



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 9, 1995

Philip E. Wright, Esquire
Lancaster City Attorney
408 North Main Street
Lancaster, South Carolina 29720

RE: Informal Opinion

Dear Mr. Wright:

By your letter of September 21, 1995, to Attorney General Condon, you have advised that the City of Lancaster has recently received numerous requests for information under the Freedom of Information Act, which requests the City has attempted to handle. You have sought an opinion as to various aspects of the requests. Each of your questions will be addressed separately.

By way of background, it is noted that the General Assembly has made the following findings with respect to freedom of information:

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 person seeking access to public documents or meetings.

Section 30-4-15, S.C. Code Ann. (Revised 1991). In view of the expressed legislative purpose, this Office has noted that the Freedom of Information Act ("the Act") "is a statute remedial in nature and must be liberally construed to carry out the purpose

Philip E. Wright, Esquire
Page 2
October 9, 1995

mandated by the General Assembly." Ops. Att'y Gen. dated March 27, 1984; February 22, 1984; August 8, 1983; November 14, 1989; and others.

The Supreme Court in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991), stated the purpose of the Freedom of Information Act in a similar manner:

[W]e find that the essential purpose of the [Freedom of Information Act] is to protect the public from secret government activity. Sections 30-4-40(a)(2) and 30-4-70(a)(1) provide general exceptions to disclosure by exempting certain matters from disclosure. Bellamy, however, urges protection of her rights as an individual while the [Freedom of Information Act] protects a clearly identifiable class, the class protected is the public. Nowhere do Secs. 30-4-40 and -70 purport to protect individual rights. ...

....
The [Freedom of Information Act] creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exemptions from disclosure contained in Secs. 30-4-40 and -70 do not create a duty not to disclose. The exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act. ...

305 S.C. at 295, 408 S.E.2d at 221. In Bellamy v. Brown, Bellamy was fired from her position as executive director of the Horry County Council on Aging. Two members of the Council's governing body made statements to the media about why Bellamy was fired. As a result Bellamy sued, claiming that a duty of confidentiality owed her under the Freedom of Information Act was breached. Following the above discussion as to the purpose and duty of the Freedom of Information Act, the court held that "no special duty of confidentiality is established by the [Freedom of Information Act]." Id. Clearly, disclosure is the rule; exemption or nondisclosure is the exception to the rule.

With this background in mind, each of your questions will be examined.

Question 1

Is the City of Lancaster required by any provisions of the Freedom of Information Act to release information concerning the identity of persons applying for employment with the City of Lancaster?

Philip E. Wright, Esquire

Page 3

October 9, 1995

As previously observed, disclosure is the rule, with nondisclosure the exception. Should the City of Lancaster, as a public body,¹ receive a request pursuant to the Freedom of Information Act for a public record² which would contain names of persons applying for employment with the City of Lancaster, §30-4-30(a) should be considered; that subsection provides:

Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40, in accordance with reasonable rules concerning time and place of access.

Section 30-4-40 enumerates the matters which are exempt from disclosure under the provisions of the Freedom of Information Act; subsection (a)(2) exempts "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy" What would constitute an unreasonable invasion of personal privacy would be for the City of Lancaster to determine.

This Office has examined various aspects of disclosure, pursuant to the Freedom of Information Act, in employment situations. Enclosed are copies of opinions of this Office dated November 14, 1989 (particularly helpful with a discussion about what might constitute an unreasonable invasion of personal privacy); October 28, 1988; November 21, 1975; February 3, 1977; and February 27, 1991. The older opinions contain language concerning the "public interest" exception; I am sure that you are aware that the General Assembly removed that exception from the Freedom of Information Act in 1987. The opinions point out that one factor to be considered is the nature of the position being applied for; there may be less privacy related to a position which could be considered a public office, for example.

To respond to your first question, I am of the opinion that the Freedom of Information Act would require disclosure of such information unless the City of Lancaster found that one of the exemptions of §30-4-40, the most likely one being §30-4-40(a)(2), would be applicable to the document or record sought under the Freedom of Information Act.

¹The definition of "public body" for purposes of the Freedom of Information Act is codified at S.C. Code Ann. §30-4-20(a) and includes municipalities.

²The definition of "public record" is codified at §30-4-20(c).

Philip E. Wright, Esquire

Page 4

October 9, 1995

Question 2

Is the City of Lancaster required by any terms of the Freedom of Information Act to release any information relating to the identity of an employee, the details of the issues related to the grievance against the employee, and the decision of council relating to the grievance?

The principles which are responsive to your first question are also applicable to your second question; ultimately, the City of Lancaster must determine whether the records or documents sought pursuant to the Freedom of Information Act would be subject to disclosure. One additional consideration may be present with respect to a grievance, however, in that a grievance might or might not be handled in an executive session rather than a public meeting, pursuant to §30-4-70(a)(1) which permits a public body to hold a meeting closed to the public for

[d]iscussion 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 such 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.

