

Freedom of Information Act (FOIA)

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SOUTH CAROLINA
ASSOCIATION OF COUNTIES

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Freedom of Information Act (FOIA)

- ▶ Public records and information must be made available to the public **at a minimum cost or delay. Public has a right to inspect public records of public bodies.**



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Freedom of Information Act (FOIA)

- ▶ “Public body” –Any public or governmental body or political subdivisions of the State (counties, municipalities, townships), school districts, special purpose districts, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, and advisory committees.... (sheriff’s departments, jails, EMS, detention centers, etc.)

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Public Record

“**Public Record**”- Includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form (i.e., **emails**) or characteristics prepared, owned, used, in possession of, or retained by a public body. Records such as income tax returns, medical records, adoptions records, **are not public records. Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body are not public records.**

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Other Non-Public Records

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;...

5

Autopsy Reports

The South Carolina Supreme Court held that autopsy reports are medical records and, as such, are not public records subject to disclosure under FOIA finding: “[w]hile cognizant of our obligation to strictly construe the FOIA in favor of disclosure, we are nevertheless compelled here by the plain meaning of the statutory term to conclude that an autopsy report is exempt from the FOIA’s disclosure requirement.”

Perry v. Bullock, 409 S.C. 137, 144, 761 S.E.2d 251, 254-55 (2014).

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Body Cameras

Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.

7

Juvenile Records

(A) Except as provided herein, law enforcement records and information identifying children pursuant to this chapter are confidential and may not be disclosed **directly or indirectly** to anyone, other than those entitled under this chapter to receive the information.

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Rights Under FOIA

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.

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Rights Under FOIA

A public body is not required to create an electronic version of a public record when one does not exist to fulfill a records request.

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Prisoner Limitation

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;... unless they are exercising their constitutionally protected rights.

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Fees

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.

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Fees

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.

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Fees

If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format.

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Fees

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.

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Fees

- ▶ 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.

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Fees

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.

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Fees

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.

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Initial Response Time

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;...

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Initial Responses Time (Old Records)

...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.

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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.

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Production Deadlines

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.

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Deposit Deadlines

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.



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No Response

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.



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Extensions

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.

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Public Records That Must be Available

Section 30-4-30 (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 a written request, **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:**

- (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 a public body or its agent that were distributed to or reviewed by a member of a public body during a public meeting for the preceding six-month period.

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Exemptions

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

(1) Trade Secrets

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Privacy

(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).

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Privacy

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.

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Exemptions

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

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FOIA Exemptions (Cont'd)

- ▶ (5) Documents used in a proposed sale or purchase of property
- ▶ (6) **Compensation of public body employees except:**
 - ▶ (A) Anyone making 50k or more & all department heads even if they make less than 50k
 - ▶ (B) For classified and unclassified employees with salaries between 30k and 50k, the compensation level within a range of 4k beginning at 30k

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FOIA Exemptions (Cont'd)

- ▶ (C) For classified employees making less than 30k, the salary schedule with the compensation range for the compensation level
- ▶ (D) For unclassified employees making less than 30k, the compensation level within a range of 4k beginning at 2k
- ▶ (7) Correspondence or work products from legal counsel (Can't use attorney work product exemption to hide disclosable documents (Post & Courier v. Berkeley County School District))

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FOIA Exemptions (Cont'd)

- ▶ (13) All materials gathered during a search to fill an employment position, except materials relating to not fewer than the final three applicants (The Spartanburg Herald-Journal v. Spartanburg County School District No. 7)
- ▶ (15) Identity of a Whistleblower
- ▶ (18) Autopsy Pictures and Videos
 - ▶ May be viewed by:
 - ▶ (a) law enforcement agency, for official use only;
 - ▶ (b) parents of the deceased, surviving spouse, guardian, personal representative, or next of kin;

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More Exemptions

(18) “Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy...” except that persons set forth Section 17-5-535 can view accordingly.

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Separation Requirement

“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.”

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Matters Specifically Made Public

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; ...

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Matters Specifically Made Public

- ▶ (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.

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Dash Cameras

(9) notwithstanding any other provision of the law, data from a video or audio recording made by a law enforcement vehicle mounted recording device or dashboard camera that involves an officer involved incident resulting in death, injury, property damage, or the use of deadly force.

