Freedom of Information Act Handbook for County Government

2023 Supplement

File with the Freedom of Information Handbook, 2018 Edition

SOUTH CAROLINA
ASSOCIATION OF COUNTIES

PREFACE

Store this supplement with the Freedom of Information Handbook, 2018 Edition. Any time the Freedom of Information Handbook, 2018 Edition is consulted, this volume must be checked for amendments to the statutes, updated case law, and Attorney General's opinions interpreting the statutes.

The Freedom of Information Handbook, 2018 Edition, includes practice pointers, case notes, and summaries of Attorney General's opinions in addition to those included here. This publication is not intended to be the final word on FOIA. Because the Freedom of Information Act continues to evolve through legislative amendment and case law, it is important to consult your county attorney when you have a question regarding the application of the law to a particular set of facts.

This publication is intended to give you a readily available reference book with which to begin your research. Should you need additional assistance, the South Carolina Association of Counties staff is available to help all county officials and employees. Whether your question involves a matter requiring the interpretation of law, research, or proposed legislation, the Association staff is available to serve you.

Please call the Association at 1-800-922-6081 or email us at: scac@scac.sc.

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PRACTICE POINTERS

The South Carolina Association of School Administrators (SCASA) is a non-profit, South Carolina corporation whose purpose is to advocate on legislative and policy issues impacting education. In August of 2009, Rocky Disabato sent a request for records to SCASA pursuant to the FOIA. The Executive Director of SCASA sent Mr. Disabato a response in which she refused to produce any of the requested materials and asserted that SCASA is not subject to the FOIA. Disabato then filed a complaint in circuit court seeking a declaration that SCASA violated the FOIA by refusing to comply with his request as well as an injunction requiring SCASA to comply with the FOIA. SCASA filed a motion to dismiss the action pursuant to Rule 12(b)(6), SCRCP, on the grounds that, when the FOIA is applied to a public body that is a non-profit corporation engaged in political advocacy, the FOIA unconstitutionally violates the First Amendment rights of speech and association.

In ruling on the motion to dismiss, the circuit court assumed that SCASA is supported by public funds, is a public body subject to the FOIA, and is a corporation engaged in political speech and issue advocacy. The court first held that the FOIA burdens SCASA's First Amendment speech and association rights, and then reviewed the constitutionality of the FOIA using a combination of the exacting and strict scrutiny standards of review. In its order dismissing Disabato's complaint, the court state that "[t]he FOIA's broad definition of a 'public body' can only be sustained as constitutional if the FOIA's open meeting and records disclosure requirements are substantially related to a sufficiently important governmental purpose and no less restrictive means of achieving this purpose exists." The court held the FOIA as applied to SCASA does not meet that standard because the disclosure and open meetings requirement are not substantially related to the purposes of the statute and because a less restrictive means of achieving the statute's purposes exists. Accordingly, the court held the FOIA violates SCASA's First Amendment speech and association of rights and granted the motion to dismiss.

The case was appealed to the South Carolina Supreme Court. The Court reversed the circuit court's dismissal and found that FOIA did not unconstitutionally burden SCASA's First Amendment speech and association rights even though FOIA implicates SCASA's right to associate by interfering with its ability to deliberate internally and by removing any associational privacy. The case was remanded to determine among other things, whether SCASA is a public body subject to FOIA. The ultimate decision on whether or not SCASA is a public body and whether the receipt or use of public funds should determine what a public body is could have implications for other non-profit corporations such as SCAC.

Although a final decision has not been reached in this case, we do learn from this case that FOIA withstands a constitutional challenge even when it infringes on the First Amendment speech and association rights.

Pursuant to Act No. 15 of 2014, which requires each county to be represented by a Local First Steps Partnership Board and provide services within every county it represents, §59-152-60(B) states that a meeting or election of a local partnership board must comply with all disclosure requirements of the Freedom of Information Act.

CASE NOTES

Autopsy reports are considered medical records under §30-4-20(c) and are therefore exempt from disclosure under the South Carolina Freedom of Information Act. Section 17-5-5(1) of the South Carolina Code (2014) defines an autopsy as "the dissection of a dead body and the removal and examination of bone, tissue, organs, and foreign objects for the purpose of determining the cause of death and manner of death." Although the objective of an autopsy is to determine the cause of death, as the statute indicates, the actual examination is comprehensive. Thus, the medical information gained from the autopsy and indicated in the report is not confined to how the decedent died. Instead, an autopsy, which is performed by a medical doctor, is a thorough and invasive inquiry into the body of the decedent which reveals extensive medical information, such as the presence of any diseases or medications and nay evidence of treatments received, regardless of whether that information pertained to the cause of death. Perry v. Bullock, 409 S.C. 137, 761 S.E.2d 251 (S.C. 2014).

The Hilton Head Island-Bluffton Chamber of Commerce is not a public body for purposes of the FOIA even though it receives and expends accommodation tax funds that are designated for promoting tourism. The General Assembly enacted the A-Tax statute, which involves the administration of a state sales tax imposed on sleeping accommodations provided to overnight guests. S.C. Code Ann. § 12-26-920(A) (2014 & Supp. 2017), S.C. Code Ann. §§ 6-4-5 to -35 (2004 & Supp. 2017). A portion of this tax is remitted to the local governments where it was collected and, in turn, they must expend the A-Tax funds in accordance with the statutory provisions governing allocation. *See* S.C. Code Ann. § 12-36-2630(3); S.C. Code Ann. §§ 6-4-10 to -35. Specifically, the A-Tax statute dictates that the local governments must select at least one organization—referred to as the designated marketing organization (DMO)—to manage the expenditure of the funds; however, the local governments must ensure the funds are "used only for advertising and promotion of tourism." S.C. Code Ann. § 6-4-10(3). In this case, the Chamber was selected to be a DMO—to direct the expenditure of tourism funds—for several local governments and it received funds from the Department of Parks, Recreation, and Tourism (a PRT Grant).

We made clear that the mere receipt or expenditure of public funds did not mean "that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm's length basis." *See Weston v Carolina Research & Dev. Found., 303 S.C.398, 401 S.E.2d 161 (1991*). Here, there is a specific statute (or proviso) that directs the local governments to select a DMO to manage the expenditure of certain tourism funds and requires the governments to maintain oversight and responsibility of the funds by approving the proposed budget and receiving an accounting from the DMO. Thus, this is not the situation found in *Weston* wherein the funds were intended to be given to a public body and, instead, were diverted to a private organization to be spent without oversight. Through the A-Tax

statute (and Proviso 39.2) there are accountability measures in place and the public has access to information regarding how the funds are spent. Therefore, the concern in *Weston* regarding the lack of a legislatively sanctioned process mandating oversight, reporting, and accountability is not present in the expenditure of these funds.

