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Office of the Attorney General

State of South Carolina
Opinion No. 84-125
October 26, 1984

***1** Michael L. M. Jordan, Esquire
Attorney for the Town of Hilton Head Island
Post Office Box 5666
Hilton Head Island, South Carolina 29938–5666

Dear Mr. Jordan:
By your letter and memorandum dated June 22, 1984, you have asked for an opinion of this Office on three questions related to South Carolina's Freedom of Information Act, Section 30–4–10, et seq., Code of Laws of South Carolina (1983 Cum. Supp.), as follows:
1. Is an ad hoc citizens' committee designated by resolution of the Town Council of Hilton Head Island, to provide input and advice to the Town Manager on the drafting of proposed legislation, a ‘public body’ under the Freedom of Information Act and thus subject to the requirements of the Act?

2. Are proposed ordinances developed by the Town staff, which proposals have not yet been released to the Town Council or otherwise distributed, ‘public records' under the Act and thus subject to disclosure?

3. Are confidential information reports, prepared by the Town Manager for distribution to members of the Town Council, part of the ‘public record’ under the Act and thus subject to disclosure?

Each question will be dealt with separately in this opinion, following a general discussion of the Freedom of Information Law.

South Carolina's Freedom of Information Act, as it presently exists, was enacted as Act No. 593, 1978 Acts and Joint Resolutions. Section 2 of the Act states the findings of the General Assembly
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.

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 Company v. Interim Board of Education for Wake County, 29 N.C. App. 37, 223 S.E. 2d 580 (1976). With the legislative intent in mind, the questions presented by the Town Council of Hilton Head Island will be examined.

Question 1

***2** In your letter you indicated that the Town Council determined that 'citizen input would be appropriate' to assist the Town Manager in drafting a proposed sign ordinance. Council, by verbal resolution, designated a group of citizens to serve as an advisory committee to assist the Town Manager by analyzing, revising, and modifying the proposed ordinance. The Town Manager would then examine the committee's proposal, revise it as he felt necessary, and submit the proposed ordinance to Council for review. While you did not so state, it is assumed that Council is likewise free to modify, adopt, or reject the Town Manager's proposal.

That portion of the Freedom of Information Act defining a public body provides in part in Section 30–4–20(a) of the Code that a public body is

any department of the State, 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 and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, such bodies as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

From this definition it is apparent that the General Assembly intended the Act to apply to a broad range of bodies or entities. Committees are not specifically included in the definition of 'public body,' though this Office has concluded on several occasions that committees of public bodies were themselves public bodies subject to the Act. See Ops. Atty. Gen. dated June 1, 1984; July 28, 1983; [1] July 11, 1983; and April 3, 1979; but see Ops. Atty. Gen. dated October 15, 1980 and October 19, 1981. In construing the Arkansas Freedom of Information Act relative to committees, that state's Supreme Court stated:

It clearly appears that the General Assembly, in referring to public meetings, attempted to 'cover the field', . . . and we attach no particular significance to the fact that the word 'committees' is not specifically enumerated; in other words, it was the intent of the legislature, as so emphatically set forth in its statement of policy, that 'public business be performed in an open and public manner.'

Arkansas Gazette Company v. Pickens, 522 S.W. 2d 350, 353 (Ark. 1975). Thus, even though committees are not denominated public bodies in Freedom of Information acts, such acts have been found to be applicable to committees.

While the courts of this State have not yet addressed the applicability of the Act to committees, judicial interpretation in other states of Freedom of Information statutes applicable to committees is helpful in responding to your question. While there is authority to the contrary, generally committees of public bodies have been found to be subject to the same Freedom of Information requirements as the parent bodies; this is so even in instances where members of the committee in question are not members of the parent body. See, for example, Bradbury v. Shaw, 116 N.H. 415, 360 A. 2d 123 (1976) (mayor's industrial advisory committee); Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974) (citizens' planning commission); State v. Swanson, 92 Wis. 2d 310, 284 N.W. 2d 655 (1979) (annexation and appropriation committee); Syracuse United Neighbors v. City of Syracuse, 80 App. Div. 2d 984, 437 N.Y.S. 2d 466 (1981) (mayor's task force and homestead committee); but see Sanders v. Benton, 579 P. 2d 815 (Okla. 1978) (citizens' advisory committee not subject to open meeting law) and McLarty v. Board of Regents, 231 Ga. 22, 200 S.E. 2d 117 (1973) (Student Activity Fund Committee of state university not subject to sunshine law). In Town of Palm Beach, supra, such a citizens' commission was found to be an arm of the town council and thus subject to the state's sunshine laws; the ad hoc committee is quite similar to the planning commission in Town of Palm Beach and using the Florida court's rationale could be viewed as an arm of the Town Council of Hilton Head Island.

