

The State of South Carolina



Office of the Attorney General

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July 16, 1987

The Honorable Earle E. Morris, Jr.  
Comptroller General, State of South Carolina  
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Dear Mr. Morris:

Your office, by letter dated June 4, 1987, has posed several questions prompted by the recent amendment to the Freedom of Information Act, Section 30-4-10 et seq. of the Code of Laws of South Carolina. After a brief discussion about the interpretation of the amendments, each of your questions will be examined.

By an act numbered H.2263, R-164, various amendments were made to the Freedom of Information Act. A statement of public policy will now be codified as Section 30-4-15 of the Code, slightly amending Section 2 of Act No. 593 of 1978; this statement 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.

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In light of this purpose, the Office of the Attorney General has strongly encouraged that the Act be interpreted liberally to effectuate the purpose of the Act. Op. Atty. Gen. No. 84-64, dated June 1, 1984. Your questions will be examined with a view toward effectuating this purpose by liberally construing the Act, which is remedial in nature. See South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Too, please be advised that exemptions to the Act's applicability are generally construed narrowly, News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake County, 29 N.C. App. 37, 223 S.E.2d 580 (1976), to further the purposes of the Act.

Question 1

Should the office of the Comptroller General refer requests for information to the agency where the expenditure occurred?

This question has been addressed previously by the Attorney General's Office in opinions dated November 4, 1983 and September 7, 1978, copies of which are enclosed. As stated in the first-cited opinion:

There is no provision in the Freedom of Information Act for exemption from disclosure of otherwise disclosable information by one agency merely because the identical information is available from another agency. ... If the individual requesting the information is unable to obtain it from [the agency housing the original record], then the [other agency having a record containing the identical information] should not rely upon any provision of the South Carolina Freedom of Information Act as a basis for denying the request.

Assuming that the information sought in a freedom of information request is disclosable, the conclusions of these prior opinions would remain unchanged by the recent amendments to the Act. The Comptroller General may refer such requests to the agency housing the original record or information; if that agency refuses to honor the request for material deemed to be disclosable, the Comptroller General should then make the information available.

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As you are aware, the Act mandates a response within fifteen working days of receipt of a request under the Act. Section 30-4-30(c) provides that the request is to be considered approved if written notification is not provided within the fifteen-day period. While such a referral does not relieve the Comptroller General of responsibility for responding to the request, neither would the referral have the effect of tolling the fifteen-day response period.

#### Question 2

What type of information is the Office of the Comptroller General allowed to exchange with other state agencies?

Section 30-4-30 (a) of the Code provides 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, ... ." The term "person" is defined as "any individual, corporation, partnership, firm, organization or association" by Section 30-4-20(b). Assuming that the Comptroller General fits within this definition, the Comptroller General could make a request for information from public bodies under the Act. The Act itself does not appear to contemplate an exchange of information among or between agencies, however.

The sharing of information among or between agencies is usually authorized by statute, given the confidential nature of many agency records. See, for example, Section 1-20-40 of the Code (state agencies to provide information requested by the Audit Council or Reorganization Commission). Should such a need to exchange information arise, it would be wise to consult legal counsel for all entities involved. It would be impossible, by an opinion, to address all instances in which such an exchange could arise, and legal counsel for the entities would be able to evaluate each situation on its merits, given the agencies' statutory authority. An example of sharing information among agencies involved in the state employee payroll process is found in an opinion dated November 27, 1978, enclosed. This is only one of the many instances in which a question of sharing information could arise.

#### Question 3

Should individuals be notified when the Comptroller General receives a freedom of information request for release of their salary?

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The Act does not address your particular question. As you are aware, the amendments to the Act made sweeping changes with regard to the release of salary information of public employees and officers. Section 30-4-40(a)(6) protects from disclosure salaries paid by public bodies except as permitted on the following:

(A) For those persons receiving compensation of fifty thousand dollars or more annually, for all part-time employees, for any other persons who are paid honoraria or other compensation for special appearances, performances or the like, and for employees at the level of agency or department head, the exact compensation of each person or employee;

(B) For classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars;

(C) For classified employees not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the salary schedule showing the compensation range for that classification including longevity steps, where applicable;

(D) For unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation of thirty thousand dollars or less annually, the compensation level within a range of four thousand dollars, such ranges to commence at two thousand dollars and increase in increments of four thousand dollars.

(E) For purposes of this subsection (6), 'agency head' or 'department head'

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means any person who has authority and responsibility for any department, of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body.

Because the Comptroller General may not have available the information needed to determine whether an individual affected by a request would be, for example, a department head, it would be prudent to consult the agency which employs the individual or incurred the expenditure. The appropriate agency would be able to offer the necessary guidance to make certain that the appropriate information is released. The agency could then notify the affected employee as it sees fit. As long as the Act is followed and the correct information is released, the procedure to be followed internally would be a matter of policy rather than state law. But see R. 19-708.06 of the Budget and Control Board and Op. Atty. Gen. dated August 5, 1977, discussed infra.

#### Question 4

Are the following items excluded from release under the Freedom of Information Act?

- A. Home telephone number
- B. Home address
- C. Social Security number
- D. Where state employees spend the night when traveling on state business

Whether to disclose such items is not specifically addressed by the Act. Unless closed to the public by some relevant statute, see Section 30-4-20(c), or as a result of Sections 30-4-40 or 30-4-70, generally the contents of public records are to be disclosed. Residence addresses and telephone numbers have been deemed disclosable since the same are often ascertainable by reference to many publicly attainable books and records. Michigan State Employees Association 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).

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Caution should be exercised in disclosing these two items. Section 30-4-40(a)(2) exempts from disclosure "[i]nformation of a personal nature where the disclosure thereof would constitute unreasonable invasion of personal privacy ... ." As indicated by the Michigan State Employees Association decision and others cited therein, such disclosure of residence address has not been deemed an invasion of privacy. However, if an individual has an unlisted or unpublished telephone number or there are reasons such as the need for security which mandate personal privacy, such a release could constitute an unreasonable invasion of personal privacy. Thus, a determination as to disclosure must be made on a case-by-case basis, following guidelines in cases such as Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984) and Child Protection Group v. Cline, 350 S.E.2d 541 (W. Va. 1986), enclosed.<sup>1/</sup> To the extent that today's opinion is inconsistent with opinions dated January 25, 1978 and August 5, 1977, today's opinion as to the release of home addresses and telephone numbers of state employees will be deemed to be controlling.

An individual's Social Security number should most probably not be disclosed pursuant to a freedom of information request. The disclosure of a Social Security Account number, unless authorized by a statute such as the federal Privacy Act, has been found to constitute a clearly unwarranted invasion of personal privacy. Swisher v. Department of the Air Force, 459 F.Supp. 337, aff'd 660 F.2d 369 (8th Cir. 1981).

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<sup>1/</sup> In determining whether an invasion of privacy would be unreasonable, the West Virginia court set forth five factors to be considered:

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, supra, 350 S.E.2d at 543.

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By Section 30-4-50(6), "[i]nformation in or taken from any account, voucher or contract dealing with the receipt or expenditure of public or other funds by public bodies" is specifically declared to be public information. To receive reimbursement for lodging while traveling on state business, a state employee or officer attaches a receipt from the place of lodging to the request for reimbursement, which then is transmitted to the Comptroller General for payment. Thus, information such as where a state employee was housed while traveling on state business would be information from a voucher and thus subject to disclosure unless exempt for a reason defined under Section 30-4-40 such as unreasonable invasion of personal privacy. Such a determination must be made on a case-by-case basis, using criteria such as those provided in the enclosed cases.

A regulation of the Budget and Control Board, R.19-708.06, has established the following guidelines:

Under the Freedom of Information Act, the State of South Carolina and its political subdivisions should release only the employee's salary range, grade, job description, date of employment, position questionnaire, sex, race, name and title. Actual salaries of the directors of agencies, departments, institutions and commissions must be released. Such information shall be released only upon a written request signed by the party requesting it. Any further disclosure could come only if the employee authorizes the release or a court of competent jurisdiction orders such disclosure. The agency may assess the requesting party a reasonable charge for the costs incurred in providing the information requested.

It appears that information other than that detailed in the regulation has been deemed disclosable by courts in other jurisdictions, such as residence addresses and telephone numbers as outlined above. Clearly, the regulation could not be read to limit disclosure under the Act, particularly in light of Society of Professional Journalists v. Sexton, supra.<sup>2/</sup> If

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<sup>2/</sup> In Sexton, a regulation of the Department of Health and Environmental Control was invalidated by the court as it added certain limitations, not contemplated by the Act, to a DHEC statute concerning the furnishing of death certificates.

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disclosure of an item not listed in the regulation is requested, it would be a more cautious approach to evaluate the item in light of the new Act and, if any doubt exists, make the disclosure to comply with the liberal purpose of the Act.

Question 5

Is the Comptroller General allowed to charge for the cost of providing information?

- A. Direct cost?
- B. Indirect cost?

Section 30-4-30(b) provides the following guidelines for charging fees:

The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Such records shall be furnished at the lowest possible cost to the person requesting the records. ... Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees shall not be charged for examination and review to determine if such documents are subject to disclosure. Nothing in this chapter shall prevent the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of such costs prior to searching for or making copies of the records.

The statute thus allows for certain direct and indirect costs to be considered in establishing a fee for searching for or making copies of records. If you have a question about whether a particular item should be included in determining the fee, please advise and more pertinent guidance will be offered.

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Question 6

Must a request for information be in writing?

The Act does not specifically require that a request be made in writing. However, the receipt by a public body of a written request for information pursuant to the Act triggers the fifteen working-day period in which a determination to grant the request must be made. For that reason, it would be advisable to have a request in written form, to be able to establish the fact of receipt, date of receipt, and also to accurately calculate the response period. Considering the nature of the information which could conceivably be requested from your office, it would be a protective measure to have such requests in writing.

Question 7

The Freedom of Information Act refers to releasing certain salaries in a range of \$4,000.00. How are these ranges established?

The portion of the Act to which you refer is Section 30-4-40(a)(6)(B), which mandates disclosure of salaries

[f]or classified and unclassified employees, including contract instructional employees, not subject to item (A) above who receive compensation between, but not including, thirty thousand dollars and fifty thousand dollars annually, the compensation level within a range of four thousand dollars, such ranges to commence at thirty thousand dollars and increase in increments of four thousand dollars[.]

We understand that the Division of Human Resource Management is working on the establishment of these ranges. When we have been notified by the Division that the ranges have been established, we will so advise your office. If questions remain after such establishment, we will be happy to work with your office to provide the necessary assistance.

Question 8

Should information be released over the phone or in writing?

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Section 30-4-30(c) provides that if a request pursuant to the Act is granted, "the record must be furnished or made available for inspection or copying." The language of the Act anticipates that a record be furnished in physical form, though release over the telephone does not appear to be prohibited. As noted in response to your sixth question, the information requested from your office could involve sensitive matters; for that reason, and further to lessen the chances of misunderstanding and to provide an accurate record of the information provided, it would be advisable to provide responses to such requests in written form.

#### Question 9

The Freedom of Information Act appears to imply that exact salaries of department heads regardless of the salary amount must be released. How are department heads identified or defined?

Section 30-4-40(a)(6)(A) mandates the disclosure of the exact compensation of employees at the level of agency or department head. Section 30-4-40(a)(6)(E) defines "agency head" or "department head" to be "any person who has authority and responsibility for any department, of any institution, board, commission, council, division, bureau, center, school, hospital, or other facility that is a unit of a public body." This definition is quite broad and, as suggested for other parts of the Act, should be construed liberally to effectuate the policy of openness intended by the Act. See Section 1 of H.2263, R-164.

If your office should receive a request for the disclosure of the salary of a particular individual, it is conceivable that your office would not know whether that individual occupied a position of "department head." It would therefore be advisable to consult the agency which employs the individual to determine whether the individual is a "department head," thus mandating disclosure of his exact compensation. If doubt remains as to whether a particular piece of information should be disclosed even after consultation with the appropriate agency, this Office's policy is to disclose such information in doubtful cases, to carry out the purposes of the Act. See Op. Atty. Gen. No. 84-53, dated May 10, 1984.

We hope that the foregoing has been responsive to the questions raised by your office. Please advise if you need clarification or additional information.

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With kindest regards, I am

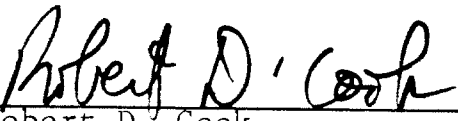
Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

  
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