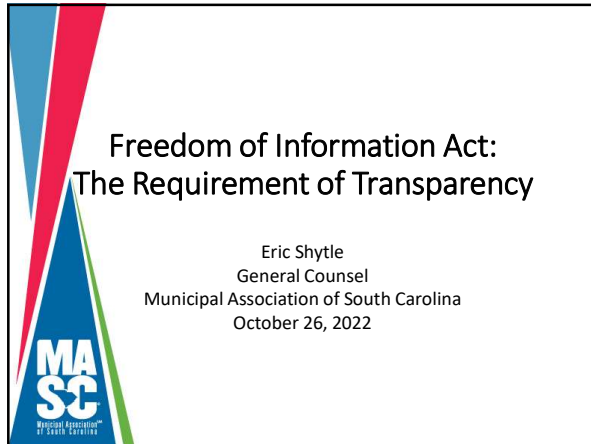


Freedom of Information Act: The Requirement of Transparency

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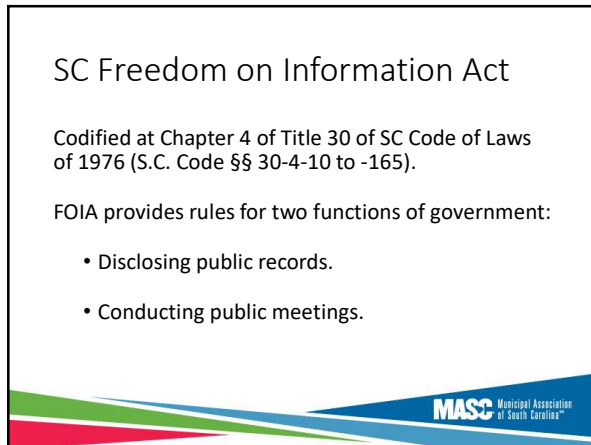


SC Freedom on Information Act

Codified at Chapter 4 of Title 30 of SC Code of Laws of 1976 (S.C. Code §§ 30-4-10 to -165).

FOIA provides rules for two functions of government:

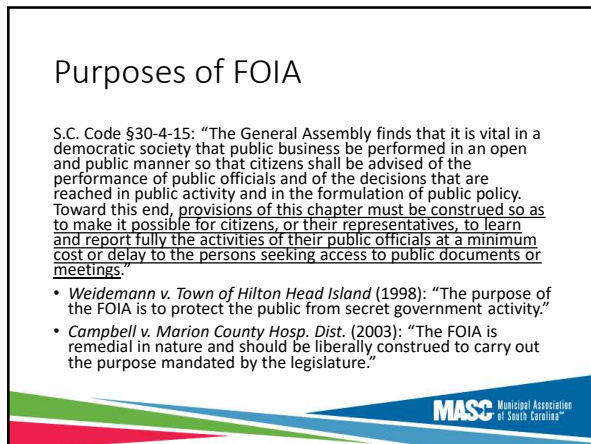
- Disclosing public records.
- Conducting public meetings.



Purposes of FOIA

S.C. Code §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."

- *Weidemann v. Town of Hilton Head Island* (1998): "The purpose of the FOIA is to protect the public from secret government activity."
- *Campbell v. Marion County Hosp. Dist.* (2003): "The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature."



Applicability of FOIA

- "Public body means . . . any public or governmental body or political subdivision of the State, including . . . Municipalities . . . 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."
- *Quality Towing, Inc. v. City of Myrtle Beach* (2001): Review committee composed of city employees created by the city manager to evaluate bids by towing companies was an "advisory committee" and thus a "public body."
- *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce* (2018): Chamber of Commerce was not a public body even though it received and expended accommodation tax funds because other statutes provided different accountability measures and public access to how public funds were spent.

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Applicability of FOIA

"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.

Definitely a public record:

- Documents and records in hardcopy and electronic formats.
- Emails.
- Text messages on phones provided by the public body.

