetings under FOIA. The fact that a quorum is present at a social gathering does not, without more, mean the gathering is a meeting under FOIA. However, §30-4-70(b) provides that no “chance meeting” or “social gathering” may be used to circumvent the Act.

Every meeting of an advisory committee must be open to the public unless closed pursuant to § 30-4-70. Meeting minutes must be taken and made available upon request pursuant to § 30-4-90. The minutes must include a statement of the efforts to comply with the public notice requirements of the FOIA. Meeting minutes and other public records created and maintained by the advisory committee must be made available upon request pursuant to §§ 30-4-50 and 30-4-30. Written public notice and the agenda, if any, must be given for every meeting of an advisory committee as required by § 30-4-80. Executive Session may be conducted by advisory committees after a public vote to go into executive session and then only for a specifically stated purpose authorized by the FOIA. No “official action,” e.g., vote, may be taken in executive session. The only action which may be taken in executive session is to adjourn or return to the public session. Deciding on a course of action by polling the body is prohibited. Only after returning to the public session is it permissible to move to take a vote to commit to a course of action or take the course of action discussed in executive session.

If an advisory committee or any other public body votes to go into executive session, the presiding officer is required to publicly announce the executive session’s specific purpose. Specific purpose is defined at § 30-4-70 as a “description of the matter to be discussed” identified by one of the following: (1) discussion of employment matters; (2) discussion of contract negotiations and receipt of legal advice; (3) discussion of security matters; (4) discussion of crimes and offenses; and (5) discussion of matters concerning economic development. The Quality Towing case held that the failure to announce the specific purpose of an executive session is a violation of the FOIA.

Quorum: The term “quorum” is defined at §30-4-20(e) to mean a simple majority. The definition of a quorum is used to determine when a meeting under FOIA has been convened. However, FOIA’s definition of a quorum does not necessarily apply to all situations. After convening a meeting by virtue of the presence of a simple majority, there will be instances where a majority is lost. For example, a member may become absent or disqualified from taking official action and voting and his or her absence reduces the membership in attendance to less than a simple majority. In this situation, the body’s bylaws will probably control how to proceed in the absence of a majority. FOIA appears to control only the definition of a quorum for purposes of convening the meeting, not taking action and voting. Disqualification on matters affecting an economic interest is treated in the Ethics Reform Act of 1991 at S.C.Code §8-13-700(B) and S.C. Code §4-9-180,

reprinted in the Appendix.

CASE NOTES

Upon request, FOIA mandates disclosure of records held by a “public body” unless the documents fall within enumerated exemptions. S.C. Code Ann. §§ 30-4-30 to -40 (Supp. 2003). The Court did not need to look any further than the plain meaning of “public or governmental body or political subdivision of the State” to find the sheriff’s department is subject to FOIA. The office of the sheriff was created by our state constitution which grants the General Assembly authority to determine their duties, qualifications, training, and compensation. Furthermore, the sheriff’s department is supported exclusively by public funds and the Supreme Court has ruled that an organization, corporation, or agency supported in whole or in part by public funds is sufficient grounds alone to find the organization is a “public body” under the Act. *Burton v. York Sheriff’s Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).

A physician request to a public hospital, for information concerning physicians salaries and purchase prices for their practices, was public information under FOIA and did not amount to trade secrets. Information obtained pursuant to FOIA, from a public body, cannot be protected from further disclosure by the requestor through a restraining order. In the court’s discretion, attorney fees may be awarded to the party seeking relief when they prevail in whole or in part. *Campbell v. Marion County Hospital*, 354 S.C. 274, 580 S.E.2d 163 (Ct.App. 2003).

Meetings may be conducted outside of municipal boundaries. The Court of Appeals in construing the “minimal cost or delay” provision in §30-4-15 adopted a balancing test weighing the interests of the public against the government’s need to conduct a meeting at a distant site. The Supreme Court affirmed the use of a balancing test but reversed and remanded the case for further findings. To determine if a meeting complies with the “minimum cost or delay” requirements in §30-4-15, the interests of the municipality in conducting a meeting outside the municipal limits should be weighed against the cost or delay to the public. *Wiedemann v. Town of Hilton Head*, 326 S.C.573, 486 S.E. 2d 263 (Ct. App. 1997); affirmed in part but reversed with directions to take additional evidence to determine if the test was met. Opinion No. 24789, Filed May 18, 1998.

A County Board of Education meeting is within the definition of a "meeting" under §30-4-20(d) thus requiring public notice to be given where the matters on the agenda included (1) points of agreement and disagreement between the Board and a city planning committee; (2) a summary of research regarding school size; (3) operational costs at a city school as compared to other similar schools; and (4) rezoning and transporting students from the area, since the nature of the items on the agenda, together with the expressed intent to "go over each piece of information" necessarily entailed Board discussion of matters over which it had "supervision, control, jurisdiction or advisory power" involving the school. *Braswell v. Roche*, 299 S.C. 181, 383 S.E. 2d 243 (1989).

Death certificates are not medical records in a normal sense but are statements of conclusion by persons required by law to make findings after the death of a citizen of the state and as such are not exempt from disclosure under §30-4-20. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E. 2d 313 (1984). [*Ed. Note: §44-63-86 makes death certificates public fifty years after the date of death.*]

Preliminary proposals to be placed on a school board agenda which are circulated to the school board members several days before the meeting need not be released prior to the meeting under §30-3-20 where full disclosure is made at the meeting. *Cooper v. Bales*, 268 S.C. 270, 233 S.E. 2d 306 (1977). [*Ed. Note: The definition of "public record" was amended after this opinion and the same result may not obtain today.*]

The Act's provision permitting public body to hold closed meeting to discuss employment, demotion, or discipline of an employee does not exempt internal investigation report of a law enforcement agency from disclosure; the report is public record and question of its exemption must be resolved by reference to §30-4-40. *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E. 2d 747 (1996).

In an action seeking the review of DSS files pursuant to FOIA, the Court of Appeals affirmed the trial court's denial of the appellants' request to review the files where they contained at least some materials exempt from the Act's disclosure requirements and the record failed to show that the trial court was asked to review the DSS file and separate exempt and nonexempt material; however, appellants were not precluded from reappearing before the trial court and requesting that it conduct a review to separate the material based on its exempt status. *Beattie v. Aiken County DSS*, 319 S.C. 449, 462 S.E. 2d 276 (1995).

Section 12-54-190 does not alter the non-disclosure provisions of §12-54-240 since the legislature could not reasonably have intended to prevent disclosure of tax commission assessments to local taxing authorities. *South Carolina Tax Comm. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E. 2d 843 (1994).

The fact that the tax commission refused to sign a confidentiality agreement with a property owner was sufficient evidence on which to hold that the tax commission did not promise that the information in question would be kept confidential. *South Carolina Tax Comm. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E. 2d 843 (1994).

A research foundation was a "public body" within the meaning of §30-4-20(a) even though it was a private corporation where it was supported in whole or in part by public funds and had expended public funds. The common law concept of "public" versus "private" corporations is inconsistent with the Act's definition of "public body" and therefore cannot be superimposed on FOIA. *Weston v. Carolina Research & Dev. Foundation*, 303 S.C. 398, 401 S.E. 2d 161 (1991).

An advisory committee made up of city staff members rather than council members is a public body under the FOIA. Here, the committee was formed by the city manager consisting of city staff employees to evaluate RFPs and advise the city manager on the award of a contract entailing the expenditure of public funds. Employees organized to render advice to council either directly or indirectly constitute a public body subject to the notice and open meeting requirements under the FOIA. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E. 2d 862, (2001).

ATTORNEY GENERAL'S OPINIONS

Disclosure requirements under FOIA are mandatory unless specifically exempted and there is no duty of confidentiality imposed by FOIA on a public body. In *Burton v. York Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), the Court held that internal investigation reports relating to the performance of a sheriff and his deputies performance of their public duties are not exempt from the FOIA disclosure requirements and must be disclosed. Therefore, a sheriff's office must comply with the mandated disclosures pursuant to FOIA regardless of possible claims that may be made by its employees for releasing information pertaining to internal affairs investigations. 2006 Op. Atty. Gen., dated May 23, 2006.

The Majority Caucus of the South Carolina House of Representatives is subject to FOIA provisions because it is supported in whole or in part by public funds and is expending public funds making it a "public body" for purposes of FOIA. FOIA has no "de minimus" requirement, "such that a certain minimum level of public funds must support or be expended by an entity before FOIA is applicable. Our Supreme Court, in *Weston v. Carolina Research and Development Foundation*, "recognized that 'indirect' or 'in kind' public funding, such as by virtue of an entity's use of public employees or governmental resources, is sufficient to invoke FOIA." FOIA "does not draw a quantitative line between 'insignificant' or de minimus support and substantial or significant support from public funds." 2006 Op. Atty. Gen., dated May 19, 2006.

Under the Charter Schools Act, the nature of charter schools is alluded to as both private and public. For FOIA purposes, charter schools are treated as "public bodies" pursuant to §59-40-50(B)(10) that states a charter school must "be subject to the Freedom of Information Act, including the charter school and its governing body." 2006 Op. Atty. Gen., dated March 9, 2006.

The Clinton Newberry Natural Gas Authority, providing substantial cash flow to the two municipalities, would be considered a "public body" for purposes of the Act and would be required to comply with the Act. The Authority currently is not taking any formal action to make the distribution to the two cities. Section 30-4-70 requires that "no formal action may be taken in executive session" and that "no vote may be taken in executive session." Such action may only be taken in open session. The Act defines "formal action" as "a recorded vote committing the body concerned to specific action." Op. Atty. Gen., dated March 10, 2005.

§ 30-4-20

The Investigative Review Committee (IRC) operating in conjunction with the Board of Veterinary Medical Examiners (BOE) within the Department of Labor, Licensing and Regulation would be considered a “public body” for purposes of the Act and would be required to comply with the Act. The IRC as a “public body” would be required by the Act to formally adopt its actions in open sessions. While §40-69-60 makes information received by the Board “through inspections and investigations” confidential, it is questionable whether this provision encompasses the actual recommendations to the Board of disciplinary actions by the IRC. Since the Act requires any exceptions to be narrowly construed, a court would most likely determine §40-69-60 to be inapplicable to the IRC’s recommendations to the Board. Op. Atty. Gen., dated January 27, 2005. See *Burton v. York Sheriff’s Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004).

Section 30-4-30(a) of the Act provides that “any person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40...” The term “person” is defined as “any individual, corporation, partnership, firm, organization or association” by §30-4-20(b). Assuming a particular state agency fits within the definition of a “person,” that agency could make a request for information from public bodies pursuant to the Act. A similar determination of a “person” could be made as to a particular municipal agency authorizing one agency to request and receive information from another agency where permitted. Therefore, sharing of information between a municipal police department and a clerk / treasurer’s office for official purposes and the enforcement of codes is permitted. 2004 Op. Atty. Gen., dated December 16, 2004.

Language in a statute that the State Commission for the Blind “shall meet at least monthly” must be construed to indicate that the legislature intended for the commission to meet not less than once a month. The Act at Section 30-4-20(d) would allow the Commission to meet telephonically, providing the Commission with a less expensive and time consuming means of fulfilling its statutory obligation of a monthly meeting. 2004 Op. Atty. Gen., dated December 15, 2004.

The Act is applicable to the South Carolina Association of Public Charter Schools (SCAPCS). SCAPCS comes within that portion of the definition of “public body” which includes “any organization, corporation or agency supported in whole or in part by public funds or expending public funds” because SCAPCS receives public funds, described as federal grant funds in addition to public charter school funds. 2004 Op. Atty. Gen., dated October 27, 2004.

The Act offers no guidance as to how a public body is to establish its agenda or how a member of the public will be allowed to participate at a meeting. It would be up to a court to review the policy and determine whether it is a reasonable policy considering all attendant facts and circumstances. 1992 Op. Atty. Gen. No. 92-40.

A committee may be subject to the Act if it is supported in whole or in part by public funds, or if it expends public funds. 1983 Op. Atty. Gen. No. 83-39.

The Act applies to any meeting of a public body whether the meeting is designated as formal or informal and whether action is taken upon public business or merely discussed. 1983 Op. Atty. Gen. No. 83-55.

The Act is applicable to a breakfast meeting held by a member of the General Assembly with the City Council, Mayor, and Public Service District Commissioners to discuss possible legislation that directly affects or concerns these bodies. 1983 Op. Atty. Gen. No. 83-100.

The Real Estate Commission is a public body subject to the requirements of the Act; when the Real Estate Commission is operating as an appellate or quasi-judicial body, an open meeting should be held, with open deliberations, and voting conducted in open or a public session. 1994 Op. Atty. Gen. No. 94-22.

Telephone bills of a public agency are considered public records and subject to disclosure under the Act. Section 30-4-40(a)(2) would not present valid reason, absent some specific showing to the contrary, to withhold telephone billing records. 1993 Op. Atty. Gen. No. 93-17.

Applications received from prospective appointees, by County Legislative Delegation, are considered public records under the Act. However, each individual application should be examined to determine whether information therein would be exempted from disclosure. 1993 Op. Atty. Gen. No. 93-66. [*Ed. Note: §30-4-40(13) was adopted after this opinion was issued and allows exemption of all materials gathered in a search to fill a position up to the point that the search is narrowed to three candidates. For the final three candidates, all material must be disclosed, except tax returns, medical records, social security numbers, or other exempt information.*]

The Charleston Harbor Estuary Citizens' Committee most probably would be considered a public body and thus subject to the terms of the Act. 1989 Op. Atty. Gen. No. 89-96.

A public body is precluded from taking formal action or a vote except in a public session. Because the distinction between purely procedural matters and "formal action" is often not clear, a public rather than secret vote should be taken if any doubt exists. Ad hoc committees or task forces appointed by the Mayor and City Council for information-gathering or advisory functions would be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-5.

A school improvement council would be considered to be a "public body" for purposes of the Act and as such would be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-14.

Out-of-court settlement records maintained by a public agency, where the settlement involves the expenditure of public monies, are ordinarily "public records" subject to disclosure under the Act unless the information contained in the settlement documents is specifically exempt from disclosure under the Act. Judicial records that contain settlement information are generally accessible by the public; however, a court has an inherent authority to seal the records in an

§ 30-4-20

appropriate case. 1988 Op. Atty. Gen. No.88-32.

Neither the County Directors and Supervisors Association of the South Carolina Department of Social Services nor the South Carolina Association of County Human Services Administrators, charitable corporations which receive no public funds, appear to fall within the definition of "public body," and, therefore, would not be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-47.

A school district may release the names of currently enrolled graduating seniors if the procedures for disclosure of directory information has been followed by the school district under 34 CFR §99.37. 1988 Op. Atty. Gen. No. 88-72.

Records of marriage licenses are public records and are subject to terms of the Act. 1985 Op. Atty. Gen. No. 85-63.

Ad hoc committee appointed by county council to study long range planning for a county is subject to requirements of Act. 1985 Op. Atty. Gen. No. 85-145.

Records of Department of Mental Health which identify patients or ex-patients are confidential by law and are not subject to disclosure pursuant to Act. 1984 Op. Atty. Gen. No. 84-22.

Certain public funds maintained by State Workers' Compensation Fund do not appear to be confidential and are subject to disclosure under Act, unless exempt under provision of Section 30-4-40. 1984 Op. Atty. Gen. No. 84-53.

Under the Act, a final order or opinion issued in disciplinary proceeding by State licensing board or agency is public information. 1984 Op. Atty. Gen. No. 84-61.

Court would probably find that ad hoc citizens committee appointed by Town Council to be a public body subject to the Act. 1984 Op. Atty. Gen. No. 84-125.

Under §30-4-20(a) a "public body" is defined by statute to include any governmental body or political subdivision of the state or "... any organization, corporation or agency supported in whole or in part by public funds or expending public funds..."; case law defines a private hospital as one which is owned, maintained, and operated by a corporation without any participation by any governmental agency and receipt of public compensation does not transform a private hospital into a public institution; receipt of public funds on a contractual basis for services rendered to the county for the care of indigent patients is not "... support in whole or in part by public funds..." In these particular circumstances, this private corporation has not assumed the status of a public body and is not subject to the requirements of the Act. 1982 Op. Atty. Gen. No. 82-15.