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Dash Cameras

(9)(a) A law enforcement or public safety agency may apply to the Circuit Court to request injunctive relief to prevent the disclosure of the video or audio recording. A hearing must be requested within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request for disclosure and the hearing shall be held in camera.

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Dash Cameras

(b) The court may order the recording not be disclosed upon a showing by clear and convincing evidence that the disclosure would harm the agency by a provision specified in Section 30-4-40(3).

(c) A court order to withhold the release of a recording under this section must specify a definite time period for the withholding of the release of the recording and must include the court's findings as to the specific harm proven.

(d) A copy of the order shall be made available to the person requesting the release of the recording.

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Meetings of Public Bodies

- ▶ Must be open to the public
- ▶ Can be in person or by phone or other electronic means

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Meetings closed from the Public - Executive Session

- ▶ A public body may hold a closed meeting for the following matters:
 - ▶ Employment matters (hiring, firing, discipline)
 - ▶ Discussion of negotiations for a proposed sale or purchase of property
 - ▶ Legal advice

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Meetings closed from the Public - Executive Session (Cont'd)

- ▶ Investigating criminal conduct
- ▶ Security personnel or devices
- ▶ Discussions of proposed location or expansion of industries or other businesses
- ▶ **Must announce purpose before going into executive session**



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Notice of Meetings of Public Bodies

- ▶ Public bodies must give public notice of regularly scheduled meetings at the beginning of the year.
- ▶ Must publish agenda 24 hours prior to meeting
- ▶ Agenda may be amended by 2/3 vote of members present.



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Minutes of Public Bodies

- ▶ All public bodies shall keep written minutes of all their public meetings.
- ▶ Date, time and place
- ▶ Members of the public body recorded as present or absent
- ▶ Substance of all matters discussed, proposed, decided

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FOIA Lawsuits

(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.

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Lawsuit Awards

(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.

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Public Body Lawsuits

(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.

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Awards

(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.

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Penalties

(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

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Commercial Solicitation Prohibition

(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.

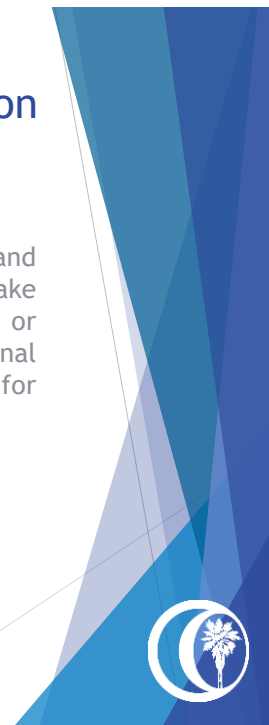
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Commercial Solicitation Prohibition

(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.

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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

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Practical Guidance

- ▶ Log in every FOIA request and assign each a unique tracking number.
- ▶ Keep an annual running log of requests.
- ▶ Open file in a shared folder for each request with an all documents scanned and have a “Tracking Sheet” to document all conversations/actions related to your handling.
- ▶ Circulate an “assignment chart” coordinate who is working on what and what is due.

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Practical Considerations

- ▶ Where are public records found?
 - ▶ Personal Devices?
 - ▶ Public business discussed on personal social media page?
- ▶ What types of media constitutes a public record?
 - ▶ Social Media Posts?
- ▶ How long do I have to keep records?

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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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Practical Considerations

- ▶ HIPPA Considerations
- ▶ Privacy Exemptions
 - ▶ Both general exemption (a)(2) and law enforcement records specific exemption (a)(3)(C)
 - ▶ Cell numbers?
 - ▶ Home addresses?
 - ▶ Victim Information?
 - ▶ 9-1-1 caller information?

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Practical Considerations

- ▶ Federal FOIA v. State FOIA
- ▶ Security Information
 - ▶ Balancing Transparency and Preparedness with Security
- ▶ Law Enforcement Techniques
 - ▶ Ops Plans?
 - ▶ Surveillance Plans/Capabilities?

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Practical Guidance

- ▶ Draft Letters
 - ▶ Prospective law enforcement inquiry
 - ▶ Initial Final Determination
 - ▶ Voluminous Request
 - ▶ Criminal Discovery Denial
- ▶ Fee schedules
- ▶ FOIA request forms

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FOIA Handbook

- ▶ FOIA Handbook @ www.sccounties.org



FOIA Handbook



FOIA Handbook Supplement (2023)

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