Anne Marie Green Board Chair Lexington County School District One P.O. Box 1869
AGO 2441
No. 2441
South Carolina Attorney General Opinion
State of South Carolina Office of the Attorney General
January 4, 2022

Lexington, SC 29071-1869

Dear Ms. Green:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> As Chair of the Board of Trustees of Lexington County School Board One, I am requesting an opinion from the Office of the S.C. Attorney General regarding a provision of the S.C. Freedom of Information Act (FOIA). Specifically, the Board seeks an opinion regarding the proper meaning and application of Section 30-4-90(a)(4) of the FOIA concerning the ability of one member of a public body-in this case, a member of the school board-to have included in the body's meeting minutes, without Board majority consensus, information and/or documents that the individual member insists be included in the minutes.
>
> One concern is that inclusion in Board meeting minutes of the email in question, which notes one Board member's negative view of the performance of an employee, intrudes on the role and function of the Administration under the direction of the Superintendent. This principle of distinct roles of the Board, its individual members, and the Administration is embodied in several provisions of Board policy, including Policy BC ("It is the responsibility of each board member to do the following: . . . Understand that the basic function of a school board is policymaking, not administration, and accept the responsibility of learning to discriminate intelligently between these two functions") and Policy BDD (Board will "[a]llow the superintendent to administer the schools," and will "[c]ommunicate with staff members through the superintendent"; Superintendent
>
> will "[a]dminister effectively and provide the professional educational leadership necessary. All district employees are responsible directly or indirectly to the superintendent"). Copies of the cited Board policies are enclosed.
>
> A further concern is that inclusion in Board minutes (a public record) of the email in question, containing one member's negative views of an employee's job performance, appears to be in conflict with the letter and/or spirit of other FOIA provisions, including Section 30-4-40(a)(2) (personal privacy exemption, when no determination of performance shortcoming has been made), Section 30-40-70(a)(1) (executive session privilege for discussion of employee performance matters). In other situations, in which one member requests inclusion of information and/or documents in the body's minutes, additional FOIA provisions may be implicated, such as Section 30-4-40(a)(7) (attorney-client privilege exemption), the waiver of which would belong to the entire Board.
>
> The Board requests an opinion regarding the following questions:

> 1. Is the ability of a public body's member under Section 30-4-90(a)(4) to request that information or documents be included in the meeting minutes of the body without limitation, or may a public body impose reasonable limitations on a member's ability to request inclusions in or additions to the minutes, based on the import of other applicable FOIA provisions and/or the body's written policy, such as those cited to above?
>
> 2. Whether a majority of the members of a public body can deny an individual member's request to include in the body's meeting minutes information or documents that the Board majority believes to be inconsistent with or in violation of Board policy, FOIA provisions, or other laws or legal requirements, such as those cited above.

Law/Analysis

As is discussed more fully below, it is this Office's opinion that the S.C. FOIA, S.C. Code §§ 30-4-10 *et seq.*, does not permit a public body to preempt a member of the body from including information in the written minutes of its public meetings by majority vote or through adoption of policy. See S.C. Code § 30-4-90(a)(4). However, these minutes are public records from which a public body may exempt certain enumerated categories of information from disclosure. See S.C. Code § 30-4-40. Additionally, certain information within a public document is required to be closed to the public. See S.C. Code Ann. § 30-4-20(c). The information which may be exempt from disclosure or is otherwise required to be closed to the public can be redacted or separated prior to disclosing the rest of the document. S.C. Code Ann. § 30-4-40(b).

This Office has not identified a decision from our state courts interpreting section 30-4-90(a)(4). As a matter of first impression, we will rely on the rules of statutory construction to analyze the questions presented. The primary rule of statutory construction is to "ascertain and give effect to the intent of the legislature." *Kerr v. Richland Mem'l Hosp.*. 383 S.C. 146,148, 678 S.E.2d 809, 811 (2009) (citations omitted). The South Carolina Supreme Court has held that when the meaning of a statute is clear on its face, "then the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007) (citations omitted) (internal quotations omitted); *see also Hodges v. Rainev*. 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." *State v. Henkel*. 413 S.C. 9, 14,774S.E.2d458,461 (2015), *reh'g denied (Aug*. 5, 2015).

The S.C. FOIA explicitly states the General Assembly's findings and purpose as follows:

> [I]t 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.

