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HENRY MCMASTER
ATTORNEY GENERAL

August 11, 2006

The Honorable Dwight A. Loftis
Member, House of Representatives
540 Sulphur Springs Road
Greenville, South Carolina 29617

Dear Representative Loftis:

You have requested an opinion on behalf of Sandi Engelman, a member of the Charleston County School Board, regarding the activities of Board. With your request, you submitted a letter from Ms. Engelman addressed to Attorney General Henry McMaster. Ms. Engelman states as follows in her letter:

> Charleston County School Board Member, Mr. Gregg Meyers, "admitted," in Charleston's Post and Courier, that he and four other Charleston County School Board Members, Mr. Hillery Douglas, Mr. Brian Moody, Ms. Susan Simons and Ms. Nancy Cook, violated South Carolina's Sunshine Law by discussing and pre-determining the outcome of the '06-'07 school budget. Five board members represent a quorum and that quorum's collective action prior to the board meeting represents collusion.
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> Mr. Meyers is quoted in the Post & Courier as follows: "He knew the board needed five votes in favor of next year's budget for it to pass, so he talked with other board members before hand about what they would support. He came prepared with a typed motion to approve the budget as presented by the superintendent with four stipulations."
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> For these five board members to discuss on the phone what they would agree to support before the school board meeting is "voting by electronic means" - a clear violation of an open session agenda item. Their illegal collusion was substantiated at the June 26, 2006 meeting of the Charleston County School Board when not one of them said a word during the discussion time. At that meeting Mr.

Request Letter

> Meyers simply raised his hand and read his already typed motion. Mr. Meyers' motion was seconded and the voted passed, 5 to 4.

Law / Analysis

Based upon the information provided in Ms. Engelman's letter, it is apparent that your question relates to whether or not the named members contravened the Freedom of Information Act. ("FOIA"). While we are unable to determine facts, and thus must assume the facts to be as stated in the letter, it is our opinion that FOIA was likely violated in the circumstances presented.

The FOIA was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions. A number of amendments have been made to FOIA over the years. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble to FOIA, set forth in S.C. Code Ann., Section 30-4-15, provides as follows:

> [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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

On numerous occasions, in construing FOIA, we have emphasized the Legislature's expression of openness in government, as articulated in § 30-4-15. In *Op. S.C. Atty. Gen.*, Op. No. 88-31 (April 11, 1988), for example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA, as follows:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. *Martin v. Ellisor*, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. *South Carolina Department of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. *News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

See also, *Evening Post Publishing Co. v. City of North Charleston*, 363 S.C. 452, 611 S.E.2d 496 (2005) [FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government]. *See also*, *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) ("FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.").

Adhering to these general principles governing FOIA, we have issued a number of opinions which are relevant to your question. Some twenty-three years ago, in *Op. S.C. Atty. Gen.*, Op. No. 83-55 (August 8, 1983), we addressed the question of whether FOIA governs "informal" meetings or "social gatherings" in which a quorum of a public body gathers informally, and although no official action is taken by the group, the public body discusses matters over which it has jurisdiction. In the Opinion, we noted that § 30-4-60 mandates that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 fo this chapter." While we recognized that § 30-4-70 enumerates a number of situations in which a public body is authorized to go into executive session, we further commented that § 30-4-70(C) provides that

> [n]o chance meeting, social meeting or electronic communication shall be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

Moreover, the Opinion emphasized that § 30-4-80 of FOIA "establishes requirements for giving public notice of meetings held by public bodies." Such provision states:

> (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 early as is practicable 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.
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> (b) Legislative committees must post their meeting times during weeks of the regular session of the General Assembly and must comply with the provisions for notice of special meetings during those weeks when the General Assembly is not in session. Subcommittees of standing legislative committees must give notice during weeks of the legislative session only if it is practicable to do so.