More difficult questions:

- Documents provided to the public body and taken back up.
- Text messages on phones not provided by the public body.
- Emails from personal email accounts dealing with business of the public body.

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Applicability of FOIA

"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.

Lambries v. Saluda County Council (2014): "Meetings are not limited to instances where action is taken.... Deliberative gatherings are included as well, and deliberation in this context connotes not only collective decision-making but also the collective acquisition and exchange of facts in preparation for the final decision."

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Public Records

S.C. Code §30-4-30

- Public bodies must respond to any written request for public records.
- Public bodies are almost never required to create a public record or an electronic version of a hardcopy record.
- Certain records must be made available for inspection during business hours without the need for a written request: (1) minutes of meetings held during the preceding six months; (2) law enforcement incident reports for the preceding fourteen day period; (3) documents identifying persons detained for the preceding three months; (4) documents produced by a 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 months.

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Response Times and Formats

- 10 business days to respond to a request (20 business days for records over 24 months old).
- Public record must be provided within 30 calendar days from the date of response (35 calendar days for records over 24 months old).
- Request is considered granted if no response is received within the set limits (only for nonexempt records or information).
- Timetables may be extended by mutual consent.

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Fees

- S.C. Code §30-4-30(B): "The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records."
- Records must be furnished at the lowest possible cost (hourly salary of lowest-paid employee capable of fulfilling request). Different employees may be required for different requests.
- Fees may not include time to determine if an exemption applies, including legal fees, but may include legal fees necessary to redact records.
- Public body may require a deposit of not more than 25% of anticipated costs before copies of documents are made.
- Public body must adopt a fee schedule and post it on its website.

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Exemptions

S.C. Code § 30-4-40 lists records that a public body may exempt from disclosure.

- Most exemptions are not mandatory.
- Records that contain both exempt and non-exempt material must be redacted and the non-exempt part disclosed.
- Many other exemptions are located elsewhere in State and federal law.

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Exemptions

Personal privacy. Information of a personal nature where public disclosure would constitute an unreasonable invasion of personal privacy.

- *City of Columbia v. ACLU of South Carolina* (1996): Internal investigation reports of law enforcement agencies are not exempt. "We disagree with Respondent's contention that the internal investigation reports of law enforcement agencies are *per se* exempt because they contain personal information as a matter of course. The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis."
- *Burton v. York County Sheriff's Dept.* (2004): Employment records of sheriff's deputies who had been suspended for misconduct were not exempt.
- *Glassmeyer v. City of Columbia* (2015): Home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager were exempt.

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Exemptions

Contracts and documents related to contractual negotiations. Exempt until the contract has been entered into or the property had been sold or purchased.

Compensation. Disclosure is based on total compensation:

- For employees making \$50,000 and up, as well as department heads, the law requires disclosure of the "exact amount" of compensation
- For employees making less than \$50,000, the law allows disclosure of salary ranges or classes in \$4,000 increments.

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Exemptions

Records subject to attorney-client privilege.

- Must be careful to maintain attorney-client privilege for exemption to attach

Economic development. Records related "to efforts or activities of a public body . . . to attract business or industry to invest within South Carolina."

- Documents become subject to disclosure when (1) the offer has been accepted, and (2) the project has been announced.

Job searches. Materials gathered by a public body during a search to fill an employment position.

- Materials related go the finalists for a position must be disclosed (no fewer than 3, but can be more)

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Other Exemptions: Commercial Solicitation

- SECTION 30-2-50. (A) A person or private entity shall not knowingly obtain or use personal information obtained from a [public body] for commercial solicitation directed to any person in this State.
- (B) Each [public body] 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.
- (C) All [public bodies] 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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Other Exemptions: Business License Records

- SECTION 30-4-40(a)(2), unreasonable invasion of personal privacy – "information as to gross receipts contained in applications for business licenses."
- SECTION 6-1-120: "[I]t is unlawful . . . 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."
- SECTION 6-1-420(E): "[A] taxing jurisdiction may not share or disclose any information relating to business license tax applications with any third party other than to acknowledge whether or not a business has paid the taxing jurisdiction's business license tax for a relevant year."

