ALAN WILSON
ATTORNEY GENERAL

February 18, 2021

Emily H. Farr, Director
South Carolina Department of Labor, Licensing and Regulation
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Director Farr:

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

> On behalf of the South Carolina Department of Labor, Licensing and Regulation, I respectfully request an advisory opinion concerning whether the examples presented below would violate the Freedom of Information Act (FOIA). The first two examples raise concerns of the open meeting requirement of FOIA, and the third example raises the question of what kinds of limitations there may be on communications with individual members of a professional licensing board.
>
> Example 1:
> A member of the public sends an email to all members of a professional licensing board regarding a matter over which the board has advisory power. Members of the board "reply all" and begin to provide input on the matter through email correspondence.
>
> Example 2:
> An employee of the agency sends an email to all members of a professional licensing board seeking to ascertain a mutually agreeable date for the board members to convene for a board meeting. Board members "reply all" to the employee with dates of availability.
>
> Example 3:
> A member of the public or a professional association communicates with an individual member of the board, in his or her capacity as a board member, seeking the board member's input or opinion over a matter within the board's jurisdiction

> and control or otherwise providing information on a matter within the board's jurisdiction and control outside of an open meeting.
> ...

Law/Analysis

It is this Office's opinion that a court may well hold an email chain in which at least a quorum of a public body's membership discusses or takes action upon a matter over which the public body has supervision, control, jurisdiction or advisory power constitutes a "meeting" according to the S.C. Freedom of Information Act ("S.C. FOIA"). S.C. Code § 30-4-20(d). However, as our state appellate courts have not issued an opinion addressing whether emails can constitute a meeting, this conclusion is not free from doubt. Courts in several other states that have analyzed the issue hold emails can constitute meetings according to the open-meetings or sunshine laws adopted in their respective jurisdictions. Further, opinions issued by the attorneys general in other states similarly find that emails and other electronic communications may constitute meetings in certain circumstances. While these authorities are not binding precedent in this state and are based on the law adopted in their respective jurisdictions, their reasoning is persuasive and broadly consistent with the statutory scheme adopted in the S.C. FOIA.

Because we have not found a decision from our state courts that considers whether emails can constitute a meeting, this opinion will examine the language of the S.C. FOIA according to the rules of statutory construction to ascertain the intent of the General Assembly. The primary rule of statutory construction is to "ascertain and give effect to the intent of the legislature." Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citations omitted). The South Carolina Supreme Court has held that when the meaning of a statute is clear on its face, "then the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) (citations omitted) (internal quotations omitted); see also Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that 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."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). The S.C. FOIA explicitly states the General Assembly's findings and purpose as follows:

> [I]t 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 § 30-4-15. Our state courts have repeatedly stated that 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); see also Glassmeyer v. City of Columbia, 414 S.C. 213, 219, 777 S.E.2d 835, 839 (Ct. App. 2015). To that end, our courts have held the S.C. FOIA is "remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864–65 (2001). In light of the S.C. FOIA's mandate of liberal construction in favor of access, this Office's policy has long favored the disclosure of public records and access to public meetings. See 1988 S.C. Op. Att'y Gen. 131 (May 26, 1988) ("This is consistent with the basic principle and the policy of this Office that the FOIA should always be liberally construed.... Any doubt should always be resolved in favor of disclosure."). With these principles in mind, this opinion next addresses relevant portions of the S.C. FOIA to determine legislative intent.

"Meeting" is statutorily defined within the S.C. FOIA as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code § 30-4-20(d) (emphasis added). The South Carolina Supreme Court has stressed that this definition is "not limited to instances where action is taken" but also includes discussions of matters "over which the public body has supervision, control, jurisdiction or advisory power." Lambries v. Saluda Cty. Council, 409 S.C. 1, 14, 760 S.E.2d 785, 792 (2014). The S.C. FOIA requires that "[e]very meeting of all public bodies shall be open to the public unless closed" according the provisions of the Act. S.C. Code § 30-4-60. In addition to this requirement that meetings be open to the public, the Act also prohibits using a "chance meeting, social meeting, or electronic communication ... in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code § 30-4-70(c).

