ALAN WILSON
ATTORNEY GENERAL

February 11, 2016

Mr. Drew H. Davis, Esquire
General Counsel
Beaufort County Board of Education
Post Office Drawer 309
Beaufort, South Carolina 29901-0309

Dear Mr. Davis:

You have requested the opinion of this Office as to whether the Beaufort County Board of Education ("the Board") has the authority to discipline one of its own members for policy or conduct violations in executive session pursuant to Section 30-4-70(a)(1) (2007 & Supp. 2015) of the South Carolina Freedom of Information Act. Specifically, you provide as follows:

> [t]he Board currently has a policy, BCR 12: Process for Addressing Violations of Policy, which contains a progressive four (4) step process by which the Board disciplines its members for policy or conduct violations. One of the steps provides the Board will discuss, in executive session, the alleged policy or conduct violation(s) with the charged Board member. It is this provision which has raised some issue and concern.[1]

In answering your concerns, we believe it is first necessary to address the authority a county board of education has to discipline its own members. Thus, our opinion of whether the Board can (1) discipline its members and (2) if so, whether it can do so in executive session pursuant to Section 30-40-70(a)(1) of the Freedom of Information Act follows.

Law / Analysis

Disciplinary Measures

Beginning with the first step our analysis – the authority of a county board of education

[1] See BCR 12: Process for Addressing Violations of Policy § B. ("The Board and each of its members are committed to faithful compliance with the provisions of the Board's policies. In the event of a member's willful and continuing violation, the Board will seek remedy by applying any of the following measures. . . . (B.) Discussion in private session between the charged member and the full Board. In the event of additional violations by the same member, any member of the Board may request the Chair schedule a closed session discussion with the charged member. The charged member will be notified in writing by the Chair at least three workdays prior to the closed meeting of the entire Board and will be provided with a statement of the alleged violation. The closed meeting will be announced in advance and convened upon vote of the majority of the Board members in attendance in public session. The meeting may be attended by Board members and the Board's attorney.").

to discipline its own members – it has been the consistent opinion of this Office that entities created by statute, like a county board of education, can only exercise those powers expressly granted to it by statute and those powers conferred by necessary implication. See, e.g., Op. S.C. Att'y Gen., 2015 WL 1636661 (March 26, 2015); Op. S.C. Att'y Gen., 1974 WL 27574 (Jan. 4, 1974); Op. S.C. Att'y Gen., 1969 WL 15607 (June 24, 1969). In a recent opinion of this Office, we summarized South Carolina Supreme Court precedent discussing this rule of law as follows:

> the authority of a state agency or governmental entity created by statute "is limited to that granted by the legislature." Nucor Steel v. South Carolina Public Serv. Comm'n, 310 S.C. 539, 426 S.E.2d 319 (1992). "As creatures of statute, regulatory bodies. . . possess only those powers which are specifically delineated. By necessity however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged." City of Rock Hill v. South Carolina Dep't of Health and Envtl. Control, 302 S.C. 161, 165, 394 S.E.2d 327, 300 (1990) (internal citations omitted). As such, this Office has recognized on numerous occasions that governmental agencies "can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly inherently, or impliedly." Op. S.C. Att'y Gen., 1988 WL 485289 (Sept. 22, 1988).

Op. S.C. Att'y Gen., 2015 WL 1636661 (March 26, 2015).

Also, in a 1974 opinion, we discussed the authority and powers of a State Board of Education. Like the opinion referenced above, our 1974 opinion recognized that

> [g]enerally speaking, state officers, boards, commissions, and departments have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed on them. This power cannot be varied or enlarged by usage or by administrative construction. Executive and administrative officers, boards, departments, and commissions have no powers beyond those granted by express prevision or necessary implication.

