ALAN WILSON
ATTORNEY GENERAL

March 4, 2013

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Dear Mr. Dillingham,

We received your letter requesting an opinion on behalf of your client, the City of Rock Hill, seeking this Office's interpretation of S.C. Code § 30-4-40(a)(13) of the Freedom of Information Act ("FOIA"). That provision states:

> (a) A public body may but is not required to exempt from disclosure the following information:
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> ....
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> (13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying. In addition to making available for public inspection and copying the materials described in this item, the public body must disclose, upon request, the number of applicants considered for a position. For the purpose of this item "materials relating to not fewer than the final three applicants" do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section.

§ 30-4-40(a)(13).

Specifically, you ask whether the above provision requires the disclosure of materials gathered to fill a governmental position for which there are three or more final applicants when an individual government employee is responsible for filling the position. You have also attached a memorandum from your office which expresses the opinion that § 30-4-40(a)(13) only requires the disclosure of such materials where the hiring decisions are the responsibility of the governing body of a public entity, of a government employee. In support of this opinion, the memorandum asserts "the overarching purpose of this provision is to ensure that hiring decisions are not being made by the public body of the governmental entity in executive session ...." It also argues that construing the provision to require disclosure in such situations would be an unreasonable interpretation that is contrary to the plain meaning of its language. Furthermore, it asserts such an interpretation would have the following effects:

> [I]t would require all governmental entities to have at least three final applicants for each and every position in cases where there is no public interest; it would require three applicants in situations where there may be fewer than three applicants that apply for the position; and it would result in an unnecessary and burdensome hiring process for positions in which there is no concern regarding the decision being made in executive session....

In summary, the memorandum concludes as follows:

> Although there is little case law interpreting S.C. Code Ann. § 30-4-40(a)(13), the cases and opinions interpreting this provision exclusively involve situations where a governing board or council is making the hiring decision. The logical interpretation and plain reading of S.C. Code Ann. § 30-4-40(a)(13) is that it only applies in instances where the public body of a governmental entity makes the hiring decisions rather [than] instances where a governmental employee makes the hiring decisions.

Law/Analysis

The FOIA is codified at S.C. Code §§ 30-4-10 et seq. As for the legislative intent behind FOIA, § 30-4-15 provides:

> 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.

Case law further provides that "FOIA is remedial in nature and should be liberally construed to carry out its purpose." Evening Post Pub. Co. v. Berkeley County, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). "FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). Furthermore, "the essential purpose of the FOIA is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

In responding to your question, several principles of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). Courts will reject an interpretation of a statute "when such an interpretation leads to an absurd result that could not have been intended by the legislature. Lancaster County Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 222 670 S.E.2d 371, 373 (2008).

S.C. Code § 30-4-30(a) provides that "[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 ...." (Emphasis added). "Public record," as defined in § 30-4-20(c), "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." Thus, a central inquiry in any request for records under FOIA is whether such records are in the possession or control of a "public body."

For purposes of FOIA, "public body" is broadly defined as follows:

> "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**, 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....

§ 30-4-20(a) (emphasis added).

The plain language of § 30-4-20(a) broadly encompasses, without qualification, any agency, authority, public body, or political subdivision. Nothing in the language of the that provision indicates a "public body" for purposes of FOIA is limited to the governing body of a public entity. Furthermore, our Court of Appeals has held that the plain language of § 30-4-20(a) encompasses the office of sheriff and the sheriff's department. See Burton v. York County Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). If "public body" is construed in the manner proposed in the memorandum, a multitude of public entities, officers, and employees would not be subject to the requirements of FOIA simply because they lack, or are not a part of, some multi-member governing body. Such an absurd result was clearly not intended by the Legislature. For the above reasons, we are of the opinion that a "public body" for purposes of FOIA encompasses the members of a public entity's governing body, if any, as well as any other officers or employees of the entity. Therefore, we believe any public records in the possession or control of a public employee are considered, for purposes of FOIA, to be the records of the employing entity. Such records are thus subject to disclosure unless a specific exemption applies.

