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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 8, 1996

Mr. William P. Edenfield
Member, Board of Trustees
The Regional Medical Center
P. O. Box 1284
Orangeburg, South Carolina 29115

Re: Informal Opinion

Dear Mr. Edenfield:

You advise that you are a member of the Board of Trustees of the Regional Medical Center in Orangeburg. You further state that

[t]he board of the Regional Medical Center of Orangeburg and Calhoun Counties consists of seventeen (17) individuals. These individuals are appointed by county council. I call the overall Board "the committee of the whole." In addition, we have several what I call "... subcommittees". These subcommittees are the finance committee, the executive committee, the strategic and long-term planning committee and the personnel committee. The individuals that serve on these committees are members of the board and are appointed by the chairman. The question of concern is as follows:

If a certain member of the "... committee of the whole" is not a member of a subcommittee, can this board member attend subcommittee meetings? In other words, can a member of the overall board who is not a member of the Executive Committee attend the Executive Committee

subcommittee meetings? The next question and the big question is if a "subcommittee" such as the Executive Committee goes into executive session, must the board member who is a member of the "... committee of the whole" and who is attending the meeting be required to leave the room during executive sessions? (emphasis in original)

It has always been our thought process that if a member of the "committee of the whole" would remain in a committee meeting even if they were not a member of the committee when ... it went into executive session.

Law / Analysis

You have provided a copy of Ordinance No. 81-11-19, a joint ordinance between Orangeburg and Calhoun County Councils, to create the Orangeburg-Calhoun Regional Hospital and to Provide for its Board of Trustees and its Duties and Powers. As you indicate, the Ordinance creates a governing board, consisting of seventeen members. Section 6 of the Ordinance enumerates a lengthy list of powers and authority of the Board and, specifically, Subsection (2) of Section 6 empowers the Board to

[a]dopt such bylaws, rules and regulations for the conduct of its business and expenditure of its funds as it may deem advisable.

You have also enclosed a copy of the Board's Bylaws. Pursuant to Section 2.4-4, all Board members are to receive reasonable notice of Board meetings. Section 2.4-8 provides that "[t]he Board meetings shall be conducted under the Robert's Rules of Order."

Article IV of the Bylaws establishes the Committees of the Governing Board and Section 4.2 creates the Executive Committee. Various powers and responsibilities of the Executive Committee are enumerated. Section 4.2-3 provides that meetings of the Executive Committee may be called by or at the direction of the committee chairman or at the behest of a majority of committee members. Section 4.10 states that

[e]ach committee shall meet as often as is necessary to perform its duties. Notice will be given any time and in any manner reasonable that is designed to inform the members of

the time and place of the meeting. Each committee shall keep minutes of its proceedings.

South Carolina's Freedom of Information, S.C. Code Ann. Sec. 30-4-10 et seq. requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." Of course, the governing board of the Orangeburg-Calhoun Regional Medical Center is a "public body" pursuant to the Act. An "executive session" is generally defined as "one to which the public does not have access." Op. Atty. Gen., April 22, 1970. The limited reasons for which an executive session may be held and the procedure for entering into executive session are specified in Section 30-4-70. Permissible, though not mandatory reasons for which a public body may conduct an executive session are:

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body
- (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice, settlement of legal claims or the position of the public agency in other adversary situations involving the assertion against said agency of a claim.
- (3) Discussion regarding the development of security personnel or devices.
- (4) Investigative proceedings regarding allegations of criminal misconduct.
- (5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

A "meeting" is defined in Section 30-4-20(d) as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision,

Mr. Edénfield
Page 4
October 8, 1996

control, jurisdiction or advisory power." Therefore, the Freedom of Information Act applies to meetings of a quorum (or committee) of the Orangeburg-Calhoun Regional Medical Center Board. Op. Atty. Gen., Op. No. 94-22 (March 31, 1994).

Section 30-4-70(6) provides that

[p]rior to going into executive session the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the specific purpose of the executive session. No formal action may be taken in executive session. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action. No vote may be taken in executive session.

We have consistently concluded that executive sessions should be used sparingly and that the Freedom of Information Act does not require that they be even employed at all if the public body chooses not to. As was stated in Op. No. 94-22,

[t]he rule under the Freedom of Information Act is openness; the permissive reasons for holding executive sessions are few and 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.

Even though executive sessions should be used infrequently, they nonetheless may be employed for the authorized reasons set forth in the statute, provided the statutory procedure is met. The FOIA, however, does not speak to the question of who may or may not be present in an executive session, only that the "public agency" may convene such session.

It would appear, therefore, that the question of who may be present or who may be excluded from an executive session is one of common law and parliamentary procedure. The law is somewhat sparse in this area.

However, an opinion issued by the Virginia Attorney General, 1985-86 Va. Op. Atty. Gen. 331 (July 11, 1985) concluded that a public body possessed the discretion to allow nonmembers of the body to attend closed meetings. There, it was stated:

... a public body may admit certain nonmembers to a closed meeting without destroying the closed status of the meeting. This conclusion is consistent with the prior Opinions cited above and with the practical requirements of government. A public body may, therefore, admit those persons deemed necessary or whose presence will reasonably aid the public body in its consideration of a topic which is the subject of a properly convened closed meeting.

