



ALAN WILSON
ATTORNEY GENERAL

October 25, 2012

Patrick J. Maley, Inspector General
Office of the Inspector General
110 Centerview Drive, Suite 201
Columbia, South Carolina 29210

Dear Mr. Maley,

We received your letter requesting an opinion of this Office concerning the Inspector General's responsibilities under the Freedom of Information Act ("FOIA") in light of the recent enactment of Act No. 105 of 2012. The Act's title indicates it adds Chapter 6 to Title 1 of the S.C. Code "so as to create the office of State Inspector General, to provide that the State Inspector General is appointed by the Governor with the advice and consent of the Senate, to authorize the State Inspector General to address fraud, waste, abuse, and wrongdoing within the South Carolina Executive Government Agencies, and to provide for the powers, duties, and functions of the office." Citing several sections from Chapter 6 of Title 1 as added by the Act, you ask the following questions:

- 1) Reading § 1-6-20(F) and § 1-6-50(C), can it be inferred that if the Inspector General does not issue a final report then the investigative work product is not subject to FOIA?
- 2) Does § 1-6-100 protect the identity of any witness in an investigation that discloses information about fraud, waste, and abuse, or does it protect only the original complainant? You express concern that if it does not protect any witness, individuals will be hesitant to cooperate with the Inspector General. You then ask if the Office of the Inspector General can establish a policy which assumes all witnesses desire confidentiality, or if all witnesses should be offered the option of confidentiality after having FOIA explained to them.

Law/Analysis

Under the FOIA, "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40" § 30-40-30(a). Expressly excluded from the public's right to inspect are "[m]atters specifically exempted from disclosure by statute or law." § 30-4-40(a)(4). However, "[t]he exemptions to FOIA should be narrowly construed to not provide a blanket prohibition of disclosure in order to guarantee the public reasonable access to certain activities of the government." Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 83, 708 S.E.2d 745, 748 (2011) (quotations and citations omitted). Furthermore, "[t]he determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." City of Columbia v. ACLU of S.C., Inc., 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996) (citation omitted).

Pursuant to Act 105, § 1-6-20 establishes the Office of the State Inspector General and provides that the Inspector General “is responsible for investigating and addressing allegations of fraud, waste, abuse, mismanagement, misconduct, violations of state or federal law, and wrongdoing in agencies.” § 1-6-20(A), (B). Subsection (F) provides that “[e]xcept for information declared confidential under this chapter, records of the Office of the State Inspector General are subject to public inspection” under the FOIA, §§ 30-40-10 et seq.¹

As you mention, Act 105 specifically establishes certain information in the possession of the Inspector General that is confidential and therefore not subject to disclosure under FOIA. S.C. Code § 1-6-50(C) provides:

For an investigation that results in a report, the State Inspector General must prepare a written report that remains confidential until it is issued as a final report. The State Inspector General is the authority who determines if an investigation requires a report. The State Inspector General, in his discretion, may give an agency advice or recommendations that remain confidential and are not issued as a report.

Furthermore, § 1-6-100 states:

(A) If an individual discloses information alleging fraud, waste, abuse, mismanagement, misconduct, violations of state or federal law, and wrongdoing in an agency in good faith to the State Inspector General, the individual's identity is confidential and must not be disclosed to anyone other than the Governor, the staff of the Office of the State Inspector General, or an authority to whom the investigation is subsequently referred or certified, unless:

(1) the State Inspector General makes a written determination that it is in the public interest to disclose the individual's identity; or

(2) the individual consents in writing to disclosure of the individual's identity.

(B) After an investigation is completed and a report is issued pursuant to Section 1-6-50(C), the investigative records of the State Inspector General are subject to public inspection pursuant to Chapter 4 of [Title 34].² However, if an individual's identity is confidential pursuant to subsection (A), the individual's identity or any information that reasonably might lead to the discovery of the individual's identity must not be disclosed, except as pursuant to subsection (A) or subsection (E).

