



ALAN WILSON  
ATTORNEY GENERAL

June 28, 2019

The Honorable Cal Forrest  
Member  
South Carolina House of Representatives  
District No. 39  
P.O. Box 182  
Monetta, SC 29105

The Honorable Darrell Hudson  
Member  
Lexington County Council  
156 Kellers Lane  
Lexington, South Carolina 29072

Dear Representative Forrest and Mr. Hudson:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

I am writing on behalf of Lexington County Councilman Darrell Hudson, and myself for an opinion from you on the following questions:

1. Does a duly elected school board member have the right to ask for a detailed itemized statement of what expenses are being incurred by the School District?
2. Does the duly elected school board member have to use the Freedom of Information Act to request this information?
3. Does a duly elected member of the school board have to pay to get this information?
4. What is a reasonable time for this information to be delivered to the duly elected school board member?

#### Law/Analysis

1. Does a duly elected school board member have the right to ask for a detailed itemized statement of what expenses are being incurred by the School District?

It is this Office's opinion that a member of a school district board of trustees may request a detailed statement of what expenses are being incurred by the school district. In Wilson v. Preston, 378 S.C. 348, 356, 662 S.E.2d 580, 584-585 (2008), the South Carolina Supreme Court

held that a county administrator “cannot deny a council member access to county financial documents.” On the other hand, the Court also held that the administrator had discretion in how he responded to the request, and he was not required to provide the council member with the requested “financial information in a particular time frame or manner.” Id. In dissent, Justice Beatty wrote:

In my view, an elected official by virtue of the office held has the inherent right of timely access to any and all information possessed by the governmental entity that he or she is duly elected to. To hold otherwise would condone the disenfranchisement of the people the elected official represents. The denial of information would clearly hinder, if not nullify, an elected official in the performance of his duties.

378 S.C. at 361, 662 S.E.2d at 586. The majority opinion addressed Justice Beatty’s dissent by clarifying that if an administrator flatly denied access to county financial documents, “issuing a writ of mandamus [for their production would be] clearly appropriate.” 378 S.C. at 356 n.2, 662 S.E.2d at 584 n.2. Although the Justices differed on how swiftly access must be granted, both the majority and the dissenting opinions in Wilson support an elected official’s ability to access financial documents possessed by the body to which they are elected.

School district board of trustees members have a responsibility to manage a school district similar to the responsibility that a county council has for managing a county. See S.C. Code 59-19-10 (“Each school district shall be under the management and control of the board of trustees provided for in this article, subject to the supervision and orders of the county board of education.”). Although school district boards of trustees are created under separate statutory authority from county councils, a court would likely apply the holding in Wilson to an analogous situation where a school district board of trustees member requests financial documents from the school district superintendent. See Wilson, supra. In such a case, the superintendent would have discretion regarding the time frame and manner in which the financial documents are provided to a board member, but would not have discretion regarding whether to provide access to the financial information at all. See id.

2. Does the duly elected school board member have to use the Freedom of Information Act to request this information?

As is discussed more fully in the response to question one, it is this Office's opinion that a member of school district board of trustees does not need to make a request according to the S.C. FOIA for the disclosure of financial documents from the school district that they manage.

3. Does a duly elected member of the school board have to pay to get this information?

It is this Office's opinion that school district board of trustees members are not required to pay for access to financial documents of the school district that they manage. However, if a board member decides to request public records from the school district they oversee under the S.C. FOIA, the member may be subject to the fee schedule authorized under the act. The S.C. FOIA provides a public body may establish and collect fees as follows:

The public body may establish and collect fees as provided for in this section. The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records. The public body shall develop a fee schedule to be posted online. The fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request. Fees charged by a public body must be uniform for copies of the same record or document and may not exceed the prevailing commercial rate for the producing of copies. Copy charges may not apply to records that are transmitted in an electronic format. If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because

furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. A deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records.

