8258 Advisory

HENRY MCMASTER
ATTORNEY GENERAL

October 27, 2006

The Honorable Dwight A. Loftis
Member, House of Representatives
540 Sulphur Springs Road
Greenville, South Carolina 29617

Dear Representative Loftis:

This opinion is in response to your inquiry regarding fees which may be charged by an agency for production of records under the South Carolina Freedom of Information Act. By your letter, you informed us of the following:

> On July 14, 2006, the South Carolina Civil Justice Coalition ("SCCJC") attempted to obtain certain public records from the South Carolina Workers' Compensation Commission ("Commission") pursuant to the South Carolina Freedom of Information Act ("FOIA"), S.C. Code § 30-4-10 et seq. Specifically, SCCJC requested access to all final orders, Agreements and Final Releases, and Form 16's issued or approved by the Commission since 2001.
>
> The Commission responded in writing to this FOIA request on August 1, 2006 and stated that while SCCJC is entitled to review final orders of the Commission, a fee of four hundred and thirty-four thousand, two hundred and fifty dollars ($434,250.00) would be required to make the requested final orders available for inspection. In addition, the Commission asserted that the Agreement and Final Releases and Form 16's are not public and would not be released because they contain information related to workers' compensation accidents, injuries, and settlements.

Based on the above information, you request an opinion with respect to the following questions:

1. Is the fee of $434,250 sought by the Commission for responding to the above-referenced FOIA request reasonable, and is it consistent with the underlying premise of FOIA to make it possible for citizens to learn and report fully the

Request Letter

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activities of public officials at a minium cost, delay, and inconvenience to the requesting party?

2. If the Agreement and Final Releases and Form 16's sought by SCCJC contain material which is exempt, is the Commission required to separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of the FOIA?

Law/Analysis

The FOIA was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions. A number of amendments have been made to FOIA over the years. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble to FOIA, set forth in S.C. Code Ann., Section 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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

(emphasis added).

On numerous occasions, in construing FOIA, we have emphasized the Legislature's expression of openness in government, as articulated in § 30-4-15. In Op. S.C. Atty. Gen., Op. No. 88-31 (April 11, 1988), for example, we summarized the rules of statutory construction which this Office adheres to in interpreting FOIA, as follows:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. Bankers Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News & Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C.App 37, 223 S.E.2d 580 (1976). See also Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611

> S.E.2d 496 (2005) [FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government]; Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) ["FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature."].

Section 30-4-30 of the South Carolina Code (1991 & Supp. 2005), contained in FOIA, provides in relevant part that

> (a) Any person has a right to inspect or copy any public record of a public body except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.
>
> (b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit by these costs before searching for or making copies of the records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

We have commented upon § 30-4-30 and the requirements thereof on several occasions. For example, in Op. S.C. Atty. Gen., Op. No. 92-40 (July 23, 1992), we stressed that the reasonableness of the fees charged for production and reproduction of public records is ultimately a factual question to be made by a court. However, we cautioned therein that these fees may not constitute a means for denying access to records. There, we stated:

> [a]pplying the terms of § 30-4-30 to the cited terms of the resolution, we note that the public body may make reasonable rules concerning time and place of access to public records. What is considered reasonable is a question of fact and depends on the circumstances under which access is permitted. In addition, fees may be established

and collected for searching for or making copies of records; such fees may not exceed actual costs. Also, the custodian may charge a reasonable hourly rate for making records available to the public. This Office cannot determine such factual questions as whether $.25 per page exceeds the cost of making a copy or whether $15.00 per hour for custodian's time is reasonable. Finally, a requester may be required to post a reasonable deposit prior to the public body's searching for or copying records; whether the required deposit of an amount equal to the estimated costs is reasonable is again a factual question.

By an opinion of this Office dated November 4, 1976 ..., we opined that public bodies may set up reasonable requirements for viewing and copying public records. That opinion cautioned, however, that an internal system or policy for handling such requests "must be carefully considered to make sure that it does not, by design or implication, inhibit or reduce the public's ability to examine public records." The same cautionary statement would be applicable to the situation outlined above.

If your constituents feel that the FOIA is being violated ... in that fees are in excess of actual costs, the hourly rate is not reasonable, the deposit is unreasonable, and the like, they may wish to consider pursuing the remedies available under FOIA.

And, in Op. S.C. Atty. Gen., October 4, 2004, we noted the following with regard to § 30-4-30:

[a]s indicated, the fees charged pursuant to the FOIA must not exceed the actual cost of searching for and making copies. Such copies must be furnished at the lowest possible cost. The charging of exorbitant fees inconsistent with such mandate would be improper.

Further, in Op. S.C. Atty. Gen., February 6, 2001, we concluded that

... the fee charged with the Department of Public Safety for copies of records must not exceed the actual cost of searching for and making copies and also must be furnished at the lowest possible cost ....