The Act encompasses telephone conference calls within the definition of the term "meeting"

found in §30-4-20(d). 1981 Op. Atty. Gen. No. 81-29.

Documents compiled in a research survey and a tabulation of the resultant responses done by the Office of the Executive Director for House Research at the request of a member of the House of Representatives concerning H. 2193 are public records and are subject to public disclosure. 1980 Op. Atty. Gen. No. 80-17.

Attorney General believes that notice requirement of the Act should be followed by public body which will reconvene from "recess" or "adjourned" meeting wherever such reconvened meeting will be held, anticipated to be held in executive sessions, or otherwise. Even though public may not have legal right to be present at every part of every meeting, nevertheless public generally has right to know where meeting is and when it will be. 1991 Op. Atty. Gen. No. 91-42.

Applications or resumes of candidates for position of superintendent of education are considered public records. However, school board must examine each application or resume and determine what information is or is not subject to disclosure under the Act. 1991 Op. Atty. Gen. No. 91-52. [*Ed. Note: §30-4-40(13) was adopted after this opinion was issued and allows exemption of all materials gathered in a search to fill a position up to the point that the search is narrowed to three candidates. For the final three candidates, all material must be disclosed, except tax returns, medical records, social security numbers, or other exempt information.*]

Whether family counseling center, a private, nonprofit human services delivery organization, which receives approximately 83 percent of its funding from United Way funding, program fees from clients generated for services rendered, community contributions, and other investments, remainder of funding coming from public monies through contracts and otherwise, would be deemed "supported in whole or in part by public funds" for purposes of being subject to the Act, remains a question of fact which may require judicial resolution. Public funds received under contract for provision of specific services may be exempt from consideration; access to DSS records would show how the money was spent. Public funds provided "in-kind" or via grants may be sufficient to bring an entity under the Act. It is suggested that center's board of directors, working with counsel, review information and make a determination whether the extent of public funding would constitute support and, if so, decide how to handle requests made under the Act. Doubt as to applicability of FOIA should be resolved in favor of openness and disclosure. 1992 Op. Atty. Gen. No. 92-01.

The practice of using telephone poll to handle matters over which public body has authority would most probably not comply with the Act. Rather, meeting of body either corporally or by means of electronic equipment such as a telephone conference call would be preferable way to handle an emergency situation, so the body may act collectively rather than its members acting individually and independently. 1992 Op. Atty. Gen. No. 92-02.

The Attorney General has advised that a court would likely find that the Chester County Economic Development Board's exercise of governmental functions establishes it as a public body

§ 30-4-30

under FOIA's definition of "public body" at Section 30-4-20(a). 2001 Op. Atty. Gen., dated February 15, 2001 (2001 WL 265255 (S.C.A.G.)).

The Attorney General's office advised that for purposes of serving warrants, subpoenas and other legal documents, local law enforcement officers may request customer address information from the Seneca Light and Water Plant. Customer address information in a public body's possession constitutes a "public record" as defined in Section 30-4-20 (c). This opinion notes, however, that although the release of home addresses would not generally constitute an unreasonable invasion of personal privacy, if an individual has an unlisted or unpublished telephone number or there are reasons such as the need for security which mandate personal privacy, such a release could constitute an unreasonable invasion of personal privacy. Thus, the decision to disclose must be made on a case-by-case basis. 2000 Op. Atty. Gen., dated October 2, 2000 (2000 WL 1803605 (S.C.A.G.)).

S.C. Code §30-4-20(d) permits convening a meeting telephonically. 2000 Op. Atty. Gen. No. ____, dated August 3, 2000 (2000 WL 1205954 (S.C.A.G.)).

§30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice; records to be available when requestor appears in person.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40, in accordance with reasonable rules concerning time and place of access.

(b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or

reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

(d) The following records of a public body must be made available for public inspection and copying during the hours of operations of the public body without the requestor being required to make a written request to inspect or copy the records when the requestor appears in person:

- (1) minutes of the meetings of the public body for the preceding six months;
- (2) all reports identified in Section 30-4-50(A)(8) for at least the fourteen-day period before the current day; and
- (3) documents identifying persons confined in any jail, detention center, or prison for the preceding three months.

HISTORY: 1978 Act No. 593, §4; 1987 Act No. 118, §4; 1990 Act No. 555, §1; 1998 Act No. 423, §1.

PRACTICE POINTERS

§ 30-4-30

This part of the law gives the basic rules for access to public records. Any person, including a business, corporation, or other organization, is permitted to inspect (look at) and receive copies of public records. This privilege is limited only to the extent that the record, or a part of it, is exempted from the Act or made confidential either in FOIA or another statute or law.

A public body may impose reasonable rules for access to public records. For example, a public body may permit inspection of public records during regular business hours in the presence of a person acting as the custodian of records particularly when access to original records, court records, and records of historic or economic value is sought.

In regard to access to records, a written FOIA policy is especially important. A policy should, at a minimum, specify the manner and method for inspection of records, charges for fees and costs for searching for and making copies of records and specify when fees and costs are waived. Basic office procedures are discussed in the section entitled “Responding to a FOIA Request” in the Preface. Issues related to fees and costs are discussed in §30-4-30(b).

A response to a FOIA request must be made in writing within 15 working days. The term “working days” excludes Saturdays, Sundays and legal public holidays. Since the 15-day letter is deemed to be the public body’s final opinion and determination on the public availability of the requested record, the letter is legally significant. In practice, many FOIA requests are vague. A written reply acknowledging receipt of the request, stating what is understood to be the subject of the request, the action being taken to provide public records, and a request to clarify any uncertainties is appropriate. For further information, see the section entitled “Responding to a FOIA Request” in the Preface.

Costs and Fees: The Act permits, but does not require, charging “reasonable” costs and fees for searching for and copying documents. However, a fee may not be charged to examine a FOIA request and the records in order to determine if the records can be provided. Thus, the costs of obtaining legal advice about a FOIA request cannot be charged to the requestor.

The Act regulates costs and fees by saying that (1) fees may not exceed actual costs of searching for or making copies; (2) fees must be uniform for copies of the same record; and (3) records must be furnished at the lowest possible cost to the person requesting them. For example, the public body is entitled to charge for staff time required to search for and make copies of records. But, the same fee must be charged for similar records regardless of who makes the request. And, the lowest possible costs should be charged. Charging costs and fees is not mandatory and costs and fees may be waived. This is a practical response when, for example, only a few copies are requested which do not warrant the time and expense for accounting for the income. The Act also states that costs and fees may be waived when providing the records primarily benefits the general public. The issue of waiver of costs and fees should be part of a written office policy. Finally, a reasonable hourly rate for making records available and requiring a deposit against costs before searching for or making copies is allowed.

Form of record: Records must be provided in a form that is “both convenient and practical” for use by the person requesting the record if it is equally convenient for the public body to provide the record in that form. This part of the Act is probably applicable to electronic data and perhaps to the form of a record provided to a person with disabilities.

Electronic data should be assimilated and provided in the same or similar form used by the public body. The courts have not discussed how this section may apply to persons with disabilities. The public body should consider the form of the record requested by a person with disabilities. The Act does not mandate that a public body provide a record in a form different from that in which it was originally prepared. However, care should be taken to be sensitive to the needs of the disabled community. If a record is also available in, for example, braille then a braille version should be made available upon request. If the public body does not normally prepare the record in a form usable by the requestor, and if the requestor preauthorizes the charges, the public body may assist the requestor by reformatting the record into a usable form. Caution should be taken in as much as this issue has not been addressed by the courts.

15-day letter: A written response to a FOIA request must be mailed or personally delivered to the requestor within 15 working days from the date the request was received. If there will be a delay in responding within the allotted time, contact the requestor and confirm any discussions in writing. If an agreement is reached to extend the time in which to respond, it is especially important to write and confirm the agreement along with any other issues like costs, fees, deposits, and the time and place for inspection of records. See the section entitled “Responding to a FOIA request” in the Preface for more on this subject.

Failure to respond in writing within 15 working days means, according to the statute, that the disclosure of public information at the time and place requested is deemed approved. However, under the holding in *Litchfield Plantation v. Georgetown County Water & Sewer*, 314 S.C. 30, 443 S.E. 2d 574 (1994), the exemptions in §30-4-40 are absolute despite a public body’s failure to respond with 15 days.

The statute states that within 15 working days from the date of receipt of a written request, the public body shall notify the requestor of its “determination and the reasons therefore.” According to the statute, the determination is the final opinion of the public body as to public availability of the requested record. Since FOIA appears to give the public body only one opportunity to decide how to treat a records request, it is preferable to write well in advance of the expiration of the 15-day period if clarification is needed. Any agreement altering the 15-day period in which to respond and any discussions about fees and costs must be documented in writing with a copy mailed or personally given to the requestor.

Legal public holidays: A public body is given 15 days excluding Saturdays, Sundays, and legal public holidays to respond to a FOIA request. “Legal public holidays” are determined by the governing authority of the public body. For example, the State government operates according to

the published list of state “legal public holidays” but the Governor is empowered to authorize other “legal public holidays” by executive order. Similarly, local governments operate according to a predetermined list of holidays but the governing body may authorize different “legal public holidays” for the county. It is possible and permissible for a local government to operate according to a calendar of legal public holidays that is different from the state government. And, in that case the local government’s calendar of legal public holidays controls.

“In-person” requests: No written request is required, no waiting period is allowed, and copies should be made available when a request for records is made in person for (1) the last 6 months of meeting minutes; (2) the last 14 days of law enforcement reports specified in §30-4-80(A)(8); and (3) the last 3 months of jail, detention center, and prison records identifying confined persons. Section 30-4-50(A)(8) states that the 14-day reports are: “reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. When a report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the report.” Nothing in the Act prevents documenting, in writing, these FOIA requests and the public body’s response.

The period of time given for each kind of record in this subsection does not mean that records created before these periods of time are not public records. The window of time given is simply to ease the burden of immediately providing certain documents for a given period of time.

CASE NOTES

A physician request to a public hospital, for information concerning physician’s salaries and purchase prices for their practices, was public information under FOIA and did not amount to trade secrets exempt from the FOIA. *Campbell v. Marion County Hospital*, 354 S.C. 274, 580 S.E.2d 163 (Ct.App. 2003).

Under §30-4-30(c), failure to respond within 15 days means that the disclosure of nonexempt material at the time and place of access which the party requested is deemed approved. However, exemptions from disclosure in §30-4-40 are absolute despite a public body's failure to respond within 15 days. The exemptions in §30-4-40 cannot be waived. *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E. 2d 574 (1994).

In an action seeking the review of DSS files pursuant to the Act, the Court of Appeal affirmed the trial court's denial of the appellants' request to review the files where they contained at least some materials exempt from the Act's disclosure requirements and the record failed to show that the trial court was asked to review the DSS file and separate exempt and nonexempt material; however, appellants were not precluded from reappearing before the trial court and requesting that it conduct a review to separate the material based on its exempt status. *Beattie v. Aiken County DSS*,

§ 30-4-30

319 S.C. 449, 462 S.E. 2d 276 (1995).

Section 12-54-190 does not alter the non-disclosure provisions of §12-54-240 since the legislature could not reasonably have intended to prevent disclosure of tax commission assessments to local taxing authorities. The purpose of the Act is to protect the public from secret government activity. The fact that the tax commission refused to sign a confidentiality agreement with a property owner was sufficient evidence on which to hold that the tax commission did not promise that the information in question would be kept confidential *South Carolina Tax Comm. v. Gaston Copper Recycling Corp.*, 316 S.C. 163 447, S.E. 2d 843 (1994).

ATTORNEY GENERAL'S OPINIONS

Section 44-53-530 states that “all forfeited monies and proceeds from the sale of forfeited property as defined in §44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency.” All expenditures from these accounts must be documented, and the documentation made available for audit purposes and upon request by a person under FOIA provisions. 2005 Op. Atty. Gen, dated October 5, 2005.

In regards to incarcerated individuals, §30-4-30(3) states that “documents identifying persons confined in any jail, detention center, or prison for the preceding three months” are among the records of a public body open for public inspection. Therefore, the “names of individuals confined in a jail or prison are accessible to the public in such circumstances.” Information as to the release of a prisoner is also public information because the matter of the sentence and the particular punishment for a particular crime are matters of public record and a prisoner’s release could be easily calculated by such public information. 2005 Op. Atty. Gen., dated August 5, 2005.

Section 30-4-30(a) of the Act provides that “any person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40...” The term “person” is defined as “any individual, corporation, partnership, firm, organization or association” by §30-4-20(b). Assuming a particular state agency fits within the definition of a “person,” that agency could make a request for information from public bodies pursuant to the Act. A similar determination of a “person” could be made as to a particular municipal agency authorizing one agency to request and receive information from another agency where permitted. Therefore, sharing of information between a municipal police department and a clerk / treasurer’s office for official purposes and the enforcement of codes is permitted. 2004 Op. Atty. Gen., dated December 16, 2004.

The Act makes no distinction between members of public, candidates for elected public office, members of legislature, or other categories of requestors as to who may be able to inspect or copy records of public body. 1993 Op. Atty. Gen. No. 93-63.

§ 30-4-30

Public body may disclose names, sex, race, title, and dates of employment of all officers and employees of public body subject to any applicable restriction or limitation under the Act. 1993 Op. Atty. Gen. No. 93-63.

Mailing lists of various publications which would include subscribers' mailing addresses are disclosable unless an exception restricts public's right to access. 1993 Op. Atty. Gen. No. 93-63. [*Ed. Note: §30-4-50(B) was adopted after this opinion was issued.*]

The Act does not contemplate release of information in appointment matters as to prospective appointees when application period has not closed by end of 15 day response period. The Act appears to require that information requested be disclosed as is contemplated by §30-4-30(c). 1993 Op. Atty. Gen. No. 93-66. [*Ed. Note: See additional requirements in this part of the Act concerning disclosure of employment application materials adopted after this opinion was written.*]

An arrest warrant or bench warrant would generally be disclosable upon its being served upon the person named in the warrant unless the information in the warrant is otherwise exempt under the Act; the custodian of criminal investigatory records, such as search warrants, has the discretion to disclose such records if he or she deems that it would not harm law enforcement or the investigation. 1989 Op. Atty. Gen. No. 89-78.

Whether or not a sheriff's department can release the tape of a 911 conversation or its contents must be determined by that agency; any decision as to non disclosure would be subject to possible judicial review. 1988 Op. Atty. Gen. No. 88-28.

Out-of-court settlement records maintained by a public agency, where the settlement involves the expenditure of public monies, are ordinarily "public records" subject to disclosure under the Act unless the information contained in the settlement documents is specifically exempt from disclosure under the Act. Judicial records that contain settlement information are generally accessible by the public; however, a court has an inherent authority to seal the records in an appropriate case. 1988 Op. Atty. Gen. No. 88-32.

The Comptroller General may refer requests for information to the agency housing the original record or information; if that agency refuses to honor the request for material deemed to be disclosable under the Act, the Comptroller should then make the information available. The Act itself does not appear to contemplate an exchange of information among or between state agencies. The Act allows for certain direct and indirect costs to be considered in establishing a fee for searching for or making copies of records. While the Act does not specifically require that a request for information be made in writing, it would be a protective measure to have such requests in writing to establish the fifteen-day response period. 1987 Op. Atty. Gen. No. 87-69.

System of allowing access to official records of Probate Court through a staff member and by charging fee appears to comport with provisions of Act. 1985 Op. Atty. Gen. No. 85-63.

Supplementary homicide reports should be disclosed under the Act. 1983 Op. Atty. Gen. No. 83-85.

Any written request is sufficient under the Act; an attorney's work product and any correspondence generated by that attorney for the public body which he represents may be removed from records to be disclosed, along with any other material violative of the attorney-client relationship; that information is sought in furtherance of a civil law suit has no effect on the requirement for disclosure mandated by the Act; medical records in the possession of a public body should not be disclosed absent consent or a court order; there is no federal legislation prohibiting the disclosure of arrest records and criminal investigation reports. 1981 Op. Atty. Gen. No. 81-64.

Consumer complaints received under §37-6-117 and which are not subject to the investigatory powers of the administrator under §37-6-106 are public records which the public has the right to inspect or copy pursuant to §30-4-30. 1980 Op. Atty. Gen. No. 80-10.

