1977 S.C. Op. Atty. Gen. 45 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-45, 1977 WL 24388

Office of the Attorney General

State of South Carolina
Opinion No. 77-45
February 3, 1977

***1** The South Carolina Freedom of Information Act does not require that the public be given access to personnel files and employment applications maintained on employees of the South Carolina House of Representatives.

TO: Charles T. Ferillo, Jr.,
Executive Director
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QUESTION PRESENTED:

Does the South Carolina Freedom of Information Act require public disclosure of personnel files and employment applications for employees of the South Carolina House of Representatives?

STATUTES, CASES, ETC:

Code of Laws of South Carolina, 1962, as amended, Section 1–20, et seq;

5 U.S.C.A. § 552(b)(6);

Cooper, et al. v. Bales, et al., Memorandum of Opinion and Order, filed January 23, 1976, Richland County Court of Common Pleas;

Demian v. State Employees Grievance Committee, et al., Order issued November 24, 1975, Richland County Court of Common Pleas;

Wisher v. News-Press Co., 310 So. 2d 345 (1975).

DISCUSSION OF ISSUES:

The question has been presented as to whether or not the South Carolina Freedom of Information Act, Code Section 1–20 et seq. [hereinafter 'Act] requires public disclosure of personnel files and employment applications for employees of the South Carolina House of Representatives.

It has previously been the opinion of this Office that certain records maintained by public agencies concerning public employees would be available upon request to a member of the public, pursuant to the Act. Such information would include the annual salary and grade of such employee, but not the complete personnel file of a public employee. (See attached Opinion of May 31, 1976). It should be noted that the Federal Freedom of Information Act exempts personnel files from disclosure when such disclosure would constitute unwarranted invasion of personal privacy. See 5 U.S.C.A. § 552(b)(6).

The South Carolina Act is a relatively new piece of legislation and has been subjected to only limited analysis by the South Carolina Supreme Court. However, at least two Circuit Judges have had an opportunity to discuss the personnel records aspect of the Act, and their Orders are enlightening. It should be noted that notices of intention to appeal were given from these Orders. The appeal in Demian was abandoned, and the Cooper appeal will be argued February 10, 1977, before the South Carolina Supreme Court.

In the Order of Judge Eltzroth, signed November 24, 1973, in the case of Demian v. State Employees Grievance Committee, et al., the Act was interpreted as follows:
. . . it appears that the Legislature specifically sought to exclude personnel matters from the public record disclosure provided for in the Freedom of Information Act, when it specifically provides that executive sessions would be permitted for the purpose of discussing or considering employment, appointment, compensation, promotion, demotion, discipline, or release of an employee. It may be noted that, had the Legislature intended to include personnel matters as public records, it would not have added that exception.

***2** . . . Obviously, the authorized privacy of legitimate executive sessions recognized in § 1–20.3(b) would be defeated if a record of such executive session is made and the disclosure of the record was compelled under § 1–20.1 of the Code; I would find it abhorrent to make personnel matters and the future of those affected matter of public record.

Judge Eltzroth was reading Section 1–20.1 in pari materia with Section 1–20.3, to arrive at the conclusion that records or other writings which are the result of an executive session, or are eligible for executive session status, are not subject to public disclosure. This interpretation was later arrived at by former Chief Justice Moss in his Memorandum of Opinion and Order in Cooper, et al. v. Richland School District One, et al.

Justice Moss held:
These sections [1–20.1 and 1–20.2] must, however be read in light of Section 1–20.3, which accords a degree of confidentiality to certain subjects specifically delineated therein. . . If an item or subject is accorded executive session status under the Act, it is illogical to extend this confidential privilege and subsequently require the release of documents containing the privileged information. Section 1–20.2, dealing with access to public records must be construed in conjunction with Section 1–20.3, in order to determine the true intent and spirit of the Act. Common sense as well as proper rules of statutory construction require it.

Under these two Circuit Court decisions, a public employee's personnel file would not be a record available for public inspection under this Act.

Since an application for employment generally constitutes the initial entry in a personnel file and probably contains confidential information, such document should be considered as part of the personnel file and treated accordingly.

The South Carolina Circuit Court decisions are in harmony with the Florida District Court of Appeal. This Court in Wisher v. News-Press Publishing Company, 310 So. 2d 345, held that public policy prohibited the disclosure of personnel files of government employees, even though such records were not specifically exempted from the Florida Public Records Act. You will note that there is ‘public interest’ exception in South Carolina's Act, Section 1–20.1.

As an aside, it is to be noted that the Wisher case effectively overruled Florida Attorney General Opinions (073–212, 073–51) holding that personnel files of public employees were public records and open to general inspection.

CONCLUSION:

The South Carolina Freedom of Information Act does not require that the public be given access to personnel files and employment applications maintained on employees of the South Carolina House of Representatives.

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