



ALAN WILSON  
ATTORNEY GENERAL

June 19, 2013

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Aiken City Attorney  
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Dear Mr. Smith:

Attorney General Alan Wilson has referred your letter of February 27, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

As quoted from your letter: *"I am the City Attorney for the City of Aiken. I would like to take this opportunity to request an Opinion from the Attorney General regarding a situation that is affecting the City Council of the City of Aiken. .... Recently, we had a situation with one of the members of City Council who wanted to observe the operations of our Public Safety Department. This council member spent time in the Public Safety Command Center and attended roll call meetings of Public Safety officers as they were briefed on their responsibilities for their next shift. Upon discovery of the council member's actions, I prepared a legal memorandum for distribution to all of our council members wherein I advised them of my legal opinion regarding the inappropriate activity of this council member. I have attached a copy of this memorandum for your information and review. I am informed and believe that the council member in question is not satisfied with my advice to City Council and that he believes that he should be able to continue to participate in the closed meetings of the Public Safety Department. I would like for you to review my advice to City Council and issue your opinion."*

As you quoted in your letter, S.C. Code Sections 5-13-30 through 5-13-40 (1976 Code, as amended) says:

All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. Without limitation of the foregoing, the council shall:

- (1) Employ a manager;
- (2) Establish other administrative departments and assign and distribute the work thereof upon recommendation of and with the approval of the manager;
- (3) Adopt the budget of the municipality;
- (4) Authorize the issuance of bonds by bond ordinance, subject to such restrictions and limitations as may be prescribed by law;
- (5) Have the power to inquire into the conduct of any office, department or agency of the municipality, make investigations as to municipal affairs and give the public information concerning them;

- (6) Adopt plats;
- (7) Adopt and modify the official map of the municipality;
- (8) Provide for an independent annual audit of the books and business affairs of the municipality and for a general survey of municipal business;
- (9) Provide for the general health and welfare of the municipality in accordance with the statute law of the State with reference to the general police powers granted to municipalities;
- (10) Enact ordinances of any nature and kind, not prohibited by the law or Constitution of the State or of the United States; and
- (11) With the advice of the manager, appoint all committees, boards and commissions relating to the affairs of the municipal government, except as otherwise provided by law.

[S. C. Code § 5-13-40:]

- (a) Except where authorized by law, no councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected to the council.
- (b) Neither the council nor any of its members shall in any manner be involved in the appointment or removal of any municipal administrative officers or employees whom the manager or any of his subordinates are empowered to appoint.
- (c) Except for the purpose of inquiries and investigations, **neither the council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager except through the manager**, and neither the council nor its members shall give orders to any such officer or employee, either publicly or privately.

(emphasis added). As quoted in your letter, following these statutes, you say:

*[t]his section makes it clear that individual City Council members should not have any official interaction with employees of the City of Aiken. Individual City Council members are also prohibited from participating in meetings of the Public Safety Department or other City Departments unless they are specifically invited to do so by the City Manager. ... Does this mean that individual City Council members cannot ask questions about what is going on in the various City Departments? Absolutely not. However, your avenue for asking specific questions about a particular department is through the City Manager you[] have appointed to run the every day business of the City. If City Council is concerned about how a particular City Department is functioning, City Council has the right to conduct a proper investigation. This must be done by a majority vote of Council. No individual City Council member has the right to conduct such an investigation. As mentioned above, [a] City Council member should not 'deal with' City employees and City Council members should not "give orders" to City employees. I believe it is clear that the State law looks to prohibit City Council members from having "official" interaction with City employees. I would like to provide with you a listing of what I believe is acceptable and unacceptable interaction with City employees. This listing is not complete and I suspect we will add*

*to this list as time goes on.... The following activities are acceptable activities for Council members:*

- a. Council members may freely participate in City meetings that are open to the public or that you[] may be specifically invited to [ie. City Council, Planning Commission, Design Review Board, Board of Zoning Appeals, Character First meetings, Annual Employee Recognition functions, etc...]. It is appropriate to speak freely about the business before that Commission just as a regular citizen is allowed to do. It is also appropriate for a Council member to ask questions of City employees who are making presentations during a City Council meeting whether it be a Monday night meeting or a Horizons meeting.*
- b. Council members may enjoy casual interactions with City employees they may meet in their every day lives. Whether the conversation takes place in a public meeting, at a local golf course, at church or in the grocery store. It is ok to tell an employee they are doing a great job and you appreciate what they are doing for the City. It is also ok to engage in normal everyday conversations about the employee's family or other items that do not involve City business.*
- c. Council members are able to conduct their personal business with the City just as a citizen would do. Interaction with City employees is necessary to pay your water bill, your taxes and your business license fees. There is no prohibition with having the kinds of conversations you need to have in order to conduct your personal business with the City.*