Vehicle towing records of a sheriff may be open for public inspection. 1974-75 Op. Atty. Gen. No. 4197.

The Taylors Fire & Sewer District may set up reasonable requirements for viewing and copying records. However, what is considered reasonable would require factual determination which the Attorney General's Office cannot resolve by an Opinion. 1992 Op. Atty. Gen. No. 92-40.

§30-4-40. Matters exempt from disclosure.

(a) A public body may but is not required to exempt from disclosure the following information:

(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal services and nontariff agreements, and evaluations and other materials which contain

references to potential customers, competitive information, or evaluation.

(2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

(3) Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:

(A) disclosing identity of informants not otherwise known;

(B) the premature release of information to be used in a prospective law enforcement action;

(C) disclosing investigatory techniques not otherwise known outside the government;

(D) by endangering the life, health, or property of any person; or

(E) disclosing any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial

(4) Matters specifically exempted from disclosure by statute or law.

(5) Documents of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property; however:

(a) these documents are not exempt from disclosure once a contract is entered into or the property is sold or purchased except as otherwise provided in this section;

(b) a contract for the sale or purchase of real estate shall remain exempt from disclosure until the deed is executed, but this exemption applies only to those contracts of sale or purchase where the execution of the deed occurs within twelve months from

the date of sale or purchase;

(c) confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed.

(6) All compensation paid by public bodies except as follows:

(A) For those persons receiving compensation of fifty thousand dollars or more annually, for all part-time employees, for any other persons who are paid honoraria or other compensation for special appearances, performances, or the like, and for employees at the level of agency or department head, the exact compensation of each person or employee;

(B) For classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars;

(C) For classified employees not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the salary schedule showing the compensation range for that classification including longevity steps, where applicable;

(D) For unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the compensation level within a range of four thousand dollars, such ranges to commence at two thousand dollars and increase in increments of four thousand dollars.

(E) For purposes of this subsection (6), "agency head" or "department head" means any person who has authority and responsibility for any department of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body.

(7) Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.

(8) Memoranda, correspondence, and working papers in the possession

of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions of this chapter.

(9) Memoranda, correspondence, documents, and working papers relative to efforts or activities of a public body and of a person or entity employed by or authorized to act for or on behalf of a public body to attract business or industry to invest within South Carolina; however, an incentive agreement made with an industry or business: (1) requiring the expenditure of public funds or the transfer of anything of value, (2) reducing the rate or altering the method of taxation of the business or industry, or (3) otherwise impacting the offeror fiscally, is not exempt from disclosure after:

(a) the offer to attract an industry or business to invest or locate in the offeror's jurisdiction is accepted by the industry or business to whom the offer was made; and

(b) the public announcement of the project or finalization of any incentive agreement, whichever occurs later.

(10) Any standards used or to be used by the South Carolina Department of Revenue for the selection of returns for examination, or data used or to be used for determining such standards, if the commission determines that such disclosure would seriously impair assessment, collection, or enforcement under the tax laws of this State.

(11) information relative to the identity of the maker of a gift to a public body if the maker specifies that his making of the gift must be anonymous and that his identity must not be revealed as a condition of making the gift. For the purposes of this item, "gift to a public body" includes, but is not limited to, gifts to any of the state-supported colleges or universities and museums. With respect to the gifts, only information which identifies the maker may be exempt from disclosure. If the maker of any gift or any member of his immediate family has any business transaction with the recipient of the gift within three years before or after the gift is made, the identity of the maker is not exempt from disclosure.

(12) Records exempt pursuant to Section 9-16-80(B) and 9-16-320(D).

(13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying. In addition to making available for public inspection and copying the materials described in this item, the public body must disclose, upon request, the number of applicants considered for a position. For the purpose of this item “materials relating to not fewer than the final three applicants” do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section.

(14) (A) Data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where the data, records, or information has not been publicly released, published, copyrighted, or patented.

(B) Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education or any public or private entity supporting or participating in the activities of a state institution of higher education in the conduct of or as a result of study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity until the information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This item applies to, but is not limited to, information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.

(C) The exemptions in this item do not extend to the institution's financial or administrative records.

(15) The identity, or information tending to reveal the identity, of any individual who in good faith makes a complaint or otherwise discloses

information, which alleges a violation or potential violation of law or regulation, to a state regulatory agency.

(16) Records exempt pursuant to Sections 59-153-80(B) and 59-153-320(D).

(17) Structural bridge plans or designs unless: (a) the release is necessary for procurement purposes; or (b) the plans or designs are the subject of a negligence action, an action set forth in Section 15-3-530, or an action brought pursuant to Chapter 78 of Title 15, and the request is made pursuant to a judicial order.

(18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

(19) Private investment and other proprietary financial data provided to the Venture Capital Authority by a designated investor group or an investor as those terms are defined by Section 11-45-30.

(b) If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.

(c) Information identified in accordance with the provisions of Section 30-4-45 is exempt from disclosure except as provided therein and pursuant to regulations promulgated in accordance with this chapter. Sections 30-4-30, 30-4-50, and 30-4-100 notwithstanding, no custodian of information subject to the provisions of Section 30-4-45 shall release the information except as provided therein and pursuant to regulations promulgated in accordance with this chapter.

(d) A public body may not disclose a “privileged communication”, “protected information”, or a “protected identity”, as defined in Section 23-50-15 pursuant to a request under the South Carolina Freedom of Information Act. These matters may only be disclosed pursuant to the procedures set forth in Section 23-50-45.

HISTORY: 1978 Act No. 593, §5; 1980 Act No. 495; 1987 Act No. 118, §5; 1993 Act No. 181, §489; 1994 Act No. 404, §1; 1995 Act No. 1, §11; 1996 Act No. 458, Part II, §31 D; 1998 Act No. 371, §7; 1998 Act No. 423, §§2, 3, 4, 5 & 6; 1999 Act No. 122, § 4; 2002 Act No. 339, §§18, 19,

§ 30-4-40

& 29; 2002 Act No. 350, §1; 2003 Act No. 34, §2; 2003 Act No. 86, §§4 & 5; 2005 Act No. 125, §2; 2006 Act No. 380, §2.

Please note: There has been a discrepancy in §30-4-40(a)(2) between the bound copy of the Supplement of the SC Code and the Westlaw version for several years. The 2006 bound copy of the SC Code (available January 2007) will eliminate the discrepancy. The language in this publication of §30-4-40(a)(2) is consistent with the proper language.

Cross References –

Referendum required to approve creation of a county police department, see §4-9-33.

Tax collector's lists, see §12-49-1260.

Crimestoppers information, see §§23-50-15 and 23-50-45.

Certain autopsy records are not to be disclosed, see §17-5-535.

Certain Venture Capital Authority is not public information, see §11-45-30.

Certain taxpayer information confidential, see §6-1-120.

Workers' Compensation Commission regarding accidents, injuries and settlements are confidential, see §42-19-40.

Records required by the Child Fatality Advisory Committee, the Department of Child Fatalities, DSS, and the central registry of child abuse and neglect are confidential, see §§20-7-5960 and 20-7-690.

Certain crime victim information about victims confidential, see §16-3-1555(B).

Juvenile records and Department of Juvenile Justice information confidential, see §§20-7-8505, 20-7-8510, and 20-7-1360(D).

Evidence of criminal charges against a person who is either found to be innocent or the charges are dismissed must be destroyed, see §17-1-40.

Records expunged by order of the court are confidential, see 22-5-910.

Emergency Medical Services for Children Program information confidential, see §44-61-340.

The federal Privacy Act of 1974, PL 93-579, 88 Stat 1896, is codified at 5 U.S.C.A. §552 A and as a general rule, does not apply to state or local governments. However, there is an uncodified provision, relating to social security numbers, that does apply to state or local governments. For example, claimant agencies participating in the Setoff Debt Program are not governed by the federal Privacy Act, unless they request or demand social security numbers from individuals. If a social security number is requested or demanded, the individual must be told whether disclosing the social security number is voluntary or mandatory and for what purpose it will be used. Claimant agencies are free to obtain social security numbers from other sources, such as from private entities or from other state or local agencies, if those agencies are willing to provide them.

The Welfare Reform Act of 1996, P.L. 104-193, added 42 U.S.C. §666(a)(13) and (a)(16) which now requires the states, in order to qualify for various types of welfare funding, to have in

place a number of procedures to facilitate the collection of overdue child support payments. The procedures require that social security numbers of any applicant for a professional license, commercial driver's license, occupational license, recreational license, or marriage license be recorded on the application; any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment have their social security number placed in the records relating to the matter, and the social security number of any deceased individual must be placed in the records relating to the death and be recorded on the death certificate.

In response to the Welfare Reform Act, the South Carolina General Assembly has adopted a variety of provisions that require disclosure of social security numbers. For example, Section 20-7-994 requires disclosure of an applicant's social security number on specified license applications; Section 20-1-220 requires that a marriage license cannot be issued unless a written application is made containing both parties social security numbers; and Section 44-63-75 requires that social security numbers must be included on forms used to record birth, death, divorce, the application for marriage, and birth and death certificates.

The South Carolina Freedom of Information Act requires state and local governments to make public records available upon request unless a specific exemption to the FOIA applies. When a public record contains exempt and nonexempt information, the exempt information must be separated from the nonexempt information and the nonexempt information must be made available. Section 30-4-40(b). As it relates to social security numbers, the key exemption in the FOIA is Section 30-4-40(a)(2) which allows a public body to withhold "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." The Courts and the South Carolina Attorney General's Office have consistently held that social security numbers may be withheld from disclosure by removing or obliterating the social security number from a released document. In 1999, the Attorney General's Office advised that "[t]he South Carolina Freedom of Information Act authorizes nondisclosure of these social security numbers pursuant to 30-4-40(a)(2) which exempts disclosure of records where such would constitute the unreasonable invasion of personal privacy. This office has previously concluded that social security numbers would fall within this exemption and thus, a social security number could be withheld from disclosure to the public." However, in this opinion dealing with disclosure of social security numbers contained on marriage applications and licenses, the Attorney General's Office stated: "While Social Security numbers (as opposed to the rest of the marriage license application) are exempt under the Freedom of Information Act, the Act does not require withholding of even this exempt material from public disclosure. Instead, the Freedom of Information Act leaves this decision to the records custodian." 1999 Op. Atty. Gen., dated May 18, 1999 (1999 WL 387064 (S.C.A.G.)).

Maintaining social security numbers in confidence is particularly difficult where public records are filed which include social security numbers. At least one Attorney General's opinion has addressed whether there is an obligation to remove or obliterate the social security number before recording a document which is publicly available. Social security numbers appear on

§ 30-4-40

mortgages, mortgage releases, and financing statements which are recorded in the clerks' of court and registers' offices and made available for public viewing. The social security numbers are inscribed on these documents by banks and other lenders for purposes unrelated to the conduct of public business. In this instance, the Ohio Attorney General held that a "person who is asked to furnish his social security number for inclusion within a mortgage, mortgage release, veterans discharge, or financing statement, which eventually is submitted for recording by the county recorder, should not reasonably expect that the number itself will thereafter remain a private matter, forever shielded from public scrutiny." The Attorney General concluded that "a person's expectation of privacy in his social security number (in this situation) is qualified by or dependant upon the specific context in which that person furnishes the number to another party." 1996 WL 291649 (Ohio A.G.) Thus, the public official was not required to remove or obliterate the social security numbers from public records prior to recording them.

This above situation must be contrasted with different factual situations. For example, in response to a request for employee information from a state or local government, social security numbers may be obliterated or removed. A person who submits their social security number to their employer for purposes including taxation has an expectation of privacy. *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994); *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993).

These are but a few of the statutes making specified records confidential rather than disclosable under a FOIA request. Specific questions should be directed to your county attorney.

PRACTICE POINTERS

General: The decision to claim an exemption from disclosure under this section is optional. The public body has the option to make the listed records available to the public or it may decline to do so by responding in writing within 15 working days from the date of receipt of the request that the records are "exempt" under FOIA. Note that in *Bellamy v. Brown*, 305 S.C. 291, 408 S.E. 2d 219 (1991), the Supreme Court held that FOIA does not create a duty of confidentiality. Accordingly, no cause of action for invasion of privacy can be maintained against a public officer based on a FOIA disclosure.

Even though the FOIA allows the public body to exempt certain records after a request is made, there are varying interpretations among practitioners. Some believe it would be in the public body's best interest to assert the statutorily allowed exemption before any request is made. For example, the public body could explicitly exempt from disclosure specific information that falls within one of the fifteen enumerated categories in § 30-4-40 before a request for disclosure is made.

The blanket adoption of the exemption could be adopted as a permanent ordinance or as an

additional point in the portion of the county budget ordinance setting search and copy fees. Any adoption of the exemption should also state who, if anyone, may waive the exemption on behalf of the county. This specific authorization to waive an exemption also serves to preclude a waiver by other employees.

SPECIFIC EXEMPTIONS IN FOIA

The following are comments about records which are exempt from disclosure under FOIA. The comments are presented in the same paragraph order as the statute. Note that a public body is required to separate exempt from nonexempt information in a record and provide the record as modified to the requestor. Thus, there will be instances where a modified record must be provided in order to utilize the exemptions given here.

Trade secrets, etc. ¶ 1. “Trade secrets” are defined in this section at §30-4-40(a)(1). Information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds is public information and is not exempt under the “trade secrets” exclusion. A public body is not required to disclose trade secrets which are contained in these type of records or records concerning companies with whom the public body has contracted or otherwise engaged in business relations. Other non-public information specified in this paragraph includes paid subscriber information and customer lists.

Because this section is optional relative to disclosure, the terms of any contract or other agreement should be reviewed to determine the existence of any covenants to maintain records in confidence. Secondly, the owners or drafters of the records should be consulted when their records, containing exempt information, are requested. When providing records, exempt and non exempt information may be separated.

Information of a personal nature ¶ 2: A simple test to determine if information is of a personal nature and not subject to disclosure is whether information is about an individual’s private life rather than information arising under an individual’s official capacity. For example, a social security number is information of a personal nature. Social security numbers should be removed from records like travel vouchers before providing them to the public.

Law enforcement records ¶ 3 Paragraph 3 details a list of law enforcement records which are not considered public and are exempt from disclosure under the Act. Information that identifies informants, information that may lead to an arrest or prosecution, special investigation methods, and information that could lead to endangering the life, health or property of a person is not required to be disclosed.

Matters exempted from disclosure by statute or law ¶ 4. This exemption requires familiarity with a vast amount of statutory and common law. A record made confidential by statute or other law is not required to be provided to the public. For a partial list of these statutes refer to the Preface.

Contracts ¶ 5: Records concerning proposed contractual arrangements and records incidental to the proposed sale or purchase of property are exempt. These records may be sheltered from view until the contract is entered into or the property is sold or purchased. Specified confidential proprietary information like a loan application or financial statement which is not otherwise publicly available is not required to be disclosed. Note that pursuant to §4-9-130, a public hearing must be held before council action is taken to sell, lease or contract to sell or lease real property owned by the county.

Compensation and Salaries ¶ 6: Information about specified salary ranges and recipients is required to be disclosed. In sum that statute requires disclosure of:

A. \$50,000 or more	B. \$30,001 to \$50,000	C. \$30,000 or less	D \$30,000 or less
The exact compensation for all employees, including part-time employees, anyone paid honoraria or compensation for special appearances, and agency or department heads.	The compensation level within a range of \$4,000 starting at \$30,000+ increasing in increments of \$4,000 for classified and unclassified employees & contract instructional employees not subject to item A.	The salary schedule showing the compensation range for classified employees not subject to item A.	The compensation level within a range of \$4,000 commencing at \$2,000 for unclassified employees including contract instructional employees not subject to item A.

An agency or department head is a person who has authority and responsibility for a department of an institution, board, commission, council or the like.

Attorney work product ¶ 7 Correspondence, work product and attorney-client privileged material prepared by a public body's lawyer is not required to be disclosed. Consult the attorney if this material is requested. The client must claim the privilege and there are significant issues of law concerning the attorney-client privilege.

Other matters: Certain materials pertaining to General Assembly members and staff ¶ 8; Economic development materials ¶ 9; Department of Revenue materials ¶ 10; University donors, exceptions ¶ 11; and Investment of retirement funds ¶ 12 are made exempt in the paragraphs noted here.

