ALAN WILSON
ATTORNEY GENERAL

July 15, 2024

The Honorable Ronnie A. Sabb
Member
South Carolina Senate
Post Office Box 88
Kingstree, South Carolina 29556

Dear Senator Sabb:

We received your letter requesting an expedited opinion of this Office concerning "the applicability of South Carolina Title 30, South Carolina Title 59 and any other laws related to the actions taken by Berkeley County School District Board of Education (Board of Education) during a meeting where they voted to defund a public elementary school." You provided the following information with your letter:

1. The Board of Education met for a prior public noticed meeting for a 2nd reading concerning their annual budget.
2. During this meeting, a member of the Board of Education made a motion to amend the budget to defund a school and merge it into another school. This motion was discussed and subsequently passed by a majority of the board members.
3. It is believed that the Board of Education may have received several suggested potential actions items to consider as a part of their annual budget discussion. However, the meeting's agenda did not specially outline that a vote or discussion would take place concerning the closure of a public school or any of the other potential action items being considered by the Board of Education.
4. The agenda for this meeting did give prior public notice that the annual budget that included funding for all schools within the district would be discussed.

Based on this information, you ask "whether the method and manner in which the board of education made a long-term decision to permanently close a public school by way of an amendment to the annual budget was lawful under our current laws." While we cannot determine facts, we believe a court might conclude the notice given was insufficient under FOIA to apprise the public of the action taken.

Law/Analysis

Section 59-17-50 of the South Carolina Code (2020) gives a county board of education the authority to "consolidate schools and school districts, in whole or in part, whenever, in its judgment, such consolidation will promote the best interests of the cause of education in the county." Moreover, section 59-19-90 of the South Carolina Code (2020) vests certain powers in school district boards of trustees including:

> (1) Provide schoolhouses. Provide suitable schoolhouses in its district and make them comfortable, paying due regard to any schoolhouse already built or site procured, as well as to all other circumstances proper to be considered so as best to promote the educational interest of the districts;
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> . . .
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> (5) Control school property. Take care of, manage and control the school property of the district;
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> . . .
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> (9) Transfer and assign pupils. Transfer any pupil from one school to another so as to promote the best interests of education, and determine the school within its district in which any pupil shall enroll; and
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> . . . .

Citing this authority, our Supreme Court in Gamble v. Williamsburg County School District, 305 S.C. 288, 289, 408 S.E.2d 217, 218 (1991) recognized a school district's authority to close schools it oversees. It is our understanding that through a county-wide consolidation and local legislation, the functions and powers vested in school district trustees were vested in the Berkeley County School District Board of Education (the "Board of Education"). See Op. Att'y Gen., 2014 WL 1398585 (S.C.A.G. Feb. 28, 2014) (citing 1956 S.C. Acts 761). Therefore, we believe the Board of Education likely had authority to make decisions about the closure of one of its elementary schools and the transfer of students to another school.

However, based on the information you provided, it appears your concerns lie in the fact that the Board of Education effectuated its decision to close an elementary school not by taking board action on the closure, but through the adoption of its budget. This raises concerns as to whether the Board of Education complied with the South Carolina Freedom of Information Act ("FOIA") in noticing the agenda for the meeting. S.C. Ann. §§ 30-4-10 et seq. (2007 & Supp. 2023).

Our Court of Appeals described the purpose of FOIA as follows:

> The essential purpose of the FOIA is to protect the public from secret government activity. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct.App.2003); see also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001) ("FOIA was enacted to prevent the government from acting in secret."); Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 535 n. 4, 500 S.E.2d 783, 785 n. 4 (1998) (noting that "[t]he purpose of the FOIA is to protect the public from secret government activity"). The FOIA meets the demand for open government while preserving workable confidentiality in governmental decisionmaking. Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991); Campbell, 354 S.C. at 281, 580 S.E.2d at 166.
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> "South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government." Fowler v. Beasley, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). The FOIA creates an affirmative duty on the part of public bodies to disclose information. Bellamy, 305 S.C. at 295, 408 S.E.2d at 221; Campbell, 354 S.C. at 281, 580 S.E.2d at 166. The purpose of the FOIA is to protect the public by providing for the disclosure of information. Id. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature. Campbell, 354 S.C. at 281, 580 S.E.2d at 166.

Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004).

With these purposes in mind, we turn to the notice and agenda requirements under FOIA. Section 30-4-80 of the South Carolina Code (Supp. 2023) requires written public notice twenty-four hours prior to a meeting, which must include the agenda. This provision also states: "Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting." S.C. Code Ann. § 30-4-80(A). We further considered FOIA's agenda requirement in a 2019 opinion. Op. Att'y Gen., 2019 WL 3758868 (S.C.A.G. July 30, 2019). The opinion concluded the use of a catchall entry, such as "Other Administrative Business," on the agenda could not be used to allow a public body to address issues which are not otherwise noticed on an agenda. Id. We explained:

> It is this Office's opinion that a court would likely find such a practice violates the S.C. FOIA. In Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016), the South Carolina Supreme Court held that a town violated the S.C. FOIA by taking unnoticed action at a special meeting following an executive session. The Court explained that a public body may not know in advance what action it will take, but that it still must "give notice that some action may be taken." 415 S.C. at 632, 785 S.E.2d at 202. This Office has

opined on the necessity that an agenda provide adequate public notice as follows:

> [The S.C. FOIA] must be read broadly or liberally, and exceptions thereto narrowly, so that "public business is performed in an open and public manner" and the public is properly informed of government activity. As we stated many years ago, "[t]hese notice requirements may not be simply ignored by the public body; they are mandatory." Moreover, as we further advised, "'adequate notice to the public at large is an integral part of the public meeting concept; a meeting cannot be deemed to be public merely because its doors are opened to the public if the public is not properly informed . . . .'" Op. S.C. Att'y Gen., 1984 WL 159828 (No. 84-20) (February 22, 1984) (quoting Consumers Education and Protective Assn. v. Nolan, 368 A.2d 675, 681, n. 4 (Pa. 1977)).

