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ATTORNEY GENERAL

October 28, 2013

D. Laurence McIntosh, Esquire
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P.O. Box 1831
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Dear Mr. McIntosh:

By your letter dated August 12, 2013, you have asked for the opinion of this Office regarding issues related to the Freedom of Information Act. Specifically, you explain that the District's Superintendent "has requested that his evaluation be conducted in open session" rather than executive session which, based upon the materials you have provided us, appears to be the District's standard policy. You then ask the following questions:

(1) "Do the provisions of Section 30-4-70 require the board to grant his request" and:

(2) "If the board is not required to grant his request may it, nevertheless, decide to do this process in an open session on the basis that the board has a right to conduct its business in public if no one is adversely affected by that. That is, if the board is not required to grant his request for an open session, may it, nevertheless, voluntarily decide to do the evaluation in open session since that is what the superintendent desires. He certainly would not be in a position to complain about a process that he has requested."

Our response follows.

Law/Analysis

In response to your first question, it is our opinion that Section 30-4-70 of the Code does not require the school board to grant the superintendent's request that his evaluation be conducted in open session. While it is true Section 30-4-70(a)(1) allows an "employee or client" of a public body "the right to demand" a public hearing, a review of the statute further reveals this right is limited to adversarial hearings regarding such an employee. See S.C. Code Ann. § 30-4-70(a)(1) (West 2007) ("[I]f an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly.").

Because we believe a superintendent's annual evaluation is not adversarial in nature, but according to board policy is instead, "the basic structure for board evaluation of the superintendent which ensures board accountability to the community" it is the opinion of this Office that the board is not required to grant the superintendent's request to have his evaluation conducted in open session. Moving to your second question, we further believe that both the FOIA statute and our prior opinions make it clear that the board is not required to close a meeting to conduct the superintendent's evaluation and as a result, could, consistent with the superintendent's request, voluntarily decide to perform the evaluation in open session.

A. Question One

As you are no doubt aware, Title 30, Chapter Four of the South Carolina Code contains what is known as the "Freedom of Information Act" ("FOIA") legislation which, at its' core, is designed to provide transparency in public governance. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006) ("[The] purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies."); S.C. Code Ann. § 30-4-15 (West 2007) ("[I]t 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."). Consistent with its' legislative intent of providing transparency in public governance, South Carolina's FOIA statute provides that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code Ann. § 30-4-60 (West 2007).

As evidenced by the terms of Section 30-4-60, Section 30-4-70(a) of the Code details the circumstances under which "[a] public body may hold a meeting closed to the public." S.C. Code Ann. § 30-4-70(a). One such circumstance is that mentioned by Section 30-4-70(a)(1) of the Code. Section 30-4-70(a)(1) allows a public body to "close" a meeting when the meeting relates to:

> Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

S.C. Code Ann. § 30-4-70(a)(1). In other words, Section 30-4-7-(a)(1) permits, but does not require, a public body to close a meeting when the meeting relates to "[d]iscussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body" albeit with one exception—when the meeting is an adversary hearing regarding the aforementioned matters.

Understanding this, we now turn to the question advanced in your letter---whether the board is required to honor the superintendent's request that his evaluation be conducted in public. We believe that because the superintendent's evaluation is not an adversarial hearing, he has no right to demand a public hearing and as a result, the board is not required to honor his request.

As detailed above, Section 30-4-70(a)(1) clearly explains that "if an *adversary hearing* involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly." S.C. Code Ann. § 30-4-70(a)(1) (emphasis added). Therefore, we must determine whether the superintendent's evaluation is an "adversary hearing" under the FOIA statute. In making such a determination, we will review the board's purpose in conducting an evaluation of the superintendent and the means by which the evaluation is performed in comparison to the meaning of the phrase, "adversarial hearing."

According to Florence School District One Policy, the purpose of evaluating the superintendent is "to promote professional excellence and improvement of the superintendent's skills." Florence Sch. Dist. One Policy, Code CBI (Adopted Feb. 2000). Specifically, the policy explains that the board, by evaluating the superintendent, will strive to: (a) clarify the superintendent's role in the school system; (b) "clarify for all board members the role of the superintendent in light of his/her responsibilities, authority and organizational expectations[;]" (c) develop "unity of purpose and harmonious working relationships between the board and superintendent[;]" (d) develop "an opportunity for goal achievement through regular appraisal and feedback[;]" (e) "[e]nhance organizational health resulting from involved, committed and strengthened individuals" and (f) "[p]rovide administrative leadership of unquestionable excellence for the school system." Florence Sch. Dist. One Policy, Code CBI (Adopted Feb. 2000). The policy further explains this process is done by "evaluation . . . of the board's written statements" after which "[t]he board will give the superintendent a written or oral opinion of his/her abilities and performance" in a variety of areas.[1] Florence Sch. Dist. One Policy, Code CBI (Adopted Feb. 2000). After receiving the opinion, the superintendent is allowed to "respond to the evaluation." Florence Sch. Dist. One Policy, Code CBI (Adopted Feb. 2000). Board policy explains the superintendent's evaluation may result in changes to the superintendent's job description, helps to "establish a foundation for identifying new priorities and objectives . . . for the next year's evaluation" and may be the basis for considering an increase in the superintendent's rate of compensation.[2] Thus it seems clear, the evaluation process is essentially a meeting, collaborative in nature, in which the board provides the superintendent with its'

[1] While we recognize that Florence School District One Policy requires the evaluation to be conducted in executive session, failing to do so would not be at odds with the FOIA statute as discussed in question two below. Indeed, the "[f]indings and [p]urpose" title from Section 30-4-15 indicates a preference that "public business be performed in an open and public manner[.]" S.C. Code Ann. § 30-4-15.

