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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 27, 1997

James Randall Davis, Esquire
Post Office Box 489
Lexington, South Carolina 29071-0489

Re: Informal Opinion

Dear Mr. Davis:

You note that "[a]nnually, Lexington County Health Services District, Inc. has an external C.P.A. firm perform a financial audit as well as a management letter which are presented to the Board for the Health District." You seek an opinion as to "what circumstances under which the audit report and/or management letter could be discussed in executive session." You further note that "[o]bviously any vote to accept the audit report and/or management letter would be in regular session."

LAW / ANALYSIS

The South Carolina Freedom of Information Act, S.C. Code Ann. Sec. 30-4-10 et seq., has as its purpose the following:

> [t]he 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 persons seeking access to public documents or meetings.

Section 30-4-15. In view of the expressed legislative purpose, this Office has noted that the Freedom of Information Act "is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly." Ops.Atty.Gen., dated March 27, 1984; February 22, 1984; August 8, 1983; November 14, 1989; and others. See also, Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991).

Section 30-4-60 of the FOIA expressly 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." An "executive session" is generally defined as "one to which the public does not have access." Op.Atty.Gen., April 22, 1970.

In an Informal Opinion, dated October 8, 1996, it was stated as follows with regard to the permissible use of executive sessions pursuant to the FOIA:

> [t]he 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. (emphasis added).

Section 30-4-70 (6) particularizes the procedures which must be followed with regard to executive sessions. In the same Informal Opinion referenced above it was also noted with respect to executive sessions that

> [w]e 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.

Other opinions of this Office make it clear that only for those reasons specified in § 30-4-70 may a public body utilize an executive session. As we said in an Opinion dated October 30, 1985, referencing an earlier opinion of February 8, 1979,

> whether a "State regulatory agency, which has adjudicatory responsibilities pursuant to statute, may meet in executive session to deliberate on matters presented as evidence in public proceedings before it, consistent with the provisions of the ... Freedom of Information Act" was discussed [in the February 8, 1979 opinion]. That opinion concluded that the Act does not "permit a state regulatory agency to go into executive session for the purpose of deliberating on matters of public record. The agency may, of course, go into executive session for the purposes outlined in Section [30-4-70]."

In Op.Atty.Gen., Op.No. 94-22 (March 31, 1994), we observed that "[t]he limited reasons for which an executive session may be held and the procedure for entering executive sessions are specified in § 30-4-70." And in Op.Atty.Gen. Op.No. 88-9 (January 26, 1988), this Office stated that "Section 30-4-70 enumerates the very limited circumstances for which executive sessions may be convened and further specifies the procedures to be followed in convening an executive session." The old so-called "administrative briefing", which was formerly authorized pursuant to § 30-4-70, and which enabled public officials by "executive session called for the purpose of receiving information or memoranda

pertaining to some activity over which [a public body] ... exercises supervision, control, jurisdiction or advisory power..." see, Op.Atty.Gen., Op.No. 85-3 (January 17, 1985), was repealed when the FOIA underwent major revisions in the late 1980's.

Recently, in City of Cola. v. American Civil Liberties Union of S.C., ___ S.C. ___, 475 S.E.2d 747 (1995), the South Carolina Supreme Court commented upon the use of an executive session pursuant to the FOIA, and noted the separate purposes of the specified reasons for an executive session and non-disclosure of records. There, the Court stated:

> [u]nder the FOIA, a public body may hold a meeting closed to the public to discuss, among other things, the employment, demotion, or discipline of an employee. Section 30-4-70(a)(1). Respondent analogizes its internal investigation [of a police officer] to a Section 30-4-70(a)(1) "discussion", and argues that because Respondent can conduct such a discussion closed to the public, it therefore follows that any report memorializing that discussion should also be exempt from disclosure under the FOIA. ...
>
> The plain language of Section 30-4-70(a)(1) does not exempt from disclosure a "public record" as that term is defined by Section 30-4-20. Section 30-4-70(a)(1) does no more than to allow public bodies to conduct certain "discussions" closed to the public. Thus, as the report is a public record as defined by Section 30-4-20, the question of its exemption must be resolved by reference to Section 30-4-40 ("Matters exempt from disclosure").

Your letter indicates that "[o]bviously, any vote to accept the audit report and/or management letter would be in regular session", thus indicating that once such acceptance has occurred, these documents will be released to the public. Of course, financial audits would generally be public information, unless a particular exception is applicable pursuant to § 30-4-40.

Accordingly, it is my opinion that an executive session would generally not be available to the Board to receive and discuss a document such as an audit and/or management letter. There is no specific authority provided in § 30-4-70 for an executive session for such purpose. Moreover, as stated above, the old "administrative briefing" is no longer authorized by the Freedom of Information Act as a means to receive and discuss

documents. Unlike the FOIA's in some states, § 30-4-70 does not authorize an executive session for the "[d]iscussion of the contents of documents excluded from the definition of a 'public record' ... where such discussion may disclose the contents of such documents ... ." Compare, 29 Del.C. §§ 10004(b)(6). Accordingly, the Board would have to carefully examine the specified reasons contained in § 30-4-70 to determine if an executive session is permitted for the particular discussion contemplated. Only if a document contains subject matter which can legally be discussed in executive session pursuant to § 30-4-70, would an executive session be authorized. Moreover, even where § 30-4-70 may be applicable, a public body is not required to convene in executive session, but is free to choose to meet in public.

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/ph