Employment applications ¶ 13 . In general, employment applications are not public records until the applicant list is culled to the “finalists.” This section makes information about “finalists” a matter of public record. The application materials for at least 3 finalists must be disclosed. The number of applicants considered, without identifying who or providing documentation about them, is also a matter of public record and must be provided upon request. Information about the finalists which becomes a matter of public record excludes income tax returns, medical records, social security numbers, or other information made non-public under this section. Remove information of a personal nature from a copy of the document and provide the modified record upon request.

Higher education research records ¶ 14. Research records and data collected by faculty members

at state institutions of higher education are not public records.

Identity of whistle blowers ¶ 15. The identity of a whistle blower is not a matter of public record. The statute restricts this exemption to those making a complaint or disclosing information to a “state regulatory agency” which could be DHEC or another agency vested with jurisdiction to guard the environment. However, the exclusion is not restricted to "environmental whistle blowers." See also paragraph 3 in this statute.

Tax payer confidentiality §6-1-120 was added to make certain taxpayer information confidential and a violation is punishable as a crime with disqualification from public office or employment. The Act adds § 6-1-120 to provide that, unless a court directs disclosure, it is unlawful for an officer or employee of a county or its agent to divulge or make known the information in a report, tax return, or application required to be filed by the taxpayer with that county, pursuant to an ordinance imposing: (1) a hospitality or accommodation tax authorized; (2) a business license tax authorized under § 4-9-30(12); or (3) a fee calculated using either the gross proceeds of sales or paid admissions.

Section 6-1-120 permits: (1) publication of statistics classified to prevent the identification of particular reports, returns, or applications and the information on them; and (2) inspection of reports, returns, or applications and the information included on them by an officer or employee of the county or an agent retained by an officer or employee in connection with audits of the taxpayer, appeals by the taxpayer, and collection efforts in connection with the tax or fee which is the subject of the return, report, or application. A person violating this law is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. In addition, if the person convicted is an officer or employee of the county, the offender is dismissed from the office or position held and is disqualified from holding a public office in this State for five years following the conviction. Section 2 of the Act relates to state tax information.

Section 6-1-120 making taxpayer information submitted in connection with local government taxes private was amended effective May 1, 2000. The Act is reprinted in the Appendix. Some additional statutory exemptions to the FOIA are referred to in the section names “Sampling of Statutory Exemptions from FOIA.”

Confidentiality of information appearing on a driver’s license §30-4-160 was added to FOIA and prohibits the Department of Public Safety from selling or providing social security numbers, photographs or signatures to a private party.

Confidentiality of information contained in a Veteran’s discharge record. 2002 Act No. 308 amended § 30-15-60 to state that a DD 214 record or other discharge record is not a public record for purposes of Chapter 4, Title 30.

CASE NOTES

The financial burden of a change in venue did not justify withholding the tape of an emergency telephone call to 911 dispatcher under the §30-4-40(a)(3)(B) exemption for records of law enforcement and public safety agencies compiled in the process of detecting and investigating crime, if the disclosure of the information would harm the agency by the premature release of information to be used in a prospective law enforcement action. The financial cost of a venue change is not the type of harm this exemption is intended to prevent. Rather, it is intended to prevent harms such as those caused by release of a crime suspect's name before arrest, the location of an upcoming sting operation, and other sensitive law-enforcement information. A city is not entitled to a presumption that it would be harmed by disclosure of a 911 tape even though the audiotape was to be used in a criminal trial. A city is required to prove particular harm under §30-4-40(a)(3)(B). *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (Sup. Ct. 2005).

A prosecutor's belief that the release of a 911 tape prior to a criminal trial would have caused him to lose his license to practice law did not justify refusal to disclose the audiotape under the §30-4-40(a)(3)(B) exemption. The Rules of Professional Conduct did not affect whether the 911 tape was exempt from disclosure under the Act since disclosure under the Act was the obligation of the government and professionalism was the personal obligation of a government attorney. *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (Sup. Ct. 2005).

The Act's exemptions are to be narrowly construed so as to fulfill the purpose of the Act to guarantee the public reasonable access to certain activities of the government. An exemption from disclosure under the Act provides the government with discretion to either release the record or withhold it. Whether a record is exempt from disclosure under the Act depends on the particular facts of the case and the government has the burden of proving that the exemption applies. *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (Sup. Ct. 2005).

Even though the Act creates an affirmative duty on the part of public bodies to disclose information, it also enumerates fifteen categories of public records that may be exempt from disclosure. Section 30-4-40(a)(2), known as the "privacy exemption," does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure. The Court resorts to general privacy principles by balancing conflicting interests - the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other. Reports of complaints or allegations of illegal conduct made against named deputy sheriff's and employment information for the named deputy sheriff's, including dates of employment, title, rank, pay-rate schedule, copies of disciplinary letters, and records of suspension are not exempt from disclosure. The Court concluded that the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their interest to remain out of the public eye. *Burton v. York Sheriff's*

§ 30-4-40

Department, 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004).

The information contained in criminal investigative reports can be withheld from disclosure only to the extent that it falls within one or more of the exemptions enumerated in Section 30-4-40(a). Section 30-4-40(b) mandates that a public record containing both nonexempt and exempt material be segregated so that the nonexempt material is made available to the public. The exempt and nonexempt portions of the report should be determined on a case-by-case basis. *Burton v. York Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004).

A physician request to a public hospital, for information concerning physicians salaries and purchase prices for their practices, was public information under FOIA and did not amount to trade secrets. Therefore, the information requested was disclosable under FOIA. The information obtained pursuant to FOIA, from a public body, cannot be protected from further disclosure by the requestor through a restraining order. *Campbell v. Marion County Hospital*, 354 S.C. 274, 580 S.E.2d 163 (Ct.App. 2003).

The purpose of the Act is not to protect or create duty of confidentiality but to protect the public by providing for disclosure of information. The exemptions from disclosure contained in §§30-4-40 and 30-4-70 do not create a duty not to disclose. At most, the two sections simply allow public agencies the discretion to withhold exempted materials from public disclosure. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E. 2d 219 (1991).

County board of education properly held closed meeting to interview representative of petitioners who sought dismissal of superintendent of schools. The petitions failed to specify the reasons for the dismissal and the board's only practical way to determine what the reasons might be and whether the matters to be considered did not constitute an invasion of the superintendent's right of personal privacy was to conduct a closed meeting. *Georgetown Communications, Inc. v. Williams*, 290 S.C. 149, 348 S.E. 2d 396 (Ct. App. 1986).

Tape recordings and written files maintained by city police department of telephone complaints or written reports received during a certain period concerning altercations between a person making the request and her ex-husband were exempt from disclosure by the exception in §30-4-40(a)(3)(B) where the police chief had advised the city council that the requested tapes contained very sensitive police communications and included calls from regular informants, as well as Crimestopper calls from citizens, and the council was also notified that the shooting of the person making the request was presently pending for indictment and prosecution in the next few weeks. *Turner v. North Charleston Police Dept.*, 290 S.C. 511, 351 S.E. 2d 583 (Ct. App. 1986).

The Act's provision permitting a public body to hold closed meeting to discuss employment, demotion, or discipline of employee does not exempt internal investigation report of law enforcement agency from disclosure. The report is a public record and the question of its exemption must be resolved by reference to §30-4-40. *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E. 2d

747 (1996).

The exemptions to the Act do not provide a blanket prohibition of disclosure of the entire record containing exempt material; rather, the exempt and nonexempt must be separated and the nonexempt material disclosed. *Beattie v. Aiken County DSS*, 319 S.C. 449, 462 S.E. 2d 276 (1995).

In an action seeking the review of DSS files pursuant to the Act, the Court of Appeal affirmed the trial court's denial of the appellants' request to review the files where they contained at least some materials exempt from the Act's disclosure requirements and the record failed to show that the trial court was asked to review the DSS file and separate exempt and nonexempt material. Appellants were not precluded from reappearing before the trial court and requesting that it conduct a review to separate the material based on its exempt status. *Beattie v. Aiken County DSS*, 319 S.C. 449, 462 S.E. 2d 276 (1995).

If information qualifies as a trade secret under §30-4-40 and is exempt from disclosure, the exemption creates no duty of confidentiality and the tax commission may disclose the information in its discretion. *South Carolina Tax Comm. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E. 2d 843 (1994).

Exemptions in §30-4-40, specifically subsection (a)(2), create no duty of confidentiality. Thus, the exemptions impose no duty not to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure. *South Carolina Tax Comm. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E. 2d 843 (1994).

Under §30-4-30(c), failure to respond within 15 days means that the disclosure of nonexempt material at the time and place of access which the party requested is deemed approved. *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E. 2d 574 (1994).

Exemptions from disclosure in §30-4-40 are absolute despite a public body's failure to respond within 15 days as required by §30-4-30(c). The exemptions in §30-4-40 cannot be waived. *Litchfield Plantation Co. v. Georgetown County Water & Sewer Dist.*, 314 S.C. 30, 443 S.E. 2d 574 (1994).

Statements given by confidential informants contained in a SLED report were properly exempted from disclosure under the Act since it was not possible to disclose the substance of the statements without revealing the informants' identities; however, not all confidential informants' statements are per se exempt since only the identity of the informants, and not the information contained in their statements, is protected. *Newberry Pub. Co. v. Newberry County Comm. on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E. 2d 870 (1992).

SLED's policy of denying all FOIA requests for criminal investigative reports, without determining whether portions of the reports are subject to disclosure, is in direct contravention of

§ 30-4-40

the clear language of §30-4-40(b) providing that the public body shall separate the exempt and nonexempt material requested and make available the nonexempt material. *Newberry Pub. Co. v. Newberry County Comm. on Alcohol & Drug Abuse*, 308 S.C. 352, 417 S.E. 2d 870 (1992).

SLED was required to disclose the portions of a criminal investigative report requested under FOIA which included documents otherwise available to the public as public records since the records were not subject to any exemption contained in §30-4-40(a). *Newberry Pub. Co. v. Newberry County Comm. on Alcohol & Drug Abuse*, 308 S.C. 384 , 417 S.E. 2d 870 (1992).

Death certificates are not exempt from disclosure under §30-4-40. *Society of Professional Journalists v. Sexton*, 283 S.C.563, 324 S.E. 2d 313 (1984). [*Ed. Note: §44-63-86 makes death certificates public fifty years after the date of death.*]

Federal government was not entitled to presumption that all sources supplying information to FBI in a criminal investigation are confidential within meaning of federal Freedom of Information Act exemption. Source may be deemed confidential for purposes of exemption if the source furnished information with the understanding that FBI would not divulge communication except to the extent the FBI thought it necessary for law enforcement purposes. The government is entitled to presume that a FBI source is confidential where circumstances support the inference of confidentiality. *United States Dep't of Justice v. Landano*, 124 L. Ed. 2d 84, 113 S. Ct. 2014 (1993).

ATTORNEY GENERAL'S OPINIONS

Incident reports are generally considered to be public information but pursuant to §30-4-40 law enforcement agencies have the discretion to exempt from disclosure certain information. For example, §30-4-40(a)(3)(A) states that information is exempt from disclosure if it is determined that the information would endanger the life, health, or property of any person. Consistent with the recognized rights of victims in this state to be protected and the above FOIA provisions, the Attorney General advises “against the casual release of the names of juvenile victims to the public.” 2006 Op. Atty. Gen., dated May 5, 2006.

Certain criminal record information may be considered confidential pursuant to §30-4-40(a)(3). The provisions of §4-9-33 require that criminal records databases and other similar restricted databases related to law enforcement functions remain separate and under the supervision of the sheriff. Such supervisory requirement by a sheriff is in keeping with FOIA provisions that restrict public accessibility to certain law enforcement records and documents. 2006 Op. Atty. Gen., dated April 20, 2006.

Local boards distributing allocated funds for emergency food and shelter through the Federal Emergency Management Food and Shelter Program (EFSP) may collect and view the names of recipients of these funds to prevent fraudulent “duplication.” Disclosure of the names serves an

§ 30-4-40

important public interest by providing valuable information as to who receives funds and how those funds are distributed. “A court would likely conclude that the intrusion upon the privacy interests of recipients of EFSP assistance is ‘de minimus’ rather than ‘clearly unwarranted’” since only the names of the recipients are disclosed by the nonprofit agencies to the local boards. Even though the privacy interest in this situation is considered to be de minimus, having the recipient sign a valid waiver of any privacy right would eliminate any dispute regarding the right. 2005 Op. Atty. Gen., dated May 18, 2005.

Section 30-4-30(a) of the Act provides that “any person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40...” The term “person” is defined as “any individual, corporation, partnership, firm, organization or association” by §30-4-20(b). Assuming a particular state agency fits within the definition of a “person,” that agency could make a request for information from public bodies pursuant to the Act. A similar determination of a “person” could be made as to a particular municipal agency authorizing one agency to request and receive information from another agency where permitted. Therefore, sharing of information between a municipal police department and a clerk / treasurer’s office for official purposes and the enforcement of codes is permitted. 2004 Op. Atty. Gen., dated December 16, 2004.

Generally, the records concerning the discipline of a police officer are not exempt from disclosure under the “personal privacy exemption” contained in Section 30-4-40(a)(2). Such records, including the names of those officers disciplined, are not exempt because they relate to matters of “legitimate public concern” rather than “personal privacy” in one’s private life. Even though there is no blanket exception afforded to records of disciplinary action taken by a law enforcement agency or other public body, there may be particular exemptions such as the protection of one’s social security number. 2004 Op. Atty. Gen., dated February 4, 2004. See also *Burton v. York Sheriff’s Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct.App. 2004).

The confidentiality requirements of §§56-5-1340 and 56-5-1360 should be construed as being applicable only to accident reports made by individuals involved in an accident and are inapplicable to those reports filed by law enforcement officers. Accident reports filed by law enforcement officers pursuant to §56-5-1270 are not confidential. 1986 Op. Atty. Gen. No. 86-23.

Telephone bills of a public agency are considered public records and subject to disclosure under the Act. Section 30-4-40(a)(2) would not present valid reason, absent some specific showing to the contrary, to withhold telephone billing records. 1993 Op. Atty. Gen. No. 93-17.

Public body may disclose names, sex, race, title, and dates of employment of all officers and employees of public body subject to any applicable restriction or limitation under Act. 1993 Op. Atty. Gen. No. 93-63. [*Ed. Note: Under §30-4-50(A)(1) a public body must disclose this information.*]

Mailing lists of various publications, which would include subscribers' mailing addresses, are disclosable unless an exception restricts public's right to access. 1993 Op. Atty. Gen. No. 93-63. [*Ed. Note: §30-4-50(B) was adopted after this opinion was issued.*]

Whether to disclose any portion of an application for licensure as a proprietary school, such as financial reports, is a decision to be made by the Commission on Higher Education on a case-by-case basis. 1992 Op. Atty. Gen. No. 92-23.

Section 50-21-410 would appear to prohibit the South Carolina Wildlife & Marine Resources Department from releasing information from vessel numbering system records under a FOIA request when the request is not related to boating safety. 1992 Op. Atty. Gen. No. 92-43.

The disclosability of prefiled indictments under the Act is to be determined by the clerks of the court subject to judicial scrutiny. 1989 Op. Atty. Gen. No. 89-16.

An arrest warrant or bench warrant would generally be disclosable upon its being served upon the person named in the warrant unless the information in the warrant is otherwise exempt under the Act; the custodian of criminal investigatory records, such as search warrants, has the discretion to disclose the records if he or she deems that it would not harm law enforcement or the investigation. 1989 Op. Atty. Gen. No. 89-78.

Whether or not a sheriff's department can release the tape of a 911 conversation or its contents must be determined by that agency; any decision as to nondisclosure would be subject to possible judicial review. 1988 Op. Atty. Gen. No. 88-28.

Salary survey information of various local governmental employees maintained in a data base by the Appalachian Council of Governments may be released under the Act. Drafts of actual salary studies should not be released until the drafts are made available to the client jurisdiction or otherwise distributed. Salary information of an entity not classified as a public body, in the possession of a public body such as the Council, would not be subject to the compensation disclosure requirements of §30-4-40(a)(6). However, because the disclosure of a private employee's salary could constitute an invasion of privacy with respect to his financial affairs and because the information may be protected by an exemption under FOIA, consultation with the private sector firm prior to disclosure of such salary information is recommended. 1988 Op. Atty. Gen. No. 88-42.