Prior opinions of this Office have consistently advocated practices that encourage the fullest possible access to public records. See Ops. Atty. Gen Jan. 24, 1990; April 11, 1988. In accordance, with this principle, we would question whether the increase, though less than the actual cost, is also the "lowest possible cost" required by Section 30-4-30. An increase that triples the previous rate concerns us, but many questions of fact must be resolved before any definitive conclusion could be reached. This Office is not authorized to make factual determinations in a legal opinion. See Op. Atty. Gen. Feb. 17, 1999 ... . Thus, a court, as the ultimate finder

> of fact, must determine whether the increased rate is both equal to or less than the actual cost and is, in fact, the lowest cost possible to provide copies of records ... . [O]nly a court could find that the Division [of Motor Vehicles] exceeded its authority.

(emphasis added).

These opinions are consistent with authorities elsewhere and with general authorities. As is noted in 37A Am.Jur.2d, Freedom of Information Acts, § 444, a fee charged by an agency for providing records "can only be one which compensates for the actual cost of furnishing the records or services provided, and the agency is not mandated to set the fee at a profit-making level." Moreover, it is also recognized that "the fee for copying public records must be reasonable and cannot be used as a tool to discourage access." 66 Am.Jur.2d, Records and Recording Laws § 20. The agency bears the burden of justifying the charging of fees to the public. See, Graham v. Davis County Solid Waste Mgment and Energy Recovery Special Service Dist.., 979 P.2d 363 (Utah 1999). A fee which appears exorbitant based upon the "mere size" of the fee must be rebutted by the agency. Natl. Treas. Employees Union v. Griffin, 811 F.2d 644 (D.C. Cir. 1987) [fee of $8,000]. The presumption is in favor of disclosure of documents. Fuller v. Homer, 113 P.3d 659 (Alaska, 2005); Rathmann v. Bd. of Directors of Davenport Comm. Sch. Dist., 580 N.W.2d 773 (Iowa 1998). Excessive charges for access to records "constitute a subversion of the intent of the [Freedom of Information] Act." Op. Ky. Atty. Gen., Op. No. 03-ORD-050 (March 19, 2003). Thus, it is clear that an agency may not impose an excessive or exorbitant fee for producing public records and, pursuant to § 30-4-30 and Op. S.,C. Atty. Gen., February 6, 2001, must charge only the actual cost to the agency in such production, as well as the lowest possible cost.

Next, we address your question as to whether the Commission must separate material that is not exempt from the FOIA from material that is exempt and provide such material to SCCJC. Section 30-4-30(a), as cited above, contains the general provision requiring public records of public bodies to be open to public inspection. Section 30-4-40 of the South Carolina Code (1991 & Supp. 2005) exempts a public body from providing such information as contained in its enumerated list. Subsection (b) of this provision, however, states: "If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter." S.C. Code Ann. § 30-4-40(b) (Supp. 2005). In considering this portion of section 30-4-40 in a previous opinion, we explained: "when a request under the Act is received by an agency, each document requested must be reviewed in its entirety to determine whether any or all of the document is subject to disclosure." Op. S.C. Atty. Gen., October 15, 1986. Furthermore, in another opinion we concluded the exemptions under FOIA must be applied narrowly and an agency which desires to use an exemption has "the burden of showing document-by-document and line-by-line the applicability of that exemption." Op. S.C. Atty. Gen., February 25, 1998.

Conclusion

As we have previously recognized, only a court may determine the reasonableness of a fee or charge imposed by an agency for the costs of producing records. However, it must be emphasized that an agency's charge of excessive fees for producing records requested under FOIA is as much a violation of the Act as outright denial of records deemed disclosable pursuant thereto. Based upon the express requirement set forth in § 30-4-30 of FOIA, a public body, such as the Workers' Compensation Commission, must produce the records requested at actual cost to the agency and at the lowest possible cost. In accordance with this standard, the agency or public body cannot indirectly deny access to records not subject to exemptions provided pursuant to § 30-4-40 by imposing excessive or exorbitant costs of production upon the requester. As we have previously opined, an agency which desires to rely upon a particular exemption to disclosure under FOIA, has the "burden of showing document-by-document and line-by-line the applicability of that exemption."

In other words, a court will require the public body to justify fees which, based upon the "mere size" of the fee, appear excessive. Considering the huge size of the fee in question here, such fee appears on the surface to be excessive and exorbitant. While only a court could make such a determination, based upon the actual costs to the agency to produce the records requested, and whether the amount charged is indeed the "lowest possible cost," the agency will have to set forth in detail to the court why such a large fee is warranted. Although the court may require a narrowing of the scope of the request, it is difficult to imagine that a fee bordering on almost a half a million dollars is the lowest possible cost for producing even the large quantity of documents requested. Moreover, the agency will have to justify document-by-document and line-by-line any exempted material and is required to separate the disclosable material from that entitled to exemption.

Our suggestion, beyond what we have stated herein, (which is simply to restate the law, rather than make factual conclusions) is thus that the S.C.C.J.C. utilize the remedies provided under FOIA. If an agency has not followed the requirements of § 30-4-30, and has indeed denied access to records through the imposition of excessive fees, or is withholding non-exempt material from disclosure, an action in circuit court for violation of FOIA, may result in enjoining such practice and imposing attorneys fees upon the agency. See, Op. S.C. Atty. Gen. August 11, 2006. ["Any violation of the Act ... authorizing a court to issue an injunction and to assess attorneys fees against the body."]

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General