SOUTH CAROLINA FREEDOM OF INFORMATION ACT
(ANNOTATED)

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I. HISTORY OF FOIA IN SOUTH CAROLINA

SECTION 30-4-10. Short title.

This chapter shall be known and cited as the "Freedom of Information Act".

The current version of the South Carolina Freedom of Information Act (codified at Sections 30-4-10 through 30-4-165) was enacted in large part in 1978. Substantial amendments to FOIA were made in 1985 and 1987 by the General Assembly.

The 1978 Act replaced an earlier, simpler Freedom of Information Act which was originally enacted in 1972. Several significant differences of the 1972 Act from the current version of FOIA include:

1972 Act requirement for open meetings applied only to meetings of the governing body of public agencies.

1972 Act permitted executive sessions for administrative briefings and committee reports.

1972 Act only required that public records be open for inspection and copying during regular business hours; no requirement on public body to provide copies.

1972 Act only provided for injunctive relief as a remedy with no provision for attorneys' fees; no criminal sanctions provided.

II. HOW FOIA IS TO BE INTERPRETED

SECTION 30-4-15. Findings and purpose.

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.

The statute requires the courts to construe FOIA to require disclosure and openness unless an exemption from disclosure is specifically made available.

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, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

The purpose of FOIA is to protect the public from secret government activity. Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E. 2d 783 (S.C. 1998).

FOIA provisions must be construed to make it possible for the public to learn of and report on activities of public officials. Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E. 2d 752 (Ct. App. 2001).

Our State Court of Appeals, in discussing the rationale for FOIA, quotes U.S. Supreme Court Justice Scalia's description of the Federal Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Scalia, The Freedom of Information Act Has No Clothes, REG., Mar.-Apr. 1982. The Court of Appeals quickly notes "needless to say we would never apply either pejorative to a statute enacted by our General Assembly." Herald Publishing Company, Inc. et al. v. Barnwell, et al. 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

But the federal FOIA is no help in interpreting South Carolina's FOIA.

Reliance on the federal FOIA is not helpful in analysing South Carolina's FOIA. The exemptions contained in the federal FOIA are more expansive than those contained in South Carolina's FOIA. Newberry Publishing Co. Inc. v. Newberry County Commission on Alcohol and Drug Abuse, et al., 308 S.C. 352, 417 S.E. 2d 870 (S.C. 1992).

However, FOIA or "sunshine laws" of other states may be helpful in interpreting the South Carolina FOIA.

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The court relied on the federal case of County of Suffolk, New York v. First American Real Estate Solutions, 261 F.3d 179 (2d Cir. 2001) and approving followed that federal court's interpretation of New York law that the state agency's New York FOIA obligation is to make its records available for public inspection and copying, but "it is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute." Seago v. Horry County, 378 S.C. 414, 663 S.E. 2d 38 (S.C. 2008).

But not always…the same court distinguished a Florida state court decision which held exactly opposite.

And an earlier decision of the South Carolina Court of Appeals likewise distinguished FOIA laws of other states.

Legislatures of every state have enacted open meeting laws in some form or another, and because no two acts are the same, and because each case differs factually from the others, decisions from other states construing their statutes may be of limited assistance. Therefore, when deciding how to interpret S.C.'s FOIA, the Courts look to the statement of the legislature's intent expressed in Section 30-4-15, Wiedemann v. Town of Hilton Head Island, 326 S.C. 573, 486, S.E. 2d 263 (Ct. App. 1997).

But see Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

III. WHO IS SUBJECT TO FOIA REQUIREMENTS?

SECTION 30-4-20(a) "Public body" means any department of the State, a majority of directors or their representations of departments within the executive branch of state government as outlined in Section 1-30-10, 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, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

A review committee formed by the City Manager and consisting of city employees, but not City Council members, with prior experience with local towing companies or the procurement process, for the purpose of evaluating proposals by towing companies for services to the City, is a public body under FOIA. Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

The fact that the city manager and not the city council created the committee is not enough to remove the committee from the definition of "public body" as stated in FOIA. Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

A committee set up to give advice to the city manager and ultimately to city council is a "public body" under FOIA. Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

The court cited to a Florida decision that held where committees are found to be one step, however remote, in the decision-making process, courts tend to require committees to open their meetings.

The 1987 amendments to FOIA were clearly intended to include advisory bodies to be included in the definition of "public body". Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

The amendment in 2003 was intended to include the Governor's Cabinet in the definition of "public body." See also new Section 30-4-65 added in 2003.

Interestingly, FOIA does not appear to apply to the South Carolina Court System.

When asked if the Grand Jury is subject to FOIA, the Attorney General responded that "it is not at all clear that the court system is included within the reach of FOIA. The definition of a 'public body' in FOIA does not expressly mention the courts or any part thereof." S.C. Op. Atty. Gen. 2014 WL 3965783 (August 4, 2014).

A distinction exists between the "governmental function" and a "proprietary or business function." But a committee formed to give advice to a public body or official is performing a governmental function. Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

A committee formed to help determine the award of a city contract which entailed the expenditure of public funds is a "public body" under FOIA. Quality Towing, Inc. v. City of Myrtle Beach, et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

What about local board implementing federal government programs?

Local boards which collect information and implement federal law under the Emergency Fund and Shelter Program of the Federal Emergency Management Agency (FEMA) are acting as part of the federal government. Therefore, the local boards are subject to federal law when acting pursuant to federal policy, and consequently are subject to the disclosure requirements of the federal FOIA, not State FOIA. S.C. Op. Atty. Gen. 2005 S.C. A G LEXIS 58 (May 18, 2005).

What about non-governmental or non-quasi- governmental organisations?

FOIA does not apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms-length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent.

This is to be contrasted with a situation where:

When a block of public funds is diverted en masse from a public body to a related organsation, or when the related organisation undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organisation receiving and spending the funds. Weston et al. v. Carolina Research and Development Foundation, et al., *303 S.C. 398, 401 S.E. 2d 161 (S.C. 1991).*

A nonprofit corporation which operates exclusively for the benefits of a governmental body and that is supported in whole or in part by public funds and has expended public funds is a "public body" under FOIA. Weston et al. v. Carolina Research and Development Foundation, et al., *303 S.C. 398, 401 S.E. 2d 161 (S.C. 1991).*

> *Each of the following transactions alone would bring a nonprofit corporation within FOIA's definition of "public body":*
>
> > *1). Public property is sold by a governmental body to an unrelated third party. As consideration for the purchase of the public property, the third party pays the governmental body $3,001,801 and makes a gift of $2,000,000 to the nonprofit corporation. By accepting a portion of the purchase price paid for publicly owned real estate, the nonprofit corporation accepted the support of public funds and therefore because subject to FOIA.*
> >
> > *2). The nonprofit corporation accepted federal grant moneys and undertook to administer the expenditure of this money for the development of a building to be leased to the governmental body. The grant was originally earmarked for the governmental body, but was re-directed to the nonprofit corporation after the federal agency was advised that the governmental body was "acting through" the nonprofit corporation, which in turn was acting on "behalf" of the governmental body as its "agent". The grant was awarded to the governmental body "acting through" the nonprofit corporation. By accepting these funds and managing their expenditure, the nonprofit corporation has received support from public funds and has expended public funds, thus becoming subject to FOIA.*
> >
> > *3). Nonprofit corporation accepted a conveyance of real estate and cash grants from governmental bodies pursuant to a contractual agreement and that once the conveyance and grants occurred in performance of their contractual agreement, no further public funds would go into the project. The nonprofit corporation used the land and grant proceeds to develop a building to be used for public entertainment purposes. By receiving funds from the public coffer and managing their*

expenditure, the nonprofit corporation received support from and expended public funds, this becoming subject to FOIA.

4). A governmental body routed research and development contracts received from private third parties through the nonprofit corporation, who retained 15-25% of the total contract amount as "administrative fees." No evidence was presented that the nonprofit corporation's personnel actually performed any services to earn the fees. By taking the fees, the nonprofit corporation has received support from public funds and became subject to FOIA.

Any entity that is supported in whole or in part by public funds or expends public funds are subject to FOIA.

A nonprofit corporation which operates for the benefit of a governmental body and that used personnel of that governmental body on the governmental body's payroll in conjunction with a construction project by the nonprofit corporation establishes, at a minimum, partial support from public funds for the nonprofit corporation. Weston et al. v. Carolina Research and Development Foundation, et al.*, 303 S.C. 398, 401 S.E. 2d 161 (S.C. 1991).*

In 2013, the State Supreme Court addressed a First Amendment constitutional challenge to the application of FOIA to a nonprofit corporation. In Disabato v. South Carolina Association of School Administrators, ___ S.C. ___, 746 S.E. 2d 329 (S.C. 2013), the Court examined the effects of FOIA on the freedoms of speech and association of a nonprofit corporation whose purpose is to advocate on legislative and policy issues impacting education.

