

October 22, 2007

Charles J. Boykin, Esquire
Boykin, Davis & Hawkins, LLC
Post Office Box 11844
Columbia, South Carolina 29211

Dear Mr. Boykin:

We understand from your letter that you represent Greenville Technical College and wish to request an opinion on its behalf regarding whether certain matters before the Greenville Technical College Area Commission (the "Commission") must be discussed in an open session of the Commission's meeting or whether they may be discussed in an executive session. From your letter, we understand the matter in question is the College's anti-nepotism policy, which you recite in your letter. You state that the Commission's chairman, Dr. Robert Wilson, "has been advised that some members of the Area Commission would like to meet and discuss a possible change to the [anti-nepotism] policy. In addition to seeking to change the policy, some members are seeking to have this discussion in Executive Session." Thus, you at the prompting of Dr. Wilson, are asking whether this matter may be discussed in executive session or whether an open session is required.

Law/Analysis

Section 30-4-60 of the South Carolina Code (2007), forming part of the South Carolina Freedom of Information Act ("FOIA"), requires: "Every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." Section 30-4-70 of the South Carolina Code (2007) allows public bodies to conduct meetings closed to the public for the following reasons:

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

(2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

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

(4) Investigative proceedings regarding allegations of criminal misconduct.

(5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

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

In construing this provision to determine whether the Commission may discuss its anti-nepotism policy in a closed session, we must keep in mind the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Davis v. School Dist. of Greenville County, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007).

The Legislature expressed the purpose of FOIA in section 30-4-15 of the South Carolina Code (2007). This provision states:

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.

S.C. Code Ann. § 30-4-15. From this provision, our courts determined that “[t]he essential purpose of the FOIA is to protect the public from secret government activity. South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government. The 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, 580 S.E.2d 163 (Ct. App. 2003) (citations and quotations omitted).

Given the principles of construction noted above, we must narrowly construe the exceptions to the open meeting requirement provided by the Legislature in section 30-4-70. In reviewing these exceptions, we do not find an exception clearly encompassing a discussion of a public body’s personnel policies. Subsection (a)(1) allows for discussion of matters related to the “employment, appointment, compensation, promotion, demotion, discipline or release of an employee.” However, because the statute specifies “an employee,” we do not believe given the narrow construction afforded to this exception that this exception includes employee policies generally applicable to all employees.

Furthermore, we considered a similar issue in an opinion issued in 2001. *Op. S.C. Atty. Gen.*, July 18, 2001. In that opinion, we were asked to address the propriety of Jasper County Council holding a meeting in executive session to discuss the county’s approval of the purchase of military time for county employees meeting certain criteria. *Id.* Looking specifically to subsection (a)(1) of section 30-4-70, we stated:

The statute does allow for the discussion of employment and compensation matters, but qualifies these by the phrase “of an employee, student, or a person regulated by a public body” The exception is for the purpose of protecting the privacy interests of the employee, or particular person, affected by the body’s discussions. A discussion of a general personnel policy applicable to all qualifying employees is not, in our opinion, contemplated by this exception.

Furthermore, this Office has consistently concluded that executive sessions should be used sparingly and that the Freedom of Information Act does not require that they be even employed at all if the public body so chooses. As was stated in an opinion of this Office dated March 31, 1994,

[t]he rule under the Freedom of Information Act is openness; the permissive reasons for holding executive sessions are few and narrowly drawn. If any doubt should exist as to whether a meeting should be open to the public, the doubt should be resolved in favor of openness, to conduct public business in public.

Mr. Boykin
Page 4
October 22, 2007

Thus, it is our opinion that discussion of a general personnel policy in executive session is not permissible under the Freedom of Information Act. Moreover, in light of the legislative purpose of the Act, any doubt in the construction of its provisions should be resolved in favor of an open session.

Id.

Based upon our reading of the exceptions provided to the open meeting requirement contained in section 30-4-70, the Legislature's intent with regard to the provision, and our past consideration of personnel policy discussions in an executive session, we are of the opinion that the discussion of an anti-nepotism policy does not appear to fall within the stated exceptions to the open meeting requirement under section 30-4-70. Thus, construing section 30-4-70 in favor of an open session, we conclude that matters such as discussions over an anti-nepotism policy are not eligible to be discussed in an executive session and must be discussed during an open meeting.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General