ALAN WILSON
ATTORNEY GENERAL

August 28, 2012

Will Martin, Manager
Bamberg Board of Public Works
P.O. Box 1180
Bamberg, SC 29003-0780

Dear Mr. Martin:

We received your letter requesting an opinion of this Office on behalf of the Bamberg Board of Public Works ("BPW").[1] You inquire about the ability of the BPW to conduct meetings via telephone conferencing. Specifically, you ask: (1) whether or not the attendance of a BPW member may be via telephone, (2) whether or not a member present via telephone may be counted as part of a quorum, and (3) whether or not the vote of a member attending via telephone is valid.

Law/Analysis

Prior to addressing the merits of your particular request, it is important to emphasize that South Carolina's Freedom of Information Act ("FOIA") was adopted in its present form in 1978 S.C. Acts No. 593. A number of amendments have been made to FOIA over the years. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble to FOIA, set forth in S.C. Code Ann. §30-4-15, provides as follows:

> [t]he 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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

On numerous occasions, in construing FOIA, we have emphasized the Legislature's expression of openness in government, as articulated in §30-4-15. In an opinion of this Office dated April 11, 1988, for

[1]The BPW is established pursuant to S.C. Code Ann. §5-31-210.

example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA, as follows:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

See also Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (2005) [FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government]; South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843, 846 (1994) [The purpose of the FOIA is to protect the public from secret government activity"]; cf. Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862, 864-65 (2001) ["FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature"].

In the past, this Office has commented on the conduct of meetings by various public boards via telephone.[2] In an opinion dated January 21, 1992, we discussed whether the Joint Appropriations Review Committee ("JARC") may poll its members via telephone as a means of taking action on certain decisions. This question lead to a discussion of what constitutes a "meeting." Citing to 2 Am. Jur.2d Administrative Law §288, we stated:

> [g]enerally, it is recognized that
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> > [a] municipal or county council or a legislative body can act only as a body and when in legal session as such. And the powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council [or body] separately is not the action of the council [or body], and an agreement entered into separately by the members of the council [or body] outside a regular meeting is not binding.

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[2]"Public body" as used in §30-4-20(a) specifically includes municipalities. See Ops. S.C. Atty. Gen., January 16, 1992; December 21, 1983.

Moreover, it has been stated that

> [t]he powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts and specifically acts involving discretion and judgment, particularly acts in a judicial and quasi-judicial capacity, are official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum of the number designated by statute.

Although we ultimately determined that telephone polling does not constitute a meeting, we deduced that a telephone conference call would constitute a meeting. Looking to §30-4-20(d) of FOIA,[3] we concluded that:

> [a] telephone conference call would appear to be one means of handling a matter in an emergency situation such as your letter describes. A meeting is defined by §30-4-20(d) to be "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." (Emphasis added.) This Office has advised previously that such language authorizes a meeting to be convened by means of a telephone conference call, Ops. Atty. Gen. dated March 25, 1981 and November 17, 1980, apparently at least in the absence of a statute requiring a public body to meet physically in a certain place... Thus, if JARC were to convene via a telephone conference call set up as described in these two opinions, with public notice requirements of §30-4-80(b) observed, so that it may act collectively rather than its members acting individually and independently of each other, such would appear to comply with the requirements of the Freedom of Information Act.

In 2005, we reviewed a city ordinance setting forth procedures for telephonic meetings to be conducted by a city council. Op. S.C. Atty. Gen., August 25, 2005. The ordinance called for all members attending by teleconference to be able to hear all comments made at the meeting and in turn all council members, staff, and members of the public physically present at the meeting to be able to hear the teleconferencing council member. Id. We examined the ordinance in light of §30-4-20(d), defining the term "meeting" under FOIA, emphasizing its inclusion of those "by means of electronic equipment." Id. Citing to an opinion of this Office dated November 17, 1980, we concluded that so long as the city council complies with all of the other requirements under FOIA, such as the notice and minute-keeping requirements, the procedures set forth in the ordinance for telephonic meetings would comply with FOIA.

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[3]Section 30-4-20(d) provides that "meeting" means "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." [Emphasis added].

Id.; see also Op. S.C. Atty. Gen., March 25, 1981 [advising that a meeting of the Mining Council held by means of a telephone conference comes within the ambit of FOIA, provided that such conference calls are open to the public, that sufficient notice is given as required, and that minutes of the telephonic meetings are also kept].

In this context, we note an opinion of this Office dated August 11, 2006, where we reiterated that although FOIA authorizes telephonic meetings, such meetings must comply with FOIA; there must be proper notice to the public and news media, and the public allowed to be present. However, based upon the circumstance presented by the requestor, we advised FOIA's authorization of telephonic meetings does not permit circumvention of FOIA by holding pre-meeting telephone conferences of a quorum of the body, without the requisite notice, so as to discuss public business in secret. We thus concluded that such a conference would constitute a "meeting" and if FOIA is not followed, a violation of FOIA would result.

Subsequently, in an opinion of this Office dated March 14, 2007, we considered whether members of the State Workforce Investment Board ("Board") could attend meetings, be counted as part of a quorum, and vote via telephone. We reviewed FOIA and our prior decisions discussing telephone conferences under State law. In reviewing the enabling legislation establishing the Board, we found no requirement that its meetings be physically held in a particular place. After reviewing the above-cited authority, we stated in the opinion that "under South Carolina law, presuming all other FOIA requirements are satisfied, we believe the Board may hold its meetings via telephone conference call." However, because the Board was created pursuant to federal law, we considered sunshine legislation addressing "open" meetings. Although concluding that a plain reading of the definition of open meetings may include telephone conferences, we ultimately deferred to the federal courts to clarify whether telephonic meetings are valid for the Board under the circumstances. Id.

By way of further illustration, we note an opinion of this Office dated May 18, 2007, advising that while we generally find public bodies may conduct meetings via telephone, because the statutes provided that the Board of State Canvassers' meetings shall be held at the Election Commission or another specified location more convenient for the Board, the Legislature intended for this body to physically meet. We therefore concluded that the Board could not meet via a telephone conference call. In another opinion dated March 27, 1992, we advised that, because §14-7-140 then required all three jury commissioners be physically present at the same location for jury drawings by computer; nothing suggests that their presence may be accomplished by electronic connection from a remote computer location.

Conclusion

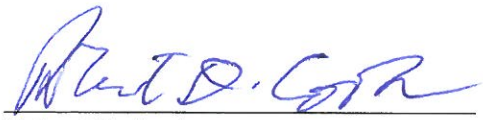
Our research indicates that a public board acting under state law and in accordance with the South Carolina Freedom of Information Act has authority to conduct its meetings via telephone conference. We find no requirement that the BPW's meetings must physically be held in a particular place. Thus, under South Carolina law, presuming all other FOIA requirements are satisfied, it is the opinion of this Office the BPW may hold its meetings via telephone conference call.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General