

The State of South Carolina



Office of the Attorney General

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November 14, 1989

The Honorable Donald H. Holland
Senator, District No. 27
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Camden, South Carolina 29020

Dear Senator Holland:

By your letter of October 19, 1989, you have requested the opinion of this Office as to whether names or applications of applicants for nomination to the Public Service Commission, as submitted to the Public Service Merit Selection Panel, would be disclosable under South Carolina's Freedom of Information Act. You have further asked whether any provision of Act No. 167, 1979 Acts and Joint Resolutions, when read in conjunction with the Freedom of Information Act, would prevent any person or particular class of persons from obtaining such information under the provisions of the Freedom of Information Act.

At the outset, it is noted that the General Assembly has made the following findings with respect to freedom of information:

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 public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Section 30-5-15, Code of Laws of South Carolina (1988 Cum. Supp.); Act No. 118, §1, 1987 Acts and Joint Resolutions. In view of the expressed legislative purpose, this Office has noted that the Freedom of Information Act (the "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.

The Honorable Donald H. Holland
Page 2
November 14, 1989

Section 30-4-30 of the Code provides in subsection (a) that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by §30-4-40... ." Clearly, the Merit Selection Panel would fall within the definition of the term "public body" as defined in Section 30-4-20(a). The term "public record" is defined in Section 30-4-20(c) to include

all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body. ...

Certain records not relevant to your inquiry are excluded from the definition of public records.

Individuals interested in being considered for election to the Public Service Commission file an application with the Merit Selection Panel. We understand that the Panel holds an initial screening meeting and then an open public meeting at which time potential nominees are interviewed. Names of nominees are sent to the General Assembly, who then are screened and reviewed by the Joint Legislative Screening Committee. Finally, the General Assembly holds an election to select the members of the Public Service Commission. See Act No. 167 of 1979, codified at Section 58-3-21 et seq. of the Code.

You ask first whether the names of those who have filed applications with the Panel may be released under the Freedom of Information Act. We can identify no portion of Act No. 167 of 1979 or the Freedom of Information Act which makes confidential the names of the applicants. Section 58-3-23 provides in part that "[u]pon selecting persons for nomination to the commission the names of such persons shall be made public and submitted to the General Assembly for election or nonelection." Nothing within Section 58-3-23 would appear to preclude the release of the names of the applicants at a time prior to the selection of the nominees. 1/

1/ It is noted that applicants, at some stage, are interviewed at a public meeting of the Merit Selection Panel. Anyone in attendance at that public meeting will be apprised immediately of the identity of the applicants being interviewed. Such being the case, there appears to be no practical reason not to disclose the names of the applicants should such a request therefor be made pursuant to the Freedom of Information Act.

The Honorable Donald H. Holland
Page 3
November 14, 1989

In an opinion dated October 28, 1988 (copy enclosed), this Office addressed the question of whether a form, contemplated for use by applicants for consideration for appointment to boards or commissions by a county legislative delegation, would be subject to disclosure under the Freedom of Information Act. It was concluded therein that names of applicants could most probably be released. This opinion is most analogous to the issue you have raised about the disclosure of the names of applicants for appointment or election to a public office such as the Public Service Commission.

The availability of the entire application as presented to the Merit Selection Panel requires more scrutiny. By an opinion of this Office dated June 9, 1982 (copy enclosed), this Office advised that "the Panel may exempt such applications from disclosure under the Freedom of Information Act," citing provisions of Section 30-4-40(a)(2) which protects "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy... ." Upon reconsideration, this Office is of the view that the opinion of June 9, 1982 must be modified somewhat.

The opinion of June 9, 1982 did not take into account the language of Section 30-4-40(b), which provides:

If any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.

In subsequent opinions and in practice, this Office has encouraged the review of each individual document sought under the Act, to redact the material which is exempt from disclosure and release for disclosure the remainder. For example, in the opinion of this Office dated October 28, 1988, concerning availability of information of the application form, this Office advised:

This question is difficult to answer in the abstract. Should a request be received from the form on a particular appointee, it would be necessary to examine the form at that time to determine what information could be disclosed. Such determination would be within the purview of the custodian of the form.

Disclosure of the applicant's name, residence address, business address, and military service information was suggested. Further consideration was suggested as to disclosure of an individual's social security number, for example. (This list of information is not meant to be exhaustive.)

The Honorable Donald H. Holland
Page 4
November 14, 1989

To determine whether an individual's personal privacy may be unreasonably invaded, this Office has suggested that the following test may be helpful:

1. Whether disclosure would result in a substantial invasion of privacy and, if so, how serious?
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality.
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Child Protection Group v. Cline, 350 S.E.2d 541, 543 (W. Va. 1986). This Office has previously advised, with respect to unreasonable invasion of personal privacy,

For a record or portion thereof to be exempt under the personal privacy exemption, Section 30-4-40(a)(2), the invasion must be unreasonable. The Fourth Circuit Court of Appeals, in construing a similar provision in the federal Freedom of Information Act, 5 U.S.C. §552 et seq., stated that "in determining the issue whether a disclosure would constitute a 'clearly unwarranted invasion of personal privacy', they should 'tilt the balance in favor of disclosure.'" Robles v. Environmental Protection Agency, 484 F.2d at 846. Because the South Carolina and federal statutes are similar, the reasoning of the Robles court could be followed in this instance to conclude that public disclosure in doubtful cases is favored.

