ALAN WILSON
ATTORNEY GENERAL

June 14, 2023

Howard M. Knapp
Executive Director
South Carolina Election Commission
Post Office Box 5987
Columbia, South Carolina 29201

Dear Mr. Knapp:

We received your letter requesting an opinion from this Office as to whether "[u]nder S.C. Code § 30-4-40(a)(2), can statements and information provided by persons involved in the elections process to SEC auditors in the course of an audit authorized under Sec. 7-3-20(D)(3), when what is provided is not otherwise protected by another provision of law, be considered 'information of a personal nature' subject to the SEC's discretionary exemption from disclosure under FOIA"?

Law/Analysis

Section 30-4-40 of the South Carolina Code (2007 & Supp. 2022) is contained in the South Carolina Freedom of Information Act ("FOIA"). The Legislature expressed the purpose of FOIA in section 30-4-15 of the South Carolina Code (2007):

> 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 South Carolina Supreme Court discussed the purpose of FOIA in South Carolina Tax Commission v. Gaston Copper Recycling Corporation, 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994), stating, "The purpose of the FOIA is to protect the public from secret government activity." In another opinion, the South Carolina Supreme Court determined: "South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996).

Our courts also recognize FOIA "is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003). Generally, FOIA requires public bodies to disclose their records unless such records fall within the enumerated exemptions provided in FOIA. S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2022) ("A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access."). Section 30-4-40 of the South Carolina Code lists the enumerated exceptions in which a public body may but is not required to disclose information under FOIA. However, our courts instruct that "consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed." Burton v. York County Sheriff's Dep't, 358 S.C. 339, 348, 594 S.E.2d 888, 893 (Ct. App. 2004).

Included in this list of exceptions under section 30-4-40 is the following:

> 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, 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, and any audio recording of the final statements of a dying victim in a call to 911 emergency services. Any audio of the victim's statements must be redacted prior to the release of the recording unless the privacy interest is waived by the victim's next of kin. This provision must not be interpreted to restrict access by the public and press to information contained in public records.

S.C. Code Ann. § 30-4-40(a)(2) (Supp. 2022). As our Court of Appeals explained in Burton v. York County Sheriff's Department, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004),

> Section 30-4-40(a)(2) does not specifically list or define the types of records, reports, or other information that should be classified as personal or private information exempt from disclosure. We must, therefore, resort to general privacy principles, which examination involves a balancing of conflicting interests-the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.
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> Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, "'one of the primary limitations placed on the right of privacy

> is that it does not prohibit the publication of matter which is of legitimate public or general interest.'" Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)). Indeed, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting Meetze, 230 S.C. at 337, 95 S.E.2d at 609).

In balancing personal rights to privacy and public rights to information, our courts consider whether the evidence "demonstrates disclosure would further the FOIA's purpose of protecting the public from secret government activity." Glassmeyer v. City of Columbia, 414 S.C. 213, 223, 777 S.E.2d 835, 841 (Ct. App. 2015). If the court finds the information is personal in nature and releasing such information would not further FOIA's purpose, then the exemption is likely to apply. Id. (finding disclosure of home addresses, personal telephone numbers, and personal e-mail addresses of city mayor applicants constitutes an unwarranted invasion of an individual's privacy and therefore, exempt from disclosure under privacy exemption). According to our Supreme Court, "This is . . . a determination necessarily based on evidence." S.C. Lottery Comm'n v. Glassmeyer, 433 S.C. 244, 251, 857 S.E.2d 889, 893 (2021) (refusing to uphold the circuit court's judgment on the pleadings as to whether lottery winners' personal information is covered under the privacy exemption because there was not an opportunity to develop a factual record upon which to base the court's decision). Furthermore, "[t]he determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." City of Columbia v. Am. C.L. Union of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996).

