



HENRY McMASTER
ATTORNEY GENERAL

May 25, 2010

Fire Chief Domenic Manera
York Fire Department
PO Box 500
York, SC 29745

Dear Chief Manera:

We received your letter requesting an opinion of this Office concerning the Rural Fire Board entering into executive session. As a way of background, you explained in your request letter that “[i]n York County we have the Rural Fire Board who oversees the disbursement of County funds as it applies to the rural fire program. The rural fire program is set up to ensure that the local volunteer fire departments are adequately equipped, and are also provided with base funding. The City of York on the other hand is under contract with the York County Council to provide fire protection in the unincorporated areas of our district.” You asked the following questions:

1. Is it proper for a board to enter into executive session to discuss a contract between two government bodies that they are not a party of?
2. Is it legal to take a straw poll while in executive session?
3. Is it legal to tell the members of the board that executive session will not end unless all members agree to support the motion?
4. Is it legal for a current county councilman to participate in an executive session with the Rural Fire Board and offer comments not consistent with the remaining members of the County Council? They had no knowledge of his attending this meeting.
5. While speaking with the Assistant County Manager for York County she made the statement that while in executive session it was obvious that several members of the Rural Fire Board had already met to discuss this issue via telephone or possibly

email. How does the law apply to members of a board having prearranged meetings or discussing issues prior to a meeting to secure votes? If this is a violation would those records such as emails be subject to disclosure if subpoenaed?

This opinion will address prior opinions of this Office, relevant statutes and caselaw to answer the questions posed above.

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).

"Every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70. The term "executive session" is defined as "one to which the public does not have access." Op. S.C. Atty. Gen., April 22, 1970. The South Carolina Code of Laws of 1976, § 30-4-70 specifies the limited reasons for which an executive session may be held and the procedure for entering into executive session. The statute reads as follows:

- (a) A public body may hold a meeting closed to the public for one or more of 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 .
..
 - (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 said 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).
- (b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.
- (c) No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

S.C. Code § 30-4-70(a) - (c). This Office stated that the “statute makes clear that no action may be taken on any of topics discussed in executive session even if they fall under one of the few exceptions” listed above. Op. S.C. Atty. Gen., March 10, 2004.

In an opinion of this Office dated October 8, 1996 we stated as follows:

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We have 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 chooses not to. As was stated in Op. No. 94-22,

[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.

Op. S.C. Atty. Gen., October 8, 1996.

This opinion will address each of your five questions individually in the conclusion.

Conclusion

Question 1

S.C. Code § 30-4-70(a)(2) states that a closed meeting is permissible to discuss negotiations for a contract, but the common understanding would be that one should be a party to the contract being discussed. Here, the Rural Fire Board is not a party to the contract between York County Council and the City of York.

When construing the exceptions of § 30-4-70 narrowly and taking into account the legislative preference for public session, it is the opinion of this Office that it does not generally permit a board to enter into executive session to discuss a contract between two government bodies to which they are not a party. However, one should note that the ultimate question of whether any particular issue fits within the exceptions of § 30-4-70 may hinge on facts that are beyond the scope of this opinion. As a general matter, questions of fact can only be determined by a court of competent jurisdiction and not this Office. See Ops. S.C. Atty. Gen. March 10, 2004; June 30, 2003.

Question 2

The last sentence of S.C. Code § 30-4-70(b) states that the “members of a public body may not commit the public body to a course of action by a polling of members in executive session.” Statutory language should be given its plain and ordinary meaning within the context of the overall legislative intent. It is the opinion of this Office that taking a straw poll during executive session would violate the statute, especially if members were held to the straw poll taken once executive session was over.

Question 3

In accordance with the response to Question 2, it would be a violation of the statute for members of the board to be told that executive session will not end unless all members agree to support the

motion.¹ “No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action” while in executive session. S.C. Code § 30-4-70(b). Therefore, holding members in executive session until a consensus is reached is not permissible because a court would likely consider such behavior a method of committing the body to a course of action while in executive session.

Question 4

This Office has stated that “a public body possessed the discretion to allow nonmembers of the body to attend closed meetings.” Op. S.C. Atty. Gen., October 8, 1996. We cited an opinion issued by the Virginia Attorney General which concluded the following:

No provision of the Freedom of Information Act . . . prohibits a public body meeting in executive session from permitting the presence of any person or persons whom they may deem necessary or helpful in conducting their executive discussions.

Op. S.C. Atty. Gen., October 8, 1996 (citing 1985-86 Va. Op. Atty. Gen. 331, July 11, 1985). See also, Op. S.C. Atty. Gen., April 26, 2002.

Although the law is somewhat sparse in this area, it is the opinion of this Office that a current county councilman may participate in an executive session with the Rural Fire Board and offer comments not consistent with the remaining members of the County Council without destroying the closed status of the meeting.

Question 5

S.C. Code § 30-4-70(c) states that “[n]o chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” S.C. Code § 30-4-7(c). Hence, it is the opinion of this Office that it would be a violation of the statute if several members of the Rural Fire Board had already met to discuss issues via telephone or possibly email. The law does not permit members of a board having prearranged meetings or discussing issues prior to a meeting in an attempt to secure votes. In light of the legislative intent of FOIA, a court could likely find that those records such as emails be subject to disclosure if subpoenaed.

¹ During executive session, a motion was made to recommend that the substations would only be built on the condition that York County terminates the current contract with the City of York for fire protection outside the city limits.

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Consistent with prior opinions of this Office, if there is any doubt as to whether information should be disclosed, the doubt should be resolved in favor of openness.

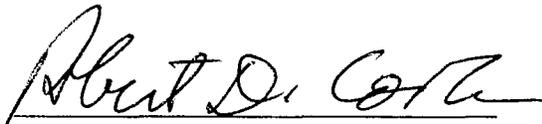
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General