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ATTORNEY GENERAL

October 7, 2004

R. Allen Young, Esquire
Mount Pleasant Town Attorney
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Dear Mr. Young:

You have sought our opinion regarding "relief options" which might be available involving a situation where "non-committee members are attending meetings [of committees appointed by Mt. Pleasant Town Council], sitting with the committee and participating therewith (no voting) on a regular basis." You reference your own Memorandum, dated October 18, 2002, as well as earlier memos dated August 20th and September 20th, 2002 in which you cautioned that such attendance and participation by noncommittee members of Council could violate the Freedom of Information Act. You also refer to our opinion of August 19, 2002. There, we agreed with your conclusion and stated that, should the facts demonstrate regular attendance and participation by noncommittee members, such could be deemed by a court to constitute a "meeting" of Town Council, thereby requiring compliance with the notice provisions of FOIA. Councilmember Santos has joined in your request for an opinion. Councilmember Van Nort has also requested an opinion regarding the same question.

Apparently, your concern relates to one instance in particular, which involved the County's Planning and Development Committee's consideration on July 2, 2002 of the Revised Impact Assessment for Seacoast Church expansion. Councilman Santos has questioned whether the FOIA was violated in that instance because a noncommittee member spoke at some length on this issue, placing certain "comments on the record before Tuesday night's Council meeting." As we understand it, the noncommittee member presence at the committee meeting was sufficient to constitute a quorum of Town Council itself – if that member's presence and participation is considered.

Law / Analysis

Our August 19, 2002 opinion considered "'the legality of Mount Pleasant noncommittee councilmembers attending and participating in committee meetings.'" We reviewed a number of decisions and Attorneys General opinions from other jurisdictions which considered the issue as well, as the conclusions reached by you as attorney for the Town of Mount Pleasant. The August 19, 2002, opinion referenced S.C. Code Ann. Section 30-4-70(c) of the Freedom of Information Act

which provides that "[n]o chance meeting ... shall be used in circumvention of the spirit of" the FOIA in order to "act upon a matter over which the public body has supervision, control, jurisdiction or advisory power."

In reviewing the case law and other authorities from jurisdictions outside South Carolina, we summarized these as follows:

> [t]hese authorities divide, reaching various conclusions. Some authorities conclude that the members present who are not part of the committee or body conducting the meeting must actually participate in order to be counted for purposes of a quorum of the full board. Other authorities conclude that the physical presence of the non-committee members transforms the meeting into a meeting of the full body.

Certain of these authorities view the mere physical presence of a noncommittee council or board member as no different from a member of the public being in attendance. These cases and Attorneys General opinions require actual participation by the member in the discussions of the committee for there to be a "meeting" of the full body. For example, we referenced the Opinion of the Minnesota Attorney General [Op. No. 63A-5, 1996 WL 492291, (August 28, 1996)] which stated as follows:

> [t]he foregoing reasoning would not apply, however, in circumstances where the additional Council members participate in discussion or deliberations of a committee which is officially comprised of less than a quorum of the Council. In such a case, the additional members' involvement would go beyond mere receipt of the same information as members of the public who might choose to attend. Discussions and deliberations among a quorum or more of the Council would lead to the formulation of a consensus or preliminary decision by the Council itself. Such a process should take place in a properly called and noticed Council meeting rather than in a meeting represented as a committee meeting only.

We further recognized in the August 19, 2002 opinion that "[t]here also exists authority which concludes that the physical presence of a quorum itself where a non-committee member is in attendance at a committee meeting creates a 'meeting' of the full body." We explained that these authorities have concluded that if noncommittee members attending a committee meeting created a quorum of the entire body, such attendance constitutes a violation of state law if the notice, agenda and public participation requirements of a meeting of the entire body were not met.

As part of the August 19, 2002 opinion, we also referenced a "third line of authorities [which] adopts the rule which creates a rebuttable presumption that anytime there is present a quorum of a public body, such is for the purpose of holding a 'meeting.'" This is the position of the Wisconsin Supreme Court as held in State v. Village Bd., 173 Wis.2d 553, 494 N.W.2d 408 (1993). In that case, the Court stressed that "[l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking ...." Thus, "interaction between

members of a governmental body is not necessary for convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties or responsibilities." 494 N.W.2d at 415.

