ALAN WILSON
ATTORNEY GENERAL

September 12, 2016

The Honorable John L. Scott, Jr.
P.O. Box 142
Columbia, SC 29202

Dear Senator Scott:

Attorney General Alan Wilson has referred your letter dated August 23, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):
I write to you to request an opinion relating to the meeting rules of the South Carolina Department of Disabilities and Special Need (DDSN) Commission.
On August 18, 2016, the Commission adopted two sets of rules, one that applies to Commissioners and DDSN Staff and one that applies to members of the public in attendance. Of the rules applying to the Commissioners and DDSN Staff, one provision states, "No recording of meetings".

My question is whether the provisions of Section 30-4-90(c), which allow "any person in attendance" to record the meeting apply to both DDSN Commissioners and Staff, and if so, does the rule violate the provision of the Freedom of Information Act?

Law/Analysis:
As you are likely aware, the Department of Disabilities and Special Needs is a department created within the executive branch of South Carolina's government. S.C. Code § 1-30-10(A)(6). Its governing authority and duties are provided by statute in Section 1-30-10. This Office has previously opined that a county commission of the Department of Special Needs Commission County Board is an office of honor or profit. See, e.g., Ops. S.C. Att'y Gen., 2009 WL 580565 (S.C.A.G. Feb. 17, 2009) (Oconee County Board of Disabilities and Special Needs); 1995 WL 803355 (S.C.A.G. April 5, 1995) (Charleston County Disabilities and Special Needs Board); 1995 WL 67616 (S.C.A.G. Jan. 10, 1995) (Newberry County Disabilities and Special Needs Board); 1993 WL 439029 (S.C.A.G. Sept. 10, 1993) (Richland/Lexington Board of Disabilities and Special Needs). It is unclear from your letter whether you are referring to rules made by the Commission at the State or county level, but our analysis will keep both scenarios in consideration. Without knowing more about the rule disallowing recording of meetings, one could interpret it as preventing employees and commissioners of the Board from recording while acting within the scope of their employment or office. Conversely, one could interpret it as preventing an employee from recording a meeting whether acting within the scope of their employment or not. We presume from your letter you are referring to an employee or commissioner at a meeting acting within the scope of his duties as a public officer or employee of the government. However, this is a factual question beyond the scope of an opinion. This Office issues legal, not factual opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)). A court will look at the rule differently if the employee is a citizen acting on a matter of public concern than it would

if the employee is acting in an official role. See Garcetti v. Ceballos, 126 S.Ct. 1951 (U.S. 2006). Even if the rule is a prohibition only on official capacity activity of the employee, it still must have a reasonable basis for it. Again, these considerations are beyond the scope of this opinion.

Therefore, let us examine the statute. South Carolina Code Section 30-4-90 states that:

> (a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:
> (1) The date, time and place of the meeting.
> (2) The members of the public body recorded as either present or absent.
> (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.
> (4) Any other information that any member of the public body requests be included or reflected in the minutes.
>
> (b) The minutes shall be public records and shall be available within a reasonable time after the meeting except where such disclosures would be inconsistent with Section 30-4-70 of this chapter.
>
> (c) All or any part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic or video reproduction, except when a meeting is closed pursuant to Section 30-4-70 of this chapter, provided that in so recording there is no active interference with the conduct of the meeting. Provided, further, that the public body is not required to furnish recording facilities or equipment.

S.C. Code § 30-4-90 (1976 Code, as amended)(emphasis added). A public body is defined in the South Carolina Freedom of Information Act as:

> [A]ny department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known....

S.C. Code § 30-4-20(a) (1976 Code, as amended). The State and county boards of the South Carolina Department of Disabilities and Special Needs would be considered a public body under this statute. As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the General Assembly controls the literal meaning of a statute. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and

consistent with the purpose, plan and reasoning behind its making. Id. at 816. Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the General Assembly, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956)). Therefore, we will not look to other statutes to determine the meaning of "recorded by any person in attendance" but will look to a clear and unambiguous meaning. S.C. Code § 30-4-90(c). Based on a reasonable interpretation of the language, it would seem that "any person in attendance" would include members of a commission and members of a board. If the General Assembly intended to limit the Freedom of Information Act, it would have done so.

