

The State of South Carolina



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March 31, 1994

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1201 Main Street, Suite 1500
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Dear Mr. Birgeron:

On behalf of the members of the South Carolina Real Estate Commission, you have asked whether the Commission members may deliberate on certain subjects in private, executive sessions. As clarified by subsequent correspondence, the Commission wishes to know what, if any, deliberations may be held in private or executive session and under what circumstances.

The Commission has original jurisdiction over license reinstatement hearings. In addition, the Commission members act as an adjudicatory body in hearing appeals from decisions of the Real Estate Commissioner pursuant to S.C. Code Ann. § 40-57-220, which appeals generally involve disciplinary proceedings brought against licensees (with sanctions ranging from reprimands to license revocation), decisions on an applicant's eligibility for licensing, cease and desist orders, and revocation of time share and land sale registrations.

As with any statute, the primary objective of both the courts and this Office is to ascertain and effectuate legislative 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 itself states that the public policy of this State favors public meetings; thus, there must be "some exceptional reason so compelling" as to override that policy and close a meeting for reasons other than those expressly stated in § 30-4-70. (And those "exceptional reasons" would be very few and very far between.)

Requart L.H.

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The Freedom of Information Act is a statute remedial in nature, which must be liberally construed to carry out the purpose mandated by the legislature. See South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1976). Any exceptions to the Act's applicability must be narrowly or strictly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 223 S.E.2d 580 (N.C. 1976).

The Real Estate Commission was established pursuant to § 40-57-50 and predecessor statutes, to license and regulate various real estate-related practices. The Commission receives and expends public funds. See Part I, § 70AE of Act No. 164 of 1993 (annual appropriations act). Without question, the Commission is considered a "public body," as that term is defined in § 30-4-20(a) to include

any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of this State, ... or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds

Thus, applicability of the Freedom of Information Act to the Real Estate Commission, as a public body, is established.

Section 30-4-60 provides that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." The limited reasons for which an executive session may be held and the procedure for entering into executive session are specified in § 30-4-70.¹ A meeting is defined in § 30-4-20(d) as "the

¹Permissible (though not mandatory) reasons for which a public body may conduct an executive session are, pursuant to § 30-4-70(a):

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body
- (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against said agency of a claim.

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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." Therefore, the Freedom of Information Act applies to meetings of a quorum (or a committee) of the Real Estate Commission.

Section 40-57-220

One statute particularly mentioned in the request letters is S.C. Code Ann. § 40-57-220, which provides an avenue of appeal for a licensee or an applicant aggrieved by the decision of the Real Estate Commissioner in refusing, suspending, or revoking a license or in issuing reprimands. The statute provides that, upon receipt of notice of appeal, the commissioner

shall call a hearing on the matter, which must be confined to the record, and which must be attended by at least five members of the Real Estate Commission, including the member from the congressional district in which the appellant resides and four other members to be selected by the chairman. The commission may affirm the commissioner's ruling or remand the case for further proceedings. Upon request of any party, the commission shall hear oral arguments and receive written briefs. ...

We observe that the role of the Real Estate Commission under this statute is quasi-judicial in nature. Conceivably at least three distinct aspects could be involved: a hearing of an adversary nature, which could include oral argument at the request of any party, the discussion following the hearing, and the vote as to upholding the Commissioner's decision.

¹(...continued)

- (3) Discussion regarding the development of security personnel or devices.
- (4) Investigative proceedings regarding allegations of criminal misconduct.
- (5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

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A "hearing" usually means the hearing of evidence and arguments thereon in a cause. Shields v. Utah Idaho Central Railway Company, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938). It is usually comprised of the opportunity to adduce proof and further to argue as to the inference thereof, Seibold v. State, 287 Ala. 549, 253 So.2d 302 (1970), to meet and rebut evidence and to cross-examine witnesses, Whirlpool Corp. v. State Bd. of Tax Commissioners, 167 Ind.App. 216, 338 N.E.2d 501 (1975), and includes the right to be present and put forth one's contentions. People v. Richetti, 302 N.Y. 290, 97 N.E.2d 908 (1951). Discussion of the discipline of a person regulated by a public body (i.e., a licensee) is a permissible, though not mandatory, reason for a public body to meet in executive session, by § 30-4-70(a)(1); such discussion does not appear to be within the generally accepted definition of "hearing" and probably should be treated separately from the adversary hearing unless the "discussion" is characterized as appellate and quasi-judicial in nature, in which case a different result is compelled (as is the case here). A hearing of an appellate nature should be open.

