



ALAN WILSON
ATTORNEY GENERAL

April 30, 2013

The Honorable Jana W. Jayroe
Mayor, Town of Little Mountain
P.O. Box 154
Little Mountain, South Carolina 29075

Dear Mayor Jayroe,

You have requested an opinion of this Office as to several issues related to the Little Mountain Reunion (the "Reunion"), a festival that has historically been held on an annual basis in the Town of Little Mountain (the "Town"). By way of background, you have explained that the Reunion is organized and overseen by the Little Mountain Reunion Association (the "Association"), a non-profit organization that receives no public funds and is governed by volunteers elected by community members. The Reunion is held in a park owned by the Town through a rental agreement with the Association. You indicate the Reunion was cancelled last year because the former mayor claimed the Town's insurance was not sufficient to cover the potential liability that would result from the sale of beer and because the Association had not purchased insurance to cover the event. You state the Association has now assured you that it is insured by a private carrier who is aware of the beer sales, and that any alcohol at the Reunion would be sold by a third party vendor compensated by either the Association or the Town. The Town is currently insured through the Municipal Association of South Carolina. However, you indicate this year the former mayor is again citing risk problems for the Town as a reason to cancel the event. You state Town Council meetings "have become nothing but shouting matches between the former mayor and the members of the [Association]." With this background information in mind, you ask the following questions:

- 1) Can you, as Mayor, appoint a committee that can meet in private to discuss this problem and then present possible solutions to the Town Council in a public meeting?
- 2) Would our opinion as to the first issue be affected by the presence of the Town's legal counsel at this committee meeting, thereby incurring expenses on the part of the Town?
- 3) Is the former mayor's assertion correct that the Town's assets are not protected no matter how much insurance the Town or the Association has as a result of alcohol sales at the event?

Law/Analysis

Questions 1 & 2

The issue of whether the proposed committee may meet in private to discuss the problems surrounding the Reunion and present possible solutions to the Town Council is governed by the Freedom

of Information Act (“FOIA”), S.C. Code §§ 30-4-10 *et seq.* Under FOIA, “[e]very meeting of all *public bodies* shall be open to the public unless closed pursuant to § 30-4-70 of this chapter.” § 30-4-60 (emphasis added). The definition of “public body” for purposes of FOIA includes:

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**

§ 30-4-20(a) (emphasis added).

It is firmly established that a committee or other body formed to give advice to a government body or a public official is a “public body” subject to FOIA. See Quality Towning, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001) (holding plain language of § 30-4-20(a) includes review committee formed by city manager to evaluate proposals submitted by towing companies for city contract and then provide advice and recommendations to manager and city council); see also Ops. S.C. Att’y Gen., 1988 WL 383514 (April 11, 1988) (concluding Charleston Memorial Hospital Advisory Committee, appointed by county council to provide recommendations concerning contractual negotiations with local hospitals, is unquestionably a “public body” subject to FOIA); 1985 WL 166109 (Dec. 17, 1985) (“public body” for purposes of FOIA includes ad hoc committee appointed by county council to make recommendations concerning various matters before the council). Therefore, we believe such a committee created by the Mayor to give advice to the Town Council is undoubtedly a “public body” for purposes of FOIA. As such, its meetings would have to be open to the public unless an exception applies.

S.C. Code § 30-40-70 identifies the limited purposes for which a public body may hold a meeting closed to the public and the procedures for entering into executive session. Pursuant to subsection (a)(2) of the statute, a public body may hold a meeting closed to the public for the following purposes:

(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 the agency of a claim.

§ 30-4-70(a)(2). Subsection (b) states that “[b]efore 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....” § 30-4-70(b).

Although the proposed committee’s discussions might concern a potential contractual arrangement between the Town Council and the Association, the committee would not be an actual party to any such contractual negotiations. We have consistently advised that the “[d]iscussion of negotiations incident to proposed contractual arrangements” under § 30-4-70(a)(2) may not be invoked as a reason to meet in executive session by a public body that is not a party to the proposed contract or actually involved in negotiating the contract. See Ops. S.C. Att’y Gen., 2010 WL 2320806 (May 25, 2010) (“it is the opinion of this Office that [§ 30-4-70(a)(2)] does not generally permit a board to enter into executive

session to discuss a contract ... to which they are not a party”); 1988 WL 383514 (April 11, 1988) (“Section 30-4-70(a)(2) of the Code should not be invoked as a reason to meet in executive session by a public body whose assigned task is information gathering rather than actual negotiation of a contract”). Therefore, it is our opinion that such a committee may not meet in executive session for the purpose of discussing potential contractual arrangements between the Town Council and the Association.¹