***3** Courts tend to focus on the nature of the functions performed by a committee rather than the composition of the committee or the proximity of its functions to the final decision. Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (search committee of a state university subject to sunshine law). As indicated in McLarty, supra, and in other cases, only a committee established to perform some governmental function would be subject to the Freedom of Information Act. The giving of advice to a public body or official has been found to be a necessary governmental function. MFY Legal Services, Inc. v. Toia, 93 Misc. 2d 147, 402 N.Y.S.

2d 510 (1977). Where committees are found to be one step, however remote, in the decision-making process, courts tend to require committees to open their meetings. Wood v. Marston, supra.[2] It appears to be immaterial that the ultimate decision-making body may reject the proposals or advice of the committee. See, for example, Wood v. Marston, supra; State v. Swanson, supra; and MFY Legal Services, Inc. v. Toia, supra. According to one court, the ultimate question to be decided is whether the members of the committee have convened to exercise the powers, duties, or responsibilities vested in the committee and not whether the committee is 'empowered to exercise the final powers of its parent body.' State v. Swanson, 284 N.W. 2d at 659.

As stated in your letter, the Town Council of Hilton Head Island 'determined that citizen input would be appropriate to assist the Town Manager in drafting a sign ordinance for presentation to the Town Council.' In examining a citizens' advisory commission charged with a similar function, i.e., citizen input, the Supreme Court of Florida, in Town of Palm Beach v. Gradison, supra, stated:

Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. . . . Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.

Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.

. . . Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate in governmental activities, the decision-making process will be improved.

296 So. 2d at 475–76. In reviewing the creation and status of the commission and finding it to be an arm of the Town Council, the court continued:

However, a subordinate group or committee selected by the governmental authorities should not feel free to meet in private. The preponderant interest of allowing the public to participate in the conception of a proposed zoning ordinance is sufficient to justify the inclusion of this selected subordinate group, within the provisions of the government in the sunshine law.

***4** Id. The commission in the Town of Palm Beach decision is similar enough to the ad hoc committee appointed by the Town Council of Hilton Head Island that a court deciding the applicability of the Freedom of Information Act to the ad hoc committee could find the Florida court's reasoning persuasive.

As stated in the opinion of this Office of July 28, 1983, not every committee would be subject to the Freedom of Information Act. A major case cited in that opinion and in your letter, McLarty v. Board of Regents, supra, which upholds that conclusion, is readily distinguishable from the ad hoc committee under consideration here. That portion of Georgia's 'Sunshine Law' pertinent to the court's decision provides that '[a]ll meetings of any State department, agency, board, bureau, commission . . . at which official actions are to be taken. . .' are to be open to the public. McLarty v. Board of Regents, 200 S.E. 2d at 118–19. The Georgia court interpreted this provision to mean that the sunshine law applies to meetings of bodies empowered to act officially for the state and at which such official action is taken. By contrast, Section 30–4–60 of the South Carolina Code states that '[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30–4–70 of this chapter.'[3] It is apparent that South Carolina's statute applies to a broader range of entities and types of meetings than would Georgia's statute. Thus, this State's statutes would encompass meetings of public bodies whether or not official action is to be taken, and the McLarty decision could not be controlling in this instance. On a similar basis, the contrary decisions in Sanders v. Benton, supra, and Washington School District No. 6 v. Superior Court, 112 Ariz. 335, 541 P. 2d 1137 (1975) may also be distinguishable from

your situation. See also opinion No. 83–55, dated August 8, 1983 (copy enclosed), wherein this Office concluded that the taking of final action is not controlling; even at a meeting where only discussion and no action occurs, the Act would be applicable.

