



ALAN WILSON
ATTORNEY GENERAL

June 15, 2023

The Honorable Matthew W. Leber
Member
South Carolina House of Representatives
District No. 116
3805 Marshfield Rd.
Johns Island, SC 29455

Dear Representative Leber:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter states the following.

In what could be a violation of state law, it has come to my attention the Charleston County School Board is creating multiple versions of their public meeting notices. This impedes the ability for the public to give robust input on matters before the board and ultimately impacts the future of the children this board serves.

Out of an abundance of caution, I respectfully request your office review the public meeting notice procedures of the Charleston County School Board to include the proper notification of agenda items.

Law/Analysis

Initially, it must be noted that determining whether a public notice or an agenda was edited, and if so when, requires factual findings which are beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions"). However, we will assume the facts provided in your letter in order to offer guidance.

The South Carolina Code of Laws requires public bodies to provide an agenda and public notice for all regular and special 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.

S.C. Code § 30-4-80(A) (Supp. 2022). After an agenda is posted, items cannot be added to an agenda without “an additional twenty-four hours notice to the public.” *Id.* Additional items may be added to an agenda after the meeting begins, but only by “a two-thirds vote of the members present and voting.” *Id.* Finally, in the case where “an item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given,” it may be added with both (1) “a two-thirds vote of the members present and voting” and (2) “upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.” *Id.* The S.C. Freedom of Information Act (“S.C. FOIA”) does not authorize other changes to an agenda.

A public body violates the S.C. FOIA if it takes unnoticed action. This Office understands the May 30th meeting was called as a special meeting. The South Carolina Supreme Court noted that the S.C. FOIA does not define “special meeting,” but the Court has described such meetings as “meeting[s] called for a special purpose and at which nothing can be done beyond the objects specified for the call.” *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 630, 785 S.E.2d 198, 201 (2016) (internal quotations omitted). In *Brock*, the Court explained that public bodies are authorized to close an open meeting and enter executive session.

Importantly, no action may be taken in executive session except to (a) adjourn or (b) return to public session. *Id.* § 30-4-70(b). Therefore, FOIA does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session.

Brock, 415 S.C. at 630 (internal quotations omitted) (emphasis added). The Court also recognized that “unnoticed items may be added to an executive session discussion at the time of a meeting.” *Id.* at 631. However, after leaving executive session and reconvening open session, the public body can only act on properly notice items. *See id.* Further, in the case of special meetings, any item acted upon cannot “exceed the scope of the purpose for which the meeting was called.” *Id.* Finally, the Court clarified that its “holding does not require [a public body] to list with specificity the actions it plans to take following an executive session; it only requires ... notice that some action may be taken.” *Brock* 415 S.C. at 632.

Attached to your letter are two PDF documents containing a heading that reads “Tuesday, May 30, 2023 Board of Trustees- Special-Called Meeting.” One of the files is named “Board Agenda Public Version” with a time stamp of 6/9/23, 2:47 PM. The second file is named “Board Member Version Agenda” with a time stamp of 6/2/23, 2:53 PM. Both documents include “Motion & Voting” entries for adoption of the agenda, entering executive session, reconvening open session, the subjects addressed in open session, and to adjourn the meeting. They also reflect which members of the board were present or absent. The information in these documents was necessarily recorded after an original agenda was posted; which would have occurred on May 29th or earlier to comply with the twenty-four hours notice requirement discussed above. It is unclear whether these documents are meant to reflect minutes of the meeting, but they are not an original agenda as it includes information that would not have been available at the time it was required to be publicly posted.¹

The South Carolina Court of Appeals recently issued an unpublished opinion addressing alleged S.C. FOIA violations arising from a city’s website containing two documents whose title included the word “Agenda.” Holcomb v. City of N. Augusta, No. 2020-000080, 2023 WL 3000661, at *1 (S.C. Ct. App. Apr. 19, 2023). The respondent alleged that the city violated the S.C. FOIA by considering a project not listed within the document titled “Agenda 050718 Complete.” However, the file titled “Agenda 050718” included an item listed as “projects related to the sales tax” which could include the project. The Court found that the “one-page agenda posted on the website and physically posted (as is required by section 30-4-80(A))” was the agenda, while “Agenda 050718 Complete” which contained thirty-six pages of “supplementary information and background for different items on the agenda,” was background material. Id. The Court defined “‘agenda’ as ‘a list of items to be considered.’ See Agenda, Black’s Law Dictionary (11th ed. 2019) (defining agenda as, ‘A list of things to be done, as items to be considered at a meeting, usu[ally] arranged in order of consideration’).” Id. Finally, the Court rejected the argument that because the title of the larger document included the term “Agenda” it should be considered the agenda for the meeting.

We are not aware of a common understanding of agenda that hinges on something's title, and we doubt the statute was meant to control how public bodies name documents (as opposed to relying on the common meaning of agenda). As outlined above, we understand the term “agenda” to describe a list of things to be done such

¹ See S.C. Code § 30-4-90(a) (emphasis added).

All public bodies shall keep written minutes of all of 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.

as items to be considered at a meeting. We also understand agenda to not include background material, however it is labeled.

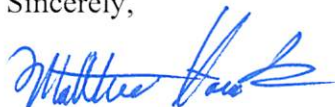
Id. at *2. As in Holcomb, if a court is asked to review multiple documents all purported to be an agenda for a public meeting, it would likely consider which of the documents was “posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body.” S.C. Code § 30-4-80(A). If the agenda document which is publicly posted accurately reflects the items discussed and acted upon in a meeting, a court is unlikely to find a violation under S.C. Code § 30-4-80(A).

Conclusion

Of course, an opinion of this Office cannot determine facts or conduct an investigation, but can only comment on the law. However, as discussed above and based on a recent opinion of the South Carolina Court of Appeals, we advise that if a court is asked to review multiple documents all purported to be an agenda for a public meeting, it would likely consider which of the documents was “posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body.” S.C. Code § 30-4-80(A). If the agenda document which is publicly posted accurately reflects the items discussed and acted upon in a meeting, a court is unlikely to find a violation under S.C. Code § 30-4-80(A).

Regardless of whether the documents attached to your letter are ultimately determined to be an agenda, the uncertainty surrounding them has led to confusion regarding what topics were properly noticed to the public. We take this opportunity to remind public bodies that the S.C. FOIA was adopted based on the finding “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.” S.C. Code § 30-4-15. To that end, public bodies should make every effort to ensure their agendas, public notices, and procedures used to conduct public meetings not only comply with the minimum requirements of the S.C. FOIA, but also accurately apprise the citizenry of the activities of their bodies and the decisions of their public officials. As we cautioned the Board in an earlier letter, “[f]or decades, in order for public bodies to fully comply with FOIA, this Office has advised that when in doubt, disclose.” That advice remains applicable here.

Sincerely,



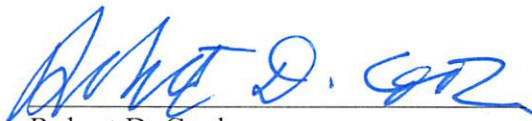
Matthew Houck
Assistant Attorney General

The Honorable Matthew W. Leber

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REVIEWED AND APPROVED BY:

A handwritten signature in blue ink, appearing to read "Robert D. Cook". The signature is written in a cursive style with a horizontal line underneath the name.

Robert D. Cook
Solicitor General