*The following activities are not acceptable:*

- a. It is not appropriate for a Council member to participate in any Staff meeting [ie. Planning Department staff meeting, Public Safety roll call, etc...] unless the City Manager specifically invites you to participate in that meeting.*
- b. It is not appropriate for a Council member to tell a City employee [other than the City Manger] how they should do their job.*
- c. It is not appropriate for a Council member to ask a City employee for a favor to help out one of their constituents. However, it is appropriate for a Council member to contact the City Manager to let him know that Mrs. Wilson has a water leak and that it needs to be attended to.*
- d. It is not appropriate for a Council member to be in the Public Safety Dispatch Center or other places that the general public is not allowed to visit such as the Finance Department's enclosure where payment is accepted for the City's bills or offices where confidential information is kept.*
- e. It is not appropriate for a Council member to ask a City employee questions about that employee's job, supervisor, or working conditions. Council members cannot conduct personal investigations into various City activities.*

*Please remember that the above guidelines are not all inclusive but they serve as a guide for City Council. Please address any specific questions you may have about a planned activity to the City Attorney or the City Manager if you have any doubt about that activity.*

While your letter, as quoted above, is very detailed, this Office will not consider each directive. Moreover, this Office only issues legal opinions, so we will refrain from commenting on legal advice

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given by you to your client, as that is left in your discretion, nor will we go into detail of factual scenarios and hypotheticals. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). However, this Office will give you our opinion regarding the law that may be helpful as you advise the City of Aiken.

South Carolina law specifies three different forms of municipal government:

- 1) Mayor-council (§ 5-9-10ff),
- 2) Council (§ 5-11-10ff), and
- 3) Council-manager (§ 5-13-10ff).

Every municipality must choose one of the three forms of government to form under South Carolina law. S.C. Code § 5-5-10 (1976 Code, as amended). Based on the information provided in your letter, this Office understands that the City of Aiken is operating under a council-manager form of government and therefore would be subject to Title 5 Chapter 13 of the South Carolina Code of Laws. Under a council-manager form of municipal government, the municipal council is composed of a mayor and either four, six or eight councilman. S.C. Code §5-13-20 (1976 Code, as amended). Under South Carolina law, all municipal powers not otherwise proscribed statutorily belong to the municipal council. S.C. Code § 5-7-160. Additionally, a city council is required to meet monthly and is authorized to “determine its own rules and order of business and shall provide for keeping minutes of its proceedings which shall be a public record.” S.C. Code § 5-7-250.

It appears from your letter the particular language of the statute that is causing some difference of opinion with the City Council member is S. C. Code § 5-13-40 which says “...**neither the council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager except through the manager.**” (emphasis added). Therefore, let us look to statutory interpretation to determine the meaning of what to “deal with” is. Id. As a background on statutory interpretation, the cardinal rule in statutory interpretation is to ascertain the intent of the legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute’s interpretation must be “practical, reasonable, and fair” and consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a “sensible construction,” and a “literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose.” U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). This Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)).

Looking at the statute itself, “deal with” is neither explained nor defined. S. C. Code § 5-13-40. Therefore, let us further examine the term. Black’s Law Dictionary defines the verb form of “deal” as:

- 1) To distribute (something) <to deal drugs>.
- 2) To transact business with (a person or entity) <to deal with the

competitor>.

3) To conspire with (a person or entity) <to deal for the account>.

Black's Law Dictionary 457 (Bryan A. Garner ed., 9<sup>th</sup> ed., Thompson Reuters 2009). Let us further examine the words "transact and conspire." Black's Law Dictionary defines "transact" in the verb form as:

- 1) To carry on or conduct (negotiations, business, etc.) to a conclusion <transact business >.
- 2) *Civil law*. To settle (a dispute) by mutual concession. See TRANSACTION (4).
- 3) To carry on or conduct negotiations or business <refuses to transacts with the enemy>.

Black's Law Dictionary 1635 (Bryan A. Garner ed., 9<sup>th</sup> ed., Thompson Reuters 2009). Conspire is defined as:

vb. To engage in conspiracy; to join in a conspiracy.