The finding of the committee to be a public body would subject the committee to the provisions of the Freedom of Information Act, particularly the notice and open meeting requirements. See Sections 30–4–60 and 30–4–80. Additionally, Section 30–4–70, pertaining to closure of meetings, would also be applicable. This Office expresses no opinion as to the appropriateness of the committee properly entering into executive session or undergoing an administrative briefing but would merely point out that such are available to a public body if properly undertaken.

In summary, while there is contrary but distinguishable authority, this Office believes that a court faced with the issue would probably find the citizens' ad hoc committee appointed by the Town Council of Hilton Head Island to be a public body subject to the Freedom of Information Act, particularly since the committee was appointed to provide citizen input. As a reading of the above-cited cases demonstrates, a lack of final legislative authority, independent existence, [4] or ability to render an enforceable decision would not be determinative. Until such time as the courts may address the issue, however, the better practice would be to assume the applicability of the Freedom of Information Act to the committee and to follow the requirements of the Act. As is stated in Grein v. Board of Education, 216 Neb. 158, 343 N.W. 2d 718 (1984):

***5** From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.

343 N.W. 2d at 724.

Question 2

You have asked whether proposed ordinances or drafts of proposed ordinances developed by the Town staff would be ‘public records' subject to public disclosure prior to disclosure to Council or otherwise distributed. You have advised that various personnel prepare one or more drafts of an ordinance which may or may not ultimately be presented to Council for consideration. Your position is that such drafts or proposals are the work product of the Town's personnel and are not yet ‘public records' subject to disclosure. For purposes of this opinion, working drafts and proposals in final form will be considered separately.

The term ‘public record’ is defined by Section 30–4–20(c) to include

all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of or retained by a public body.

By Section 30–4–40 of the Code, certain matters may be exempt from disclosure; none of those possible exemptions appears to be applicable in this instance. In addition, certain matters are declared to be public information by Section 30–4–50, which provides in part:

Without limiting the meaning of other sections of this chapter, the following categories of information are specifically made public information subject to the restrictions and limitations of §§ 30–4–20, 30–4–40 and 30–4–70 of this chapter:

***

(5) Written planning policies and goals and final planning decisions; . . .

As stated previously, the Freedom of Information Act is to be interpreted broadly, with any exceptions being narrowly construed. Using this framework, your question will be considered.

A working draft of a proposed ordinance could conceivably fit within the definition of a public record, particularly in light of the fact that there is no exception for working papers and so forth of entities other than the General Assembly. See Section 30–4–40(a)(8). However, following the reasoning in Cooper v. Bales, 268 S.C. 270, 233 S.E. 2d 306 (1977), a court faced with this issue would probably protect working drafts of a proposed ordinance (as opposed to final drafts) from disclosure.

While the decision in Cooper v. Bales is distinguishable factually from the instant situation and though the decision was rendered under the former Freedom of Information Act repealed by Act No. 593 of 1978, enough similarity in fact and law does exist to make the court's reasoning applicable in the instant situation. In Cooper v. Bales immediate disclosure was sought of proposed statements of school board members, which statements would have been released with agenda materials publicly released or disclosed on the date of the school board meeting.[5] The court would not order the immediate release of such materials but permitted disclosure to be withheld until all agenda materials were released on the day of the meeting. The court stated:
***6** The trial court correctly noted that from Friday to Tuesday the Board members are able to adequately reflect on the issues, prepare for the meeting, assess his position, and modify or withdraw his stance prior to a public pronouncement.

Mandatory immediate disclosure of the proposed statements would discourage the free flow of innovative proposals and the flexibility of open-mindedness. Board members would be forced to take public stands on issues without the benefit of input from fellow staff members, staff prepared informational data, and public sentiment. Not all ideas are meritorious; fresh thought should not be stymied by premature public posture on the subject. The present Board policy[6] allows the author of an agenda item to disclose his position if he so desires. Those who are not so steadfast in their convictions should not be forced to immediately reveal initial sentiments which are subject to modification or reversal.