Another Virginia Attorney General's Opinion, 1976-77 Va. Op. Atty. Gen. 308 (January 13, 1977) found that "[n]o provision of the Freedom of Information Act ... prohibits a public body meeting in executive session from permitting the presence of any person or persons whom they may deem necessary or helpful in conducting their executive discussions." In addition, the Virginia Attorney General concluded that a committee of a public body may "allow council members not on the committee to be present during such meeting". The ultimate decision as to whether non-committee members of council could be excluded from committee executive sessions was a matter of procedure of the full council, reasoned the Attorney General, stating as follows:

[w]hether a committee of the town council, meeting in a properly called executive session, may exclude the other members of council is a matter which would be governed by the procedural rules established by the council. Any member excluded would of course later hear and participate in deciding upon any substantive issue that had been referred to the committee for recommendation.

That this issue is a question of the agency or public body's own rules, is also reflected in the Pennsylvania decision of Guy v. Woods, 104 Pa. Cmwlth. 585, 522 A.2d 193 (1987). There, the Court upheld a rule of a Borough Council which read that "[e]ach Committee Chairman may similarly call meetings of his committee which shall at the Chairman's option be closed or open to other Council members, borough officials or the public." A member of Council who was not a member of the Committee in question attacked the rule on the basis that it violated the First Amendment, the Due Process Clause and the Equal Protection Clause. The Court rejected these arguments and upheld the Rule.

With respect to the First Amendment contention, the Court said this:

[b]ecause Rule 2E advances a legitimate government interest and restricts Guy's right to speak and associate only in limited circumstances, we find that it does not violate her First Amendment rights. A local government certainly has an interest (if not a duty) to ensure that its internal affairs are operated efficiently. This interest has long been served in government by the committee structure, which allows for the division of legislative labor. The volume of work and time constraints on legislative calendars dictate that investigatory functions be given to subparts of the whole Council, where members may develop expertise and familiarity with particular subject matters

Furthermore, we see no less restrictive alternative -- and Guy points to none -- which would affect the local government's end. If Guy and all other members were included as of right in all committee deliberations, the Council would at all times be acting as a committee of the whole. We recognize that legislative matters requiring formal action by the entire Council may need preliminary informal discussion among its members who have been assigned to develop local legislation in particular subject areas.

Speaking to the Equal Protection question, the Court found the Rule to be reasonable.

We find that Rule 2E comports with the constitutional guarantees of equal protection of the laws. As we have noted, the classification arises from a compelling need for the smooth operation of governments at the local level as well as the need for candor among elected officials. Moreover, there is no blanket exclusion of non-committee members from committee sessions; the discretion to close sessions of Council is narrowly limited to committee meetings where no formal action may be taken. The rule does not prohibit Guy's meeting with committee members at any time outside of the informal committee sessions.

Mr. Edenfield
Page 7
October 8, 1996

Clearly, meetings of a public body or committee thereof which are required by law to be open to the public may be attended by any member of the public including non-committee members of that body. Section 30-4-60 expressly states that "[e]very meeting of all public bodies shall be open to the public" See also, Op. Atty. Gen., April 22, 1970 [where meeting is open to public, no discrimination as to who can attend]; Mason's Legislative Manual, Sec. 629 ["(a)ny member of a legislative body has the right, ordinarily, to be present at committee meetings and to express an opinion, but the member cannot vote and must give way to any member of the committee."] Whether or not such non-committee members of the body are allowed to speak at public committee sessions is governed by the Rules of the public body. See Op. Atty. Gen., November 30, 1987 [Rules of Charleston County Council provide that during committee meetings of Council open to the public, while business is being discussed, speaking to the committee by a non-member would be permitted only upon permission of or recognition by the committee.]

With respect to executive sessions of the Committee, as concluded by the foregoing authorities, the question of who may be present at the executive session is a matter to be resolved by the Board's operating rules. Clearly, no statute or existing law requires that a non-Committee member of the Board be excluded from executive sessions. Mason's Legislative Manual states also as a general proposition that "[t]he general rule is that a committee cannot exclude other members of the body from its deliberations" indicating that such exclusion must come from the body itself through its rules or bylaws. As I have indicated, the little case law extant on this subject has upheld such a rule or bylaw on the policy considerations of efficiency, time, expertise, etc.

Based upon my review of the Bylaws submitted by you, I can find no express mention of the question of attendance by non-committee members of the Board at executive sessions. However, as noted above, the Bylaws adopt Robert's Rules of Order as part of the Board's procedures. In Robert's, it is stated [§ 52, p. 212, Seventy-Fifth Anniversary Edition], it is stated:

members of the society have a right to appear at the committee meetings and present their views on the subject before it at such reasonable times as, upon request, the Committee may appoint. But during the deliberations of the Committee no one has a right to be present, except members of the committee.

Mr. Edenfield
Page 8
October 8, 1996

Thus, reliance upon Robert's by the Committee may be the basis of the exclusion, although I am only guessing at this.

As the Virginia Attorney General has stated "[a]ny member excluded [from Committee deliberations] would of course later hear and participate in deciding upon any substantive issue that had been referred to the committee" Thus, even if you are excluded from the Committee deliberations, you would obviously have the opportunity to hear and debate these matters as they come before the full body.

Beyond, this, as I have indicated above, there is no legal requirement under South Carolina law for exclusion of non-Committee members of a public body from executive sessions. Instead, such a matter is one to be dealt with through Board operating rules. It appears that the Board possesses discretion to adopt a rule of entry into the executive session only by committee members, but nothing requires that such a procedure be a part of the Board's operating procedures. Thus, your additional remedy would be to seek modification or clarification of the Board's bylaws and operating procedures.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an