Op. Atty. Gen. No. 84-53, dated May 10, 1984.

Therefore, with respect to the disclosure of the contents of an application filed with the Merit Selection Panel, the application constituting a public record, this Office would suggest that such contents be reviewed. If disclosure of any item on an application would be deemed to be an unreasonable invasion of personal privacy, such item may be exempted from disclosure under the Act. Any item not so exempted under the Act should be disclosed. If doubt exists as to the disclosure of a particular item, this Office suggests

resolution of that doubt in favor of disclosure. To the extent that this conclusion conflicts with the opinion expressed on June 9, 1982, today's opinion is deemed controlling on the issue.

Finally, you have asked whether any provision of Act No. 167 of 1979, when read in conjunction with the Freedom of Information Act, would prevent any particular person or class of persons from obtaining information as described above pursuant to the Act. As stated earlier, Section 30-4-30(a) grants "any person" the right to "inspect or copy the public records of a public body" subject to the limitations expressed in Section 30-4-40 of the Code. The term "person" is defined in Section 30-4-20(b) to include "any individual, corporation, partnership, firm, organization or association." The Act thus has a broad concept of who is entitled to obtain information from public records pursuant to the Act. The Act contains no limitation on any person or group of persons not entitled to avail himself or itself of the Act.

The only arguable limitation expressed in Act No. 167 of 1979 as to any person or group of persons would be that part of Act No. 167 codified as Section 58-3-23(C):

No person shall be eligible for election to the commission unless he is nominated by the Merit Selection Panel. The panel shall be an independent agency and shall not confer with or consider suggestions or requests from the Governor or any member of the General Assembly.

It could be argued that the very last clause of Section 58-3-23(C) would preclude a request from the Governor or any member of the General Assembly pursuant to the Freedom of Information Act. In construing a statute, however, a particular phrase or clause should not be considered in isolation; force and effect should be given to all parts of a statute insofar as is possible. State ex rel. McLeod v. Nessler, 273 S.C. 371, 256 S.E.2d 419 (1979). Further, a statute should be construed in its own context. Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942).

Taken in context, it would appear that the intent of Section 58-3-23(C) is to ensure the independence of the Merit Selection Panel, to prevent the Governor or any member of the General Assembly from propounding the candidacy of any particular individual, or to prevent the Merit Selection Panel from soliciting information or advice from the Governor or members of the General Assembly, or to prevent the request or suggestion of the Governor or a member of the General Assembly that the Panel consider an individual for nomination to the Public Service Commission. It is difficult to imagine how a request under the Freedom of Information Act could be seen as

The Honorable Donald H. Holland
Page 6
November 14, 1989

violative of Section 58-3-23(C); this statute would not preclude the Governor or a member of the General Assembly from making a request for a public record (or any part thereof), pursuant to the Freedom of Information Act and directed to the Merit Selection Panel, in our opinion.

To summarize the foregoing, it is the opinion of this Office that :

1. Names of applicants being considered by the Public Service Merit Selection Panel to be nominated for election by the General Assembly to the Public Service Commission would be disclosable under the Freedom of Information Act. Nothing in Act No. 167 of 1979 makes this information confidential.
2. Should a request be received pursuant to the Freedom of Information Act for applications filed by persons interested in being considered for nomination for election to the Public Service Commission, the Merit Selection Panel should review the requested records and disclose whatever information or records (all or part thereof) may be deemed disclosable. Clearly, certain portions would be disclosable: applicant's name, residence address, telephone number (unless unlisted), business address and telephone number, residency and citizenship, date and place of birth, education, work experience, military service, and the like are examples of information which, if disclosed, would not violate one's privacy. In case of doubt, the Panel should resolve such doubt in favor of disclosure. In any event, the entire application would not be exempted from disclosure.
3. Reading Act No. 167 of 1979 in conjunction with the Freedom of Information Act, there is no provision which would preclude a person or any class or group of persons from making a request for public records pursuant to the Freedom of Information Act, directed to the Merit Selection Panel.

The Honorable Donald H. Holland
Page 7
November 14, 1989

With kindest regards, I am

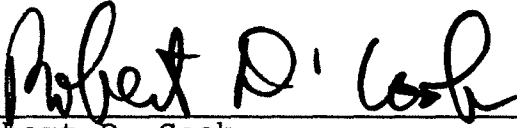
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw
Enclosures

REVIEWED AND APPROVED BY:



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