1984 S.C. Op. Atty. Gen. 256 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-111, 1984 WL 159918

Office of the Attorney General

State of South Carolina
Opinion No. 84-111
September 6, 1984

***1** The Honorable Derwood L. Aydlette, Jr.
Member
House of Representatives
608–B Harborview Road
Charleston, South Carolina 29412

Dear Representative Aydlette:
You have asked whether or not a public body (legislative delegation) may approve a budget, pursuant to its apparently delegated statutory authority, [1] by circulating a petition, one at a time, among that body's individual members. As we understand it, such a letter was presented to each member and that member either approved or disapproved the budget. To our knowledge, originally there was no collective action in the form of a meeting by the members of the body. However, we are informed that subsequent thereto the budget was approved in a public meeting. You wish to know whether the original individual action may be taken 'without voting on it in a public meeting.' It is our opinion that a public meeting is required to take the contemplated action.

Generally, it is recognized that
A municipal or county council or legislative body can act only as a body and when in legal session as such. And the powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all members of the council separately is not the action of the council and an agreement entered into separately by the members of council outside a regular meeting is not binding.

56 Am.Jur.2d, Municipal Corporations, § 155. Another treatise has similarly stated:
The powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts and specifically acts involving discretion and judgment, particularly acts in a judicial and quasi-judicial capacity, are official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum of the number designated by statute.

2 Am.Jur.2d, Administrative Law, § 288. These basic principles are recognized by several similar treatises in the context of action by a variety of other public officers and bodies. See, 73 C.J.S., Public Administrative Law and Procedure, § 18; 68 Am.Jur.2d, Schools, § 46; 67A C.J.S., Parliamentary Law, § 5.

The same general principles of law are almost universally adhered to by jurisdictions outside South Carolina. For instance, it was stated in State v. Kelly, (N.M.), 202 P. 524, 21 A.L.R. 156 (1921) that 'where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the members, or a quorum thereof, present.' 21 A.L.R. at 170. Moreover, the Court, in School Dist. No. 95 v. Marion Co. School Reorg. Comm., (Kan.), 208 P.2d 226, 231 (1949), noted that '. . . any board, commission or committee should act as a body. That rule is recognized as being well established.' And in Webster v. Texas Pacific Motor Transport Co., (Tex.), 166 S.W.2d 75 (1942), the Texas Supreme Court wrote:
***2** It is a well established rule in this State, as well as other States, that where the Legislature has committed a matter to a board, bureau or commission or other administrative agency, such . . . must act thereon as a body at a stated meeting, or one

properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend . . .. [A]greement by the individual members acting separately, and not as a body . . . is not sufficient.

166 S.W.2d at 77. The Webster case cited a wealth of other authorities for the foregoing statement and indeed the cases are numerous in support thereof. See, e.g., State Tax Comm. v. El Paso Nat. Gas Co., 73 Ariz. 43, 236 P.2d 1026 (1951); Edsall v. Jersey State Borough, 220 Pa. 591, 70 A. 429 (1908); Moore v. Babb, (Ky.), 343 S.W.2d 373 (1960); Moskow v. Bost. Redev. Auth., (Mass.), 210 N.E.2d 699 (1965); Edwards v. Hylbert, (W.Va.), 118 S.E.2d 347 (1960); School Dist. v. Framlau Corp., (Pa.), 328 A.2d 866 (1974). Moreover, the Court in Webster explained the rationale for the rule that public bodies must act collectively in assembled meetings.

The purpose of the rule . . . which requires the board to act as a body at a regular meeting or at its called meeting, upon proper notice, is to afford each member of the body an opportunity to be present and to impart to his associates the benefit of his experience, counsel, and judgment and to bring to bear upon them the weight of his argument on the matter to be decided by the Board, in order that the decision, when finally promulgated, may be the composite judgment of the body as a whole.

Our own Supreme Court, if its language in particular cases is any indication, appears to accept this rule also. In Gaskin v. Jones, 198 S.C. 509, 18 S.E.2d 454 (1942), for example, the Court stated:

In the absence of any statutory or other controlling provision, the commonlaw rule to the effect that a majority of a whole body is necessary to constitute a quorum applies, and no valid act can be done in the absence of a quorum. A majority of such a body must be present to constitute a Board competent to transact business. (Emphasis added.).

198 S.C. at 513. In addition, the Court in Abbeville v. McMillan, 52 S.C. 60, 72 (1897), quoted with approval language used by the United States Supreme Court in Cooley v. O'Connor, 12 Wall. 391 at 398 (1871):

It is true that when an authority is given jointly to several persons, they must generally act jointly or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number.