The Court in Disabato *concluded "that while the FOIA does impact SCASA's speech and association rights, the First Amendment is not violated. [T]he FOIA impacts SCASA's freedoms of speech and association. However, simply because a statute negatively affects a constitutional right does not mean the statute unconstitutionally infringes that right. Instead, courts assess the constitutionality of a statute by selecting the appropriate level of scrutiny and subjecting the statute to that scrutiny."*

Applying the intermediate scrutiny standard, the Court concluded that "the FOIA serves important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to advance those interests."

The Disabato *court also described those types of nonprofit organisations that would be subject to FOIA. "We made clear in* Weston *that the FOIA only applies to private entities who receive governmental funds* en masse*. The FOIA would not apply to a private entity that receives public funds for a specific purpose. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or healthcare clinic. However, the FOIA does apply to any private organization that is generally supported by public funds."*

What about nonprofit recipients of annual appropriations from the government?

Under S.C. Code Section 59-40-50(B)(10), the governing body of a "charter school" (which is a nonprofit corporation forming a school which operates within a public school district) is a "public body" for purposes of FOIA. See, S.C. Op. Atty. Gen. 2003 S.C. AG LEXIS 15 (February 26, 2003).

In the Attorney General's opinion, the Majority Caucus of the State House of Representative is a "public body" subject to FOIA, notwithstanding that dues paid by its membership is its only direct financial support, because 3 members of its staff receive rent-free office space in a State office building. S.C. Op. Atty. Gen. 2006 S.C. AG LEXIS 91 (May 19, 2006).

What about a non-profit corporation that is a one-time recipient of a State grant?

Because the St. Johns Water Company, a nonprofit corporation that provides retail water service to residents and businesses, received a one-time $100,000 grant from the State over 30 years ago when it was formed, the Attorney General is of the opinion that the St. Johns Water Company is a public body under FOIA. The AG does not believe that FOIA attempts to draw a quantitative line between "insignificant" or "de minimis" support from and substantial or significant support from public funds. S.C. Op. Atty. Gen. 2006 S.C. AG LEXIS 266 (December 28, 2006).

In the opinion of the Attorney General's office, the Jenkinsville Water Company, a nonprofit 501(c)(3) corporation is a "public body" for purposes of FOIA because it was the recipient of several federal government grants, and possibly the recipient of a State grant and a county grant. S.C. Op. Atty. Gen. 2011 AG LEXIS 122 (August 8, 2011).

SECTION 30-4-65. Cabinet Meetings subject to chapter provisions; cabinet defined.

(A) The Governor's cabinet meetings are subject to the provisions of this chapter only when the Governor's cabinet is convened to discuss or act upon a matter over which the Governor has granted to the cabinet, by executive order, supervision, control, jurisdiction, or advisory power.

(B) For purposes of this chapter, " cabinet" means the directors of the departments of the executive branch of state government appointed by the Governor pursuant to the provisions of Section 1-30-10(B)(1)(i) when they meet as a group and a quorum is present.

IV. PUBLIC DOCUMENT REQUIREMENTS OF FOIA

SECTION 30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice; records to be available when requestor appears in person.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by Section 30-4-40, in accordance with reasonable rules concerning time and place of access.

It is not a violation of equal protection where the municipality requires the presence of police officers when a citizen who has demonstrated loud and violent behavior desires to examine and copy public records under FOIA. Tennant v. City of Georgetown*, 2014 WL 4101209, a U.S. District Court decision of the District of South Carolina, decided August 18, 2014.*

Note that this right of access to public documents, subject to the exemptions described below, is for the general public. The State Attorney General has opined that each member of a governing body possesses broad authority to request production of that agency's public records, even items that are exempt under FOIA. However, the Attorney General cautions that this authority "may not extend to matters barred by disclosure" such as the situation where records are made private pursuant to federal law. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 39 (March 12, 2002).

The Attorney General has also concluded that even if the Legislature desires to withhold disclosure on a website operated by the State Comptroller General, that officer can waive any applicable exemptions to disclosure and post the public documents. S.C. Op. Atty Gen. 2008 SC AG LEXIS 79 (May 14, 2008).

Concerning commercial use of public information:

FOIA grants the public an immutable right to access public records. However, this right of access is viewed differently where commercial use of public information is concerned. Seago v. Horry County*, 378 S.C. 414, 663 S.E. 2d 38 (S.C. 2008).*

Depending on the nature of those documents, and the public body's special rights in those documents, the rights of the recipient to use those public documents for commercial benefit may be restricted.

If public documents do not constitute "trade secrets," the information contained therein pursuant to FOIA could not be protected by a restraining order. Campbell v. Marion County Hospital District*, 354 S.C. 274, 580 S.E. 2d 163 (Ct. App. 2003).*

But where the public documents are protected by copyright:

Because FOIA does not prohibit the copyrighting of some specialised public information, the public body may obtain copyrights, and maps can be copyright-protected to the extent that it can be shown that it contains original material, research, and creative compilation. It does not violate FOIA for a public entity to copyright specially-created digital data and to restrict subsequent commercial use as long as the information is provided initially to the requesting person or entity. Seago v. Horry County, *378 S.C. 414,663 S.E. 2d 38 (S.C. 2008).*

(b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. 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. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. 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 may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

There is no FOIA violation where the public body waives fees to public entities. Seago v. Horry County, *378 S.C. 414, 663 S.E. 2d 38 (S.C. 2008).*

FOIA limitations on fee structure for providing copies of public records are applicable only to those copies that are provided in keeping with the spirit of FOIA. FOIA fee provisions do not contemplate subsequent commercial distribution of copyright-protected documents for profit. FOIA does not control fees for subsequent commercial distribution for profit of copyrighted public records. Seago v. Horry County, *378 S.C. 414, 663 S.E. 2d 38 (S.C. 2008).*

The Attorney General opines that a public body's charge of excessive fees for producing records requested under FOIA is as much a violation of FOIA as outright denial of records deemed disclosable pursuant thereto (where the agency attempted to charge $434,250 to make the copies of requested records and to redact non-disclosable information contained therein). S.C. Op. Atty Gen. 2006 S.C. AG LEXIS 239 (October 27, 2006).

(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

Failure to respond within 15 days is held to mean that disclosure of non-exempt material at the time and place of access which the party requested is deemed approved. The exemptions are not waived by the public body's failure to respond within 15 days. Litchfield Plantation Company, Inc. v. Georgetown County Water and Sewer District, *314 S.C. 30, 443 S.E. 2d 574 (S.C. 1994).*

Motion for summary judgment in favour of public body was proper where public body provided all requested documents after filing of complaint. Sloan v. Friends of the Hunley, Inc. et al., *369 S.C. 20, 630 S.E. 2d 474, 2006 S.C. Lexis 168 (S.C. 2006).*

(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 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; and

For public bodies that operate "24/7" and do not close for holidays (such as a Sheriff's Department), FOIA mandates far more than the public being given access to these records only during traditional "9-5" business hours. Access must be given "during the hours of operation of the public body" and, in the case of the Sheriff's Office, that Office operates around the clock. We interpret FOIA as sufficiently broad to require reasonable public access to Sheriff's incident reports at night, on weekends, and during holidays. S.C. Op. Atty. Gen. 2008 S.C. AG Lexis 173 (December 23, 2008).

(3) documents identifying persons confined in any jail, detention center, or prison for the preceding three months.

SECTION 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.

The State Attorney General has concluded that a note left at the site of the Confederate submarine H. L. Hunley, which read "Veni, Vidi, Vici, Dude", by one of the discoverers of the submarine is a "record" under FOIA. S.C. Op. Atty. Gen. 2003 S.C. AG LEXIS 71 (July 10, 2003).

The definition of "public record" is very broad. It is safe to assume that all records, including computer data, prepared by or in possession of a public body are subject to FOIA unless a specific exclusion can be found in the statute.

According to the Attorney General, the names of employees of a public body participating in the TERI program and the dates upon which their participation began is a public record for which no exemption from disclosure is available, notwithstanding a Budget and Control Board Regulation to the contrary. S.C. Op. Atty Gen. 2007 S.C. AG LEXIS 9 (January 24, 2007).

Autopsy reports are medical records that are exempt from FOIA's disclosure requirements. Perry et al. v. Bullock, et al., 409 S.C. 137, 761 S.E.2d 251 (S.C. 2014).

But contrast:

Although admittedly in the nature of medical records, death certificates are not exempt from disclosure. Even though they contain a medical certification of the cause of death, they are statements of conclusions by persons required by law to make such findings after the death of a citizen of the State. Society of Professional Journalists et al. v. Sexton et al., 283 S.C. 563, 324 S.E. 2d 313 (S.C. 1984).

