



HENRY McMASTER  
ATTORNEY GENERAL

July 9, 2010

The Honorable Shannon S. Erickson  
Member, House of Representatives  
129 S. Hermitage Road  
Beaufort, South Carolina 29902

Dear Representative Erickson:

We received your letter requesting an opinion of this Office concerning a new health insurance rate structure implemented by the City of Beaufort (the "City"). According to your letter, "[t]his year, the City of Beaufort has notified retirees that their category of '50+' has been renegotiated and in that process the premiums have been raised dramatically. The changes being made go into effect this year and only affects retirees." You added that "[i]n an effort to understand the changes, my constituents asked for documents from the City in a freedom of information act request. The request was sent certified mail and was signed for by a representative of the City, but to date, no reply has been received." In addition, you state that your "constituents are frustrated by the lack of communication from the City and feel that the practice of changing one category is discriminatory." Thus, you request an opinion of this Office on this matter.

#### **Law/Analysis**

Included with your request, you provided us with a copy of a letter from one of your constituents to Henry McMaster. According to this letter, the constituent requested information from the City as to "the analyses leading up to the increase and change in rate structure." The constituent states that he did not receive a response within the fifteen working days, as he believes is required under South Carolina law.

The South Carolina Freedom of Information Act ("FOIA") requires, in pertinent part:

(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.

...

(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and

legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

...

S.C. Code Ann. § 30-4-30 (2007). Section 30-4-20(a) of the South Carolina Code (2007) specifically includes municipalities in the definition of the term “public body” for purposes of FOIA. Thus, any public records held by the City, that are not exempt under section 30-4-40, must be disclosed upon request.

Section 30-4-20(c) of the South Carolina Code (2007) defines a public record as including “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” We are not sure what type of information the City maintains with regard to the insurance rates charged to its retirees. However, we would presume that generally insurance rate information, if held in the City’s possession, would fall under this definition of public record. Furthermore, we believe this information likely is not exempt under section 30-4-40 unless it contains individual insureds’ personal information, in which case, it may be exempt under section 30-4-40. However, without further information about the documents held by the City, we are unable to conclusively state that this information is required to be disclosed under FOIA. This Office, unlike a court, is without jurisdiction to investigate and determine factual issues. Op. S.C. Atty. Gen., April 9, 2010. As such, we cannot make conclusive findings as to the disclosure of the information sought from the City by your constituent. However, as a rule of thumb, this Office consistently advises public bodies with regard to FOIA that when in doubt, the body should disclose the information requested. Op. S.C. Atty. Gen., August 14, 2008. Moreover, while section 30-4-30(c) does not require disclosure within 15 days of receipt of the FOIA request, it does require that the public body respond to the request within 15 days of its receipt. Additionally, our Supreme Court stated that pursuant to section 30-4-30(c), a public body’s failure to respond to a request within 15 days equates to the public body’s approval of the request so long as the information is not exempt pursuant to section 30-4-40. Litchfield Plantation Co., Inc. v. Georgetown County Water and Sewer Dist., 314 S.C. 30, 32, 443 S.E.2d 574, 575 (1994).

Your constituent also raises questions about whether or not the City can create a separate group for retirees under 65 years of age without violating anti-discrimination laws. Section 38-71-200 of the South Carolina Code prohibits discrimination in insurance rates. This provision, contained in the general provisions for accident and health insurance, states: “Discrimination

between individuals of the same class in the amount of premiums or rates charged for a policy of insurance covered by this chapter, in the benefits payable on the policy, in terms or conditions of the policy, or in another manner is prohibited, except as provided in Sections 38-57-140 and 38-71-1110.” S.C. Code Ann. § 38-71-200 (2002). According to the information you provided, the City created a separate insurance class for retirees below the age of 65. To our knowledge, all individuals in this class are charged the same rate. Thus, we do not believe the City’s decision to charge this group a rate different than its active employees violates section 38-71-200. Thus, we do not believe that creating this class violates State law precluding discrimination with regard to health insurance premiums or rates.

Although we do not believe that creating a separate class for pre-65 retirees violates State law, we recognize that this classification may create an issue under federal law. One issue that may be considered is whether by creating a pre-65 class of retirees, the City violates the retirees due process rights guaranteed by the Fourteenth Amendment.

The Fourteenth Amendment prohibits states from depriving a person of “life, liberty, or property, without due process of law.” This prohibition applies with equal force to municipalities. See Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510 (1913). We take a two-step approach to procedural due process claims: first, we ask whether the plaintiff has been deprived of a protected liberty or property interest; if so, we ask whether the deprivation occurred without due process. Doe v. Heck, 327 F.3d 492, 526 (7th Cir.2003).

Pro’s Sports Bar & Grill, Inc. v. City of Country Club Hills, 589 F.3d 865, 870 (7<sup>th</sup> Cir. 2009).

In our research, we did not find any State law governing retirement benefits for municipal employees. Furthermore, we are not aware of the means by which the City’s employees are afforded post-retirement health benefits. Thus, we cannot comment on whether or not retirees have a property interest in post-retirement health benefits. Accordingly, we cannot address whether or not creating a classification for retirees under the age of 65 violates due process.

In addition to a due process claim, creating a category for retirees under the age of 65 may also create an issue with regard to federal law, such as the Employee Retirement Income Security Act (“ERISA”) or the Age Discrimination in Employment Act (“ADEA”). 29 U.S.C.A. §§ 1001 et seq. & 29 U.S.C.A. §§ 621 et seq. However, as we have stated on numerous occasions, this Office general does not construe federal law. Op. S.C. Atty. Gen., December 18, 2008. As, such, we are not equipped to address whether or not creating a pre-65 class of retirees violates federal law.

Lastly, your constituent asks “[u]nder whose purview does this situation fall?” We believe a State court must resolve any issues involving the City’s compliance with FOIA or any determination as to the discriminatory nature of the classification with regard to State insurance laws.

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However, with regard to any issue involving federal law, we believe these issues are best addressed before a federal court.

### **Conclusion**

According to FOIA, public bodies are required to disclose any public record not specifically exempt from disclosure upon request of an individual. Because the City is clearly a public body, it must then disclose any information it may have concerning retiree health insurance premiums, so long as this information does not fall into one of the exempt categories listed in section 30-4-40 of the South Carolina Code. We do not have any information on the type of records the City may maintain with regard to retiree health insurance premiums. Thus, we cannot conclusively determine whether such information must be disclosed. Regardless, we generally advise all public bodies to disclose records in their possession. Furthermore, we point out that according to section 30-4-30(c), the City is required to at least respond to any written request for records within fifteen days of receiving the request.

As for the discriminatory nature of the City's rate structure for retirees, we do not believe this rate structure violates State law. However, we recognize that creating a separate class for pre-65 retirees may create an issue under federal law. Nonetheless, any questions involving federal law are beyond the scope of an opinion of this Office.

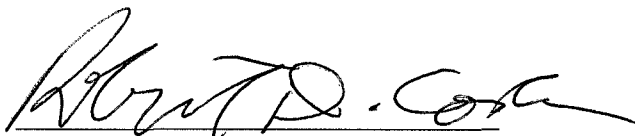
Very truly yours,

Henry McMaster  
Attorney General



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REVIEWED AND APPROVED BY:



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