Black's Law Dictionary 352 (Bryan A. Garner ed., 9<sup>th</sup> ed., Thompson Reuters 2009). The Respondents in a Washington State case argued to "deal" is "'[t]o act as an intermediary in business or any affairs; to manage; to make arrangements; to negotiate.'" Webster's New International Dictionary (1919, subd. 8). "'Deal' is not a technical term \*\*\*. It has been defined as meaning an arrangement to attain a desired result by a combination of interested parties; a secret arrangement, as in business or political bargains; also an act of buying and selling; a bargain.'" 25 C.J.S. Deal, p. 1039." State v. Johnson, 20 Wash.2d 494, 495, 148 P.2d 320, 321 (1944). Based on the plain reading of "deal with" while keeping in mind the definitions, it is likely that undertaking or participating in any type of business or attending private business meeting not open to the public would give the appearance of someone dealing with municipal employees. While this Office makes no determination as to motive or facts, no matter how well-intended or benevolent, such actions could meet the definition of "deal with" under S.C. Code § 5-13-40. Moreover, it is a well-recognized principle of law that an act which is forbidden to be done directly cannot be accomplished indirectly. Ops. S.C. Atty. Gen., 2000 WL 1803581 (November 13, 2000); 1990 WL 599265 (July 31, 1990) (citing State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940); Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969)). As the State Supreme Court cautioned in Richardson v. Blalock, 118 S. C. 438, 110 S.E. 678 (1922), "[t]hat which cannot be done directly cannot be done indirectly." The purpose of this rule is to prevent circumvention of the law by ruse or artifice. Op. S.C. Atty. Gen., 2003 WL 21471505 (June 10, 2003). However, please note S.C. Code § 5-13-40 does not prevent any lawful communications made between city councils and city employees during public meetings under the First and Fourteenth Amendments to the United States Constitution. Local 2106, Int. Assoc. of Firefighters, AFL-CIO v. City of Rock Hill, 600 F.2d 97 (Ct.App. 4<sup>th</sup> Cir. 1981).

Fortunately, guidance is provided the Local 2106, Intl. Assn. of Firefighters v. City of Rock Hill case. There, the Fourth Circuit Court of Appeals commented extensively upon § 5-13-40(c). The Court addressed the question of whether this statute "presents a sufficient governmental purpose to justify limiting access to the [city] council meetings based on speech content and the status of the firefighters as municipal employees." The City of Rock Hill had refused, using § 5-13-40(c) as its reason, to allow the Rock Hill Firefighters Association to appear before the council for the purpose of having Council address its 1972 policy statement recognizing the Association "as spokesman and representative of all employees of the fire department requesting such representation." Id. at 99. The Fourth Circuit concluded that

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appearing before Council constituted a "public forum" for First Amendment purposes, because such meetings were open to any citizen of Rock Hill to comment on any subject related to city government "except for the prohibition affecting city employees." Thus, in the view of the Fourth Circuit, the First and Fourteenth Amendment was violated by Rock Hill's denying Firefighters Association the opportunity to speak at the Council meeting.

Concluding that § 5-13-40(c) provided no justification to exclude the Firefighters Association from the public forum, the Fourth Circuit commented extensively upon the meaning and purpose of this statute. The Court stated as follows:

[t]he Firefighters contend that section 5-13-40(c) of the South Carolina Code is facially constitutional. The trial court correctly resolved that contention in favor of Rock Hill. Facially, the statute attempts to accomplish a desirable objective of the "Home Rule" movement the elimination of political pressures from the operation of city governments. In plain terms, it simply prohibits city councils and their members from interfering with the direct supervision of city employees. South Carolina municipal councils, however, obviously retain their legislative powers and responsibilities to deal with employees and other matters that affect the operation of municipalities and it is in the exercise of this legislative function that the councils create a public forum ... . It is Rock Hill's action, inappropriately relying on section 5-13-40(c), limiting access to this public forum that violates the First and Fourteenth amendments to the United States Constitution not the South Carolina statute.