The Act does not address whether or not individuals should be notified when there is a FOIA request for release of their salary. Inasmuch as the disclosure of residence addresses or telephone numbers could constitute an unreasonable invasion of personal privacy, a determination as to disclosure under FOIA of residence addresses and telephone numbers must be made on a case by case basis. To the extent this opinion is inconsistent with opinions dated January 25, 1978, and August 5, 1977, this opinion as to the release of home addresses and telephone numbers of state employees will be deemed to be controlling. An individual's Social Security number should most

§ 30-4-40

probably not be disclosed pursuant to a FOIA request. Information such as where a state employee was housed while traveling on state business would be information from a voucher and thus subject to disclosure unless exempt for a reason defined under §30-4-40. The determination must be made on a case-by-case basis. While FOIA does not appear to prohibit the release of information over the telephone, it is advisable to provide responses to FOIA requests in written form to lessen the chances of misunderstanding and to provide an accurate record of the information provided. Because the definition of "department head" is quite broad, a request for the disclosure of the salary for a particular individual should be referred to the agency which employs the individual to determine whether or not the individual occupies a "department head" position. 1987 Op. Atty. Gen. No. 87-69.

Inasmuch as §42-19-40 contains no criminal penalty provision, a criminal prosecution cannot be undertaken pursuant to this provision for the unauthorized release of a confidential settlement agreement in a worker's compensation case. Because only those officers possessing removal power by virtue of a statute or constitutional provision may exercise such power, it would be a matter for the Governor to determine whether the unauthorized release of a settlement agreement in violation of §42-19-40 would constitute sufficient grounds for removal. Because the Act was designed to encourage the disclosure of public records and contains no specific provision dealing with the enforcement of confidentiality, by either criminal or civil remedies, the release of a settlement agreement which is confidential pursuant to §42-19-40 is not enforceable under FOIA. 1986 Op. Atty. Gen. No. 86-55.

Records of Department of Mental Health which identify patients or ex-patients are confidential by law and are not subject to disclosure pursuant to Act. 1984 Op. Atty. Gen. No. 84-22.

Certain public funds maintained by State Workers' Compensation Fund do not appear to be confidential and are subject to disclosure under the Act, unless exempt under provision of §30-4-40. 1984 Op. Atty. Gen. No. 84-53.

Under the Act, final order or opinion issued in disciplinary proceeding by State licensing board or agency is public information. 1984 Op. Atty. Gen. No. 84-61.

South Carolina Department of Social Services may release copies of cost reports filed by provider nursing homes under Title XIX of Social Security Act (Medicaid) to the public without violating either state or federal Freedom of Information Act, privacy right, or property right of provider nursing home services. 1984 Op. Atty. Gen. No. 84-79.

Incident reports used by campus police to report activities occurring within Department of Mental Health which may have criminal implications and which contain patient identities are public information but to the extent that it contains confidential information the information is exempt from disclosure under FOIA. 1984 Op. Atty. Gen. No. 84-85.

Public body (legislative delegation) is required under FOIA to act collectively in formally

convened open meeting and acting upon matters within its authority (budget approval). Once meeting is required, FOIA would probably be deemed applicable requiring meeting to be public unless specific exemption is applicable. 1984 Op. Atty. Gen. No. 84-111.

Court would probably find that ad hoc citizens committee appointed by Town Council to be a public body subject to the Act. 1984 Op. Atty. Gen. No. 84-125.

The Act does not require a public body to prepare and furnish a list that reflects information extracted from public records. 1981 Op. Atty. Gen. No. 81-20.

An autopsy report is not subject to public disclosure. 1981 Op. Atty. Gen. No. 81-87.

A school principal possesses the requisite amount of independent authority and control to be considered a "department head" for purposes of the Act. His salary is subject to disclosure. 1978 Op. Atty. Gen. No. 78-158. [*Ed. Note: §30-4-40(a)(6)(E) codifies this opinion.*]

United State Supreme Court's decision concluded that each state may enact legislation authorizing disclosure of "rap sheets" to public. SLED's regulation as to particular data to be disseminated is consistent with the Court's ruling and present South Carolina law. Supreme Court has concluded that "rap sheets" may continue to be treated as in the past by SLED in accordance with SLED's regulation. General Assembly could, consistent with Supreme Court's ruling specifically authorize by legislation disclosure of "rap sheets" to public. 1990 Op. Atty. Gen. No. 90-15.

Where legal counsel to Audit Council has been employed in dual capacity as both legal counsel and auditor there would be no distinction in work done as auditor and work performed as attorney under either the Act or Rules of Professional Conduct governing confidentiality of attorney's work product. 1991 Op. Atty. Gen. No. 91-4.

Applications or resumes of candidates for position of superintendent of education are considered public records. However, school board must examine each application or resume and determine what information is or is not subject to disclosure under Freedom of Information Act. 1991 Op. Atty. Gen. No. 91-52. [*Ed. Note: §30-4-40(13) was adopted after this Opinion was issued and allows exemption of all materials gathered in a search to fill a position up to the point that the search is narrowed to three candidates. For the final three candidates, all material must be disclosed, except tax returns, medical records, social security numbers, or other exempt information.*]

Without question, the Act applies to meetings of Legislature and its committees. 1992 Op. Atty. Gen. 92-02.

Pursuant to Section 30-4-40(b), if a public record contains material which is exempt pursuant

§ 30-4-40

to S.C. Code §6-1-120, the public body must separate the exempt and nonexempt material and make the nonexempt material available. Thus, a county council would be entitled to redact information in the record of appeal in a matter involving a local government tax matter prior to allowing inspection or production of the record. This opinion advises that in *The State-Record Co., Inc. v. City of Columbia*, C.A. No. 99-CP-40-3284, the circuit court declared that Section 6-1-120(A) “must be read to preclude disclosure of financial information contained in business license applications. Based on this determination, the court concludes that defendant’s failure to provide public access to the non-financial information contained in business license applications, including specifically, the name of the applicant, and the name, location and type of business, is a violation of the FOIA.” The court ordered the defendant permanently restrained and enjoined from withholding public access to the non-financial information contained in a business license application. 2000 Op. Atty. Gen. No. ___, dated June 28, 2000 (2000 WL 1205927 (S.C.A.G.)).

Section 30-4-50 (8) and 30-4-40(3) do not, in and of themselves, require a law enforcement agency to delete suspect information from an incident report prior to releasing the report under the FOIA. The fact that an investigation is ongoing, a warrant has not been issued, or the suspect has not been convicted would not alter this conclusion. However, the law enforcement agency is required to determine on a case-by-case basis whether a particular incident report contains information that is exempt from disclosure pursuant to another provision of the Code. Section 30-4-40(3) gives law enforcement agencies the discretion to exempt from disclosure materials which satisfy the requirements listed therein. Incident reports are public records and subject to disclosure. Section 16-3-1520 was enacted, in part, to ensure that victims receive a copy of these reports. 1999 Op. Atty. Gen. No. ___, dated June 17, 1999 (1999 WL 1893881 (S.C.A.G.)).

Section 17-1-40 of the South Carolina Code of Laws requires the destruction of certain criminal records. If a criminal charge is dismissed or the person is found innocent, the arrest and booking record, files, mug shots, and fingerprints must be destroyed and no evidence of the record pertaining to the charge may be retained by any municipal, county or State law enforcement agency. Section 30-4-40(a)(4) of the FOIA exempts from disclosure any matter specifically exempted by statute or law. Therefore, Section 17-1-40 is an exemption from the FOIA. However, arrest warrants are disclosable under FOIA. Information contained in an arrest warrant, which is exempt from disclosure by §§30-4-40 and 30-4-70 or others statutes, should be deleted prior to disclosure. Criminal convictions and sentences are also matters of public record. 2001 Op. Atty. Gen., dated January 10, 2001 (2001 WL 129348 (S.C.A.G.)).

Records expunged by order of the court pursuant to S.C. Code § 22-5-910 are exempt from disclosure under FOIA. 2001 Op. Atty. Gen., dated January 10, 2001 (2001 WL 129348 (S.C.A.G.)).

An expungement order granted under § 17-22-150, dealing with the disposition of charges against offenders accepted into an intervention program, would not require an agency to destroy the personnel records pertaining to the incident. This includes the agency’s internal investigation of the

incident. In a footnote to this opinion, the Attorney General's Office stated that whether the documents contained in the agency's personnel file are subject to disclosure under FOIA would depend on the information contained in the specific document. Such internal investigations are not subject to a *per se* exclusion. See *City of Columbia v. American Civil Liberties Union of South Carolina*, 323 S.C. 384, 475 S. E. 2d 747 (1996), but, specific items may qualify for an exemption pursuant to §30-4-40. See, *Beattie v. Aiken County Dept. of Social Services*, 319 S.C. 449, 462 S. E. 2d 276 (1995). 2000 Op. Atty. Gen., dated December 13, 2000 (2000 WL 33120655 (S.C.A.G.)).

32 C.F.R. § 45.3 makes the DD Form 214 confidential as a matter of federal law, except where dissemination is authorized by the written consent of the service member. This being the case, this form would be exempt under § 30-4-40(4) of the FOIA as a matter "specifically exempted from disclosure by statute or law." 2002 Op. Atty. Gen., dated May 16, 2002 (2002 WL 1340416 (S.C.A.G.)). (2002 Act No. 308 amended § 30-15-60 to state that a DD 214 record or other discharge record is not a public record for purposes of Chapter 4, Title 30.)

§ 30-4-45. Information concerning safeguards and off-site consequence analysis; regulation of access; vulnerable zone defined.

(A) The director of each agency that is the custodian of information subject to the provisions of 42 U.S.C. 7412(r)(7)(H), 40 CFR 1400 "Distribution of Off-site Consequence Analysis Information", or 10 CFR 73.21 "Requirements for the protection of safeguards information", must establish procedures to ensure that the information is released only in accordance with the applicable federal provisions.

(B) The director of each agency that is the custodian of information, the unrestricted release of which could increase the risk of acts of terrorism, may identify the information or compilations of information by notifying the Attorney General in writing, and shall promulgate regulations in accordance with the Administrative Procedures Act, Sections 1-23-110 through 1-23-120(a) and Section 1-23-130, to regulate access to the information in accordance with the provisions of this section.

(C) Regulations to govern access to information subject to subsections (A) and (B) must at a minimum provide for:

- (1) disclosure of information to state, federal, and local authorities as required to carry out governmental functions;

and

(2) disclosure of information to persons who live or work within a vulnerable zone.

For purposes of this section, “vulnerable zone” is defined as a circle, the center of which is within the boundaries of a facility possessing hazardous, toxic, flammable, radioactive, or infectious materials subject to this section, and the radius of which is that distance a hazardous, toxic, flammable, radioactive, or infectious cloud, overpressure, radiation, or radiant heat would travel before dissipating to the point it no longer threatens serious short-term harm to people or the environment.

Disclosure of information pursuant to this subsection must be by means that will prevent its removal or mechanical reproduction. Disclosure of information pursuant to this subsection must be made only after the custodian has ascertained the person's identity by viewing photo identification issued by a federal, state, or local government agency to the person and after the person has signed a register kept for the purpose.

HISTORY: 2002 Act No. 339, §30.

§30-4-50. Certain matters declared public information; use of information for commercial solicitation prohibited.

(A) Without limiting the meaning of other sections of this chapter, the following categories of information are specifically made public information subject to the restrictions and limitations of Sections 30-4-20, 30-4-40, and 30-4-70 of this chapter:

- (1) the names, sex, race, title, and dates of employment of all employees and officers of public bodies;
- (2) administrative staff manuals and instructions to staff that affect a member of the public;

- (3) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
 - (4) those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the public body;
 - (5) written planning policies and goals and final planning decisions;
 - (6) information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies;
 - (7) the minutes of all proceedings of all public bodies and all votes at such proceedings, with the exception of all such minutes and votes taken at meetings closed to the public pursuant to Section 30-4-70;
 - (8) reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. Where a report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the report;
 - (9) statistical and other empirical findings considered by the Legislative Audit Council in the development of an audit report.
- (B) No information contained in a police incident report or in an employee salary schedule revealed in response to a request pursuant to this chapter may be utilized for commercial solicitation. Also, the home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to this chapter may not be utilized for commercial solicitation. However, this provision must not be interpreted to restrict access by the public and press to information contained in public records.

HISTORY: 1978 Act No. 593, §6; 1982 Act No. 370; 1992 Act No. 269, §1; 1993 Act No. 44, §1; 1998 Act No. 423, §7.

PRACTICE POINTERS

This statute clearly designates certain records as “public records” which must be made

§ 30-4-50

available upon request. In a 1998 amendment to the Act, the word "incident," which had described the kind of law enforcement records required to be disclosed, was deleted from §30-4-50(A)(8). Now, the kind of law enforcement records which must be disclosed is much broader.

Paragraph (B) of §30-4-50 prohibits commercial solicitation of persons whose identity was obtained from a police incident report or an employee salary schedule obtained under a FOIA request. The home address and home telephone number of an employee or officer of a public body revealed in response to a FOIA request may not be use for commercial solicitation. A public body's office policy may include requirements to ensure compliance with the commercial solicitation prohibition when a FOIA request is received from a person known, or reasonably suspected to be, soliciting information for such use.

CASE NOTES

In an action for invasion of privacy arising from a publication's reporting a prison rape which included the victim's name, the controlling law to determine if the information was lawfully obtained was not the rape shield law, §16-3-730, but FOIA. *Doe v. Berkeley Publishers*, 322 S.C. 307, 471 S.E. 2d 731 (Ct. App. 1996).

Findings of fact and conclusions of law in the final order of the state board of medical examiners, which suspended a physician for misconduct, was public information and publication of the findings would not be enjoined. *Ewing v. State Bd. of Medical Examiners*, 290 SC 89, 348 S.E. 2d 361 (1986).

ATTORNEY GENERAL'S OPINIONS

Accessing home addresses and home telephone numbers of officers and employees of a public body for use by a nonprofit professional organization for membership recruitment and similar activities does not, on its face, appear to fall within the definition of "commercial solicitation." Of course, the public body to whom such a request is presented would ultimately make the determination as to whether a particular activity would constitute "commercial solicitation" or to release any records under the recent amendments to the Act. 1992 Op. Atty. Gen. No. 92-20.

Information such as where a state employee was housed while traveling on state business would be information from a voucher and thus subject to disclosure unless exempt for a reason defined under §30-4-40. The determination must be made on a case-by-case basis. 1987 Op. Atty. Gen. No. 87-69.

Under the Act, a final order or opinion issued in disciplinary proceeding by State licensing board or agency is public information. 1984 Op. Atty. Gen. No. 84-61.

Incident reports used by campus police to report activities occurring within Department of Mental Health which may have criminal implications and which contain patient identities are public information, but to extent that it contains confidential information, the information is exempt from disclosure under FOIA. 1984 Op. Atty. Gen. No. 84-85.

A grievance file of the Board of Commissioners on Grievances and Discipline is not public information unless the proceeding has been made public at the request of the respondent attorney or the investigation is predicated upon a conviction of the attorney for a crime or upon public discipline imposed upon the attorney in another jurisdiction. 1981 Op. Atty. Gen. No. 81-60. [*Ed. Note: The disciplinary rules for attorneys were amended after this opinion was issued.*]

When the Administrator of Consumer Affairs receives information relating to consumer complaints, pursuant to §37-6-117, and the complaint is later determined to be groundless, the Administrator is not required to release the information. 1976-77 Op. Atty. Gen. No. 77-132.