This Office has opined on several occasions that when a public body has been charged with adjudicatory functions, the Freedom of Information Act does not authorize such a public body to enter executive session for purposes of deliberation on matters of public record.² Ops. Atty. Gen. dated May 26, 1988; October 30, 1985; October 2, 1985; February 8, 1979, copies enclosed. While the opinions were felt to be not free from doubt, such opinions were in accordance with court decisions from other jurisdictions as Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973) (a board exercising quasi-judicial functions is not part of the judicial branch of government; its meetings must be open to the public generally); Citizens Action Coalition of Indiana, Inc. v. Public Service Commission of Indiana, 425 N.E.2d 178 (Ind. Ct. App. 1981) (agency was not vested with judicial powers and thus must deliberate at meetings open to the public); Appeal of Emmanuel Baptist Church, 364 A.2d 536 (Pa. Cmwlth. 1976) (zoning hearing board is quasi-judicial, not judicial, and must reach its decisions in an open meeting). If the Real Estate Commission is characterized as an appellate, quasi-judicial body, as it appears to this Office, then there appears to be no authorization for the Commission to convene in executive session to deliberate on a publicly held hearing which is a matter of public record. Of course, convening in executive session for other reasons authorized by § 30-4-70 would be permissible (though not mandatory).

²Section 40-57-210 requires the Real Estate Commissioner to keep a public docket or other record of rulings, decisions, investigations, hearings, and the like.

By contrast, see former § 30-3-40(c), repealed by Act No. 593 of 1978, which specifically allowed deliberations to be conducted in executive session.

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The final step in the process is to determine whether to uphold the action of the Real Estate Commissioner. It is inescapable that a vote of the commissioners hearing the matter must be held. Section 30-4-70(a)(6) specifically provides:

No formal action may be taken in executive session. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action. No vote may be taken in executive session. [Emphasis added.]

Clearly, the vote which determines whether to uphold the decision of the Real Estate Commissioner must be made in an open or public session.

Section 40-57-230

Issuance of a new license after revocation is governed by § 40-57-230:

After the revocation of any license, no new license shall be issued to the same licensee, within a period of one year from and after the date of such revocation, nor at any time thereafter except upon an affirmative vote of at least a majority of the members of the Commission.

Again, whether the "hearing" occasioned by this section is required to be open is dependent upon how it is characterized: disciplinary in nature or quasi-judicial. As discussed previously, if such action is quasi-judicial, it should be held in an open meeting, with open deliberations. In any event, the vote required by § 40-57-230 must be conducted in an open session rather than executive session.

Other Proceedings

Your request letter indicates that the Commission acts as an adjudicatory body in other proceedings such as cease and desist orders and revocation of time share and land sale registrations. We did not locate particular statutes providing specific procedures as to these proceedings. The foregoing discussions should offer sufficient guidance, particularly if the proceedings are adjudicatory or appellate in nature. The rule under the Freedom of Information Act is openness; the permissive reasons for holding executive sessions are few and are narrowly drawn. If any doubt should exist as to whether a meeting should be open to the public, the doubt should be resolved in favor of openness, to conduct public business in public.

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Conclusions

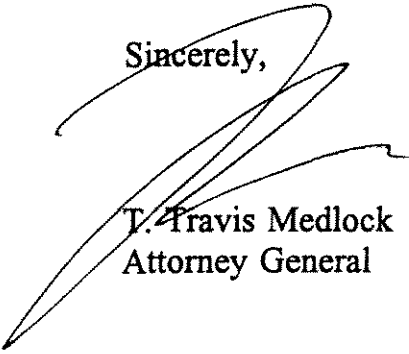
When the public is shut out of the public's business, it opens the way for misinformation and rule by a few people. Our advice is to put everything out in the open and give everybody a chance to know what is going on. The public eye is always better than the closed door.

Therefore, it is our opinion that:

1. The Real Estate Commission is a public body subject to the requirements of the Freedom of Information Act.
2. In those instances in which the Real Estate Commission is operating as an appellate or quasi-judicial body, an open meeting should be held, with open deliberations, and voting conducted in an open or public session.
3. The permissive reasons for entering executive session are few and are narrowly drawn. If the Real Estate Commission is to hold a discussion that would fall within these limited reasons, the Commission may (but is not required to) convene in executive session. Any action taken (i.e., a vote) must be taken in open session.
4. The rule under the Freedom of Information Act is openness, so that public business is conducted in public. Any doubt as to whether a meeting should be open to the public should be resolved in favor of openness.

With kindest regards, I am

Sincerely,



T. Travis Medlock
Attorney General

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Enclosures