FOIA, of course, remains vibrant as it provides the General Assembly's determination for optimum transparency in connection with the general expenditure of public funds. Following the passage of FOIA, the General Assembly enacted the more narrow and targeted A-Tax statute (and Proviso 39.2) to provide what it determined were the necessary accountability safeguards with regard to the expenditure of these specific funds while simultaneously protecting the private nature of the organizations selected to perform this marketing function. The General Assembly deemed these provisions sufficient to ensure that the funds are being properly expended. *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber Commerce*, 423 S.C. 295, 814 S.E.2d 513 (S.C. 2018).

Palmetto Health is not a public body subject to FOIA even though it receives government funds. Unlike the Foundation in the *Weston* case, Palmetto Health does not operate for the sole benefit of the state and is not an organization otherwise related to the state. It is not generally supported by public funds. The public funding Palmetto Health receives from governmental grants constitutes a miniscule portion of its revenue and accounts for none of its income because Palmetto Health only moves grant monies into income when it has expenses equal to that amount.

The governmental funds are not given to Palmetto Health "en masse." Rather, the governmental grantors provide the funds to Palmetto Health for the specific purposes of fulfilling the obligations specified in the grants. David Lee, Palmetto Health's Director of Financial Forecasting, stated the grantors direct how the money from the grants can be spent. The grant reimburses Palmetto Health only once Palmetto Health personnel provide the goods and services obligated by the grant. Lee emphasized the funds it received were equal to the expenditures it incurred. Lee asserted Palmetto Health has never received unrestricted government monies and in order to receive any funds from government grants, it has to perform the services as directed under the granting documents. Furthermore, as in *DomainsNewMedia.com*, the grants Palmetto Health receives include requirements for strict accounting, documentation, and reporting to the grantors. The public would be able to determine with specificity how the funds were spent by seeking this information from the governmental grantors. Thus, the FOIA does not need to be extended to a private grant recipient to ensure transparency in the expenditure of public funds. *Sisters of Charity Providence Hospitals v. Health*, 2021-UP-276 (S.C. App. July 21, 2021).

The South Carolina Educational Credit for Exceptional Needs Children Fund (the Fund) is not a public body even though it was created by the General Assembly in a proviso in the 2016-2017 General Appropriations Act. The Fund receives private donations and those who donate may receive a state tax credit. No public funds were expended even though under the proviso the Department of Revenue in concert with the Fund directors administer the fund, including, but not limited to, the keeping of records, the management of accounts, and disbursement of the grants awarded pursuant to the proviso. The program was permanently codified by the General Assembly in 2018.

It is hard to see how the Fund is not a nonprofit corporation acting as a proxy for the state; that seems to be its entire reason for existing. Nonetheless, we hold that, under the precedent in *DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 814 S.E.2d 513 (2018),* the Fund is not a public body for purposes of FOIA. The support that the Fund receives in the form of likely fleeting assistance from state officials and use of the state fundraising platform is *de minimis* I rather than the diversion of "a block of public funds…*en masse"* or "the management of the expenditure of public funds." *Jefferson Davis, Jr. v. South Carolina Educational Credit for Exceptional Needs Children Fund*, Appellate Case No. 2019-001231, Opinion No. 6014 (S.C. App. August 9, 2023 WL 5062401. (Not reported in S.E. 2d).

ATTORNEY GENERAL'S OPINIONS

Five members of a school board, which constituted a quorum, held a telephone conference to discuss the proposed school budget that would be voted on at the upcoming board meeting. The telephone conference would constitute a "meeting" of a "public body" for purposes of FOIA. The school board would constitute a public body pursuant to §30-4-20(a). The meeting requirement is met because there is a convening of a quorum of the constituent membership of the public body to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power. The holding of such telephonic meetings without the requisite notice and access of the public to the discussions is in violation of FOIA. S.C. Op. Att'y Gen., 2006 WL 2593081 (August 11, 2006).

The Commission on Higher Education (CHE) is a public body within the definition provided in §30-4-20(a). Records and documents submitted to CHE as part of an application for a license by a proprietary school are public records pursuant to §30-4-20(c) and are subject to disclosure unless exempt under a provision of FOIA. S.C. Op. Att'y Gen., 2007 WL 1302771 (March 30, 2007).

Pursuant to §30-4-20(d), a board member of a public body may attend a meeting of that body via telephone and may be counted as part of the quorum and vote on matters at the meeting. S.C. Op. Att'y Gen., 2012 WL 3875118 (August 28, 2012).

The financial records of a city drug fund program that are in possession of the city are public records subject to disclosure pursuant to §30-4-20(d), regardless of the fact that such records are not kept, maintained or compiled by the City in the regular course of business, but were created and compiled in response to requests from SLED. The records were requested as part of an investigation of misconduct allegations that the City Attorney was dismissing criminal charges under the condition that a "donation" be made by the defense to the city drug fund. Section 17-1-40 which states that "a person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and no evidence of the record pertaining to the charge may be retained by the municipal, county, or state law enforcement agency," does not apply to a municipality as it is not a law enforcement agency.

Finally, the privacy exemption of §30-4-40(a)(2) that would allow individual donors to keep their identities private is likely to be outweighed by the public's right to information concerning the source of the city's funds. While §30-4-40(a)(11) would normally allow the maker of a gift to a public body to remain anonymous at their request, a court would probably find that individuals who paid money to the city drug fund on the condition of the dismissal of charges did not make a "gift" and their identities would not be protected regardless of whether they gave money on the condition of anonymity. S.C. Op. Att'y Gen., 2012 WL 6218332 (November 28, 2012).

P. 16 §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.

PRACTICE POINTERS

Many public records contain personal identifying information such as social security numbers. Social security numbers are also routinely collected as a necessary part of the daily function of some local governmental entities. Act 190 of 2008, which deals with identity theft and fraud protection laws, requires agencies that collect social security numbers to segregate those numbers so that they may be easily redacted pursuant to a public records request in compliance with §30-2-310(A)(1)(b).

In addition, §30-2-330(A) prohibits the filing of documents to be recorded in the register of deeds or clerk of court's office that include personal identifying information such as a social security number or driver's license number, unless such information is required by law or court order. Pursuant to §30-2-330(B), a consumer or their attorney may request that personal identifying information be redacted from an image or copy of an official record of a public document, such as a mortgage, on the register of deeds or clerk of court's public website. The request must be made in writing and must specify the page number of the documents that contains the personal identifying information. There is some question as to whether the information redaction process provided in §30-2-330(B) applies only to electronic copies or to physical copies in light of §30-1-30, which prohibits the alteration of public records. EDITOR'S NOTE: Act 56 of 2023, which goes into effect on July 1, 2024, provides that any personal identifying information of an active or former judge or law enforcement officer held or maintained by any state or local governing entity is confidential and must not be disclosed to the public if the judge or officer has filed a formal request with the entity. Information relating to the personal identifying information of the judge or officer or revealing whether the individual has family members would be deemed confidential. Any government entity that redacts or withholds information under this article is required to provide the requestor a description of the redacted or withheld information.