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Other Exemptions: Body-Worn Cameras

- SECTION 23-1-240(G)(1). Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.
- The statute provides access in certain circumstances to SLED, the Attorney General, circuit solicitors, and law enforcement agencies.
- In addition, certain people (for example, the subject of the recording, parents and legal guardians, attorneys, etc.) may access body-worn camera footage "pursuant to the South Carolina Rules of Criminal Procedure, the South Carolina Rules of Civil Procedure, or a court order."

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Other Exemptions: Juvenile Justice Code

- SECTION 63-19-2030(A): "[L]aw enforcement records and information identifying children . . . are confidential and may not be disclosed directly or indirectly to anyone, other than those entitled under this chapter to receive the information."
- "Child" is a person less than 18 years of age, but not a person 17 years of age or older who is charged with certain serious felonies.
- 2013 WL 6924891, at *5 (S.C.A.G. Dec. 30, 2013): "[S]uch an incident report or other law enforcement record concerning a child must generally be released to the public or made available for public inspection with the child's identifying information redacted from the report."

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Other Exemptions: Victim's Identification

- S.C. Const. Art. I, § 24 provides that victims of crime have the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process.
- The Attorney General has interpreted this provision to allow exemption of victims' identities, especially for juvenile victims and victims of sexual crimes.
- See also S.C. Code § 16-3-1525 and 16-3-1535, which make confidential the names, addresses, and telephone numbers of victims and witnesses when held by "a jail, prison, or detention or holding facility, including a mental health facility" or "the Department of Corrections, the Department of Probation, Parole and Pardon Services, the Board of Juvenile Parole, and the Department of Juvenile Justice."

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Commercial Solicitation

Under S.C. Code § 30-2-50, commercial solicitation means contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service.

What requests are covered under this provision?

- Names and addresses of new business license applicants for the past year by a company that sells copiers.
- Names and addresses of all water and sewer customers by a company that provides sewer line insurance.
- Building permit information, including property owner names and addresses, for residential construction over the past year by a trade publication that compiles residential construction costs.

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Other Exemptions: PII

• SECTION 30-2-310. A public body may not "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."

• SECTION 16-13-510. Personal identifying information includes (1) social security numbers; (2) driver's license numbers or state identification card numbers; (3) checking account numbers; (4) savings account numbers; (5) credit card numbers; (6) debit card numbers; (7) personal identification (PIN) numbers; (8) electronic identification numbers; (9) digital signatures; (10) dates of birth; (11) current or former names, but only when linked to other identifying information provided in this section; (12) current or former addresses, but only when linked to other identifying information provided in this section; or (13) other numbers, passwords, or information that may be used to access a person's financial resources or will uniquely identify an individual.

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Dealing with Burdensome or Improper Requests

- A public body may file a request for a hearing in circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or improper requests.
- Allows the public body to request a hearing if it is unable to make a good faith determination regarding information's exemption from disclosure.

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Best Practices for FOIA Requests

- Adopt a comprehensive FOIA Policy.
- Include a fee schedule and deposit requirements, and put it on the website.
- Assign a specific position the responsibility to coordinate FOIA responses.
- Ask requestors to use an approved form, but respond to all "written requests."
- Adopt all possible exemptions, but keep in mind that typically the decision to apply an exemption is up to the local government.
- Respond to FOIA requests as quickly and completely as possible.
- Include a "completion form" with all FOIA responses that includes a commercial solicitation warning.

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What is a Public Meeting?

- Convening of a quorum
- To discuss or act upon public business
- In person or by electronic means

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Chance Meetings or Social Gatherings

S.C. Code § 30-4-70(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.

How does this provision impact:

- Social media?
- Email?
- Text messages?
- The annual Christmas party?

