The State of South Carolina

Office of the Attorney General

Opinion No 86-55
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May 13, 1986

The Honorable Addison G. Wilson
Member, South Carolina Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Wilson:

You have asked, by letter dated May 1, 1986, whether there are any criminal penalties for the unauthorized release by an Industrial Commissioner of a settlement agreement reached in connection with a worker's compensation case.

Section 42-19-40 of the Code provides as follows:

> The records of the [Industrial] Commission, in so far as they refer to accidents, injuries and settlements shall not be open to the public, but only to parties satisfying the Commission of their interest in such records and of the right to inspect them. (emphasis added).

As referenced, this provision expressly makes confidential settlement agreements in worker's compensation cases.

Consistent with this Office's earlier advice, as to whether there are any criminal violations in this area, matters such as these are referred to the local Solicitor who must make a determination, based upon all the facts and circumstances, as to whether a criminal prosecution is warranted. See, letter from Nathan Kaminski, Jr., to the Honorable Carroll Campbell, Jr., dated April 23, 1986. In this particular instance, following an investigation by the State Law Enforcement Division, the Circuit Solicitor of the Fifth Judicial Circuit has recently indicated that, inasmuch as Section 42-19-40 contains no criminal penalty provision, a criminal prosecution cannot be undertaken pursuant to this provision. The prosecutorial decisions of the Circuit Solicitor generally are controlling, and thus your question

concerning possible criminal violations has been answered in light of SLED's investigation and the Solicitor's decision.

You have subsequently asked on May 6 whether the release of a confidential settlement agreement in violation of Section 42-19-40 by an Industrial Commissioner could constitute grounds for removal from office. Section 1-3-240 of the Code is a principal means for removal of public officers and provides as follows:

> Any officer, county or State, except an officer whose removal is provided for in Section 3 of Article XV of the State Constitution and an officer guilty of the offense named in Section 22 of Article IV of the Constitution, who is guilty of misconduct or persistent neglect of duty in office ... shall be subject to removal by the Governor of the State upon any of the foregoing causes being made to appear to the satisfaction of the Governor. But before removing any such officer the Governor shall inform him in writing of the specific charges brought against him and give him an opportunity on reasonable notice to be heard. 1/

1/ Our Supreme Court has held that Article XV, § 3 of the State Constitution, which provides for removal by the Governor on the address of two-thirds of each house of the General Assembly for willful neglect of duty or other reasonable cause by "any executive or judicial officer" is not applicable. In McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873, 876 (1912), the Court held that Article XV, § 3 applies to "[e]very executive and judicial officer whose authority and jurisdiction extends over the entire State, in whose official conduct the entire State is concerned, and whose office was created by the Constitution, or created by Statute and filled by the election by the people at large, is removable ... by the Governor on the address of the General Assembly...." The Court went on to note that all other officers were removable pursuant to the various statutory procedures.

It is evident that, pursuant to the foregoing provision, the primary responsibility for removal of public officers rests with the Governor. In this regard, our Supreme Court has stated that

> For reasons satisfactory to itself, the Legislature, after enumerating the offenses for which certain officers might be removed from office, chose to place the removal of such officers, in the first instance, in the hands of the Governor, but carefully provided for various steps, clearly judicial in their nature, to be taken in the hearing or trial for removal. And, as further showing that the entire procedure was to be judicial, the Act provides for an appeal by the officer from the order of the Governor removing him from office, and requires the Governor, when such appeal is duly made to a Circuit Judge, to make a return to that court, filing it with the record in the case, including a copy of his order, grounds of removal, evidence in support thereof, etc.
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> [W]hen the Act is read and considered as a whole, no other conclusion can be reached than that the Legislature intended to create the Governor, for the purposes of the Act, a judicial tribunal, in that the power vested in him by the law was not executive, nor intended to be so, but purely judicial.

Richards v. Ballentine, 152 S.C. 365, 369, 150 S.E. 46 (1929). Thus, pursuant to one of the primary means for removal of public officers, 2/ the General Assembly has determined that public officers may be removed from office only for certain specific reasons, after a hearing has been held in which the various facts and circumstances are considered. By express statute, the Legislature has made it the prerogative of the Governor to exercise the removal power. As we have previously recognized,

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2/ Of course, § 1-3-240 is not necessarily exclusive. See, Article VI, § 8 of the State Constitution (removal for conviction of certain crimes).

such factual determinations cannot be made in the context of an Attorney General's opinion. See, Op. Atty. Gen., December 12, 1983; November 15, 1985. Accordingly, since only those officers possessing removal power by virtue of statute or constitutional provision may exercise such power, see, State v. Hough, 103 S.C. 87, 87 S.E. 436 (1915), it would be a matter for the Governor to determine whether the unauthorized release of a settlement agreement in violation of Section 42-19-40 would constitute sufficient grounds for removal.

Of course, this issue is probably now moot inasmuch as it is our understanding that the term of office of the particular Commissioner in question ends this year and a decision has apparently been made not to reappoint the Commissioner in question.

In addition, on May 8 you asked whether the unauthorized release of such settlement agreement would violate the Freedom of Information Act and whether the Act's penalties could be invoked with respect to such release. We would advise that the FOIA was not intended to be used as a means to prevent disclosure of records, but instead was designed to encourage such disclosure. Accordingly, we doubt that the FOIA provides a basis for enforcing the confidentiality of such records or that the FOIA's penalties would be applicable to the referenced situation.

