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Office of the Attorney General

State of South Carolina
Opinion No. 83-55
AUGUST 8, 1983

***1 SUBJECT: Public Information**

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.

TO: Charleston County Attorney

QUESTION:

You have asked the opinion of this office with respect to the scope of the open meeting and notice requirements of the South Carolina Freedom of Information Act, §§ 30–4–10 et seq. of the Code of Laws of South Carolina (1976 amended). Specifically, you wish to know whether these requirements of the Act are applicable where county matters are discussed at social or informal gatherings which have a majority of the members of the council present, but at which no 'official action of any type affecting county government is ever taken . . .'. You also inquire about informal or social gatherings where members of county council are invited 'to generally discuss matters which may directly or indirectly affect the county'; in this situation, you note that 'by no means is any official action taken by the members of the council who may be in attendance' and that '[s]ometimes these meetings mentioned . . . may have topics discussed over which the county has no jurisdiction or authority.'

DISCUSSION:

The South Carolina Freedom of Information Act is presently codified in § 30–4–10 et seq. The Statute was enacted in its present form in 1978. It mandates that '[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30–4–70 of this chapter.' (emphasis added). § 30–4–70 enumerates several reasons for which a 'public body may hold a meeting closed to the public', among them discussion relating to employee relations, contractual matters, receipt of legal advice and investigative proceedings' regarding allegations of 'criminal misconduct.' Where a public body finds that, because of one or more of these reasons, the meeting, as defined, should be closed to the public, the body is authorized to go into executive session, pursuant to those procedures set forth in § 30–4–70(5). § 30–4–70(c) further requires that:

No 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.

In addition, § 30–4–80 establishes requirements for giving public notice of meetings held by public bodies. § 30–4–80 provides:

(a) All public bodies shall give written public notice of their regular meetings at the beginning of each calendar year. The notice shall include the dates, times and places of such meetings. Agendas, if any for regularly schedules meetings shall 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 shall post on such bulletin board public notice for any called, special or re-scheduled meetings. Such notice shall be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice shall include the agenda, date, time and place of the meeting. This requirement shall not apply to emergency meetings of public bodies.

***2** Subsection (c) of § 30–4–80 requires the public body at least to post '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.' And, pursuant to subsection (d),

All public bodies shall make an effort to notify 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 shall be noted in the minutes of the meetings.

It is evident from your letter that no one disputes the fact that the Charleston County Council would constitute a 'public body' as defined in § 30–4–20(a). And as your inquiry suggests, we will assume that there is a 'quorum' of council members present at the social gatherings. See, § 30–4–20(e). Thus, it is apparent that the answers to your questions depend in large part upon whether the situations you present constitute a 'meeting' as defined by the Freedom of Information Act.

§ 30–4–20(d) of the Act defines a 'meeting' for purposes of the Act. The word means

. . . 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).

As with any statute, the primary guideline to be used in construing the Freedom of Information Act or any provision thereof, is the intention of the Legislature. Adams v. Clarendon Co. School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). 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.W.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.

It is evident then that the Freedom of Information Act is a statute remedial in nature and must be liberally construed in order to carry out the purpose mandated by the General Assembly. See, South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Such a construction is in accord with that generally given Freedom of Information Acts in other states. See e.g., Holden v. Board of Trustees of Cornell, 80 A.D.2d 378, 440 N.Y.S.2d 58 (1981); Florida Parole and Probation Comm. v. Thomas, (Fla), 364 So.2d 480 (1978); Greene v. Athletic Council of Iowa State, (Iowa), 251 N.W.2d 559 (1977); Laman v. McCord, (Ark.), 432 S.W.2d 753 (1968). 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., (N.C.), 223 S.E.2d 580 (1976). In Wolfson v. State, (Fla.), 344 So.2d 611 (1977), for example, the Court noted with respect to the Florida FOIA:

***3** We are persuaded to apply the rule that a statute enacted for the public benefit should be liberally construed even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent.

344 So. 2d, supra at 613. In Jefferson Co. v. Courier Journal, (Ky.), 551 S.W.2d 25 (1977), the Court further expounded upon the fundamental purpose and intent of Freedom of Information statutes:

Some forty-seven jurisdictions have adopted the so-called open meetings or sunshine statutes which are designed to require governmental agencies to conduct the public's business in such a way that the deliberations are accomplished in an atmosphere wherein the public and the media may be present.

551 S.W.2d, supra at 27. Thus, when interpreting the word 'meeting' as used in the FOIA, the term must be broadly construed in light of the foregoing remedial purpose. [1]

A number of decisions in other jurisdictions, having FOIA statutes similar to South Carolina's have addressed the question of what constitutes a 'meeting' for purposes of the Act. It is evident from these decisions that whether or not the public body finally acts upon a matter before it is not controlling with respect to whether or not it is a 'meeting' and thus subject to the FOIA. In Town of Palm Beach v. Gradison, (Fla.), 296 So.2d 473, 477 (1974), the Florida Supreme Court stated:
One purpose of the . . . [Act] was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be 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 forseeable action will be taken.

Likewise, other courts have refused to limit their respective states' FOIA's use of the term 'meeting' simply to a public body's final action upon a matter. See e.g., Woodbury Daily Times Co. v. Gloucester Co. Sewerage Authority, (N.J.), 376 A.2d 607, 610 (1977); City of New Carrollton v. Rogers, (Md.), 410 A.2d 1670 (1980); Wolfson v. State, supra; Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors, 263 Cal. App.2d 41, 69 Cal. Reptr. 480 (1968); News Journal Co. v. McLaughlin, (Del.), 377 A.2d 358 (1977). In City of New Carrollton v. Rogers, supra, the Court interpreted an FOIA definition of 'meeting' which was very similar to that incorporated in § 30–4–20(d). The Court made it clear that the definition was not limited to instances where a public body takes final action. Said the Court,
It is, therefore, the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business. (Emphasis added).