268 S.C. at 273. The court also focused on the short length of time from preparation of the materials to their being made public and stated that the Act was not violated by the board's policy.

In applying this reasoning to the instant situation, it may be seen that working drafts of proposed ordinances are subject to modification. Town personnel should not be bound by their first ideas expressed in a new, proposed ordinance; there should be room for new ideas and flexibility. Working drafts may be revised one or more times prior to the final product being submitted by Town personnel to Council, or some working drafts may be discarded in the formative stages, never being presented to Council for consideration. Based on Cooper v. Bales, it would appear that working drafts of proposed ordinances should not be disclosed, unless or until such drafts are made available to Council or otherwise distributed.

As to a final draft of a proposed ordinance ready to be presented to Council for consideration, a court could conclude that the same would fall within Section 30–4–50(5) as final planning decisions. While the issue has not been decided by courts of this State, guidance may be found in Shevin v. Byron, Harless, Schaffer, etc., 379 So. 2d 633 (Fla. 1980), which state's definition of ‘public records' is substantially similar to this State's.[7] The court stated:
That definition [of ‘public records'] limits public information to those materials which constitute records—that is, materials that have been prepared with the intent of perpetuating or formalizing knowledge.

To give content to the public records law which is consistent with the most common understanding of the term ‘record,’ we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. To be contrasted with ‘public records' are materials prepared as drafts or notes, which constitute mere precursors of governmental ‘records' and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation. Inter-

office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

***7** 379 So. 2d at 640. While the reasoning in Shevin would exclude rough or working drafts of proposed ordinances, as would be the conclusion under Cooper v. Bales, the same reasoning would probably mandate disclosure of the final draft of a proposed ordinance, i.e., the draft which would be submitted to Council for first reading.

Courts in other jurisdictions faced with the issue of disclosure of working drafts or pre-decisional materials have, in many instances, denied disclosure of such materials. See especially Annot., 26 ALR 4th 639 (1983). It should be noted that many states' Freedom of Information laws contain exemptions for working papers or pre-decisional materials, which exemption is modeled after the federal Freedom of Information Act. South Carolina's statute contains no such exemption except as to the General Assembly, as noted; thus, these cases might not be persuasive to South Carolina courts. The ultimate decision as to applicability of the Act and thus disclosure of working drafts or final drafts of proposed ordinances will be up to the courts, of course.

It must be pointed out that even for matters considered to be public records, by the provisions of Section 30–4–20(c), the public body may vote to preclude their disclosure; in pertinent part, Section 30–4–20(c) provides:
. . . nor shall the definition of public records include those records concerning which the public body, by favorable public vote of three-fourths of the membership taken within fifteen working days after receipt of written request, concludes that the public interest is best served by not disclosing them. . . .

Thus, the Town Council may vote to exclude public records from public disclosure where Council feels that the public interest would best be served by non-disclosure, by following the procedure outlined in Section 30–4–20(c).

Question 3

You have advised this Office that the Town Manager routinely prepares a confidential memorandum for Council, which memorandum may also contain information on matters which may, or will, come before Council. The memorandum may also contain information as to actions and/or proposed actions to be taken by the Town's staff, which might not otherwise come to the attention of Council. You believe that the public interest would best be served by not disclosing the memorandum, though you have given no reason therefor. The issue is whether this memorandum is a ‘public record’ under the Act and thus subject to disclosure.

Because statutory and other authority as to this type of record is scarce, the response to this question is not free from doubt. As noted above, South Carolina's act does not contain an exemption from disclosure for intra-agency or inter-office materials such as the Town Manager's memorandum. The same Code sections and cases cited in response to question two would also be applicable in this instance. Some of the information contained in a given memorandum may fall within the categories specified by Section 30–4–40 as possibly exempt from disclosure; such a determination would necessarily be made on a case-by-case basis. Section 30–4–70, as to materials appropriate for an executive session or administrative briefing, may be applicable. Furthermore, by Section 30–4–20(c), the public body (Town Council) may, by three-fourths vote, preclude disclosure of whatever materials the release of which would not serve the public interest.

