1984 WL 566300 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 21, 1984

***1** The Honorable Philip T. Bradley
Member
House of Representatives
Box 16538
Greenville, South Carolina 29606

Dear Representative Bradley:
You have asked our advice with respect to several questions concerning the Freedom of Information Act (FOIA). Your questions are as follows:

1. You reference an opinion issued by this Office on March 22, 1983. In that opinion, it was indicated that there is currently no legal restriction to prevent an individual member of a public body from disclosing the proceedings and discussions held in an executive session in which the individual participated. The opinion noted that "[t]he only preventative solution to individual disclosure of the contents of executive session discussions and individual votes would be by the rules of conduct or regulations adopted by the particular Board in issue with appropriate sanctions attached in the event of disclosure." You wish to know what sanctions could be imposed on appointed or elected members of a school board who violate regulations or rules of conduct which prohibit the disclosure of the contents of executive session proceedings.

2. Secondly, you inquire whether an individual member of a public body may take his own minutes of executive session discussions and proceedings.

3. Third, you ask whether a public body which takes formal action against an employee in executive session must then name the employee by name in the mandated public ratification process; if so, "may ratification be delayed until a later meeting so that the employee may be notified prior to the public's learning of his dismissal during ratification?"

I will attempt to address each of your questions in the sequence in which you have asked them. Since I have been unable to find authority which clearly answers your questions, I can only offer my own legal advice, rather than an opinion of this Office.

DISCLOSURE OF PROCEEDINGS AND DISCUSSIONS HELD IN EXECUTIVE SESSION

(Question 1)

There is no clear answer to this question. As will be seen, several authorities touch upon the problem, but I have found no case which clearly resolves the issue. Accordingly, I can only review these authorities for you with the understanding that the law does not provide clear guidance.

The starting point is of course the FOIA itself, codified at Section 30-4-10 et seq. Section 30-4-60 of the Act provides that every meeting of a public body shall be open to the public unless closed pursuant to Section 30-4-70. Section 30-4-70 authorizes a public body to convene in executive session under certain limited circumstances and provided the procedures contained therein are met. Similarly, Section 30-4-30 extends to every person the right to inspect public records except as provided in Section 30-4-40, which again, provides certain limited exceptions to disclosure.

This Office has stated in the past, however, that the FOIA does not mandate nondisclosure of records nor require that meetings be closed to the public simply because a particular exemption may be applicable. The exemption provisions in Sections 30-4-40 and 30-4-60 are stated in permissive terms. See, Op. Atty. Gen., June 1, 1984; Op. Atty. Gen., July 17, 1984. Based upon similar permissive language, the Michigan Supreme Court in Tobin v. Mich. Civil Service Comm., 416 Mich. 661, 331 N.W.2d 184 (1982) concluded that the FOIA "authorizes, but does not require, nondisclosure of public records falling within an FOIA exemption." 331 N.W.2d at 186. Mandatory nondisclosure, concluded the Court, must thus result from some other provision of law "as if the FOIA did not exist." Supra at 188. Thus, it appears fairly well established that a public body may voluntarily choose to disclose material or open its meetings to the public despite the fact that an exemption may be applicable. See also, Chrysler Corp. v. Brown, 441 U.S. 281, 60 L.Ed.2d 208 (1979). For the same reasons, the body could choose to disclose material or the minutes of a meeting held in executive session.

***2** On the other hand, it is a different question when an individual member of a public body chooses to release such material, wholly apart from any collective decision by the body. Only recently, this Office stressed that a public body must act collectively and not individually. Op. Atty. Gen., September 6, 1984. Such body is authorized to act only by collective action through a majority of its membership. Gaskins v. Jones, 198 S.C. 508, 18 S.E.2d 454 (1942).

