1983 S.C. Op. Atty. Gen. 172 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-100, 1983 WL 142769

Office of the Attorney General

State of South Carolina
Opinion No. 83-100
December 21, 1983

***1** The Honorable D. L. Aydlette, Jr.
608–B Harborview Road
Charleston, S.C. 29412

Dear Representative Aydlette:
You have asked our advice concerning the applicability of the Freedom of Information Act to the following situation. As a member of the General Assembly, you wish to hold breakfast meetings with the City Council and Mayor of Folly Beach and with the Commissioners of the James Island Public Service District; the purpose of these meetings, as we understand it, is to discuss possible legislation which directly affects or concerns these bodies, as well as generally to discuss any assistance you might be able to give these bodies as the elected Representative from that area. You specifically inquire whether the notice provisions of the Freedom of Information Act would be applicable to this situation. It is our opinion that the Freedom of Information Act governs the situation you present and that its notice provisions would be applicable.

This office only recently concluded that:
The Freedom of Information Act applies to any meeting of a public body, as defined in the Act whether the meeting is designated as formal or informal and whether action is taken upon public business or merely discussed. A public body may not ignore the requirements of the 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.

Op. Atty. Gen. August 8, 1983 (copy enclosed). In that opinion, we noted that the Freedom of Information Act 'is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly.' Supra at 3. In reliance upon Town of Palm Beach vs. Gradison, (Fla.), 296 So.2d 473, 477 (1974), we stated: 'When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the state.' Supra at 9.

Our earlier opinion dealt specifically with situations where members of county council were invited to informal or social gatherings 'to generally discuss matters which may directly or indirectly affect the county.' In that situation, we concluded that the Freedom of Information Act was applicable and that the notice provisions required therein were controlling.

The question which you pose, although somewhat different is, nevertheless, answered by the rationale of our earlier opinion. While a single member of the General Assembly may not constitute a 'public body' for purposes of the FOIA, there is no question that the mayor and council, as well as the governing commission of the public service district would. August 8, Op., supra at 3. [1] And merely because that public body may have been invited to the gatherings by others, such as a member of the General Assembly would not itself mean there had occurred no meeting of that public body. ITT World Comm., Inc., vs. F.C.C., 699 F.2d 1219, 1242 (D.C. Cir. 1983); August 8, Op., supra.

***2** We must still decide, however, whether the public body is conducting a 'meeting' as defined by § 30–4–20(d) of the Act. There, 'meeting' is defined 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 (emphasis added).

Thus, the question here is whether a gathering of the public body to discuss with, or recommend to, a member of the General Assembly proposed legislation affecting the public body would be the kind of 'supervision, control, jurisdiction or advisory power' which the Freedom of Information Act contemplates.

Obviously, the city council or governing board of a public service district cannot itself enact a statute, even if the statute concerns a matter directly affecting the city or public service district. Under the Constitution of South Carolina, that power is expressly reserved to the General Assembly. See, Art. III, § 1.

However, merely because the public body cannot itself finally enact the legislation affecting it does not mean the Freedom of Information Act is inapplicable where the public body assembles to discuss or make recommendations concerning that legislation. As we stated in our earlier opinion, 'when interpreting the word 'meeting' as used in the FOIA, the term must be broadly construed in light of the [Act's] . . . remedial purpose.' August 8, Op., supra at 4. The General Assembly has found in § 2 that the Act's purpose is to make it 'possible for citizens or their representatives, to learn and report fully the activities of their public officials.' Here, although in a technical sense, the governing commission of a public service district or a city council does not have 'supervision' or 'jurisdiction' over legislation enacted by the General Assembly, that is not the point. Where proposed legislation or action of the General Assembly or a legislative delegation affects a matter with which the public body is concerned, discussion of such action by the quorum of the public body would, in our opinion, be a 'meeting' within the meaning of the Act.

