The State of South Carolina

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Opinion No 88-37
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The Honorable Glenn F. McConnell
Senator, District No. 41
610 Gressette Building
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked for the opinion of this Office as to whether the Charleston Memorial Hospital Advisory Committee, appointed by Charleston County Council, properly entered executive session with respect to information-gathering which will affect the contractual negotiations between Charleston County Council and one or more of the hospitals in Charleston.

From minutes of the Charleston County Council meeting of June 18, 1987, the committee is charged as follows:

> Regarding Charleston Memorial Hospital providing medical care, i.e., inpatient and outpatient service, that Council charge a committee to be made up of not to exceed eleven (11) members, to be comprised of no less than three members of the Advisory Board of Trustees of Charleston Memorial Hospital and members of the Health Care Advisory Committee as designated by the Chairman of County Council, to report back to council not later than 120 days past the adoption of the motion with the following information:
>
> 1st: Should the county continue to be a direct health care provider by operating Charleston Memorial Hospital.
>
> 2nd: If the answer is Yes -- Develop a process by which the county can provide services through the hospital at a

> minimal annual operating cost and capital investment, not limiting this to a renegotiated contract with MUSC.
>
> 3rd: If the answer is No -- (i.e., if the county should not continue to be a direct health care provider operating Charleston Memorial Hospital) -- Develop a process for alternative provisions for health care as currently provided by Charleston Memorial Hospital. [Emphasis added.]

Thus, this advisory committee is to report to Charleston County Council with information gathered as directed. With this background in mind, the requirements of the Freedom of Information Act vis-a-vis the committee will be examined.

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).

Unquestionably, the Advisory Committee is a "public body," as that term is defined in the Act to include "committees, subcommittees, advisory committees, and the like of any such body by whatever name known ... ." Section 30-4-20 (a) of the Code. Thus, the Advisory Committee is subject to the requirements of the Act.

The Act, in 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. The reasons for which an executive session is authorized are found in Section 30-4-70 (a) and include the following:

> (1) Discussion of employment, appointment compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held such employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.
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> (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.
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> (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.

As noted earlier, exceptions to the open meeting requirements must be narrowly construed. We understand the reason cited for the committee's convening in executive session to be Section 30-4-70(a)(2), to discuss "negotiations incident to proposed contractual arrangements ... ."

According to the minutes cited to above, the Advisory Committee was charged with the task of gathering information to be reported to County Council, including recommendations as to a process of providing health care. The actual negotiation of a contract was not delegated to the committee. The memorandum prepared by the Assistant Charleston County Attorney on this issue states: "Even if the Advisory Committee does not have the authority to negotiate a contract, its express purpose is to gather information and factual data incident to the contractual negotiations County Council will eventually be conducting." It thus appears that the committee will not actually be negotiating a contract for health care; its role is limited to information-gathering and recommendations as to the provision of health care.

As stated in Nichols v. Pendley, 331 S.W.2d 673 (Mo. App. 1960),

> Negotiation implies a discussion of terms, a bargaining. It is generally used in connection with the consummation of business matters (65 C.J.S., p. 1273), "to treat with a view to coming to terms." ... The very word carries the connotation of steps near to completion. Thus, one "negotiates" a contract, or a trade, or a treaty. It is farther down the road toward accomplishment than is "submit." One submits a proposition. Thereafter the other may "consider" it, and the parties may negotiate concerning it to a conclusion. Shakespeare said, "Let every eye negotiate for itself, and trust no agent."

Id., 331 S.W.2d at 677. The court in Dunklee v. Shepherd, 145 Colo. 197, 358 P.2d 25 (1960), citing Black's Law Dictionary, defined "negotiation" as "[t]he deliberation, discussion,

or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale or other business transaction." Id, 358 P.2d at 27. From these definitions of "negotiation," it is clear that the term encompasses more than information-gathering; the term would include the coming together of the parties as to terms of an agreement.

Thus, it must be concluded that Section 30-4-70(a)(2) of the Code should not be invoked as a reason to meet in executive session by a public body whose assigned task is information-gathering rather than actual negotiation of a contract.

Concern has been repeatedly expressed to this Office that advisory committees charged with information-gathering responsibilities cannot successfully deal with sensitive issues or otherwise freely exchange ideas while subject to public scrutiny. We have recognized that concern 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 convene 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).

See also Op. Atty. Gen. dated January 14, 1988 (both dealing with information-gathering activities of advisory committees). We must reiterate that, until the General Assembly acts to close such meetings of an advisory committee which is charged with information-gathering or advisory functions, the advisory committee should opt for an open meeting if any doubt exists as to the type of meeting to be conducted.

With kindest regards, I am

Sincerely,

T. Travis Medlock
Attorney General

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Enclosures: Op. Atty. Gen. No. 85-145
Op. Atty. Gen. No. 84-125
Op. Atty. Gen. dated January 14, 1988