

# South Carolina FOIA - Know When to Hold Them, Know When to Fold Them

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# Purpose

S.C. Code Ann. §30-4-15

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.

# Purpose

“The essential purpose of the FOIA is to protect the public from secret government activity....

South Carolina’s FOIA was designed to guarantee the public **reasonable access** to certain activities of the government.”

Campbell v. Marion Cty. Hosp. Dist., 354 S.C. 274, 280–81, 580 S.E.2d 163, 166 (Ct. App. 2003).

# What is a Public Body

## § 30-4-20(a)

**Public body** means **any** department of the State,... 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...**, and includes any quasi-governmental body of the State and its political subdivisions...

# Public Body

- ✓ County Councils; City and Town Councils
- ✓ School Districts
- ✓ Special Purpose Districts
- ✓ Public Utility Boards
- ✓ Standing or Ad Hoc Committees; Subcommittees; Advisory Groups
- ✓ Staff Committees if Committee is making recommendation to ruling body\*
- ✓ Organizations that receive or are supported by public funds

# What is Public Record

S.C. Code Ann. § 30-4-20(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...

# Public Record

- Prepared,
- Owned,
- Used,
- In the Possession of, or
- Retained by a Public body

# Non-Public Record

S.C. Code Ann. § 30-4-20(c)

Records such as:

- income tax returns
- medical records,
- hospital medical staff reports,
- scholastic records,
- adoption records,...

**are not considered to be made open to the public under the provisions of this act;...**



## Other Non-Public Records § 30-4-20(c)

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;...

**\*See Handout\***

# Non-Public Records

- Autopsy Reports - Perry v. Bullock, 409 S.C. 137, 761 S.E.2d 251 (2014).
- Body Camera Data - S.C. Code Ann. § 23-1-240(G)(1)
- Juvenile Records - S.C. Code Ann. § 63-19-2030 (Direct or indirect identifiers)
- HIPPA
- FERPA
- Certain Expunged Records - S.C. Code Ann. § 17-1-40

# Security Information

## § 30-4-20(c)

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.

# Personal Identifying Information Privacy Protection Act

S.C. Code Ann. § 30-2-300

(3) When state and local government entities possess social security numbers or other personal identifying information, the governments should minimize the instances this information is disseminated either internally within government or externally with the general public.

# Personal Identifying Information Privacy Protection - § 30-2-310

Except as provided in Sections 30-2-320 and 30-2-330 of this article, a public body,...**may not**:

(e) intentionally communicate or otherwise make available to the general public an individual's social security number or a portion of it containing six digits or more **or other personal identifying information**. "Personal identifying information", as used in this section, has the same meaning as "personal identifying information" in **Section 16-13-510**, except that it does not include electronic identification names, including electronic mail addresses, or parent's legal surname before marriage;

# Personal Identifying Information - § 16-13-510(D)

“Personal identifying information” includes, but is not limited to:

- (1) social security numbers;
- (2) driver's license numbers or state identification card numbers issued instead of a driver's license;
- (3) checking account numbers;
- (4) savings account numbers;
- (5) credit card numbers;
- (6) debit card numbers;
- (7) personal identification (PIN) numbers;

# Personal Identifying Information - § 16-13-510(D)

(8) electronic identification numbers;

(9) digital signatures;

**(10) dates of birth;**

(11) current or former names, including first and last names, middle and last names, or first, middle, and last names, but only when the names are used in combination with, and linked to, other identifying information provided in this section;

(12) current or former addresses, but only when the addresses are used in combination with, and linked to, other identifying information provided in this section; or

(13) other numbers, passwords, or information which may be used to access a person's financial resources, numbers, or information issued by a governmental or regulatory entity that uniquely will identify an individual or an individual's financial resources.

# Rights Regarding Public Records

S.C. Code Ann. § 30-4-30(A)(1)

A person has a right to inspect, copy, **or receive an electronic transmission** of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, **in accordance with reasonable rules concerning time and place of access.**



## Prisoner Limitation- § 30-4-30(A)(1)

This right [FOIA] does not extend to individuals serving a sentence of imprisonment in a state or county correctional facility in this State, in another state, or in a federal correctional facility;...

# Fees

S.C. Code Ann. § 30-4-30(B)

The public body may establish and collect fees as provided for in this section. The public body may establish and collect reasonable fees not to exceed the actual cost of the **search, retrieval, and redaction of records.**

## Fees - § 30-4-30(B)

The public body **shall** develop a fee schedule to be posted online.

The fee for the **search, retrieval, or redaction** of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request.

## Fees - § 30-4-30(B)

The records must be furnished at the lowest possible cost to the person requesting the records.

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.