> (c) Subcommittees, other than legislative subcommittees, of committees required to give notice under subsection (a), must make reasonable and timely efforts to give notice of their meetings.
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> (d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.
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> (e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

The 1983 Opinion also pointed out that § 30-4-20(d) of FOIA defines a "meeting" for purpose of the Act as

> ... the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

In our analysis, we advised in the 1983 Opinion that one purpose of FOIA is "'... to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.'" Further quoting with approval *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974), we noted that the Florida Supreme Court stressed that

> [r]arely could there by any purpose to a nonpublic pre-meetings conference except to conduct some part of the decisional process behind closed doors. The statute should be construed to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion ... relates to any matter on which foreseeable action will be taken.

Thus, as expressed in the 1983 Opinion, in enacting FOIA, "the General Assembly intended that a 'meeting' represent more than merely a public body's final action upon a matter." Accordingly, our conclusion in Op. No. 83-55 was that

> ... the definition of 'meeting' [cannot] be limited to formal as opposed to informal gatherings. It should ... be noted that South Carolina's FOIA does not speak of 'official' meetings, but simply of 'the convening of a quorum ... of a public body ... to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.' Absence of the modifying word 'official' to precede the term 'meeting,' we believe, expresses an intent to include unofficial or informal

> meetings [as defined] within the coverage of the Act. See, *People ex rel. Difanis v. Barr*, (Ill.), 414 N.E.2d 731, 734 (1980). Moreover, § 30-4-70(5)(c) forbids use of a chance meeting, social meeting, or electronic communication [to be] used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction or advisory power ...'; it would thus appear that the General Assembly anticipated that social gatherings be deemed 'meetings' if such gatherings otherwise meet the requirements set forth in the definition .... And, as emphasized earlier, the Act must be liberally construed in order to fulfill its remedial purpose. When all of these factors are considered in light of the statutory definition of 'meeting', it is evident that the mere fact that a gathering is characterized as 'social' in nature is not controlling; what is instead dispositive is whether the gathering or convening of the body is 'to discuss or act upon a matter over which the public body has supervision, control, jurisdiction ro advisory power.'
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> Authorities from other jurisdictions agree with this conclusion in that they recognize no real distinction between formal and informal gatherings for purposes of the applicability of the Freedom of Information Act. See e.g., *Bd. of Public Instruction v. Doran*, (Fla.), 224 So.2d 693 (1969); *Bagby v. School Dist. No. 1, Denver,* (Colo.), 528 P.2d 1299 (1974); *People ex rel. Difanis v. Barr, supra*; *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, [263 Cal. App. 2d 41, 69 Cal. Reptr. 480 (1968)].

Likewise, in *Op. S.C. Atty. Gen.*, Op. No. 3880 (November 1, 1974), we rejected a procedure in which school board members privately discussed "their viewpoints and ideas on matters which will be officially passed on later in regular meetings." We noted that such a procedure creates a "suspicion of irregularity" concerning the school board and is not in keeping with FOIA. There, we commented:

> [w]hile the purpose and motives of these meetings are to better inform yourself and the board members of the facts and issues to be considered in a formal meeting, the same may easily create doubt and concern about the Board's action.

Moreover, Op. No. 89-111 (October 11, 1989) set forth in detail FOIA's requirements for giving notice of "meetings", as defined in the Act (§ 30-4-80) and concluded that such requirements are mandatory. We further noted therein that

> [p]ublic 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.

More recent authorities in other jurisdictions support the conclusions expressed in these opinions. *See e.g., Mayor & City Council of El Dorado v. El Dorado Broadcasting Co.*, 544 S.W.2d 206, 207 (Ark. 1976) (*en banc*) ["The Freedom of Information Act applies alike to formal and informal meetings and since we are required to give the Act a liberal interpretation, we cannot agree with appellants that it applies only to meetings of officially designated committees."]; *Difanis v. Barr, supra* ["Thus, to allow the nine defendants to circumvent the Act simply because they designate their meeting as an informal gathering or informal caucus would be to thwart the intent of the Act."]; *Puka v. Greco,* 464 N.Y.S.2d 349, 354 (1983) [FOIA "encompasses an informal gathering of a quorum of a public body on notice to discuss business ...."]; *Brookwood Area Homeowners Assn., Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1322 (Alaska, 1985) [quoting, *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983) that "[m]odern public meetings statutes reject the argument that only the moment of ultimate decision must be subject to public scrutiny, and require that preliminary deliberations be open as well."]; *In The Matter of Goodson Todman Enterprises, Ltd. v. City of Kingston Common Council*, 550 N.Y.S. 2d 157, 158 (1990) ["Public bodies may not escape public view by claiming that they did not formally convene when, in fact, a meeting took place at which business of public interest was discussed .... [I]nformal conferences, agenda sessions and work sessions ... invoke the provisions of the [Open Meetings] statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting ...."].

