



ALAN WILSON
ATTORNEY GENERAL

October 9, 2023

The Honorable Marvin R. Pendarvis, Member
South Carolina House of Representatives
328-A Blatt Building
Columbia, SC 29201

Dear Representative Pendarvis:

You seek our opinion regarding “whether the Charleston County School District complied with FOIA requirements during its September 25, 2023 meeting.” At that meeting, as we understand it, the School Board went into executive session to discuss an “employment matter” and, upon returning, voted 5-4 to place the Superintendent on paid administrative leave, pending the outcome of an investigation of his actions. By way of background you have attached the memorandum of Alice Paylor, Interim General Counsel, Charleston County School District, dated October 4, 2023. Ms. Paylor is of the opinion that the Board “complied with the requirements of FOIA. . . .” Her memorandum states as follows:

. . . [y]ou have requested that I provide you with a legal opinion concerning the CCSD Board of Trustees’ compliance with FOIA at its September 25, 2023, meeting. I was present at the meeting, and, in my legal opinion, the Board complied with the requirements of FOIA as set forth below.

Section 30-4-80(A), SC Code, provides in pertinent part: “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.”

The District complied with this section when the agenda was changed on September 22, 2023, and the posting was updated to reflect that change.

Section 30-4-70 provides when meetings of a public body may be closed and states in pertinent part:

“(a) A public body may hold a meeting closed to the public for one or more of the following reasons:

(1) Discussion of employment, . . . discipline or release of an employee . . . by a public body...

...

“(b) Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, ‘specific purpose’ means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) ..., the identity of the individual ... being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) to return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.”

At the September 25, 2023 regular meeting of the CCSD Board of Trustees, the agenda reflected that there was an item to be discussed in executive session concerning an employment matter, as allowed by 30-40-70(a)(1). During the executive session, the Board members discussed placing the Superintendent on paid administrative leave. There was no polling of the members. Executive session was properly adjourned, and the Board returned to the public setting. As the items came up on the agenda, the Board voted unanimously to authorize an investigation into a complaint against the superintendent, and a majority of the Board voted to place the superintendent on administrative leave with pay pending the outcome of the investigation. All requirements of FOIA were met.

According to Ms. Paylor, prior to going into executive session, the Board informed the public that in executive session, the Board would discuss “an employment matter.” Thus, the question is whether such announcement meets the requirements of FOIA.

Law/Analysis

Of course, this Office is unable, in its advisory opinion, to adjudicate whether FOIA was violated in a given instance. Only a court, in possession of all the facts, and with the authority to resolve cases or controversies, may do so. As we previously stated, your questions relate to “the legality of meetings [which concern] factual determinations which this Office [cannot make] in this situation.” Op. S.C. Att’y Gen., 2015 WL 4497735 (July 6, 2015). Here, we have only Ms. Paylor’s memorandum and her conclusion that FOIA requirements were met. However, as we advised in our 2015 opinion, “[w]hat we can do is recite the law regarding . . . concerns about the meeting that took place.” Based upon our prior opinions, and the decisions of our courts, we believe a court would likely conclude that FOIA’s requirements for convening in executive session were not met.

In interpreting South Carolina’s Freedom of Information Act (“FOIA”), we must keep in mind the purpose of the Act as set forth by the General Assembly:

[t]he 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. Based upon this intent of the General Assembly, our courts have determined that “[t]he essential purpose of the FOIA is to protect the public from secret government activity. South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.” Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 280-81, 580 S.E.2d 163, 166 (2003) (citations and quotations omitted).

FOIA authorizes a public body to enter executive sessions in certain limited circumstances. For example, Section 30-4-70(a) provides that:

- (a) A public body may hold a meeting closed to the public for one or more of the following reasons:
 - (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if any adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

This Office has consistently advised “that executive sessions should be used sparingly and that the FOIA does not require that they be employed at all should the public body choose not to do so.” Op. S.C. Att’y Gen., 2016 WL 963697 (February 11, 2016). It appears that the foregoing reason for the executive session referenced above is applicable here. Further, Subsection (b) of § 30-4-70 provides the proper procedure for entering executive session. Such provision requires:

[b]efore going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action

may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.

(emphasis added). See Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 165, 547 S.E.2d 862, 866 (2001) (“FOIA prohibits any formal action to be taken in executive session.”).

We have considered the meaning of the “specific purpose” provision of § 30-4-70(b) in prior opinions. In Op. S.C. Att’y Gen., 1988 WL 383492 (Op. No. 88-9) (January 26, 1988), for example, we commented upon the appropriateness of convening in executive session pursuant to § 30-4-70(a)(1) by announcing in public that the public body sought to discuss “personnel matters.” There, we advised:

Additionally, this Office was asked about the appropriateness of requesting an executive session to discuss personnel matters without stating the specific action to be discussed. As noted above, Section 30-4-70(a)(6) now requires that ‘the specific purpose of the executive session’ be announced. The word ‘specific’ was added by Act No. 118 of 1987 and means ‘precise,’ ‘definite,’ ‘explicit,’ Robert Bosch Corporation v. United States, 305 F.Supp. 921, 924 (U.S. Cust. Ct. 1969); more than perfunctory or general, Ed Hall Drilling Company v. Profitt, 424 S.W.2d 403 (Ky. Ct. App. 1968); the very opposite of ‘general.’ State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N.W.2d 502 (1949).

Because the General Assembly has mandated that the specific purpose of an executive session be announced prior to so convening, we do not deem an announcement that ‘personnel matters’ will be deemed to be in compliance with Section 30-4-70(a)(6).