The case of News Journal Co. vs. McLaughlin, (Del.), 377 A.2d 358 (1977) is fully supportive of this conclusion. There, a quorum of the Wilmington, Delaware City Council met at the Office of the Mayor. The purpose of the meeting was to report upon and discuss the possible repeal by the Delaware General Assembly of certain statutes by which the City of Wilmington was authorized to impose and collect a wage tax. No notice, pursuant to Delaware's FOIA, was given of this meeting. A citizen sought admission to the meeting, but was denied.

An action was subsequently brought, challenging the Council's failure to comply with the Freedom of Information Act. It is significant to note that Delaware's FOIA is virtually identical to § 30–4–10 et seq. with respect to the definitions of 'meeting' and 'public body' contained therein. The defendants argued to the Court that the gathering was not a 'meeting' within the scope of the Act. The Court characterized defendants' argument as follows:

***3** . . . City Council has absolutely no supervision or control over the General Assembly or the existing statutes then under consideration by it. Likewise, the possible repeal of a State statute is something which does not fall within the jurisdiction of municipal government. Finally, while defendants concede that perhaps everyone has a right to offer advice and opinion to members of a legislative body, they point out that there is no statute or constitutional provision which would give the City Council 'advisory power' as to actions taken by the General Assembly. Thus, their argument concludes the subject matter which brought them together and on which information was provided was not one over which City Council had any supervision, control, jurisdiction or advisory power and, as a consequence, their meeting was not for the purpose of discussing or taking action on public business.

377 A.2d, supra at 358.

The Court, however, rejected this argument. It is instructive to examine fully and quote freely from the Court's analysis:

What this argument chooses to ignore, however, is the fact that the purpose of the gathering was not merely for academic discussion on the repeal of a statute which would have no effect upon the City. Rather it was to consider possible action by the General Assembly which, if taken, could have abolished the Wilmington wage tax and thereby compelled a restructuring of City finances, both matters over which the City Council clearly had control, supervision and jurisdiction. In fact, a repeal of the City's power to impose the tax by ordinance would have deprived the City thereafter of something over which it was then exercising control and supervision. From the undisputed facts . . . the purpose of the meeting, which was predominated by a

quorum of City Council, was to discuss a matter of public business within the meaning of the Sunshine Law and to consider the best cause of action to be taken in the interests of the City and its inhabitants (emphasis added).

Supra. The Court further observed that any other construction might encourage 'the crystallization of secret decisions to a point, just short of ceremonial acceptance . . .'. Supra at 362. And the Court distinguished cases such as Judge vs. Pocius, (Pa.), 367 A.2d 788 (1977), stating that in Pocius the Pennsylvania law applied only to a meeting where 'formal action' was taken. We note also that Courts in other States have cited the McLaughlin case as authoritative and with approval. See, Puglisi vs. School Comm. of Whitman, (Mass.), 414 N.E.2d 613, 614 (1981); People ex rel Difanis vs. Barr, (Ill.) 379 N.E.2d 895 (1979), affd., 414 N.E.2d 731 (1980); see also, 38 A.L.R.3rd 1070 (Cum. Supp. at p. 79).

We too believe the Court's reasoning in McLaughlin to be sound and in accord with the purpose of this State's Freedom of Information Act. The fact that the public body is, in this instance, actually meeting these matters among representative, rather than discussing these matters among themselves, can make no difference in our conclusion. Indeed, the case would appear stronger where the public is meeting with the official who is in a position to assist in carrying out their recommendations. We therefore believe the FOIA to be applicable to the circumstances you have described; thus, we would advise that if a quorum of a public body, meets with a member of the General Assembly to discuss legislation or other matters directly affecting that public body's supervision, control, jurisdiction or advisory power,[2] then the Freedom of Information Act is applicable and its notice provisions must be followed.

Sincerely yours,

***4** Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 'Public body' as used in § 30–4–20(a) specifically includes political subdivisions, special purpose districts and municipalities.

2 We express no opinion as to any so-called 'academic discussions' of matters over which the public body has no supervision, control, jurisdiction or advisory power.' See, McLaughlin, supra. This opinion assumes such discussion; examples would include discussions concerning the size or area of public service districts or appointments to their governing boards or matters concerning a city's taxing powers. Obviously each case must be decided on its own facts and is controlled by the subject matter which the public body will discuss.

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