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ATTORNEY GENERAL

October 17, 2019

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Dear Ms. Fryar and Mr. Harvin:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office concerning the South Carolina Freedom of Information Act ("FOIA") on behalf of the Colleton County Board of Voter Registration and Elections (the "Board"). We understand from your letter, the Board is concerned about the methods of public participation at Board meetings under FOIA. Specifically, you ask

whether members of the public must or may be required to contact the Board at least 24 hours before the meeting, and request that the topics upon which they intend to comment be placed on the agenda so as to inform other members of the public of the subject matter to be addressed.

Law/Analysis

As you mentioned in your letter, we addressed public participation at meetings governed by FOIA in a 1995 opinion. Op. Att'y Gen., 1995 WL 803571 (S.C.A.G. May 16, 1995). Relying on an opinion issued in 1992, we concluded FOIA does not offer guidance on how the public can participate in a public meeting other than to state "[p]articipation of the public can be limited by the terms of § 30-4-70(c), which provides '[t]his chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised.'" Id. (quoting Op. Att'y Gen., 1992 WL 575646 (S.C.A.G. July 23, 1992)). We also quoted the portion of our 1992 opinion addressing the impact on the public body's establishment of an agenda.

"Because the FOIA offers no guidance as to how a public body is to establish its agenda for any type of meeting, a court reviewing the matter would likely consider whether such a policy would be reasonable, given the need for conducting public business in public, in an orderly fashion. Even if an

individual is seeking to address the District, as a public body, given the U.S. Constitution's First Amendment's guarantee of freedom of speech, still the public body is authorized to place reasonable restrictions on the time, place, and manner of speech in a public forum. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). It would be up to a court to review the policy and determine whether such is a reasonable policy, considering all attendant facts and circumstances.”

Id. (quoting Op. Att’y Gen., 1992 WL 575646 (S.C.A.G. July 23, 1992)).

Since those opinions, our courts have not provided further clarification in regard to public participation at meetings under FOIA. Section 30-4-70(d) of the South Carolina Code (2007), formerly codified as section 30-4-70(c) of the South Carolina Code, continues to state: “This chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised.” But, we find no further guidance in FOIA as to public participation.

In a 2017 opinion, quoting a 2008 opinion, we recognized “generally, there is no per se right to speak at a public meeting where there are rules in place establishing procedures and policies to be followed in speaking.” Op. Att’y Gen., 2017 WL 1528199 (S.C.A.G. Apr. 14, 2017) (quoting Op. Att’y Gen., 2008 WL 608960 (S.C.A.G. Feb. 25, 2008)). In that opinion, we concluded the ability of a member of the public to speak during a meeting is determined by state law or in the absence of such, the public body’s own policy. Section 7-5-10 of the South Carolina Code (2019) governs the creation of county boards of voter registration and elections. This statute does not address the public’s ability to speak at Board meetings. We did not discover any other state law pertaining to the public’s ability to speak at Board meetings. Thus, we suggest the Board look to its own policies regarding public comments at Board meetings, as a court is likely to uphold those policies so long as they are reasonable.

While FOIA gives us very little guidance as to the ability of the public to speak at meetings covered under FOIA, there have been several recent developments in regard to the notice requirement under FOIA and specifically the posting of agendas. At the time of our 1995 opinion, section 30-4-80(a), containing the notice requirement, read

- (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as

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early as is practical but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

(emphasis added). The South Carolina Supreme Court in Lambries v. Saluda County Council, 409 S.C. 1, 760 S.E.2d 785 (2014) interpreted section 30-4-80(a) as not requiring an agenda for regularly scheduled meetings. Further, that Court held because agendas for regular meetings are optional, it would not “judicially impose a restriction on the amendment of an agenda for a regularly scheduled meeting, especially when it is clear that no agenda is required at all.” Id. at 18, 760 S.E.2d at 794.

As you indicate in your letter, the Legislature amended section 30-4-80(a), presumably in reaction to the Court’s ruling in Lambries. This provision now states in pertinent part:

(A) All public bodies, except as provided in subsections (B) and (C) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies.

S.C. Code Ann. § 30-4-80 (Supp. 2018). The plain language of the revised statute makes clear agendas are required for regular meetings in addition to special meetings. See Brock v. Town of Mount Pleasant, 415 S.C. 625 n.4, 785 S.E.2d 198 n.4 (2016) (concluding in a footnote that “FOIA now requires agendas for regularly scheduled meetings . . .”). Accordingly, an agenda is required for any regular or special meeting of the Board and, barring an emergency meeting, the Board is required to posts its agenda at least 24 hours prior to a meeting.