Op. S.C. Att'y Gen., 1974 WL 27574 (Jan. 4, 1974) (quoting 81 C.J.S. States § 58 at 977-78) (internal quotations omitted). Our 1974 opinion went on to provide that "[a]ny reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power." Id. (quoting Piedmont and N. Ry. Co. v. Scott, 202 S.C. 207, 24 S.E.2d 353; 73 C.J.S. Public Administrative Bodies and Procedures § 50). We have also recognized that these same principles should be applied to county boards of education. See Op. S.C. Att'y Gen., 1969 WL 15607 (June 24, 1969) ("Inasmuch as the Greenville County Board of Education is a creature of statute, it may only exercise those powers which have been expressly conferred upon it and those which are necessarily incidental to its express powers") (citing 78 C.J.S. Schools and School Districts § 99 at 846).

Chapter 15 of Title 59 addresses county boards of education, with S.C. Code Ann. § 59-15-20 (2004) providing that "[t]he county board of education shall constitute an advisory body with whom the county superintendent of education shall have the right to consult when he is in doubt as to his official duty." In addition to serving in this advisory capacity to the county superintendent, county boards of education have the additional authority to

> prescribe such rules and regulations not inconsistent with the statute of law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them. This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and make a report on this hearing to the board for its determination.

S.C. Code Ann. § 59-15-40 (2004). As part of the tiered management system of the public school system of our State, both the State Board of Education and local boards of education have been given similar rule making and authority by our legislature to hold a hearing for matters in connection with their responsibilities. See S.C. Code Ann. § 59-5-70(A) (2004) ("The [State Board of Education] may, in its discretion, designate one or more of its members to conduct any hearing in connection with any responsibility of the board and make a report on any such hearing to the board for its determination"); S.C. Code Ann. § 59-19-110 (2004) ("The boards of trustees of the several school districts may prescribe such rules and regulations not inconsistent with the statute of law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them. This rule-making power shall specifically include the right, at the discretion of the board, to designate one or more of its members to conduct any hearing in connection with any responsibility of the board and to make a report on this hearing to the board for its determination").

In addition to the powers specifically granted to the county boards of education, certain county boards also have the powers vested to school district boards of trustees. See S.C. Code Ann. § 59-19-100 (2004) ("Where the county educational system operates as a unit, the county board of education or the educational governing body of the county shall have all the powers and duties of school trustees"). Pursuant to Act 977 of 1970, this appears to apply to the Beaufort County Board of Education as it operates as the governing body of the School District of Beaufort County without the existence of school district boards of trustees. See Act No. 977, 1970 S.C. Acts 2077 § 3 ("The Board of Education in Beaufort County shall ex-officio be and constitute the Board of School Trustees of the School District and is confirmed as the governing body of the School District of Beaufort County with all the powers vested by law in school district boards of trustees"). S.C. Code Ann. § 59-19-90 (2004 & Supp. 2015) enumerates the powers of school district trustees that would, in Beaufort County's instance, be devolved upon the Beaufort County Board of Education.

We do not interpret any of the powers granted to county boards of education or school district boards of trustees as expressly authorizing disciplinary measures to be taken on its own members. Your letter cites S.C. Code Ann. § 59-19-60 (2004 & Supp. 2015), authorizing county boards of education to remove school district trustees from office, as evidence that the Beaufort County Board of Education "posses[es] the power to re[gu]late their own members within the

bounds of the law." While we understand your argument, the Beaufort County Board of Education operates as the governing body of the School District of Beaufort County without school district boards of trustees. Thus, it is our opinion that legislation pertaining to removal of school district trustees would not be applicable under the governing system of the Beaufort County School District since school district boards of trustees do not exist in Beaufort County.

While our research does not show the legislature has expressly granted county boards of education or local school boards with authority to discipline its own members in any manner, we must still determine our opinion of whether a court would likely find the authority to discipline one's own members is inherent. Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997) is relevant when answering this question being that the Fourth Circuit Court of Appeals specifically addressed the power to disciple one's own member by censure and stripping the member of his committee assignments for a period of one year due to use of abusive language. We note that the public body under scrutiny in the case was the Loudoun County, Virginia Board of Supervisors ("Board of Supervisors"). Id. at 741. In counties in Virginia adopting what is known as the County Board Form of Government, the powers and duties of the county as body politic and corporate are vested in a board of county supervisors. See V.A. Code Ann. § 15.2-402. Thus, the Loudoun County Board of Supervisors discussed in Whitener appears to be akin to a county council operating in our state.