S.C. Code Ann. § 30-4-30(B) (emphasis added). If a request for disclosure of public records is made under the S.C. FOIA, there is an exception from a public body's fee schedule for members of the General Assembly when the request is related to their legislative duties. This exception only explicitly applies to General Assembly members and was not extended to other legislative bodies by statute. However, there is an additional exception from an established fee schedule when an agency determines that a waiver or reduction is in the public interest. *Id.*<sup>1</sup> A school district may well find that furnishing information requested by a member of its board of trustees primarily benefits the general public by facilitating oversight and is in accord with the purpose of the S.C. FOIA itself. *See* S.C. Code Ann. § 30-4-15 (“[P]rovisions 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.”). In such a case, a court likely would hold a school district may provide the requested documents without charge or at a reduced charge. However, finding that a disclosure is in the public interest is discretionary on the part of the agency and the requestor might not be granted a waiver or reduction from the fee schedule.

4. What is a reasonable time for this information to be delivered to the duly elected school board member?

As is discussed above, members of a school district board of trustees may request access to the financial documents of the school district to which they are elected. If a school district has

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<sup>1</sup> S.C. Code Ann. § 30-4-30(B) employs the term “agency” to discuss how a waiver or reduction from a fee schedule may be authorized when it is determined to be in the public interest. Agency is not a defined term within the S.C. FOIA. Unlike the term public body which explicitly includes school districts, it is unclear whether agency is meant to include local governmental bodies. The S.C. FOIA often modifies agency where it is employed throughout the act. *See* S.C. Code Ann. §§ 30-4-40(A)(15) (providing an exemption for “the identity, or information tending to reveal the identity, of any individual who in good faith makes a complaint or otherwise discloses information, which alleges a violation or potential violation of law or regulation, to a state regulatory agency.”); 30-4-45(C) (“Disclosure of information pursuant to this subsection must be made only after the custodian has ascertained the person's identity by viewing photo identification issued by a federal, state, or local government agency to the person and after the person has signed a register kept for the purpose.”). Because the term “agency” is not modified in S.C. Code Ann. § 30-4-30(B), a court may well hold it applies to state bodies as well as local governmental bodies, including school districts.

an established policy regarding how its superintendent is to respond to requests from its board of trustees members, then that policy should be referred to regarding the manner and time for responding to such a request. In the absence of such a policy, it appears that the appropriate response time is a discretionary matter unless the law otherwise mandates a response within a particular time. See Wilson, 378 S.C. at 356, 662 S.E.2d at 584 (“[A] writ of mandamus cannot issue to compel the Administrator to deliver the County’s financial documents to Wilson in a particular manner or within a particular time frame.”). The S.C. FOIA is one such law that sets a detailed schedule for a public body to comply with a request for documents. Section 30-4-30(C) establishes the timeframe for a public body to make a determination regarding the public availability of a requested public record and for furnishing or making records available for inspection or copying.<sup>2</sup> If a member of a school district board of trustees requests the disclosure of public records under the S.C. FOIA, the response time is dictated by S.C. Code Ann. § 30-4-30(C).

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<sup>2</sup> Section 30-4-30(C) provides the following schedule for a public body to respond to a request for public records:

Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of the request, notify the person making the request of its determination and the reasons for it; provided, however, that if the record is more than twenty-four months old at the date the request is made, the public body has twenty days (excepting Saturdays, Sundays, and legal public holidays) of the receipt to make this notification. This determination must constitute the final opinion of the public body as to the public availability of the requested public record, however, the determination is not required to include a final decision or express an opinion as to whether specific portions of the documents or information may be subject to redaction according to exemptions provided for by Section 30-4-40 or other state or federal laws. If the request is granted, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the final determination was provided, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the final determination was provided. If a deposit as provided in subsection (B) is required by the public body, the record must be furnished or made available for inspection or copying no later than thirty calendar days from the date on which the deposit is received, unless the records are more than twenty-four months old, in which case the public body has no later than thirty-five calendar days from the date on which the deposit was received to fulfill the request. The full amount of the total cost must be paid at the time of the production of the request. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed, electronically transmitted, nor personally delivered to the person requesting the document within the time set forth by this section, the request must be considered approved as to nonexempt records or information. Exemptions from disclosure as set forth in Section 30-4-40 or by other state or federal laws are not waived by the public body’s failure to respond as set forth in this subsection. The various response, determination, and production deadlines provided by this subsection are subject to extension by written mutual agreement of the public body and the requesting party at issue, and this agreement shall not be unreasonably withheld.

