1984 S.C. Op. Atty. Gen. 159 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-64, 1984 WL 159871

Office of the Attorney General

State of South Carolina
Opinion No. 84-64
June 1, 1984

***1** Larry A. Jackson
President
Lander College
Greenwood, South Carolina 29646

Dear President Jackson:
You have asked several questions concerning the relationship of South Carolina's Freedom of Information Act (FOIA) to the functioning of the Tenure Committee at Lander College. We will address each of your questions in the order presented, but will first comment generally upon the Freedom of Information Act in South Carolina.

South Carolina's Freedom of Information Act is presently codified as Section 30–4–10 et seq., Code of Laws of South Carolina (1983 Cum. Supp.). In enacting the FOIA in its present form in Act No. 593, 1978 Acts and Joint Resolutions, the General Assembly 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.

Act No. 593 of 1978, Section 2. As with any statute, the primary guideline to be used in construing the FOIA or any provision thereof, is the intention of the legislature. Adams v. Clarendon County School District No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). One obvious purpose of the FOIA is to protect the public. Toward that end, the Act is remedial in nature and must be construed liberally to carry out the purpose mandated by the General Assembly. See, South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Exemptions from or exception to the Act's applicability are to 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). With that general introduction, we turn to the specific questions you have raised.

Your first question is: Is the Tenure Committee of a state college a public body under the Freedom of Information Act. We would advise that it probably is. Section 30–4–20(a) of the Act in pertinent part defines a ‘public body’ as
any department of the State, any state board, commission, agency and authority, and public or governmental body . . . or any organization, corporation or agency supported in whole or part by public funds or expending public funds . . ..

Unquestionably, Lander College is a state supported institution of higher learning and now functions as a state agency. See, § 59–101–30. Lander receives and expends public funds. There is, therefore, little doubt that the governing board of Lander itself is a ‘public body’ and subject to the requirements of the Freedom of Information Act.

Further, it is our understanding that the governing board of Lander College has created a permanent executive committee of the college known as the Tenure Committee. That Committee consists of 6 tenured faculty members, elected by the faculty at large. Each member of the Committee serves a three year term. The Committee possesses the broad authority to hear questions

concerning the grant or denial of faculty tenure and to make recommendations thereupon to the President. It is our understanding that such recommendations carry considerable weight and are usually followed.

***2** In a previous opinion, this Office addressed a similar question relating to a committee's status as a public body. Op. Atty. Gen., July 28, 1983. There we noted that '[g]enerally committees of public bodies are subject to the same FOIA requirements as the parent bodies.' While we recognized that 'not every committee would be subject to the Freedom of Information Act,' we concluded that if the particular committee, in making its recommendations, was performing a governmental function, it constituted a 'public body', and therefore was subject to the Act. In that opinion, we cited the case of Arkansas Gazette Co. v. Pickens, (Ark.), 522 S.W.2d 350 (1975), which involved a university's Student Affairs Committee. There, the Court concluded that the Committee, which possessed the responsibility for examining matters relating to student affairs and making recommendations thereupon, was a public body, subject to the Act.

Similarly, the Tenure Committee at Lander has the responsibility for making recommendations concerning faculty tenure. Clearly, the decision concerning which faculty members to grant tenure is the performance of a governmental function at a state university. Based then upon the reasoning contained in our previous opinion referenced above, we would advise that the Tenure Committee would probably constitute a 'public body' for purposes of the Freedom of Information Act and thus the Act should be followed; and even though our previous opinion, unlike here, dealt with members of a governing board who also served as members of the committee in question, such distinction is of no consequence. In Carl v. Board of Regents of Univ. of Okla., (Okl.), 577 P.2d 912 (1978), the Oklahoma Supreme Court concluded that the University's Admissions Board, consisting entirely of faculty, senior medical students and physicians was a 'public body' for purposes of the Oklahoma FOIA.

With respect to your second question, you wish to know whether the Tenure Committee, in voting on a particular individual's being granted or denied tenure, must record the vote by individuals. We assume from your third question that tenure decisions by the Committee are made in executive session and we also assume that such executive sessions are proper. [1] In a recent opinion of this Office, we noted that the FOIA does not specifically address how voting is to be carried out in executive session, Op. Atty. Gen., April 24, 1984. There, we stated

The FOIA does not specify that voting be carried out in a particular manner, either in open session or executive session. By Op. Atty. Gen. No. 77–279, dated September 8, 1977, this Office indicated that voting by secret ballots, voice vote, or show of hands would be acceptable absent specific procedures in an organization's bylaws or rules. But in an Opinion dated January 17, 1984, we noted that the prior Opinion predated the Freedom of Information Act as it is presently codified, and thus the Act must now be read with the prior Opinion. Section 30–4–90(a)(3) now states:

***3** (a) All public bodies shall keep written minutes of all their public meetings. Such minutes shall include but need not be limited to:

* * *

> (3) The substance of all matters proposed, discussed or decided and, at the request of any member, of any votes taken.

Our January 17, 1984 Opinion stated that:

[i]t would appear that secret ballots may be used; but if a member of council asks that a vote be recorded, then a secret ballot could not be used in that instance. Further, . . . if votes taken by secret ballot should be recorded by name, then such votes would become a matter of public record subject to disclosure, after the votes are submitted and tabulated.