As previously mentioned, the provision relevant to your question excludes from mandatory disclosure "[a]ll materials, regardless of form, gathered by a *public body* during a search to fill an employment position, except that all materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying...." § 30-4-40(a)(13) (emphasis added). Stated differently by our Supreme Court, the language of § 30-4-40(a)(13) "requires the public body to disclose [materials related to] the final pool of applicants comprised of at least three people." New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007).

Nothing in the language of § 30-4-40(a)(13) that suggests it only applies to such materials gathered by the *governing body* of a public entity when filling a position. Consistent with our previous conclusion that "public body" for purposes of FOIA encompasses the entity *en bloc*, including any officer or employee of the public entity, we do not believe that provision can be construed as excluding such materials gathered during a search to fill a position within the public entity simply because the hiring decision is made by someone who is not a member of the entity's governing body. Such a construction would allow public employers to avoid disclosure by simply delegating the responsibility for hiring decisions to individuals who are not members of entity's governing body. Such an absurd result was not intended by the Legislature. Therefore, it is our opinion that § 30-4-40(a)(13) requires a public entity to disclose materials relating to the final pool of three or more applicants for a position even when the hiring decision is made by an employee of the entity. Such a construction, we believe, is consistent with the purpose of FOIA. See Seago v. Horry County, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) ("The exemptions to FOIA should be narrowly construed to ensure public access to documents").

We are not persuaded by the arguments made in the attached memorandum to the contrary. We disagree with the assertion that there is little or no public interest in each and every employment position within a government entity. The Legislature recognized the public's interest in such information as to any position of public employment when it codified § 30-4-40(a)(13) without any language limiting its applicability to certain employment positions based on classification, salary, or any other criteria. In addition, nothing in § 30-4-40(a)(13) or any other provision of FOIA indicates such employment records may be withheld based on a public entity's subjective and arbitrary determination as to the public significance attached to such records. Furthermore, since the employment of any individual by a public entity necessarily entails the expenditure of public funds, the public certainly has an interest in learning whether such funds are being prudently used to hire qualified individuals and in a manner otherwise consistent with the law. See §§ 30-4-50(A)(1), (6) (information specifically made public information under FOIA includes "the names, sex, race, title, and dates of employment for all employees and officers of public bodies" as well as "information ... dealing with the receipt or expenditure of public funds"); see also Op. S.C. Att'y Gen., 2011 WL 6959371 (Dec. 5, 2011) (noting public has an interest in information that would shed light on a government entity's activities and "promote the reasonable and efficient use of public funds").

We also do not agree that "the overarching purpose of [§ 30-4-40(a)(13)] is to ensure that hiring decisions are not being made by the public body of the governmental entity in executive session." The provisions of § 30-4-40 do nothing more than clarify what types of records, materials, and information in the possession of a government entity are exempt from disclosure under FOIA. Separate sections of FOIA govern the public's right of access to "meetings" of public bodies. See §§ 30-4-60 to -90.[1] The inability of a public body to make a hiring decision in executive session is expressly addressed in § 30-4-70. Although a public body may hold a meeting closed to the public for the purpose of discussing the employment or dismissal of an employee pursuant to § 30-4-70(a)(1), a public body is expressly prohibited from making the actual decision of whether to hire or fire an employee in executive session. See § 30-4-70(b) ("No action may be taken in executive session except to (a) adjourn or (b) return to

[1] We note that for purposes of FOIA a "meeting" is expressly defined as "*the convening of a quorum of the constituent membership of a public body* ... to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." § 30-4-20(d) (emphasis added). Thus, the provisions of FOIA governing the public's right of access to the "meeting" of a "public body" are generally only applicable to the gathering or assemblage of multiple members of a public body. As we previously stated, however, no such limitation is found in the provisions of FOIA applicable to the disclosure of public records or the definition of "public body" under § 30-4-20(a).