In an opinion of this Office dated July 3, 1976 (copy enclosed), it was suggested that the sections of the Freedom of Information Act as it then existed were intended to have been read together; thus, if a matter was appropriate for discussion in executive session, a document related to those matters appropriate for executive session would not be discoverable under the Freedom of Information Act, according to that opinion.³

In response to your second question, I am of the opinion that the purpose and spirit of the Freedom of Information Act, as described above, requires openness unless the public body determines that a particular exemption is applicable; such exemption might be §30-4-40(a)(2), if the public body determines that disclosure of a record or document would constitute an unreasonable invasion of an individual's personal privacy, or §30-4-

³Of course, it is within the province of the public body to finally determine that a public record or document should or should not be disclosed.

70(a)(1), if the matter is one which was handled in executive session,⁴ or possible other exemptions of which the public body (here the City of Lancaster) may be aware.

Question 3

Are council members prohibited from discussing with members of the general public issues discussed in executive session? If so, what sanctions are available against council members who violate that prohibition?

This Office observed, in an opinion dated March 23, 1983 (copy enclosed), that

there is no mandatory restriction either upon the public body or the individual members of that body against the disclosure of an individual's vote or the reasons for that vote on any topic taken up during the session.

The only preventative solution to individual disclosure of the contents of executive session discussions and individual votes would be by the rules of conduct or regulations adopted by the particular Board in issue with appropriate sanctions attached in the event of disclosure.⁵

The issue of disclosure of the contents of discussions which took place in executive sessions and any possible sanctions which might attach was revisited in an opinion dated September 21, 1984 (copy enclosed). Therein it was stated:

[T]here is no express prohibition in the FOIA itself concerning disclosure by an individual member of the contents of discussions conducted in executive sessions. While the Act requires that the decision to convene an executive session must be by "favorable vote" or by a majority, and thus it is arguably inconsistent with the intent of the Act if there is individual disclosure of executive session proceedings, the Act does not specifically address this situation. General parliamentary law usually does forbid such disclosure, however. As this Office noted in an earlier opinion parliamenta-

⁴Section 30-4-70(a)(6) precludes a public body from taking formal action in executive session; no vote may be taken in executive session, as well.

⁵The 1987 amendments to the Freedom of Information Act preclude voting in executive session, as mentioned in the previous footnote. This opinion was rendered prior to those amendments but is nevertheless useful as it discusses disclosure of discussions which occurred in executive session.

Philip E. Wright, Esquire

Page 6

October 9, 1995

ry law generally prohibits an individual member of a public body from violating the secrecy of an executive session. Op. Att'y Gen., July 7, 1983; Robert's Rules of Order, (newly revised edition), p. 81. This is consistent with the conclusion expressed in the March 23, 1983 opinion and with the following summation of the general law in this area:

Orderly procedure requires some rules for the proper dispatch of business and deliberation in the conduct of the council or governing body of a municipal corporation. It is competent for the body to adopt its own regulations and rules of procedure when they are not prescribed by statute or charter provision... . In the absence of rules of procedure prescribed by municipal charter or statute or adopted by the governing body, the general parliamentary law prevails. Rules adopted by the governing body in conformity with statutory authority are as binding on it as the statute itself; and the consequences of a refusal to comply substantially with its provisions or of a violation of its inhibitions must, in reason, be the same as those of a noncompliance with, or a violation of, a requirement prescribed by statute.

62 C.J.S. Municipal Corporations §400. ...

The opinion of September 21, 1984, continued by examining the authority of a public body to impose sanctions and what some of those sanctions might possibly be. The opinion also noted difficulty with applicability of the First Amendment to such a situation. The adoption of a regulation or bylaw by the public body was discussed therein, as well as extreme sanctions such as suspension or removal from office for alleged breaches of secrecy of executive sessions. The opinion concluded:

Based upon all of the foregoing, it would appear that the safest course in attempting to enforce such a regulation or bylaw is for the board or public body to seek some form of equitable relief (i.e. mandamus, injunction or quo warranto) against a member who fails to comply. That way any First Amendment problems which the Guste court suggest exist could be dealt with by the court without subjecting the public body to possible liability.

Since these opinions were rendered, there has been no amendment to the Freedom of Information Act concerning the secrecy of matters discussed in executive session or the imposition of sanctions against a member of the public body who allegedly breaches such

Philip E. Wright, Esquire

Page 7

October 9, 1995

secrecy. The suggested courses of action contained in those opinions would still be viable, in my opinion.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that the foregoing has satisfactorily responded to your inquiry, as far as is possible given that the City of Lancaster must make the final determination that a particular record or document is or is not disclosable under the Freedom of Information Act.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General

Enclosures