The Whitener Court affirmed the internal disciplinary measures taken by the Board of Supervisors, characterizing them as "legislative in nature." Id. at 744. It noted the authority and accompanying legislative immunity from exercising such authority " 'has [its] taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.'" Id. at 743 (quoting Tenney v. Brandhove, 341 U.S. 367, 372, 71 S.Ct 783, 786 (1951)) (modification in Whitener). After highlighting that the United States Constitution "enumerates for Congress the power, long asserted by Parliament, to 'punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member,'" the Court recognized "Americans at the founding and after understood the power to punish members as a legislative power inherent even in 'the humblest assembly of men'" and, that it is with this power that "'institutional integrity'" is preserved. Id. at 744 (quoting U.S. Const. art. I § 5, cl. 2; Joseph Story, Commentaries on the Constitution of the United States § 419; Powell v. McCormack, 395 U.S. 486, 548, 89 S.Ct. 1944 (1969)). Accordingly, the court concluded that the Board of Supervisors was authorized – acting in its legislative capacity – when it voted to discipline one of its own members and was protected by legislative immunity when doing so. Id. at 744.

In regards to legislative authority or capacity, prior opinions of this Office have stated that "as a general rule, the legislature has the power to investigate any subject with respect to which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or to perform any other act delegated to it." Op. S.C. Att'y Gen., 1986 WL 191969 (Jan. 14, 1986) (citing 81A C.J.S. States § 56). "In other words, it is a general principle of law that 'the power to investigate is an essential corollary to the power to legislate.'" Id. Consistent with the Whitener decision, we have pointed out that "this rule is also applicable to local legislative bodies such as city or county council which have been given extensive authority under Article VIII of the Constitution and the Home Rule Acts." Id. (citing § 4-9-10 et seq.; § 5-7-10 et seq.; 4 McQuillin, Municipal Corporations, § 13.05).

In prior opinions of this Office we have also recognized that certain school boards have been viewed as legislative bodies in particular instances. In an opinion written to determine whether the Pickens County School Board could constitutionally employ an opening prayer or invocation at its regularly scheduled meeting pursuant to the legislative prayer exception established by the United States Supreme Court decision in Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330 (1983), we acknowledged that some courts have afforded school boards with legislative immunity for purposes of § 1983 liability. See Op. S.C. Att'y Gen., 2013 WL 482679 (Jan. 28, 2013). One case we pointed out was Chadwell v. Lee County Sch. Bd., 457 F. Supp. 2d 690, 695 (W.D. VA. 2006), where the court held the decision of a school board to demote an employee, allegedly based on her political affiliation, was legislative in nature and therefore the board members were entitled to legislative immunity. Id. at *6. Furthermore, we highlighted Doe v. Tangipahoa Sch. Bd., 631 F. Supp. 2d 823 (E.D. La. 2009), where the court provided as follows: "[b]ecause the function of the School Board, as the body governing public schools, is more like a legislature than a public school classroom or event, and is patently a deliberative body under the law, the plaintiffs fail to persuade the court that traditional Establishment Clause principles. . . apply." Id. at *14. Thus, for purposes of whether school boards fall within the exception permitting prayer for legislative or deliberative bodies in Marsh, we concluded that "while other decisions in other circuits disagree, we believe a school district in South Carolina possesses such powers and authority as to qualify it as a "deliberative" or "legislative" body for purposes of Marsh." Id. We reaffirmed this conclusion in 2014 after considering the United States Supreme Court decision of Town of Greece v. Galloway, 134 S.Ct. 1811 (2014). Op. S.C. Att'y Gen., 2014 WL 4659412 (Sept. 3, 2014).