***3** Several cases in other jurisdictions have specifically addressed the application of this basis rule in the context raised here, i.e. the action of a public body by the circulation of a letter or other document to each member of the body individually. For example, in Commonwealth v. Burns, 365 Pa. 596, 76 A.2d 383 (1950), a majority of the judges of common pleas of the county were given, by statute, the authority to appoint members to the Board of Revision of Taxes. A 'round robin' was circulated among the judges concerning a particular appointment. After being signed by a majority, the paper was then forwarded to the Secretary of the Board of Judges who then notified the proper parties. Subsequently, an action of quo warranto was brought challenging the appointment on the ground that it was made without notice to all the judges and without a meeting of them. The Supreme Court of Pennsylvania held the appointment to be void, concluding:

The improvised expedient of a round robin—signed by fifteen of the twenty judges, the name of one being signed by proxy, with no one of the judges being given an opportunity to express his opinion as to the fitness of the appointee, and with one President Judge of said Courts, having no knowledge of the appointment until after it has been made, clearly does not satisfy the requirements of the Act.

76 A.2d at 384. The Court relied upon an earlier Pennsylvania case, Commonwealth ex rel. Claghorn v. Cullen, 13 Pa. 132 where a similar procedure had been declared invalid with respect to a private corporation. The Court in Cullen had reasoned:

The opportunity to deliberate, and, if possible to convince their fellows, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority.

13 Pa. at 144.

This Office has also previously considered a similar situation and has reached the same conclusion as that expressed in the preceding cases. Former Attorney General T. C. Callison concluded in a published opinion that where a public body had passed a Resolution in a regular meeting at which a quorum of the membership was present 'that such Resolution could not be nullified by individual members being approached out of session and their signature procured nullifying or rescinding the legal action of the Board.' Attorney General Callison discussed at length the public policy underlying his conclusion, citing South Carolina authorities in support thereof.
I call your attention to the case of Gaskin v. Jones, 18 S.E.2d, page 454, 198 S.C. 508, and the case of McMahon v. Jones, 94 S.C., page 362.

The latter case, you will note, holds that the public is entitled to the benefit of the judgment and discretion individually and collectively of a Commission of five members in the administration of its charity.

It is my opinion that under the above decisions the County of Lancaster would be entitled to the combined judgment and discretion of the members of your Board of Directors in session with the majority present, which would preclude the circulation of a petition, contract or agreement to individuals separately for signature, unless such procedure had been authorized in a regular meeting with a quorum present.

***4** Op. Atty. Gen., July 28, 1954. Based then upon the foregoing abundance of authority, we would conclude that general case law and common law requires that action taken by members of a public body, be taken collectively in a meeting, particularly where as here such action would constitute the exercise of a discretionary function. [2]

Remaining is the question of what effect the enactment of the Freedom of Information Act has had upon this general authority. 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 has 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 Dist. 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). See also, Op. Atty. Gen., June 1, 1984.

Section 30–4–60 of the Act mandates that '[e]very meeting of all public bodies [as defined] shall be open to the public unless closed pursuant to § 30–4–70 of this chapter.' Section 30–4–20(d) of the Act defines a 'meeting' to be
. . . the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

The statute defines a 'public body' in Section 30–4–20(a) as
. . . any department of the State, any state board, commission, agency and authority, any state board, commission, agency and authority, any public or governmental body or political subdivision of the State including counties, municipalities, townships, school districts and special purpose districts, or any organization, corporation or agency supported in whole or in part by public funds or expending public funds . . ..

***5** It is evident that the South Carolina Act, like the federal FOIA, does not expressly require a public body to hold a meeting in order to conduct its business. See, Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967); Common Cause v. Nuc. Reg. Comm., 674 F.2d 921 (D.C. Cir. 1982); Pac. Legal Found. v. Council on Env. Qual., 636 F.2d 1259 (D.C. Cir. 1980). Certainly however, the entire tenor of the Act, as best expressed in Section 2, anticipates that public bodies will conduct their business in 'meetings' as defined. Indeed, the conduct of the public's business in a 'meeting' of a public body is the basic starting point of the Act. Clearly then, we cannot say that the Freedom of Information Act derogates the general law, cited above, requiring a public body to act collectively in a meeting; if anything, it reinforces that requirement. Accordingly, the general law mandates that a public body act collectively in a formally convened meeting when acting upon matters within its authority; and if the body constitutes a 'public body' as defined by the FOIA, the Freedom of Information Act then requires the meeting of that public body to be open to the public unless a specific statutory exemption is applicable.

It must be finally determined whether the FOIA is applicable to the Charleston Legislative Delegation. We believe it probably is.