## Fees - § 30-4-30(B)

- Fees charged by a public body must be **uniform** for copies of the same record or document and **may not exceed the prevailing commercial rate for the producing of copies.**
- **Copy charges** may not apply to records that are transmitted in an electronic format.
- Fees may **not** be charged for **examination and review** to determine if the documents are subject to disclosure.

## Fees - § 30-4-30(B)

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 benefiting the general public.

## Fees - § 30-4-30(B)

A **deposit** not to exceed **twenty-five percent** of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records.

[Important for Deadlines]

## Initial Response Time

### § 30-4-30(C)

Each public body, upon **written** request for records made under this chapter, shall within **ten** days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any request, notify the person making the request of its determination and the reasons for it;...



## Initial Responses Time (Old Records)

### § 30-4-30(C)

...provided, however, that if the record is more than **two years old** at the date the request is made, the public body has **twenty days** (excepting Saturdays, Sundays, and legal public holidays) of the receipt to make this notification.

# Final Opinion

This determination must constitute the final opinion of the public body as to the public availability of the requested public record, **however, the determination is not required to include a final decision or express an opinion as to whether specific portions of the documents or information may be subject to redaction according to exemptions provided for by Section 30-4-40 or other state or federal laws.**

## Production Deadlines - § 30-4-30(C)

If the request is granted, the record must be furnished or made available for inspection or copying no later than **thirty calendar days** from the date on which the request was granted, unless the records are more than twenty-four months old, in which case the public body has no later than **thirty-five calendar days** from the date on which the request was granted to fulfill the request.

# Deposit Deadlines

## § 30-4-30(C)

If a **deposit** as provided in subsection (B) is required by the public body, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the deposit is received, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the deposit was received to fulfill the request. The full amount of the total cost must be paid at the time of the production of the request.

# No Response

## § 30-4-30(C)

If written notification of the determination of the public body as to the availability of the requested public record is neither mailed, electronically transmitted, nor personally delivered to the person requesting the document within the time set forth by this section, the request must be considered approved as to non-exempt records or information.

Exemptions from disclosure as set forth in Section 30-4-40 or by other state or federal laws are not waived by the public body's failure to respond as set forth in this subsection.

## Extensions

### § 30-4-30(C)

The various response, determination and production deadlines provided by this subsection are each subject to extension by mutual agreement of the public body and requesting party at issue, and such agreement shall not be unreasonably withheld.

# Public Records That Must be Available

## § 30-4-30(D)

(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, unless the record is exempt pursuant to Section 30-4-40 or other state or federal laws, 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;
- (3) documents identifying persons confined in a jail, detention center, or prison for the preceding three months; and
- (4) all documents produced by the public body or its agent that were distributed to or reviewed by a member of the public body during a public meeting for the preceding six-month period.

## Exemptions § 30-4-40(a)

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

- (1) Trade Secrets



# Privacy

## § 30-4-40(a)(2)

(2) “Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of privacy...”

- Balancing Test - “we must balance the privacy interest of the applicants against the interest of the public’s need to know this information.”

Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), reh’g denied (Oct. 29, 2015).

# Privacy

## § 30-4-40(a)(2)

Ordinarily, a citizen requesting information under FOIA should not have to disclose the reason for the request. However, when a public entity invokes the unreasonable invasion of personal privacy exemption in subsection 30-4-40(a)(2), the circuit court must balance the conflicting interests of the individual's privacy against the public's need to know. **In such an instance, the court must understand and address the reason for seeking the information because the reason goes directly to the public's interest and whether the invasion of personal privacy would be unreasonable. In this case, Glassmeyer's reason for seeking the information from the Lottery Commission should be developed at trial.**

S.C. Lottery Comm'n v. Glassmeyer, 433 S.C. 244, 253, 857 S.E.2d 889, 894 (2021).

# Privacy

## § 30-4-40(a)(2)

and any audio recording of the final statements of a dying victim in a call to 911 emergency services. Any audio of the victim's statements must be redacted prior to the release of the recording unless the privacy interest is waived by the victim's next of kin. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

# Law Enforcement Records

## 30-4-30(a)(3)

(3) Records, video or audio recordings, or other information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

**(A) would interfere with a prospective law enforcement proceeding;**

**(B) would deprive a person of a right to a fair trial or an impartial adjudication;**

# Law Enforcement Records

## 30-4-30(a)(3)

**(C) would constitute an unreasonable invasion of personal privacy;**

**(D) would disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation, by an agency conducting a lawful security intelligence investigation, or information furnished by a confidential source;**

# Law Enforcement Records

## 30-4-30(a)(3)

**(E) would disclose current techniques and procedures for law enforcement investigations or prosecutions, or would disclose current guidelines for law enforcement investigations or prosecutions if such disclosure would risk circumvention of the law;**

(F) would endanger the life or physical safety of any individual;

(G) would disclose any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial.

## More Exemptions

### § 30-4-40(a)

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

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

# Separation Requirement

## § 30-4-40(b)

(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.”