The Act does not require that the public be given access to personnel files and employment applications maintained on employees of the South Carolina House of Representatives. 1976-77 Op. Atty. Gen. No. 77-45. [*Ed. Note: §30-4-40(13) was adopted after this Opinion was issued and allows exemption of all materials gathered in a search to fill a position up to the point that the search is narrowed to three candidates. For the final three candidates, all material must be disclosed, except tax returns, medical records, social security numbers, or other exempt information.*]

Under the decision in *Cooper v. Bales*, the State and its political subdivisions should release only the employee's salary, grade and job description upon request under the FOIA. Any further disclosure could come only if the employee authorizes the release or if a court of competent jurisdiction orders such disclosure. 1976-77 Op. Atty. Gen. No. 77-243. [*Ed. Note: See §§30-4-50(A)(1) and 30-4-40(6), which were adopted after this Opinion was issued and which require the disclosure of certain employee information.*]

Records containing charges against residential homebuilders should be made available for public inspection and copying once a proper disposition has been made of the charge by the Residential Homebuilders' Commission. 1976-77 Op. Atty. Gen. No. 77-288.

A public body may disclose names, sex, race, title, and dates of employment of all officers and employees of public body subject to any applicable restriction or limitation under the Act. 1993 Op. Atty. Gen. No. 93-63.

Except for commercial solicitation, the Act does not limit how a requestor may use public information obtained pursuant to the Act. Consideration should be given to ethics and election laws if information obtained under the Act is to be used in a political campaign. 1993 Op. Atty. Gen. No. 93-63.

§30-4-55. Disclosure of fiscal impact on public bodies offering economic incentives to business; cost-benefit analysis required.

A public body as defined by Section 30-4-20(a), or a person or entity employed by or authorized to act for or on behalf of a public body, that undertakes to attract business or industry to invest or locate in South Carolina by offering incentives that require the expenditure of public funds or the transfer of anything of value or that reduce the rate or alter the method of taxation of the business or industry or that otherwise impact the offeror fiscally, must disclose, upon request, the fiscal impact of the offer on the public body and a governmental entity affected by the offer after:

- (a) the offered incentive or expenditure is accepted, and
- (b) the project has been publicly announced or an incentive agreement has been finalized, whichever occurs later.

The fiscal impact disclosure must include a cost-benefit analysis that compares the anticipated public cost of the commitments with the anticipated public benefits. Notwithstanding the requirements of this section, information that is otherwise exempt from disclosure under Section 30-4-40(a)(1),(a)(5)(c),and(a)(9) remains exempt from disclosure.

HISTORY: 2003 Act No. 86, § 3.

§30-4-60. Meetings of public bodies shall be open.

Every meeting of all public bodies shall be open to the public unless closed pursuant to §30-4-70 of this chapter.

HISTORY: 1978 Act No. 593, §7.

PRACTICE POINTERS

All meetings are open to the public. Only portions of a meeting specified in §30-4-70 may be closed to the public. Meetings in general are discussed in §30-4-20 and the practice pointer following. Note that there is a special statute for procedures relative to adopting ordinances at S.C. Code §4-9-120.

There are two other specific statutes applicable to council meetings and notice thereof. Section 4-9-130 speaks to the requirements for public hearings with public notice concerning specific financial matters to be taken up by council at §4-9-130. Section 6-1-80 supersedes FOIA and §4-9-130 as they relate to the form of public notice required to adopt the county budget. Both statutes are reprinted in the Appendix.

CASE NOTES

Meetings may be conducted outside of municipal boundaries. The Court of Appeals in construing the “minimal cost or delay” provision in §30-4-15 adopted a balancing test weighing the interests of the public against the government’s need to conduct a meeting at a distant site. The Supreme Court affirmed the use of a balancing test but reversed and remanded the case for further findings. To determine if a meeting complies with the “minimum cost or delay” requirements in §30-4-15, the interests of the municipality in conducting a meeting outside the municipal limits should be weighed against the cost or delay to the public. *Wiedemann v. Town of Hilton Head*, 326 S.C. 573, 486 S.E. 2d 263 (Ct. App. 1997); affirmed in part but reversed with directions to take additional evidence to determine if the test was met. Opinion No. 24789, Filed May 18, 1998.

A review committee composed of city staff members organized by the city manager to evaluate RFPs and advise the city manager on the award of a contract was held to be a public body (an advisory committee) within the meaning of “public body” in Section 30-4-20(a). It did not matter that the members of the committee were not members of the city council. The fact that the committee was set up to give the city manager and ultimately the city council advice made the review committee an advisory committee covered by the open meetings laws in the FOIA. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E. 2d 862 (2001).

ATTORNEY GENERAL'S OPINIONS

Telephonic and electronic meetings must comply with all the provisions of FOIA. This includes the provision set forth in §30-4-60 that all meetings of a “public body” shall be open to the public. This also includes the provisions set forth in §30-4-80 and §30-4-90 that require giving notice of the meetings and keeping minutes of the meetings. It is recommended that a speaker phone be placed in a conference room or other gathering place in the offices which would allow several persons to monitor what was taking place in the meeting and to communicate with members as

needed. An ordinance outlining the procedures for telephonic meetings is not necessary since the requirements are outlined in the FOIA. "An ordinance could not limit the FOIA." 2005 Op. Atty. Gen., dated August 25, 2005.

Since the parole board in this State is considered a "public body," parole board meetings are subject to FOIA. Its meetings must be open to the public except for limited circumstances outlined in §30-4-70 in which an executive session may be held. Therefore, "the particulars of the parole of an individual would then be matters of public record." 2005 Op. Atty. Gen., dated August 5, 2005.

Attorney General believes that notice requirement of Act should be followed by a public body which will reconvene from "recess" or "adjourned" meeting wherever such reconvened meeting will be held, anticipated to be held in executive session, or otherwise. Even though public may not have legal right to be present at every part of every meeting, nevertheless public generally has right to know where meeting is and when it will be. 1991 Op. Atty. Gen. No. 91-42.

School board would be required to interview candidates for position of superintendent in open or public meeting unless board voted to do so in an executive session. 1991 Op. Atty. Gen. No. 91-14.

While the statute does not expressly address question and while courts have not yet faced issue, the Act seemingly would be applicable to search committee of University of South Carolina, which committee is searching for or interviewing candidates to serve as head basketball coach of a university. 1991 Op. Atty. Gen. No. 91-42.

A school improvement council would be considered to be a "public body" for purposes of the Act and as such would be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-14.

An advisory committee whose assigned task is information-gathering or advisory functions should not meet in executive session to discuss proposed contractual arrangements unless they are directly involved in the actual negotiation of a contract. 1988 Op. Atty. Gen. No. 88-31.

No individual may be elected commissioner of a highway district unless he receives a favorable vote from a majority of members of the legislative delegation which comprises the district. The delegation may meet in executive session to discuss the appointment of a person to a public body although such a meeting in executive session is not required. 1986 Op. Atty. Gen. No. 86-50.

In absence of truly exigent circumstances, FOIA requires public body to give notice, in the manner prescribed, of time, place, date and agenda of its meetings. Notice is to be given as far in advance of the meeting as is practicable, but no less than 24 hours before meeting. 1984 Op. Atty. Gen. No. 84-20.

Practice of using telephone poll to handle matters over which public body has authority

§ 30-4-60

would most probably not comply with Act. Rather, meeting of body either corporally or by means of electronic equipment such as telephone conference call would be preferable way to handle emergency situation so body may act collectively rather than its members acting individually and independently. 1992 Op. Atty. Gen. 92-02.

The Real Estate Commission is a public body subject to the requirements of the Act. When the Real Estate Commission is operating as an appellate or quasi-judicial body, an open meeting should be held, with open deliberations, and voting conducted in open or public session. 1994 Op. Atty. Gen. No. 94-22.

The Attorney General advised that a court would likely find that the Chester County Economic Development Board's exercise of governmental functions establishes it as a public body under FOIA's definition of "public body" at Section 30-4-20(a). 2001 Op. Atty. Gen., dated February 15, 2001 (2001 WL 265255 (S.C.A.G.)).

Convening a meeting telephonically is permitted by the Act. 2000 Op. Atty. Gen. No. ____, dated August 3, 2000 (2000 WL 1205954 (S.C.A.G.)).

§30-4-65. Cabinet meetings subject to chapter provisions; cabinet defined.

(A) The Governor's cabinet meetings are subject to the provisions of this chapter only when the Governor's cabinet is convened to discuss or act upon a matter over which the Governor has granted to the cabinet, by executive order, supervision, control, jurisdiction, or advisory power.

(B) For purposes of this chapter, "cabinet" means the directors of the departments of the executive branch of state government appointed by the Governor pursuant to the provisions of Section 1-30-10(B)(1)(i) when they meet as a group and a quorum is present.

HISTORY: 2003 Act No. 86, § 6.

§30-4-70. Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly.

(a) A public body may hold a meeting closed to the public for one or more of the following reasons:

(1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

(2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

(3) Discussion regarding the development of security personnel or devices.

(4) Investigative proceedings regarding allegations of criminal misconduct.

(5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

(6) The Retirement System Investment Commission, if the meeting is in executive session specifically pursuant to Section 9-16-80(A) or 9-16-320(C).

(b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding

§ 30-4-70

officer shall announce the specific purpose of the executive session. As used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.

(c) No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

(d) This chapter does not prohibit the removal of any person who wilfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised.

(e) Sessions of the General Assembly may enter into executive sessions authorized by the Constitution of this State and rules adopted pursuant thereto.

(f) The Board of Trustees of the respective institution of higher learning, while meeting as the trustee of its endowment funds, if the meeting is in executive session specifically pursuant to Sections 59-153-80(A) or 59-153-320(C).

HISTORY: 1978 Act No. 593, §8; 1987 Act No. 118, §6; 1998 Act No. 423, §8; 1998 Act No. 371, §7B; 1999 Act No. 122, §4; 2005 Act. No. 153, Pt. IV, §5.

PRACTICE POINTERS

The reference to a "meeting closed to the public" means executive session. An executive session is conducted privately outside the presence of the public and press. Executive session may be requested by motion and conducted only for the purposes specified in this statute. The former practice of "ratifying" action taken in executive session has been abolished.

Executive session procedure: This statute specifies that a public motion and vote must be taken to go into executive session. If the body votes to go into executive session, the presiding officer is

required to publicly announce the executive session's specific purpose. Specific purpose is defined at paragraph (b) of this section and means a "description of the matter to be discussed as identified in items (1) through (5) of subsection (a)" of this section. If the matter at issue concerns item (1), employment matters of a specific person, or item (5), business recruitment / economic development, the identity of the person or entity being discussed need not be publicly announced.

The only action allowed to be taken in executive session is to adjourn or return to public session. Deciding on a course of action by polling members in executive session is prohibited.

It is not sufficient to state: "We are going into executive session." Rather, a specific purpose must be stated. For example, "We are going into executive session to discuss negotiations incident to a proposed contractual arrangement," is sufficient.

Upon conclusion of executive session and returning to public session, it is prohibited to "ratify action taken in executive session." The appropriate statement consists a motion and vote in public session to direct staff to take the course of action discussed in executive session. For example, the statement: "I move to authorize staff to negotiate the contract within the limits discussed in executive session," is appropriate. However, before a contract can be entered into, the contract's details must be disclosed and voted on in public session. For example, at the conclusion of a public session discussion of a pending contractual matter, a member may move "to purchase the property for \$1,000.00 so that a new correctional facility can be built on the site."

Executive session is permitted only to:

Discuss employment matters ¶ 1 The statement: " We are going into executive session to discuss the employment of an executive director," is suitable. Current or potential employee names do not have to be stated. If the employment matter concerns an adversarial hearing about an employee or client and the employee or client requests a public hearing then a public hearing must be granted.

Discuss contract negotiations and receive legal advice ¶ 2. Discussions about contracts, sales and purchases, and receipt of legal advice may be conducted in executive session. Receipt of legal advice in executive session is permitted if the legal advice relates to a pending, threatened, or a potential claim or other matters covered by the attorney-client privilege. A contract, once entered into, is a matter of public record. Only matters relating to a potential claim or discussions about an adversarial relationship arising from a contract may be discussed in executive session. Other matters arising from a contractual relationship concerning performance or simple status reports should be discussed during public session.

For example, "We are going into executive session to receive legal advice about a pending law suit," is suitable. After rising from executive session, the body must vote in public to commit to any particular course of action. For example, "I move to authorize the attorney to respond to the

legal action discussed in the manner specified," sufficiently records in public the action discussed in private.

Discuss security measures ¶ 3. Discussions about security measures proposed or taken, security personnel or devices may be conducted in executive session. To commit to any course of action, a public vote must be taken.

Discuss crimes and offenses ¶ 4. Discussions about alleged criminal wrongdoing, investigative proceedings about allegations of criminal misconduct, and discussions about matters that may lead to criminal prosecution may be conducted in executive session. To commit to a course of action, a vote must be taken in public session.

Discuss matters concerning economic development ¶ 5. Discussions about the proposed location, expansion, or the provision of services encouraging location or expansion of business in the area served by the public body is permitted to be conducted in executive session. To commit to a course of action, a vote must be taken in public session. However, a vote on a contract or the sale or lease of real property must follow the procedures in §4-9-130, which requires a public hearing.

Chance meetings and disruptive behavior. Subparagraph (c) of this section prohibits committing to a course of action at a chance meeting, a social meeting, or by electronic communication which is not the subject of public notice and made open to the public. Subparagraph (d) permits a public body to remove a person who "wilfully disrupts" a public meeting if the orderly conduct of the meeting is seriously compromised.

CASE NOTES

Holding a closed session meeting of city council to hear the presentation by attorneys concerning a waste water treatment plant clearly fell within exemption from the open meeting requirement for receipt of legal advice provided by §30-4-70(a)(2), since, even though the city was not involved in litigation at the time of the closed meeting, litigation was a grave real possibility. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

Exemption from the open meeting requirement in §30-4-70(a)(2) does not require that a public body actually be engaged in litigation, only that legal advice be rendered. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

Presentation by consultants who were evaluating three water supply alternatives under consideration by city council fell within the exemption from the open meeting requirement found in §30-4-70(a)(2). *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

The "purpose" of the executive session was sufficiently announced by the announcement of

the mayor, after city council had voted to go into executive session, that while in executive session city council would discuss the employment of a person for the development of a training session for the council, hear a legal presentation by attorneys for the city, and receive a report from consultants on a proposed water treatment plant. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

Newspapers' complaint because the city council took up matters not on the agenda while in executive session was without merit, since the Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session, and, moreover, no prejudice resulted to the newspapers as a result of their not having an agenda for the meeting in advance of the meeting taking place. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

The "Peeping Tom" statute [§16-17-470] was inapplicable to the conduct of newspaper reporters who sought to overhear proceedings of city council while in executive session since the reporters were on public property and not on or about the premises of another. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

County board of education properly held a closed meeting to interview representative of petitioners seeking dismissal of superintendent of schools where the petitions, as presented, failed to specify the reasons for the dismissal, and the board's only practical way to determine what those reasons might be and whether the matters to be considered did not constitute an invasion of the superintendent's right of personal privacy was to conduct such a meeting. *Georgetown Communications, Inc. v. Williams*, 290 S.C. 149, 348 S.E. 2d 396 (Ct. App. 1986).

FOIA provision permitting public body to hold closed meeting to discuss employment, demotion, or discipline of employee does not exempt internal investigation report of law enforcement agency from disclosure. The report is a public record and question of its exemption must be resolved by reference to §30-4-40. *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E. 2d 747 (1996).

County legislative delegation did not violate the Act by recommending appointment to governor to fill vacant school board position in properly noticed, open public meeting through process in which sign up sheet was circulated at meeting. Although formal action was to be taken by recorded vote and two members may have prematurely signed sheet nothing in the provision required vote to be by open roll-call and two members were present at meeting and adhered to their signatures. *Fowler v. Beasley*, 322 S.C. 463, 472 S.E. 2d 630 (1996).

The Act dictates the procedures by which public bodies must conduct their meetings. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995), affirmed on grounds other than the FOIA violation, 324 S.C. 238, 478 S.E. 2d 836 (1996).

§ 30-4-70

Upon a finding of a violation of the Act, the trial court may order equitable relief as it considers appropriate and a violation of FOIA must be considered to be an irreparable injury for which no adequate remedy at law exists. Consequently, the trial court did not abuse its discretion when it ordered the invalidation of a vote by a Public Service District to terminate an employee where the vote was in violation of the Act. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S. C.124, 459 S.E. 2d 876 (Ct. App. 1995); affirmed on grounds other than the FOIA violation, 324 S.C.238, 478 S.E. 836 (1996).