In addition to concluding a school board should be treated as a legislative body for purposes of application of the United States Supreme Court exception permitting deliberative or legislative bodies to employ an opening prayer at scheduled meetings, we have also recognized that the power of a county school board likely includes the authority to create its own policies and bylaws. See Op. S.C. Att'y Gen., 2007 WL 3317610 (Oct. 17, 2007). Furthermore, in an opinion concerning whether sanctions or discipline could be imposed on a fellow school board member for disclosing the proceedings and discussions held in executive session, we acknowledged

> [i]t is competent for the body to adopt its own regulations and rules of procedure when they are not prescribed by statute or charter provision. . . . In the absence of rules of procedure prescribed by municipal charter or statute or adopted by the governing body, the general parliamentary law prevails. Rules adopted by the governing body in conformity with statutory authority are as binding on it as the statute itself; and the consequences of a refusal to comply substantially with its provisions or of a violation of its inhibitions must, in reason, be the same as those of a noncompliance with, or a violation of, a requirement prescribed by statute.

Op. S.C. Att'y Gen., 1984 WL 566300 (Sept. 21, 1984) (citing 62 C.J.S. Municipal Corporations, § 400).

While we concluded adopting rules and regulations was likely appropriate, we cautioned that "[t]he "more difficult question. . . is the extent to which the individual member may be sanctioned for a violation of such a rule of procedure." Id. at *2. Due to a lack of authority that answered the questions asked, the author noted "I can only present to you the various options which may exist and discuss briefly the difficulties which each may entail. No particular option or alternative is herein endorsed." Id. Thereafter, we discussed disciplinary procedures of expulsion, suspension, and censure but questioned the effectiveness of them all if they were imposed by the school board. Id. at *2-4. In regards to the authority to expel or suspend a member, we again noted that school boards' powers are derived from statute, which include any accompanying inherent or incidental powers. Id. at *3. Specifically, we provided as follows:

> [i]t is nevertheless still questionable whether a public body, such as a school board, possesses the authority to invoke such extreme sanctions of expulsion or suspension. To [o]ur knowledge, no statute gives a school board this authority. And while there is support for the proposition that a legislative body, such as a municipal council, "has the inherent or incidental power to expel one of its own members," 56 Am.Jur.2d. Municipal Corporations, § 150, such authority is usually given only by statute or charter; moreover, a school board usually possesses only such powers as are expressly or impliedly granted to it by statute. 68 Am Jur. 2d, Schools, § 15.

Id. Therefore, due to the uncertainly of the type of discipline a school board could impose and enforce, we concluded that "the safest course in attempting to enforce such a regulation or by-law is for the board or public body to seek some form of equitable relief (i.e. mandamus, injunction or quo warranto) against a member who fails to comply." Id. at *4.

In summary of this analysis, we have concluded in prior opinions of this office that school boards should be treated as legislative bodies for certain purposes and that they also have the power to create their own policies and bylaws. However, it is also clear that entities such as county boards of education only possess such powers as are expressly or impliedly granted by statute. Thus, because no statute gives the Board authority to discipline its own members, and since we believe the Board's broad rule making powers apply only in regards to those powers expressly granted, we question the extent to which county boards of education can discipline one of its own members. Put differently, we believe a court would find any inherent authority of the Board must be derived from or be necessary in carrying out its express powers. Accordingly, without clarification from the legislature, we do not believe that the Board can exercise general disciplinary powers as an inherent power upon review of the express powers granted to it.

The questionable nature of a school board's disciplinary authority over its own members has been voiced by Attorney General opinions in other states. The Office of the Maryland Attorney General addressed whether disciplinary measures imposed by the County Board of Education on one of its members was proper after release of information discussed in executive session. Op. Md. Att'y Gen., 1980 WL 118109 (Nov. 26, 1980). The opinion concluded that the board was permitted to adopt procedural rules but distinguished that it did "not believe that an attempt to impose a duty of silence on an elected or appointed public official, enforceable by disciplinary measures, [could] be viewed as a mere matter of procedure." Id. at *2. Thus, the

opinion went on to note that "[a]ny such obligation would be a substantive 'legislative rule' –an obligation that must find its source in State law. . . . We cannot find any source in State law that would authorize the creation here of such a legislative rule." Id. However, the opinion did clarify that it was not the belief of the Office of the Maryland Attorney General "that the Board is powerless to express its disapproval of such actions." Id. Thus, it provided that while "the Board itself may not discipline one of its members –by fine, expulsion, suspension, or even 'reprimand', as the term is commonly understood, it certainly has the power to adopt a resolution that, while having no formal legal effect as a sanction, criticizes what the Board perceives to be improper conduct." Id. at *3.