Thus, in the context of the various lines of authority, our August 19, 2002 concluded:

> [b]ased upon the foregoing authorities, we agree with Mr. Young's analysis that, certainly, where the non-committee members in attendance at the committee meetings participate in the deliberations of the committee, a "meeting" of [council] has occurred. Moreover, we are of the opinion as well that the better analysis with respect to the situation which you reference is provided by the Wisconsin Supreme Court in State v. Village Bd., supra: that when a quorum of such body is assembled together there is created a rebuttable presumption that such assemblage is for a "meeting" of that body. While, clearly, non-committee members are free to attend committee meetings as spectators or observers, the physical assemblage of a quorum in the same room of a public body – in this instance Mt. Pleasant Town Council – creates the appearance, at least, that the Town Council is conducting a meeting.

With that background in mind, we turn to your additional question of what remedies are available with respect to any violations of the FOIA which occur as a result of the practice of noncommittee members attending and participating in committee meetings in those instances in which a quorum of th entire body of Town Council is present in the meeting at the same time. As we concluded in the August 19, 2002 opinion, "each situation would have to be judged on its own facts."

We continue to hold the opinion that the practice of noncommittee members of Mount Pleasant Town Council attending and participating in committee meetings and which result in the full Council being physically present in the room, constitutes a likely violation of the Freedom of Information Act if the notice provisions of the Act are not followed informing the public of a meeting of Town Council. This conclusion would also hold true as to the July 2, 2002 committee meeting which you specifically reference. By the same token, however, we have stated repeatedly over the years that "only a court could actually determine that a violation of the Freedom of Information Act has occurred ..." in a given situation. Op. S.C. Atty. Gen., September 13, 1995. Thus, with respect to your question concerning what remedies are available, we would refer you to the specific judicial remedies contained in the Freedom of Information Act, § 30-4-10 et seq. We will outline these remedies below.

We note that the Freedom of Information Act was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions and was amended by Act No. 118, 1987 Acts and Joint Resolutions. The Act's preamble best expresses both the Legislature's intent in enacting the statutes, as well as the public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

> [t]he General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Based upon this legislative purpose, our courts thus held that "the FOIA was enacted to prevent the government from acting in secret." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001). Moreover, "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Id. at 864-865.

With respect to the notice requirements contained in the FOIA, we have consistently opined that the Act mandates adequate notice. The notice provisions of the FOIA are found in § 30-4-80. Opinions dated February 22, 1984, October 11, 1989 and June 28, 1991 (Op. No. 91-42) address the Act's notice requirements. In the February 22, 1984 opinion, for example, we stated the following:

> ... there must also be ample notice to the public of public meetings. For, it is generally recognized that if no steps are taken to make the public aware that a public meeting is taking place, the fact that the meeting is open is rendered "virtually meaningless." Bensalem Tp. Sch. Dist. v. Gigliotti Corp. (Pa.), 415 A.2d 123, 125 (1980). As the Pennsylvania Supreme Court stated in Consumers Education and Protection Assn. v. Nolan, 470 Pa. 372, 384, n. 4, 368 A.2d 675, 581, n. 4 (1977),
>
> > ... adequate notice to the public at large is an integral part of the public-meeting concept; a meeting cannot be deemed to be public merely because its doors are opened to the public if the public is not properly informed of its time and place ... .
> >
> > And, without doubt, these notice requirements may not be simply ignored by the public body; they are mandatory ... The section requires overt and affirmative action by the public body to fulfill the notice requirements.

Section 30-4-80 sets forth the notice requirements which must be complied with pursuant the FOIA. Among the requirements is that the notice must be posted at the office or meeting place at least twenty-four hours prior to the meeting and that the news media must be notified. This provision expressly states that "[t]he notice must include the agenda, date, time, and place of the meeting." Such requirement is particularly important with respect to the situation in which a quorum

of the entire Town Council is gathered in one room at a committee meeting, and yet the public is not notified of a meeting of the full Council. As the Court noted in State v. Village Bd., supra,

> [h]owever, because no notice was given of their attendance, the public may not have been aware of the perceived importance of these meetings to the Village Board and therefore failed to attend. Thus, the public was not made aware that information was being presented that could form the rationale behind the Village Board's action. The open meeting law is intended to allow the public access to the fullest information possible concerning the workings of government and the decisionmaking process. The public can hardly have access to this information if not made aware of its existence. Thus, even if the Village Board members did not interact at the Plan Commission meetings, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decisionmaking authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law.

