

## The State of South Carolina



## Office of the Attorney General

T. TRAVIS MEDLOCK  
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE 803-734-3970

October 28, 1988

The Honorable D. N. Holt, Jr.  
Chairman, Joint Delegation  
Charleston County Office Building  
2 Courthouse Square, Room 317-A  
Charleston, South Carolina 29401

Dear Representative Holt:

Thank you for your quick response to my letter of October 19, 1988 with additional information on the issue of an individual to be appointed to the Charleston County Medical Examiners Board who has apparently refused to fill out a form from the Governor's Office entitled "Application for Appointment to Boards, Commissions and Committees." You have asked several questions about the use of the form and the appointment procedure, each of which will be addressed after a discussion of the facts.

Factual Background

An individual was appointed to serve on the Charleston County Medical Examiners Board from June 30, 1980. His last term expired on June 30, 1988, at which time he was recommended by the Charleston County Legislative Delegation on May 5, 1988 for appointment for another four-year term. He has apparently chosen not to fill out the above-referenced form, which states at the top of the first page: "Your appointment is NOT complete until this form is completed and filed with the Governor's Office." The Governor's Office has not completed the appointment process, pending receipt of the form.

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### Statutory Considerations

Section 17-5-220, Code of Laws of South Carolina (1976), prescribes the creation of a medical examiner commission in all counties of this State having a population of 100,000 or more, according to the last official United States Census. The commission is to consist of five members, four of whom "must be appointed by the Governor upon recommendation of the county legislative delegation." The term of office is specified to be four years, from July first of the first year to June thirtieth of the fourth year.

### Question 1

Unless and until the individual in question fills out the form and returns it to the Governor's Office, what is his status on the Charleston County Medical Examiners Board?

As noted above, the term for which this individual was last appointed by the Governor expired on June 30, 1988. At present, unless and until the appointment process is completed, the individual would be considered to be "holding over." Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952). As stated in Bradford, citing to 67 C.J.S. Officers §141,

[o]ne who holds over after the expiration of his legal term, where no provision is made by law for his holding over, is generally regarded as a de facto officer, but on the office being filled either by appointment or election, as may be provided by statute for the filling of the office, and the qualification of the appointee or electee, the de facto status terminates. <sup>1/</sup>

Id., 221 S.C. at 261.

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<sup>1/</sup> A "de facto" officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, supra.

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Thus, the individual in question would be considered to be holding over and would be a de facto officer until his successor should be selected or until the present reappointment process has been completed.

Question 2

Would it be legal for the Charleston County Legislative Delegation to require any applicant for appointment to fill out this form before the Delegation votes on his appointment?

No statute expressly permits or prohibits such a practice. The Delegation might use whatever means it wished, within reason, to assure itself that an individual being considered for a specific appointment met the qualifications for the specific position. The means to be utilized must, of course, be decided upon by the Delegation.

Question 3

Would the information on the above-referenced form become available under the Freedom of Information Act?

This question is difficult to answer in the abstract. Should a request be received for 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.

Certain information may most probably be released including: name of applicant; residence address (Michigan State Employees Assn. v. Department of Management and Budget, 135 Mich. App. 248, 353 N.W.2d 496 (1984); Hechler v. Casey, 333 S.E.2d 799 (W.Va. 1985)); business address (State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E.2d 444 (1977)); and military service information (Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980)). On the other hand, release of social security numbers should be carefully considered, in light of the federal Privacy Act. Swisher v. Department of the Air Force, 459 F. Supp. 337, aff'd 660 F.2d 369 (8th Cir. 1981). Each form must be examined individually, prior to release, to determine what information is or is not subject to disclosure. The foregoing does not in any way intend to restrict the custodian of the form in his consideration of a proper request under the Freedom of Information Act.

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I trust that the foregoing has satisfactorily responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

*Robert D. Cook*

ROBERT D. COOK  
EXECUTIVE ASSISTANT FOR OPINIONS