Local government entities are looking for ways to cut costs and become more efficient. One of the options that is being explored is cloud computing, which is a form of outsourced IT

services. In cloud computing, software, resources, and other technology are shared over the internet and are available to computer users on demand. E-mail, word processing, and financial systems are examples of the types of information that can be outsourced in cloud computing. Local governments contract with third party vendors to provide cloud computing services usually on a subscription-based or pay-per-use service. It removes the costs associated with maintaining program licenses as well as the maintenance costs associated with maintaining hardware operations such as data backup and storage.

However, cloud computing presents some security concerns since data is being turned over into the hands of a third party. It may also present some FOIA issues such as who is now the custodian of record? The local government agency or the vendor? What if the vendor has erased the information being requested? Who has access to the data that is being handled by the vendor and what are their safeguards for a data breach? Is there an audit of the vendor services? Any county entity that is considering cloud computing should ask these kinds of questions and make sure these issues are addressed in the contract with the vendor.

Another recent technology development may present some FOIA issues for local government and public officials. In the ongoing effort to engage the public and increase transparency, governmental agencies are posting information on social media sites such as Facebook and Twitter. However, be aware that pages or information from social networking tools are likely to be considered public records subject to FOIA and record retention rules. Public officials especially need to be careful that their communications with other members of a governing body over social media networks do not violate the public meeting requirements of FOIA. This document does not address personal webpages and postings of employees, but this is an area that has the potential to raise some issues under FOIA.

CASE NOTES

Although §30-4-30 gives any person the right to inspect or copy any public record of a public body, nothing in the statute provides that records must be sent to a person for inspection before paying a copying fee, and nothing in the statute mandates special consideration for inmates. Furtick v. S.C. Dept. Of Corrections, Opinion No. 07-UP-200 (Ct. App. 2007).

A county may restrict further commercial distribution of public documents pursuant to a copyright by requiring anyone requesting the copyrighted documents to sign a licensing agreement acknowledging the copyright on the information and restricting any further commercial use without prior written consent from the county. Seago v. Horry County, 378 S.C. 414, 663 S.E.2d 38 (2008).

While a county's annual financial report is a public record under §30-4-30(a), a county administrator cannot be compelled to produce the report in a particular time frame or manner for a council member. The manner in which the report is provided is within the administrator's discretion. Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008).

Under §30-4-30, the public may review a videotape of a verbal confrontation between a police officer and a citizen while the officer is on duty, even though the videotape may contain private information regarding the marital difficulties of the citizen and a public official. The public's right to know the activities of a police officer while on duty and the possible reasons for his discharge outweigh any rights to privacy, especially when the police officer has a wrongful discharge action pending. The Sun News v. City of North Myrtle Beach, No. 26-9829 (15th Cir. April 29, 2011).

A FOIA request revealed that a county inadvertently failed to retain some government emails and text messages as a result of the administrator's computer crashing in 2014 without a central email server for backing up and archiving email messages. A private citizen could not bring a civil suit claiming the county's failure to maintain the records violated the Public Records Act, as the Act specifically references criminal liability, not civil liability. However, the inadvertent destruction of public records is a violation of the Public Records Act and not FOIA and the provisions of FOIA do not allow an action for declaratory judgment to enforce the Public Records Act. While destruction of pertinent documents covered by a then-pending FOIA request could very well present a different question, concerns about increased sunlight in government, while undeniably legitimate, cannot overcome the statutory limitation that a private right of action under FOIA must be tied to enforcing *FOIA. Ballard v. Newberry County*, 432 S.C. 526, 854 S.E.2d 848 (S.C. App. 2021).

ATTORNEY GENERAL'S OPINIONS

Even though the SC Retirement System's regulations state that all records of members of the retirement system are classified as confidential and shall not be disclosed to third parties, the SC Vocational Rehabilitation Department cannot use this as a basis to deny a request to disclose the names of employees that participate in the TERI program and the date they began participation. Where a regulation is in contravention to the disclosure requirements under FOIA, the requirements of FOIA must prevail. S.C. Op. Att'y Gen., 2007 WL 419417 (January 24, 2007).

The city council questioned whether tapes of their meetings could be destroyed as had been the practice. The public policy of this State is to preserve rather than destroy public records. The Public Records Act governs the custody and preservation of public records. The Public Records Act defines a "public record" by referencing the definition of a public record found in §30-4-20(C). Because the city creates and retains possession of such tapes, they meet the definition of a public record under the Public Records Act, and the city must comply with the Public Records Act in its handling of the tapes of its meetings. S.C. Op. Att'y Gen., 2007 WL 1651338 (May 21, 2007).

Documents related to an out-of-court settlement of a lawsuit with a confidentiality clause involving a school district are public records subject to disclosure under FOIA where public funds were expended in the lawsuit. Despite the confidentiality clause, the school district must disclose information not exempt under §30-4-40. S.C. Op. Att'y Gen., 2007 WL 4284631 (November 7, 2007).

A sheriff's office questioned whether the intent of the fifteen-day rule in §30-4-30(c) requires law enforcement agencies to adhere to calendar days since they are 24-hour public safety entities and not normal administrative offices, and since it was the published policy of the county by resolution to have records reviewed Monday through Friday from 8:00 a.m. to 5:00 p.m. excepting Saturdays, Sundays, and legal public holidays. While FOIA does not expressly address "24-7" access to incident reports, the statute does mandate far more than the public being given access to these records only during traditional "9 to 5" business hours. Therefore, it appears that §30-4-30(d)(2) requires reasonable public access to a sheriff's incident reports at night, on weekends and during legal holidays. S.C. Op. Att'y Gen., 2008 WL 5476556 (December 23, 2008).

Because a jail or detention center would be considered a "public body," copies of arrest warrants and incident reports maintained at a county detention center must be made available for walk-in inspection by the media, even though the same information could be obtained at the arresting law enforcement agency. S.C. Op. Att'y Gen., 2010 WL 3048335 (July 19, 2010).

Case law recognizes that privacy expectations may be diminished in prisons or jails due to security concerns. Therefore, it is likely that an inmate's personal calls as well surveillance footage of the booking area and other areas within a jail are subject to disclosure under §30-4-30(a). However, a court may consider whether the inmate was placed on notice of the electronic monitoring. This can be accomplished through signs near video cameras or telephones, information in orientation or prison handbooks provided to inmates, prison lectures, or discussions regarding monitoring policies. S.C. Op. Att'y Gen., 2011 WL 2648720 (June 21, 2011).