This reasoning could be applied to many documents in which a governmental or other (medical?) person is required by law to make a specific finding.

Certain photographs and signatures are not public records. See Section 30-4-160(B) below.

Here are the exceptions:

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.

Further exception:

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.

Homeland defense exception:

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.

SECTION 30-4-20(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

SECTION 30-4-160. Sale of Social Security number or driver's license photograph or signature.

(A) This chapter does not allow the Department of Public Safety to sell, provide, or otherwise furnish to a private party Social Security numbers in its records, copies of photographs, or signatures, whether digitized or not, taken for the purpose of a driver's license or personal identification card.

(B) Photographs, signatures, and digitized images from a driver's license or personal identification card are not public records.

> *The sale and purchase of information and images contained on drivers' licenses prior to the amendment to FOIA in 1999 to prohibit such practices does not constitute the tort of misappropriation of personality.* *Sloan et al. v. S.C. Dept. of Public Safety, et al. 355 S.C. 321, 586 S.E. 2d 108 (S.C. 2003).*

SECTION 30-4-165. Privacy of driver's license information.

(A) The Department of Public Safety may not sell, provide, or furnish to a private party a person's height, weight, race, social security number, photograph, or signature in any form that has been compiled for the purpose of issuing the person a driver's license or special

identification card. The department shall not release to a private party any part of the record of a person under fifteen years of age who has applied for or has been issued a special identification card.

See Section 30-4-160.

(B) A person's height, weight, race, photograph, signature, and digitized image contained in his driver's license or special identification card record are not public records.

(C) Notwithstanding another provision of law, a private person or private entity shall not use an electronically-stored version of a person's photograph, social security number, height, weight, race, or signature for any purpose, when the electronically-stored information was obtained from a driver's license record.

The inadvertent transfer of social security numbers by the Department of Public Safety to a private purchaser of certain driver license information prior to the 1999 Amendments to FOIA does not constitute the tort of misappropriation of personality. Sloan et al. v. S.C. Dept. of Public Safety, et al. 355 S.C. 321, 586 S.E. 2d 108 (S.C. 2003).

SECTION 30-4-40. Matters exempt from disclosure.

The exemptions in this section impose no duty not to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure. South Carolina Tax Commission v. Gaston Copper Recycling Corp. et al., 316 S.C. 163, 447 S.E. 2d 843 (S.C. 1994).

The exemptions to FOIA should be narrowly construed to ensure public access to documents. Seago v. Horry County, 378 S.C. 414, 663 S.E. 2d 38 (S.C. 2008).

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

The plain language of the statute contemplates the release of exempt information. Exemptions from FOIA impose no duty not to disclose but simply allow the public agency discretion to withhold exempted material from disclosure. Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E. 2d 731 (Ct. App. 1996).

FOIA does not establish a statutory duty of confidentiality. The purpose of FOIA is to protect the public by providing for the disclosure of information. The exemption from disclosure contained in Sections 30-4-40 and 30-4-70 do not create a duty not to disclose. Bellamy v. Brown, et al., 305 S.C. 291, 408 S.E. 2d 219 (S.C. 1991).

(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which

are generally recognised as confidential; and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information.

There are often contractual requirements of confidentiality with regard to these matters. Specific contract provisions should be reviewed before disclosure is made. At the very least, it is probably wise to notify the third party of the FOIA request.

Public Service Commission's View

Materials provided to the S.C. Public Service Commission in support of an application by Quality Telephone Inc. who claimed such information to be confidential and proprietary is both necessary to support the application and must be available to the public to establish the applicant's qualification for licensing, and therefore does not meet the "trade secrets" exception to FOIA. S.C. Public Service Commission, In Re. Quality Telephone, Inc., 2005 S.C. PUC LEXIS 187 (Aug. 18, 2005).

On the other hand:

When Duke Power Co. claims that the entirety of certain annual filings with FERC and the PSC are confidential because it contains information which is proprietary, commercially sensitive, and contains critical energy infrastructure information and trade secrets, the Public Service Commission agrees that it constitutes "trade secrets" exempt from disclosure under FOIA. S.C. Public Service Commission, In re: Duke Power, 2005 S.C. PUC LEXIS 289, Order No. 2005-675 (Nov. 17, 2005).

Similar result for CP&L. S.C. Public Service Commission, In Re: Carolina Power and Light Company, 2006. S.C. PUC LEXIS 105, Order No. 2006-361 (June 12, 2006).

And if the public body is in competition with the private sector:

Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.

(2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are

handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

But watch out for Section 6-1-120; very harsh penalties for disclosing certain tax information!

The difficult issue is distinguishing between an individual's private life and the individual's official capacity.

Death certificates are not exempt from disclosure as information of a personal nature because privacy rights are considered personal rights which do not survive death. Society of Professional Journalists et al. v. Sexton et al., 283 S.C. 563, 324 S.E. 2d 313 (S.C. 1984).

Internal investigative reports of law enforcement agencies are not entitled to a per se exemption because they contain personal information as a matter of course. City of Columbia v. ACLU of S.C., Inc., 323 S.C. 384, 475 S.E. 2d 747 (S.C. 1996).

The Family Privacy Protection Act of 2002 now prohibits the release of certain personal information. Citing an 11th Circuit decision, the State Attorney General has advised that "there must be a balance between the competing intents of disclosure [under FOIA] and the protection of personal privacy [under the Family Privacy Protection Act of 2002] – weighing the individual's right to protection of privacy against the public's disclosure of government information." S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 187 (September 26, 2002); citing Cochran v. U.S., 770 F. 2d 949 (11th Cir. 1985).

Arrest warrants, once served, are disclosable matters of public record. S.C. Op. Atty. Gen. 2005 S.C. AG LEXIS 187 (August 5, 2005).

A newspaper brought action seeking information from a county sheriff's department about alleged illegal and unethical conduct on the part of several deputy sheriffs. The newspaper requested information about the internal investigation which resulted in the deputies' suspension. Relying on the fact that the office of the sheriff was created by our State constitution and that the Sheriff's department is supported exclusively by public funds, the Court of Appeals determined that the Sheriff's department is subject to FOIA's disclosure requirements. The Court rejected the sheriff's argument that internal investigation material fall under the provision of the invasion of privacy exception to disclosure. Burton v. York County Sheriffs Department, 358 SC 339, 594 SE 2d 888 (Ct. App. 2004).

Relying on Burton, the Attorney General has opined that regardless of the potential for lawsuits as a result of the disclosure of information collected in an

internal investigation, a sheriff's department must disclose the information. S.C. Op. Atty. Gen. 2006 S.C. AG LEXIS 96 (May 23, 2006).

Personal financial information of parties to a PSC proceeding for the transfer of assets of a private water and sewer company are treated as "confidential" and non-disclosable by the PSC. S.C. Public Service Commission, In Re: Approval of Transfer of Assets of Goat Island Water and Sewer Company, Inc., 2006 S.C. PUC LEXIS 36, Order No. 2006-116 (Feb. 27, 2006).

Notwithstanding the provisions of S.C. Code Ann. §44-61-160, any "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" associated with 911 telephone calls can be waived by members of the caller's family. S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 66 (May 17, 2010).

The Office of the Attorney General has rendered an opinion, with a thorough discussion, addressing the FOIA disclosure requirements regarding information about borrowers under commercial loan and residential loan programmes funded with federal and local funds. S.C. Op. Atty. Gen. 2011 S.C. AG LEXIS 167 (December 5, 2011).

(3) Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:

(A) disclosing identity of informants not otherwise known;

(B) the premature release of information to be used in a prospective law enforcement action;

Harm to the Public Agency is Essential Element

Tapes of telephone conversations between a 911 dispatcher and a store owner and police were to be used as evidence at a forthcoming lynching trial. Reversing the Court of Appeals, the Supreme Court held that the specific exemption under Section 30-4-40(a)(3)(B) of FOIA for the premature release of information to be used in a prospective law enforcement action did not apply. All of the elements of this exception were present except "harm the agency". The City argued that pre-trial release of the tape would have led to pre-trial publicity likely to taint the jury pool, causing the venue of the trial to be changed. According to the City, the harm would have been that the Solicitor's Office could not have afforded the financial cost of a change of venue. The Supreme Court held that "the financial cost of a venue change… is not the type of harm that section 30-4-40(a)(3)(B) is intended to prevent. Rather, it is intended to prevent harm such as those caused by release of a crime suspect's name before arrest, the location of an upcoming

sting operation, and other sensitive law-enforcement information." *Evening Post Publishing Co. et al. v. City of North Charleston, 363 SC 452, 611 SE 2d 496 (SC 2005).*

The timing of the FOIA request is critical.