This Office's opinions have recognized that, absent a requirement that a specific public body meet in a particular physical location, the S.C. FOIA allows public bodies to hold meetings with members attending remotely via electronic equipment. See Op. S.C. Att'y Gen., 2020 WL 2266981 (April 27, 2020). Although these opinions have historically considered how members of a public body could participate in a meeting via teleconference, we have recently recognized other remote meeting technologies that similarly allow members to participate remotely and permit public access.

> While our opinions namely address meetings over conference call, there have been advancements in technology that allow meeting to be conducted with video via the internet, which may satisfy the meeting requirement as well. Regardless of the means used to conduct the meeting, we again caution that other aspects of FOIA, including the notice requirements under section 30-4-80 of the South Carolina Code (Supp. 2019), must be met if a meeting is conducted by means of electronic equipment.

Id. In fact, the Governor's March 17, 2020 Executive Order specifically directed state and local governmental bodies to "utilize any available technology or other reasonable procedures to conduct such meetings and accommodate public participation via virtual or other remote or alternate means." Exec. Order No. 2020-10, § 5 (March 17, 2020) (emphasis added). That is to say, there has been historical acknowledgement that members of a public body can participate in a meeting by using electronic equipment, such as conference calls, and that recently we recognized a broader range of technologies that can be used to meet remotely.

The questions raised in the request letter presents a related issue of whether a specific technology, email, could constitute a "meeting" when used by members of a public body. To answer this question, according to the rules of statutory construction, the words of the statute must first be examined according to their plain and ordinary meaning to ascertain the intent of the General Assembly. Catawba Indian Tribe of S.C., supra. Again, the S.C. FOIA defines "meeting" as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code § 30-4-20(d). The first scenario presented in the letter contains many of the elements of statutory definition; namely, the membership of a public body and a discussion of a topic over which the public body has advisory power. However, it is not clear whether a court would find such an email chain demonstrates the additional element of "the convening of a quorum."

Courts and Attorneys General that have examined how email communication is treated under their respective open-meetings or sunshine laws observe that the critical consideration is "how the email is used." Hill v. Fairfax Cty. Sch. Bd., 284 Va. 306, 311–12, 727 S.E.2d 75, 78-79 (2012). For instance, Beck v. Shelton, 267 Va. 482, 593 S.E.2d 195 (2004), the earliest case decided by a state's supreme court addressing this issue, explained that email can be used in much the same manner as sending an office memorandum or, at the other extreme, to actively engage in discussions.

> Indisputably, the use of computers for textual communication has become commonplace around the world. It can involve communication that is functionally similar to a letter sent by ordinary mail, courier, or facsimile transmission. In this

> respect, there may be significant delay before the communication is received and additional delay in response. However, computers can be utilized to exchange text in the nature of a discussion, potentially involving multiple participants, in what are euphemistically called "chat rooms" or by "instant messaging." In these forms, computer generated communication is virtually simultaneous.

267 Va. at 489, 593 S.E.2d at 198. More recently, in Hill v. Fairfax Cty. Sch. Bd., 284 Va. 306, 727 S.E.2d 75 (2012), the Supreme Court of Virginia reaffirmed Beck and noted newer electronic communication technologies present essentially the same issue under FOIA laws as email:

> In the intervening eight years between Beck and the present case, information technology has advanced even further. Real-time audio and visual communications over Internet-connected computers between two, three, or even more parties is now commonplace. Moreover, the increased prevalence of "smartphones" and other mobile Internet-connected devices has increased both the ability to access all forms of electronic communication and the rapidity with which a response can be sent. Nonetheless, the inquiry to be made by the trier of fact remains the same as set forth in Beck, which is whether a series of electronic communications of whatever type constitutes a meeting of a public body for purposes of applying the FOIA.

