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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 20, 1997

The Honorable Harry C. Stille
Member, House of Representatives
9 Dogwood Drive
Due West, South Carolina 29639-0203

Re: Informal Opinion

Dear Representative Stille:

You have requested an opinion of this Office as to whether, under the circumstances described in your letter, 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 Abbeville County Transportation Committee recently authorized the expenditure of "C" Funds to a project without first notifying the public that a meeting would be held to conduct a vote of the committee members. You further advised that the members voted telephonically with no opportunity for motions, seconds, or even a discussion of the project's merits.

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 so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their

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> 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).

The Freedom of Information Act is applicable to meetings and records of public bodies; therefore, the first relevant inquiry is whether the Abbeville County Transportation Committee would come within the definition of "public body."

The term "public body" is defined in §30-4-20(a) to mean

> any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known.... (Emphasis added.)

Thus, a county transportation committee is clearly a public body subject to the requirements of the Freedom of Information Act.

To fulfill the purposes expressed by the General Assembly, that body has declared that, unless specifically excepted, "[e]very meeting of all public bodies shall be open to the public ...." In Op.Atty.Gen. dated August 8, 1983, this Office concluded:

> The Freedom of Information Act applies to any meeting of a public body, as defined in the Act, whether the meeting is designated as formal or informal and whether action is taken upon public business or merely discussed. A public body may not ignore the requirements the Act when it discusses public business over which it has supervision,

> control, jurisdiction or advisory power by holding a meeting, as defined, in an informal or social setting.

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, control, jurisdiction or advisory power." [Emphasis added.] Thus, we continue to advise that, with very few exceptions, all meetings held by a public body are to be open to the public and media.

For the public to learn of the activities of a particular public body, the public must of course be notified as to the convening of the public body. Toward that end, Section 30-4-80 sets forth notice requirements to be observed by a public body. In relevant part, that statute provides:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.
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> ....
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> (c) Subcommittees, other than legislative subcommittees, of committees required to give notice under subsection (a), must make reasonable and timely efforts to give notice of their meetings.
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> (d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such

> office exists, at the building in which the meeting is to be held.
>
> (e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

As stated earlier, these requirements must be liberally construed to carry out their legislative purpose to adequately inform the public. These requirements are mandatory and may not be ignored by a public body. See, White v. Battaglia, 434 N.Y.S.2d 537 (1980). The section requires overt and affirmative action by the public body to fulfill the notice requirements. Hyde v. Banking Bd., 552 P.2d 32 (Colo. 1976); Jenkins v. Newark Bd. of Ed., 166 N.J.Super. 357, 399 A.2d 1034 (1979).

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 result of the action? Was the violation of the Act only a technical violation? Has the Abbeville County Transportation Committee 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. Accordingly, if the Abbeville County Transportation Committee violated the Freedom of Information Act at the meeting described above, it could certainly attempt to cure that violation by reconsidering its actions at a subsequent meeting in compliance with the law.

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, at 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.
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> 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 meting 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.
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> 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 Abbeville County Transportation Committee may wish to hold another meeting in compliance with the Act to reconsider their previous action on this project.

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 upon 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 Freedom of Information Act has occurred under the circumstances described in your letter, I am of the opinion that the Abbeville County Transportation Committee is clearly subject to the Act's notice requirements. Moreover, should a violation be alleged, either the Committee may attempt to cure the defect by reconsidering its decision at a properly noticed meeting, or an interested party might attempt to exercise the remedies available under §30-4-100 of the Act.

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

Sincerely yours,

Zeb Williams

Zeb C. Williams, III
Deputy Attorney General

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