Again, the FOIA does not specifically address voting procedures in executive session; and Section 30–4–90(a)(3) speaks only to voting in open session. However, the same procedure could be applied as a rule of thumb to votes taken in executive session. We are not aware of whether any rules and procedures adopted by the Commission pursuant to Section 57–3–260 of the Code might also offer guidance in this matter; if such rules and procedures have been promulgated concerning the matter of voting, such rules and procedures should be utilized. [2]

While Lander's rules and regulations and procedures would have to be consulted, in the absence of such, the guidance offered above would be useful for determining voting procedures in executive session.

Your third question concerns the procedure to be followed when the Tenure Committee returns from executive session to regular session. Again, the April 24, 1984, Opinion addresses this issue. This Office there stated:
Section 30–4–70(a)(5) requires that '[a]ny formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective.' . . ..

According to the provisions of Section 30–4–70(a)(5) an election held in executive session would not be effective until such action has been ratified in public session. This would be in keeping with the general law that only those matters considered openly, on the record, would be valid, absent statutory authority to the contrary. See, 73 C.J.S. Public Administrative Law and Procedure, § 17.

To 'ratify' is to recognize or confirm 'that which has been done without authority, or done insufficiently.' Davies v. Lahann, 145 F.2d 656, 659 (10th Cir. 1944). In Op. Atty. Gen. No. 77–279, supra, this Office concluded that '[s]uch ratification should come through a motion to confirm the action taken in executive session . . ..' Of course, upon such motion, the matter should also be voted upon in public session in the manner described above. See, Section 30–4–70(a)(5).

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 . . . [3] However, there is authority that such ratification 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.

***4** In other words, the Freedom of Information Act requires the public body simply to ratify in public session those formal actions taken by the body in executive session 'prior to such action becoming effective.' Since a decision on tenure would be a 'formal action' as defined in § 30–4–70(a)(5), that decision would need to be publicly ratified, as defined above. [4] Such ratification would, however, fulfill the requirements of the Act.

Next, you inquire whether the Committee must also publicly ratify negative decisions, that is, decisions against tenure. Section 30–4–70(a)(5), again, states that any 'formal action' taken in executive session must be ratified publicly prior to becoming effective. As defined therein, 'formal action' means 'a recorded vote committing the body concerned to a specific course of action.' Of course, the denial of tenure so commits the public body. In a previous opinion, this Office stated:
It is the opinion of this Office that when a motion is made before a body the only responses to that motion would be either a positive or a negative response of vote. Therefore, a negative response is just as much a commitment to a 'formal action' as would be a positive vote. If a motion is made in executive session and a negative vote is received, then prior to this negative vote becoming effective that vote must be ratified in public session.

Op. Atty. Gen., March 14, 1980. Thus, if the Tenure Committee voted in executive session to deny tenure, such decision would have to be publicly ratified.

Next, you inquire whether denials of tenure must be made by recorded votes, for and against. This question is answered by our response to your questions 2, 3 and 4. In summary, with regard to the question of ratification of a public body's action (denying tenure) in executive session cannot be made by secret ballot and must be publicly recorded if a member of the Committee asks that such voting be recorded. See, Op. Atty. Gen., April 24, 1984; Op. Atty. Gen., Jan. 17, 1984.

Finally, you seek guidance on the question of whether a member may change his vote in the public session from the way he voted in executive session. Again, we note that Section 30–4–70(a)(5) explicitly states that until public ratification occurs, no formal action taken in executive session is effective. The procedure for such ratification is discussed above. There is nothing in the Act that requires a member to vote a particular way on the issue of ratification merely because he voted in a certain manner in executive session.[5] Since the ratification vote is entirely separate and indeed serves to make the executive session action effective, a member is free to choose whether or not to ratify the Committee's action taken in executive session as he sees fit.

We trust this responds adequately to your inquiries. If we can be of further assistance, please let us know.
With kindest regards,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 Section 30–4–70(a)(1) states that ‘a public body may hold a meeting closed to the public for one or more of the following reasons: (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline or release of an employee . . ..’ See also, § 30–4–70(a)(5).

2 We also stated at p. 8, n.4 that ‘[t]he Act undoubtedly contemplates that voting may occur in executive sessions. See, Section 30–4–70(a)(5) . . ..’ That provision states that ‘'formal action’ means a recorded vote committing the body concerned to a specific course of action.' (Emphasis added.) We noted that ‘[a]t the very least, the results of the vote so taken must be recorded.’ See also, § 30–4–50(7).

3 We stated at p. 8, n.5 that ‘[o]therwise, public ratification of action taken in executive session could be delayed or postponed indefinitely, circumventing the intent of the Act.’

4 We would note that the Act would permit but not require the Tenure Committee to meet in executive session for discussion of and voting upon the question of tenure. This opinion should not be construed as attempting to preclude public discussion of and voting upon the question of tenure where such is possible or feasible or is desired. We simply conclude here that the Act only requires that formal actions concerning employment matters (such as tenure) taken in executive session be ratified in public (as defined above) before such actions are effective. See, Tobin v. Michigan Civil Service Commission, 416 Mich. 661, 331 N.W.2d 184 (1982).

5 We assume the particular rules of procedure in question do not speak to this.

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