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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 26, 2002

Latonya Dilligard Edwards, Chief Counsel
South Carolina Commission for the Blind
P. O. Box 79
Columbia, South Carolina 29202-0079

Dear Ms. Edwards:

You have requested "clarification of S.C. Code § 2-15-61." You note that such provision states that Legislative Audit Council (LAC) staff members shall have access to records and facilities of state agencies to carry out its audit duties. Such provision specifically excepts reports and returns of the South Carolina Department of Revenue. Your question is whether § 2-15-61 allows LAC staff members access to executive session discussions of board meetings of state agencies.

Law / Analysis

The question which you have raised is novel. I am not aware of any South Carolina case or opinion of the Attorney General which has addressed this issue. I will, however, attempt to provide you with some general thoughts and insights with respect to the issue which you have presented.

S.C. Code Section 2-15-61 provides as follows:

> [f]or the purposes of carrying out its audit duties under this chapter, the Legislative Audit Council shall have access to the records and facilities of every state agency during that agency's operating hours with the exception of reports and returns of the South Carolina Department of Revenue as provided in Sections 12-7-1680 and 12-35-1530. (Emphasis added).

The issue here is whether the use of the phrase "facilities" is sufficiently broad or specific to encompass executive sessions authorized by the Freedom of Information Act in S.C. Code Ann. Section. 30-4-70. Thus, it is first necessary to discuss the workings of the FOIA and who may attend a public body's executive session authorized thereby.

South Carolina's Freedom of Information Act, S.C. Code Ann. Section 30-4-10 et seq. requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant

to § 30-4-70 of this chapter." Permissible, though not mandatory reasons, for which a public body may conduct an executive session are enumerated in § 30-4-70. Section 30-4-70(6) of the FOIA details the proper procedure for employing an executive session as follows:

> [P]rior to going into executive session the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the specific purpose of the executive session. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action. No vote may be taken in executive session.

This office has consistently concluded that executive sessions should be used sparingly and that the FOIA does not require that they even be employed at all if the public body chooses not to. As was stated in Op. Atty. Gen., 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 business in public.

Even though executive sessions should be used infrequently, they nonetheless may be employed for the authorized reasons set forth in the statute, provided the statutory procedure is met. The FOIA, however, does not speak to the question of who may or may not be present in an executive session, only that the "public agency" may convene such session.

It would appear, therefore, that the question of who may be present or who may be excluded from an executive session is one of common law and parliamentary procedure. The law is somewhat sparse in this area.

However, an opinion issued by the Virginia Attorney General, 1985-86 Va. Op. Atty. Gen. 331 (July 11, 1985) concluded that a public body possessed the discretion to allow nonmembers of the body to attend closed meetings. There, it was stated:

> ... a public body may admit certain nonmembers to a closed meeting without destroying the closed status of the meeting .... A public body may, therefore, admit those persons deemed necessary or whose presence will reasonably aid the public body in its consideration of a topic which is the subject of a properly convened closed meeting.

Another Virginia Attorney General's Opinion, 1976-77 Va. Op. Atty. Gen. 308 (January 13, 1977) found that "[n]o 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." The Virginia Attorney

General opined that "[w]hether a committee of the town council, meeting in a properly called executive session, may exclude the other members of council is a matter which would be governed by the procedural rules established by the council."

Accordingly, based upon the foregoing authorities, this Office has previously stated that "the question of who may be present at the executive session is a matter to be resolved by [the public body's] operating rules." Op. Atty. Gen., 1996 WL 679433 (October 8, 1996). As we have noted on many occasions, a public body is not required to conduct its business in executive session. However, for certain express reasons, and pursuant to certain procedures, the FOIA does permit the body to go into executive session. Assuming however, that the public body does go into executive session, at least as a general matter, it is up to the particular body, based upon the discretion of the members of that body, as to whom is admitted to that executive session.

The question which you pose, however, is whether § 2-15-61 alters a public body's general discretion to the extent that LAC staff is admitted into a executive session. Several principles of statutory construction are applicable in this instance. First and foremost, in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Moreover, an enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). Words used should be given their plain and ordinary meaning. First South Sav. Bank, Inc. v. Gold Coast Associates, 301 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984).

The word "facilities" is typically held to mean

> [t]hat which promotes the ease of any action, operation, transaction, or course of conduct. The term normally denotes incriminate means rather than human agencies, though it may also include animate beings such as persons, people and groups thereof.

Black's Law Dictionary (5th) ed. ("Facilities," p. 531.)

Based upon the foregoing, it is not clear from § 2-15-61 whether the General Assembly intended to empower LAC to require access to an agency's executive sessions when conducting an audit of that agency. Typically, in other states, the auditor or an auditing agency is given explicit and express authority to enter the executive sessions of the public body which is being subjected to audit. See, e.g. Az. St. §41-1279.04 ("For the purpose of complying with § 41-1279.04 ("For the purpose of complying with § 41-1279.03, subsection A, paragraph 4, the auditor general, in the performance of his official duties, may attend executive sessions of the governing body of any state agency.") Moreover, there is case law which concludes that, where there exists no specific statute giving the

auditing authority access to executive session materials, such authority may not be implied. Pima County v. Heinfield, 134 Ariz. 133, 654 P.2d 281 (1982). Accordingly, while it may be argued that the word "facilities" in § 2-15-61 impliedly encompasses executive sessions, I cannot conclude with certainty that the access of LAC staff to such executive sessions is mandated by the specific wording of § 2-15-61.[1]

Although we cannot say with any degree of certainty that § 2-15-61 is written in sufficiently specific language to require admission by LAC into executive sessions of a public body being audited by that agency, we would nevertheless suggest that the agency provide such access. One purpose of an LAC audit is to determine whether an agency is complying with applicable state laws and regulations as well as State policies. See, § 2-15-50. Of course, one such law is the FOIA itself, including the proper convening by the agency into executive session. Moreover, § 2-15-120 makes all records of the LAC confidential and not subject to public disclosure prior to the publication of LAC's final report. In other words, in our judgment the sanctity of an executive session would not be compromised by that agency admitting LAC staff into such session. Indeed, one could argue that such access is necessary to fully carry out the audit in question, particularly if LAC is looking into the agency's compliance with the FOIA. Thus, cooperation with LAC in this regard is strongly encouraged.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosures

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[1] LAC's access to the minutes of an agency's executive sessions is a different question altogether. Section 2-15-61 requires access of LAC to the "records" of the agency. Certainly, as a general matter, executive session minutes would be embraced by such language. However, I do not address any particular minutes involved or any specific situation, because that question is not at issue here.