The names and addresses of individuals and businesses who have received loans from a city program funded through a combination of federal funds and the city's general funds are likely to be considered public records under FOIA. The privacy exemption of personal information in §40-4-40(a)(2) is outweighed by the fact that the loan program involves the disbursement of public funds and the only way the public can determine how public funds were spent is through access to the records and affairs of the organization receiving and spending the funds. S.C. Op. Att'y Gen., 2011 WL 6959371 (December 5, 2011).

P. 29 §30-4-40. Matters exempt from disclosure.

PRACTICE POINTERS

Act 202 of 2008 requires SLED to maintain a list of all concealed weapons permit holders, and they may only release the list or verify a permit holder's status pursuant to a request by a law enforcement agency or a subpoena or court order. Any person currently in possession of a list of permit holders provided by SLED must destroy the list. Section 23-31-215(T) requires SLED to publish an annual report of the following information on permit holders with a breakdown by county: (1) the number of permits; (2) the number of permits that were issued; (3) the number of

permit applications that were denied; (4) the number of permit applications that were renewed; (5) the number of permit renewals that were denied; (6) the number of permits that were suspended or revoked; and (7) the name, address and county of a person whose permit was revoked, including the reason for the revocation under §23-31-215(J)(1).

Companies looking to locate in this state frequently ask for confidentiality agreements. Such agreements may require counties to maintain the confidentiality of certain information for a period of years. They may also require prior written consent from the company before any public announcements can be made by the county regarding the company. Counties need to be careful that the terms of these agreements do not violate FOIA as most of the information used to attract an industry or business will become public under §30-4-30(a)(9).

In *Post & Courier v. City of North Charleston*, discussed below, the Court allowed the release of 911 tapes prior to a criminal trial that would use the tapes. The court indicated that the financial cost of a venue change is not the type of harm contemplated for the exemption found in §30-4-40(3)(A), the court seemed to indicate that if the release of the information would hurt the ability of a defendant to have a fair trial, the exemption would apply. In two separate cases in March 2012, circuit court judges denied FOIA requests for dashcam videos in pending criminal cases. In both cases, counsel for the defendants argued that the release of the video would hurt their client's chances at a fair trial.

Act No. (R. 320, H. 4560) of 2014 provides that if an expungement of criminal records is ordered, a law enforcement agency may keep records under seal for purposes of defending against litigation and keeping statistical records. This also applies to charges in magistrate's court where a person is not fingerprinted and is found not guilty so that the record is expunged. These sealed records are not subject to disclosure under FOIA. However, §17-1-40(C)(2) as amended by the Act allows incident reports to be released under FOIA. The law enforcement agency shall redact the name of the person whose record is expunged and other information which specifically identifies the person from copies of the reports provided to the person or entity making the request.

CASE NOTES

The police department must release tapes of emergency calls related to a shooting incident, even though the tapes would be used at the criminal trial and the release of the tapes to the newspaper might cause so much pretrial publicity that the trial might have to be moved to a different venue. The financial cost of a venue change is not the type of harm that the FOIA exemption is intended to prevent in protecting records of law enforcement and public safety agencies compiled in the process of detecting and investigating crime. It is intended to prevent harms 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. *The Post & Courier v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005).

A school district violated §30-4-40(a)(13) when the district only released material requested by the press on the two individuals considered by the district to be "finalists" for the superintendent position instead of the five semi-finalists out of which the two finalists were selected. The school district took the position that its obligation under the law was to disclose "only materials relating to the two finalists." However, the statutory language requiring disclosure of materials relating to "not fewer than the final three applicants" requires the public body to disclose the final pool of applicants comprised of at least three people. Application of the statute in this case requires disclosure to be limited to the final group numbering more than two (i.e., the five semi-finalists, not the entire group of thirty applicants). *Spartanburg Herald-Journal v. Spartanburg County School District* No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007).

In a FOIA lawsuit to obtain records that were potentially discoverable in a pending breach of duty action, FOIA is not a tool that may be used to bypass civil discovery in a pending case. However, if the government invokes the exemption in § 30-4-40(a)(4), "matters *specifically* exempted from disclosure by statute or law," to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record rather than vaguely referencing "discovery rules" or the "South Carolina Rules of Civil Procedure" and lumping all of the requested documents together into one category to justify nondisclosure. See "*Evening Post Publ'g. Co. v. City of N. Charleston...," 363 S.C. at 457, 611 S.E.2d at 499* ("[T]he exemptions in section 30-4-40 are to be narrowly construed so as to fulfill the purpose of FOIA ... 'to guarantee the public reasonable access to certain activities of the government.' To further advance this purpose, the government has the burden of proving that an exemption applies." (citations omitted) (quoting *Fowler v. Beasley, 322 S.C. at 468, 472 S.E.2d at 633*)); see also "*Evening Post Publ'g. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. at 83, 708 S.E.2d at 748* ("[T]he exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to 'guarantee the public reasonable access to certain activities of the government.' " (emphasis added) (quoting *Fowler*, 322 S.C. *at 468, 472 S.E.2d at 633*)). Pope v. Wilson, 427 S.C. 377, 831 S.E.2d 442 (S.C. App. 2019).

ATTORNEY GENERAL'S OPINIONS

A sheriff's office is required under FOIA to disclose internal investigation reports that contain information as to the performance of public duties by sheriff's office employees. FOIA does not provide for a right of confidentiality, despite the sheriff's concern about his office's responsibility and liability in protecting his employee's rights. Regardless of the potential for lawsuits as a result of the disclosure of such information, a sheriff's office must comply with the disclosure requirements. S.C. Op. Att'y Gen., 2006 WL 1574915 (May 23, 2006).

A public body cannot use the trade secrets disclosure exemption found in §30-4-40(a)(1) to preclude revealing the radiation monitor locations as well as the radiation levels at each specific location for Chem-Nuclear. If a public record contains both exempt and nonexempt material, the public body shall separate the exempt and nonexempt material and make the nonexempt material available. Chem-Nuclear's quarterly reports from these monitoring locations, which comes in the form of raw data that the general public would not be able to interpret, must be disclosed to the public in a form that is comprehensible. S.C. Op. Att'y Gen., 2007 WL 4284629 (November 6, 2007).

Documents related to an out-of-court settlement of a lawsuit with a confidentiality clause involving a school district are considered public records subject to disclosure under FOIA where public funds were expended in the lawsuit. A court shall not approve sealing a settlement agreement which involves a public body or institution. S.C. Op. Att'y Gen., 2007 WL 4284631 (November 7, 2007).