[2] Notably the policy goes on to say that the superintendent's salary cannot be reduced during the term of the contract. See Florence Sch. Dist. One Policy, Code CBI (Adopted Feb. 2000).

appraisal of his or her performance for the purpose of providing feedback and promoting professional development.

By contrast, an adversary hearing is different. Black's Law Dictionary defines "adverse" as "against, opposed, [h]aving an opposing or contrary interest, concern or position." Black's Law Dictionary, (9th ed. 2009). Further, this Office, in a 1988 opinion, reviewed Section 30-4-70(a)(1)'s "adversary hearing" provision, noting, "[a] hearing usually means the hearing of evidence and arguments thereon" including "the opportunity to adduce proof," the opportunity "to meet and rebut evidence," the chance to "cross examine witnesses" and the "right to be present and put forth one's contentions. Op. S.C. Atty. Gen., 1988 WL 485305 (May 26, 1988) (citing Shields v. Utah Idaho Central Railway Company, 305 U.S. 177, 185 (1938); Seibold v. State, 287 Ala. 549, 556, 253 So.2d 302, 309 (1970); Whirpool Corporation v. State Board of Tax Commissioners, 167 Ind. App. 216, 222-23, 338 N.E.2d 501, 505 (1975); People v. Richetti, 302 N.Y. 290, 297, 97 N.E.2d 908, 911 (1951)). Accordingly, we believe Section 30-4-70(a)(1)'s "adversary hearing" language relates to a procedure in which opposing parties may potentially present evidence, cross-examine witnesses and present arguments regarding a contested issue for the purpose of receiving a final determination on a contested issue.

Keeping these differences in mind, we believe Florence School District One's superintendent evaluation policy does not amount to an adversarial hearing. Indeed, the evaluation is centered on providing professional development and guidance rather than serving as a forum for opposing parties to present and respond to evidence and argument on disputed issues. It is collaborative as opposed to adverse and clearly does not fit within the definition of a "hearing." Additionally, while it is possible that there may be a difference of opinion between the board and the superintendent regarding the evaluation of the superintendent's performance, the fact remains that the purpose of the evaluation is not to resolve disputed issues, but to simply assess the superintendent's performance. In light of these differences, it is the opinion of this Office that Section 30-4-70(a)(1) of the Code does not require the school board to grant the superintendent's request that his evaluation be conducted in open session since the evaluation clearly does not amount to an adversarial hearing and thus does not confer a right to demand a public hearing.

B. Question Two

Having disposed of your first question, we will now address your next question, whether the board, although not required to honor the superintendent's request, may nevertheless choose to conduct the superintendent's evaluation in open session. We believe that it may.

As we have explained above, the purpose of South Carolina's FOIA statute is to provide transparency in public governance. See Sloan, 369 S.C. at 26, 630 S.E.2d at 478 ("[The] purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies."); S.C. Code Ann. § 30-4-15 ("[I]t 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."). Because of this purpose, we have said, "FOIA does not. . . require that meetings be closed to the public simply because a particular exemption may be applicable." Op. S.C. Atty. Gen., 1984 WL 566300 (September 21, 1984). Indeed, the exemption provisions of 30-4-70 are stated in permissive terms, something which we have mentioned in our prior opinions. S.C. Code Ann. § 30-4-70(a); Op. S.C. Atty. Gen., 1984 WL 159871, n.4 (June 1, 1984); Op. S.C. Atty. Gen., 1984 WL 566300 (September 21, 1984); Op. S.C. Atty. Gen., 2011 WL 782318 (Feb. 3, 2011). Thus, it appears fairly well-established that a public body may voluntarily choose to open its meetings to the public despite the fact that an exemption may be applicable. See e.g. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) ("We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.").

Here, while Florence School District One Policy states that the superintendent's evaluation is to be performed in executive session, were the board to decide to conduct the evaluation in open session such a decision would not be at odds with South Carolina's FOIA statute. As we have said before, FOIA is a statute whose purpose is to provide transparency in public governance and as such, the board is not required to go into executive session simply because it can. Accordingly, it is the opinion of this Office that the board may, if it so chooses, vote to perform the superintendent's evaluation in open session.

Conclusion

In conclusion, it is our opinion that Section 30-4-70(a)(1) of the Code does not require the school board to grant the superintendent's request that his evaluation be conducted in open session because his evaluation does not constitute an adverse hearing and as such, the superintendent has no right to demand a public hearing. Nevertheless, because Section 30-4-70(a)'s exemption terms are merely permissive, the board could, on its own accord, decide to perform the superintendent's evaluation in open session if it so chooses.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General