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Serial or Sequential Meetings

- AG Opinion (February 18, 2021): "It is this Office's opinion that our state courts would likely hold an email chain in which a quorum of a public body's membership discusses or takes action upon a matter over which the public body has supervision, control, jurisdiction or advisory power constitutes a 'meeting' according to the S.C. FOIA."
- What about sequential workshops? *Croft v. Town of Summerville* (2019) found no violation when a town split the public body into smaller groups for workshops in order to avoid having a quorum. The AG disagreed, and the S.C. Supreme Court vacated.

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Public Meetings

S.C. Code § 30-4-80: Notice of Meetings

- 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.
 - Must be posted at the main office and on your website if you have one.
 - Notice must include the agenda, date, time and place of the meeting.
- An agenda must also be given to media and any person who requests receipt of notice.

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Agendas for Public Meetings

- 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.
- If the item to be added is a final reading or there will not be an opportunity for public comment, the change must be approved by a 2/3 vote and it must be an "emergency or an exigent circumstance."
- "Exigency" – An urgent need or circumstance

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Procedure to Add Items

Procedure to add item to a public meeting agenda within 24 hours of the meeting



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Executive Sessions

Meetings must be open to the public unless closed as an "executive session." S.C. Code § 30-4-70: allows executive sessions for:

- 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;
- 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;
- Discussion regarding the development of security personnel or devices;
- Investigative proceedings regarding allegations of criminal misconduct; or
- 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.

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Executive Sessions

S.C. Code § 30-4-70(b): Before going into executive session, the presiding 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.

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Executive Sessions

Quality Towing, Inc. v. City of Myrtle Beach (2001).

- Agenda: "Towing – Contractual Recommendation."
- Announcement: "This matter will be discussed in executive session."
- Holding: "FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. As evidenced by the minutes, the presiding officer did not announce the specific purpose of the executive session."

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Executive Sessions

Donohue v. City of North Augusta (2015).

- Agenda/Announcement: "Upon the request of the City Administrator and in accordance with Section 30-4-70 (a) (2), City Council unanimously voted to go into executive session for the purpose of discussion of negotiations incident to a proposed contract"
- Holding: The City did not satisfy FOIA's specific purpose requirement.

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Executive Sessions

Suggested announcements of specific purpose:

- Employment matters: Reference the department or division.
- Contractual negotiations: Name of party, service being contracted for, or project name.
- Sale or purchase of property: Name of owner or general info such as acreage if secrecy matters.
- Attorney-client privilege: Adverse party in litigation, general description of the legal issue.
- Investigation of criminal misconduct: Alleged misconduct.
- Location of expansion of services: The service to be expanded or project name if one exists.

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Consequences of FOIA Violations

S.C. Code § 30-4-100 allows any citizen to seek injunctive relief and attorneys fees for violations, and makes FOIA useful to collaterally attack projects.

- "A violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists."
- Any citizen of the State may bring an action in circuit court alleging a violation of FOIA.
- Initial hearing must be held within 10 days, but the court will likely not hold a final hearing for up to six months.
- The court may order any equitable relief that it considers appropriate, including the invalidation of the underlying action.
- The court may grant a prevailing challenger attorney's fees and costs for any litigation.

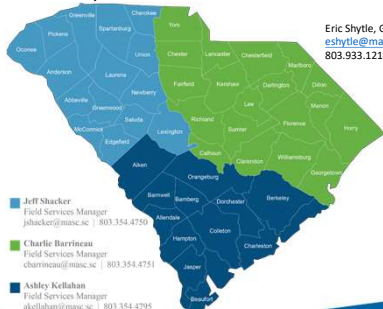
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Best Practices for Public Meetings

- Provide notice of executive sessions and include the statement of purpose where possible, however, a public body may enter into executive session to discuss an issue regardless of whether it is noticed on the agenda.
- Notice a general executive session on every agenda, regardless of whether you need one.
- Notice that "action may follow executive session" on every agenda, regardless of whether an executive session is planned.
- The presiding officer should state the purpose in executive session even where it is included on the agenda.

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Questions; Contact Information



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