



HENRY McMASTER
ATTORNEY GENERAL

June 9, 2009

Kenneth E. Darr, Jr., Esquire
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104 North Daniel Morgan Avenue, Suite 300
Spartanburg, South Carolina 29306-2322

Dear Mr. Darr:

We understand you represent Spartanburg School District 7 (the "District") and wish to request an opinion on the District's behalf. In your letter, you mention an opinion issued by this Office in 1989. You state:

In 1989, the S.C. Attorney General rendered an opinion (copy attached) that the Spartanburg City Council may amend its agenda at the beginning of a meeting - in the absence of any indication that the amendment was being made for the purpose of circumventing FOIA - where the City of Spartanburg had an underlying ordinance which permitted City Council by common consent to suspend its rules of procedure to allow an amendment of its agenda.

You ask: "Has the opinion of the Attorney General's office changed or may a public school district board of trustees with a board policy that permits amendments of its agenda by majority vote of its members still properly amend its agenda at the beginning of a meeting pursuant to such policy without violating FOIA?"

Law/Analysis

The Legislature clearly expressed the purposes of the South Carolina Freedom of Information Act ("FOIA") in section 30-4-15 of the South Carolina Code (2007). This statute provides as follows:

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

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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. Moreover, our Supreme Court in Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006) stated that “[t]he purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies.” With regard to the interpretation of the statutes contained in FOIA, our courts recognize “FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.” New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007).

Section 30-4-80 of the South Carolina Code (2007), governing the notice of meetings held by public bodies, provides in pertinent part:

(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 is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

(emphasis added).

As you mentioned in your letter, this Office issued an opinion in 1989 addressing whether the Spartanburg City Council can place a matter on its agenda during a meeting that is not included in the original agenda. Op. S.C. Atty. Gen., May 2, 1989. In reviewing the opinion, this request was initially presented as whether such action may be taken with regard to various provisions of Spartanburg’s city code, which require that matters coming before Spartanburg City Council must be submitted to the city manager at least four days prior to a meeting. Id. Relying on another portion of the city’s code allowing the rules of procedure set forth in the city’s code to be suspended if all members of the city’s council consent, we concluded that if the members of the city’s council agree, the city council can place items on the agenda after the four-day requirement. Id. However, citing section 30-4-80(a) we also note that “the placement of business on the agenda cannot be used to circumvent the Freedom of Information Act or any other provision of law governing notice to other

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board members or to the general public.” Id. We surmised: “In other words, if it is anticipated that an item will be on the agenda, it should be placed there. However, with that caveat, we concur in your conclusion and your advice issued to Spartanburg City Council.” Id.

Although we continue to believe the advice given in our 1989 opinion is correct, we must point out that we were addressing the ability to add items to the City of Spartanburg’s agenda based on provisions in the Spartanburg Code of Ordinances, only commenting briefly that FOIA provisions must also be taken into account. Thus, our 1989 opinion did not specifically address whether FOIA permits amendments to agendas within twenty-four hours of a meeting.

You point out in your letter that section 30-4-80(a) requires “public bodies to post their agenda, if any, at least 24 hours prior to a meeting.” Thus, you believe the language “if any” indicates that an agenda is not required. In addition, you argue the “[n]o language in FOIA, at [the time of our 1989 opinion] or now, expressly prohibits an agenda amendment.” Thus, we understand you take the position that public bodies retain the freedom to add and delete items from the agenda after the twenty-four-hour period has expired.

In determining whether FOIA allows agendas to be amended within twenty-four hours of a meeting, we must employ the rules of statutory interpretation, the primary of which is to “ascertain and effectuate the intent of the legislature.” Hardee v. McDowell, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (quotations omitted).

All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute’s language must be construed in light of the intended purpose of the statute. If possible, legislative intent should be found in the plain language of the statute itself.

Gay v. Ariail, 381 S.C. 341, 344-45, 673 S.E.2d 418, 420 (2009) (citations omitted).

We agree with your assessment that FOIA does not specifically require public bodies to have an agenda and the use of the phrase “if any” in section 30-4-80(a) further supports this understanding. Thus, we understand your position that when an agenda is not required, if an agenda exists, the public body should be allowed to amend it. However, as we mentioned above, our courts take 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. Certainly, the public would receive the greatest protection by requiring that the agenda in its final form be posted at least twenty-four hours in advance of a meeting. Thus, members of the public would be well informed of matters to be discussed at the meeting. In addition, if public bodies are allowed to amend their agendas up until the time of a meeting, the twenty-four-hour posting requirement contained in section 30-4-80(a) could become meaningless, as the public body could post a blank agenda and fill in items for discussion at the last minute affording no notice to the public and defeating the purpose of section

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30-4-80(a). Furthermore, interpreting section 30-4-80(a) to permit last minute changes to agendas gives public bodies the ability to post agendas with only noncontroversial items and later amend those agendas to include more controversial items without notice to the public. Accordingly, we believe this reading would deny the public some of the protection FOIA seeks to afford.

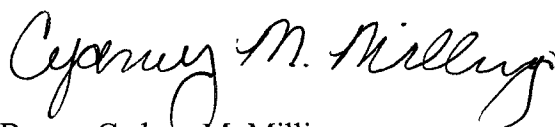
While we do not believe a public body is completely without leave to make minor adjustments to its agenda within the twenty-four hours prior to a meeting, we believe the best reading of section 30-4-80(a) is to require an agenda in its most final form to be posted at least twenty-four hours prior to the meeting. Moreover, we believe posting a final agenda within the twenty-four hour period best serves the spirit of FOIA.

Conclusion

We continue to believe the analysis and conclusions reached in our May 2, 1989 opinion are correct. However, because our opinion is based on our interpretation of whether the Spartanburg City Code would allow the addition of an item to an agenda of the Spartanburg City Council, we do not believe this opinion fully addressed the requirements for agendas posted pursuant to FOIA. Based on our reading of section 30-4-80(a) and taking into consideration the Legislature's intent with regard to FOIA, we believe posting an agenda in its final form at least twenty-four hours prior to a meeting best serves the Legislature's intent with regard to this provision.

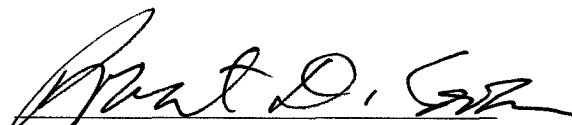
Very truly yours,

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