This exemption was not available to documents when there was no evidence of an ongoing criminal investigation at the time the FOIA request was made. *Society of Professional Journalists et al. v. Sexton et al., 283 S.C. 563, 324 S.E. 2d 313 (S.C. 1984).*

However, documents used in a criminal matter which is presently pending for indictment and prosecution in the next few weeks are exempt from disclosure. *Turner v. North Charleston Police Department et al., 290 S.C. 511, 351 S.E. 2d 583 (Ct. App. 1986).*

Regardless of timing:

Internal investigative reports of law enforcement agencies are not entitled to a per se exemption because they contain personal information as a matter of course. *City of Columbia v. ACLU of S.C., Inc., 323 S.C. 384, 475 S.E. 2d 747 (S.C. 1996).*

Boating accident reports are subject to disclosure. S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 15 (February 24, 2010).

The financial records of a City Drug Fund are generally subject to disclosure under FOIA. S.C. Op. Atty. Gen. 2012 S.C. AG LEXIS 116 (November 28, 2012).

However, the Attorney General has opined that the victim of a crime in South Carolina has a constitutional right to access the documents relating to the crime in which they were involved before the trial. S.C. Op. Atty. Gen. 2013 S.C. AG LEXIS 77 (August 20, 2013).

The office of the Attorney General has concluded that personal telephone calls of inmates confined in a county detention center are subject to disclosure under FOIA. In addition, videotaped security footage from a jail's booking area and other areas would not generally be considered private, but instead would be considered "public places" and would be subject to disclosure. S.C. Op. Atty. Gen. 2011 S.C. AG LEXIS 101 (June 21, 2011).

Where one minor committed a crime against another minor, the Attorney General has opined that a specific exemption from disclosure under FOIA is created by S.C. Code Section 63-19-2030 which expressly prohibits the public dissemination or inspection of information in incident reports and other law enforcement records identifying a crime allegedly committed by a minor. Such documents may be released only with the identifying information redacted. S.C. Op. Atty. Gen. 2013 S.C. AG LEXIS 130 (December 30, 2013).

(C) disclosing investigatory techniques not otherwise known outside the government;

(D) by endangering the life, health, or property of any person; or

The Attorney General's office has opined that it is proper for a public body to withhold the release of the names of juvenile victims to the public. S.C. Op. Atty. Gen. 2006 S.C. AG LEXIS 79 (May 5, 2006).

(E) disclosing any contents of intercepted wire, oral, or electronic communications not otherwise disclosed during a trial.

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

You need to know the rest of the Code of Laws of South Carolina and federal law.

The Attorney General has concluded that "the names and identifying information of county grand jurors, both current and past, are exempt from disclosure under FOIA." S.C. Op. Atty. Gen. 2014 WL 3965783 (August 4, 2014).

The State Attorney General has concluded that the military Certificate of Release of Discharge (DD Form 214) is confidential as a matter of federal law. This being the case, this form would be exempt under Section 3-4-40(a)(4) of FOIA. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 103 (May 16, 2002).

The specific language of S.C. Code Section 1-6-100(A) regarding the identity of "whistleblowers" indicates the identity of any individual must remain confidential if he, in good faith, discloses information to the Inspector General alleging fraud, waste, abuse, wrongdoing, etc. Such an individual's identity may only be disclosed if the Inspector General or the Governor finds disclosure is in the public interest or the individual consents in writing to the disclosure. S.C. Op. Atty. Gen. 2012 S.C. AG LEXIS 106 (October 25, 2012).

(5) Documents of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property; however:

(a) these documents are not exempt from disclosure once a contract is entered into or the property is sold or purchased except as otherwise provided in this section;

(b) a contract for the sale or purchase of real estate shall remain exempt from disclosure until the deed is executed, but this exemption applies only to those contracts of sale or purchase where the execution of the deed occurs within twelve months from the date of sale or purchase;

(c) confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed.

(6) All compensation paid by public bodies except as follows:

(A) For those persons receiving compensation of fifty thousand dollars or more annually, for all part-time employees, for any other persons who are paid honoraria or other compensation for special appearances, performances, or the like, and for employees at the level of agency or department head, the exact compensation of each person or employee;

"Salary and retirement payments to school district employees – both TERI and contract – should be disclosed." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 65 (May 12, 2010).

(B) For classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars;

(C) For classified employees not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the salary schedule showing the compensation range for that classification including longevity steps, where applicable;

(D) For unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the compensation level within a range of four thousand dollars, such ranges to commence at two thousand dollars and increase in increments of four thousand dollars.

(E) For purposes of this subsection (6), "agency head" or "department head" means any person who has authority and responsibility for any department of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body.

How far do you break this down?

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

Is it significant that the exemption is for legal counsel for the public body? What about legal counsel for individual officers or employees of the public body?

Summary judgment is probably not appropriate to decide the issue.

"The General Assembly, by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records. The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know at this juncture [summary judgment]. More development of the facts surrounding the hiring of [the public body's attorneys] as well as court review of the [document] is necessary to explore these competing interests before rendering judgment as a matter of law." Evening Post Publishing Company v. Berkeley County School District, 392 S.C. 76, 708 S.E. 2d 745 (S.C. 2011).

In litigation, a document which is exempt from disclosure under FOIA is also not discoverable under Rule 26(b)(1) SCRCP. The document is not only relevant to the subject matter involved in the case, it is the subject matter of the case itself. City of Columbia v. ACLU of S.C. et al., 323 S.C. 384, 475 S.E. 2d 747 (S.C. 1995).

But City of Columbia is distinguished in the Evening Post case.

(8) Memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions of this chapter.

(9) Memoranda, correspondence, documents, and working papers relative to efforts or activities of a public body and of a person or entity employed by or authorized to act for or on behalf of a public body to attract business or industry to invest within South Carolina; however, an incentive agreement made with an industry or business: (1) requiring the expenditure of public funds or the transfer of anything of value, (2) reducing the rate of altering the method of taxation of the business or industry, or (3) otherwise impacting the offeror fiscally, is not exempt from disclosure after:

(a) the offer to attract an industry or business to invest or locate in the offeror's jurisdiction is accepted by the industry or business to whom the offer was made; and

(b) the public announcement of the project or finalization of any incentive agreement, whichever occurs later.

Amended in 2003, this Section is intended to keep economic development incentives confidential only until the public announcement of the project or

finalization of the incentive agreement. Also see new Section 30-4-55 added in 2003.

There are often contractual requirements of confidentiality with regard to these matters. Specific contract provisions should be reviewed before disclosure is made. At the very least, it is probably wise to notify the third party of the FOIA request.

(10) Any standards used or to be used by the South Carolina Department of Revenue for the selection of returns for examination, or data used or to be used for determining such standards, if the commission determines that such disclosure would seriously impair assessment, collection, or enforcement under the tax laws of this State.

(11) Information relative to the identity of the maker of a gift to a public body if the maker specifies that his making of the gift must be anonymous and that his identity must not be revealed as a condition of making the gift. For the purposes of this item, "gift to a public body" includes, but is not limited to, gifts to any of the state-supported colleges or universities and museums. With respect to the gifts, only information which identifies the maker may be exempt from disclosure.

How is this to be policed?

If the maker of any gift or any member of his immediate family has any business transaction with the recipient of the gift within three years before or after the gift is made, the identity of the maker is not exempt from disclosure.

(12) Records exempt pursuant to Section 9-16-80(B) and 9-16-320(D).

(13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying. In addition to making available for public inspection and copying the materials described in this item, the public body must disclose, upon request, the number of applicants considered for a position. For the purpose of this item "materials relating to not fewer than the final three applicants" do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section.

A school district's selection process for superintendent began with a group of 30 applicants. That group was narrowed to 5 semi-finalists, out of which 2 finalists were selected. The district had assured the 5 semi-finalists that only the identities of the 2 finalists would be revealed. When a FOIA request was made for all materials "relating to not fewer than the final 3 applicants," the district only offered to make available material relating to the 2 individuals it considered to be finalists. The Supreme Court rejected that argument, stating that FOIA requires the disclosure of the final group numbering more than 2; i.e., the 5 semi-finalists, but not the 30 applicants. The term

"final" in Section 30-4-40(a)(13) refers to the last group of applicants, with at least 3 members, from which the employment selection is made. The New York Times v. Spartanburg County School District No. 7, 374 S.C. 307, 649 S.E. 2d 28 (S.C. 2007).

> It is the opinion of the office of the Attorney General that a "public body" is required, for purposes of FOIA, to disclose materials relating to the final pool of three or more applicants even when the responsibility for filling the position lies with a single employee of the entity and not its governing body. S.C. Op. Atty Gen. 2013 S.C. AG LEXIS 74 (March 4, 2013).

(14)(A) Data, records, or information of a proprietary nature, produced or collected by or for faculty or staff of state institutions of higher education in the conduct of or as a result of study or research on commercial, scientific, technical, or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body or private concern, where the data, records, or information has not been publicly released, published, copyrighted, or patented.