600 F.2d at 99 (emphasis added).

Thus, the Fourth Circuit, in City of Rock Hill, distinguished, for purposes of § 5-13-40(c), between members of city council "interfering with the direct supervision of city employees" and their exercise of "legislative powers and responsibilities to deal with employees and other matters that affect the operation of municipalities ... ." Council members, in other words, are prohibited by § 5-13-40(c) from interference with the supervisory function of the city manager, but maintain the "legislative function" of a city council. See, Bishop v. City of Cola., 401 S.C. 651, 738 S.E.2d 255, 261 (Ct. App. 2013) "[Under the council-manager form of government,] the City's legislative and policy powers are vested in the City Council ...."; "[t]he City Manager is the chief executive officer and administrative head of the city. Thus, he is responsible for the administration of the municipality's affairs, including the employment of assistants to exercise such supervisory responsibilities over departments as he may delegate." Accordingly, as the Fourth Circuit indicated, § 5-13-40(c) draws a line between interference by council members with supervision of city employees, which is clearly part of the administrative function of the manager, and which is prohibited by the statute; and a council member's exercise of his or her "legislative function," which is not.

Courts have recognized that the scope of performance of a legislator's duties is not limited to those acts in a legislative assembly meeting. Indeed, our own Supreme Court in Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979), has found that statements made by a member of the General Assembly attending as part of the county legislative delegation and a meeting with members of a county recreation commission were absolutely privileged. There, the Supreme Court stated that "[i]t is ... clear that unqualified privilege [for legislative acts] does not depend on the rigid requirement of a strictly legislative or judicial proceedings; its limits are fixed rather by considerations of public policy." 273 S.C., id. at 146, 255 S.E.2d, id. at 343. According to the Court, the absolute immunity of statements made by a legislator

depended instead upon whether he or she "was engaged in a legislative duty or function at the time the defamatory statements were made." *Id.* Members of the legislative delegation from Williamsburg County "had an official interest in the proper operation of the county government and its agencies, including that of the Williamsburg County Recreation Commission." *Id.* Thus, the legislator in attending the meeting, was performing a legislative function, and such statements made by him in the course of that meeting, were deemed to be absolutely privileged.

In addition, courts have concluded that other acts of a legislator, including informal as well as formal information gathering, are part of his or her legislative duties. In *Williams v. Johnson*, 597 F.Supp.2d 107, 114 (D.D.C. 2009), the Court, per Kollar-Kotelly, J. stated as follows:

... the Supreme Court has never addressed whether the [Speech or Debate] Clause covers informal, as well as formal, information gathering by a legislator, and lower courts are divided on the question. See *Jewish War Veterans [v. Gates]*, 506 F.Supp. 30, 54 (D.D.C. 2007). The Court, however, agrees with the well-reasoned decision by Judge John D. Bates in *Jewish War Veterans* in which Judge Bates concluded that investigation and information gathering by a legislator – whether formally or informally conducted – is protected by the Speech or Debate Clause "so long as the information is acquired in connection with or in aid of an activity that qualified as 'legislative' in nature." 506 F.Supp.2d at 57. That is, the Court is persuaded that, regardless of whether conducted formally or informally, "the acquiring of information [is] an activity that is a 'necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that [legislators] are able to discharge their duties properly.'" *Dominion Cogen [D.C. Inc. v. District of Columbia]*, 878 F.Supp. 258 (D.D.C. 1995) at 263; see also *Alliance for Global Justice [v. District of Columbia]*, 437 F.Supp.2d 32 (D.D.C. 2006) at 36.

In *Williams*, the Court found that a "private" meeting between a councilmember and plaintiff and his wife was within the "legislative sphere." Plaintiff had sought to subpoena the councilmember to obtain testimony and documents concerning the councilmember's alleged investigation involving a software contract which had been awarded by the District of Columbia. However, the Court quashed this subpoena because the councilmember was entitled to legislative immunity. The meeting to discuss "alleged wrongdoing at an agency that is under Councilmember Catania's oversight responsibility" had resulted in his "launching an investigation as a result of the information received" was an integral part of his legislative function.

However, "departmental powers conferred by statute cannot be overridden by local ordinance, taken away or limited by the municipal council or governing body, or overridden by an officer acting beyond his or her authority..." *Op. S.C. Atty. Gen.*, 2012 WL 440544 (January 13, 2012) (citing 62 C.J.S. Municipal Corporations § 568). As we further explained in a prior opinion:

"[I]t is well established that a municipal council may not delegate discretionary duties to individual members of council. It has thus been recognized as the governing rule" that

[a] municipal governing body cannot delegate to a municipal officer or even to one of its own committees the power to decide legislative matters properly resting in the judgment and discretion of that body or to one member of the

governing body. Thus, acts by individual members of a public body cannot bind the municipality unless officially sanctioned in accordance with a statute. The members of the governing body are chosen by the people to represent the municipality and they are charged with a public trust and the faithful performance of their duties and the public is entitled to the judgment and secretion of each member although the governing body may refer matters coming before it to a committee for examination and fact-finding.