A county business license tax ordinance amendment was properly held invalid pursuant to §30-4-70(a)(6) which precludes taking votes or formal action in an executive closed meeting where (1) the consensus regarding the amendment was reached at a closed meeting, (2) no motion to amend was made at the subsequent public meeting, and (3) the amended version was read as a "third reading" and voted upon. *Business License Opposition Committee v. Sumter County*, 311 S.C. 24, 426 S.E. 2d 745 (1992).

In a case involving a former tax assessor who filed action for a public policy tort, wrongful discharge, and violation of FOIA against the county and county administrator, the Court of Appeals held that the tax assessor could not rely on an alleged violation of FOIA by the administrator and the county council to seek damages for her termination. The tax assessor argued the county's policy, which was the subject of the suit, was made during an executive session of county council and was null and void because it was made in violation of FOIA. Therefore, according to the tax assessor, any decisions arising from the policy, including her termination, were likewise null and void. The court rejected the argument. The court stated that it could not discern from the record whether the county's policy was made by the county council in executive session, by council and the administrator in informal discussions, or by the administrator alone. However, the court stated that the answer was unimportant because FOIA is designed to "protect the public in general, not any individual in particular." Whether the initial policy was developed in violation of FOIA was found irrelevant to the question of whether the tax assessor's termination violated public policy. [The tax assessor did not argue she was terminated for exposing FOIA violations and the court did not address whether such a termination would give rise to a cause of action under the public policy exception.] The court found that if county council took action in violation of FOIA, the tax assessor could have filed an action under FOIA seeking disclosure. She could not rely on the alleged FOIA violation to seek damages for her termination. *Antley v. Shepherd*, 340 S.C.541, 532 S.E. 2d 294 (Ct. App. 2000) (rehearing denied July 15, 2000).

Former tax assessor could not rely on alleged violations of the Freedom of Information Act by county administrator and council to seek damages for her termination. Although the Court of Appeals erred in finding the FOIA claim was properly before it, the Court affirmed the conclusion reached in the analysis by the Court of Appeals holding that the assessor could not prevail on her FOIA claim. *Antley v. Shepherd*, 349 S.C. 600, 564 S.E.2d 116 (2002).

The exemption provisions of the Act did not establish a statutory duty of confidentiality for

personal information, and thus did not create a cause of action in favor of a county employee for comments made by her superiors to the press regarding her removal; neither did the superiors owe the employee a special duty of confidentiality, since the purpose of the FOIA is to protect the public from secret government activity and neither exemption provision purports to protect individual rights. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E. 2d 219 (1991).

If a public body votes to go into executive session, the presiding officer must publicly announce the executive session's specific purpose. Specific purpose is defined as a "description of the matter to be discussed" identified by one of the following: (1) discussion of employment matters; (2) discussion of contract negotiations and receipt of legal advice; (3) discussion of security matters; (4) discussion of crimes and offenses; and (5) discussion of matters concerning economic development. Failure to announce the specific purpose of an executive session is a violation of the FOIA. Finding that the city violated the FOIA by failing to state a specific purpose for the executive session, the court remanded the case for a determination of relief, if any, available to Plaintiff. Although prior decisions have held that a technical violation of the FOIA can be cured by substantial compliance with the FOIA, the court held here that failure to state a specific purpose is more than a "technical violation" which can be remedied by substantial compliance with the FOIA. The court held that FOIA's requirement to state the specific purpose of an executive session is not satisfied merely because citizens have some idea of what a public body might discuss in private. The exact purpose of the executive session must be publicly announced before going into executive session. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E. 2d 862 (2001).

ATTORNEY GENERAL'S OPINIONS

The Clinton Newberry Natural Gas Authority, providing substantial cash flow to the two municipalities, would be considered a "public body" for purposes of the Act and would be required to comply with the Act. The Authority currently is not taking any formal action to make the distribution to the two cities. Section 30-4-70 requires that "no formal action may be taken in executive session" and that "no vote may be taken in executive session." Such action may only be taken in open session. The Act defines "formal action" as "a recorded vote committing the body concerned to specific action." Op. Atty. Gen., dated March 10, 2005.

The statute makes clear that no actions may be taken on any of the topics discussed in executive session even if they fall under one of the few exceptions in Section 30-4-70. Votes to adjourn or to return to public session are the only votes that may be made in executive session. Therefore, county council may not vote on matters concerning elected county officials or to obtain lease purchase agreements in executive session. Generally, the instances where executive session is proper to discuss issues regarding elected county officials and their departments will be few. Section 30-4-70(a)(1) may apply if the discussion is related to discipline, compensation, or promotion of a county employee or any other person who is regulated by the council. Subsection (a)(4) may apply if a county official, or an employee within their department, is under some sort of

criminal investigation. Likewise, a discussion of lease purchase agreement negotiations on property acquisitions may fall under the language of Section 30-4-70(a)(2). Other contractual negotiations with outside parties and legal questions related to the financial negotiations, directed to the county attorney, may also need to be held in executive session. However, these exceptions should be construed narrowly and county council should articulate the reason why the particular issue cannot be taken up in public session. 2004 Op. Atty. Gen., dated March 10, 2004.

A public body is precluded from taking formal action or a vote except in public session. Because the distinction between purely procedural matters and "formal action" is often not clear, a public rather than secret vote should be taken if any doubt exists. Ad hoc committees or task forces appointed by the Mayor and City Council for information-gathering or advisory functions would be subject to the requirements of the Act. 1988 Op. Atty. Gen. No. 88-5.

Court would probably find that ad hoc citizens committee appointed by Town Council to be a public body subject to the Act. 1984 Op. Atty. Gen. No. 84-125.

Attorney General believes that notice requirement of the Act should be followed by public body which will reconvene from "recess" or "adjourned" meeting wherever such reconvened meeting will be held, anticipated to be held in executive sessions, or otherwise. Even though public may not have legal right to be present at every part of every meeting, nevertheless public generally has right to know where meeting is and when it will be. 1991 Op. Atty. Gen. No. 91-42.

School board would be required to interview candidates for position of superintendent in open or public meeting unless board voted to do so in executive session. 1991 Op. Atty. Gen. No. 91-14.

While the statute does not expressly address question and while courts have not yet faced issue, the Act seemingly would be applicable to search committee of University of South Carolina, which committee is searching for or interviewing candidates to serve as head basketball coach of university. 1991 Op. Atty. Gen. No 91-42.

An executive session is not appropriate for the discussion of issues causing conflict between a mayor and a city manager inasmuch as the matters to be discussed do not relate to those specified in §30-4-70(a)(1). The Act mandates that the specific purpose of an executive session must be announced and an announcement that "personnel matters" will be discussed would not be sufficient under the Act. 1988 Op. Atty. Gen. No. 88-9.

An advisory committee whose assigned task is information-gathering or advisory functions should not meet in executive session to discuss proposed contractual arrangements unless they are directly involved in the actual negotiation of a contract. 1988 Op. Atty. Gen. No. 88-31.

No individual may be elected commissioner of a highway district unless he receives a

§ 30-4-70

favorable vote from a majority of members of the legislative delegations which comprise the district. The delegations may meet in executive session to discuss the appointment of a person to a public body although a meeting in executive session is not required. 1986 Op. Atty. Gen. No. 86-50.

In absence of specified number of members necessary to convene in executive session, a simple majority vote consisting of four members would be necessary for seven-member board to convene in executive session. 1985 Op. Atty. Gen. No. 85-3.

Public body (legislative delegation) is required under FOIA to act collectively in formally convened open meeting and acting upon matters within its authority (budget approval). Once meeting is required, FOIA would probably be deemed applicable, thus requiring meeting to be public, unless specific exemption were applicable. 1984 Op. Atty. Gen. No. 84-111.

Town Council must vote in public on the question of whether to enter into executive session. 1983 Op. Atty. Gen. No. 83-49.

Under the Act, records containing charges against residential homebuilders should be made available for public inspection and copying once a proper disposition has been made of the charges by the Residential Homebuilders' Commission. 1976-77 Op. Atty. Gen. No. 77-288.

Practice of using telephone poll to handle matters over which public body has authority would most probably not comply with the Act. Rather, meeting of the body either corporally or by means of electronic equipment such as telephone conference call would be preferable way to handle emergency situation so body may act collectively rather than its members acting individually and independently. 1992 Op. Atty. Gen. 92-02.

The Real Estate Commission is a public body subject to the requirements of the Act. When the Real Estate Commission is operating as an appellate or quasi-judicial body, an open meeting should be held, with open deliberations, and voting conducted in open or public session. 1994 Op. Atty. Gen. No. 94-22.

In a county which had adopted an ordinance creating a planning commission in conformance with the model ordinance suggested by the *Comprehensive Planning Guide for Local Governments*, published by the Municipal Association and the Association of Counties, the Attorney General's Office cites the ordinance's provision for the removal of a member for cause. The county's version provided that members of the Planning Commission may be removed at any time by county council for cause. The existence of cause "shall be discussed by county council in executive session as permitted by the Freedom of Information Act, S.C. Code §30-4-70(a)(1), and the determination of removal shall be by vote in public session declaring a vacancy without a statement of cause." 1999 Op. Atty. Gen., dated July 1, 1999 (1999 WL 626618 (S.C.A.G.)).

It is not clear from §2-15-61 whether the General Assembly intended to empower the

Legislative Audit Council to require access to an agency's executive sessions when conducting an audit of that agency. Typically in other states, the auditor or an auditing agency is given explicit and express authority to enter the executive sessions of the public body which is being subjected to the audit. . . (W)e would nevertheless suggest that the agency provide such access. 2002 Op. Atty. Gen., dated April 26, 2002. (2002 WL 1340419 (S.C.A.G.)).

§30-4-80. Notice of meetings of public bodies.

(a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

(b) Legislative committees must post their meeting times during weeks of the regular session of the General Assembly and must comply with the provisions for notice of special meetings during those weeks when the General Assembly is not in session. Subcommittees of standing legislative committees must give notice during weeks of the legislative session only if it is practicable to do so.

(c) Subcommittees, other than legislative subcommittees, of committees required to give notice under subsection (a), must make reasonable and timely efforts to give notice of their meetings.

(d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.

(e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the

times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

HISTORY: 1978 Act No. 593, §9; 1987 Act No. 118, §7.

PRACTICE POINTERS

Public notice of regular meetings: At the beginning of each calendar year, written public notice of public meetings and agendas, if any, must be given to anyone who requests notice, the local news media and any other news media that request notice. Notice is provided by mailing the calendar of regularly scheduled meetings to newspapers, radio stations, and persons requesting notice. The notice (calendar) must state the date, time, place, and agenda, if any, for the meeting. Written public notice of rescheduled, special, or called meetings must also be provided to these same persons and organizations. The notice and agenda of a regularly scheduled or special meeting must be posted on a bulletin board (i.e., in a publicly viewable place) in the office building in which the meeting is to be held at least 24 hours in advance of the meeting.

It may be helpful to ask those receiving meeting notices to provide self-addressed stamped envelopes. These envelopes will provide a contact name and can be used to provide notice of meetings in the future. Failure to receive a self-addressed stamped envelope will not excuse failure to provide public notice of a rescheduled, special, or called meeting.

Public notice for a special, called, or rescheduled meeting must be posted as soon as possible but no later than 24 hours before the meeting. The notice of a special, called, or rescheduled meeting must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings.

Public notice must be provided to the local news media. The local news media means newspapers of general circulation in the jurisdiction served. A newspaper of general circulation is a newspaper available without a subscription published or available in the area served by the public body. Some jurisdictions are also served by local radio stations. A radio station that airs a news show should also be given written public notice of meetings.

Public notice related to financial matters: Section 4-9-130 requires a public hearing with at least 15 days notice to the public before council action can be taken to adopt a budget or commit to other specified financial matters. This statute is in addition to FOIA but has also been superseded by the more specific provision at §6-1-80. Section 6-1-80 provides that specified information must be included in the notice to the public of a public hearing before the adoption of a budget and specifies that notice must be given not less than 15 days in advance of the public hearing and must be a minimum of 2 columns wide with a bold headline. The balance of the statute provides what must

be stated in the notice and specifies that this notice is in lieu of the requirements of §4-9-130. The notice required under §6-1-80 will require the assistance of the finance and property tax officials due to the requirement that financial figures appear in the notice.

Charges for legal advertisements: §15-29-80 to §15-29-100 provide specific laws relative to charges for legal advertisements in newspapers.

Agenda: Any agenda for a regularly scheduled, called, special, or rescheduled meeting must be posted on a bulletin board at the office where the meeting will take place at least 24 hours before the meeting.

Bulletin boards: The agenda for all meetings must be posted on a publicly viewable bulletin board. In addition to the place to post the agenda for all meetings, the bulletin board must display written public notice of a called, special, or rescheduled meeting.

Meeting minutes: The meeting minutes must include a statement of the efforts made to comply with the public notice requirements mandated by the Act. §30-4-80(e).

CASE NOTES

The convening of a County Board of Education was within the definition of a "meeting" under §30-4-20(d) thus requiring public notice to be given, where the matters on the agenda included (1) points of agreement and disagreement between the Board and a city planning committee; (2) a summary of research regarding school size; (3) operational costs at a city school as compared to other similar schools; and (4) rezoning and transporting students from the area, since the nature of the items on the agenda, together with the expressed intent to "go over each piece of information" necessarily entailed Board discussion of matters over which it had "supervision, control, jurisdiction or advisory power" involving the school. *Braswell v. Roche*, 299 S.C. 181, 383 S.E. 2d 243 (1989).

Newspapers' complaint because the city council took up matters not on the agenda while in executive session was without merit since the act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session, and, moreover, no prejudice resulted to the newspapers as a result of their not having an agenda for the meeting in advance of the meeting taking place. *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

In holding the advisory committees are covered by the open meetings and notice provisions of the FOIA, the Court inferentially held that every meeting conducted by an advisory public body must be open to the public and conducted pursuant to the FOIA. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E. 2d 862 (2001).

ATTORNEY GENERAL'S OPINIONS

The Attorney General believes that notice requirement of the Act should be followed by public body which will reconvene from "recess" or "adjourned" meeting wherever such reconvened meeting will be held, anticipated to be held in executive sessions, or otherwise. Even though public may not have legal right to be present at every part of every meeting, nevertheless public generally has right to know where meeting is and when it will be. 1991 Op. Atty. Gen. No. 91-42.

A public body must provide notice of all public meetings, whether scheduled, rescheduled, or called to local news media, persons, or organizations who may request to be notified. Generally, the public should be notified by the posting of a notice at the office or meeting place of the public body. 1989 Op. Atty. Gen. No. 89-111.

Proper notice for a regularly scheduled meeting should be given by written public notice at the beginning of the calendar year and include the date, time, place, and agenda; called, special, or rescheduled meetings require notice at least 24 hours in advance which is to include the date, time, and place. The Act does not place responsibility on any entity to ensure that notification is received. 1989 Op. Atty. Gen. No. 89-111.

In absence of truly exigent circumstances, FOIA requires public body to give notice, in manner prescribed, of time, place, date and agenda of its meetings. Notice is to be given as far in advance of meeting as is practicable, but no less than 24 hours before meeting. 1984 Op. Atty. Gen. No. 84-20.

Public notice as used in §4-9-110 is the same term as used in §30-4-80, and public notice requirements should follow the notice provisions of the Act. 1983 Op. Atty. Gen. No. 83-64.

§30-4-90. Minutes of meetings of public bodies.

(a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:

- (1) The date, time and place of the meeting.
- (2) The members of the public body recorded as either present or absent.
- (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.
- (4) Any other information that any member of the public body

requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosures would be inconsistent with §30-4-70 of this chapter.

(c) All or any part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic or video reproduction, except when a meeting is closed pursuant to Section 30-4-70 of this chapter, provided that in so recording there is no active interference with the conduct of the meeting. Provided, further, that the public body is not required to furnish recording facilities or equipment.

History: 1978 Act No. 593, §10; 2001 Act. No. 13, §1.

PRACTICE POINTERS

Written minutes of the public session of a meeting must be prepared and maintained. The Act is not clear on whether written minutes of executive session are required. While the Association of Counties has traditionally advised that written minutes of executive session are not required by the Act there are differences of opinion in the legal community.