(B) Any data, records, or information developed, collected, or received by or on behalf of faculty, staff, employees, or students of a state institution of higher education or any public or private entity supporting or participating in the activities of a state institution of higher education in the conduct of or as a result of study or research on medical, scientific, technical, scholarly, or artistic issues, whether sponsored by the institution alone or in conjunction with a governmental body or private entity until the information is published, patented, otherwise publicly disseminated, or released to an agency whereupon the request must be made to the agency. This item applies to, but is not limited to, information provided by participants in research, research notes and data, discoveries, research projects, proposals, methodologies, protocols, and creative works.

(C) The exemptions in this item do not extend to the institution's financial or administrative records.

(15) The identity, or information tending to reveal the identity, of any individual who in good faith makes a complaint or otherwise discloses information, which alleges a violation or potential violation of law or regulation, to a state regulatory agency.

Our Supreme Court has cautioned that, unlike the federal FOIA, South Carolina's FOIA does not protect all confidential informants' statements from disclosure. Only the identity of informants, not the information contained in their statements, is exempt. Newberry Publishing Co., Inc. v. Newberry County Commission on Alcohol and Drug Abuse, et al., 308 S.C. 352, 417 S.E. 2d 870 (S.C. 1992).

The specific language of S.C. Code Section 1-6-100(A) regarding the identity of "whistleblowers" indicates the identity of any individual must remain confidential if he, in good faith, discloses information to the Inspector General alleging fraud, waste, abuse, wrongdoing, etc. Such an individual's identity may only be disclosed if the Inspector General or the Governor finds disclosure is in the public interest or the individual consents in writing to the disclosure. S.C. Op. Atty. Gen. 2012 S.C. AG LEXIS 106 (October 25, 2012).

(16) Records exempt pursuant to Sections 59-153-80(B) and 59-153-320(D).

(17) Structural bridge plans or designs unless: (a) the release is necessary for procurement purposes; or (b) the plans or designs are the subject of a negligence action, an action set forth in Section 15-3-530, or an action brought pursuant to Chapter 78 of Title 15, and the request is made pursuant to a judicial order.

(18) Photographs, videos, and other visual images, and audio recording of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed by and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

(19) Private investment and other proprietary financial data provided to the Venture Capital Authority by a designated investor group or an investor as those terms are defined by Section 11-45-30.

(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.

There is no special method for modifying records to protect confidential information from disclosure. But the effort must be made by the public body.

SLED's policy of denying all FOIA requests for criminal investigative reports, without determining whether portions of the report are subject to disclosure, is in direct contravention of the clear language of FOIA. *Newberry Publishing Co., Inc., v. Newberry County Commission on Alcohol and Drug Abuse, et al., 308 S.C. 352, 417 S.E. 2d 870 (S.C. 1992).*

A public record containing both non-exempt and exempt material must be segregated so that non-exempt material is made available to the public. *Newberry Publishing Co., Inc., v. Newberry County Commission on Alcohol and Drug Abuse, et al., 308 S.C. 352, 417 S.E. 2d 870 (S.C. 1992).*

And the trial court must also examine the documents to find which portions are exempt and which must be disclosed.

At trial, the plaintiff bears the burden of having the trial court review the documents and separate the exempt and non-exempt material. Failure to do this could result in an inadequate record for review by an appellate court. Beattie v. Aiken County Department of Social Services, et al., 319 S.C. 449, 462 S.E. 2d 276 (S.C. 1995); City of Columbia v. ACLU of SC Inc. et al., 323 S.C. 384, 475 S.E. 2d 747(S.C. 1996).

(c) Information identified in accordance with the provisions of Section 30-4-45 is exempt from disclosure except as provided therein and pursuant to regulations promulgated in accordance with this chapter. Sections 30-4-30, 30-4-50, and 30-4-100 notwithstanding, no custodian of information subject to the provisions of Section 30-4-45 shall release the information except as provided therein and pursuant to regulations promulgated in accordance with this chapter.

SECTION 30-4-55. Disclosure of fiscal impact on public bodies offering economic incentives to business; cost-benefit analysis required.

A public body as defined by Section 30-4-20(a), or a person or entity employed by or authorized to act for or on behalf of a public body, that undertakes to attract business or industry to invest or locate in South Carolina by offering incentives that require the expenditure of public funds or the transfer of anything of value or that reduce the rate or alter the method of taxation of the business or industry or that otherwise impact the offeror fiscally, must disclose, upon request, the fiscal impact of the offer on the public body and a governmental entity affected by the offer after:

(a) the offered incentive or expenditure is accepted, and

(b) the project has been publicly announced or any incentive agreement has been finalized, whichever occurs later.

The fiscal impact disclosure must include a cost-benefit analysis that compares the anticipated public cost of the commitments with the anticipated public benefits. Notwithstanding the requirements of this section, information that is otherwise exempt from disclosure under Section 30-4-40(a)(1), (a)(5)(c), and (a)(9) remains exempt from disclosure.

SECTION 30-4-45. Information concerning safeguards and off-site consequence analyses; regulation of access; vulnerable zone defined.

(A) The director of each agency that is the custodian of information subject to the provisions of 42 U.S.C. 7412(r)(7)(H), 40 CFR 1400 "Distribution of Off-site Consequence Analysis Information", or 10 CFR 73.21 "Requirements for the protection of safeguards information", must establish procedures to ensure that the information is released only in accordance with the applicable federal provisions.

(B) The director of each agency that is the custodian of information, the unrestricted release of which could increase the risk of acts of terrorism, may identify the information

or compilations of information by notifying the Attorney General in writing, and shall promulgate regulations in accordance with the Administrative Procedures Act, Sections 1-23-110 through 1-23-120(a) and Section 1-23-130, to regulate access to the information in accordance with the provisions of this section.

(C) Regulations to govern access to information subject to subsections (A) and (B) must at a minimum provide for:

(1) disclosure of information to state, federal, and local authorities as required to carry out governmental functions; and

(2) disclosure of information to persons who live or work within a vulnerable zone.

For purposes of this section, "vulnerable zone" is defined as a circle, the center of which is within the boundaries of a facility possessing hazardous, toxic, flammable, radioactive, or infectious materials subject to this section, and the radius of which is that distance a hazardous, toxic, flammable, radioactive, or infectious cloud, overpressure, radiation, or radiant heat would travel before dissipating to the point it no longer threatens serious short-term harm to people or the environment.

Disclosure of information pursuant to this subsection must be by means that will prevent its removal or mechanical reproduction. Disclosure of information pursuant to this subsection must be made only after the custodian has ascertained the person's identity by viewing photo identification issued by a federal, state, or local government agency to the person and after the person has signed a register kept for the purpose.

SECTION 30-4-50. Certain matters declared public information; use of information for commercial solicitation prohibited.

(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;

The Attorney General has opined that this requirement includes the names and badge numbers of all officers of a municipal police department. S.C. Op. Atty Gen. 2008 S.C. AG LEXIS 65 (April 2, 2008).

(2) administrative staff manuals and instructions to staff that affect a member of the public;

(3) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

Findings of fact and conclusions of law of the State Board of Medical Examiners are public information under FOIA. Ewing v. State Board of Medical Examiners, *290 S.C. 89, 348 S.E. 2d 361 (S.C. 1986).*

(4) those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the public body;

(5) written planning policies and goals and final planning decisions;

(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;

(7) the minutes of all proceedings of all public bodies and all votes at such proceedings, with the exception of all such minutes and votes taken at meetings closed to the public pursuant to Section 30-4-70;

(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.

"Copies of arrest warrants and incident reports maintained at the Spartanburg County Detention Center must be made available for walk-in inspection by the media. As to any concerns regarding redactions, in the opinion of this office, any necessary redactions should be accomplished by the arresting law enforcement agency or any law enforcement official with supervisory authority over a particular case prior to transferring the arrest warrants and incident reports to the Detention Center." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 81 (July 19, 2010).

For a thorough analysis by the Attorney General's office of the interplay between FOIA and the expungement statutes, see S.C. Op. Atty. Gen. 2013 S.C. AG LEXIS 106 (October 24, 2013).

(9) statistical and other empirical findings considered by the Legislative Audit Council in the development of an audit report.

(B) No information contained in a police incident report or in an employee salary schedule revealed in response to a request pursuant to this chapter may be utilized for commercial solicitation. Also, the home addresses and home telephone numbers of employees and officers of public bodies revealed in response to a request pursuant to this chapter may not be utilized for commercial solicitation. However, this provision must not be interpreted to restrict access by the public and press to information contained in public records.

V. PUBLIC MEETINGS REQUIREMENTS OF FOIA

SECTION 30-4-20(d) "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.