Op. S.C. Atty. Gen., 2003 WL 22862787 (November 13, 2003) (citing 56 Am.Jur.2d, Municipal Corporations, § 134). Nevertheless, as you acknowledge in your letter and as written in the statute, City Council may inquire and investigate into matters and thus would be permitted to have direct contact with municipal officers and employees in the course of such investigations and inquiries. S.C. Code § 5-13-40. However, any such formal investigation or inquiry would need to be taken by agreement of the entire Council or a majority thereof, not by one individual member acting without the authority of the Council. S.C. Code § 5-7-160. Such is not to say, of course, that individual council members may not examine for themselves, in an informal setting, the operations or certain aspects thereof, of city government.

Moreover, while the First Amendment does not create property or tenure rights and is not absolute, it is well recognized that public employees possess First Amendment rights with respect to matters of public concern. Pickering v. Bd. of Ed. Of Township High School Dist. 205, Will City, 391 U.S. 563 (1968); Bd. of County Commrs, Wabaunsee Co., 518 U.S. 668 (1996). Compare, Garcetti v. Ceballos, 547 U.S. 410 (2006) [court distinguishes public employee speaking on matters of public concern, which is protected by First Amendment, from statements made pursuant to their official duties].

**It is also worth noting that this Office has long been of the opinion that each member of a county or city council should be given access to all records of the county or city (whichever is applicable).** In an opinion, dated August 18, 1983, (1983 WL 18174) we stated:

[t]hat a council member seeks access to personnel records of county employees pursuant to his own investigation or inquiry and that he elects to bypass the County Administrator in seeking access to such records would not, in our opinion, deprive him of his right of access to such records.

(referencing Op. S.C. Atty. Gen., December 2, 1977, No. 77-380). See also, Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008) [Supreme Court denied mandamus compelling county administrator to give county council member full access to all financial records pertaining to operation of county government, but recognized that "the Administrator cannot deny a council member access to county financial documents."]. As we stated in Op. S.C. Atty. Gen., March 24, 1995 (1995 WL 803345),

[a] member of the governing body of an entity needs access to such records as to be able to do the job he or she was elected to do.

The Fourth Circuit decision in City of Rock Hill sets forth, we believe, the correct interpretation of § 5-13-40(c). City of Rock Hill makes it clear that city council or its members may not "interfere with the direct supervision of city employees." Our courts have recognized that the city manager "is the chief executive officer and administrative head of the City" and is "responsible for the administration of the municipality's affairs ..." in the council-manager form of government. Bishop v. City of Cola., supra. Thus, for city council or the members thereof to interfere with the supervision of employees of the



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municipality clearly undermines the council-manager form of government which the General Assembly has created. Council members should be advised that § 5-13-40(c) does not permit interfering with, second-guessing of or attempting to "micromanage" the administration of city government. The city manager must retain the role assigned by the Legislature of chief administrative officer of the City.

Such does not mean, however, that § 5-13-40(c) removes in any way the legislative powers or functions of council or its members. As City of Rock Hill recognizes, council and its members "retain their legislative powers and responsibilities to deal with employees and other matters that affect the operation of municipalities." Courts recognize that when legislators or council members gather information or investigate issues which may come before council (as a legislative body), such is in the performance of a legislative function. Thus, so long as councilmembers are not interfering with the administration of city government, but are seeking information from city employees in a legislative capacity, § 5-13-40(c) is not implicated.

Furthermore, this Office has long recognized the need for each councilmember to have access to all city (or county) records so that the member is "able to do the job he or she was elected to do."

**Conclusion:** This Office cannot resolve factual disputes and is obviously unable in an opinion to determine in a given instance when a councilmember is interfering with the city manager's supervisory function, thereby violating § 5-13-40(c) and when the councilmember is simply performing the legislative function of information gathering. This is clearly a fine line, and, as such, there must exist a spirit of cooperation between councilmembers and manager. Each situation should be resolved on a case-by-case basis. **Accordingly, it is our recommendation that the City of Rock Hill decision be used as a guide in working with city council in an effort to delineate this line between administrative and legislative functions.** Based on the information provided in your letter and the statute, this Office has attempted to offer an opinion on the law. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General