As stated in the March 23, 1983 opinion which you reference, there is no express prohibition in the FOIA itself concerning disclosure by an individual member of the contents of discussions conducted in executive session. While the Act requires that the decision to convene an executive session must be by "favorable vote" or by a majority, and thus it is arguably inconsistent with the intent of the Act if there is individual disclosure of executive session proceedings, the Act does not specifically address this situation. General parliamentary law usually does forbid such disclosure, however. As this Office noted in an earlier opinion, parliamentary law generally prohibits an individual member of a public body from violating the secrecy of an executive session. Op. Atty. Gen., July 7, 1983; Robert's Rules of Order, (newly revised edition), p. 81. This is consistent with the conclusion expressed in the March 23, 1983 opinion and with the following summation of the general law in this area:
Orderly procedure requires some rules for the proper dispatch of business and deliberation in the conduct of the council or governing body of a municipal corporation. It is competent for the body to adopt its own regulations and rules of procedure when they are not prescribed by statute or charter provision .... In the absence of rules of procedure prescribed by municipal charter or statute or adopted by the governing body, the general parliamentary law prevails. Rules adopted by the governing body in conformity with statutory authority are as binding on it as the statute itself; and the consequences of a refusal to comply substantially with its provisions or of a violation of its inhibitions must, in reason, be the same as those of a noncompliance with, or a violation of, a requirement prescribed by statute.

62 C.J.S., Municipal Corporations, § 400. See also, Section 59-19-110 (boards of trustees possess general rule-making authority.)

The more difficult question however, is the extent to which the individual member may be sanctioned for a violation of such a rule of procedure. As noted earlier, I can only present to you the various options which may exist and discuss briefly the difficulties which each may entail. No particular option or alternative is herein endorsed.

According to Robert's Rules of Order, "a member can be punished if he violates the secrecy of an executive session." Id. at 81. And the treatise goes on to say that "an organization or assembly has the ultimate right to make and enforce its own rules, and to require that its members refrain from conduct injurious to the organization or purposes. No one should be allowed to remain a member if his retention will do this kind of harm." Id. at 538. Robert's concludes that where a violation of a body's rules by a member occurs outside the body's presence, "charges must be preferred and a formal trial held before the assembly of the society ..."; ultimately however, depending upon the gravity of the offense, the body may expel the member. Id. at 533-534.

***3** It is nevertheless still questionable whether a public body, such as a school board, possesses the authority to invoke such extreme sanctions of expulsion or suspension. To pur knowledge, no statute gives a school board this authority. And while

there is support for the proposition that a legislative body, such as a municipal council, "has the inherent or incidental power to expel one of its own members," 56 Am.Jur.2d, Municipal Corporations, § 150, such authority is usually given only by statute or charter; moreover, a school board usually possesses only such powers as are expressly or impliedly granted to it by statute. 68 Am.Jur.2d, Schools, § 15.

In addition, there exists a specific removal procedure for school board members, set forth by statute. Section 59-19-60 provides that "[s]chool district trustees shall be subject to removal from office for cause by the county boards of education, upon notice and after being given an opportunity to be heard by the county board of education." [1] Since there exists here such an explicit statutory removal procedure, I would question whether a school board would, in effect, have the implied power to "remove" one of its own members. See generally, Home Building and Loan Assn. v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1938); cf., 67 C.J.S., Officers, § 118 (no inherent power of removal). And while the power to remove may be incidental to the power to appoint, see, Langford v. Bd. of Fisheries, 217 S.C. 118, 60 S.E.2d 59 (1950), I know of no authority which gives a school board the power to appoint its own membership. Compare, Section 59-19-30.

Moreover, it is equally questionable whether the Governor possesses the authority to remove a member of a school board. In a previous opinion, dated March 30, 1983, this Office advised that it is doubtful whether the Governor possessed such removal power, pursuant to Section 1-3-240 or any other authority, unless the individual has been indicted for a crime of moral turpitude. See. Article VI, § 8 of the South Carolina Constitution.

It is true, however, that each member of a school board as a public officer is a trustee for the public and possesses a duty to obey all laws. See, 63 Am.Jur.2d, Public Officers and Employees, §§ 7, 312-313. And as mentioned earlier, this duty extends to the obedience of all by-laws and rules of procedure. 62 C.J.S., Municipal Corporations, § 400. Since private corporations generally have the power to enforce their by-laws and rules as against the members through some form of equitable relief, see 18 C.J.S., Corporations, § 190, it is certainly arguable that public bodies possess the same authority. School districts are given corporate powers pursuant to Section 59-17-10 and in such instances courts have applied the same rules concerning corporations to public entities. Department of Highways v. Lykes Bros. S.S. Co., 209 La. 381, 24 So.2d 623 (1945); see also, Hays v. La. Wildlife and Fish Comm., (La.), 165 So.2d 556 (1964); Kinsey Const. Co. v. S.C. Dept. of Mental Health, 277 S.C. 168, 174, 249 S.E.2d 900 (1978). Thus, a good argument can be made that a public body could seek equitable relief in the form of a writ of quo warranto or an injunction to compel officers to perform the duties imposed upon them by their by-laws. 18 Am.Jur.2d, Corporations, § 172; Bassett v. Atwater, 65 Conn. 355, 32A. 937 (1895). [2]

