ALAN WILSON
ATTORNEY GENERAL

January 11, 2021

The Honorable Shannon S. Erickson, Member
South Carolina House of Representatives
District No. 124
320-C Blatt Building
Columbia, SC 29201

Dear Representative Erickson:

Attorney General Alan Wilson has referred your letter to the Opinions section. The request letter states the following:

> As a member of the South Carolina House of Representatives, I am seeking an opinion as to the applicability of the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, *et seq.* as it is being applied by boards and commissions at the South Carolina Department of Labor, Licensing and Regulation ("SCLLR"). More specifically, practicing Certified Public Accountants and others who work with the profession South Carolina citizens are being told that it is inconsistent with the spirit of FOIA to speak to individual members of the Board of Accountancy (the "Board") unless the communications take place when a quorum of the Board is meeting.
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> In support of its position, SCLLR relies on the following statutory provisions:
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> Pursuant to Title 30, Chapter 10, the Board of Accountancy is a "public body" as FOIA is applicable to "any state board [or] commission." S.C. Code Ann. § 30-4-20(a). "Every meeting of all public bodies shall be open to the public. . . ." *Id.* at § 30-4-60. The business of a board or commission is conducted during a "meeting" that "means the convening of a quorum of the constituent membership of a public body . . . to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." *Id.* at § 30-4-20(d). "Quorum" is defined as "a simple majority of the constituent membership of a public body." *Id.* at § 30-4-20(e). Based on these definitions contained in FOIA, SCLLR states that a South

Carolina citizen talking to an individual member of a board or commission outside of a regularly scheduled, or special called meeting, is violative of FOIA.

LLR has also referenced a 1974 AG's opinion that I believe is not applicable. The inquiry in that instance involved whether multiple Board members (public officials) should meet privately to discuss pending issues even if the group constitutes less than a quorum. It seems the AG opinion concluded that it was not advisable to meet privately however even then it stopped short of saying meeting in private violated the FOIA. Though again, that is not the question I am asking here. I am focused on the ability of a non-board member being able to have a conversation with a board member outside of the official board meeting.

The purpose of FOIA is to ensure the work of government is transparent, but this must be balanced concurrently with a citizen's First Amendment right under the United States Constitution to speak with public officials and public members. In the course of developing legislation, members of the General Assembly talk to various constituents outside of the entire body of the either the House or the Senate. It is clear to members of the General Assembly that we, as individuals, cannot bind the entire body to a specific action as this would violate the S.C. Constitution which delineates the exact process for legislative enactment. In the same way, South Carolina citizens and organizations should have the same First Amendment freedom to speak with individual members of a board or commission. No individual member of a board or commission can bind his or her respective body, but that should not preclude the individual member from speaking with an individual citizen or constituent group.

I am not talking about "lobbying" the LLR BOA or any other LLR Board. My understanding of Section 2-17-10, which defines lobbying and lobbyist, makes it clear that lobbying as related to a public official on Board is limited to "covered agency actions" (2-17-10(2)) which is simply the development and promulgation of regulations. The issue here is not related to the promulgation of regulations but general conversation about matters affecting the profession. Furthermore, mere informational communications are not lobbying. A citizen merely seeking to communicate with a member of a board or commission is not considered a lobbyist because he or she is not seeking any official action by the public member, rather the discussions are informational. Pursuant to S.C. Code Ann. § 2-17-10(13)(a), "[l]obbyist does <u>not</u> include: (a) an individual who receives no compensation to engage in lobbying and who expresses a personal opinion on legislation, covered gubernatorial actions, or covered agency actions to any public official or employee." (emphasis added).

> I fully recognize the distinction between informational communications about policy or procedural matters and matters of a quasi-judicial nature. There is an important distinction between communication with an individual member of a board or commission regarding routine matters and those disciplinary matters when a board sits in a quasi-judicial role to "conduct hearings on alleged violations of [Title 40, Chapter 2] and regulations promulgated under [Title 40, Chapter 2]." S.C. Code Ann. § 40-2-70(7). To be sure, "[a]ll investigations, inquiries, and proceedings undertaken pursuant to [Title 40, Chapter 2] are confidential, except as provided for." *Id.* at § 40-2-90(C). I believe this statutory prohibition against communications with a board or commission member while serving in a quasi-judicial role is important, and I do not question this prohibition against communications.
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> Therefore, I am requesting an opinion on the following question: Does the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, *et seq.* preclude a South Carolina citizen from talking to a member of a board or commission about non-disciplinary matters that may come before the board or commission outside of a meeting of the respective board or commission? I believe the advice being promulgated by the SCLLR to boards and/or commissions is inconsistent with the FOIA and rights guaranteed to all citizens under the First Amendment.

Law/Analysis

It is this Office's opinion that the S.C. FOIA does not limit a citizen's ability to speak with a member of a public body solely to when the public body holds open meetings. The General Assembly expressed the purpose of the S.C. FOIA as follows:

> The General Assembly finds that it is vital in a democratic society that public 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 (emphasis added). The S.C. FOIA addresses the goal of providing access to both public documents, S.C. Code §§ 30-4-30 to -55, and meetings, S.C. Code §§ 30-4-60 to -90, and also establishes penalties for violations of those statutes, S.C. Code §§ 30-4-100, -110. This Office is not aware of a decision of our state courts that interprets the S.C. FOIA to preclude the public from addressing a member of a public body. Nothing in the text of the S.C.

FOIA suggests the General Assembly intended to limit the public's ability to petition members of public bodies. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will.").

As your letter notes, construing the S.C. FOIA to limit citizens from petitioning their government outside of a meeting of a public body would raise serious First Amendment concerns. See Jay Alan Sekulow & Erik M. Zimmerman, Weeding Them Out by the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy, 19 Stan. L. & Pol'y Rev. 164, 171-72 (2008) ("Laws that restrict the right to petition often implicate the other guarantees of the First Amendment ...").[1] The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment makes this prohibition applicable to the State of South Carolina. See Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States."). The South Carolina Constitution affords similar protections: "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances." S.C. Const. Art. I, § 2. The United States Supreme Court has described these rights "to assemble peaceably and to petition for a redress of grievances" as "the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222, (1967). Therefore, again, it is this Office's opinion that the S.C. FOIA does not limit a citizen's ability to speak with a member of a public body solely to when the public body holds open meetings.

Conclusion

It is this Office's opinion that the S.C. FOIA does not limit a citizen's ability to speak with a member of a public body solely to when the public body holds open meetings. The letter describes certain situations where it is inappropriate for the public to address members of an administrative body on certain topics outside of an open meeting; particularly when the body is acting in a quasi-judicial capacity, promulgating regulations, or when required by lobbying statutes. See S.C. Code §§ 2-17-05 *et seq.* (providing for the regulation of lobbyists and lobbying). While there are situations where limiting public interaction with members of a public body would

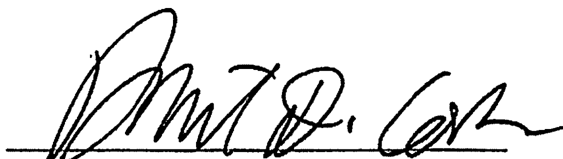
[1] In fact, this Office has previously opined that the S.C. FOIA "does not specifically address public comments," and, as a result, there is no "per se right to speak at a public meeting under FOIA." Op. S.C. Att'y Gen., 2019 WL 5669045, at 5 (October 17, 2019). An interpretation of the S.C. FOIA that limits the public's ability to address members of a public body to an open meeting while, at the same time, acknowledging the act does not explicitly provide for comment would raise even greater concerns.

be appropriate or even legally required, the S.C. FOIA is not the legal authority for such a prohibition. See, e.g., Ross v. Med. Univ. of S.C., 328 S.C. 51, 71, 492 S.E.2d 62, 73 (1997) (discussing the Administrative Procedure Act's prohibition on *ex parte* communications, S.C. Code § 1-23-360, and noting criminal sanctions may be imposed for violations thereof).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General