



ALAN WILSON
ATTORNEY GENERAL

April 05, 2017

The Honorable Katrina F. Shealy
Member
South Carolina Senate, District No. 23
P.O. Box 503
Lexington, SC 29071

Dear Senator Shealy:

Attorney General Alan Wilson has referred your letter to the Opinions section regarding whether an audio recording is a public record subject to disclosure under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code. Ann. §§ 30-4-10 et seq. Your letter describes the question as follows:

A letter was sent from my constituent to Lexington School District One seeking a copy of the audio from a Board Workshop held on February 11, 2017. In their response to the FOIA request, the Chief Communications Officer of Lexington School District One replied that "after conferring with our attorney and with the South Carolina Department of Archives and History, the district believes that the item you seek is not a public record under the Freedom of Information Act." They explained that "the official minutes from the February 11, 2017 Special Board Workshop are the public record of that meeting and that the audio is merely temporary memory-jogging notes made by a district employee for the sole purpose of preparing the official minutes and verifying their accuracy before finalizing them. In other words, the audio recording is the employee's reference tool until no longer needed (after final approval of the minutes). In fact, the chair states this at the beginning of every meeting by saying that the meeting is taped for accuracy of the minutes."

As you are aware, [S.C. Code. Ann.] § 30-4-20(c) provides, in pertinent part, that a public record includes "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." Based on the explanation of the tape recording and its use by the public body that was provided by the school district, the question here is straightforward: is a tape recording that is made by a district employee of a school district meeting in order to ensure accuracy of the official minutes of the meeting a public record that must be provided upon request?

Law/Analysis

It is this Office's opinion that a court would likely find an audio tape recording of a school district meeting by an employee of the district to be a public record of a public body subject to disclosure under the FOIA. The General Assembly described the purpose of FOIA as follows:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner 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, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (1976 Code, as amended) (emphasis added). The South Carolina Supreme Court has repeatedly stated that the "FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for disclosure of information." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); see also Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280 580 S.E.2d 163 (2003) ("The essential purpose of FOIA is to protect the public from secret government activity."); Burton v. York Cty. Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004). To achieve these purposes, the General Assembly provided that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a) (emphasis added).

"Public Body" is defined as "any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, 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 ..." S.C. Code Ann. § 30-4-20(a) (emphasis added). Because school districts are specifically included within the statutory definition of a public body, it is this Office's opinion that Lexington School District One is properly classified as a public body under the FOIA. Id.; Op. S.C. Atty. Gen., 2010 WL 2320803, at *2 (May 12, 2010) ("[W]e believe school districts in South Carolina qualify under FOIA as ... public bod[ies].").

"Public record" is defined 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...." S.C. Code Ann. § 30-4-20(c) (emphasis added). However, this definition includes the caveat that "other records which by law are required to be closed to the public are not considered to be made open to the public under [the FOIA]"¹. Id.; see also S.C. Code Ann. § 30-4-40(a)(4) ("A public body may but is not required to exempt from disclosure... [m]atters specifically exempted from disclosure by statute or law."). This exception likely would not apply to a recording of a school district meeting as the General Assembly provided that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70."

¹ Section 30-4-20(c) also excludes records which would otherwise be included within the "public record" definition if kept by certain bodies which are inapplicable to this opinion.

S.C. Code Ann. § 30-4-60. Absent demonstrating that such a meeting was closed to the public, it is this Office's opinion that a court would likely find an audio tape recording made and retained by a school district employee would qualify as a public record under the FOIA.²

While an audio tape recording of a school district meeting made and retained by a school district employee would likely be found to be a "public record of a public body," it may be exempt from disclosure under the FOIA if one of the provisions in S.C. Code Ann. § 30-4-40 applies. The South Carolina Supreme Court explained that "the determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed." Evening Post Pub. Co. v. Berkeley Cty. Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011); Burton, 358 S.C. at 348; Op. S.C. Atty. Gen., 2007 WL 4284629 (November 6, 2007). Further, exemptions from the FOIA are to be narrowly construed in order to "guarantee the public reasonable access to certain activities of the government." Evening Post Pub. Co., 392 S.C. at 83; Burton, 358 S.C. at 348 ("Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed."). A public body which seeks to invoke a FOIA exemption bears the burden of establishing that the exemption applies. Evening Post Pub. Co., 392 S.C. at 83; Seago v. Horry Cty., 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008).