With this information in mind, we now consider whether the information provided to the State Election Commission ("SEC") through an audit would qualify under this exception to FOIA. Section 7-3-20 of the South Carolina Code (Supp. 2022) sets forth the responsibilities of the executive director of the SEC. Included in these responsibilities is a requirement that the executive director

> conduct reviews, audits, or other postelection analysis of the county boards of voter registration and elections, as established pursuant to Article 1, Chapter 5, to ensure those boards' compliance with the requirements with applicable state or federal law or State Election Commission policies, procedures, or standardized processes with regard to the conduct of elections or the voter registration process by all persons involved in the elections process . . . .

S.C. Code Ann. § 7-3-20 (D)(3). In your letter, you also informed us that the Legislature recently amended section 7-3-20 adding a requirement that the executive director

> establish methods of auditing election results, which may include risk-limiting audits, hand-count audits, results verification through independent third-party vendors that specialize in election auditing, ballot reconciliation, or any other method deemed appropriate by the executive director. Election result audits must be conducted in all statewide elections after the election concludes, but prior to certification by the State Board of Canvassers, and may be performed following any other election held in the State at the discretion of the executive director. Once completed, audit reports must be published on the commission's website.

S.C. Code Ann. § 7-3-20(D)(19).

You state that in order to comply with these requirements, the SEC established an auditing division. As a part of conducting such audits, the SEC staff will interview people involved with the election process. As such, you state the following concern:

> It is important that the SEC auditors will be able to obtain full and frank statements from those interviewed during an audit. Therefore, those who are interviewed must be confident that the substance of their statements will remain confidential. This is a principle recognized by South Carolina Law in many places where authority to conduct audits is granted to state agencies.

You continue by citing other provisions of law requiring records gathered in the process of an audit to be kept confidential. S.C. Code Ann. § 2-15-62 (2005) (requiring confidentiality of records obtained by members of the Legislative Audit Council); § 1-6-100 (Supp. 2022) (protecting the identity of persons reporting information to the Office of the Inspector General); § 11-7-35 (2011) (making the audit working papers and memoranda of the State Auditor confidential). However, you note at the present time there is not a specific provision explicitly protecting the confidentiality of the information collected during an audit conducted by the SEC. Therefore, you question whether such information may be exempt from disclosure under the privacy exemption from FOIA.

While section 30-4-40(a)(2) lists some examples of information deemed personal or private and therefore exempt from FOIA, this section does not include an exhaustive list. Therefore, in accordance with guidance from our courts, it must be determined whether the privacy interests outweigh the public's interests with respect to the information. As we noted above, this determination must be made on a case-by-case basis and in accordance with the facts. As we stated in numerous opinions, this Office "does not have the jurisdiction of a court to investigate and determine facts." Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015). Accordingly, only a court can balance the conflicting interests of the interviewee's personal privacy and the public's interest in the information they provide. However, we note in City of Columbia v. American Civil Liberties Union of South Carolina, Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996), our Supreme Court rejected the contention that internal investigation reports of law enforcement agencies are *per se*

exempt from FOIA under the privacy exemption. The Court stressed, "The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." Id. Accordingly, we do not believe a court would adopt the contention that all information contained in every interview is *per se* exempt. As such, we believe a court would look at the information contained in each interview to determine whether the public's right to that information is outweighed by the individual's privacy interests.

Conclusion

As explained above, whether information gathered by the SEC in the process of conducting an audit falls within the privacy exemption under FOIA must be determined on a case-by-case basis weighing the interviewee's privacy interests against the need to protect the public from secret activity. "Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions." Op. Att'y Gen., 1999 WL 986738 (S.C.A.G. Sept. 3, 1999). Therefore, this balancing of interests must be performed by a court of competent jurisdiction who adjudicate and investigate the facts.

Nonetheless, we understand that without the ability to keep information obtained through the audit process confidential, the SEC may face difficulty in obtaining information relevant to its audit. Therefore, as an alternative to relying on the privacy exemption, which may or may not afford protection for such information, the SEC may wish to seek a specific exemption from the Legislature similar to those provided to other agencies and as referenced in your letter.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General