284 Va. at 311–12, 727 S.E.2d at 78-79; see also M4 Holdings, LLC v. Lake Harmony Estates Prop. Owners' Ass'n, 237 A.3d 1208, 1220 (Pa. Commw. Ct. 2020) (discussing the variety of "online technologies and communications equipment permitting ... simultaneous contemporaneous communication."). The following cases demonstrate how courts have evaluated whether an email exchange constitutes a meeting.

In Wood v. Battle Ground School District, 107 Wash. App. 550, 27 P.3d 1208 (2001), the Court of Appeals of Washington held that under some circumstances email communications may constitute a "meeting" according to Washington State's Open Public Meetings Act ("OPMA"). The Wood opinion explained that the OPMA defines "meeting" as "meeting at which action is taken." Id. at 562, 27 P.3d at 1216. "Action" is further defined to include "receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." Id. (emphasis added). The Court, in concluding an exchange of emails can constitute a meeting, emphasized the OPMA contains a directive to liberally construe its terms. Id.

> Thus, in light of the OPMA's broad definition of "meeting" and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a "meeting." In doing so, we also recognize the need for balance between the right of the public to have its

> business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a "meeting."

Id. at 566, 27 P.3d at 1218. In contrast, the Court held "the active exchange of information and opinions in these e-mails ... suggests a collective intent to deliberate and/or to discuss Board business." Id. at 566, 27 P.3d at 1218. The Supreme Court of Washington subsequently affirmed Wood and additionally highlighted that active participation in an email exchange can be sufficient to demonstrate a public body's intent to meet.

> Consequently, and as our courts have held, members of a governing body "must *collectively intend to meet* to transact the governing body's official business" for their communications to constitute a meeting. Wood, 107 Wn. App. at 565 (emphasis added) (citing 1971 Op. Att'y Gen. No. 33, at 19). As the Court of Appeals correctly held, the passive receipt of e-mails and other one-way forms of communication does not, by itself, amount to participation in a meeting because such passive receipt of information does not demonstrate the necessary intent to meet.

Citizens All. for Prop. Rights Legal Fund v. San Juan Cty., 184 Wash. 2d 428, 443–44, 359 P.3d 753, 761 (2015).

Similarly, in Beck v. Shelton, supra, the Supreme Court of Virginia held that email exchanges between members of a public body could constitute a "meeting" under the Virginia FOIA. The Virginia FOIA defines "meeting" to include "work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2–3708, as a body or entity, or as an informal assemblage ..." 267 Va. at 490, 593 S.E.2d at 199 (emphasis added).

> The term "assemble" means "to bring together" and comes from the Latin *simul,* meaning "together, at the same time." *Webster's Third New International Dictionary* 131 (1993). The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a "chat room" or as "instant messaging," it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission. ... [T]he key difference between permitted use of electronic communication, such as e-mail, outside the notice and open meeting requirements of FOIA, and those that constitute a "meeting" under FOIA, is the feature of simultaneity inherent in the term "assemblage."

Id. at 490–91, 593 S.E.2d at 199; see also Hill v. Fairfax Cty. Sch. Bd., 83 Va. Cir. 172 (2011), aff'd, 284 Va. 306, 727 S.E.2d 75 (2012) (holding that emails which "conveyed information unilaterally, in the manner of an office memorandum" did not constitute a meeting because "there was no evidence of a collective intent ... to move toward a decision."). In a subsequent opinion, the Court explained that "the dispositive inquiry to be made by the trier of fact is 'how the e-mail is used.'" Hill v. Fairfax Cty. Sch. Bd., 284 Va. 306, 311–12, 727 S.E.2d 75, 78-79 (2012).