A briefing of the public body by the administrative staff regarding matters over which it had supervision, control, jurisdiction, or advisory power, even though the public body intended to take no action, constitutes a "meeting" of the public body. Braswell, et al. v. Roche, et al., *299 S.C. 181, 383 S.E. 2d 243 (S.C. 1989).*

A failure to reflect the votes taken to amend an ordinance at a public meeting can result in the ordinance being declared invalid. Business License Opposition Committee et al. v. Sumter County, et al., *311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).*

SECTION 30-4-20(e) "Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

The State Attorney General has opined that where council members who are not members of one of the council's committees attend the committee meeting and participates in the deliberations of the committee, a "meeting" of the **council** has occurred if a quorum of council members are present at that **committee** meeting. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 146 (August 19, 2002).

Relying on a Wisconsin case, the State Attorney General has concluded that "when a quorum of a [public] body is assembled together there is a rebuttable presumption that such assemblage is for a "meeting" of that body. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 146 (August 19, 2002).

However, where membership on a Transition Committee (created to consolidate 2 school districts) includes 4 members (of a 7 member) school board, meetings of the Transition Committee are not also meetings of the school board because the Transition Committee has no supervision, control, jurisdiction, or advisory power generally handled by the school board. S.C. Op. Atty Gen. 2008 S.C. AG LEXIS 82 (May 6, 2008).

"It would be a violation of the statute if several members of the Rural Fire Board had already met to discuss issues via telephone or probably email." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 67 (May 25, 2010).

SECTION 30-4-60. Meetings of public bodies shall be open.

Every meeting of all public bodies shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter.

No restrictions on how open meetings are to be conducted:

Nothing in Section 30-4-70 requires action by a public body to be by open roll-call vote. The circulation of a letter or sign-up sheet, at an open, public meeting, at which each individual member signs his recommendation is in compliance with FOIA. So long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted, there is no FOIA violation. Fowler et al. v. Beasley, et al., 322 S.C. 463, 472 S.E. 2d 630 (S.C. 1996).

Or in what buildings an open meeting is held:

There is no requirement in FOIA that meetings of a public body be conducted in a public building. The only specific requirements are that the meeting be open to the public and be done at minimal cost or delay Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E. 2d 783 (S.C. 1998).

A "public meeting" at a private club in a gated residential community is not prohibited by FOIA. Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E. 2d 783 (S.C. 1998).

Or where the building is located:

Unless there is a statutory restriction to the contrary, South Carolina law does not require that public bodies conduct public meetings within their jurisdictional limits. Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E. 2d 783 (S.C. 1998).

"Balancing test" for off-site meetings:

The sole test to be applied is a balancing test to determine whether the location of the public meeting complies with the "minimum cost or delay" requirements of Section 30-4-15. To meet this test, the public body must present evidence as to why it is necessary for the public body to conduct the public meeting at the place and under the circumstances proposed. Then the court must balance the interests of the public body against those of the public. Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E. 2d 783 (S.C. 1998).

In Wiedemann, the public body presented evidence to support its need to conduct a workshop outside the jurisdictional limits. This evidence included testimony that Council members are distracted, take personal calls, and attend to personal business when meetings are held within town limits. There was testimony that remote meetings are more effective because council members are better focused, more productive, and implemented goals faster. Remote locations result in better communications and interpersonal relations within the public body. Based on this testimony, the trial court held that the minimum distance needed to achieve undistracted, uninterrupted participation by council members is 35-40 miles. The public body need not prove it is indispensable, unavoidable, or essential to conduct its meeting outside jurisdictional

limits. Wiedemann v. Town of Hilton Head Island, 334 S.C. 233, 542 S.E. 2d 752 (Ct. App. 2001).

> The Attorney General's office believes that "FOIA does allow the use of written ballots [by members of a public body voting on a matter in open session]. However, when the votes are recorded by name… the ballots become public information and these ballots must be made available to the public after they are submitted and tabulated." S.C. Op. Atty. Gen. 2008 S.C. AG LEXIS 119 (August 14, 2008).
>
> In the opinion of the Attorney General's office, a public body acting under State law and in accordance with FOIA has authority to conduct its meetings via telephone conference. S.C. Op. Atty. Gen. 2012 S.C. AG LEXIS 78 (August 28, 2012).

SECTION 30-4-70. Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly.

FOIA does not establish a statutory duty of confidentiality. The purpose of FOIA is to protect the public by providing for the disclosure of information. The exemption from disclosure contained in Sections 30-4-40 and 30-4-70 do not create a duty not to disclose. Bellamy v. Brown, et al., 305 S.C. 291, 408 S.E. 2d 219 (S.C. 1991).

This section does no more then to allow public bodies to conduct certain "discussions" closed to the public. It does not address exemptions from disclosure of public records. City of Columbia v. ACLU of SC, et al., 323 S.C. 384, 475 S.E. 2d 747 (S.C. 1995).

> Where a school district superintendent requests that his annual review be conducted in open session rather than in executive session, the school board is not required to grant his request. However, because executive session is an option, not a mandate, for the school board, it may conduct the review in open session. S.C. Op. Atty. Gen. 2013 S.C. AG LEXIS 99 (October 28, 2013).

(a) A public body may hold a meeting closed to the public for one or more of the following reasons:

> There must be a valid purpose for the executive session.

The city advanced no valid reason to hold meetings and discussions of an advisory committee concerning a public contract in private. No exemption of FOIA was thus available. Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

(1) 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; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

> According to the Attorney General, discussion of changes to a public body's anti-nepotism policy as part of its personnel policy does not fall within the exception to open meetings provided in Section 30-4-70. S.C. Op. Atty Gen. 2007 S.C. AG LEXIS 143 (October 22, 2007).
>
> Where a school district superintendent requests that his annual review be conducted in open session rather than in executive session, the school board is not required to grant his request because the right to demand a public hearing is only available in an adversarial hearing. S.C. Op. Atty. Gen. 2013 S.C. AG LEXIS 99 (October 28, 2013).

(2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property,

A contract approved by a public body in violation of the open meeting requirement of FOIA is invalid. Piedmont Public Services District v. Cowart, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995).

> FOIA "does not generally permit a board to enter into executive session to discuss a contract between two government bodies to which they are not a party." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 67 (May 25, 2010).

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.

"Formal action" is a recorded vote committing the body concerned to a specific course of action. Discussions on whether or not a contract should be awarded is not "formal action." Even where the legal advice given is that only one vendor qualifies for a contract award, mere discussions by the body is not "formal action." Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

A presentation by attorneys concerning a municipal wastewater treatment plant fell within the exemption for the receipt of legal advice. While the city was not involved in litigation at the time, litigation was a real possibility. The exemption does not require that a public body actually be engaged in litigation, only that legal advice be rendered.

Herald Publishing Company, Inc. et al., v. Barnwell et al., 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

But since this case, the statute has been amended.

The exemption for contractual matters is not limited to where contractual arrangements or property purchasers are at hand. It can include discussions of options that could take months before contracts would be signed. Herald Publishing Company, Inc. et al. v. Barnwell et al., 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

But the statute has been amended since this case.

The Attorney General is of the opinion that although executive session may properly be used by a board of zoning appeals under FOIA to receive legal advice regarding cases on appeal that they hear, they are prohibited from deliberating matters coming before it in executive session. S.C. Op. Atty. Gen. 2011 S.C. AG LEXIS 13 (February 3, 2011).

(3) Discussion regarding the development of security personnel or devices.

(4) Investigative proceedings regarding allegations of criminal misconduct.

(5) 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.

There are often contractual requirements of confidentiality with regard to these matters. Specific contract provisions should be reviewed before disclosure is made. At the very least, it is probably wise to notify the third party of the FOIA request.

(6) The Retirement Systems Investment Commission, if the meeting is in executive session specifically pursuant to Section 9-16-80(A) or 9-16-320(C).

Individuals other than just the members of the public body, its employees, and its attorneys can attend the executive session without violating FOIA. The Court of Appeals stated "we believe that the legislature could hardly have intended to limit a public body's discussions solely to its members' counseling among themselves whilst in vacuous isolation." Georgetown Communications, Inc., v. Williams, 290 S.C. 149, 348 S.E. 2d 396 (Ct. App. 1986).

The State Attorney General has opined that "executive sessions should be used sparingly and that FOIA does not require that they even be employed at all if the public body chooses not to. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 44 (April 26, 2002).

FOIA, however, does not speak to the question of who may or may not be present in an executive session. It would appear, therefore, that the question of who may be present or who may be excluded from an executive session is one of common law and parliamentary procedure. S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 44 (April 26, 2002).

Whether the public body can exclude one of its own members from an executive session is a controversial issue. The South Carolina Attorney General has referred to a Virginia Attorney General's opinion that concluded that "whether a committee of the town council, meeting in a properly called executive session, may exclude the other members of council is a matter which would be governed by the procedural rules established by the council." S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 44 (April 26, 2002); citing 1976-77 Va. Op. Atty. Gen. 308 (January 13, 1977).