Similar to the questions addressed by this opinion, the Office of the Kentucky Attorney General has discussed whether a school board member could be classified as "personnel" in order to request a closed session of the board under the Kentucky Sunshine Law. Op. Ky. Att'y Gen., 1977 WL 28294 (Aug. 15, 1977). The opinion concluded that "[s]ince a board of education has no authority to investigate or discipline or dismiss one of its members. . . we see no basis upon which a school board could go into closed session relative to one of its own members." Id.

And finally, we recognize an appellate decision issued by the Commissioner of the New York State Education Department. Appeal of George Silano from action of the Bd. of Educ. of the Sag Harbor Union of Free Sch. Dist., 33 Ed Dept Rep, Decision No. 12961, 1993 WL 13713092 (July 22, 1993). The Appeal involved a resolution issued by the Board of Education criticizing certain actions taken by a member and also censuring the member. Id. at *1. Referencing the resolution issued by the Board of Education, the Commissioner concluded as follows: "a board of education has no authority to censure or reprimand one of its members. However, a board may certainly criticize the actions of a board member for exhibiting poor judgment." Id. at *3.

These authorities provide further support of our conclusion that disciplinary power of a board of education over one of its own members is questionable without legislative authority granting such power to them. However, they also recognize that a board of education is not powerless to express its disapproval of actions of a member in violation of the board's standards, rules, or bylaws. Thus, assuming that the Board is merely criticizing certain actions of a fellow member that it does not approve of, we move to your second question of whether such discussion can be held in executive session pursuant to S.C. Code Ann. § 30-4-70(a)(1) (2007 & Supp. 2015) of the Freedom of Information Act.

Freedom of Information Act

The Freedom of Information Act ("the FOIA"), codified at S.C. Code Ann. §§ 30-4-10 et seq., was enacted with the following legislative intent in mind:

> [t]he General Assembly finds that it is vital in a democratic society that pubic business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this

> end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007 & Supp. 2015). In other words, and as the South Carolina Supreme Court has summarized, "the essential purpose of the FOIA is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

Being a statute remedial in nature, our courts recognize the FOIA "should be liberally construed to carry out its purpose." Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). Thus, it has also been recognized that any exception to the Act's applicability must be narrowly construed. Evening Post Publ'g Co. v. City of North Charleston, 363 S.E. 452, 457, 611 S.E.2d 496, 499 (2005).

Looking to the FOIA provisions specifically applicable to your question, S.C. Code Ann. § 30-4-60 (2007 & Supp. 2015) requires that "[e]very meeting of all public bodies[2] shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." The instances in which a public body may, but is not required to, conduct a closed meeting in executive session are enumerated in S.C. Code Ann. § 30-4-70 (2007 & Supp. 2015). One exemption to the open meeting requirement contained in Section 30-4-70(a)(1) (2007 & Supp. 2015) of the Code provides as follows:

> [a] public body may hold a meeting closed to the public for one or more of the following reasons:
>
> (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an *employee, a student, or a person regulated by a public body or the appointment of a person to a public body*; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of other employees or clients whose records are submitted for use at the hearing.

(emphasis added). S.C. Code Ann. § 30-4-70(b) (2007 & Supp. 2015) outlines the proper procedure to be taken if the public body chooses to enter into executive session as follows:

> [b]efore going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. . . . However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy

[2] S.C. Code Ann. § 30-4-20 (2007 & Supp. 2015) provides the definition of a "public body" for purposes of the FOIA. When addressing the FOIA, we have concluded that a school board "is unquestionably a public body." Op. S.C. Att'y Gen., 1991 WL 474744 (Feb. 27, 1991); see also Op. S.C. Att'y Gen., 2006 WL 2593081 (Aug. 11, 2006) ("Clearly, the school board would constitute a 'public body' pursuant to § 30-4-20(a)").

