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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 13, 1995

The Honorable Thomas L. Moore
Senator, District No. 25
Post Office Box 684
Clearwater, South Carolina 29822

RE: Informal Opinion

Dear Senator Moore:

By your letter of August 22, 1995, to Attorney General Condon, you have sought an opinion of this Office as to whether, under the circumstances described in your letter and the accompanying transcript of a meeting of the Aiken County Legislative Delegation, a violation of the Freedom of Information Act, or any other provision of law, may have occurred. To summarize the situation, you advised that the Delegation used paper ballots to elect the chair and vice chair of the Delegation, with the resulting totals announced. You further advised that the procedure employed in the entire process was conducted in open session and that it was the consensus of the Delegation to use this procedure.

The findings of the General Assembly and the purpose of the Freedom of Information Act, S.C. Code Ann. §30-4-10 et seq. (1976 & 1994 Cum. Supp.), are 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 to 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.

This Office has consistently advised that the Act was designed to guarantee the public reasonable access to certain information concerning activities of government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). Thus, the Act, which is remedial in nature, must be liberally construed to carry out the purposes mandated by the General Assembly. See South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978).

By Op. Att'y Gen. No. 84-111, dated September 6, 1984, this Office examined the status of a county legislative delegation as a part of the legislative branch of government, its status after the advent of home rule, and portions of the Freedom of Information Act relative to the General Assembly and legislative committees. Therein, we advised that "we believe a court would conclude the FOIA to be generally applicable to a [county legislative] delegation meeting." I am of the opinion that the conclusion of that opinion is still valid. Therefore, the applicable provisions of the Act must be considered in light of the events of the Delegation meeting cited above, as provided in the transcript.

Transcript of Delegation Meeting

As pointed out earlier, the Delegation at the meeting in question was attempting to elect a chair and vice chair. On page 6 of the transcript, Representative Huff proposed that the Delegation vote by paper ballots for the reasons stated, rather than raising hands and counting votes. On page 7, Representative Huff continues his urging for paper ballots:

> **Rep. Huff continuing:** ...I would like us to be able to vote by paper ballot. Those ballots would be available for any member of the public or the press to look at. We can you know, it's not in anyway meant to be secretive, but I'd like to be able to have us vote by that ballot process just as we would in any election.
>
> ....
>
> **Sen. Ryberg:** When you speak about voting by paper ballot, are you also talking about that you would sign your name?
>
> **Rep. Huff:** It doesn't matter how the people do it, I just would like to have a paper ballot for us to vote, and I have been in the position to where I've had to raise my hand or have a vote counted on me and it put me in a very uncomfortable and untenable position and I just didn't think it was right. I didn't think it was fair that the people be put upon to do something like that and I wanted to create a process by which we could vote, vote openly and have the votes tabulated and

counted and available to the public. So you know I don't care how you decide to do that.

Sen. Ryberg: Well, you know if you could clarify that to state that each individual would put his name at the top of that ballot so that we could tell or the press could tell how each of us voted, that would be fine with me.

....

Sen. Moore: You've heard the motion by Rep. Huff, then a second. What's the pleasure of this delegation?

Rep. Clyburne: Point of clarification. Signature of our names so the press will know how you vote?

Sen. Ryberg: No, I want to know how you voted.

Rep. Clyburne: What?

Sen. Ryberg: I want to know how you voted too. Yeah, if it need an amendment or if you just clarify it Tommy, to state how it should read.

....

Sen. Ryberg: ... I think the process needs to stay open and I think that each and everybody needs to indicate who they voted for.

Transcript, pages 7 and 8. From the reported exchange between Senator Ryberg and other members of the Delegation, it certainly appears that Senator Ryberg was asking that how each Delegation member voted at least be available for scrutiny.

This Office has previously examined the use of secret ballots by public bodies subject to the terms of the Freedom of Information Act. In Op. Att'y Gen. No. 77-279 dated September 8, 1977, this Office opined:

> The second question you raise concerns the ability of a school board to vote by secret ballot in a public session to elect officers for the board.
>
> An examination of the standard research sources has produced no case law or general statement of the law on this point. The closest language appears in Roberts Rules of Order, Section 45, page 368. ( ). This

> source states that the bylaws or rules of procedure for the particular organization should specify whether the vote should be taken by voice vote, show of hands, or ballot. Roberts indicates that in the absence of specific election procedures, any of the above mentioned methods would be acceptable. ...[1]

The 1977 opinion was found not to be clearly erroneous by an opinion of this Office dated January 17, 1984; the latter opinion observed that §30-4-90(a)(3) must be taken into account when reading the 1977 opinion. That Code section provides in relevant part:

> (a) All public bodies shall keep written minutes of all 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.

