



Office of the Attorney General

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September 21, 1990

The Honorable Ernie Passailaigue
Senator, District No. 43
Post Office Box 299
Charleston, South Carolina 29402

Dear Senator Passailaigue:

You have requested the opinion of this Office as to whether the records of the Legislative Audit Council, compiled during a "sunset review" of a state agency, remain confidential once the audit results are published. To respond to your inquiry necessitates the review of an opinion of this Office dated June 24, 1981 concerning confidentiality and disclosure of Legislative Audit Council records.

In conducting audits and "sunset reviews," staff members of the Legislative Audit Council are bound by various statutes concerning confidentiality. Of particular importance is Section 2-15-120 of the South Carolina Code of Laws, providing:

All records of ... the Legislative Audit Council with the exception of its final review and evaluation reports provided for by § 1-20-10 1/ and its final audit reports provided for by § 2-15-60 2/ shall be confidential and not

1/ Section 1-20-10 of the Code provides for the "sunset review" of various state agencies and boards twelve months prior to the termination date of termination of the agency or board in question by the Legislative Audit Council.

2/ Section 2-15-60 of the Code specifies the duties of the Legislative Audit Council and includes investigation and study of fiscal matters, audits, and the like.

subject to public disclosure prior to the publication of the final audit report.... 3/

Then, the definition of "record," as that term is used in Section 2-15-120, and penalties for violation of the statute are specified. In addition, Section 2-15-62 of the Code provides:

In the performance of their audit duties, Legislative Audit Council staff members are subject to the statutory provisions and penalties regarding confidentiality of records of the agency under review.

In construing statutes such as these, the primary objective of both the courts and this Office is to determine and effectuate legislative intent as far as possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). To do so, the language of a statute will be examined and words given their plain and ordinary meanings. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). In the absence of ambiguity, the literal meaning of language will be applied. State v. Goolsby, 278 S.C. 52, 292 S.E.2d 180 (1982).

Applying these rules of statutory construction to the foregoing statutes, it would appear that all records with respect to "sunset reviews" would be subject to confidentiality and thus protected from public disclosure by Section 2-15-120 until after the publication of the "final audit report." The first part of the statute plainly and unambiguously states that "all records of ... the Legislative Audit Council [with specified exceptions] shall be confidential and not subject to public disclosure...." The term "shall" connotes mandatory compliance. S. C. Dep't of Hwys. and Public Transportation v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). Then, the statute expressly removes the requirement of confidentiality from final review and evaluation reports (i.e., "sunset review" reports) under Section 1-20-10 and final audit reports provided for by Section 2-15-60. Finally, the publication of the "final audit report"

3/ The term "audit" is defined in Section 2-15-50 as

a broad-scope examination of and investigation into all state agency matters relating to: (a) compliance by state agencies with all applicable state and federal laws and regulations; (b) the efficiency and the economy of state agency operations; and (c) the effectiveness of state agencies in achieving desired program results.

appears to remove the requirement of confidentiality from certain records of the Legislative Audit Council, with respect to various matters undertaken pursuant to Sections 1-20-10 and 2-15-60, subject to limitations imposed by Section 2-15-62 and other applicable statutes involving confidentiality triggered by Section 2-15-62.

An argument could be made that the term "final audit report" as used in the phrase "prior to the publication of the final audit report" refers to those investigations or studies undertaken pursuant to Section 2-15-60. However, the definition of the term "audit" (found in footnote 3) appears to be broad enough to cover a "sunset review," as a "sunset review" necessarily takes into account compliance with applicable state and federal laws and regulations (Section 1-20-10 (8)); efficiency and economy of state agency operations (Sections 1-20-10 (3) and (4)); and effectiveness in achieving desired program results (Sections 1-20-10 (1), (2), and others). Grammatically, the phrase "shall be confidential and not subject to public disclosure" must refer back to "all records" with the noted exceptions. It would not make grammatical sense to then restrict the final phrase "prior to the publication of the final audit report" to only the audit report produced under Section 2-15-60. 2A Sutherland Statutory Construction § 47.33.

Among the relevant records which might be candidates for disclosure at the appropriate point in time, there could easily be, in the files of the Legislative Audit Council, records of an agency or board which records are expressly made confidential by a relevant statute. 4/ Section 2-15-62 would require that such records originally protected from disclosure continue to be treated as confidential in the files of the Legislative Audit Council. Thus, any disclosure of other agencies' or boards' records would require examination of the relevant statutes to determine whether such confidentiality is applicable and thus must be observed. For example, if a specific sentence or paragraph in a record is covered by a specific statute conferring confidential status, that information could remain confidential while permitting the disclosure of all other information. Such would uphold the confidentiality of the particular information but promote the openness anticipated by Section 2-15-120 at the same time. Cf., Section 30-4-40(b) of the Code.

4/ The term "records" is deemed to include various documents, etc. "prepared, owned, used, in the possession of or retained by the Legislative Audit Council...." Section 2-15-120 (emphasis added).

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By way of contrast, it is noted that the Compliance Review Act of 1988, Section 1-22-10 et seq. of the Code, provides the following as to confidentiality:

All records of the [Compliance Review] committee, [State Reorganization] commission staff, and the [Legislative Audit] council, with the exception of the Preliminary and Final Compliance Review Reports provided for in Sections 1-22-120 and 1-22-160, are confidential and must not be disclosed to the public.... 5/

No language similar to the final phase "prior to the publication of the final audit report" as in Section 2-15-120 is found in Section 1-22-60. Agency "sunset reviews" are specifically excluded from the provisions of the Compliance Review Act by Section 1-22-180, though Act No. 465 of 1988 (the Compliance Review Act), in section 3 otherwise specifically requires that the Compliance Review Act apply "to any audit or report released to the public by the Legislative Audit Council after December 31, 1988." Thus, as the later expression of legislative intent, the confidentiality provisions of Section 1-22-60 appear to apply to records of audits or reviews other than "sunset reviews." Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945). Thus, two standards of confidentiality are legislatively established, one applicable to "sunset reviews" and the other applicable to all other audits or reviews. Had the General Assembly wished to protect the records of the Legislative Audit Council as to "sunset reviews" as it did the records of compliance reviews, after publication of the various reports, such could have been achieved easily by drafting Section 2-15-120 in a fashion similar to Section 1-22-60.

In conclusion, it is the opinion of this Office that records of the Legislative Audit Council relative to "sunset reviews" of various agencies or boards would be available for disclosure once the final review and evaluation report of a particular agency or board is published. Such availability would be limited only by the consideration of whether given information is accorded confidential status by a specific statute. As suggested above, deletion of the particular information (sentence, paragraph, or whatever) which must be accorded confidentiality while disclosing the remaining information would promote openness anticipated by Section 2-15-120. Cf.,

5/ A statute virtually identical to Section 2-15-62 is found at Section 1-22-70.

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Section 30-4-40(b) of the Code, as well. To the extent that today's opinion is inconsistent with the prior opinion of this Office dated June 24, 1981, today's opinion will be deemed controlling. 6/

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

6/ You have not raised your question in terms of the Freedom of Information Act, and that Act is not addressed herein. This Office continues to promote disclosure of records under the Freedom of Information Act, resolving any question of disclosure in favor of openness. The same policy of openness would be promoted by disclosure of those records covered by Section 2-15-120 to the greatest extent possible.