1984 S.C. Op. Atty. Gen. 109 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-46, 1984 WL 159853

Office of the Attorney General

State of South Carolina
Opinion No. 84-46
April 24, 1984

***1** The Honorable R. B. Scarborough
Commissioner
State Highways and Public Transportation Commission of S. C.
Post Office Box 855
Charleston, South Carolina 29402

Dear Commissioner Scarborough:
Thank you for your letter asking for our opinion on certain matters. After describing the manner in which recent elections were held by the State Highways and Public Transportation Commission [hereinafter, 'Commission'] and with reference to the minutes of that meeting, you have asked the following questions:
1. Whether the Chief Commissioner and Secretary-treasurer of the Commission can legally function in their capacities after July 1, 1984, because of the manner in which they were elected?

2. Whether the Chairman and Vice-Chairman of the Commission were properly elected, and whether they have authority to act in their respective capacities since they were not nominated in an open meeting and the vote was taken in secret?

3. Whether such elections may be held in Executive Session?

4. Whether an election may be held by secret ballot when only one member opposes the secret ballot?

This opinion will briefly describe the factual situation presented in your letter and in the Commission minutes. Following a general discussion of the Freedom of Information Act [hereinafter, 'the Act'], Section 30–4–10, et seq., Code of Laws of South Carolina (1983 Cum. Supp.), this opinion will address the mechanism of going into executive session under the Act as it relates particularly to the Commission, then addressing each of your questions.

Commission minutes [1] of the meeting held on February 22, 1984, reflect that, in open session, the Commission announced its purpose to elect a Chief Commissioner; nominations were made for the position of Chief Commissioner for a four-year term, effective July 1, 1984. The Commission then voted to go into Executive Session, the minutes stating, 'The Commission went into Executive Session for the purpose of discussing personnel matters.' Upon the Commission's return to open session, the Chairman announced that as a result of the Commission elections, the following appointments had been made: Commission Chairman, Vice-Chairman, Chief Commissioner, and Secretary-Treasurer.

By your letter of March 13, you add that the Commission voted by secret ballot in executive session for the appointment of the Chief Commissioner. The Chairman then called for the replacement of the Secretary-Treasurer, who had just been selected as Chief Commissioner; the Secretary-Treasurer was elected by voice vote. The Chairman then called for the election of the Chairman, which was accomplished by voice vote. Finally, the Chairman called for the election of the Vice-Chairman, which was held by secret ballot. You also noted that you requested that votes be taken by a show of hands but received no support for your suggestion. You added that another election was held in executive session for Chief Highway Engineer, but the results

of that election were not announced when the Commission reconvened in open session and announced the results of the other elections.

***2** Because the Commission is a 'public body' as defined by Section 30–4–20(a) of the Code, the Commission is required to follow the provisions set forth in the Act, including the provisions relative to open meetings and executive sessions. The Act, in Section 30–4–60, mandates that '[e]very meeting of all public bodies shall be open to the public unless closed pursuant to Section 30–3–70 of this chapter.' (Emphasis added.) Section 30–4–70 enumerates several reasons for which a 'public body may hold a meeting closed to the public,' among them '[d]iscussion of employment, appointment, compensation, promotion, demotion, discipline or release of an employee, or the appointment of a person to a public body . . ..'

It should be noted that the Act was designed to guarantee 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). Thus, the Act, which is remedial in nature, must be liberally construed to carry out the purpose mandated by the General Assembly. [2] See, South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exceptions to the open meeting requirement of the Act must be narrowly or strictly construed, News and Observer Publishing Company v. Interim Board of Education for Wake County, 29 N.C. App. 37, 223 S.E.2d 580 (1976), as they derogate the general policy of open meetings. Illinois News Broadcasters Association v. City of Springfield, 22 Ill. App. 3d 226, 317 N.E.2d 288 (1974).

As noted above, Section 30–4–60 mandates that meetings of the Commission, as a public body, be open to the public unless closed pursuant to Section 30–4–70, which, as noted under Section 30–4–70(a)(1), provides that an executive session may be held to discuss various personnel matters. Section 30–4–70(a)(5) provides the mechanism for going into executive session:
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.

Thus, the statute clearly specifies the steps which must be taken to enter into executive session and then to put into effect actions taken during executive session:
1. The purpose for going into executive session must be one clearly specified in Section 30–4–70.

2. The public agency must vote affirmatively in public to go into executive session.

3. The presiding officer must announce the purpose of the executive session.

4. Following the executive session, any action taken in the session must be ratified in public prior to such action becoming effective.

Referencing the procedure as outlined and the questions you have presented, we first address whether the Commission was authorized by the FOIA to go into executive session for the purpose of electing persons to fill the positions of Chairman, Vice-Chairman, Chief Commissioner, and Secretary-Treasurer. According to the minutes of the meeting, the Commission went into executive session 'for the purpose of discussing personnel matters.' (Emphasis added.) Under Section 30–4–70(a)(1), this appears to be a permissible reason to go into executive session, at least with respect to the selection of a Commissioner, because his selection would involve '[d]iscussion of the appointment . . . of an employee' as contemplated by the Act.

***3** See, Sections 57–3–410 [Commission's appointment of a Chief Highway Commissioner] and Sections 57–3–430 [Commissioner is chief executive officer of Highway Department].