> the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.

This Office has consistently concluded that executive sessions should be used sparingly and that the FOIA does not require that they be employed at all should be public body choose not to do so. Op. S.C. Att'y Gen., 2002 WL 1340419 (April 26, 2002). We have also provided our opinion that:

> [t]he rule under the Freedom of Information Act is openness; the permissive reasons for holding executive sessions are few and 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 business in public.

Op. S.C. Att'y Gen., 2001 WL 957743 (July 18, 2001) (citing Op. S.C. Att'y Gen., 1994 WL 136198 (March 31, 1994).

It is with these principles in mind as well as the cardinal rule of statutory construction being to ascertain and effectuate the intent of the legislature,[3] that we must address whether a county board of education can discuss disapproval of certain actions to one of its own members in executive session pursuant to Section 30-4-70(a)(1) of the FOIA. Looking to the plain meaning of this exemption, and construing "employee, a student, or a person regulated by a public body or the appointment of a person to the public body" as referenced in this section narrowly as we are required to do, it does not appear that it would apply to the situation we have been asked to consider. This is so because we do not believe a fellow member of the Board would be considered an "employee, a student, or a person regulated by a public body" as the discussion would be directed to a member of the public body itself.

In many opinions of this Office, we have recognized that a member of a school board is a public officer. See, e.g., Op. S.C. Att'y Gen., 2015 WL 3533905 (Jan. 14, 2015); Op. S.C. Att'y Gen., Op. S.C. Att'y Gen., 1983 WL 181938 (July 8, 1983). Furthermore, in an opinion discussing whether certain public officers are also considered "employees" we have noted that "the legislative body may choose to include public officers in a definition of 'employees' found in a statute or ordinance. If such is the case, the public officer would be considered an "employee" for the limited purpose found in the legislation." Op. S.C. Att'y Gen., 1999 WL 397927 (Feb. 17, 1999) (citing 63C Am.Jur.2d Public Officers and Employees § 7 (1997)). Within the Section 30-4-70(a)(1) exemption, there is no indication that the legislature intended to include public officials within the term employee. In fact, the exception uses the term "public body" throughout. Following the canon of statutory construction that the mention of one thing implies the exclusion of another – *expressio unius est exclusion alterius*– we believe that if it was the intent of the legislature to include the public body itself within the 30-4-70(a)(1) exception, it would have expressly mentioned the same. Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578,

[3] Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 423, 425 (2009) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature").

582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.').

We also point out a prior opinion of this office where we were asked, in part, whether the public meeting exception listed in Section 30-4-70(a)(1) could be used for county council to enter into executive session to discuss county wide elected offices. Op. S.C. Att'y Gen., 2004 WL 736933 (March 10, 2004). We concluded as follows:

> [a]s a general matter, it does not appear that a discussion regarding any particular elected county official would fit any of the stated exceptions. The exception in Section 30-4-70(a)(1) may apply if the issue is related to the discipline, compensation, or promotion of a county employee or any other person who is regulated by the council. . . . However, construing these exceptions narrowly [referencing Sections 30-4-70(a)(1) and 30-4-70(a)(4)] and observing the legislative preference for public session, the instances where executive session is proper to discuss issues regarding elected county officials and their departments will be few.

Id. at *4. Therefore, our March 10, 2004 opinion also supports the conclusion that application of the 30-4-70(a)(1) exception does not include, as a general category, public officials. While there may be instances where a public official may fall within this exception, as pointed out above, it is our opinion that such instances will be few.