(emphasis added).

Likewise, in Donohue v. City of North Augusta, 412 S.C. 526, 773 S.E.2d 140 (2015), the Supreme Court of South Carolina concluded that announcement of the purpose of an executive session – the discussion of a “proposed contractual matter” – did not satisfy the “specific purpose” requirement of § 30-4-70(a) and thus “FOIA was violated.” 773 S.E.2d at 142. Quoting Quality Towing, supra, the Donohue Court explained that

FOIA is clear in its mandate that the “specific purpose” of the [executive] session “shall be announced.” Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private.

Moreover, the Donohue Court noted that in Quality Towing, the Court had rejected the argument that a violation of the “specific purpose” requirement was merely a “technical violation.” According to the Court, “given the history and purpose of FOIA, this was more than a ‘technical violation.’ The statute clearly mandates the specific purpose of the session must be announced.” 412 S.C. at 532, 773 S.E.2d at 143 (quoting Quality Towing, 345 S.C. at 164, 547 S.E.2d at 866).

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See also Miramonti v. Richland School Dist. One, 438 S.C. 612, 616, 885 S.E.2d 406, 408 (Ct. App. 2023) [“. . . a public body is forbidden from entering executive session without complying with Section 30-4-70(b) of the South Carolina Code. . . .”].

Likewise, in Brock v. Town of Mt. Pleasant, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014), aff'd as modified, 415 S.C. 625, 785 S.E.2d 198 (2016), the Court of Appeals addressed the ‘specific purpose’ provision of FOIA in several respects. The Court upheld the Town Council’s notice of purpose of an executive session in two particulars – “legal advice pertaining to O.K. Tire Store” and “personnel matters related to the clerk of council.” On the other hand, the Court found insufficient the Town Council’s announcement of purpose at another meeting, noting that “[a]nnouncing it would discuss ‘legal matters’ or obtain ‘legal advice’ on a particular issue was an insufficient announcement when Town Council obtained individual attorneys for ‘all lawsuits now and in the future as a result of the executive session discussion.’” 411 S.C. at 122, 767 S.E.2d at 211.

It is our understanding that Mr. Jay Bender, a leading expert on the First Amendment and South Carolina’s FOIA, has advised the Charleston Legislative Delegation that the School Board’s announcement prior to entering executive session was legally flawed and violative of FOIA. Mr. Bender concluded:

[t]he statement of the purpose of the executive session failed to satisfy the specificity requirement of the law. Numerous opinions by the Attorney General have concluded that the statements of “personnel matters” or “contractual matters” does not comport with the law. Additionally, the Supreme Court of South Carolina held in Donohue v. City of North Augusta, 412 S.C. 526, 773 S.E.2d 140 (2015) that the statements of the purpose of an executive session to discuss negotiations incident to a proposed contractual matter was insufficient as a matter of law.

Thus, it is well established that announcement of an “employment matter” does not meet FOIA’s “specific purpose” requirement for going into executive session.

Conclusion

Of course, this Office may not adjudicate the validity of an action of a public body, such as the Charleston County School Board, under FOIA. Only a court with the authority to determine facts and to resolve cases or controversies may do so. However, our advisory opinions provide the applicable law and typically attempt to predict how a court may rule. The watchword of our FOIA opinions for decades has been “when in doubt, disclose.” Based upon our prior opinions and the decisions of the South Carolina Supreme Court, we are of the opinion, with the information before us, that a court would probably find that the requirements of FOIA regarding a public body convening in executive session were here not met.

Our opinions have long concluded that announcement of an executive session through a generalized purpose such as “personnel matters” or “employment matters,” (as apparently was

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the case here to discuss placing the Superintendent on administrative leave) are not in compliance with FOIA's requirement that the "specific purpose" of the executive session must be announced. As we advised thirty-five years ago in Op. S.C. Att'y Gen., 1988 WL 383492 (January 26, 1988), ". . . we do not deem an announcement that 'personnel matters' [or other generalized catch phrases] will be deemed in compliance with [FOIA]." We have reiterated this interpretation ever since. The public, in our view, has a right to know more about the purpose of an executive session than such generalized reasons.

Our Supreme Court agrees with this principle. In Donohue v. City of North Augusta, 412 S.C. 526, 773 S.E.2d 140 (2015), the Supreme Court found that a generalized announcement of an executive session ("proposed contractual matter") violated FOIA's "specific purpose" requirement for convening in executive session. The Court in Donohue concluded that "FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private." Further, Donohue found that violation of the "specific purpose" requirement was not merely a "technical violation," but was one which required reversal of the circuit court's decision.

Finally, we note that Mr. Jay Bender, South Carolina's foremost FOIA expert, has advised that FOIA was violated in this instance. Mr. Bender observed, as we do here, that "[n]umerous opinions by the Attorney General have concluded that the statements of 'personnel matters' or 'contractual matters' [do] not comport with the law." He also referenced Donohue as supportive of that principle.

In short, our advice to the Board would have been to consult these opinions of the Attorney General and to follow these decisions of the Supreme Court instead of announcing the executive session by mere catchphrase. The purpose of FOIA is to provide the public with as much information as possible in the interest of transparency. As we have previously stated, "[e]ven though executive sessions should be used infrequently, they nevertheless may be employed for the authorized reasons set forth in the statute, provided the statutory procedure is met." Op. S.C. Att'y Gen., 1996 WL 679433 (October 8, 1996) (emphasis added). A court could well conclude such procedure was not met here.

Sincerely,



Robert D. Cook
Solicitor General