494 N.W.2d at 415.

Sections 30-4-100 and 30-4-110 set forth the remedies for violation of the FOIA. Pursuant to § 30-4-110, any person who willfully violates the Act is subject to criminal prosecution and fine or imprisonment upon conviction. To our knowledge, this provision authorizing criminal sanctions has seldom, if ever, been used.

The principal enforcement mechanism of the FOIA is found in § 30-4-100 of the Act. Such provision states:

> § 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. 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.
>
> (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.

Our appellate courts have generally deferred to the trial court's discretion in determining the appropriate remedy for a violation of the FOIA. For example, in Business License Opposition Committee v. Sumter County, 311 S.C. 24, 426 S.E.2d 745 (1992) the Supreme Court concluded that the special master did not abuse his discretion in enjoining Sumter County from holding any further "informal" or discussion meetings violative of the FOIA. Moreover, the Court found that the master did not abuse his discretion in ordering equitable relief invalidating the County's tax ordinance amendment.

And, in Quality Towing, Inc. v. City of Myrtle Beach, supra, the Supreme Court concluded that

> ... the plain language of section 30-4-20(a) clearly includes an "advisory committee" such as the one set up in the instant case. We therefore remand for a determination of what relief, if any, Quality is entitled to as a result of this violation.

345 S.C. at 163. (emphasis added). Further, in Burton v. York County Sheriff's Department, 358 S.C. 339, 594 S.E.2d 888 (2004), the Court of Appeals recently upheld the trial courts grant of a permanent injunction against the Sheriff and Sheriff's Department from asserting exemptions to disclosure which had no legal or factual justification. Rejecting the Sheriff Department's contention that the injunction was overly broad, the Court of Appeals held that

> [t]he injunction issued in the trial court's order provided that "defendants are permanently enjoined and restrained from asserting exemptions from mandatory disclosure that have no legal or factual justification, and from continuing to refuse to segregate exempt and non-exempt material and make non-exempt public records available for inspection and copying." The Sheriff's Department avers this injunction "did not set forth specific reasons for its issuance or describe in reasonable detail the acts to be restrained." The Department argues "the permanent injunction prevents the defendants from asserting statutory and constitutional exemptions under [FOIA]" and "extends beyond the records requested in this case to all information and records in possession of the defendants in perpetuity."
>
> Reading the trial court's order as a whole, the reasons for the injunction and the acts it intends to proscribe are amply clear. The trial court, in its findings of fact and conclusions of law, discussed at length the FOIA violation and the records ultimately subject to disclosure. We do not read the trial court's order as compelling the production of records which are exempt under FOIA. To the extent that any of the Sheriff's Department's records are exempt under section 30-4-40 of FOIA, the Department is not obligated to disclose them. We find no error with the issuance of the injunction or its scope.

358 S.C. at 354.

Conclusion

We reaffirm our opinion of August 19, 2002. In our opinion, a court would most probably conclude that the attendance and participation by noncommittee members at a committee meeting of Mount Pleasant Town Council – where there is present a quorum of the full Council – constitutes a "meeting" of the full Council. Thus, failure to comply with the notice requirements of the Freedom of Information Act – § 30-4-80 – could well result in a court's determination of a violation of the FOIA. We caution that, as we have noted previously, whether in a given instance the FOIA has been violated depends upon all the facts and circumstances, and only a court can determine that the FOIA has been contravened. Nevertheless, it is our opinion that any time a quorum of the full Council is present and participates in discussions regarding a matter over which the Council possesses jurisdiction and control, the FOIA's notice requirements relating to a meeting of Council should be followed.

With respect to remedies for a violation of FOIA, such remedies are provided in § 30-4-100 of the Act. Our courts have stressed that the trial judge (here the circuit court) possesses broad discretion to fashion a remedy for any violation of the FOIA. The trial court may, in its discretion, grant an injunction against future violations of the Act by the public body. It may even determine that action taken by the body in violation of the Act is void. Or, in the alternative, the trial court may conclude that no remedy in a given situation is appropriate. The Court also possesses the discretion to award any person bringing a successful action pursuant to the FOIA reasonable attorneys fees and/or costs of litigation.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

cc: The Honorable Gary K. Santos
The Honorable William A. Van Nort