An amendment to a statute may remove an exemption that would normally be applicable under §30-4-40(a). In this instance, §50-21-130(D), dealing with the Department of Natural Resources (DNR) boating accident reports specifically indicated that such reports "shall not be open to public inspection." In 2008, the public inspection prohibition was deleted and there is no longer a basis for preventing public release of DNR boating accident reports. S.C. Op. Att'y Gen., 2010 WL 928443 (February 24, 2010).

A list of school district employees, including teachers and administrators who make over $50,000 a year, is not exempt under §30-4-40 and should be disclosed. This would include those who have retired and entered the TERI program and also those who have completed the TERI program and are employed on a contractual basis. S.C. Op. Att'y Gen., 2010 WL 2320803 (May 12, 2010).

Sections 30-4-40(a)(2) and 30-4-40(a)(3) respectively provide an exception for personal information that would be an unreasonable invasion of privacy if disclosed to the public, and for law enforcement records under certain circumstances. However, the exceptions do not apply to a family requesting the release of 911 telephone conversations regarding a family member since there is no absolute prohibition under FOIA to releasing 911 telephone conversations and there is no basis for exemption in a given situation. In this instance, the family could waive the release of the personal information of the family member and there was no applicable law enforcement exception. S.C. Op. Att'y Gen., 2010 WL 2320805 (May 17, 2010).

Section 30-4-40(a)(13), which requires a public body during a search to fill an employment position to make available for public inspection and copying all material relating to not fewer than the final three applicants under consideration for a position, applies to an individual government employee who is responsible for filling a position. "Nothing in the language of §30-4-40(a)(13) suggests it only applies to such materials gathered by the governing body of a public entity when filing a position. Consistent with our previous conclusion that 'public body' for purposes of FOIA encompasses the entity en bloc, including any officer or employee of the public entity, we do not believe that provision can be construed as excluding such materials gathered during a search to fill a position within the public entity simply because the hiring decision is made by someone who is

not a member of the entity's governing body. Such a construction would allow public employers to avoid disclosure by simply delegating the responsibility for hiring decisions to individuals, who are not members of the entity's governing body. Such an absurd result was not intended by the Legislature. S.C. Op. Att'y Gen., 2013 WL 1695511 (March 4, 2013).

Where a request for an incident report is made regarding an alleged sexual assault committed by one minor child against another, §63-19-2030(A) specifies that law enforcement records involving juveniles are confidential. Section 30-4-40(a)(4) exempts matters that are specifically exempted from disclosure by statute or law, it would appear that such an incident report would be exempt. However, §63-19-2030(B) states that while the information identifying a child must not be open to public inspection, the remainder of these records are public information. Therefore, the incident report may be released as long as the identifying information of the juvenile subject and the juvenile victim are redacted. S.C. Op. Att'y Gen., 2013 WL 6924891 (December 30, 2013).

When news reports of investigations and arrests are posted on a police department website prior to the issuance of an expungement order along with any press release or other notices to the media pursuant FOIA, a law enforcement agency is not required to remove or delete the reports from their website simply because such news reports concern a charge for which an expungement order is issued. Even if it were to be expunged from the police department website, arguably, it could be found through a "google" search. However, because the reports and press releases could be used to circumvent the expungement laws, we would advise out of an abundance of caution that law enforcement agencies remove from their website agency-generated statements or press releases concerning criminal charges for which an expungement order has been issued. S.C. Op. Att'y Gen., 2014 WL 1511517 (April 10, 2014).

A court would likely hold the S.C. FOIA, S.C. Code § 30-4-10 et seq., does not require the production of voted ballots, scanned images of voted ballots, and vote cast records. The South Carolina State Constitution guarantees the secrecy of the ballot. Article II, Section 1 states, "All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret." S.C. Const, Art. II, § 1 (emphasis added). Moreover, Article II, Section 10 directs the General Assembly to "ensure secrecy of voting." S.C. Const. Art. II, § 10. The South Carolina Supreme Court has explained the dominant purpose of these provisions, "is to ensure the integrity of the voting process. It is calculated to secure privacy, personal independence and freedom from party or individual surveillance. It tends to promote an independent and free exercise of the elective franchise." *State ex rel. Edwards*, 270 S.C. 87, 92, 240 S.E.2d 643, 645-46 (1978). To the extent that the disclosure of materials related to a cast ballot would lead to the identification of a voter, it is this Office's opinion that a court would hold such a disclosure is not required by the S.C. FOIA and violates the South Carolina Constitution. "Section 30-4-40(A)(4) also permits a public body to exempt from disclosure those '[matters specifically exempted from disclosure by statute or law.'..." S.C. Op. Att'y Gen., 2022 WL 4229452 (September 7, 2022).

It is this Office's opinion that a court would hold the prohibition on sharing information relating to business license tax applications with third parties in S.C. Code § 6-1-420(E) does not prohibit sharing such data between public officials or employees in the performance of their duties nor the publication of statistics as authorized in S.C. Code § 6-1-120(B). "FOIA law itself, exempts

'[information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy [which] shall include, but not be limited to, information as to gross receipts contained in applications for business licenses ....' S.C. Code § 30-4-40(a)(2)." This conclusion is not free from doubt and legislative clarification may be warranted to address how broadly the exception for "a person or entity that gathers and disseminates news" is meant to apply. S.C. Code § 6-1-420(E). S.C. Op. Att'y Gen., 2022 WL 17170235 (November 14, 2022).

The question of whether or not statements and information provided by persons to the State Election Commission auditors in the course of a post-election audit authorized by §7-3-20(D) are considered information of a personal nature and therefore exempt from disclosure under FOIA must be determined on a case-by-case basis weighing the interviewed person's privacy interests against the need to protect the public from secret activity. As such, we do not believe a court would adopt the contention that all information contained in every interview is *per se* exempt. S.C. Op. Att'y Gen., AGO No. 2513, (June 14, 2023).

P. 42 §30-4-45. Information concerning safeguards and off-site consequence analysis; regulation of access; vulnerable zone defined.

PRACTICE POINTERS

The South Carolina Freedom of Information Act, S.C. Code §30-4-40(c), provides for access to restricted information on certain hazardous air pollutants 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 73.1 "Requirements for the protection of safeguards information," the unrestricted access to which could increase the risk of acts of terrorism. S.C. Code Section 30-4-45 requires an agency that is the custodian of such information to promulgate regulations to regulate access to this information. Pursuant to this provision, DHEC promulgated Regulation 61-117 which went into effect on May 25, 2012. It identifies who can have access to restricted information as well as the procedures for the release of restricted information.