S.C. Code § 30-4-15 (emphasis added). Our state courts have repeatedly stated that the "essential purpose of the FOIA is to protect the public from secret government activity." *Bellamy v. Brown*; 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *see also Glassmever v. City of Columbia*. 414 S.C. 213, 219, 777 S.E.2d 835, 839 (Ct.App. 2015). To that end, our courts have held the S.C. FOIA is "remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *Quality Towing. Inc. v. City of Myrtle Beach*. 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). In light of the S.C. FOIA's mandate of liberal construction in favor of access, this Office's policy has long favored the disclosure of public records and access to public meetings. See 1988 S.C. Op. Att'y Gen. 131 (May 26, 1988) ("This is consistent with the basic principle and the policy of this Office that the FOIA should always be liberally construed.... Any doubt should always be resolved in favor of disclosure."). With these principles in mind, this opinion next addresses relevant portions of the S.C. FOIA to determine legislative intent.

Section 30-4-90 establishes requirements for information that must be included in public meeting minutes.

> (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.*

S.C. Code Ann. § 30-4-90 (emphasis added). The plain language of subsection (a)(4) allows "any member of the public body" to have information included within the minutes. "Any" is commonly understood to include one or more of a group.[1] Given the Legislature's stated intent to allow the public to access meetings and to learn and report on the activities of public officials, it seems consistent with its design to interpret subsection (a)(4) to permit one or more members of a public body to request to include information in the minutes without being subjected to majority vote requirements. Under this construction a minority of a public body could include information demonstrating its reasons for opposition to action taken by the body within the minutes. Allowing publication of information at a single member's request is broadly consistent with Legislature's expressed intent that public business be conducted in an open and public manner.

While a member's request to include information in meeting minutes of public bodies is not generally subject to majority vote, these minutes are still public records and some information therein may be subject to listed exemptions from disclosure or otherwise be closed to the public. For instance, subsection (b) of 30-4-90 declares that minutes are public records and "shall be available within a reasonable time after the meeting *except where such disclosures would be inconsistent with § 30-4-70* [governing closed meetings or executive sessions]." This subsection presupposes that fully disclosing all information recorded within meeting minutes may conflict with other provisions of the S.C. FOIA, specifically when a public body closes a meeting to the public. Moreover, the statutory definition of "public record" recognizes multiple categories of information that are "required to be closed to the public" including where required by other law. S.C. Code § 30-4-20(c).[2] Finally, section 30-4-40 lists nineteen categories of information which a public body may elect to exempt from disclosure. The South Carolina Supreme Court explained, in

the context of the exemption for information of a personal nature, a public body must first find an exemption applies and then decide whether or not to disclose the information anyway.

> Under FOIA, "A public body may but is not required to exempt from disclosure the following information: ... Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. § 30-4-40(a)(2). A public body must make two decisions before invoking this exemption. First, the public body must determine whether the information requested is personal and whether disclosure would constitute an unreasonable invasion of personal privacy. Second, if so, the public body must determine whether to disclose the information.

vote. In contrast, when information is required to be closed by law, a majority vote is unnecessary.

Finally, the questions in your letter suggest that a public body's policy documents may provide another basis to prohibit a member's request to include certain information in the minutes. To the extent that a body's policies are consistent with the S.C. FOIA and other law, they can provide additional authority for the body's decision not to disclose the information.

Conclusion

It is this Office's opinion that the S.C. FOIA, S.C. Code §§ 30-4-10 *ct seq*., does not permit a public body to preempt a member of the body from including information in the written minutes of its public meetings by majority vote or through adoption of policy. *See* S.C. Code § 30-4-90(a)(4). However, these minutes are public records from which a public body may exempt certain enumerated categories of information from disclosure. Sec S.C. Code § 30-4-40. Additionally, certain information within a public document is required to be closed to the public. *See* S.C. Code Ann. § 30-4-20(c). The information which may be exempt from disclosure or is otherwise required to be closed to the public can be redacted or separated prior to disclosing the rest of the document. S.C. Code Ann. § 30-4-40(b). This Office strongly supports transparency and disclosure under FOIA and has consistently advised for decades: when there is a doubt disclose.

Sincerely.

MATTHEW HOUCK ASSISTANT ATTORNEY GENERAL

Notes:

[1] See The American Heritage Dictionary 61 (3rd ed. 1993) (Any is defined as "one, some, every, or all without specification."); *see also* Merriam-Webster Online, *https://www.merriam-webster.com/dictionary/any* ("one or some indiscriminately of whatever kind"); *Dictionary.com*, *http://www.dictionary.com/browse/any* ("one, a, an, or some; one or more without specification or identification.").

[2](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.

S.C. Code Ann. § 30-4-20 (emphasis added).