# Practical Guidance

1. Centralize intake and output for FOIA's
2. Date-stamp request upon receipt
3. Create a tracking system for requests and deadlines
4. Calendar deadlines (have redundancy)
5. Create a uniform fee schedule – post online
6. Conduct training for all departments/personnel on FOIA
7. Designate a PIO for media inquiries – coordinate with FOIA personnel on media FOIAs

# Public Meetings

- **S.C. Code Ann. §30-4-60** “Every meeting of all public bodies shall be open to the public unless closed pursuant to §30-4-70...”
- **§ 30-4-20(d)** defines a “Meeting” as “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.”
- A “Quorum” is thereafter described as - “a simple majority of the constituent membership of a public body (unless otherwise defined by applicable law).”

# What does FOIA prevent?

S.C. Code Ann. §30-4-70(c) protects against chance meetings, social meetings, or electronic communications which may be used to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

- What about Social Media?
  - ❖ Ex. – Commissioner A posts on their Facebook page about an issue being discussed by Commission. Commissioner B comments. Commissioner C comments. The Commission has 5 members . . . .
- What about E-Mail?
  - ❖ Ex. – Commissioner B sends an e-mail to the entire Commission about an item on the upcoming meeting agenda. Commissioner C responds. Commissioner D responds. The Commission has 5 members . . . .
- What about Text Messages?
  - ❖ Ex. – Commissioner C sends a group text message to the entire Commission about a concern they have with personnel. Commissioner D responds. Commissioner E responds. The Commission has 5 members . . . .
- What about a get together?
  - ❖ Ex. – Commission has been invited to attend the grand opening of a new District building. All 5 Commissioners show up. The Commission has 5 members . . . .

# How does a meeting comply with FOIA?

## Notice & Agenda

S.C. Code Ann. §30-4-80 provides requirements for the Notice of meetings of public bodies.

### NOTICE REQUIREMENTS

- ✓ The schedule of regular meetings must be posted at the beginning of each calendar year
- ✓ Agendas for regular and special meetings must be posted at least 24 hours prior to the meeting
- ✓ Agendas must be posted at the main office and on your website if you have one or where you conduct the meeting
- ✓ Notice must include the agenda, date, time and place of the meeting
- ✓ Agenda must be given to media and any person who requests receipt of notice

# AGENDA REQUIREMENTS

- A public body must create an agenda for all regularly scheduled and special-called meetings
- No items may be added to the agenda within 24 hours of the meeting
- Changes to the agenda within a meeting must be approved by a 2/3 vote of members present
- Added items that are final reading or will not allow for public comment must be approved by a 2/3 vote of members present and must be “emergency or an exigent circumstance”
- Exigent Circumstance = An urgent need or circumstance / a situation or circumstance that requires immediate action
  - COVID
  - Natural Disasters
  - Impending Weather
  - Time-Sensitive Issues

# Keeping of Minutes

## **S.C. Code Ann. §30-4-90. Minutes of meetings of public bodies.**

- All public bodies shall keep written minutes of all of their public meetings
- Minutes must include:
  - (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
- The minutes shall be public records except where such disclosures would be inconsistent with Executive Session parameters
- All or any part of a meeting of a public body may be recorded by any person in attendance except when a meeting is closed for Executive Session
- The public body is not required to furnish recording facilities or equipment.

# Executive Session - What is it?

**S.C. Code Ann. §30-4-70** of the South Carolina Code provides for what meetings may be closed, or held in Executive Session

- There are only five (5) grounds upon which a public body can convene in Executive Session
- Before going into Executive Session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the Executive Session
- “Specific purpose” means a description of the matter to be discussed
- 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 or voting in executive session.

# Executive Session - Allowed Discussion Topics

There are five subsections that break down as follows:

1. Personnel Matters
2. Contractual Negotiations
3. Sale or Purchase of Property
4. Attorney-Client Privilege
5. Investigative Matters
6. Location or Expansion of Services/Economic Development
7. Security Personnel or Devices



# Executive Session Agenda - Past

## Executive Session Agenda

The Council will convene in Executive Session to discuss:

- One (1) Personnel Matter
- Three (3) Contractual Matters
- One (1) Economic Development Matter
- Receive legal advice subject to Attorney-Client Privilege on two (2) matters

# Personnel Matters




Not good enough – “Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee”

- Do not need to disclose identity of the individual or entity being discussed
- Should list department or division



Discussion of personnel matter(s) regarding employee of County Administration department pursuant to South Carolina Code of Laws §30-4-70(a)(1).

# Contractual and Real Estate Negotiations

 Not Good Enough – “Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property”

- Reference name of party or the service being contracted
- Reference the name or owner or general info regarding property if secrecy is necessary



Receipt of legal advice subject to attorney-client privilege regarding the contractual terms associated with a maintenance agreement for County Administration Building property.