And, in *Business License Opposition Committee v. Sumter County* 311 S.C. 24, 426 S.E.2d 745 (1992), our own Supreme Court upheld the order of the special master enjoining the county from any further "informal" or "discussion" meetings. In that case, prior to a scheduled public meeting, County Council met and discussed a proposed ordinance. Information was received concerning proposed amendments. No public notice of the meeting was given. The Clerk of County Council called council members in advance to inform them of the "pre-meeting meeting." At this earlier discussion session, members reached a "consensus" although no formal action was taken.

Our Supreme Court upheld the Master's injunction as not constituting an abuse of discretion. Moreover, the Court held that the Master's conclusion that "Council failed to follow proper procedure in passing the amended version of the ordinance" was valid. In essence, the Master found a violation of § 30-4-70(a)(6) which prohibits taking votes or formal action in executive session. Thus, the Master found the ordinance invalid and ordered a refund of taxes paid pursuant thereto. In the Supreme Court's view,

> [w]e agree with the Master that the evidence of record demonstrates that the amendment to the ordinance was illegally adopted at the closed meeting on December 12. Finally, based upon this evidence, we find no abuse of discretion on the part of the Master in ordering the equitable relief of invalidation of the ordinance.

311 S.C. at 28. Thus, the Court concluded that it was appropriate to invalidate action taken by a public body in violation of FOIA. *See also, Op. S.C. Atty. Gen.,* Op. No. 84-11 (September 6, 1984)

[public body may not approve a budget by circulating a petition, one at a time among the body's individual members; "[s]uch budget approval function is required to be performed in public session pursuant to FOIA."]

At least two cases address the situation apparently at issue here – the use of "informal" telephone conferences to discuss public business. In *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. Ct. App. 1985), the Court upheld a permanent injunction enjoining school board members from conducting informal meetings or telephone conferences to discuss school board matters. A trustee who was concerned about the practice sought the injunction. In upholding the permanent injunction against the Board members, the Texas Court of Appeals stated:

> [s]pecifically, the Defendants, individually and collectively, have held meetings and/or engaged in deliberations to discuss public business or public policy and to arrive at a decision on public business or public policy with respect to the SAN ANTONIO INDEPENDENT SCHOOL DISTRICT without compliance with Sections 2(a) and 3A of the Act; that is, such meetings and/or deliberations were held without proper notice having been given, nor were they open to the public, nor did it involve matters requiring closed or executive meetings or sessions. The Court further finds that even if such matters required closed or executive meetings or sessions, said meetings and/or deliberations were not in compliance with Sections 2(a) and 3A of the Act as no proper notice was given nor did the Presiding Officer at an open meeting or session publicly announce that a closed or executive meeting or session would be held. The Court further finds that DR. WILLIAM R. ELIZONDO, President of the Board of Trustees of the SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, has on various and repeated occasions engaged in deliberations with other Member of the Board of Trustees to discuss public business or public policy and to arrive at a decision on public business with regard to the SAN ANTONIO INDEPENDENT SCHOOL DISTRICT by way of telephone conferences in violation of Sections 2(a) and 3A of the Act.
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> The Court specifically finds that the Defendants have violated the Texas Open Meetings Act in the past and there is a threat that they will do so in the future.
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> It is, therefore, ORDERED, ADJUDGED and DECREED that a Permanent Writ of Injunction be issued restraining and enjoining the Defendants, DR. WILLIAM R. ELIZONDO, President of the Board of Trustees; OSCAR CISNEROS, Secretary of the Board of Trustees; all other Members of the Board of Trustees; HAROLD H. HITT, Superintendent, VICTOR RODRIGUEZ, Superintendent-Elect; any other future Member of the Board of Trustees; their agents, employees, servants and representative of the Defendants from:

> (1) Conducting any meetings or engaging in deliberations to discuss public business or public policy or in arriving at a decision on public business or public policy with regard to the SAN ANTONIO INDEPENDENT SCHOOL DISTRICT by way of telephone conferences, or by private or informal meetings.
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> (2) Using SAN ANTONIO INDEPENDENT SCHOOL DISTRICT funds to disseminate political information, not involving school district matters.

And, in *Bd. of Trustees of State Institutions of Higher Learning v. Miss. Publishers Corp.*, 478 So.2d 269 (Miss. 1985), the Mississippi Supreme Court held that the Board of Trustees of Higher Learning could not circumvent the open meetings law through the use of telephone polls. In the opinion of the Court, while the Mississippi Open Meetings Act permitted "the recording of final votes by telephone, where such vote is reduced to public record and all deliberations prior to the final vote has taken place in accordance with the open meetings act," informal telephone polls could not be used to circumvent the Act. In the words of the Court,

> [t]he chancellor reiterated the use of telephone polls as a device to circumvent the open meetings act. This Court affirms this ruling insofar as such telephone polls in fact circumvent the act by preventing public disclosure of deliberation and conduct of business.

478 So.2d at 278-279.

In the situation presented, the telephone "conferences" referred to would constitute "meetings" of a "public body" for purposes of FOIA. Clearly, the school board would constitute a "public body" pursuant to § 30-4-20(a) as a "governmental body or political subdivision of the State" and as an "agency supported in whole or in part by public funds ...." *See, Op. S.C. Atty. Gen.*, May 19, 2006 (Majority Caucus a "public body" for purposes of FOIA). Moreover, the "meeting" requirement is met because, according to your letter, there is "the convening of a quorum of the constituent membership of the public body to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." Thus, FOIA's requirements are invoked. Accordingly, the holding of such telephonic meetings without the requisite notice and access of the public to the discussions is in violation of FOIA.

Conclusion

In the opinion of this Office, a court would likely conclude that the practice described in your letter – "discussing and pre-determining the outcome of the '06-'07 budget" through "collective action prior to the board meeting" – is violative of the Freedom of Information Act. While, of course, we assume the facts as described to us in your letter, and we cannot determine facts in an opinion, see, *Op. S.C. Atty. Gen.*, December 12, 1983, we reiterate our earlier opinion, No. 83-55, of August 8, 1983. This Opinion concluded that "[t]he Freedom of Information Act applies to any

meeting of a public body, whether the meeting is designated as formal or informal and whether action is taken upon public business or merely discussed." As further emphasized therein, a quorum of a public body "may not ignore the requirement of the [Freedom of Information] Act when it discusses public business over which it has supervision, control, jurisdiction or advisory power by holding a meeting, as defined, in an informal or social setting." Any violation of the Act, such as here, authorizes a court to issue an injunction and to assess attorneys fees against the body. Moreover, actions or deliberations taken in contravention of FOIA can lead to the invalidation of any action taken by the public body. *See, Business License Opposition Committee v. Sumter County, supra.* This same analysis applies with equal force to the school board in question. Thus, we strongly advise against any practice of holding telephonic conferences in advance of Board meetings in contravention of FOIA.

While FOIA does authorize telephonic meetings, *see*, § 30-4-20(d), such meetings must comply with the Act. Proper notice to the public and to the news media must be given and the public allowed to be present. However, the Freedom of Information Act's authorization of telephonic meetings does not thereby permit circumvention of the Act by holding pre-meeting telephone conferences of a quorum of the body, without the requisite notice, so as to discuss public business in secret. Such a conference would constitute a "meeting" and if FOIA is not followed, a violation of the Act would result.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General