As we have previously stated, the General Assembly in enacting South Carolina's Freedom of Information Act found that

> it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business 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, this act is adopted, making it possible for citizens, or their representatives, to learn and report fully the activities of their public officials.

We have also stated in this same context that the FOIA was designed to guarantee to the public reasonable access to certain information concerning the activities of the government. As a statute remedial in nature, any exception to the Act's applicability must be narrowly construed. Op. Atty. Gen., April 17, 1985.

Section 30-4-40 of the FOIA provides in pertinent part as follows:

> (a) The following matters may be exempt from disclosure [by a public body] under the provision of this chapter:
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> ... (4) matters specifically exempted from disclosure by statute or law.

Section 30-4-20(a) defines a "public body" as "... any department of the State, any state board, commission, agency and authority...." It is evident that the Industrial Commission is a "public body" pursuant to the foregoing definition and that settlement agreements are "matters specifically exempted from disclosure by statute or law," pursuant to § 30-4-40. See § 42-19-40. However, the question remains as to what effect, if any, the FOIA and its accompanying penalties has upon the release of a settlement agreement which is confidential pursuant to § 42-19-40. It is our conclusion that the confidentiality of such agreement is not enforceable under the FOIA.

In the opinion of this Office dated April 17, 1985, it was stated, in quoting Tobin v. Mich. Civil Service Comm., 416 Mich. 661, 331 N.W.2d 184, 186 (1982), that "the ... FOIA authorizes, but does not require nondisclosure...." The Tobin case involved a situation where the plaintiffs sought to use the Michigan FOIA to enjoin the defendants from disclosing certain information which clearly falls within one of the exceptions set forth in the FOIA. It was there argued that "if a public record is one of those named in the FOIA as 'exempt from disclosure', the statute affirmatively prohibits disclosure." 331 N.W.2d at 186.

The Supreme Court of Michigan rejected this argument. The Court noted that the Michigan FOIA stated that certain records "may" be exempt from disclosure. Such language, noted the Court, was permissive rather than mandatory. The Court further stated that nothing in the title of the Act or its "statement of public policy" indicated that "the problem being addressed was the excessive disclosure of governmental information." 331 N.W.2d 187. Furthermore, the Court could find no enforcement provision in the FOIA aimed at preventing the disclosure of records. Thus, "[a]ny asserted right by third parties to prohibit disclosure must have a basis independent of the FOIA." 331 N.W.2d at 187.

The Court in Tobin recognized that the fact that a public body could in its discretion disclose records under the FOIA notwithstanding that such records fell within an FOIA exemption did not allow the body to disregard other statutes which expressly made records confidential. But, said the court, the FOIA was not the appropriate means to enforce the confidentiality of records made confidential by such statutes. Such confidentiality must instead be preserved by the various laws making the records confidential. In effect, a so-called "reverse" FOIA action to prevent the disclosure of information must be evaluated "as if the FOIA did not exist". 331 N.W.2d at 188.

This same concept has been adopted by the United States Supreme Court in interpreting the federal FOIA. There, the Court stated that "[t]he FOIA is exclusively a disclosure statute...." and could not be used to enforce the confidentiality of records. Chrysler Corp. v. Brown, 441 U.S. 281, 292-293, 60 L.Ed.2d 208 (1979). See also, General Chem. v. Dept. of Env. Qual. Engineering, 474 N.E.2d 183 (Mass. 1985). Other cases are in accord. Moore-McCormack Lines Inc. v. ITO Corp. of Balt. 508 F.2d 945 (4th Cir. 1974) [FOIA does not forbid the disclosure of any records]; Pennzoil v. Fed. Power Comm., 534 F.2d 627 (5th Cir. 1976) [to conclude that FOIA is absolute bar to disclosure is "at war with the basic principles embodied in" FOIA]; Charles River Park "A" v. H.U.D., 519 F.2d 935 (D. C. Cir. 1975) [FOIA neither authorizes nor prohibits the disclosure of exempt information]; Andrews v. Veterans Adm. of U. S., 613 F.Supp. 1404 (D. C. Wyoming 1985) [disclosure of exempt information is not a violation of FOIA]; Town Crier v. Chief of Pol. of Weston, 272 N.E.2d 383 (Mass. 1972) [nothing prohibits disclosure subject to the rights of others]. Where an FOIA is intended to prohibit disclosure, such prohibition is usually expressly stated. See, Houston Chron. Pub. Co. v. City of Houston, 531 S.W.2d 177 at 184 (Tex. Court of Civ. App. 1975).

We believe the same reasoning would apply with respect to this State's FOIA. It is clear from the legislative history of the Act, as well as its language, that the Act was designed to insure disclosure of records and other information, not prevent such disclosure. The Act authorizes or permits certain exemptions, but as we have previously stated that it does not require that any particular records be withheld from disclosure. See, Op. Atty. Gen., July 17, 1984; April 17, 1985. Nowhere in the Act is there a specific provision dealing with the enforcement of confidentiality, either by criminal or civil remedies. See,

§ 30-4-100; 30-4-110. 3/ Moreover, in defining "public record", § 30-4-20(c) simply provides that "... records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act...."; in effect, then, the Act looks to other provisions of law to make records confidential and to enforce such confidentiality. Thus, we do not believe the FOIA authorizes use of the FOIA as a means for enforcing the confidentiality of the records you have referenced.

I trust this information is helpful to you.

Sincerely,

Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

3/ The Act authorizes injunctive relief and criminal penalties to enforce the "provisions of this chapter." Since the purpose of the Act is disclosure, we believe its enforcement mechanisms apply only as a means to gain disclosure.