***4** One final sanction which might be considered is that of censure of the member by the other members of the board. While I have found no authority which explicitly recognizes a public body's right to censure its own membership, again parliamentary law generally recognizes a motion to censure. Robert's, supra at 114. Of course, the effectiveness of such a sanction may be questionable.

A final problem with respect to any of the proposed sanctions is the possible applicability of the First Amendment. One case in particular, Dean v. Guste, (La.), 414 So.2d 862 (1982), intimates that a school board regulation which forbids dissemination of information received in executive session by the Board might be deemed a prior restraint of speech and thus violative of the First Amendment. The principal holding by the Court in Guste was that a regulation which prohibited a board member from actually recording by mechanical means board proceedings conducted in executive session was valid. However, the Court clearly suggested that it was important to its decision that the board member "remains free to publish whatever he chooses concerning any matters entertained by the School Board, limited only by his own discretion and the laws of the State governing defamation." 414 So.2d at 864. The Court further recognized that there existed "legitimate First Amendment concerns" in the members' conveying to the public the details of the School Boards' executive sessions" as completely and accurately as possible." Id. The decision seemed to draw the line, however, at least as far as mechanical recording was concerned. Still, the case can be read as suggesting that if a board were to prohibit any dissemination of executive session information such a rule would constitute a prior restraint and be constitutionally impermissible. [3] I would caution that these First Amendment

implications be considered in any attempt to enforce such a broad rule. I regret that I cannot be more specific than this because the courts simply have not yet dealt with this issue.

Based upon all of the foregoing, it would appear that the safest course in attempting to enforce such a regulation or by-law is for the board or public body to seek some form of equitable relief (i.e. mandamus, injunction or quo warranto) against a member who fails to comply. That way any First Amendment problems which the Guste court suggest exist could be dealt with by the court without subjecting the public body to possible liability.

INDIVIDUAL MEMBER'S TAKING HIS OWN MINUTES OF
EXECUTIVE SESSION DISCUSSIONS AND PROCEEDINGS

(Question 2)

You have further asked whether a member of a public body such as a school board is authorized to take his own minutes of executive session discussions and proceedings. I assume by this you mean a person would, as a member of the board, take minutes in addition to the official minutes which may be taken by the board. Again, the FOIA is the proper starting point.

***5** Section 30-4-90(a)(3) of the Act 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:
(1) The date, time and place of the meeting.

(2) The members of the public body recorded as either present or absent.

(3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.

(4) Any other information that any member of the public body requests be included or reflected in the minutes.

(b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosure would be inconsistent with § 30-4-70 of this chapter.

This Office noted in an earlier opinion that the FOIA deals specifically only with minutes of public sessions and does not expressly address minutes of executive sessions. Op. Atty. Gen., April 24, 1984. However, even though such minutes are not expressly required, a close reading of 30-4-90(b) reveals an anticipation of minutes of executive sessions being kept. Indeed, this Office recommended in the April 24 opinion that the same procedures regarding the keeping of minutes for and the recording of voting in executive session be the same as that required by the act for public sessions. Id. at 7.

While Section 30-4-90 speaks generally of a public body's keeping of official minutes and at least anticipates that official minutes of executive sessions may be kept, the Act does not address the question of whether members of a board may keep their own minutes with respect to executive sessions. The few cases that exist in this area, however, seem to say that a public body may validly prohibit this.

Section 30-4-90(c) provides in pertinent part as follows:
All or any part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction, except when a meeting is closed pursuant to 30-4-70 of this chapter, provided that in so recording there is no active interference with the conduct of the meeting.