***8** We would further point out that exceptions to the Freedom of Information Act are to be construed narrowly and should not be used to defeat the purposes of the Act. News and Observer Publishing Company, supra; Section 30–4–70(b). As one court has aptly stated:

Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and completely performing their function as public servants. . . .

Since the right of inspection under our statutes is intended to serve these broad purposes, the character of the writing which is subject to inspection is correspondingly broad. It is our view that these data, although informal, which serve the ends disclosed above are subject to inspection and, for such purposes, are a public record. . . .

It is sometimes said that to constitute a public record the writing must be one which is expressly required or authorized to be kept by law. . . . According to the better view, where the issue is the availability of a writing for inspection, the writing need only constitute a 'convenient, appropriate, or customary method of discharging the duties of the office' by the public officials. A writing need not be a document that is required by law to be kept as a memorial of official action in order to come within the definition of a 'public record.'

MacEwan v. Holm, 226 Or. 27, 359 P. 2d 413, 418–19 (1961). Applying this reasoning, the Town Manager's memorandum could be considered a public record, as you indicate that it is routinely or customarily prepared in the discharge of the Town Manager's duties.

Disclosure of matters constituting a public record is not always mandated, however. The Georgia courts balance the 'benefits accruing to the government from non-disclosure against the harm which may result to the public if such records are not made available for inspection' to the public. Northside Realty Associates, Inc. v. Community Relations Commission, 240 Ga. 432, 241 S.E. 2d 189, 191 (1978). Such a balancing test may be useful in determining here whether to disclose or refrain from disclosing the memorandum.

Applying these principles to the issue at hand, it would appear that the Town Manager's memorandum could be a public record subject to disclosure. However, the memorandum could also contain matters which should not be disclosed, which determination would be made on a case-by-case basis. While our courts have not yet given guidance on the issue, we believe they would utilize a balancing test to determine what would be appropriate for disclosure and what, if disclosed, would be detrimental to the public good.

To give you additional assistance, opinions of this Office dated May 2, 1977 (Op. No. 77–133), July 3, 1976, June 28, 1977, July 17, 1983, and July 26, 1983 are enclosed. While the Act has been amended subsequent to issuance of the earlier opinions, the reasoning contained therein would still be applicable.

***9** We trust that this guidance will enable the Town Council of Hilton Head Island to proceed under the Freedom of Information Act to resolve these issues. Please advise if additional information or clarification should be necessary.

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

1 In the opinion dated July 28, 1983, it is stated:

The Act . . . makes a special exception, from the general notice provisions of the Act, for legislative committees and subcommittees of standing legislative committees. § 30–4–80(b), supra. Reading subsection (b) in the context of the full section 30–4–80 as well as in the context of the entire Act, it is apparent that legislative committees and subcommittees of standing legislative committees are deemed 'public bodies' for purposes of the Act. If legislative committees and subcommittees are subject to the requirements of the Act, no reason appears as to why committees and subcommittees of other entitles should be excluded.

This reasoning is persuasive in the situation described in your request letter.

2 In Wood v. Marston, the court noted that '[n]o official act which is in and of itself decision-making can be 'remote' from the decision-making process, regardless of how many decision-making steps go into the ultimate decision.' 442 So. 2d at 941.

3 Section 30–4–70 provides the very few and narrow reasons for which meetings may be closed to the public and the mechanism to be utilized to properly close such meetings by going into executive session.

4 See especially Bradbury v. Shaw, supra.

5 Release of the materials was sought on a Friday; the materials would have been released on the following Tuesday anyway. 268 S.C. at 273.

6 The policy referred to in the quotation states that '[t]he time and date of release for agenda materials should be at the discretion of the author, or if no time and date are specified, the release shall be at the same time and date as that of the meeting at which the materials are to be presented.' 268 S.C. at 273, fn. 2.

7 Section 119.011(1), Fla. Stat. (1975), provides:

Definitions. For the purpose of this chapter:

(1) 'Public records' means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or made in connection with the transaction of official business by any agency.

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