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Please note that if a request is made under the S.C. FOIA for a “detailed itemized statement of what expenses are being incurred by the School District” and the document has not already been created, the S.C. FOIA would not compel the school district to create such a document. This Office’s March 5, 1996 opinion explained that the S.C. FOIA only requires providing access to public records as follows:

I would advise that access alone (for inspection or copying) of public records of a public body (assuming that the information contained in a particular record is not exempt from disclosure for some reason) is all that is required by the Freedom of Information Act. The public body is not required to create a record where the record does not otherwise exist by extracting information from other documents which are in the possession of the public body. On the other hand, the public body may create such a document for a requestor if it chooses; the fees which may be charged by the public body for doing so would be governed by §30-4-30(b).

Op. S.C. Att’y Gen., 1996 WL 190741 (March 5, 1996); see also Trask v. S.C. Dep’t of Pub. Safety, No. 2012-UP-623, 2012 WL 10864175, at \*1 (S.C. Ct. App. Nov. 21, 2012) (citing Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980) (The federal FOIA “does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.”).

Further, a court likely would hold that Wilson does not compel the creation of atypical financial documents. Wilson requested an unaudited version of a county annual financial report “immediately at the end of the fiscal year.” 378 S.C. at 355, 662 S.E.2d at 583. Instead, Wilson was given a copy of the annual financial report after the audit was complete. Id. The Wilson Court affirmed the trial court’s ruling that a writ of mandamus could not be issued to compel delivery in the format that Wilson requested. 378 S.C. at 356, 662 S.E.2d at 584. Whether a particular detailed statement of expenses is a financial document which must be created is a question of fact which is beyond the scope of this Office’s opinions. See Op. S.C. Att’y Gen., 1989 WL 508567, at \*4 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to “the province of the courts.”).

### **Conclusion**

It is this Office’s opinion that an elected official has the right to access financial documents possessed by the governmental entity that he or she is elected to oversee. Further, it

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is this Office's opinion that a member of a school district board of trustees may request a detailed statement of what expenses are being incurred by the school district. In Wilson v. Preston, 378 S.C. 348, 356, 662 S.E.2d 580, 584-585 (2008), the South Carolina Supreme Court held that a county administrator "cannot deny a council member access to county financial documents." On the other hand, the Court also held that the administrator had discretion in how he responded to the request, and he was not required to provide the council member with the requested "financial information in a particular time frame or manner." Id. A court would likely apply the holding in Wilson to an analogous situation where a school district board of trustees member requests financial documents from the school district superintendent. In such a case, the superintendent would have discretion regarding the time frame and manner in which the financial documents are provided to a board member, but would not have discretion regarding whether to provide access to the financial information at all.

Please note, however, a court likely would hold that Wilson does not compel the creation of atypical financial documents. Wilson requested an unaudited version of a county annual financial report "immediately at the end of the fiscal year." 378 S.C. at 355, 662 S.E.2d at 583. Instead, Wilson was given a copy of the annual financial report after the audit was complete. Id. The Wilson Court affirmed the trial court's ruling that a writ of mandamus could not be issued to compel delivery in the format that Wilson requested. 378 S.C. at 356, 662 S.E.2d at 584. Whether a particular detailed statement of expenses is a financial document which must be created is a question of fact which is beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 1989 WL 508567, at \*4 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts.").

Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General