Finally, a Louisiana Attorney General opinion also concluded emails between members of a public body could constitute a meeting under the Louisiana FOIA. La. Att'y Gen. Op. No. 12-0177 (Oct. 11, 2012). The Louisiana FOIA's statutory definition of "meeting" is the most similar to that in the S.C. FOIA of those examined in this opinion. S.C. Code § 30-4-20(d). It defines a "meeting" as:

> the convening of quorum of a public body to deliberate or act on a matter over which the public body has supervision, control, jurisdiction, or advisory power. It shall also mean the convening of a quorum of a public body by the public body or by another public official to receive information regarding a matter over which the public body has supervision, control, jurisdiction, or advisory power.

Id. at *2 (emphasis added). Both the Louisiana statute and S.C. Code § 30-4-20(d) share the common element of "the convening of a quorum" of a public body as well as the comparable language of "to deliberate or act on a matter over which the public body has supervision, control, jurisdiction, or advisory power" versus "to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code § 30-4-20(d). Please note that the definition in La. R.S. 42:13(A)(1) is broader because it also encompasses "receiv[ing] information regarding a matter over which the public body has supervision, control, jurisdiction, or advisory power."

The opinion focused primarily on construing the legislative intent behind the language "the convening of quorum."

> The applicable laws do not define "convene." "Convene" is defined as "[t]o call together; to cause to assemble." *Black's Law Dictionary* 355 (8th ed. 2004). Another definition specifies "to come together in a body." convene. (2008). *Merriam-Webster Online Dictionary.*

> Whether or not a quorum of the public body could be said to be "convening" for the purposes of the Open Meetings Law requires an assessment of the particular facts relevant to the particular situation, taking into account the instruction to interpret the Open Meetings Law liberally, and the public policy underlying such a body of law.

Id. at *2 (footnotes omitted). The opinion reasoned that to determine whether the membership has assembled as a body by corresponding with email, one must conduct a fact specific inquiry into the nature of the exchange.

> In determining whether or not a particular electronic exchange of information runs afoul of the Open Meetings Law a court would likely give close consideration to the nature of the communication, i.e., whether the communication encourages further discussion or whether it merely seems to be passing along information, as well as the number of individuals from a public body involved in the e-mail chain. Another important aspect to note about communicating electronically is that a public official cannot control what is e-mailed or texted to him or her, only the response to such a communication. In general, there is no indication of an immediate violation upon a simply transmittal of information from a constituent to a public official, a public official to another public official, or a member of the staff to all members of a public body. It is the opinion of this office that the mere passing along of information does not seem to invoke a "convening" of a public body for purposes of the Open Meetings Law. A court would likely take into consideration a public official's response to such a communication, what the actual response is and to whom a response is conveyed....
>
> Therefore, in light of the above, ... whether or not the members could be said to be convening requires a fact specific inquiry into the particular exchange of information.

Id. at *4.

In consideration of the authorities discussed above, it is this Office's opinion that our state courts would likely hold an email chain in which a quorum of a public body's membership discusses or takes action upon a matter over which the public body has supervision, control, jurisdiction or advisory power constitutes a "meeting" according to the S.C. FOIA. The determination of whether such an email exchange constitutes a meeting will likely require a fact dependent inquiry regarding whether a quorum has "conven[ed]." S.C. Code § 30-4-20(d). As the

term "convening" is not defined, our state courts would likely discern the General Assembly's intent by interpreting it according to its plain and ordinary meaning. Catawba Indian Tribe of S.C., supra. *Black's Law Dictionary* defines "convene" to mean "[t]o come together usu[ally] for an official or public purpose; assemble formally." CONVENE, *Black's Law Dictionary* (11th ed. 2019); see also American Heritage College Dictionary 304 (3d. ed. 1993) ("convene- to come together usu[ally] for an official or public purpose; assemble formally."). The language "convening of a quorum" suggests the General Assembly intended that a public body assemble deliberately. S.C. Code § 30-4-20(d). When members of a public body use email to actively engage in discussion of a matter within the body's jurisdiction, a court may well find an intention to come together and thereby satisfy the element of convening. In contrast, a court would likely hold passive receipt of email by itself is insufficient to establish an intent to deliberately assemble.

