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The State of South Carolina

Opinion No 88-5
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Office of the Attorney General

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January 14, 1988

Stephen A. Kern, Esquire
Greenville City Attorney
Post Office Box 2207
Greenville, South Carolina 29602

Dear Mr. Kern:

On behalf of the Mayor and City Council of Greenville, you have asked that this Office address two questions concerning the revised Freedom of Information Act, Section 30-4-10 et seq. of the Code of Laws of South Carolina (1987 Cum. Supp.):

1. What constitutes a vote in executive session?

2. Are ad hoc committees established by the Mayor and Council, having only advisory functions, subject to the Act?

After a brief discussion of the background of the Act, each of your questions will be addressed separately.

Background

In its present form, South Carolina's Freedom of Information Act was adopted as Act No. 593, 1978 Acts and Joint Resolutions, as amended by Act. No. 118, 1987 Acts and Joint Resolutions. The public policy of the Act as expressed in the preamble of Act No. 593 of 1978 was codified by Act No. 118 of 1987; Section 30-4-15 now provides:

> 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.

As with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C.App. 37, 223 S.E.2d 580 (1976).

Question 1

The Freedom of Information Act, at Section 30-4-60 of the Code, requires that every meeting of a public body be open to the public unless it is closed pursuant to Section 30-4-70 of the Code. Certain reasons for entering into executive session are authorized in Section 30-4-70, though executive sessions in Section 30-4-70, though executive sessions are not required to be held. Section 30-4-70(a)(6), as amended in 1987, now provides in relevant part that

> no formal action may be taken in executive session. As used in this item 'formal action' means a recorded vote committing the body concerned to a specific course of action. No vote may be taken in executive session.

The 1987 amendment now prohibits the taking of a vote in executive session and eliminated the former requirement of ratification in a public session when a vote had been taken in executive session as previously authorized. You have asked what constitutes a vote so as to be prohibited during an executive session.

As stated in the statute, "formal action" and "vote" appear to be treated equally in that no formal action (i.e., a recorded

vote) and no vote may be taken in executive session. Several variant definitions of the term "action" exist. While an act or action or a course of action may connote the affirmative, the term also refers to "the expression of will or purpose." Randle v. Birmingham Ry. Light & Power Co., 53 So. 918 (1910). The term "commit" in this context usually means to "promise" or "pledge." Webster's New World Dictionary (Second College Edition). Any expression of the will, purpose, commitment, or pledge of a public body could be considered a formal action, which could not be taken in executive session; nor could a vote be taken which would amount to an expression of will or purpose or commitment of the public body.

Section 30-4-15 of the Act makes it clear that the purpose of the Act is to insure that the "decisions that are reached in public activity" by a public body should occur in public. Of course, a "decision" is simply the act "of making up one's mind" or reaching a determination or conclusion on a particular issue, Hankenson v. Bd. of Ed. of Waukegan Twp. High School Dist. No. 119, Lake County, 10 Ill. App. 2d 79, 134 N.E. 2d 356, 363 (1956); the act of making a decision clearly includes "the power to say 'Yes' or "No.'" Id. Thus, a determination by a public body to take or refrain from taking a particular course of action would be a "decision" or "formal action" of the public body. Op. Atty. Gen. dated April 17, 1985.

Case law in other jurisdictions is instructive on this point. For example, in Judge v. Pocius, 367 A. 2d 788 (Pa. Cmwlth. 1977), the Pennsylvania court reviewed a statute somewhat similar to Section 30-4-70(a)(6). There, the statute in question defined "formal action" as "the taking of any vote...or the setting of any official policy." The court commented that the statute in question required that an agency which

> votes or is scheduled to vote on any resolution, rule, order, motion, regulation or ordinance, or which acts or is scheduled to act in any formal way to adopt a general principle or a definite course of action as its official policy, must do so in a public meeting... .

367 A.2d at 791. While the language of the Pennsylvania statute is not identical to our own §30-4-70(a)(6), the emphasis therein is similar; the taking of a vote by the body, committing it to a specific course of action, is what appears to be most significant. Compare, §30-4-70(a)(6) ["...a recorded vote committing the body ... to a specific course of action... ."]

The court's decision in Karol v. Board of Education, 593 P.2d 649 (Ariz. 1979), is also instructive. The Arizona statutes required any "legal action" of a public body to be finalized in public. In that instance, Arizona law defined "legal action" as a "collective decision, commitment or promise made by a majority of the members of a governing body... ." The language of Arizona's statute is similar to the definition of "formal action" in our Section 30-4-70(a)(6).

The Illinois Open Meeting Law in effect at the time of Jewell v. Board of Education, 19 Ill. App. 3d 1091, 312 N.E.2d 659 (1974), provided that "no final action may be taken at a closed session." "Final action" was deemed to be a public roll call vote which would allow the public to know the positions taken by individual members of the public body, so that such members may be held accountable to the public for their actions. Id., 312 N.E. 2d at 662. While the Illinois statute on its face allows somewhat more flexibility than does South Carolina's statute, the construction of the Illinois statute as far as providing maximum public accountability is valuable.