In addition to the matters required by this statute, §30-4-80 requires that the minutes contain a statement of the efforts made to provide public notice of the meeting. The Ethics Act at §8-13-700 (B) requires the minutes contain a written statement of disqualification of any member required to disqualify under the Ethics Act. And, §30-4-30 (d) requires that the last 6 months of meeting minutes must be made available to any person who appears in person and requests copies of the minutes.

A person may record a public meeting by tape recorder or "other means of sonic reproduction" as long as it does not create active interference in the proceeding. This does not apply to executive session. A public body is not required to furnish or provide the recording device or facilities and the public body is not required to allow other means of recording.

ATTORNEY GENERAL'S OPINIONS

Under the Act, recording a public meeting of a public body by means of a home video camera would be permitted assuming that recording is done in a manner that is not disruptive to the public meeting. Recording public figures would not violate their right of privacy since, by virtue

of their public service, they have voluntarily placed themselves before the public and they have relinquished part of their rights of privacy. 1988 Op. Atty. Gen. No. 88-3.

§30-4-100. Injunctive relief; costs and attorney's fees.

- (a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.
- (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

HISTORY: 1978 Act No. 593, §11; 1987 Act No. 118, §8.

PRACTICE POINTERS

If a member of the public or press sues a public body for violation of the Act and wins, the action taken by the public body in violation of the Act can be invalidated by the court. Further, the court can award the costs of the lawsuit including attorney's fees to the plaintiff.

CASE NOTES

Section 30-4-100(a) states that “any citizen of the State” could apply for declaratory and injunctive relief and the FOIA plaintiff was not required to have a personal stake in the outcome. *Sloan v. Friends of the Hunley, Inc.*, 630 S.E.2d 474 (Sup. Ct. 2006).

Request by physician to public hospital, for information concerning physicians salaries and purchase prices for their practices was disclosable public information under FOIA. Trial court

abused its discretion in denial of awarding attorney's fees to the prevailing party under § 30-4-100(B) as it based its decision on reasoning that was a contrariety to the evidence. The issue is remanded for a new hearing on the facts. *Campbell v. Marion County Hospital*, 354 S.C. 274, 580 S.E.2d 163 (Ct.App. 2003).

A county business license tax ordinance amendment was held invalid pursuant to §30-4-70(a)(6) which precludes taking votes or formal action in an executive closed meeting where (1) the consensus regarding the amendment was reached at a closed meeting, (2) no motion to amend was made at the subsequent public meeting, and (3) the amended version was read as a "third reading" and voted upon. *Business License Opposition Committee v. Sumter County*, 311 S.C. 24, 426 S.E. 2d 745 (1992).

A cause of action for violation of the Act should not have been dismissed where a majority of the county council had held closed meetings prior to the regularly scheduled public meetings at which a proposed business license tax was given second and third readings; the proper procedure for amending the ordinance was not followed and the plaintiffs were entitled to litigate the nature and effect of the violation, and the appropriate relief to be awarded. *Business License Opposition Committee v. Sumter County*, 304 S.C. 232, 403 S.E. 2d 638 (1991).

Under §30-4-100, the only prerequisite to an award of attorney fees and costs is that the party seeking relief must prevail, in whole or in part. Thus, where the plaintiffs prevailed on their request for declaratory relief, it was within the trial judge's discretion to award attorney fees and costs to the plaintiffs. *Cockrell v. Trustees of Dist. 20 Constituent School Dist.* 299 S.C. 155, 382 S.E. 2d 923 (1989).

In a consolidated action brought under the Act for an award of attorney's fees under §30-4-100, the trial judge did not abuse his discretion in awarding fees to encourage agencies to comply with FOIA requests. *Society of Professional Journalists v. Sexton* , 283 S.C. 563, 324 S.E. 2d 313 (1984).

Citizens and members of county legislative delegation had standing to sue for injunction to prevent appointment of a board member to county board of education under the Act's provision allowing any citizen to apply to circuit court for injunctive relief. *Fowler v. Beasley* 322 S.C. 463, 472 S.E. 2d 630 (1996).

Upon a finding of a violation of the Act, the trial court may order equitable relief as it considers appropriate and a violation of the statute must be considered to be an irreparable injury for which no adequate remedy at law exists; consequently, the trial court did not abuse its discretion when it ordered the invalidation of a vote by a Public Service District to terminate an employee where the vote was in violation of the Act. *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995), affirmed on grounds other than FOIA violation, 324 S.C. 238, 478 S.E. 2d 836 (1996).

§ 30-4-110

~~FREEDOM OF~~

§30-4-110. Penalties.

INFORMATION

HANDBOOK

FOR

HISTORY: 1978 Act No. 593, §12.

COUNTY GOVERNMENT

2006 Edition PRACTICE POINTERS

There is no experience in South Carolina where a person suffered criminal sanctions for violating the Act. However, this is matter of concern to the extent that generally speaking, property and liability insurance will not cover the expenses associated with being charged with committing a crime.



§30-4-160. Sale of Social Security number or driver's license photograph or signature.

(A) This chapter does not allow the Department of Public Safety to sell, publish or otherwise furnish to a private party Social Security numbers in its records, copies of photographs, or signatures, whether digitized or not taken for the purpose of a driver's license or personal identification card.

Association of Counties

(B) Photographs, signatures, and digitized images from a driver's license or personal identification card are not public records.

HISTORY: 1999 Act No.100, Part II, § 53.

§30-4-165. Privacy of driver's license information.

(A) The Department of Public Safety may not sell, provide, or furnish to a private party a person's height, weight, race, social security number, photograph, or signature in any form that has been compiled for the purpose of issuing the person a driver's license or special identification card. The department shall not release to a private party any part of the record of a person under fifteen years of age who has applied for or has been issued a special identification card.

(B) A person's height, weight, race, photograph, signature, and digitized image contained in his driver's license or special identification card record are not public records.

(C) Notwithstanding another provision of law, a private person or private entity shall not use an electronically-stored version of a person's photograph, social security number, height, weight, race, or signature for any purpose, when the electronically-stored information was obtained from a driver's license record.

HISTORY: 1999 Act No. 33, § 1.

APPENDIX: § 4-9-130

APPENDIX

§4-9-110. Council shall select chairman and other officers; terms of office; appointment of clerk; frequency and conduct of meetings; minutes of proceedings.

The council shall select one of its members as chairman, except where the chairman is elected as a separate office, one as vice-chairman and such other officers as are deemed necessary for such terms as the council shall determine, unless otherwise provided for in the form of government adopted. The council shall appoint a clerk to record its proceedings and perform such additional duties as the council may prescribe. The council after public notice shall meet at least once each month but may meet more frequently in accordance with a schedule prescribed by the council and made public. All meetings shall be conducted in accordance with the general law of the State of South Carolina affecting meetings of public bodies. Special meetings may be called by the chairman or a majority of the members after twenty-four hours' notice. The council shall determine its own rules and order of business. It shall keep a journal in which shall be recorded the minutes of its proceedings which shall be open to public inspection.

HISTORY: 1962 Code §14-3708; 1975 (59) 692.

§4-9-130. Public hearings on notice must be held in certain instances; adoption of standard codes or technical regulations and furnishing copies thereof; emergency ordinances.

Public hearings, after reasonable public notice, must be held before final council action is taken to:

- (1) adopt annual operational and capital budgets;
- (2) make appropriations, including supplemental appropriations;

- (3) adopt building, housing, electrical, plumbing, gas and all other regulatory codes involving penalties;
- (4) adopt zoning and subdivision regulations;
- (5) levy taxes;
- (6) sell, lease or contract to sell or lease real property owned by the county.

The council may adopt any standard code or technical regulations authorized under §6-9-60 by reference thereto in the adopting ordinance. The procedure and requirements governing the ordinances shall be as prescribed for ordinances listed in (1) through (6) above.

Copies of any adopted code of technical regulations shall be made available by the clerk of council for distribution or for purchase at a reasonable price.

Not less than fifteen days' notice of the time and place of such hearings shall be published in at least one newspaper of general circulation in the county.

To meet public emergencies affecting life, health, safety or the property of the people, council may adopt emergency ordinances; but such ordinances shall not levy taxes, grant, renew or extend a franchise or impose or change a service rate. Every emergency ordinance shall be designated as such and shall contain a declaration that an emergency exists and describe the emergency. Every emergency ordinance shall be enacted by the affirmative vote of at least two-thirds of the members of council present. An emergency ordinance is effective immediately upon its enactment without regard to any reading, public hearing, publication requirements, or public notice requirements. Emergency ordinances shall expire automatically as of the sixty-first day following the date of enactment.

HISTORY: 1962 Code §14-3710; 1975 (59) 692; 1982 Act No. 351, §1.

PRACTICE POINTERS

This statute is applicable to council meetings in addition FOIA. It is important to note that the notice of the public hearing required before the adoption of the county budget contained in this statute, §4-9-130, has been superseded by a more detailed notice provision in §6-1-80. Section 6-1-

80 provides more directions as to the form of public notice necessary when adopting the county budget. The public notice must contain several financial figures and estimates that will require the assistance of the finance and property tax officials.

§6-1-80. Budget adoption.

(A) A county, municipality, special purpose or public service district, and a school district shall provide notice to the public by advertising the public hearing before the adoption of its budget for the next fiscal year in at least one South Carolina newspaper of general circulation in the area. This notice must be given not less than fifteen days in advance of the public hearing and must be a minimum of two columns wide with a bold headline.

(B) The notice must include the following:

- (1) the governing entity's name;
- (2) the time, date, and location of the public hearing on the budget;
- (3) the total revenues and expenditures from the current operating fiscal year's budget of the governing entity;
- (4) the proposed total projected revenue and operating expenditures for the next fiscal year as estimated in next year's budget for the governing entity;
- (5) the proposed or estimated percentage change in estimated operating budgets between the current fiscal year and the proposed budget;
- (6) the millage for the current fiscal year; and
- (7) the estimated millage in dollars as necessary for the next fiscal year's proposed budget.

(C) This notice is given in lieu of the requirements of Section 4-9-130.

HISTORY: 1995 Act No. 146, §9A.

§6-1-120. Confidentiality of county or municipal taxpayer information.

(A) Except in accordance with a proper judicial order or as otherwise provided by the Freedom of Information Act, it is unlawful for an officer or employee of a county or municipality, or the agent of such an officer or employee to divulge or make known in any manner the financial information, or other information indicative of units of goods or services sold, provided by a taxpayer included in a report, tax return, or application required to be filed by the taxpayer with that county or municipality pursuant to a county or municipal ordinance imposing a:

- (1) tax authorized under Article 5 or Article 7;
- (2) business license tax authorized under Section 4-9-30(12) or Section 5-7-30;
- (3) fee the measure of which is:
 - (a) gross proceeds of sales of goods or services; or
 - (b) paid admissions to a place of amusement.

(B) Nothing in this section prohibits the:

- (1) publication of statistics classified to prevent the identification of particular reports, returns, or applications and the information on them;
- (2) inspection of reports, returns, or applications and the information included on them by an officer or employee of the county or municipality, or an agent retained by an officer or employee, in connection with audits of the taxpayer, appeals by the taxpayer, and collection efforts in connection with the tax or fee which is the subject of the return, report, or application;
- (3) sharing of data between public officials or employees in the performance of their duties.

(C) A person who knowingly violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both. In addition, if the person convicted is an officer or employee of the county or municipality, the offender must be dismissed from the office or position held and is disqualified from holding a public office in this State for five years following the conviction.

HISTORY: 1999 Act No. 111, §1; 2000 Act No. 269, §1.

ATTORNEY GENERAL OPINION

An appeal from the Business License / User Fee Appeals Board is made to a county council which reviews the record and decides the appeal without further hearing. Pursuant to S.C. Code §30-4-60, the county council meeting at which the appeal of a business license matter is considered is open to the public. This opinion addressed how to apply S.C. Code §6-1-120 as amended by 2000 Act No. 269 and preserve the confidentiality of records discussed at a public meeting. The opinion advised that §6-1-120(B)(2) specifically provides that nothing in the section prohibits the “inspection of reports, returns or applications and the information included on them by an officer or employee in connection with audits or appeals.” Section 6-1-120(B)(3) was added to state that nothing prohibits the “sharing of data between public officials or employees in the performance of their duties.” Therefore, §6-1-120 does not bar the release of taxpayer information to members of county council for use in the evaluation of an appeal. The county council would be entitled to redact information from the record on appeal in accordance with §6-1-120. The opinion notes that in *The State-Record Co., Inc. v. City of Columbia*, C.A. No. 99-CP-40-3284 the circuit court judge declared that Section 6-1-120(A) must be read to preclude disclosure of financial information contained in business license applications. The defendant’s failure to provide public access to the non-financial information contained in business license applications, including specifically, the name of the applicant, and the name, location and type of business, was declared a violation of the FOIA. The court permanently restrained and enjoined the defendant from withholding public access to the non-financial information contained in a business license application. 2000 Op. Atty. Gen. No. ____, dated June 28, 2000 (2000 WL 1205927 (S.C.A.G.)).

§6-1-330. Local fee imposition limitations.

(A) A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. A local governing body must provide public notice of any new service or user fee being considered and the governing body is required to hold a public hearing on any proposed new service or user fee prior to final adoption of any new service or user fee. Public comment must be received by the governing body prior to the final reading of the ordinance to adopt a new service or user fee. A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this section.

(B) The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid. If the revenue generated by a fee is five percent or more of the imposing entity's prior fiscal year's total budget, the proceeds of the fee must be kept in a separate and segregated fund from the general fund of the imposing governmental entity.

(C) If a governmental entity proposes to adopt a service or user fee to fund a service that was previously funded by property tax revenue, the notice required pursuant to Section 6-1-80 must include that fact in the text of the published notice.

HISTORY: 1997 Act No. 138, §7.

§8-13-700. Use of official position or office for financial gain; disclosure of potential conflict of interest.

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

APPENDIX: § 8-13-700

- (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision;
 - (2) if the public official is a member of the General Assembly, he shall deliver a copy of the statement to the presiding officer of the appropriate house. The presiding officer shall have the statement printed in the appropriate journal and require that the member of the General Assembly be excused from votes, deliberations, and other action on the matter on which a potential conflict exists;
 - (3) if he is a public employee, he shall furnish a copy of the statement to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take the action prescribed by the State Ethics Commission;
 - (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes;
 - (5) if he is a public member, he shall furnish a copy to the presiding officer of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause such disqualification and the reasons for it to be noted in the minutes.
- (C) Where a public official, public member, or public employee or a member of his immediate family holds an economic interest in a blind trust, he is not considered to have a conflict of interest with regard to matters pertaining to that economic interest, if the existence of the blind trust has been disclosed to the appropriate supervisory office.

(D) The provisions of this section do not apply to any court in the unified judicial system.

(E) When a member of the General Assembly is required by law to appear because of his business interest as an owner or officer of the business or in his official capacity as a member of the General Assembly, this section does not apply.

HISTORY: 1991 Act No. 248, § 3.

§30-2-10, et seq.. The Family Privacy Protection Act of 2002.

This chapter shall be designated as the “Family Privacy Protection Act of 2002”.

HISTORY: 2002 Act No. 225, §1.

PRACTICE POINTERS

This act implements the Family Privacy Protection Act of 2002. There appears to be some dispute as to whether county governments must adhere to the requirements contained in §§ 30-2-20 and 30-2-40. It is unlikely that political subdivisions are encompassed in the reference to “state agencies, boards, commissions, institutions, departments, and other state entities, by whatever name known.” However some authorities are assuming that this reference does include county government. In 2003, §30-2-50 was amended to clarify that those provisions are not applicable to county government.

Section 30-2-20 states that all state agencies, boards, commissions, institutions, departments, and other state entities, by whatever name known must develop privacy policies and procedures to ensure that the collection of personal information pertaining to citizens of the State is limited to such personal information required by any such agency, board, commission, institution, department, or other state entity and necessary to fulfill a legitimate public purpose. Section 30-2-40 requires state agencies, boards, commissions, institutions, departments, or other state entities which host, support, or provide links to pages or sites accessible through the world wide web must display their privacy policy and the name and telephone number of the person responsible for administration of the policy. The section also requires that when personal information is collected by an entity covered by § 30-2-40 the citizen must be advised that the information is subject to public scrutiny.