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The State of South Carolina

Office of the Attorney General

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July 23, 1992

The Honorable J. Verne Smith
Senator, District No. 5
Post Office Box 528
Greer, South Carolina 29651

Dear Senator Smith:

On behalf of several constituents, you asked this Office to review certain policies of the Taylors Fire and Sewer District relative to the Freedom of Information Act and opine as to the legality of those policies. To respond to your question, it is also necessary to review the District's enabling legislation, the Freedom of Information Act, and other legal principles.

The Taylors Fire and Sewer District was created pursuant to Act No. 1099 of 1958, as amended. In § 3, the section enumerating powers and duties of the District's governing body, subsection (4) authorized the entity to "make bylaws for the management and regulation of its affairs." Acting presumably pursuant to this grant of authority and other relevant statutory authority (such as the Freedom of Information Act), the District's governing body has adopted policies relative to establishing the agendas for their meetings and handling requests made under the Freedom of Information Act for copies of records. As we understand your constituents' concerns, these are the policies which they question; each will be addressed separately, as follows.

FOIA Requests

The first concern is that when copies of public records are requested pursuant to the Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10 et seq., constituents are being asked to pay cash in advance and $15.00 per hour for labor. The constituents feel that the District is trying to stop them from finding out the business of the district, according to an enclosure with your letter.

The mechanism for providing copies of public records is found in § 30-4-30, which provides in relevant part:

> (a) 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.
>
> (b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. ... The records must be furnished at the lowest possible cost to the person requesting the records. ... Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records. ...

A resolution adopted by the District's governing body on January 28, 1992, provides as to rates to be charged under the Freedom of Information Act:

> 4. The following rate structure shall apply to requests. This rate structure takes into account the actual cost for use of staff time, equipment and matrials [sic] and is set pursuant to S.C. Code Ann. § 30-430 [sic]:

Custodial time:	$15.00 per hour per custodian (If less than an hour to be pro-rated)
Costs per page for duplication:	$.25 per page

Plus any out-of-pocket costs, if any are incurred by the District

5. After receipt of the written request the District will acknowledge the request within fifteen days. This acknowledgement will be in writing and will notify the requestor of the policy set forth in this resolution, the rates and the estimated costs. The District will also set the place and reasonable time for the inspecting, viewing or copying of the records. The requestor will then be asked if he wishes the District to process the request, and if so, the requestor must make a deposit of a cash amount equal to the estimated costs. Charges shall be deducted from this deposit. If the costs exceed the estimate, the requestor shall pay the difference.

Applying the terms of § 30-4-30 to the cited terms of the resolution, we note that the public body may make reasonable rules concerning time and place of access to public records. What is considered reasonable is a question of fact and depends on the circumstances under which access is permitted. In addition, fees may be established and collected for searching for or making copies of records; such fees may not exceed actual costs. Also, the custodian may charge a reasonable hourly rate for making records available to the public. This Office cannot determine such factual questions as whether $.25 per page exceeds the actual cost of making a copy or whether $15.00 per hour for custodian's time is reasonable. Finally, a requestor may be required to post a reasonable deposit prior to the public body's searching for or copying records; whether the required deposit of an amount equal to the estimated costs is reasonable is again a factual question.

By an opinion of this Office dated November 4, 1976 (copy enclosed), we opined that public bodies may set up reasonable requirements for viewing and copying public records. That opinion cautioned, however, that an internal system or policy for handling such requests "must be carefully considered to make sure it does not, by design or implication, inhibit or reduce the public's ability to examine public records." The same cautionary statement would be applicable to the situation outlined above.

If your constituents feel that the FOIA is being violated by the District, in that fees are in excess of actual costs, the hourly rate is not reasonable, the deposit is unreasonable, and the like, they may wish to consider pursuing the remedies available under the FOIA. Copies of §§ 30-4-100 and 30-4-110 are enclosed for their review.

Agenda Policy

Your constituents' other concerns involve being able to ask questions of the District's governing body during meetings. An agenda policy was adopted by resolution of the governing body dated April 28, 1992.

The Freedom of Information Act contains no guidance as to how a public body is to establish its agenda or how a member of the public will be allowed to participate at a meeting. See Op. Atty. Gen. dated November 30, 1987 (copy enclosed). Participation of the public can be limited by the terms of § 30-4-70(c), which provides that "[t]his chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised." (Emphasis added.)

The agenda policy requires one wishing to appear at a regular meeting of the Board to bring any matter to the attention of the Board, to submit a written request. The request is referred to a committee, which will invite the requestor to appear at the next committee meeting. If, after that, the individual still wishes to appear before the full Board, he will advise the chairman in writing and shall be placed on the agenda of the next Board meeting, during the public section of the meeting. If the request is not first referred to a committee, the appearance will be set for the next business meeting.

The request must include the name of the requestor, information as to for whom and on whose behalf the request

is made, and comply with seven other requirements if the request is made on behalf of a corporation or any other type of organization.

Public hearings are governed by another part of the resolution. Agenda for the public hearing will be limited to the specific subject matters for which the hearing was noticed, and all remarks must be relevant to the subject matter. No advance request is necessary for one to speak at a public hearing.

Because the FOIA offers no guidance as to how a public body is to establish its agenda for any type of meeting, a court reviewing the matter would likely consider whether such a policy would be reasonable, given the need for conducting public business in public, in an orderly fashion. Even if an individual is seeking to address the District, as a public body, given the U.S. Constitution's First Amendment's guarantee of freedom of speech, still the public body is authorized to place reasonable restrictions on the time, place, and manner of speech in a public forum. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). It would be up to a court to review the policy and determine whether such is a reasonable policy, considering all attendant facts and circumstances.

We trust that the foregoing sufficiently responds to the legal aspects of your constituents' concerns, though we must leave determinations of factual issues to the appropriate trier of fact. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway /an

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions