The State of South Carolina

Office of the Attorney General

Opinion No. 85-157

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Mr. Donald L. Coffin
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Dear Mr. Coffin:

You have asked our opinion as to whether the Freedom of Information Act requires a public body which affirmatively decides by majority vote in executive session, not to take certain action, to ratify that decision in public. It is our understanding that you are primarily concerned with decisions such as not to hire an individual, not to extend a contract to a particular person, etc. It is our opinion that the Freedom of Information Act requires that ratification of such decisions be made in a public session.

South Carolina's Freedom of Information Act, in its present form, was enacted as Act No. 593, 1978 Acts and Joint Resolutions. Section 2 of the Act states the findings of the General Assembly in enacting the FOIA:

> 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.

REQUEST LETTER

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).

The Freedom of Information Act, codified at § 30-4-10 et seq., requires all meetings of a public body to be open to the public "unless closed pursuant to § 30-4-70 of this chapter." Section 30-4-70 authorizes a public body to go into executive session for certain specifically enumerated reasons. Of course, while the Act authorizes executive sessions, it does not mandate them. As was stated in Tobin v. Michigan Civil Service Commission, 416 Mich. 661, 331 N.W.2d 184, 186 (1982), "the ... FOIA authorizes, but does not require nondisclosure...."

If a public body does go into executive session, such a session "must be held in accordance with specific statutory procedures." Ghiglione v. School Comm. of Southbridge, (Mass.), 378 N.E.2d 984, 987 (1978). Section 30-4-70(a)(5) sets forth the procedures for convening an executive session and giving legal effect to those decisions made by a public body in executive session:

> (a) ....
> (5) Prior to going into executive session, the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the purpose of the executive session. Any formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action.

(Emphasis added.) It is the ratification requirement with which you are concerned because as the section expressly provides,

where ratification is required, the decision made in executive session is of no effect until such ratification occurs. Op. Atty. Gen., April 24, 1984. The question here is whether § 30-4-70(a)(5) requires the public body to ratify a decision not to employ where such decision was initially made in executive session pursuant to a vote on the question.

As stated, § 30-4-70(a)(5) requires the public body to ratify in public every "formal action" which is defined as a "recorded vote committing the body concerned to a specific course of action." 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). Thus, based upon the express language of § 30-4-70(a)(5), the relevant statutory language could certainly be read as requiring that where a public body by vote in executive session makes a decision not to employ or extend a contract, such decision should be ratified in public session.

This reading of the FOIA is consistent with common sense and the intent of the General Assembly, as expressed in the preamble to the Act, quoted above. The preamble makes it clear that the purpose of the Act is to insure that the "decisions reached" 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 Tp. 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'." Thus, in our judgment, it would defy common sense to conclude that a determination made by a public body in executive session, in which the body chose by formal vote not to take a particular course of action, was not just as much a "decision" or "formal action" of that body as a determination by it to act affirmatively.

Case law in other jurisdictions is both instructive and in accord with this reasoning. For example, in Judge v. Pocius, (Pa. Commonwealth), 367 A.2d 788 (1977), the Pennsylvania court reviewed a statute somewhat similar in language and purpose to § 30-4-70(a)(5). 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 FOIA 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)(5), 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)(5) ["... a recorded vote committing the body ... to a specific course of action... ."]

Moreover, it was held in Jewell v. Board of Ed., 19 Ill.App.3d 779, 312 N.E.2d 659 (1974) that a decision made by a board not to extend a new contract to a school teacher required a public ratification. In that case, the Illinois statute prohibited any "final action" from being taken in executive session. The Court held that a decision not to rehire fell within that definition and thus was required to be made in public before becoming legally effective.

Karol v. Bd. of Ed., (Ariz.), 593 P.2d 649 (1979) is particularly relevant to the present situation. There, the Arizona FOIA required any "legal action" of a public body to be finalized in public. In that instance, the 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 the Arizona statute was thus very similar to the definition of "formal action" contained in § 30-4-70(a)(5). The Arizona Supreme Court held that a decision by a board of education not to offer a teacher a contract constituted "legal action" within the meaning of the statute, thus requiring the action to be ratified in public. In our judgement the Karol case is persuasive for the conclusion that § 30-4-70(a)(5) requires ratification in public in the situation you reference.

You have also asked what time frame for ratification is permissible. This question was addressed in an opinion of this Office dated April 24, 1984 where it was stated:

> We believe the better practice, and one more in keeping with the spirit and intent of the Freedom of Information Act, is to ratify, in public, action taken in executive session immediately upon return to public session.... However, there is authority that such may

still be accomplished at a later public meeting, McLeod v. Chilton, 132 Ariz. 9, 643 P.2d 712 (1982) and the Act itself does not expressly prohibit this.

CONCLUSION

1. Where a public body votes in executive session on questions such as whether to employ an individual and decides not to take such action, that action should be ratified in public session by the body prior to becoming effective. Where the public body is in doubt as to whether to ratify a particular decision made in executive session, we recommend that such ratification be made.

2. The better practice, and one more in keeping with the spirit and intent of the Freedom of Information Act, is to ratify, in public, action taken in executive session immediately upon return to public session. Authority exists, however, that such may still be accomplished at a later public meeting.

If we can be of further assistance, please let us know.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg