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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

May 22, 2001

The Honorable Glenn F. McConnell
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked for an opinion regarding the applicability of the Freedom of Information Act to parole voting decisions. You provide the following information in your letter requesting the opinion:

> [a]s you know, the Parole Board is composed of seven members – one from each Congressional district and one at large. The full seven-member Board hears violent cases and a three-member panel hears non-violent cases. Five of the seven full Board members must vote in the affirmative for a violent offender to be paroled. A unanimous vote must be received for a non-violent offender. According to the Department of Probation, Parole and Pardon Services, no individual votes are recorded. Only the Chairman sees the number of green lights for parole and the number of red lights against the parole. It is my further information that this policy is not mandated by statute but is implemented by policy of the Parole Board.
>
> Given the Freedom of Information Act in South Carolina and the right of the press and the public to have access to the record of actions taken by a public agency, it seems that this policy flies in the face of the Freedom of Information Act and public accountability. Needless to say, the victims of violent crimes and their families should be able to see who is voting for and against the parole of the criminal offender. Also, how can Senators who vote on these appointments exercise the power of advice and consent when the agency, by its policy, prevents us from knowing how the individual

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Request Letter

> members have discharged their duties on the cases before them? Judges, Masters-in-Equity and other Commissioners cannot hide faceless behind red and green lights. In my opinion, neither should the Parole Board. In the absence of legislation specifically granting them this authority, I am requesting an Attorney General's Opinion as to whether or not under the applicable statutes what they are doing is legal. In this way, I can make a determination if I need to proceed forward in filing a bill to rectify what I consider to be an abhorrent practice.

Law / Analysis

The Department of Probation, Parole and Pardon Services is established pursuant to S. C. Code Ann. Sec. 24-21-20 (A) as a cabinet agency. In addition, § 24-21-10(B) creates the Board of Probation, Parole and Pardon Services, consisting of seven members.

Section 24-21-30 (A) sets forth the procedure for holding the Parole Board's "meetings." Section 24-21-30(B) specifies the Board's authority with regard to the granting of paroles. As you note in your letter, the statute distinguishes between violent and non-violent offenses as well as "no parole offenses." Section 24-21-30 (B) states as follows:

> (B) The board may grant parole to an offender who commits a violent crime as defined in Section 16-1-60 which is not included as a 'no parole offense' as defined in Section 24-13-100 on or after the effective date of this section by a two-thirds majority vote of the full board. The board may grant parole to an offender convicted of an offense which is not a violent crime as defined in Section 16-1-60 or a 'no parole offense' as defined in Section 24-13-100 by a unanimous vote of a three-member panel or by a majority vote of the full board.
>
> Nothing in this subsection may be construed to allow any person who commits a 'no parole offense' as defined in Section 24-13-100 on or after the effective date of this section to be eligible for parole.

Particularly striking is the fact that nowhere either in Section 24-21-30 or in the various statutes relating to parole is there any authorization to keep the individual votes of the Parole Board secret. To the contrary, the statutes strongly suggest that compliance with the FOIA is contemplated by the General Assembly. See, § 24-21-30 (A) ("meetings" required); § 24-21-40 (Board to keep a complete record of all its proceedings); § 24-21-221 (notice must be given of board hearings to victim, solicitor, and law enforcement agency).

We turn now to a discussion of South Carolina's Freedom of Information Act. The FOIA was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions and was amended by Act No. 118, 1987 Acts and Joint Resolutions. The Act's preamble best expresses both the Legislature's intent in enacting the statutes, as well as the public policy underlying it. The preamble, set forth in § 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 report fully 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, this Office has emphasized its approach in construing the Freedom of Information Act consistent with the Legislature's above-referenced expression of public policy. In Op. Atty. Gen., Op. No. 88-31 (April 11, 1998), we summarized the rules of statutory construction which this Office follows in interpreting the FOIA thusly:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and 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).

In essence, the rule of thumb to which this Office has consistently adhered with respect to any Freedom of Information Act question is: when in doubt, disclose.

We have concluded that the Freedom of Information Act is applicable to the Parole Board. In an opinion dated October 30, 1985, we found that the Parole Board is a "public body" under the FOIA. In addition, in that same opinion, we concluded that the votes of individual members of the

Parole Board must be disclosed to the public. There, we stated the following in reaching the conclusion that public disclosure of individual votes is a requirement of the FOIA:

> This question is answered in part by Section 30-4-90(a)(3):
>
> > All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to: . . .
> >
> > (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken. . . .
>
> This Code section was discussed in Op. Atty. Gen. No. 84-4, which concludes that
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> > secret ballots may be used; but if a member of council asks that a vote be recorded, then a secret ballot could not be used in that instance. Further, . . . if votes taken by secret ballot should be recorded by name, then such votes would become a matter of public record subject to disclosure, after the votes are submitted and tabulated.

Likewise, opinions of Attorneys General in other states also conclude that the individual votes of Parole Board members constitute public information. See 1993 WL 31747 (Neb. A.G. July 28, 1993) [Parole Board hearing and decision-making process must be conducted in public]; 1985 WL 167852 (Idaho A.G.) [Commission of Pardons and Parole may not vote in private]. See also, Turner v. Wainwright, 379 So.2d 148 (Fla. D. Ct. of App., 1st Dist) [Parole and Probation Commission is subject to open public meetings law and is required to open to the public all meetings at which official acts are to be taken].

You note in your letter that the Board's refusal to disclose the votes of individual members is based upon Board policy rather than upon any statutory provision. However, the Supreme Court of South Carolina has emphasized that an agency regulation cannot make secret what is otherwise public information under the FOIA. See, Soc. of Prof. Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313 (1984). In Sexton, a regulation of the Department of Health and Environmental Control limited the class of persons to whom a death certificate might be furnished, in contravention of a specific statute and the Freedom of Information Act. The Court held the regulation invalid and repugnant to the FOIA. The Sexton Court noted that "[a]mending FOIA to restrict the class of

persons to whom DHEC must furnish death certificates is a legislative function." Id. Applying the reasoning of Sexton, it is clear that an agency regulation or policy which alters the mandate of a statute will be deemed invalid by the courts.

In short, the Freedom of Information Act requires the votes of individual members of the Parole Board to be public information.

Conclusion

The Freedom of Information Act requires openness as the watchword for government business. It is our opinion that the votes of the individual members of the Parole Board to grant or deny parole must be made available to the public. The Freedom of Information Act gives the red light to a system which conceals individual Parole Board votes and the green light to openness in disclosing those votes. Crime victims, their families and friends, as well as citizens, have a right to know which Parole Board members voted to return a criminal back to the streets and which ones voted to deny parole. In order to have Parole Board members and the Governor who appoints them held accountable for their decisions, it is obvious that member of the Parole Board cannot hide their votes or keep them secret. The Freedom of Information Act requires that the decisions of individual members of the Parole Board regarding a request for parole be exposed to the sunlight of public scrutiny.

In short, the Freedom of Information Act does not permit this system where individual Board members can conceal their votes and hide their actions. The very purpose of the Freedom of Information Act is to insure access to government to guarantee accountability from government. Without knowing how an individual Parole Board member voted, everyone is left in the dark.

With kind regards, I am

Very truly yours,

Charlie Condon
Attorney General

CC/ph