

John O. Williams, II, Esquire, 2018 WL 4385558 (2018)

Amending Agenda - Final Action Items

2018 WL 4385558 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 5, 2018

*1 John O. Williams, II, Esquire
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Berkeley County Legal Department
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Dear Mr. Williams:

You seek our opinion “regarding the appropriateness of using the exigent circumstances exception [of FOIA] to amend an agenda [so as] to add a referendum question on the general election ballot regarding the creation of a special tax district.” By way of background, you provide the following information:

Berkeley County Council voted on August 27, 2018 to request an Attorney General’s opinion on the issue outlined below.

1. South Carolina Code of Laws § 30-4-80(A) prescribes how items may be added to an agenda after a meeting begins. That section states, “[a]fter the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.” Further, South Carolina Code of Laws § 7-13-355 requires that any question that is to “be submitted to the qualified electors in a referendum held at the time of a general election” must be “submitted to the appropriate election commission to be placed on the ballot no later than 12:00 noon on August fifteenth...”. There is uncertainty as to the meaning of the term exigent found in § 30-4-80(A) as it relates to the deadline found in § 7-13-355.

Further, you note:

[b]y way of background, at the beginning of the council meeting on August 13, 2018 a councilman learned that an item requested to be on the agenda was not placed on the agenda. Also, that councilman learned of a statutory deadline (August 15, 2018) for adding a question to the general election ballot in November. During the meeting of the Committee on Justice and Public Safety, that councilman made a motion to find that an exigent circumstance existed and to amend the agenda to add a resolution which would place a referendum on the general election ballot asking the voters whether they wanted to add a millage of two mills for the provision of recreation services in the unincorporated areas of the county. The vote was passed by a 5 to 1 vote of County Council.

If a council member makes a motion to find that an exigent circumstance exists and to amend the agenda to place a referendum question on the general election ballot, with the exigent circumstance being that there is a statutory deadline to send the question to the Election Commission of which the council member was not aware prior to the meeting, does that qualify as an exigent circumstance?

Law/Analysis

*2 As noted, your question concerns the Freedom of Information Act or FOIA, codified at S.C. Code Ann. § 30-4-10 et seq. As we advised only recently,

As noted, your question raises concerns under FOIA, codified at § 30-4-10 et seq. FOIA is a remedial statute and must be liberally construed. As we advised in Op. S.C. Att’y Gen., 2016 WL 963697 (February 11, 2016), FOIA was enacted with the following legislative purpose in mind:

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[t]he 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.

S.C. Code Ann. § 30-4-15 (2007 & Supp. 2015). In other words, and as the South Carolina Supreme Court has summarized, “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).

Being a statute remedial in nature, our courts recognize the FOIA “should be liberally construed to carry out its purpose.” Evening Post Publ’g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Thus, it has also been recognized that any exception to the Act’s applicability must be narrowly construed. Evening Post Publ’g Co. v. City of North Charleston, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005).

“‘The essential purpose of FOIA is to protect the public from secret government activity.’” D’ Brock v. Town of Mt. Pleasant, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (quoting Lambries v. Saluda County Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014)).

Op. S.C. Att’y Gen., 2018 WL 3326902 (June 28, 2018).

Our 2018 Opinion discussed previous decisions of our courts at some length. We noted that Lambries v. Saluda County Council, 409 S.C. 1, 760 S.E.2d 785 (2014) interpreting § 30-4-80 of FOIA, had concluded that previously, with respect to a regularly scheduled meeting, FOIA did not require a public body to have any agenda at all. As we explained, Lambries held that previously “nowhere in FOIA is there a statement that an agenda is required for a regularly scheduled meeting.” 409 S.C. at 14, 760 S.E.2d at 791.

As the Opinion further noted, however, the General Assembly amended FOIA in 2015 by Act No. 70 in response to Lambries. The purpose of the Act, as expressed in its Title was to “provide [that] public bodies shall post agendas for all regularly scheduled meetings” and to “provide for the manner in which these agendas subsequently may be amended.” Section 30-4-80(A) of FOIA now reads as follows:

***3 § 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. An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies. Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a Finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. Nothing herein relieves a public body of any notice requirement with regard to any statutorily required public hearing.

(emphasis added).

Our 2018 Opinion also referenced Brock v. Town of Mt. Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016). There, the Supreme Court dealt with an issue prior to the 2015 amendment, noting that the Court of Appeals had failed to distinguish between regularly scheduled meetings and special meetings for purposes of the requirement of agendas under the pre-2015 FOIA. However, Brock also noted that “[a]lthough this case is governed by a previous version of the statute, FOIA now requires agendas for regularly scheduled meetings and set forth a specific procedure for amending agendas during meetings.” 415 S.C. at 629, n. 4, 785 S.E.2d at 201, n. 4 (emphasis added).