P. 45 §30-4-50. Certain matters declared public information; use of information for commercial solicitation prohibited.

ATTORNEY GENERAL'S OPINIONS

A police department should honor a request to provide the names and badge numbers of all officers who work openly with the public. Such a request is consistent with the provisions of §30-4-50(A)(1) that the names, sex, race, title, and dates of employment of all employees and officers of public bodies are public information subject to disclosure unless another provision of

law would restrict access to that information in a particular situation. S.C. Op. Att'y Gen., 2008 WL 1960277 (April 2, 2008).

P. 48 §30-4-60. Meetings of public bodies shall be open.

PRACTICE POINTERS

GUIDELINES FOR ELECTRONIC COMMUNICATIONS BETWEEN COUNCIL MEMBERS AND CHIEF ADMINISTRATIVE OFFICERS (CAOs) OUTSIDE OF SCHEDULED COUNCIL MEETINGS

The Chief Administrative Officer (CAO) may provide information to council members via email as a group. However, council members must be mindful of the fact that such communications are subject to FOIA. Here are some suggestions to help ensure such communications are in compliance with FOIA:

● CAOs can provide information in a group email to council members regarding his/her duties and functions and any other information necessary for council members to perform their duties as elected officials. However, council members should be careful to avoid asking questions regarding the information provided in the group email that are matters that should be addressed in a council meeting. SCAC would strongly encourage council members to address their questions directly to the chair so that the chair under the advice of counsel can determine whether the question can be addressed by the CAO or whether the questions or questions should be placed on an agenda and addressed at a scheduled council meeting.

● CAOs can respond to general questions from individual council members electronically such as dates and times of meetings, statistical county data, or other county information that involves the daily functions of the CAO. However, a council member should avoid questions regarding matters that are pending action by council as a whole, or agenda matters for an upcoming meeting. Individual council members should also avoid asking the CAO questions regarding county personnel. Any questions regarding county personnel should be directed to the council chair to determine whether it is an agenda matter that can be discussed in an open council meeting or a matter that should be addressed in executive session.

● Council members should avoid discussing county matters in group emails, even if it is not a majority of council members. As few as two council members having a discussion electronically regarding county business could possibly be viewed as circumventing the requirements of FOIA. Council members should not engage in polling other members on matters on the agenda or matters pending before council.

CASE NOTES

A balancing test must be used to determine whether a public body's meeting place complies with the provisions of §30-4-15, which requires that meetings be held with minimum cost or delay to the public. In this case, the balancing test is "the interests of the public in having a reasonable opportunity to attend a board workshop versus the board's need to conduct a workshop at a site beyond the county boundaries." The town did not violate FOIA by holding its workshop at Dataw Island and the town's interest in increased attention and focus of the council members by having the workshop at a remote location outweighed the small cost and delay to the public in attending the workshop at that location. Weidmann v. Town of Hilton Head Island, 344 S.C. 233, 542 S.E. 2d 752 (Ct. App. 2001).

ATTORNEY GENERAL'S OPINIONS

Meetings of public bodies do not have to be held in a specific location and can be conducted via telephone as long as the other requirements of FOIA are met, unless the statutes that govern the public body require the meetings to be held at a specific location or in a particular manner. Section 7-17-220 calls for the SC Election Commission to meet at the office of the Commission, unless otherwise provided in §7-3-10(c). Section 7-3-10(c) requires the Commission to also meet at its offices or at a more convenient location. These provisions do not contemplate a meeting of the Commission via telephone conference call. S.C. Op. Att'y Gen., 2007 WL 1651329 (May 18, 2007).

A meeting of a transition committee created by the General Assembly to consolidate the school districts of a county does not constitute a meeting of the school district, even though four of the members on the committee are members of the board of one of the school districts. However, a court would more than likely conclude that the committee is a public body under §30-4-60, requiring the meetings to be open to the public. S.C. Op. Att'y Gen., 2008 WL 2324810 (May 6, 2008).

P. 57 §30-4-70. Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly.

CASE NOTES

A school board violated FOIA by going into executive session without stating the purpose of the executive session. The board contends it did not abridge FOIA by discussing a parent's complaint letter in executive session because the discussion occurred while the board was receiving legal advice. This argument stumbles at the starting block: a public body is forbidden from entering executive session without complying with section 30-4-70(b) of the South Carolina Code (2007), which states: "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." Because there is no evidence the board complied with this section, its executive session was improper. See *Donohue v. City of North Augusta*, 412 S.C. 526, 531-33, 773 S.E.2d 140, 142-43 (2015) (announcement that "contractual matter" would be discussed in executive session was insufficient to satisfy "specific purpose" requirement of section 30-4-70(b).

Even if the board had complied with the FOIA's specific purpose requirement when it retreated into executive session, it could not have taken any vote except to adjourn or resume its public session. § 30-4-70(b). Importantly, 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." Id. The board argues it took no action on the parent's complaint during executive session. However, the chairman's statements during the public meeting undercut this argument. The chairman declared the decision to respond by letter to the parent's complaint was "based off the discussion" in executive session.

Nevertheless, the board insists that because no vote on how to respond to the parent's complaint was taken, the board did not take any action in executive session. This argument chases itself and then collides with the chairman's statements and the letter he sent in response to the parent's complaint. These immovable facts support the circuit court's finding that the board decided how to respond to the parent's complaint during executive session. *Miramonti v. Richland Cnty. Sch. Dist. One*, 483 S.C. 612, 885 S.E.2d 406 (Ct. App. 2023).

ATTORNEY GENERAL'S OPINIONS

The circulation of a letter of recommendation to each member of a congressional district to appoint an individual from that district to the Department of Transportation Commission without the congressional district meeting and voting on the appointment violates §30-4-70. The circulation of a letter at an open public meeting where each member of the congressional district signs his recommendation does not violate FOIA, as long as the vote is taken at the meeting. S.C. Op. Att'y Gen., 2007 WL 1031442 (March 28, 2007).

A city fire department questioned whether a county rural fire board could do the following: (1) enter into executive session to discuss a contract between two government bodies that they are not a party of; (2) take a straw poll while in executive session; (3) tell members the executive session would not end unless all members agree to support the motion; (4) discuss the issue via telephone or possibly email prior to the meeting; and (5) have a county councilman participate in the executive session and offer comments not consistent with the remaining members of the county council. It appears that the board violated §30-4-70(a)(2). While that provision permits a closed meeting to discuss negotiations for a contract, the common understanding would be that one should be a party to that contract being discussed. The board also violated §30-4-70(b) as members of a public body may not commit the public body to a course of action by polling or commit the public body to a course of action while in executive session. Furthermore, any telephone or email

communication by board members violated §30-4-70(c) as no chance meetings or electronic communication may be used to circumvent the spirit of the requirements of FOIA. However, no provision of FOIA prohibits a public body from permitting the presence of any person whom they may deem necessary or helpful in conducting their executive sessions. S.C. Op. Att'y Gen., 2010 WL 2320806 (May 25, 2010).

