

January 24, 2007

Eric S. Moore, Human Resource Director
South Carolina Vocational Rehabilitation Department
Post Office Box 15
West Columbia, South Carolina 29171-0015

Dear Mr. Moore:

You recently submitted a letter requesting an opinion of this Office dealing with the South Carolina Freedom of Information Act ("FOIA"). You informed us that you received several FOIA requests from Vic Abercrombie seeking the names of the South Carolina Vocational Rehabilitation Department's (the "Department's") employees participating in the Teacher and Employee Retirement Incentive ("TERI") program and the dates these employees began participating in the TERI program.

In your letter you state:

In researching how to respond to these requests, the Department was informed by the South Carolina Retirement System that they do not provide such information under FOIA requests. The Retirement System has a specific exemption detailed in South Carolina Code of Regulation 19-903 which reads, "All records of members, active and inactive, maintained by the South Carolina Retirement System are classified as confidential and shall not be disclosed to third parties, except State and Federal authorities and then only at the discretion of the Director of the South Carolina Retirement System." The Department is concerned that if it releases the information requested by Mr. Abercrombie, it would be circumventing the intent of the Regulation that this information be kept confidential. Therefore, the Department is requesting an opinion from your office on whether it should release the names of its current TERI employees, in the counties specified in the requests, along with the employees' dates of beginning TERI participation, in response to Mr. Abercrombie's FOIA requests.

Law/Analysis

South Carolina's FOIA is found in chapter 4 of title 30 of the South Carolina Code. In enacting the FOIA, the Legislature specifically expressed the purposes of the legislation:

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 (1991). Our Supreme Court recently surmised: "The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006). In addition, the Supreme Court instructed: "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001).

Section 30-4-30(a) of the South Carolina Code (1991), under the FOIA, provides: "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." Section 30-4-20(a) of the South Carolina Code (Supp. 2005) defines the term "public body" for purposes of FOIA to mean

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, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

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As a department of the State supported by public funds, we believe the South Carolina Vocational Rehabilitation Department qualifies under the FOIA as a public body.

Moreover, the FOIA also defines the term “public record” to include “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 Ann. § 30-4-20(c) (Supp. 2005). This definition also describes items that are not considered public records including, among other things, income tax returns and medical records. Id.

We understand that Mr. Abercrombie seeks records containing the names of the Department’s employees participating in TERI and the dates upon which their participation began. Assuming the Department maintains such records, it is our opinion that they would constitute a public records for purposes of disclosure under the FOIA. Therefore, unless exempt from disclosure under section 30-4-40 of the South Carolina Code (1991 & Supp. 2005), the Department would be required to disclose such documents containing the information Mr. Abercrombie requests. Section 30-4-40 exempts eleven specific types of matters from disclosure under the FOIA. S.C. Code Ann. § 30-4-40. Such matters include, among others, trade secrets, records of law enforcement during the course of an investigation, and work product of legal council. Id. In our review of these matters, we did not discover an exception applying under the circumstances presented in your letter. Thus, we conclude that records 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 Mr. Abercrombie to inspect or copy such records.

Nonetheless, your letter indicates your concern is not whether the information pertaining to TERI participants employed by the Department is subject to disclosure under the FOIA, but rather the impact of the regulation promulgated by the State Budget and Control Board on information otherwise subject to the FOIA. As quoted in your letter, section 19-903 of the South Carolina Code of Regulations generally prohibits disclosure of records pertaining to members of the South Carolina Retirement System to third parties. S.C. Code Ann. Regs. 19-903. Accordingly, we understand your concern in disclosing the requested information in light of this regulation.

In Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), the South Carolina Supreme Court addressed the similar issue of whether a death certificate must be disclosed pursuant to the FOIA despite a Department of Health and Environmental Control regulation requiring death certificates remain closed to the public. In that case, the Court stated:

Although a regulation has the force of law, it must fall when it alters or adds to a statute. While we sympathize with DHEC’s desire to limit public access to death certificates, we believe that § 61-19-§ 39(a)(2) contravenes FOIA . . . We therefore hold that Regulation

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61-19 § 39(a)(2) is invalid and repugnant to FOIA. Amending FOIA to restrict the class of persons to whom DHEC must furnish death certificates is a legislative function.

Id. at 567, 324 S.E.2d at 315.

In this instance, like the Court in Society of Professional Journalists, we find regulation 19-903 in contravention with the requirements of the FOIA. We also appreciate the fact that the Retirement System seeks to limit access to the records of its members. However, we believe a court would hold the State Budget and Control Board regulation must fall to the FOIA. Accordingly, we opine that despite regulation 19-903, the Department must provide Mr. Abercrombie with the requested information.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General