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ATTORNEY GENERAL

March 15, 2021

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Dear Ms. Ward:

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

The South Carolina Freedom of Information Act provides in Section 30-4-30(A)(1) persons a right of access to public records stating:

A person has a right to inspect, copy or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access.

This right of access is triggered by a written request for records. S.C. Code Ann. § 30-4-30(C). No particular form for a written request is established by the Freedom of Information Act. Beaufort County requires an affidavit attesting that the specific FOIA request is not for the purposes of obtaining information for commercial solicitation. Beaufort County takes the position that it is a reasonable measure to require an affidavit be executed by the requester prior to documents being released. This affidavit is required when a FOIA request includes, but is not limited to, extensive tax records, housing records, or records pertaining to a large number of citizens in the County. Being that "reasonable measure" is not defined by FOIA, the County relies on provisions of the Family Privacy Act to support the affidavit requirement, specifically Sections 30-2-50(B) and (C) which provide:

(B) Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records

pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited, [emphasis supplied]

(C) All state agencies, local governments, and political subdivisions of the State shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation, [emphasis supplied]

Persons who knowingly violate the "no commercial solicitation" prohibition are subject to criminal prosecution, and upon conviction may be fined, imprisoned, or both. S.C. Code Ann. § 30-2-50(D).

The County has received objection to the execution of the required affidavit. Specifically, the execution of an affidavit requires a person to engage the services of a Notary Public, and potentially burdens a citizen's right of access to public records in terms of time and expense. Additionally, there is concern that criminal prosecution is available in specified circumstances. For these reasons, the County is inquiring whether an affidavit requirement exceeds the authority granted to governmental entities under the Freedom of Information Act and the Family Privacy Protection Act?

If a governmental entity cannot condition access to public records on the execution of an affidavit, may a governmental entity satisfy its notice and reasonable measures duty by specifying when the records subject to the Family Privacy Protection Act are produced that they may not be used for commercial solicitation?

#### Law/Analysis

It is this Office's opinion that a court likely would hold the S.C. Freedom of Information Act ("S.C. FOIA"), S.C. Code § 30-4-10 *et seq.*, does not authorize a public body to require that a requestor provide an affidavit before it furnishes public records. However, as is discussed more fully below, this Office's prior opinion found ambiguity in the directives regarding the protection of personal information in the Family Privacy Protection Act ("FPPA"), S.C. Code § 30-2-10 *et seq.* See Op. S.C. Att'y Gen., 2020 WL 4730382, at 2 (August 3, 2020). While the directive to "take reasonable measures" to protect personal information is subject to interpretation, this Office has not found support to conclude the General Assembly intended this directive to authorize affidavits as a precondition to comply with a public records request. S.C. Code § 30-2-50(C).

It is unclear what mechanism the county used to adopt its affidavit requirement. However, even assuming that the affidavit requirement was adopted by ordinance, the requirement must still be “consistent with the Constitution and the general law of the State.” Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 361, 660 S.E.2d 264, 267 (2008). To evaluate whether the affidavit requirement is consistent with the general laws of the state, this opinion will interpret the S.C. FOIA and the FPPA according to the rules of statutory construction. Statutory construction of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) (“The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible.”). 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.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Further, “[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). Where statutes deal with the same subject matter, it is well established that they “are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Penman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010).

As is noted above, the S.C. FOIA grants a person the right to “inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access.” S.C. Code § 30-4-30(A)(1) (emphasis added). Subsection 30-4-30(B) permits public bodies to “establish and collect reasonable fees” as well as to require a deposit not to exceed twenty-five percent of anticipated costs for record reproduction prior to searching for records and making copies. S.C. Code § 30-4-30(B). Subsection 30-4-30(C) sets deadlines to notify the requestor of the public body's determination regarding the public availability of the requested public records, when public records will be made available for inspection or copying, and also establishes a presumption that a request is approved if notification is not made timely. S.C. Code § 30-4-30(C). Public bodies are also permitted to exempt information within an otherwise responsive public record if it falls within one of the categories listed in S.C. Code § 30-4-40(A).