In Bramlette v. Stringer, 186 S.C. 134, 144, 195 S.E. 257 (1938), our Supreme Court noted that a county legislative delegation 'undoubtedly belongs to the Legislative Department of Government . . ..' While as a result of reapportionment, 'the complexion of the legislative delegation has changed such that there is no longer a county-oriented legislative delegation elected by the voters of an entire county and answerable to the people thereof,' Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92, 95 (1976), the Legislative Delegation still serves an important function of government in this State. Even after reapportionment and Home Rule, the General Assembly has continued to recognize the Legislative Delegation as an entity, see Act No. 283 of 1975, Section 3, and to delegate to it certain powers. See, e.g. Act No. 283 of 1975, Section 4; Act No. 84 of 1983. Such authorization 'in effect . . . constitute[s] the . . . Legislative Delegation a committee of the Legislature . . ..' Gunter v. Blanton, 259 S.C. 436, 441, 192 S.E.2d 473 (1972); Aiken Co. Bd. of Ed. v. Knotts, 274 S.C. 144, 262 S.E.2d 14 (1980).

Clearly, the Freedom of Information Act generally encompasses meetings of the Legislature and its committees. See, Section 30–4–70(e); 30–4–80(b); 30–4–40(b). While a meeting of the Legislative Delegation may not represent the typical legislative committee meeting anticipated by the FOIA, see, Section 30–4–80(b), nevertheless in light of Gunter's characterization of the Delegation as a legislative committee in similar circumstances and in view of the FOIA's broad purpose, we believe a court would conclude the FOIA to be generally applicable to a delegation meeting. It is difficult to imagine that the General Assembly silently intended to exempt the Legislative Delegation from the FOIA's coverage in the face of the broad and remedial purpose expressed in Section 2 of the Act and particularly where we must presume that, at the time of the FOIA's enactment, the Legislature was fully aware that the Delegation continued to function as a local governmental entity. [3] See e.g., Act No. 219 (Section 66) of 1977; see also, Ingram v. Bearden, 212 S.C. 399, 47 S.E.2d 833 (1948). Moreover, it would suggest an inconsistency in legislative purpose to conclude that the General Assembly intended that other legislative committees were subject to the Act, but a meeting of the Delegation was not.

***6** As we understand it, the Charleston Legislative Delegation approved the annual budget of the Charleston County Park, Recreation and Tourism District, pursuant to Section 5(21) of Act No. 1595 of 1972. While we are not aware of the precise circumstances of the particular approval and cannot comment thereon, [4] as a general matter such a budget approval function is required to be performed in public session pursuant to the FOIA. See, Section 30–4–70(b) [no budgetary matters to be discussed in closed administrative briefing session except as otherwise provided by law]. Again however, whether a particular exemption under the FOIA is applicable would depend upon all the facts and circumstances present before the public body at the time.

Based upon the information before us, we can only repeat here what we have already said, that any exemptions to the FOIA are to be narrowly construed.

One additional comment should not be overlooked or misconstrued. This Office possesses no authority, statutory or otherwise, to void or declare invalid any procedure utilized by the Legislative Delegation. The procedures of a public body must remain within its own province and only a court may declare them invalid. This Office can only advise you as to how a court would probably view the matter based upon the authorities cited above. With that understanding, we would advise that a court would probably conclude that the approval of the budget of the Charleston County Park, Recreation and Tourism District by the Charleston Legislative Delegation be done in a formal public meeting. This conclusion is consistent with the action which we understand has now been taken.

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

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 In this instance, the Charleston Legislative Delegation apparently acted to approve the budget of the Charleston County Park, Recreation and Tourism District, pursuant to Section 5(21) of Act No. 1595 of 1972. However, we understand that the question of the Delegation's authority (as opposed to that of county council) in this matter is presently being questioned in pending litigation. Consistent with the longstanding policy of this Office, we do not comment upon any issues under consideration by the Court in that action. The question we address here is solely that of whether a public body may act to approve a budget unless such is done in a formally convened, public meeting.

2 See, Gunter v. Blanton, 259 S.C. 436, 192 S.E.2d 473 (1972).

3 In addition, whether or not we view the Legislative Delegation as a legislative committee in the formal sense, the definition of 'public body' contained in the FOIA nevertheless appears sufficiently broad to encompass a Legislative Delegation. Section 30–4–20(a) defines a 'public body' as '. . . any department of the State, any state board, commission, agency and authority, any public or governmental body . . . or any organization, corporation or agency supported in whole or in part by public funds or expending public funds and includes any quasi-governmental body of the State . . ..' Any opinion in conflict with this conclusion is hereby superseded.

4 See, Op. Atty. Gen., December 12, 1983 [the Office of the Attorney General is not empowered and does not possess the resources to adjudicate questions of fact.]

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