Regarding recording of meetings, this Office has previously opined that anyone in attendance may video record a State Employee Grievance Hearing as long as there is no interference with the meeting. Op. S.C. Att'y Gen., 1988 WL 485328 (S.C.A.G. October 18, 1988). This Office has also opined that S.C. Code § 30-4-90(c) authorizes the video recording of a public meeting of a public body by anyone in attendance. Op. S.C. Att'y Gen., 1988 WL 383487 (S.C.A.G. January 14, 1988). This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (S.C.A.G. March 4, 2009); 2006 WL 2849807 (S.C.A.G. September 29, 2006); 2005 WL 2250210 (S.C.A.G. September 8, 2005); 1986 WL 289899 (S.C.A.G. October 3, 1986); 1984 WL 249796 (S.C.A.G. April 9, 1984). Moreover, while the South Carolina Freedom of Information Act is not a constitutional right, this Office traditionally supports transparency in government and "when in doubt, disclose." See, e.g., Op. S.C. Att'y Gen., 2007 WL 4284629 (S.C.A.G. November 6, 2007). Moreover, the Supreme Court of South Carolina has used the intermediate standard of scrutiny in analyzing Freedom of Information Act questions and concluded:

> The language of the FOIA contains no indication that it is intended to or does distinguish between speech or that it places a greater burden on any particular message. Rather, the FOIA equally burdens all public bodies regardless of the content of their speech. Moreover, the State's purpose in enacting the FOIA, as expressed by the General Assembly, was to strengthen our democracy, a purpose unrelated to the content of the expression. Thus, we conclude the statute is content-neutral and the intermediate scrutiny standard applies.

Disabato v. S. Carolina Ass'n of Sch. Adm'rs, 404 S.C. 433, 448, 746 S.E.2d 329, 336–37 (2013). Undoubtedly the South Carolina Freedom of Information Act (S.C. Code § 30-4-10, et seq.) is designed to protect citizens. As our State Supreme Court has concluded, the "essential purpose of the FOIA to protect the public from secret government activity." Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015), reh'g denied (Oct. 29, 2015) (citing Perry v. Bullock, 409 S.C. at 141, 761 S.E.2d at 253 (2014)). See, also, Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) ("the essential purpose of the FOIA is to protect the public from secret government activity"). The Court has clearly defined the intent of the South Carolina Freedom of Information Act as protecting the public. Our Fourth Circuit Court of Appeals has stated concerning Freedom of Information Acts generally:

> In general, the FOIA exemptions are to be narrowly construed in favor of disclosure. *J.P. Stevens & Co. v. Perry,* 710 F.2d 136, 139 (4th Cir.1983). However, the act expressly recognizes that "public disclosure is not always in the public interest." *Baldrige v. Shapiro,* 455 U.S. 345, 352, 102 S.Ct. 1103, 1108, 71 L.Ed.2d 199 (1982).

Bowers v. U.S. Dep't of Justice, 930 F.2d 350, 354 (4th Cir. 1991). Since the South Carolina Freedom of Information Act authorizes recording of meetings "by any person," this Office believes a court will be reluctant to uphold such a rule preventing anyone from recording a meeting.

Conclusion:
It is for all of the above reasons we believe a court will interpret Section 30-4-90(c) of the South Carolina Freedom of Information Act to allow "any person in attendance" to record meetings open to the public, noting that the United States Supreme Court has limited the rights of government employees in official roles depending on factual circumstances not addressed herein.[1] However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[1] See Garcetti v. Ceballos, 126 S.Ct. 1951 (U.S. 2006).