As mentioned earlier, the Court in Dean v. Guste, supra interpreted a similar Louisiana provision as not prohibiting members of a Louisiana school board from adopting a by-law which forbade members from tape recording executive sessions. The Court stated:
There is no similar provision relating to the recordation of executive sessions. We interpret the legislature's silence on this matter to mean that each public body should have the prerogative to allow or prohibit the use of tape recorders at closed meetings.

In light of that interpretation we hold that the School Board's prohibition is neither arbitrary nor unreasonable, and therefore must be upheld. (citations omitted).

414 So.2d at 866.

A similar conclusion was reached by the Court in Zamora v. Edgewood Ind. School Dist., (Tex.Civ.App.), 592 S.W.2d 649. Again, a member of a school board attempted to tape record an executive session and the other members objected. The Court observed:
***6** Having specifically approved the use of the recording devices in the public meetings, the Legislature necessarily denied the use of such devices in executive sessions. The need for some subjects to be discussed in closed sessions is apparent and the Legislature recognized the importance thereof. To permit such private proceedings to be recorded against the desires of the majority of the Board would, we think, weaken or at times destroy the privacy required by an executive session.

592 S.W.2d at 650.

It is true that these cases involve the mechanical recording of executive sessions and not note taking by hand or written transcription. It is also evident that the Act only deals with mechanical recording and does not address one way or the other the unofficial written recording of public sessions. And it could be argued that such handwritten recording is less intrusive than the mechanical kind dealt with in the cases above. However, the principal difference is one of form and completeness, not substance and as noted in Zamora, the key distinction is the need for privacy in the executive session. The fact remains that the General Assembly has only authorized the unofficial recording of public sessions, and not executive sessions. Thus, I believe a court would give considerable weight to the reasoning in Dean v. Guste and Zamora and based thereupon could uphold a board's by-law prohibiting any recording by a member, taped or otherwise, of an executive session.

Again unfortunately, my conclusion is guarded at best. The member might argue the need for taking informal notes for his own later reflection or a vote, totally apart from any desire on his part to disseminate the information to the public; the fact that the Act does not speak to the situation or expressly prohibit it could be viewed as supportive of this argument. I can only point out that the existing cases have construed similar statutes otherwise and place greatest emphasis upon the need for privacy in an executive session, stressing that such privacy is interfered with by “unofficial” recording. Zamora, supra, Belcher v. Mansi, 569 F.Supp. 379, 384, n. 7 (D.R.I. 1983) [court distinguishes between recording of executive sessions]. To the argument of each individual member's need for his own notes, the courts would probably answer that official minutes should suffice. And even where the First Amendment is discussed, the courts seem to distinguish between the recording of executive session proceedings and later publishing or disseminating what happened in those proceedings. Thus, in my view a court may uphold a board rule prohibiting a member from taking his own minutes in executive session.

RATIFICATION IN PUBLIC SESSION OF ACTION TAKEN BY THE
PUBLIC BODY IN EXECUTIVE SESSION AGAINST THE EMPLOYEE

(Question 3)

Section 30-4-70(a)(5) of the FOIA requires that "[a]ny formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective." In a recent opinion, this Office concluded that the election of certain public officials in executive session had no legal validity until their selection was ratified by the body in public session. Op. Atty. Gen., April 24, 1984. We noted that:

***7** "[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 noted upon in public session in the manner described above.

While it is clear that if a public body takes disciplinary action against an employee in executive session, such action must be ratified in a public session if it is to be legally effective, it is unclear as to the precise form of such ratification. I have not been able to locate any case which addresses the question of whether the employee must actually be named in the ratification process. [4] However, it is apparent that the disciplinary action contemplated in your letter would relate to the particular individual personally. Thus, pursuant to Section 30-4-70(a)(5), it is evident that the particular individual must be identifiable in some form for the disciplinary action to be legally effective.

Of course, it must be remembered that Section 30-4-40 (a)(2) provides in pertinent part as follows:
(a) The following matters may be exempt from disclosure under the provisions of this chapter:

... (2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy ....