You also ask whether the presence of the Town’s legal counsel at the committee’s meetings would have any effect on the committee’s ability to discuss matters in executive session. As previously mentioned, the latter part of § 30-4-70(a)(2) permits a public body to enter into executive session for “the receipt of legal advice” As stated by our Court of Appeals, “[t]he exemption does not require that a public body actually be engaged in litigation, only that legal advice be rendered.” Herald Pub. Co., Inc. v. Barnwell, 291 S.C. 4, 10, 351 S.E.2d 878, 882 (Ct. App. 1986). Therefore, we believe the committee would be permitted to receive legal advice in executive session.²

However, we caution as we have in the past that “executive sessions should be used sparingly and that [FOIA] does not require that they be ... employed at all if the public body chooses not to.” Op. S.C. Att’y Gen., 1996 WL 679433 (Oct. 8, 1996). We have also repeatedly advised that, consistent with FOIA’s mandate of liberal construction in favor of openness,³ the exemptions to the open meeting requirements should be narrowly construed and any doubt as to whether a meeting may be closed should be resolved in favor of openness.⁴ Furthermore, we emphasize that it is the receipt of legal advice, and not the mere presence of an attorney, that triggers the exemption in § 30-4-70(a)(2). Therefore, we caution that discussions in a meeting closed to the public for the purpose of receiving legal advice must be limited to just that; the executive session may not be used to discuss other matters for which an express exemption does not apply.

Question 3

Your final question concerns the Town’s potential liability exposure if alcohol sales are permitted at the event on the grounds of the park owned by the Town. The Town’s civil liability for any tort claim

¹ We note, however, that the Town Council could certainly invoke § 30-4-70(a)(2) as a reason to discuss proposed contractual arrangements in executive session.

² We note that § 30-4-70(a)(2) also clearly permits the Town Council to meet in executive session to receive legal advice directly from the Town’s legal counsel.

³ As stated in § 30-4-15:

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.

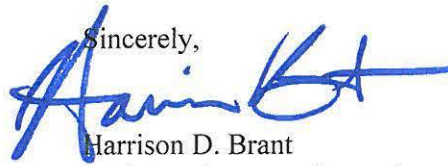
⁴ See Op. S.C. Att’y Gen., 1994 WL 136198 (March 31, 1994) (“The rule under [FOIA] is openness; the permissive reasons for holding executive sessions are few and are narrowly drawn. If any doubt should exist as to whether a meeting should be open to the public, the doubt should be resolved in favor of openness, to conduct public business in public.”).

The Honorable Jana W. Jayroe
Page 4
April 30, 2013

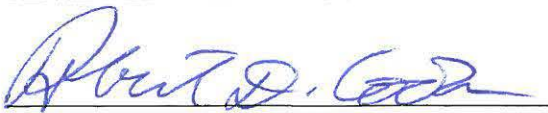
is governed exclusively by the South Carolina Tort Claims Act (the "Act"), S.C. Code §§ 15-78-10 *et seq.* See § 15-78-20(a) ("the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein"); § 15-78-20(b) ("The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents"). The Act provides that governmental entities "are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." § 15-78-40.

Particularly relevant to your question, the Act places statutory caps on the amount claimants may recover from a governmental entity for damages in any tort action. The most a single plaintiff may recover for loss arising from a single occurrence⁵ is \$300,000 regardless of the number of governmental entities involved. § 15-78-120(a)(1). In addition, the total amount that may be recovered for losses arising from a single occurrence, regardless of the number of plaintiffs or entities involved, is \$600,000. § 15-78-120(a)(2). Pursuant to § 15-78-120(b), no award of punitive or exemplary damages is permitted. Furthermore, with the exception of a reasonable attorney's fee which may be imposed as a sanction for frivolous filings pursuant to § 15-78-120(c), no attorneys' fees may be awarded to a successful plaintiff under the Act. See Knoke v. S.C. Dept. of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996) (holding plaintiff not entitled to attorneys' fees as Torts Claim Act is "the exclusive civil remedy for governmental torts ... and provides for an award of an attorney's fees only as a sanction for filing frivolous pleadings or motions" pursuant to § 15-78-120(c)).

Thus, although the Town is generally liable for its torts "in the same manner and to the same extent as a private individual," unlike a private individual the Town's liability for damages resulting from its torts are limited to the amounts set forth in § 15-78-120. These statutory caps apply to any tort claim against the Town regardless of how much the actual damages in any such case may be and regardless of whether any other potentially liable parties – e.g., the Association and/or any independent alcohol vendors – otherwise have sufficient insurance or assets to cover the amounts they may be liable for. The question of whether the Town has sufficient liability insurance to cover any tort claims that might result from the sale of alcohol in the Town's park up to the maximum amounts set forth in § 15-78-120 must be addressed with your insurance carrier.

Sincerely,

Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Deputy Attorney General

⁵ See § 15-78-30(g) (defining "occurrence" as "an unfolding sequence of events which proximately flow from a single act of negligence").