You stated in your letter of December 14, 1987, that in your opinion, the Section 30-4-70(a)(6) prohibition did not apply to votes on purely procedural matters such as votes to adjourn; to set a time for the next meeting; motions to defer, table, or place an item on the agenda of the next formal meeting for formal vote; and the like. This Office concurs with your conclusion insofar as the public body is not committing itself to a specified course of action, establishing or revising policy or procedures, electing not to take some action, or rendering some decision on other than a purely mechanical or procedural issue.

One may imagine the potential votes of a public body as being on a continuum; it is very difficult to decide where a procedural matter ends and commitment to a formal course of action begins. As long as the actual decision-making is made in public so that public accountability for the actions and decisions of public officials is maintained, construing very narrowly the permissibility of taking of a vote to only those matters which will not commit the public body to a formal course of action, such would probably be permissible. By reaching this conclusion, we must acknowledge the potential for abuse of this conclusion; we must remind public bodies of the express purpose of the Freedom of Information Act and the necessity of keeping decision-making activities before the public rather than behind closed doors.

Question 2

Section 30-4-20 (a), the definition of "public body," was amended by Act No. 118 of 1987 to now include "committees, subcommittees, advisory committees, and the like of any such body by whatever name known... ." (Certain committees of health care facilities are excluded from the definition, but these committees are not relevant to your inquiry.) You have asked whether ad hoc committees appointed by the Mayor and City Council, which have been charged only with advisory functions, would be subject to the Freedom of Information Act.

We concur with your conclusion that such committees would fall within the definition of "public body" and thus would be subject to the Freedom of Information Act. In Op. Atty. Gen. No. 85-145, issued December 17, 1985, we concluded that an ad hoc committee appointed by a county council to study long-range planning for the county would be subject to the Freedom of Information Act. Similarly, in Op. Atty. Gen. No. 84-125, issued October 26, 1984, we concluded that an ad hoc citizens' committee appointed by a town council to provide citizen input in drafting a sign ordinance would be subject to the Act. While these enclosed opinions predate the 1987 amendment to the Act, the amendment makes even more meaningful the reasoning in those opinions that such ad hoc committees should be subject to the Act.

You have expressed some concern about the gathering of information by an ad hoc committee or task force on sensitive issues and how such may be accomplished if the task force or committee is subject to the Act and must hold public meetings unless an executive session is properly authorized. The same concern was recognized in Op. Atty. Gen. No. 85-145:

> Concern has been expressed that because many alternatives are being considered toward making a recommendation, the news media and the public may misinterpret the various proposals or may jump to conclusions that may never be reached by the ad hoc committee in making its recommendations. In formulating its recommendations, the committee must freely exchange its ideas; it has been suggested that opening the meetings under the Act would inhibit the free flow of ideas and would promote misinterpretation. Most likely, this discussion would not be of the kind which would permit a committee to con-

vene in executive session. See Section 30-4-70(a) of the Code. Nor is it like that Laurens County Council, the parent entity, could convene in executive session for this type of discussion. Thus, such discussions should be conducted openly.

Courts in other jurisdictions have considered these concerns in determining that various committees would be subject to the Act. The pitfalls in opening discussions of preliminary matters are detailed in Arkansas Gazette Company v. Pickens, 522 S.W.2d 350 (Ark. 1975)(Fogleman, J., concurring). Therein it was noted that matters of public policy are involved and that since the legislative branch of government declares public policy, the General Assembly should make the determination to open or close committee meetings. Until such time as the South Carolina General Assembly acts to close such meetings, we would advise that the ad hoc committee of Laurens County Council follow the general principle stated in Opinion No. 84-125:

> If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meeting Laws and opt for a meeting in the presence of the public.

Grein v. Board of Education, 216 Neb. 158, 343 N.W.2d 718 (1984); Town of Palm Beach v. Gradison, 206 So.2d 473 (Fla. 1974).

We must reiterate that, until the General Assembly acts to close such meetings of a task force or ad hoc committee which is charged with information-gathering or advisory functions, the task force or committee opt for an open meeting if any doubt exists as to the type of meeting to be conducted.

Conclusion

1. A public body is precluded from taking formal action or a vote except in public session. Formal action means "a recorded vote committing the body concerned to a specific course of action." Any expression of will or purpose of the public body, a decision to take or refrain from taking specific action, the establishing of policies or procedures, or the like would be included in the term "formal action." Votes in the nature of a vote to adjourn, setting a time for the next meeting, or parliamentary procedure, affecting only procedural aspects of the public body's meeting, would probably be permissible. Because the distinction between purely procedural matters and "formal action" is often not clear, a public rather than secret vote should be taken if any doubt exists, in keeping with the spirit and purpose of the Freedom of Information Act.

2. Ad hoc committees or task forces appointed by the Mayor and City Council for information-gathering or advisory functions would be subject to the requirements of the Freedom of Information Act.

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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