Please note that our courts would also likely consider the "simultaneity" of participation in an email exchange. See Beck, supra (holding that an email chain with the shortest interval between responses of four hours and the longest period of over two days was "the functional equivalent of letter communication" and did not constitute a meeting). The South Carolina Court of Appeals recently issued a related opinion addressing an attempt to split the membership of a public body into smaller groups to receive information and discuss issues at workshops in order to avoid having a quorum. Croft as Tr. of James A. Croft Tr. v. Town of Summerville, 428 S.C. 576, 837 S.E.2d 219 (Ct. App. 2019), reh'g denied (Jan. 24, 2020), cert. granted (Aug. 10, 2020). In Croft, the Town of Summerville Board of Architectural Review (the "Board") met with a developer regarding a project that was under review by the Board. Id. A town employee arranged for Board members to meet with the developer in staggered workshops.

> In July 2014, the Developer held a series of "workshops" with members of the Board to discuss the Project. In an email to the Board, a Town employee reminded members that two members would meet with the Developer at a time so there would be "no possibility of it looking like a quorum." In December 2014, the Developer held workshops with three Board members at a time. The Town employee again reminded Board members, "To avoid any possibility of a quorum (as this is not a public meeting), please stay within your agreed time frame."

428 S.C. at 592, 837 S.E.2d at 227–28. The Court acknowledged "the problematic nature" of the emails and stressed that "'workshops' should not be used to circumvent FOIA requirements." 428 S.C. at 592, 837 S.E.2d at 228. Even so, the Court concluded that the workshops did not constitute a "meeting" under the S.C. FOIA because, as defined, it "specifically requires the presence of a quorum." 428 S.C. at 593, 837 S.E.2d at 228. Because the Board members were divided into smaller groups, under a strict reading of the statute, the Court held there was no evidence a quorum

was present during the workshops. Id. Further, the Court held that the workshops did not violate the prohibition on "chance meeting, social meeting, or electronic communication ... used in circumvention of the spirit of requirements of [the S.C. FOIA]" because the Board "did not 'act upon' the matter of the Project" during the workshops. Id. (discussing S.C. Code § 30-4-70(c)).

This Office disagrees with the conclusion in Croft, and instead finds that the General Assembly did not intend the S.C. FOIA to require such a formulaic construction of quorum requirements and the prohibition of violations of the open meeting requirements. Other jurisdictions have rejected such a strict interpretation of quorum requirements in their state open meeting laws. An Arizona Attorney General opinion rejected this specific practice of splitting the membership of a public body into smaller units to avoid constituting a quorum under the Arizona Open Meeting Law ("OML"). 2005 Ariz. Op. Att'y Gen. No. I05-004 (July 25, 2005).

> The OML does not specifically address whether all members of the body must participate simultaneously to constitute a "gathering" or meeting. However, the requirement that the OML be construed in favor of open and public meetings leads to the conclusion that simultaneous interaction is not required for a "meeting" or "gathering" within the OML. "Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions ..... **Splintering** the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that is or may be presented to the public body for a decision." Arizona Agency Handbook § 7.5.2. (Ariz. Att'y Gen. 2001). Thus, even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a "meeting." See Del Papa v. Board of Regents, 114 Nev. 388, 393, 956 P. 2d 770, 774 (1998) (rejecting the argument that a meeting did not occur because the board members were not together at the same time and place); Roberts v. City of Palmdale, 20 Cal. Rptr. 2d 330, 337, 853 P. 2d 496, 503 (1993) ("[A] concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.").

Id. at *2 (emphasis added) (footnotes omitted). Although this Office has not identified an opinion issued by our state courts rejecting this practice, the South Carolina Supreme Court may provide clarification on this issue as it has granted certiorari to address Croft.