The 1984 opinion continued:

> It would appear that secret ballots may be used [to elect officers of county council]; but if a member of council asks that a vote be recorded, then a secret ballot could not be used in that instance. Further, as the prior opinion concludes, 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.

In addition, this Office examined the use of secret ballots and voting in executive session with respect to election of officers of the State Highway Commission in Op. Att'y Gen. No. 84-46, dated April 24, 1984.[2] This opinion cited the opinions of September 8,

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[1]The response to question 1 addressed in Op. Att'y Gen. No. 77-279 would no longer be valid, as 1987 amendments to the Freedom of Information Act provide that "No vote may be taken in executive session." Moreover, the response to question 2 does not take into account a later amendment to the Act as to recording votes pursuant to §30-4-90(a)(3).

[2]Section 30-4-70(a)(6) provides that "No vote may be taken in executive session."
(continued...)

1977, and January 17, 1984, and suggested that the procedures examined therein be followed in the election of the officers of the Highway Commission.

It appears from the transcript that Senator Ryberg was asking that "secret" ballots not be used; he asked that individuals put their names at the top of the paper ballot so that the Delegation or the press could tell how each member voted (transcript, page 7). Later in the exchange he stated twice that he wanted to know how members voted and that "each and everybody needs to indicate who they voted for." (transcript, page 8). Applying the reasoning of the above-cited opinions to this exchange at the Delegation meeting, it could certainly be argued that Senator Ryberg was asking that ballots not be "secret," that members sign or initial their ballots so that how members voted would be known. While Senator Ryberg did not specifically ask (at least in the pages of the transcript forwarded to this Office) that the minutes reflect how each member voted, the substance of his request was certainly that the information on members' votes be available to the members themselves or the press.

The minutes of the meeting in question have not been presented to this Office for review; thus, I cannot determine what the minutes might say about Senator Ryberg's request as to be able to identify who voted how on Delegation officers or whether the minutes identify who voted how on the issue. I cannot say that the terms of §30-4-90(a)(3) have or have not been complied with in the absence of such information. In any event, such a determination could be made conclusively only by a court considering the issue. I am of the opinion, however, that an excellent argument could be made that a member of the public body (here, the Aiken County Legislative Delegation) did request that votes taken for officers be capable of being identified by member, so that such information would be available for recording in the minutes of the public body as the Act contemplates. For the public body to honor the request of one of its members, in keeping with the spirit and the letter of §30-4-90(a)(3), would be in accord with the reasoning and conclusions of the three Opinions of this Office summarized above and, in my opinion, would have been the more preferable course if such was not done.

Assuming that a court found a violation of the Act to have occurred, several additional questions would then be presented: Was there any prejudice to anyone as a

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[2](...continued)
This 1987 amendment to the Freedom of Information Act was not in effect when Op. Att'y Gen. No. 84-46 was rendered; thus, the portion of Op. No. 84-46 referring to voting in executive session and subsequently ratifying action in a public session would no longer reflect the state of the law in South Carolina.

result of the action or inaction? Was the violation of the Act only a technical violation? Has the Delegation taken any further, subsequent action to rectify the violation? And, finally, what relief might a court provide to remedy the (assumed) violation of the Act?

In Multimedia, Inc. v. Greenville Airport Commission, 287 S.C. 521, 339 S.E.2d 884 (S.C. App. 1986), the complainant alleged that the Greenville Airport Commission violated the Act by holding a meeting without providing notice as required by the Act. The decision to hire an executive director made at the alleged improperly noticed meeting was reconsidered at a subsequent meeting the notice of which did comply with the Act. The Court of Appeals stated:

> No cause of action under the FOIA has been stated where the complaint reveals the prior action was subsequently ratified at a meeting complying with the law. [Cites omitted.] Moreover, substantial compliance with the Act will satisfy its requirements where a technical violation has no demonstrated effect on a complaining party. [Cites omitted.] In this case, Multimedia was not prejudiced, since the action at the April meeting was reconsidered at the properly noticed May meeting. [Cite omitted.] Reconsideration of the Commission's decision at the properly held May meeting cured any prior FOIA violation. [Emphasis added.]

287 S.C. at 525. If indeed there was a violation of the Freedom of Information Act by actions taken at the Delegation meeting described above, it would certainly be possible to cure that violation by reconsidering the decisions made at the Delegation meeting in accordance with members' wishes (i. e., using paper ballots but having members initial them or sign their names, in accordance with the request of the member who asked that information be available as to how each and every member voted).

Should a violation be alleged to have occurred, an interested or aggrieved party might attempt to exercise the remedies available under §30-4-100 of the Act. That section provides:

> (a) Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

> (b) If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation. If such person or entity prevails in part, the court may in its discretion award him or it reasonable attorney fees or an appropriate portion thereof. [Emphasis added.]