Op. S.C. Att'y Gen., 2018 WL 4385558, at 5. An agenda item description that is too vague to provide the public notice would not comply with the purpose and framework of the S.C. FOIA. See Richardson v. Fairfield Cty. ex rel. Fairfield Cty. Council, No. 2006-UP-263, 2006 WL 7286041, at *5 (S.C. Ct. App. May 24, 2006) (whether an agenda is so vague that it fails to provide public notice is reviewable under the S.C. FOIA). Therefore, it is this Office's opinion that a court may well find the use of a catchall agenda item is too vague to provide public notice and violates the S.C. FOIA.

Id. In summary, "FOIA seeks to prohibit public bodies taking unnoticed action in secret meetings." Op. Att'y Gen., 2019 WL 5853772 (S.C.A.G. Oct. 29, 2019).

As we noted in a recent opinion, "this Office may not adjudicate the validity of an action of a public body . . . under FOIA. Only a court with the authority to determine facts and to resolve cases or controversies may do so." Op. Att'y Gen., 2023 WL 6804635 (S.C.A.G. Oct. 9, 2023). However, we will attempt herein to provide guidance based on the information you provided to us. In your letter, you state the Board of Education provided notice of the meeting and included its annual budget as an item on the agenda. At the meeting, a member of the Board of Education moved to amend the budget to defund a school and merge it in with another school, which was adopted by a majority of the Board of Education.

Initially, if viewed in isolation as purely a budget matter, a court could find the Board of Education's action met the letter of FOIA as it provided the public with notice of its intent to take action on the budget, including school funding, and its decision to defund the school appears to fit within that agenda item. On the other hand, given the broad scope of the purpose of FOIA to provide the public with sufficient information, a court could find the Board of Education's actions go beyond the scope of acting on the budget. As noted above, the Board of Education clearly has

the authority to consolidate its schools, but the only means to act on that authority is through a public vote. See Miramonti v. Richland Cnty. Sch. Dist. One, 438 S.C. 612, 617, 885 S.E.2d 406, 408 (Ct. App. 2023) ("In general, a public body may act only after the action has been approved by a majority vote of a quorum of its members."). To take such action, the Board of Education must provide notice pursuant to section 30-40-80. Based on the information you provided, the notice did not include consolidating schools, but only pertained to budgetary matters. As such, a court could conclude the public lacked notice of the Board of Education's intention to exercise its authority to close a school. In short, a court could view the closure of the school as an unnoticed action in violation of FOIA.

We found a West Virginia decision concluding that generic forms of notice of agenda items contravene the notice requirements of FOIA. Capriotti v. Jefferson Cnty. Plan. Comm'n, No. 13-1243, 2015 WL 869318 (W. Va. Feb. 26, 2015). In that instance, a planning commission simply gave notice in the agenda of "legal advice," failing to apprise the public of pending litigation the commission planned to discuss with respect to a proposed settlement thereof. Id. Indeed, the West Viginia court concluded the commission's agenda was simply a "generic reference to 'legal advice' [that] provided no indication whatsoever that the ongoing FAF proceedings would be a topic of discussion . . . ." Id. at *6. The court found such notice was inadequate and violated the West Virginia Open Governmental Proceedings Act. Id.

Even if a court were to take the view that the action taken by the Board of Education followed the letter of FOIA, we believe a court could find the Board of Education's actions run afoul of the spirit of FOIA. As we stated in a 1989 opinion regarding section 30-4-80:

> Public bodies are encouraged to take all steps necessary to comply with both the letter and the spirit of the Act, to carry out the expressed purpose of keeping the public informed about the performance of their public officials and the conduct of public business. If any doubt exists as to action to be taken, the doubt should be resolved in a manner designed to promote openness and greater notice to the public.

Op. Att'y Gen., 1989 WL 406201 (S.C.A.G. Oct. 11, 1989).

Under the circumstances you describe, while the action taken by the Board of Education could be viewed as limited to the budget, couching the decision to defund the school as a budgetary item leaves the public uninformed of the Board of Education's intention to close the school. We believe at the very least the spirit of FOIA requires the Board of Education to disclose this intention to the public prior to taking action on the budget so that it may be properly informed of not only the actions of the Board of Education, but the consequences of those actions. Moreover, as concluded in the West Virgina case, a court could find a violation of FOIA.

Conclusion

State law gives the Board of Education authority to close and consolidate schools. Based on the information you provided, rather than acting on that authority, the Board of Education effectively closed a school by defunding it through an amendment to the school district's budget. As such, we are concerned that effectuating the closure solely by amending the school district's budget may constitute an unnoticed action in violation of FOIA.

Under FOIA, section 30-8-40 mandates public bodies provide notice and an agenda at least twenty-four hours prior to a meeting. Based on the information you provided, the public was given notice of the Board of Education's intention to take action on the school district's budget, including the funding of schools, in its agenda. At the meeting, the Board of Education amended the budget to defund the school. While a court may view this action as consistent with the notice and agenda provided, the consequence-the closing of a school-was not disclosed to the public. As such, at a minimum, we believe the spirit of FOIA requires the Board of Education give the public notice of its intent to close the school prior to taking action either directly by exercising its statutory authority or indirectly by defunding the school. Further, based on case law in other jurisdictions, a court could conclude FOIA was violated. Such a determination would be up to a court based upon all the facts and circumstances.

Sincerely,

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Assistant Attorney General

Robert D. Cook
Solicitor General