HENRY MCMASTER
ATTORNEY GENERAL

May 12, 2010

The Honorable John M. "Jake" Knotts, Jr.
Senator, District No. 23
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:

We received your letter requesting an opinion of this Office concerning the Freedom of Information Act. As background, you explained the following:

> Recently I have had an inquiry from the media as to why they are being denied information under the Freedom of Information Act regarding their request for a list of school district employees, including teachers and administrators, who make over $50,000.00 a year. This would include those who have retired and entered the TERI [Teacher and Employee Retirement Incentive] program and also those who have completed the TERI plan and are employed on a contractual basis.

You asked whether or not the above referenced information should be released under the Freedom of Information Act. This opinion will address prior opinions, legislative intent, relevant statutes and caselaw.

Law/Analysis

Chapter 4, Title 30 of the South Carolina Code of Laws 1976 contains the "Freedom of Information Act" (FOIA). The General Assembly expressly states that the purpose of FOIA is 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 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 § 30-4-15.

In Sloan v. Friends of Hunley, Inc., the Supreme Court of South Carolina held that the "purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." Sloan, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006). Also, in Quality Towing, Inc. v.City of Myrtle Beach, the Supreme Court held that "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). The Code further clarifies the legislative intent of FOIA by stating, "[a]ny 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." S.C. Code § 30-4-30(a).

The terms "public body" and "public record" are both defined in S.C. Code § 30-4-20(a) and (c) respectively:

> (a) "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, **school districts**, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . . .
>
> (c) "Public record" includes 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. . . .

S.C. Code § 30-4-20(a) & (c) (emphasis added).

School districts are specifically mentioned in the definition of a public body and are bodies supported by public funds, so we believe school districts in South Carolina qualify under FOIA as a public body. S.C. Code § 30-4-20(a). As noted in an opinion of this Office dated January 24, 2007 we addressed a similar issue of disclosure under FOIA and concluded that a list of participants in the TERI program would qualify as public records. We stated as follows:

> [R]ecords containing information as to employees of the Department who are participants in the TERI program constitute public records. Therefore, under the FOIA, the Department, as a public body, is required to allow [the requestor] to inspect or copy such records.

Op. S.C. Atty. Gen., January 24, 2007.

S.C. Code § 30-4-40 lists various matters that are exempt from disclosure. Such matters include, among others, trade secrets, records of law enforcement during the course of an investigation, work product of legal council, and private investment and other proprietary financial data. S.C. Code § 30-4-40. Depending on the nature of the retirement fund, one could make an argument that an employee's retirement records could fall under the exemption in S.C. Code § 30-4-40(a)(19), "private investment and other proprietary financial data." Additionally, one could argue that the requested information should be protected under S.C. Code § 30-4-40(a)(2) which exempts "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." In Burton v. York County Sheriff's Department, the Court of Appeals explained the following:

> Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life free from unwarranted publicity. Sloan, 355 S.C. 321 (2003). However, "one of the primary limitations placed on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest." Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)).

Burton, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (2004).

The Burton court held that access to information sought should be granted because the "performance of public duties by the Sheriff and his deputies and the response of the Department to allegations of misconduct by the deputies" is a matter of public interest. Burton, 358 S.C. 339, 352 (2004). The court goes on to explain that under the Fourteenth Amendment, the right to privacy has been narrowly defined and limited to specific situations such as "certain rights of freedom of choice in marital, sexual, and reproductive matters." Burton, 358 S.C. at 353.

The Sheriff's Department urged the Burton Court to "add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny." Id. at 353. The court held that unless and until the Supreme Court rules otherwise, the court will "follow its precedent and not expand the 'right of privacy' under the Fourteenth Amendment beyond those situations which the Court has ruled bear on the most intimate decisions affecting personal autonomy-namely reproductive rights, familial and marital relations." Id. at 354.

In an opinion dated August 21, 1980, this Office concluded the following:

> By statute the names, sex, race, title, and dates of employment of all public employees when requested in writing must be furnished to the requesting party. Age, experience, length of contract, and daily schedules of all teachers employed in a school district constitutes information of a personal nature where the public disclosure thereof would constitute an

> unreasonable invasion of personal privacy absent the consent of the party about whom this information is sought.

Op. S.C. Atty. Gen., August 21, 1980.

We believe a court would hold, in accordance with the nature of FOIA, that the salary and retirement payments to school district employees - both TERI and contract - should be disclosed. The Supreme Court held in Seago v. Horry County that "[a]ny government agency attempting to avail itself of an exemption bears the burden of proving the exemption applies." Seago, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) (citing Evening Post Publ'g Co. v. City of North Charleston, 363 S.C. 452, 457, 611 S.E.2d 496,499 (2005)). The court also held that the "exemptions to FOIA should be narrowly construed to ensure public access to documents." Id.[1]

In an opinion of this Office dated April 10, 1995 we stated as follows:

> . . . common sense must prevail over technical niceties. This construction is not only in keeping with the spirit of the FOIA, but also with the admonition from the courts that, **where records show the manner of expenditure of public monies, there is virtually no legitimate reason why those expenditures should not be disclosed** . . .
>
> In this instance, nondisclosure of a person's compensation, because the actual salary is under $50,000 when, in reality, the employee's total compensation from the university or college exceeds that amount, would actually mislead the public by giving the false impression that the public body was renumerating the individual in an amount considerably less than is the case. Accordingly, it is our opinion that where the total compensation from the university or college is greater than $50,000, such must be disclosed.

Op. S.C. Atty. Gen., April 10, 1995 (emphasis added).

Similar logic can be applied to individuals who participated in the TERI program for five years but have now come back as contract employees. The language of the statute reads "persons receiving compensation of fifty thousand dollars or more annually." Even though the words "contract employee" are not mentioned, the individual's compensation should be disclosed under FOIA if he or she receives fifty thousand dollars or more. See Id.; S.C. Code § 30-4-40(6)(A).

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[1] See also, Society of Prof'l Journalists, 283 S.C. 563, 566 (1984) (DHEC argued that S.C. Code § 30-4-40(a)(2) applied as the "information was of a personal nature where the public disclosure thereof would constitute unreasonable invasion of privacy." However, the Supreme Court disagreed and held that the exception did not apply and the requested information should be disclosed as the information was of legitimate public interest).

Conclusion

In accordance with the general nature of FOIA and our referenced opinion above, where records show the manner of expenditure of public monies, there is no applicable exception in the law, nor, in our view, any valid basis for why those expenditures should not be disclosed. Op. S.C. Atty. Gen., April 10, 1995. We conclude that the list of school district employees, including teachers and administrators, who make over $50,000.00 a year should be disclosed. This would include those who have retired and entered the TERI program and also those who have completed the TERI plan and are employed on a contractual basis.

The school district is a public body and the information requested falls within the category of public record. Therefore, the list should be disclosed because "[a]ny 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." S.C. Code § 30-4-30(a). There is no clear exception in S.C. Code § 30-4-40 that applies to this situation.

Consistent with prior opinions, it is the opinion of this Office that all of the requested information should be released under the Freedom of Information Act.

Sincerely,

Henry McMaster
Attorney General

Leigha Blackwell

By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

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