A county board of zoning appeals cannot go into executive session for the purposes of discussing the individual views of board members so as to attempt to find a consensus among them that can become the basis for their written decision. However, they can go into executive session to receive legal advice from their attorney. S.C. Op. Att'y Gen., 2011 WL 782318 (February 3, 2011).

A county school district board likely did not meet the requirements of FOIA by announcing at a meeting that it was going into executive session to discuss "an employment matter" and, upon returning, voted 5-4 to place the school superintendent on paid administrative leave, pending the outcome of an investigation of his actions. As the Court *in Donohue v. City of North Augusta,* 412 S.C. 526, 773 S.E.2d 140(2015) explained, "FOIA is clear in its mandate that the 'specific purpose' of the [executive] shall be announced…. Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private." S.C. Op. Att'y Gen., 2023 WL 6804635 (October 9, 2023).

P. 63 §30-4-80. Notice of meetings of public bodies.

PRACTICE POINTERS

On June 8, 2014, the South Carolina Supreme Court issued an opinion *in Lambries v. Saluda County Council et al*, that FOIA's notice provisions found in §30-4-80 does not require an agenda to be issued for a regularly scheduled. This reverses the Court of Appeals decision dated June 13, 2012, that found the practice of county councils amending their agendas during regularly scheduled meetings is a violation of the public notice provisions of the FOIA. Section 30-4-80 provides: (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 practical but not later than twenty-four hours before the meeting. The notice must also include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies. (Also, see Model Rule 5, in the Model Rules of Parliamentary Procedure for South Carolina Counties, Second Edition, p.8)

It is important to note that the Supreme Court's decision does leave open the possibility for future courts to find a FOIA violation if an amendment to an agenda is made to intentionally skirt

FOIA's notice provision. While the Court has determined that FOIA does not require an agenda for a regularly scheduled council meeting, if council does intend to use an agenda for individual regular meetings they should be posted pursuant to §30-4-80 at least twenty-four hours prior to the meeting. In addition, council members should determine from their county attorney whether a specific amendment to an agenda item could violate FOIA notice requirements.

CASE NOTES

A circuit court misinterpreted the word "agenda" and failed to apply its plain and ordinary meaning. See *Worthington v. Belcher*, 274 S.C. 366, 368, 264 S.E.2d 148, 149 (1980). ("Words used in a statute are to be given their plain and ordinary meaning."). The common understanding of the term "agenda" is a list of items to be considered. See Agenda, Black's Law Dictionary (11th ed. 2019) (defining agenda as, "A list of things to be done, as items to be considered at a meeting, usually arranged in order of consideration"); *Lee v. Thermal Eng'g Corp*., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning."). As applied here, that definition dictates that the "agenda" for the meeting in question was the single page linked to the City's website entitled "Agenda 050718" containing a short list of items the City planned to consider at the meeting.

The respondent argues, and the circuit court found, that the City violated FOIA by considering a project that was not mentioned in a different document; a longer document named "Agenda 050718 Complete" and posted on the City's website. We disagree. The one-page agenda posted on the website and physically posted (as is required by section 30-4-80(A)) conspicuously included "Resolution No. 2018-11-A Resolution Identifying North Augusta Projects for the Aiken County Capital Projects Sales Tax IV." The larger document contained supplementary information and background material for different items on the agenda, including a list of proposed projects related to the sales tax resolution. It is of course true that the City discussed a project for inclusion in the sales tax that was not listed in the longer document. Still, this was not a change to the meeting's "agenda." The agenda advertised that the City would consider projects related to the sales tax. The discussion of this project was in precisely that context.

"If we were to adopt the respondent's position, we would be effectively holding that the City was required to pin all 36 pages of the longer document – with all of the supplemental information – to its bulletin board. See S.C. Code Ann. § 30-4-80(A) (stating FOIA requires posting the agenda on a public bulletin board). We understand the term 'agenda' to describe a list of things to be done such as items to be considered at a meeting. We also understand agenda to not include background material, however it is labeled." *Holcomb v. City of North Augusta*, 2023 WL 3000661, No. 2023-UP-158, Appellate Case 202-000080 (Ct. App. 2023). (Not reported in S.E.2d)

ATTORNEY GENERAL'S OPINIONS

A school district with a policy that permits amendments of its agenda by majority vote of its members at the beginning of a meeting wanted to know whether its board of trustees violated

FOIA by following this policy. Although FOIA does not specifically require public bodies to have an agenda as indicated by §30-4-80(a), South Carolina courts have taken the position that the provisions in FOIA should be liberally construed in favor of disclosure in order to provide the greatest protection to the public. While it does not appear that a public body is completely without leave to make minor adjustments to its agenda within the twenty-four hours prior to a meeting, it appears that the best reading of §30-4-80(a) is to require an agenda in its most final form to be posted at least twenty-four hours prior to the meeting. S.C. Op. Att'y Gen., 2009 WL 1968596 (June 9, 2009).

P. 64 §30-4-90. Minutes of meetings of public bodies.

CASE NOTES

When interpreting a county ordinance, the courts may look to the minutes of the council as evidence of legislative intent. Eagle Container Co., LLC v. County of Newberry, 379 S.C. 564, 666 S.E.2d 892 (2008).

ATTORNEY GENERAL'S OPINIONS

The Board of Probation, Parole and Pardon Services' refusal to disclose individual votes of board members based on policy rather than any statutory provision does not comply with FOIA. The votes of individual members must be disclosed. S.C. Op. Att'y Gen., 2001 WL 790250 (May 22, 2001).

A question was raised on whether or not one member of a public body – in this case, a member of the school board – could place in the body's meeting minutes, without board majority consensus, information and/or documents that the individual member insists be included in the minutes. Section 30-4-90 establishes requirements for information that must be included in public meeting minutes:

(a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:

(1) The date, time and place of the meeting;

(2) The members of the public body recorded as either present or absent;

(3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken; and

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

S.C. Code Ann. § 30-4-90 (emphasis added). The plain language of subsection (a)(4) allows "any member of the public body" to have information included within the minutes. "Any" is commonly understood to include one or more of a group. Given the Legislature's stated intent to allow the public to access meetings and to learn and report on the activities of public officials, it seems consistent with its design to interpret subsection (a)(4) to permit one or more members of a public body to request to include information in the minutes without being subjected to majority vote requirements. Under this construction a minority of a public body could include information demonstrating its reasons for opposition to action taken by the body within the minutes. Allowing publication of information at a single member's request is broadly consistent with the Legislature's expressed intent that public business be conducted in an open and public manner. S.C. Op. Att'y Gen., 2022 WL 119688 (January 4, 2022).