The State Attorney General has stated that "although we cannot say with any degree of certainty that § 2-15-61 is written in sufficiently specific language to require admission by [the Legislative Audit Council] into executive sessions of a public body being audited by that agency, we would nevertheless suggest that the agency provide such access." S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 44 (April 26, 2002).

The Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session. Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in open session. FOIA recognises this by providing that an executive session can only follow an open session, where the public body must vote in public to meet in executive session. Harold Publishing Company, Inc. et al. v. Barnwell et al., 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

See also Brock v. Town of Mt. Pleasant, 2014 WL 5654291, decided on November 5, 2014, by the State Court of Appeals.

What happens if executive session is overheard by others?

It is not actionable for reporters to eavesdrop on an executive session if they are merely waiting in a place provided for reporters or other members of the public. Harold Publishing Company, Inc. et al. v. Barnwell et al., 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).

Check for soundproof doors and walls to maintain privacy.

What about members of the public body who blab?

The State Attorney General has wrestled with this issue. In 1983, the Attorney General commented that "there is no mandatory restriction either upon the public

body or the individual members of that body against the disclosure of an individual's vote or the reasons for that vote on any topic taken up during the [executive] session." S.C. Op. Atty. Gen., March 23, 1983.

"The only preventative solution to individual disclosure of the contents of the executive session discussions… would be by the rules of conduct or regulations adopted by the particular Board in issue with appropriate sanctions attached in the event of disclosure."

In 1984, the Attorney General cautioned against First Amendment concerns when an individual member of a public body is sanctioned for revealing discussions of that body whilst in executive session. Noting the decision of the Louisiana courts in upholding the validity of a regulation which prohibited a board member from actually recording by mechanical means board proceedings conducted in executive session, the Attorney General stated "the Court clearly suggested that it was important to its decision that the board member 'remains free to publish whatever he chooses concerning any matters entertained by the School Board, limited only by his own discretion and the laws of the State governing defamations'. The Court further recognised that there existed 'legitimate First Amendment concerns' in the members' conveying to the public the details of the School Board's executive session as completely and accurately as possible.'" The State Attorney General stated in 2002 that "this advice, rendered in 1984, remain valid today, in my opinion." S.C. Op. Atty. Gen. 2002 S.C. AG LEXIS 54 (March 26, 2002); citing Dean v. Guste, 414 So. 2d 862 (La. 1982).

"Although the law is somewhat sparse, it is the opinion of this Office that a current county councilman may participate in an executive session with the Rural Fire Board and offer comments not consistent with the remaining members of the County Council without destroying the closed status of the meeting." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 67 (May 25, 2010).

(b) 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. 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.

In Brock v. Town of Mt. Pleasant, 2014 WL 5654291, decided on November 5, 2014, the State Court of Appeals held that the Town's announcing it would discuss "legal matters" or obtain "legal advice" on a particular issue was an insufficient announcement [of the purpose of an executive session] when Town Council obtained individual attorneys for "all lawsuits now and in the future" [for Councilmembers] as a result of the executive session discussion.

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 in executive session.

Prior to going into executive session the public agency shall vote in public on the question and when such vote is favourable the presiding officer shall announce the ***specific*** *purpose of the executive session. FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).*

No harm, but still a foul?

Even if it is only a "technical violation" where there has been no demonstrated effect on a complaining party, failure by the presiding officer to announce the specific purpose for the executive session is a clear violation of FOIA where plaintiffs are entitled to relief. Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

"Formal action" is a recorded vote committing the body concerned to a specific course of action. Discussions on whether or not a contract should be awarded is not "formal action." Even where the legal advice given is that only one vendor qualifies for a contract award, mere discussions by the body is not "formal action." Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

Where an ordinance was adopted, not at the public meeting, but illegally at the closed meeting, the ordinance was declared invalid. Business License Opposition Committee et al. v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

A contract approved by a public body in violation of the open meeting requirement of FOIA is invalid. Piedmont Public Services District v. Cowart, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995).

And you can't hold members of a public body "hostage" in executive session.

> "It would be a violation of the statute for members of the board to be told that executive session will not end unless all members agree to support the motion. S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 67 (May 25, 2010).

(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.

Remember: committees and other small bodies are "public bodies" subject to this requirement. Although the intent of a social meeting may be determinative, a "chance meeting" could prove more problematic.

When asked if two close friends appointed to a three-member committee of the Simpsonville Town Council could continue to "socialize," the Attorney General opined that "a court will likely determine the South Carolina Freedom of Information Act would not apply to socializing where no business [matters] are discussed or acted upon, as determined on a case-by-case basis." S.C. Op. Atty. Gen. 2014 WL 3965780 (August 5, 2014).

"It would be a violation of the statute if several members of the Rural Fire Board had already met to discuss issues via telephone or probably email." S.C. Op. Atty. Gen. 2010 S.C. AG LEXIS 67 (May 25, 2010).

(d) This chapter does not prohibit the removal of any person who wilfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised.

(e) Sessions of the General Assembly may enter into executive sessions authorized by the Constitution of this State and rules adopted pursuant thereto.

(f) The Board of Trustees of the respective institution of higher learning, while meeting as the trustee of its endowment funds, if the meeting is in executive session specifically pursuant to Sections 59-153-80(A) or 59-153-320(C).

SECTION 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. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

The Supreme Court has thoroughly analysed this provision in light of the Saluda County Council amending its posted agenda at a regularly scheduled meeting. In Lambries v. Saluda Cnty. Council, 409 S.C. 1, 760 S.E.2d 785 (2014), the Supreme Court overturned a decision of the State Court of Appeals and considered notice and agenda requirements for the various classifications of public body meetings.

The General Assembly appears to have identified three broad classes of meetings and set forth different notice requirements for each:

(1) Regularly scheduled meetings. 'All public bodies… 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. Agenda, if any, must be posted

on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings.'

A 'regular' meeting is one 'convened at a stated time and place….Since notice is given at the beginning of the year, the public is well apprised of these meetings, which provide an ongoing opportunity for the public body to consider and act upon routine matters that arise throughout the year.

An agenda, if there is one, must be posted at least twenty-four hours before the meeting. Thus, County Council could chose to issue no agenda at all.

FOIA contains no prohibition on the amendment of an agenda for a regularly scheduled meeting.

(2) Called, special, or rescheduled meetings. 'All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting.'

In contrast [to a regular meeting], a 'special' meeting is a meeting called for a special purpose and at which nothing can be done beyond the objects specified for the call. Since the permissible topics for a special meeting are restricted to the 'objects of the call,' it is reasonable to infer that our General Assembly has purposefully chosen to mandate that an agenda be prepared for this type of meeting, as compared to a regularly scheduled meeting. The consideration of the limited subject matter necessarily dictates different notice requirements.

(3) Emergency meetings. This requirement [posting a notice including the agenda, date, time, and place of the meeting not less than twenty-four hours before the meeting as required for called, special, or rescheduled meetings] does not apply to emergency meetings of public bodies.'

Failure to give notice of a meeting of a public body can result in the ordinance approved at that meeting being declared invalid. <u>*Business License Opposition Committee et al v. Sumter County, et al.*</u>*, 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).*

The Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session. Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in open session. FOIA recognises this by providing that an executive session can only follow an open session, where the public body must vote in public to meet in executive session. <u>*Harold Publishing Company, Inc. et al. v. Barnwell et al.*</u>*, 291 S.C. 4, 351 S.E. 2d 878 (Ct. App. 1986).*

In Brock v. Town of Mt. Pleasant, 2014 WL 5654291, decided on November 5, 2014, the State Court of Appeals held that the FOIA does not prohibit a public body from acting on agenda items that were designated as "executive session items" upon reconvening to public session. Town Council could not have known what action it would take – to include on an agenda – prior to discussing the relative legal issues and personnel matters during executive session. From the posted and amended agendas, the public and the press had notice Town Council desired to confer with its attorney in closed session regarding certain matters and may take some action upon reconvening to open session."

Remember: many non-governmental bodies are "public bodies" for purposes of FOIA.

The Attorney General cautions that the exception for emergency meetings must be narrowly construed and applied only where an unforeseen occurrence or combination of circumstances call for immediate action or remedy. Simply the declaration of an emergency by the public body is not enough. S.C. Op. Atty Gen. 2007 S.C. AG LEXIS 101 (July 17, 2007).

(b) Legislative committees must post their meeting times during weeks of the regular session of the General Assembly and must comply with the provisions for notice of special meetings during those weeks when the General Assembly is not in session. Subcommittees of standing legislative committees must give notice during weeks of the legislative session only if it is practicable to do so.