An action taken allegedly in violation of the Act is not void ab initio but is instead voidable. In Business License Opposition Committee v. Sumter County, ___ S.C. ___, 426 S.E.2d 745 (1992), Sumter County Council met prior to a scheduled county council meeting on October 24, 1989, and discussed a proposed business license tax ordinance; no notice of this meeting was given. A second time, council again met prior to a scheduled public meeting on December 12, 1989, and discussed the proposed ordinance and amendments proposed thereto; no notice of this meeting was given. Minutes of the latter meeting show that the ordinance was given third reading on that date and thus adopted, but no vote was taken on the proposed amendment. The Master in Equity concluded that the amendment to the ordinance was not legally adopted but was instead adopted at the closed meeting prior to the council meeting. The Master declared the ordinance invalid.

On appeal, the issue of invalidation of the ordinance was considered. The court stated:

> The Master also held the ordinance invalid on the ground that County Council failed to follow proper procedure in passing the amended version of the ordinance. He found that, at the closed December 12 meeting, a consensus was reached on the amendment but that, at the subsequent public meeting, no motion to amend was made. Rather, the amended version was read as a "third reading" and voted upon. The Master found this violative of §30-4-70(a)(6), which precludes taking votes or formal action in an executive closed meeting and, accordingly, he ordered a refund of taxes paid under protest pursuant to the ordinance.
>
> County argues that invalidation of the ordinance is impermissible, contending that no vote was taken at the closed meeting and, further, that the ordinance is presumed valid.
>
> As noted above, the trial court, in its discretion, may order injunctive relief for FOIA violations as it considers appropriate. S.C. Code Ann. §30-4-100 (1991). In reviewing actions in equity, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. [Cites omitted.]

> We agree with the Master that the evidence of record demonstrates that the amendment to the ordinance was illegally adopted at the closed meeting on December 12. Finally, based upon this evidence, we find no abuse of discretion on the part of the Master in ordering the equitable relief of invalidation of the ordinance.

426 S.E.2d at 747-48.

Invalidation of the action taken by a public body, allegedly in violation of the Act, is one form of equitable relief that a court might grant pursuant to §30-4-100. Such was the case in Business License Opposition Committee v. Sumter County, supra. The public body in Multimedia, Inc. v. Greenville Airport Commission, supra, avoided invalidation of the action taken allegedly in violation of the Act due to their reconsideration of the same issue at the next, properly noticed meeting. To avoid a result similar to that experienced by Sumter County Council, the Aiken County Legislative Delegation may wish to seriously consider holding another election of officers to comport with the request of Senator Ryberg to identify how each member voted.

One other concern is the fact that §30-4-100 provides for the awarding of attorney fees and costs, in whole or in part, to a person or entity who seeks relief under the Act and prevails in whole or in part. Attorney fees and costs in the amount of $12,253.08 were awarded against Sumter County Council in Business License Opposition Committee, supra, a case which went to the Supreme Court twice on various issues. Attorney fees and costs were awarded to the Bush River Planning Committee, against the Newberry County Board of Education, in Braswell v. Roche, 299 S.C. 181, 383 S.E.2d 243 (1989), in the amount of $1,500.00. Attorney fees and costs of $2,000.00 were awarded against District 20 Constituent School District of Charleston County, a figure the Supreme Court found reasonable based on a review of the record, particularly the expeditious manner in which the school district responded to the appellants' assertions, and considering the factors in Baron Data Systems, Inc. v. Loter, et al., 297 S.C. 382, 377 S.E.2d 296 (1989). The Department of Health and Environmental Control was assessed attorney fees and costs of $2,102.88 in Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), in which decision the Supreme Court observed that "[t]he trial judge did not abuse his discretion in awarding fees to encourage agencies to comply with FOIA requests." 283 S.C. at 568. That a public body might be required to pay attorney fees and costs should a challenge to some action or inaction alleged to be a violation of the Act be successful is a serious consideration.

Conclusion

In conclusion, while only a court could actually determine that a violation of the Freedom of Information Act has occurred by the activities described above and in the transcript enclosed with your letter, I am of the opinion that a member of the public body, the Aiken County Legislative Delegation, did ask that votes by the public body for its officers be capable of being identified by member, the result being that such most probably should have been recorded in the minutes of the meeting of the public body pursuant to §30-4-90(a)(3). For the public body to honor the request of one of its members, in keeping with the spirit and letter of the Freedom of Information Act, would be in accord with the reasoning and conclusions of the opinions referenced above and enclosed herewith, and in my opinion, would have been the more preferable course if such was not done.

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 it has satisfactorily responded to your inquiry and that you will advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General

Enclosures