P. 65 §30-4-100. Injunctive relief; costs and attorney's fees.

CASE NOTES

There is no good faith exception for an award of attorney's fees under FOIA. The Spartanburg Herald-Journal v. Spartanburg County School District No. 7, 374 S.C. 307, 649 S.E.2d 28 (2007).

Attorney's fees may be awarded pursuant to §30-4-100, even though the information that is being requested is produced prior to a court determination on whether the information should have been released. 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 status to the citizen by producing the documents after litigation is filed. Sloan v. Friends of the Hunley, Inc., 393 S.C. 152, 711 S.E. 2d 895 (2011).

A citizen has standing to bring a suit to invalidate a severance agreement between a county and its former administrator on the basis that it violated FOIA. The severance package was not placed on the council meeting agenda where it was approved. The legislature has specifically conferred standing upon any citizen to bring a FOIA claim against a public body for declaratory or injunctive relief, or both under §30-4-100(a). Appellant has pled that he is a citizen of the State and that FOIA has been violated. Nothing more is required. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012).

Although a circuit court correctly found that a school district had violated FOIA by not producing documents and was within its discretion to award attorneys' fees, it abused its discretion by reducing the hourly rate of the attorneys for the prevailing party without basing its decision on any evidence. There are six factors courts should consider in exercising that discretion: (1) nature,

extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004)*. We have previously held that a court should consider all six factors in making its decision, and we have explained "none of these six factors is controlling." *Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)*. "[T]he trial court should make specific findings of fact on the record for each of these factors." *Burton, 358 S.C. at 358, 594 S.E.2d at 898.*

"Here, the circuit court made general findings as to some—but not all—of the six factors." Nevertheless, the circuit court awarded attorney's fees at a rate of $100 per hour, rather than the hourly rate presented by Horton—$295 for Twombley and $250 for Campbell. The court provided no explanation and cited no evidence in the record to support its conclusion that $100 per hour was reasonable. At oral argument, counsel for the school district was asked to point to evidence that supported the $100 per hour rate. When counsel could not do so, he admitted the circuit court "should have explained her reasoning in a more comprehensive way." Although the circuit court has discretion in deciding the "specific amount of ... reasonable attorneys' fees*," Kiriakides, 382 S.C. at 20, 675 S.E.2d at 445*, its decision must not be "based on unsupported factual conclusions," *Sloan, 393 S.C. at 156, 711 S.E.2d at 897*. In the absence of any evidence to support the rate, we find the circuit court abused its discretion. *Horton v. Jasper Cnty. Sch. Dist.*, 815 S.E.2d 442 (S.C. 2018).

A trial court did not abuse its discretion in awarding attorneys' fees when a party prevails only in part or withdraws or abandons certain claims against a school district for violating FOIA prior to trial. The school district produced requested information prior to trial, but after the commencement of litigation. "If a person or entity seeking relief under [the Freedom of Information Act[2] prevails, [s]he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award [her] reasonable attorney's fees or an appropriate portion of those attorney's fees. *Glassmeyer v. City of Columbia, 414 S.C. 213, 224, 777 S.E.2d 835, 841 (Ct. App. 2015)*. ("Under this section, the only prerequisite to an award of attorney's fees and costs is that the party seeking relief must prevail, in whole or in part." (quoting *Campbell v. Marion Cnty., Hosp. Dist., 354 S.C. 274, 288-89, 580 S.E.2d 163, 170 (Ct. App. 2003)*; *Sloan, 393 S.C. at 156, 711 S.E.2d at 897* ("[A] prevailing party is one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." (alteration in original) (quoting *Heath v. County of Aiken, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990)); id. at 157, 711 S.E.2d at 897* ("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."); *Burton, 358 S.C. at 358, 594 S.E.2d at 898. Garris v. Lexington Sch. Dist. One*, 2022-UP-297, (S.C. App. 2022). (Not reported in S.E.2d).

P. 67 §30-4-110. Penalties.

PRACTICE POINTERS

South Carolina had its first case of criminal charges against a public body for failure to comply with FOIA. Four members of a fire commission were issued courtesy summons to face criminal charges in magistrates court for a violation of §30-4-110. They were accused of willfully and intentionally holding an illegal meeting on June 16, 2010, by failing to give the required 24-hour notice, not taking proper minutes of the meeting, failing to notify the public, and by taking a secret vote at the meeting. Although there was an admission that the meeting in question was held in violation of FOIA, a jury court found the commissioners not guilty based on a finding that their actions were not willful. Even though no criminal sanctions were issued, this case serves as a reminder of the serious consequences of noncompliance with FOIA.

APPENDIX

P. 69 §4-9-130. Public hearings on notice must be held in certain instances; adoption of standard codes or technical regulations and furnishing copies thereof; emergency ordinances.

ATTORNEY GENERAL'S OPINIONS

A county wanted to know whether the granting of a utility easement by the county over real property that it owns should be authorized by ordinance in accordance with the provisions of §40-9-130 and be treated as if it were a transfer of a fee simple interest in property. Given the binding effect that a transfer of a utility easement would have on the county and the fact that the transfer of an easement on the county's property constitutes a legislative act, an ordinance calling for such a transfer requires a public hearing. S.C. Op. Att'y Gen., 2009 WL 580887 (February 17, 2009).

As a part of the procedure for approving new debt for a fire district where the county must sign off on any new bonds issued and approve the budget, a court giving effect to both §6-1-80 and §4-9-130 likely would find that each body must hold a public hearing prior to its adoption of the district budget. S.C. Op. Att'y Gen., 2012 WL 889085 (September 19, 2012).

P. 71 §6-1-80. Budget adoption.

ATTORNEY GENERAL'S OPINIONS

A school board is not required to notify the public that a proposed budget for the school board would result in tax increases if it were adopted. Section 6-1-80 requires a public hearing prior to the adoption of the school district's budget, as well as notice of such a hearing in a newspaper of general circulation at least fifteen days prior to the hearing. Additionally, the notice must contain information regarding current year revenues and millage rates versus budgeted revenues and millage rates. The district published the notice in the Post and Courier on June 13, 2005, advertising a public hearing to be held on June 28, 2005. The notice appears on its face to meet all of the requirements for notice set forth in §6-1-80. S.C. Op. Att'y Gen., 2006 WL 1877118 (June 27, 2006).

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  - Technical research bulletins and surveys
  - Online forum discussions for county officials
- Host our Annual Awards program showcasing counties' successes
- Communicate regularly through:
  - The monthly *County COMPASS* email newletter;
  - Our quarterly *County Focus* magazine;
  - Social media channels; and
  - The SC Counties events app

Local Leaders. Statewide Strength.

www.sccounties.org

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