(c) Subcommittees, other than legislative subcommittees, of committees required to give notice under subsection (a), must make reasonable and timely efforts to give notice of their meetings.

(d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.

(e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

Where the vote on approving a contract occurs in executive session, a subsequent public ratification and pulling of members of the public body was in effective. Piedmont Public Services District v. Cowart, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995).

SECTION 30-4-90. Minutes of meetings of public bodies.

(a) All public bodies shall keep written minutes of all of their public meetings.

Remember, that committees, etc. are "public bodies."

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.

A failure to reflect the votes taken to amend an ordinance at a public meeting can result in the ordinance being declared invalid. Business License Opposition Committee et al. v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

The Attorney General's office is of the opinion that it is a violation of FOIA for members of a public body to vote on appointments to boards and commissions by using a voice vote by each council member to designate a number for a vote instead of the candidate's name. S.C. Op. Atty. Gen. 2012 S.C. AG LEXIS 101 (October 12, 2012).

(4) Any other information that any member of the public body requests be included or reflected in the minutes.

Because this statutory provision would take precedent over the public body's bylaws or rules of procedure, if a member wants the minutes to reflect some information, its inclusion is not subject to an affirmative vote by the membership of the public body.

(b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosures would be inconsistent with Section 30-4-70 of this chapter.

(c) All or any part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic or video reproduction, except when a meeting is closed pursuant to Section 30-4-70 of this chapter, provided that in so recording there is no active interference with the conduct of the meeting. Provided, further, that the public body is not required to furnish recording facilities or equipment.

VI. PENALTIES AND REMEDIES FOR VIOLATIONS OF FOIA

SECTION 30-4-100. Injunctive relief; costs and attorney's fees.

(a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later.

Failure to give notice of a meeting of a public body can result in the ordinance approved at that meeting being declared invalid. Business License Opposition Committee et al v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

A failure to reflect the votes taken to amend an ordinance at a public meeting can result in the ordinance being declared invalid. Business License Opposition Committee et al. v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

Where an ordinance was adopted, not at the public meeting, but illegally at the closed meeting, the ordinance was declared invalid. Business License Opposition Committee et al. v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

A contract approved by a public body in violation of the open meeting requirement of FOIA is invalid. Piedmont Public Services District v. Cowart, 319 S.C. 124, 459 S.E. 2d 876 (Ct. App. 1995).

There is a one year statute of limitations.

Standing

FOIA permits any citizen to apply to the circuit court for injunctive relief. Fowler et al. v. Beasley, et al., 322 S.C. 463, 472 S.E. 2d 630 (S.C. 1996).

Standing under FOIA does not require the information seeker to have a "personal stake in the outcome." Sloan v. Friends of the Hunley, Inc. et al., 369 S.C. 20, 630 SE 2d 474 (S.C. 2006).

Affirmed by the State Supreme Court in Freemantle v. Preston, et al., 398 S.C. 186, 728 S.E. 2d 40 (S.C. 2012).

The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

Equitable relief is always available for a violation of FOIA.

But damages for wrongful termination of government employee are not available under FOIA even if employment policy complained of was approved by public body in violation of FOIA. Antley v. Shepherd et al., 340 S.C. 541, 532 S.E. 2d 294 (Ct. App. 2000).

Even if it is only a "technical violation" where there has been no demonstrated effect on a complaining party, failure by the presiding officer to announce the specific purpose for the executive session is a clear violation of FOIA where plaintiffs are entitled to relief. Quality Towing, Inc. v. City of Myrtle Beach et al., 345 S.C. 156, 547 S.E. 2d 862 (S.C. 2001).

The only prerequisite to an award of attorney fees and costs is that the party seeking relief must prevail, in whole or in part. Cockrell et al. v. Trustees et al., 299 S.C. 155, 382 S.E. 2d 923 (S.C. 1989).

A writ of mandamus cannot issue to compel the County Administrator to deliver the County's financial documents to plaintiff councilmember in a particular manner or within a particular time frame. Wilson v. Preston 378 S.C. 348, 662 S.E. 2d 580 (S.C. 2008).

Where the defendants are sued in their individual capacities (not in their official capacities), the complaint fails to state a case of action under FOIA. Cricket Cove Ventures LLC v. Gilland, et al., 390 S.C. 312, 701 S.E. 2d 39 (Ct. App. 2010).

(b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof.

Where the Clerk of the public body was instructed not to give notice of a meeting in compliance with FOIA, attorneys' fees were awarded. Business License Opposition Committee et al. v. Sumter County, et al., 311 S.C. 24, 426 S.E. 2d 745 (S.C. 1992).

Although DHEC contended that it acted in good faith reliance on its own regulation which prohibited disclosure of the document, which regulation was struck down by the Court, it was within the discretion of the trial court to grant attorneys' fees to the plaintiffs, Society of Professional Journalists et al. v. Sexton et al., 283 S.C. 563, 324 S.E. 2d 313 (S.C. 1984).

Reliance on internal policies likewise will not defeat a claim for attorneys' fees.

Violation of FOIA by failing to give public notice of the meeting resulted in attorneys' fees award to plaintiffs. Braswell et al. v. Roche et al., 299 S.C. 181, 383 S.E. 2d 243 (S.C. 1989).

Where the plaintiff did not present evidence on the issue of attorneys' fees and the special referee denied plaintiff's motion to re-open evidence stating he did not think attorneys' fees should be awarded, the court found that the special referee did not abuse his discretion. Litchfield Plantation Company, Inc. v. Georgetown County Water and Sewer District, 314 S.C. 30, 443 S.E. 2d 574 (S.C. 1994).

There is no good faith exception to an award of attorneys' fees.

Even where public body acted in good faith based on its reasonable understanding of the statute, no good faith exception exists for an award of attorneys' fees under FOIA. The New York Times v. Spartanburg County School District No. 7, 374 S.C. 307, 649 S.E. 2d 28 (S.C. 2007).

> To receive an award of attorneys' fees, the plaintiff must be the "prevailing party." Where the public body provides the requested public document after litigation is filed seeking it, the plaintiff is the "prevailing party' even though the case is dismissed on the motion of the public body that the controversy is moot.

When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed." Sloan et al. v. Friends of the Hunley, Inc., et al., *393 S.C. 152, 711 S.E. 2d 895 (S.C. 2011). "Honoring legislative intent as expressed in FOIA by awarding attorneys' fees in these circumstances may serve as an impetus for public bodies to comply with a FOIA request and thus avoid the imposition of an attorneys' fee award."*

See also Sloan v. S.C. Department of Revenue, *409 S.C. 551, 762 S.E.2d 687 (S.C. 2014), where plaintiff was entitled to attorneys fee award where the agency produced the requested public records after suit was filed.*

> However, the attorneys' fees clock stops when the public body provides the requested public document.

"[W]e are constrained to reverse the award of [attorneys'] fees beyond the time [the public body] produced the requested documents." Sloan et al. v. Friends of the Hunley, Inc., et al., *393 S.C. 152, 711 S.E. 2d 895 (S.C. 2011).*

SECTION 30-4-110. Penalties.

Any person or group of persons who willfully violates the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned for not more than thirty days for the first offense, shall be fined not more than two hundred dollars or imprisoned for not more than sixty days for the second offense and shall be fined three hundred dollars or imprisoned for not more than ninety days for the third or subsequent offense.

ABOUT HOWELL LINKOUS & NETTLES, LLC

Howell Linkous & Nettles, LLC, is devoted to the practice of municipal bond law, economic development incentive law, local government law, and affordable housing development.

Sam Howell has nearly 34 years experience representing local governments across South Carolina. Mr. Howell has served as Charleston County Attorney and as bond counsel to the State of South Carolina, many of its agencies, and many other municipal and other local governmental units across the State. He has argued many cases in the State and federal appellate courts on matters of the powers of state and local government entities and municipal finance. He has also represented state and local governmental entities, private industry, and developers in public-private partnerships and economic development incentives.

Alan Linkous brings a practical business perspective to the municipal finance arena. Supplementing his bond and economic development experience, Mr. Linkous has extensive background in commercial finance, real estate law, and corporate transactions. In addition, Mr. Linkous worked as a real estate workout lender and as a commercial lender for two major commercial banks prior to his practicing law.

Robert Nettles represents local governments, housing authorities, non-profit organizations and for-profit developers in the development of affordable multifamily housing. He brings a strong tax and real estate background to counsel the public-private partnerships which most efficiently leverage federal, state and local grant and loan programs with private sources of debt and equity.

Allison King focuses her legal practice in multifamily housing development, economic development incentives, municipal bonds, and charter school finance. Prior to practicing law, Ms. King worked as a real estate development manager where she managed development of mixed use and affordable communities. Ms. King is admitted to practice in both South Carolina and North Carolina.