Thus, pursuant to § 30-4-80, as amended, if the public body does not determine “by a two-thirds vote of the members present and voting” and “upon a finding by the body that an emergency or exigent circumstance exists if the item is not added to the agenda,” then an amendment of the agenda during the meeting may not occur. The question is, therefore, the meaning of “emergency or exigent circumstance” as used in § 30-4-80 of FOIA.

*4 The terms “emergency” or “exigent circumstance” is not defined in FOIA. Where a statute does not define a term or terms, our courts have consistently concluded that the words must be given their common and ordinary meaning. As was stated in Pee v. AVM, Inc., 344 S.C. 162, 167-68, 543 S.E.2d 232, 235 (Ct. App. 2001), affd., 352 S.C. 167, 573 S.E.2d 785 (2002).

“... words should be given their plain and ordinary meaning. ‘In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute.’” State v. Ramsey, 331 S.C. 555, 561, 430 S.E.2d 511, 515 (1993). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense. Powers v. Fidelity & Deposit Co., 180 S.C. 501, 186 S.E. 523 (1936). Where the legislature chooses not to define a term in the statute, courts should interpret the term in accordance with its usual and customary meaning. Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994).

In Op. S.C. Att’y Gen., 1978 WL 35238 (November 24, 1978), in the context of FOIA, it noted that the “word ‘emergency’ has been defined as unforeseen circumstances calling for immediate action.” (citing Garvey v. Trow, 170 P.2d 845 (Ariz. 1946)). And, in Op. S.C. Att’y Gen., 1983 WL 142761 (Op. No. 83-92, December 5, 1983), we stated:

[t]he term ‘emergency’ is an unusual or abnormal condition beyond the control of the [requesting municipality] and a condition beyond [its] reasonable power to remove or overcome. It may arise from causes other than casualty or act of God. United States v. Atlantic Coast Line Railroad Company, 153 F.2d 243, 246 (4th Cir. 1946). Our Supreme Court has used the definition from Webster’s New International Dictionary to define ‘emergency’ as ‘an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy, pressing necessity or exigency.’ Hice v. Dobson Lumber Company, 180 S.C. 259, 185 S.E. 742, 746 (1936). Thus, because your police force is depleted due to circumstances both unforeseen and beyond your control which may not be reasonably overcome, an emergency would exist.

As can be seen, Hice appears to have defined “emergency” and an “exigent circumstance” to be synonymously. It is well settled that the word “exigent” has as its synonym words such as “acute,” “compelling,” “critical,” “pressing” and “urgent.” Merriam-Webster Online Dictionary Thesaurus. As one court has stated, “[t]he term ‘exigent’ indicates a situation where adverse events are imminent” In re Earl and Theresa Shear, 2010 WL 3463382 (Bankr., D.N.D. 2010). Likewise, in In re Jefferies, 2018 WL 1449146 (Bankruptcy, D.D.C. 2018), the Court found that “[t]he word ‘exigent’ refers to something that is ‘urgent’ or that requires ‘immediate action or aid.’” (quoting In re Catoe-Emerson, 2009 WL 47330*1 (Bankr., D.D.C. 2009)).

Conclusion

*5 In our opinion, the amendment of the agenda “to add a referendum question on the general election ballot regarding the creation of a special tax district” is not an “emergency” or an “exigent circumstance” as required by § 30-4-80(A) of FOIA. As discussed above, FOIA must be read broadly or liberally, and exceptions thereto narrowly, so that “public business is performed in an open and public manner” and the public is properly informed of government activity. As we stated many

years ago, “[t]hese notice requirements may not be simply ignored by the public body; they are mandatory.” Moreover, as we further advised, “adequate notice to the public at large is an integral part of the public meeting concept; a meeting cannot be deemed to be public merely because its doors are opened to the public if the public is not properly informed” Op. S.C. Att’y Gen., 1984 WL 159828 (No. 84-20) (February 22, 1984) (quoting Consumers Education and Protective Assn. v. Nolan, 368 A.2d 675, 681, n. 4 (Pa. 1977)).

With respect to your situation, we cannot read the addition of the referendum for the creation of a special tax district as meeting the exception for addition to the agenda during the meeting as either an “emergency” or an “exigent circumstance.” We understand that § 7-13-355 imposes a deadline of August 15 for placement of a referendum issue on the general election ballot. However, the existence of a statutory deadline cannot be deemed an “emergency” or an “exigent circumstance.” The statutory deadline has been there all along. Placement and compliance with the deadline is within the control of Council and could have been foreseen, certainly. Moreover, such action cannot be deemed “urgent,” “pressing” or one “requiring immediate action.” FOIA was designed for the protection of the public, and the agenda of a regularly scheduled meeting is to advise the public as to the issues to be considered at that meeting.

Sincerely,

Robert D. Look
Solicitor General

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