Our state courts and this Office have repeatedly emphasized that the S.C. FOIA is a remedial statute and "should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc., supra. The Act itself states that its provisions should be construed "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 ... meetings." S.C. Code § 30-4-15; see also Bellamy, supra ("[T]he essential purpose of the FOIA is to protect the public from secret government activity."). Thus, a strict interpretation of the Act's

quorum requirement that would limit public access to the activities of public bodies by gamesmanship is antithetical to the stated purposes of the S.C. FOIA. It is this Office's opinion that, as used in the S.C. FOIA, "quorum" should be broadly construed to include instances where the membership of a public body purposefully divides itself into smaller groups, uses separate email chains, or engages a combination of technologies to avoid constituting a quorum and open meeting requirements. Alternatively, it is this Office's opinion that a court may well hold that each of these groups is a "public body" as the S.C. FOIA defines the term to include "committees, subcommittees, advisory committees, and the like of any such body by whatever name known." S.C. Code § 30-4-20(a). Such a construction would conform with the directive of liberal construction in favor of public access to meetings and avoid gamesmanship in circumvention of the spirit of the S.C. FOIA.

Conclusion

In conclusion, it is this Office's opinion that a "meeting," as defined in the S.C. FOIA, can occur when members of a public body use email to communication amongst themselves if the correspondence demonstrates a quorum of the body intends to convene "to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code § 30-4-20(d). As is discussed more fully above, this Office construes "convening of a quorum of the constituent membership of a public body" to mean the coming together or assembling of a public body for a specific purpose. CONVENE, Black's Law Dictionary (11th ed. 2019). Whether a quorum of the constituent membership of a public body has been convened will necessarily involve factual determinations beyond the scope of this Office's opinions. Some of the factors that a court may consider include whether there is an active exchange of information or mere passive receipt, the number or responses, the time between responses, and whether at least a quorum of a public body is included in the discussion. This Office cautions, however, that the provisions of the S.C. FOIA are interpreted broadly to permit citizens to be advised regarding the performance of public officials and in the formulation of public policy. See Bellamy, supra; S.C. Code § 30-4-15. Therefore, this Office warns public bodies against relying on a rigid interpretation of the term "meeting" to avoid open meeting requirements and against using email to obscure whether a meeting has occurred. S.C. Code § 30-4-70(c).

The request letter describes three examples in which email is used by members of a professional licensing board. In the first example, email is sent by one member to all members, members "reply all," and provide input on a matter over which the board has advisory power. A court may well hold such an exchange constitutes a meeting because this suggests an intent to actively exchange information and deliberate.

In the second example, an agency employee sends email to all members of a board regarding scheduling a meeting and members "reply all" to the employee with dates of availability. A court likely would not find a "meeting" has occurred. Even though a quorum of the board's members are copied on the email and all members receive replies, the hypothetical does not suggest an intent on the part of the board members to discuss the matter with each other. Moreover, the matter that is actually discussed is logistical, rather than a matter over which the board has advisory power.

Finally, in the third example a member of the public communicates with a single member of the board about a matter within the board's jurisdiction. This would not be a "meeting" as defined by the S.C. FOIA because only one member is addressed rather than a quorum. Additionally, there is no indication that the member intends to bring the matter up for discussion with other members of the board or otherwise act on the matter. If such a communication is in writing or otherwise recorded via video or audio, it would likely be a "public record" of the board and may be inspected and disclosed under S.C. Code § 30-4-30. This example alludes to another concern that the communication with the board member may be an *ex parte* communication. *Ex parte* communications with agency members and employees are prohibited in contested cases by the Administrative Procedures Act. See S.C. Code § 1-23-360; see also 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 and noting criminal sanctions may be imposed for violations thereof). Certainly, members of a public body should consult with the body's attorney when they have concerns about the appropriateness of communications.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General