The content of the agenda in regard to public comments is a more complex question. Despite amendments to section 30-4-80 requiring agendas for regular and special meetings, the Legislature did not provide further guidance as to what should be listed in the agenda.

In Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016), the Supreme Court considered whether unnoticed action at a special meeting following an executive session violated

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FOIA. Because the meeting in question occurred prior to the enactment of the revised section 30-4-80, the Court distinguished between regular and special meetings. Id. at 631, 785 S.E.2d at 201-02. Finding the meeting in question to be a special meeting, the Court concluded in accordance with its decision in Lambries, ““nothing can be done beyond the objects for the call”” in a special meeting. Id. at 631, 785 S.E.2d at 202 (quoting Lambries, 409 S.C. at 15, 760 S.E.2d at 792). The Court considered the fact that the town listed the executive session in its agenda, but opined because it did not include the fact that action was to be taken after the executive session, it technically violated FOIA. Id. at 632, 785 S.E.2d at 202. The Court explained

our holding does not require the Town to list with specificity the actions it plans to take following an executive session; it only requires the Town give notice that some action may be taken. This gives Town Council the flexibility to act as may be discovered appropriate during executive sessions while ensuring the public receives notice Town Council may take such action.

Id.

According to Brock, our Supreme Court interprets FOIA’s agenda requirement to give general notice of the items to be discussed, including whether a public body plans to take action after an executive session. However, it does not expect public bodies to list each item with specificity. Like the Court explained in Brock, “[w]e, like the trial court and court of appeals, recognize that unforeseen events often occur and Town Council may ‘not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session.’” Id. at 632, 785 S.E.2d. at 202 (quoting Brock v. Town of Mount Pleasant, 411 S.C. 106, 119, 767 S.E.2d 203, 209 (Ct. App. 2014)). Similarly, it would be difficult, if not impossible, to know exactly what members of the public would say at a meeting of the Board. Thus, we presume courts would similarly find FOIA requires the Board to give notice that public comments will be taken at a public meeting, but would not require the Board to list with specificity the nature of those comments.

In a recent opinion, the South Carolina Court of Appeals considered, among other things, whether the Town of Summerville provided proper notice to the public of their opportunity to speak at meetings of the Summerville Architectural Review Board pursuant to FOIA. Croft as Tr. of James A. Croft Tr. v. Town of Summerville, No. 2015-002199, 2019 WL 5057739 (S.C. Ct. App. Oct. 9, 2019). The Court cited to a Summerville ordinance requiring the Architectural Review Board to give public notice of meetings to discuss applications for the demolition of structures. Id. at 7. The ordinance mandated notice by publication fourteen days prior to the meeting and required it include not only the date, time, and place, but a statement that the public will have an opportunity to comment at the meeting. Id. The appellant argued the board violated FOIA by not notifying the public of the opportunity to comment on the demolition application. The Court, however, explained

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Although Appellants contend the newspaper advertisements announcing Board meetings did not state the public would be allowed to comment on the proposed demolition, the evidence in the record indicates otherwise. At least one of the advertisements provided in the record announced the Board would be meeting on May 11, 2015 at 6:00 p.m.; stated the Board would “hear the final approval request for demolition of all existing structures” listed by tax map number in the ad; and noted the Board would “accept public comment.”

Id. at 9.

This opinion is not directly on point as the subject of the public comments was not in question. However, Croft indicates the purpose of FOIA with regard to public comments is to notify the public of its opportunity to speak rather than the content of the public’s speech. Accordingly, while not free from doubt, we do not believe the Board would be required to publish the topics upon which the public may comment on at the Board’s meetings.

Conclusion

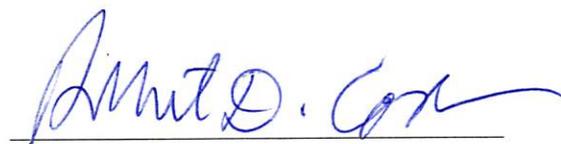
Other than section 30-4-70(d), FOIA does not specifically address public comments. Therefore, we do not find a per se right to speak at a public meeting under FOIA. We did not find any other statutory right for the public to comment at Board meetings. Nonetheless, we suggest looking to the Board’s policies for guidance on how it should handle public comments at its meetings. In addition, under the revised version of section 30-4-80, we believe the Board must post an agenda at least 24 prior to any regular or special meeting. For meeting at which the Board will receive public comments, we recommend the Board include in its agenda notice that public comments will be taken. However, we are not aware of a requirement that the Board include the specific topics members of the public intend to cover in their comments on the agenda.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General