Finally, we point out the case of Georgetown Commc'ns, Inc. v. Williams, 290 S.C. 149, 348 S.E.2d 396 (Ct. App. 1986). Here, the Court of Appeals upheld authorization of the Georgetown County Board of Education entering into executive session to discuss a petition for the removal of the Superintendent of Education of Georgetown County.[4] Id. at 152, 348 S.E.2d at 398. The court determined that entering into executive session was permitted because "[d]iscussion concerning dismissal of an *employee* is an exemption to the requirements of the FOIA that a public body must hold public meetings." Id. (emphasis added). In addition, the court justified the board's decision to enter into closed session on S.C. Code Ann. § 30-4-40(a)(2) which permits a public body to withhold from disclosure "information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy. . . ." Id. The court noted that the board went into executive session to ascertain the basis of the request that the Superintendent be dismissed and, "after being satisfied that the transpirance [sic] of the petitioners' reasons for seeking the removal of the Superintendent would not constitute an unreasonable invasion of his privacy and, further, the petitioners' reasons were not worthy of further exploration, the Board voted to give the public a full account of what occurred." Id. at 151, 348 S.E.2d at 397.

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[4] While we do note "[t]he county superintendents of education shall be ex officio members of the county boards of education in those counties in which the county superintendent of education is elected by the people" and the Georgetown County Superintendent of Education is elected in each general election held in presidential election years, analysis in Georgetown Communications can be distinguished because the discussion concerned a petition to remove the superintendent in his role as superintendent. S.C. Code Ann. § 59-15-10 (2004); Act No. 907, 1962 S.C. Acts 2215, § 3.

We believe the court's analysis of the 30-4-70(a)(1) exception to holding public meetings together with the privacy exception, codified at Section 30-4-40(a)(2), illustrates the rationale behind the 30-4-70(a)(1) exemption, being to protect the privacy interest of the person at issue. Speaking of the personnel exception generally within an article on the Arkansas Freedom of Information Act, it was highlighted that the overall justification of the "personnel exception" is as follows:

> [t]he so-called 'personnel' exception, certainly among the most common in sunshine legislation, is justified on two grounds. First, a public employee, like his counterpart in the private sector, has privacy and reputational interests that deserve protection. Although the public employee is supported by the taxpayer and his salary is a matter of public record, he should not have to fear that his personal weaknesses will be discussed at an open meeting. Moreover, it is likely that more qualified individuals will accept government positions if, as in private employment settings, their privacy is assured. Second, it is arguable that government bureaucracies will function more efficiently if internal staffing and management decisions can be reached in private. For example, assessments of employee performance are likely to be more candid in closed sessions among higher-level agency officials.

John J. Watkins, Open Meetings Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268, 314 (1984).

Unlike the situation in Georgetown Communications, in the question you have asked us to consider, the Board would not need to meet in private session to determine if the privacy interest of the member at issue would be violated if discussed in public. This is so because the Board would of course already know the basis of the misconduct they want to discuss with the member. Should an unreasonable invasion of personal privacy be a concern, perhaps adoption of a resolution, like recommended by the Office of the Maryland Attorney General as discussed above, would be the most appropriate course of action.

Conclusion

For the reasons set forth above, we question the extent to which a county board of education can discipline its own members without legislative authority granting such power to it to do so. However, we do acknowledge that a county board of education would not be powerless to express its disapproval of actions of a member in violation of the board's standards, rules, or bylaws.

As to whether the Board can express its disapproval of the actions of a member in executive session pursuant to S.C. Code Ann. § 30-4-70(a)(1), in recognizing that the FOIA exceptions must be narrowly construed, we do not believe that it can. There is no indication that the legislature intended to include public officials within the meaning of the term "employee" to whom, in part, the 30-4-70(a)(1) exception applies. Furthermore, if it was the intent of the legislature to include the public body itself within the 30-4-70(a)(1) exception, under the

statutory canon of *expressio unius est exclusion alterius*, it is our opinion that it would have expressly done so. And finally, since the public body would know the reason it wishes to express disapproval to a member, the overarching policy reasons of preventing an unreasonable invasion of personal privacy behind the enactment of the Section 30-4-70(a)(1), as was exemplified in Georgetown Communications, would not apply.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General