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."). Thus, it is clear from the language of § 30-4-70 that the Legislature intended for that section, and not § 30-4-40, to prevent public bodies from making employment decisions in executive session. This distinction was recognized by our Supreme Court in City of Columbia v. Am. Civil Liberties Union of S. Carolina, Inc., 323 S.C. 384, 388, 475 S.E.2d 747, 749 (1996):

> The plain language of § 30–4–70(a)(1) does not exempt from disclosure a "public record" as that term is defined by § 30–4–20. Section 30–4–70(a)(1) does no more than to allow public bodies to conduct certain "discussions" closed to the public. Thus, as the report is a public record as defined by § 30–4–20, the question of its exemption must be resolved by reference to § 30–4–40 ("Matters exempt from disclosure").

The same conclusion applies here. Any question as to the exemption of the employment records in question must be resolved by reference to the provisions of § 30-4-40. As we previously concluded, employment records concerning the pool of three or more applicants for a position within a public entity are not exempt under § 30-4-40(a)(13) simply because a single employee of the public entity is responsible for the hiring decision.

Finally, we do not agree that our interpretation of § 30-4-40(a)(13) has the effect of requiring public entities to have at least three applicants for each and every position, even when there are less than three applicants. Nothing in the language of the provision mandates that a minimum number of applicants are necessary before a public employment position may be filled; it is limited in scope to the disclosure of materials gathered in an employment search. To quote our Supreme Court once more, the plain language of the statute "requires the public body to disclose the final pool of applicants comprised of at least three people." New York Times, 374 S.C. at 311, 649 S.E.2d at 30. As the Court further went on to state:

> The term "final" in § 30-4-40(a)(13) refers to the last group of applicants, with at least three members, from which the employment selection is made.
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> ....
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> The fact that a public employer has to disclose information regarding an employment search does not in any way force the employer to officially name three finalists. The statute simply requires a public employer to disclose material relating to a larger group of applicants if it chooses to name one or two "finalists."

Id. at 312, 649 S.E.2d at 30. In situations in which there are less than three applicants for a position, there is clearly not a final group of applicants from which the employment selection is made. Therefore, we believe the plain language of § 30-4-40(a)(13) requiring the disclosure of "materials relating to not fewer than the final three applicants under consideration for a position" does not apply to positions for which there are not at least three total applicants.

Conclusion

It is the opinion of this Office that a "public body" is required, for purposes of FOIA, to disclose materials relating to the final pool of three or more applicants even when the responsibility for filling the position lies with a single employee of the entity and not its governing body. Under FOIA, "public records" in the possession or control of a "public body" are subject to disclosure unless a specific exemption applies. § 30-4-30(a). As defined in § 30-4-20(a), we believe a "public body" for purposes of FOIA encompasses a public entity *en bloc*; that is, it includes the members of the entity's governing body, if any, as well as any other officers or employees of the entity. Such an interpretation is consistent with the plain language of the statute broadly defining "public body," as well as FOIA's mandate of liberal construction. To otherwise construe "public body" as applying only to a public entity's governing body would have the effect of excluding a multitude of public entities, officers, and employees from the requirements of FOIA simply because they lack, or are not a part of, some multi-member governing body. Such an absurd result was not intended by the Legislature. Therefore, we believe any public records in the control or possession of a public employee are considered to be the records of the employing entity for purposes of FOIA. As such, they are subject to disclosure unless a specific exemption applies.

S.C. Code § 30-4-40(a)(13) requires a "public body" to disclose materials related to the final pool of applicants for a position consisting of three or more people. Nothing in the language of that provision suggests disclosure is only required when the hiring decision is made by the governing body of a public entity. Consistent with our conclusion that a "public body" encompasses a public entity *en bloc* and the rule that exemptions to FOIA are to be narrowly construed to ensure public access to documents, we believe § 30-4-40(a)(13) requires disclosure even when the hiring decision is made by someone who is not a member of the entity's governing body. To otherwise interpret the provision as applying only to situations in which the hiring decision is made by the governing body of a public entity would allow public employers to avoid disclosure by simply delegating the responsibility for hiring decisions to individuals who are not members of entity's governing body. Such an interpretation is contrary to the purpose of FOIA and would lead to an absurd result not intended by the Legislature.

Very truly yours,

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REVIEWED AND APPROVED BY:

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