As this Office is not empowered to determine factual questions, we cannot decisively state whether an exemption would authorize a public body to withhold a public record otherwise subject to the FOIA. See Op. S.C. Atty. Gen., 2015 WL 4497734 (July 2, 2015) ("[A]s we have cautioned in numerous opinions, this Office does not have the jurisdiction of a court to investigate and determine facts."). Nevertheless, in light of the FOIA's mandate of liberal construction in favor of disclosure, this Office has consistently advised public bodies concerning FOIA requests that, "when in doubt, disclose..." Op. S.C. Atty. Gen., 2015 WL 4699336 (July 27, 2015).³

This Office notes the statement attributed to Lexington School District One that "the official minutes... are the public record of that meeting and that the audio is merely temporary memory-jogging notes" appears to misconstrue the school district's disclosure obligations under the FOIA. The General Assembly made the decision as to what documentary materials constitute a public record and the result "is compelled... by the plain meaning of the statutory term." Perry v. Bullock, 409 S.C. 137, 144, 761 S.E.2d 251, 254 (2014). The FOIA states that "any public record of a public body" is subject to "inspect[ion] or copy." Section 30-4-30(a). The FOIA does not allow a public body to choose to disclose "official minutes" rather than "all... tapes, recordings, or other documentary materials." Section 30-4-20(c). A public body which discloses a limited selection of public records instead of "any" public records responsive to a FOIA request could be subject to injunctive relief, costs and attorney's fees under S.C. Code Ann. § 30-4-100. Further, if a person or group is found to have willfully violated the FOIA they "shall be deemed guilty of a misdemeanor" under S.C. Code Ann. § 30-4-110. Lambries v. Saluda Cty.

² The South Carolina Supreme Court has found that even where applicable, "the exemptions from disclosure contained in §§ 30-4-40 and 30-4-70 do not create a duty of nondisclosure. These exemptions, at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure." Campbell, 354 S.C. at 281 (internal citations omitted); Bellamy, 304 S.C. at 295.

³ Campbell, 354 S.C. at 287 ([T]he South Carolina Attorney General's 1998 "Public Official's Guide to Compliance with South Carolina's Freedom of Information Act," states the FOIA must be construed "liberally to carry out its intent that citizens obtain public information at the least cost, inconvenience, or delay. Consistent with this mandate, my Office has adopted the following guiding principles in opinions construing the FOIA: When in doubt, disclose....").

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Council, 409 S.C. 1, 10, 760 S.E.2d 785, 789 (2014). Again, in accordance with the South Carolina Supreme Court's admonition "to strictly construe the FOIA in favor of disclosure" this Office advises public bodies to disclose any non-exempt public records sought by a FOIA request. Perry, 409 S.C. at 144.

Conclusion

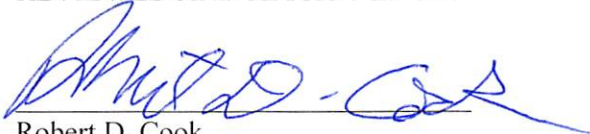
It is this Office's opinion that a court would likely find an audio tape recording of a school district meeting by an employee of the district to be a public record of a public body subject to disclosure under the South Carolina Freedom of Information Act. Under the Act, the General Assembly did not leave the public body free to determine which records are "public records" and which are not. If a record is a "public record" as defined by FOIA, it must be disclosed absent an express exemption. However, because this Office is not empowered to determine factual questions, we cannot state whether an exemption would authorize such a school district to withhold information otherwise subject to the FOIA. We hope that the guidance provided above will assist you, your constituent, and Lexington School District One in determining what documents are public records subject to disclosure under the FOIA. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General