¹ According to the Act, the actual text of § 1-6-20(F) states that these records “are subject to public inspection *under Chapter 4 of this title.*” (Emphasis added). However, we believe this to clearly be a scrivener’s error as there is no Chapter 4 in Title 1 and the FOIA is found in Chapter 4 of Title 30.

² The same scrivener’s error addressed in Note 1 concerning § 1-6-20(F) appears here in § 1-6-100(B).

(C) This subsection does not apply to a person who is a party to an action brought by the State Inspector General. Information received by the State Inspector General is not required to be produced in the course of discovery, unless ordered by a court after a showing of particularized need and proof that the information requested cannot be obtained from another source.

....

(E) A person may disclose confidential information, records, or an individual's identity that is confidential pursuant to subsection (A) if the Governor authorizes the disclosure of this information in the public interest.

§ 1-6-100.

In construing the above provisions of Chapter 6 of Title 1, a number of rule of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). Courts "will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 472 (2007). "[S]tatutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable." State v. Thomas, 372 S.C. 466, 468, 642 S.E.2d 724, 725 (2007). Furthermore, "[t]here is a presumption that the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects." City of Camden v. Fairfield Elec. Co-op., Inc., 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007). Thus, pursuant to the Last Legislative Expression Rule, "in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment." Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993).

With regards to your first question, we do not read § 1-6-40(C) as giving the Inspector General the discretion to determine whether an investigative report is issued as a final report. The plain language of that provision only gives the Inspector General the authority to determine "*if* an investigation requires a report." Id. (emphasis added). Once the determination has been made that an investigation requires a report, the Inspector General has no discretion in determining whether to prepare a report or issue a final report. Instead, the Inspector General "*must* prepare a written report that remains confidential *until* it is issued as a final report." Id. (emphasis added). Thus, the statute contemplates the inevitable issuance of a final report from any investigation from which the Inspector General determines a report is required. The report is only confidential during the time it is being prepared until the time it is ultimately issued as a final report. The last sentence in § 1-6-40(C) simply provides the Inspector General with the discretion, in the absence of an investigation resulting in a report, to provide confidential advice and recommendations to an agency.

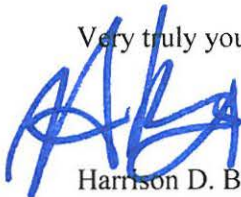
As for the confidentiality of the records of an investigation or the work-product of an investigation, § 1-6-100(B) states that "[a]fter an investigation is completed and a report is issued

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pursuant to Section 1-6-50(C), the investigative records of the State Inspector General are subject to public inspection” Thus, investigative records do not become subject to disclosure under FOIA until a final report is issued on the matter. This does not suggest, however, that the Inspector General has the authority to determine whether investigative records should or should not remain confidential by deciding whether to issue a final report. As previously discussed, the Inspector General has the authority to make the initial determination as to whether an investigation requires a report. Once the determination has been made that a report is required, a final report and the investigative records must ultimately be made subject to public inspection under FOIA.

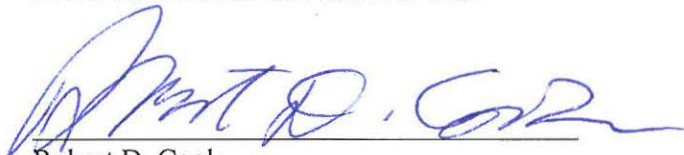
In response to your second question, we do not believe § 1-6-100(A) was intended to protect only the identity of the individual who makes the initial allegation of fraud, waste, abuse, wrongdoing, etc., as no such limitation is found in the express language of that provision. Instead, the language of § 1-6-100(A) indicates the identity of any individual must remain confidential if he or she, in good faith, discloses information to the Inspector General alleging fraud, waste, abuse, wrongdoing, etc. Such an individual’s identity may only be disclosed if the Inspector General or the Governor finds disclosure is in the public interest or the individual consents in writing to disclosure. See §§ 1-6-100(A), (E). Therefore, the implementation of a policy which presumes that any individual disclosing information alleging fraud, waste, abuse, wrongdoing, etc., desires confidentiality unless they otherwise consent to disclosure would be consistent with the law as stated in § 1-6-100.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General