***4** 410 A.2d, supra at 1079. Moreover, § 30–4–20(d)'s use in the disjunctive of the terms 'discuss or act upon' cannot be ignored. (Emphasis added). Since each word in the provision must be given its full effect, see, Home Building and Loan Assn. v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1939), it is apparent that the General Assembly intended that a 'meeting' represent more than merely a public body's final action upon a matter. [2]

Nor can the definition of 'meeting' be limited to formal as opposed to informal gatherings. It should first 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. [3] 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 or advisory power.'

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, supra.

In the Sacramento Newspaper Guild case, the question before the Court was whether a luncheon gathering at the Elks Club, attended by the county supervisors, the county council, county executive, county director of welfare and members of the Central Labor Council, AFL-CIO, and held to discuss a strike was a 'meeting' for the purposes of California's FOIA. Newspaper reporters sought, but were denied, admission to the gathering. The Court noted that for purposes of the Act, 'deliberative gatherings . . . are meetings', however confined to investigation and discussion.' 69 Cal. Reptr., supra at 485. Moreover, just as South Carolina's FOIA, the purpose of the California Act was to insure that all meetings be 'open and public.' Supra at 484. Thus, said the Court, the legislative intent and objective of the Act 'impels rejection of a narrow interpretation.' Supra at 486. Concluding then that characterization of a gathering as social or informal makes little or no difference with respect to the applicability of the FOIA, the Court stated:

***5** In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance . . .. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elk's Club luncheon, attended by the Sacramento County board of supervisors was such a meeting. (emphasis added).

Supra at 487. Likewise, in People ex rel. Difanis v. Barr, supra, the Court observed that it would 'thwart the intent of the Act' to distinguish informal gatherings from formal meetings for the purpose of defining 'meeting' as used in the Act. In short, we believe the purpose of South Carolina's Freedom of Information Act was generally to give the public the required notice of any 'meeting' as defined in the Act; regardless of whether a gathering be simply for discussion or action upon public business, or whether the gathering be designated informal or formal in nature, if the definition of 'meeting' is met, then the requisite notice of the meeting must be given. In other words, if there has been convened 'a quorum of the constituent membership of a public body whether corporal or by means of electronic equipment' and the purpose of the gathering is
to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power . . . [,]

then public notice is mandated. [4] See Appalachian Power Co v. Public Service Comm., (W.Va.), 253 S.E.2d 377, 381–382 (1979).

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Footnotes

1 The only possible exception to this would be in the context of a criminal prosecution, pursuant to the criminal penalties provided in § 30–4–110 of the Act. An argument could perhaps be made that, where criminal penalties are being sought, the well-recognized principle of strict construction of criminal laws should be adopted. See, Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors, 263 Cal. App.2d 41, 69 Cal. Reptr. 480 (1968). And it is well settled in this State that a statute which is both penal and remedial may be given a liberal construction in a civil court and yet be strictly construed in a criminal court in a prosecution for violation. McKenzie v. Peoples Baking Co., 205 S.C. 149, 31 S.E.2d 154 (1944). This is not a question which need be decided to answer your inquiry however, because you do not mention possible criminal prosecutions. We would note nevertheless that even if the FOIA were strictly construed in the context of a criminal prosecution, such would not affect the liberal construction which the Act must be given in all other settings; and there would be a good argument that the FOIA 'should be liberally construed even though it contains a penal provision.' Wolfson v. State, supra.

2 The word 'discuss' in its ordinary meaning is 'to argue by presenting the various sides of a question, to debate fully and openly . . .'. The word also means to talk 'About something in a deliberative fashion, with varying opinions offered constructively and usually, amicably, so as to settle an issue . . .'. Houman v. Mayor and Council, (N.J.), 382 A.2d 413, 425 (1977).

3 It is true that § 30–4–70(5)(c) only notes the phrase 'act upon' and does not mention the word 'discuss'. However, we do not construe this section as a limitation upon the scope of the FOIA in the context of 'social' or 'informal' meetings. First, § 30–4–70(5)(c) itself uses the word 'meeting' when speaking of a 'social meeting'; reference must thus be had to § 30–4–20(d), defining the word 'meeting' to include discussion, as well as final action. Secondly, § 30–4–70(5)(c) appears to represent merely a prohibition upon a public

body's misuse of the exceptions to open meetings as provided in subsections (1) through (4), not a delineation of substantive rights. Third, in view of the remedial purpose of the Act it would be incongruous and not in accord with the majority view to construe the Act in a more limited manner merely because the meeting was characterized as 'social' in nature; the Act must be liberally construed. See, Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors, supra. As stated above, unless the discussion stage is deemed as part of the meeting, public notice is meaningless. And it is well recognized that a word unintentionally omitted from a statute may be supplied in order to give effect to the Legislature's purpose. City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936); Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938).

4 It should be emphasized again that the purpose of the gathering must be 'to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.' The fact a casual comment regarding public business might be made at a purely social function would obviously not trigger the applicability of the Act. By the same token however, § 30–4–70(5)(c) prohibits use of the social gathering as a guise to discuss or conduct public business outside the ambit of the Act. Each case must, of course, be analyzed on its own set of facts; but, as the Court stated in Town of Palm Beach v. Gradison, 296 So.2d, supra at 477, 'When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.' It should also be remembered that only 'emergency meetings' are entitled to an automatic exemption pursuant to the notice provisions of the Act.

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