Where a public body takes disciplinary action against an employee, it may well mean that his "good name, reputation, honor or integrity is at stake," thus requiring that he be given a subsequent opportunity to refute at a hearing the particular charges made against him. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 558 (1972). [5] The individual may thus have some privacy interest in not having his name publicly mentioned until at least he is given the opportunity to refute the charges made against him. [6] Accordingly, the public body should balance this privacy interest against the public's right to know and especially the need for some specificity in ratification so as to make the disciplinary action legally effective. One possibility might be to identify the individual by a case file or some other identifying classification without actually naming him by name. In my judgment however, unless he is identified in some manner, by file number or otherwise, the public ratification of the disciplinary action taken against him could well be legally ineffective.

You mention in your letter the possibility of delaying ratification until the individual can be notified of the disciplinary action taken against him. In the April 24, 1984 opinion mentioned earlier, this Office 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 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.

***8** Op. at 9. Thus, it would probably be permissible for the public body to delay ratification of the disciplinary action at least until the employee is informed of the action the body intends to take against him. Such would certainly seem in that situation to be preferable. And it may be that such delayed ratification would, in those instances where the employee does not seek to challenge the action to be taken against him, enable the public body then to mention the name of the employee in the ratification

process; in those instances where the disciplinary action goes unchallenged, it would appear that the employee's privacy interest would be considerably diminished. It should be remembered, however, that until public ratification occurs, the disciplinary action is not legally effective; and thus the board or public body may at some point need to proceed with the ratification process because of personnel or other considerations. In that event, I would recommend adopting some form of identification procedure (file number, etc.) such as suggested above.

In summary then my own legal conclusions are as follows:

1. In answer to your question 1, probably the safest and most effective sanction would be to seek some form of equitable relief against the member in the courts, thereby protecting the body from any possible liability concerning the validity of the rule or its attempted enforcement.

2. Based upon existing decisions, a rule prohibiting a member's taking his own minutes of executive sessions may be sustainable under the FOIA and the First Amendment.

3. If disciplinary action is taken in executive session against an employee, it must be publicly ratified in some form to be legally effective; and I would recommend that the employee must be identified in some manner, such as by file number, etc. The employee's privacy interests should also be considered in such identification, thus making anonymous identification perhaps necessary in some instances. However, I would further suggest that any ratification be delayed at least until the employee is informed of the action to be taken against him.

I hope this information is of some assistance to you. Again, I regret that I cannot be more precise in my answers to you, but the law is not yet clear enough in this area to do so. I remind you that my letter should be considered only as my own legal advice and not an Attorney General's opinion.
Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 I express no opinion regarding the applicability of this removal provision to the specific situation which you reference.

2 Again, whether such injunctive relief could be sought pursuant to the FOIA itself remains problematical. The Tobin case, cited above, suggests that the FOIA is not to be used to prevent disclosure, as opposed to nondisclosure, of information. It would appear from this that disclosure by a single member of executive session proceedings is more of an internal board problem rather than an FOIA issue.

3 It is difficult for me to see how the Court distinguishes for First Amendment purposes between dissemination of information concerning what transpired in executive session and a rule which prohibits the actual recording of those sessions. If the purpose of recording is ultimately public dissemination, I fail to see how that would not also represent a prior restraint. The Court in Guste, seemed to see some distinction, however; perhaps the Court viewed the rule prohibiting tape recording merely as a limitation upon the time, place and manner of First Amendment exercise. See, C.B.S. v. Lieberman, 439 F.Supp. 862, 866 (N.D. Ill., E.D. 1976). By contrast, a rule prohibiting any and all discussion of what transpired in executive session would be viewed as a complete and prior limitation on speech. Nebraska Press Assn. v. Sturt, 427 U.S. 539, 556-559 (1976).

4 One case, Nageotte v. Bd. of Supervisors, (Va.), 288 S.E.2d 423 (1982) held that “it is not necessary to identify the personnel in convening an executive session to consider personnel matters.” The case is, in my judgment, distinguishable because in Nageotte, the Court considered only the convening in executive session and not the public ratification of action taken necessary to give such action legal validity.

5 I do not herein attempt to address the extent of any due process rights which may be present here.

6 See, e.g., Minneapolis Star v. State of Minn., (Minn.), 163 N.W.2d 46 (1968) (Court distinguishes charges and investigations from a contested case, for purposes of an unwarranted invasion of privacy.)

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