Receipt of legal advice subject to attorney client privilege regarding the contractual terms associated with the sale of a portion of County property located at 100 County Drive.

# Attorney-Client Privileged Matters

 Not good enough – “Receipt and review of legal advice”

- Reference adverse party in litigation or a general description of the legal issue to be discussed



Receipt of legal advice subject to attorney-client privilege regarding litigation filed by County employees relative to the County Administration Building environmental concerns




Receipt of legal advice subject to attorney client privilege regarding County loan for construction of new Administration building


# Investigative Matters

 Not good enough – “Investigative proceedings regarding allegations of criminal misconduct”

➤ Reference alleged misconduct

 Receipt of legal advice subject to attorney-client privilege regarding investigation relative to forensic audit results conducted on County banking accounts

# Economic Development Matters

 Not good enough – “Discussion of matters relating to the proposed location, expansion or the provision of services encouraging location or expansion of industries or businesses in the area”

- Reference the service to be expanded or project name if applicable
- Do not need to disclose identity of individual or entity being discussed

 Discussion of contractual terms regarding certain incentives being offered by County to Project Moneymaker

# Security Personnel or Devices

- ✘ Not good enough – “Discussion of security personnel or devices.”
  - Reference the place where the security personnel or devices is to be used
  - Do not need to disclose what security is needed or why



Discussion of security relative to County Administration Building.

# Executive Session - How do we take-action?

## **REMEMBER – NO VOTING OR POLLING**

Suggested Wording for Agendas to take action coming out of Executive Session:

- “Council may take action on matters discussed in Executive Session;”

**OR...**

- “Possible actions by Council in follow up to Executive Session”

**OR...**

- “Items requiring a vote following Executive Session”



# Commercial Solicitation Prohibition

## § 30-2-50

(B) Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

# Commercial Solicitation Prohibition

## § 30-2-50

(C) All state agencies, local governments, and political subdivisions of the State shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.

# Matters Specifically Made Public

## § 30-4-50

(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; ...

# Matters Specifically Made Public

## § 30-4-50

- (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; ...
- (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.

# Lawsuits

## § 30-4-100

(A) A **citizen of the State** may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties.

# Lawsuit Awards

## § 30-4-100

(B) If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees.

# Public Body Lawsuits

## § 30-4-110

(A) A public body may file a request for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

# Awards

## § 30-4-110

(C) If a person or entity seeking relief under this section prevails, the court may order:

- (1) equitable relief as he considers appropriate;
- (2) actual or compensatory damages; or
- (3) reasonable attorney's fees and other costs of litigation specific to the request, unless there is a finding of good faith. The finding of good faith is a bar to the award of attorney's fees and costs.



# Penalties

## § 30-4-110

(F) If the court finds that the public body has arbitrarily and capriciously violated the provisions of this chapter by refusal or delay in disclosing or providing copies of a public record, it may, in addition to actual or compensatory damages or equitable relief, impose a civil fine of five hundred dollars.

**- Criminal Penalties Removed**

# Executive Session or Meeting Violation

The Court may order any equitable relief that it considers appropriate including **invalidating underlying action.**

# Executive Session allows us to meet behind closed doors - but does it protect what we actually discuss behind closed doors?

FOIA and S.C. Code Ann. §30-4-70 allows the public body to convene behind closed doors and out of the view of the public to discuss certain items that, by design, need to remain protected (at least for a period of time)

## **BUT**

FOIA and SC Code Ann. §30-4-70 does not protect what you discuss (ultimately) because most of what you discuss under the allowances becomes public record – or at least the product of those discussions becomes public record

- ❖ A contract, once executed, will become a public record
- ❖ A purchase or sale of property will become a public record
- ❖ An investigation will, more than likely, ultimately become public record and reported
- ❖ An Economic Development project will ultimately become public record and reported
- ❖ A personnel matter may, ultimately, become a public record perhaps through reporting or personnel files

# But what about the discussions themselves?

FOIA and S.C. Code Ann. §30-4-70, however, does not protect the actual discussions you have behind those closed doors

- ❖ For example, if you discuss a personnel issue and ultimately take action on that issue, under oath, you could be required to testify as to those discussions

**UNLESS . . . .**

The discussion is considered to be and actually does receive legal advice subject to attorney-client privilege

**THEREFORE . . . .**

If you are discussing matters which are legitimately in need of legal advice, best to have an attorney in the room with you

And best to use the phrase “Receipt of legal advice subject to attorney-client privilege regarding \_\_\_\_\_” when placing the item for discussion on the agenda

# Practical Considerations

- Media query v. FOIA request
  - What constitutes a FOIA request (“magic words”)
  - Role of PIO in FOIA
  - Laundry lists of questions
- FOIA v. Subpoena
- FOIA v. Discovery

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