With respect to the other officers in question, Section 30–4–70(a)(1) does not clearly authorize the selection of those officers in executive session. And general authority permitting the selection of a public body's own officers in executive session is scarce. We have located one case in which a public body was found to be properly in executive session when it selected persons to fill the positions of chairman and vice-chairman. See, Edgar v. Oakland Museum Advisory Commission, 36 Cal. App.3d 73, 111 Cal. Reptr. 364 (1973). The Court there did not accept the idea that an executive session should be held only when a public body was considering persons outside that body for positions on the governing boards. The Court noted:

There is nothing in the provision authorizing executive sessions which makes any distinction between officers appointed by a [public] body over whom the body will have control and supervision, and officers appointed by a [public] body to fill vacancies in its own membership. The obvious purpose underlying the authority to hold such executive sessions is to permit complete freedom of discussion with the minimum of embarrassment both to the members of the [public] body and to the person being discussed by them, ...

111 Cal. Reptr. at 366.

Section 57–3–260 provides for the separate selection of a Chairman, other officers and Secretary-Treasurer of the Highway Department (who acts as secretary of the Commission). This provision appears similar to that addressed in the Edgar case, cited above; and, as noted in that case, it was held that the offices of Chairman and Vice-Chairman of the Board in question could be validly filled by election in executive session. Moreover, we note that Section 57–3–260 does not itself specify that nominations be made or votes taken in a particular manner. Thus, we cannot find where conducting such elections or appointments in executive session is specifically prohibited and have found some support for such elections, provided, of course, the remaining requirements of Section 30–4–70(a)(5) are met. However, since authority on this question is scarce and is certainly not controlling, and since the fundamental purpose of the Act is to conduct public business in public, we would recommend that, absent a strong need for executive session, such officers be selected in public. Where a public body is selecting from its own membership its presiding officers, such as Chairman, we do not believe there would usually be the same need for an executive session, as when that body is selecting a chief executive officer from outside its membership.

The second general question presented relates to the procedure to be followed, pursuant to Section 30–4–70(a)(5), for entering into executive session. From all that appears, it was, arguably, announced in public session that the Commission was going into executive session to elect a Chief Commissioner. As to the elections to fill the positions of Chairman, Vice-Chairman and Secretary-Treasurer, there is more doubt, however, as the elections for those positions in executive session do not appear to have been specifically announced publicly beforehand. Clearly, we believe the Act contemplates that executive sessions should be preceded by the disclosure of such information as is sufficient to apprise the public in attendance of the subject matter to be undertaken. [3] In this instance, while a court could find that the public announcement that ‘personnel matters' were to be discussed was sufficient to go into executive session to select all the officers in question, clearly a more detailed and specific announcement as to each position would have been preferable, given the purpose of the Act.

***4** 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:

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

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(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 award 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. [4]

The third general question concerns the procedure to be followed upon return to the open session from the executive session. 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 minutes of the meeting and your letter, the Chairman announced the results of the election upon return to open session. There is no indication that the votes taken in executive session were ratified in open session. According to the provisions of Section 30–4–7(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).

***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. [5] 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. Here, we understand that the new Commissioner does not begin his term of office until July 1, 1984. Thus, so that his appointment will be effectual prior to that time, we would recommend that the Commission now ratify in public session the Commissioner's appointment.

We would also recommend that the Commission now ratify in public session the election of Chairman, Vice-Chairman and Secretary-Treasurer. We are informed that these officers began their terms on April 1, 1984; until their election is ratified in public session, the FOIA states that such action would not be effectual. Nevertheless, because these officers would have been acting in a de facto capacity, 67 C.J.S. Officers, § 276, their acts as Chairman, Vice-Chairman and Secretary-Treasurer would be valid as to third parties. To give them a de jure capacity, would now require ratification of their election in a public session.

CONCLUSION

Applying the general law to the questions which you have specifically asked, we would advise:
1. The elections of the Chief Commissioner and Secretary-Treasurer must be ratified in an open, public session before their elections would be effective.

2. The elections of the Chairman and Vice-Chairman must likewise be ratified in an open, public session, before their elections would be effective.

3. Because the Chief Highway Commissioner is appointed as an officer of the Commission, his selection could probably be made in executive session. And while authority in the area is scarce and the answer to your question is not clearcut, we have located one case which permits the election of Chairman, Vice-Chairman and Secretary-Treasurer in executive session. We would further recommend however, where a public body selects from its membership its presiding officers such as Chairman, that unless there is a strong need for executive session, these officers should be selected in public. Again, as to any action taken in executive session, that action is not effective until properly ratified in public.

4. Prior opinions of this Office have discussed secret ballots. We would advise that where a member of a public body asks that a vote be recorded, a secret ballot may not be taken in that instance.

Sincerely,

T. Travis Medlock
Attorney General

Footnotes

1 We have compared the minutes of the Commission meeting with the tape recording made during the course of the meeting and have found that the minutes coincide with the tape.

2 This Office has consistently espoused that a liberal construction of the Freedom of Information Act is required. See, for example, Opinions of Attorney General dated July 28, 1983; August 8, 1983; December 21, 1983; January 17, 1984; and February 22, 1984.

3 When this is not done, however, courts have been hesitant to nullify actions taken in executive session, unless some prejudicial effect to the public is demonstrated, choosing to enforce compliance prospectively such as by injunctive relief. See, Karol v. Bd. of Ed. Trustees, 122 Ariz. 95, 593 P.2d 649 (1979). Whether prejudicial effect has been demonstrated would, of course, necessitate a finding of fact by the appropriate body in an appropriate proceeding.

4 The Act undoubtedly contemplates that voting may occur in executive sessions. See, Section 30–4–70(a)(5): “formal action' means a recorded vote committing the body concerned to a specific course of action.' (Emphasis added.) At the very least, the results of the vote so taken must be recorded. See also, Section 30–4–50(7).

5 Otherwise, public ratification of action taken in executive session could be delayed or postponed indefinitely, circumventing the intent of the Act.

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