Finally, section 30-4-50(A) declares that certain categories of information are “public information.” Of those categories that are declared to be public information, subsection 30-4-50(B) explicitly prohibits commercial solicitation using “information contained in a police incident report or in an employee salary” as well as “home addresses and home telephone numbers of employees and officers of public bodies” revealed in a S.C. FOIA request. S.C. Code § 30-4-50(B). While the statute prohibits using this information for commercial solicitation, it also cautions that

“this provision must not be interpreted to restrict access by the public and press to information contained in public records.” *Id.* In Seago v. Horry County, 378 S.C. 414, 663 S.E.2d 38 (2008), the South Carolina Supreme Court cited to this statute in the context of Horry County’s efforts to restrict commercial distribution of GIS data it created. The Court concluded that “Horry County could use its copyright to protect the GIS data from subsequent commercial use without violating FOIA,” however it could not “refuse to honor the initial FOIA request.” *Id.* at 429, 663 S.E.2d at 46. It is this Office’s opinion that a court would similarly hold a county cannot use an affidavit requirement to refuse to comply with a request for public records.

The request letter suggests that provisions of the Family Privacy Protection Act of 2002 (“FPPA”), S.C. Code § 30-2-10 *et seq.*, support an affidavit requirement. The FPPA directs state entities to develop privacy policies and procedures to limit the collection of personal information pertaining to citizens of South Carolina to only information that is “necessary to fulfill a legitimate public purpose.” S.C. Code § 30-2-20. Each state entity is also directed to display its privacy policy on its website and advise citizens that information collected is “subject to public scrutiny.” S.C. Code Ann. § 30-2-40. As originally enacted, section 30-2-50 prohibited a person from “obtain[ing] or us[ing] any personal information obtained from a public body for commercial solicitation directed to any person in this State.” 2002 Act No. 255, §1. The FPPA was amended in 2003 to replace “public body” with “state agency” to clarify that the act did “not apply to a local governmental entity of a subdivision of this state or local government.” 2003 Act No. 20, § 2. However, the FPPA and the S.C. FOIA were both subsequently amended by 2017 Act No. 67. While the act amended several provisions of the S.C. FOIA, the act only amended one statute in the FPPA. 2017 Act No. 67, § 6. The act was titled, in relevant part, “AN ACT ... TO AMEND SECTION 30–2–50, RELATING TO THE PROHIBITION ON OBTAINING PERSONAL INFORMATION FROM A STATE AGENCY FOR COMMERCIAL SOLICITATION, SO AS TO EXTEND THE PROHIBITION TO INFORMATION OBTAINED FROM LOCAL GOVERNMENTS AND POLITICAL SUBDIVISIONS OF THE STATE.” *Id.* Section 30-2-50 now reads:

- (A) A person or private entity shall not knowingly obtain or use personal information obtained from a state agency, a local government, or other political subdivision of the State for commercial solicitation directed to any person in this State.
- (B) Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

(C) All state agencies, local governments, and political subdivisions of the State shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.

(D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both.

S.C. Code Ann. § 30-2-50 (Supp. 2020) (emphasis added).

In an August 3, 2020 opinion this Office interpreted section 30-2-50 to place the following responsibilities on a county government:

Section 30-2-50(B) makes clear a local government, such as a county, is responsible for providing notice to those seeking personal information that they cannot use it for commercial solicitation. We imagine this could be accomplished by providing the requesting entity with such a notice when providing information in compliance with the Freedom of Information Act (“FOIA”). However, section 30-2-50(C) goes further to also require local governments to “take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.” The statute does not elaborate on what such “reasonable measures” are and therefore, this language is subject to interpretation.

Given that the statute specifically requires notice be given to entities requesting personal information, we believe “reasonable measures” go beyond giving notice and involve some sort of action on behalf of the local government to ensure the information will not be used for commercial solicitation. The determination of what measures should and can be taken by a local government are questions of policy, which are beyond the scope of an opinion of this Office.

Op. S.C. Att’y Gen., 2020 WL 4730382, at 2 (August 3, 2020). We reaffirms the opinion’s conclusion that section 30-2-50 requires local governments to both provide notice regarding the prohibition on commercial solicitation and to take reasonable measures against persons obtaining or distributing personal information for commercial solicitation. Moreover, it is true that this Office’s opinions do not make initial policy suggestions. However, it is certainly within this Office’s authority to opine on whether a chosen policy is consistent with the general law of this state.

Ultimately then, the issue is whether the ambiguity regarding what constitutes “reasonable measures” in the FPPA can be interpreted to allow local governments to implement an affidavit requirement for public records requests under the S.C. FOIA. It does not appear that the General Assembly intended the amendments to the FPPA to indirectly amend the S.C. FOIA. In addition to amending section 30-2-50 to extend the prohibition on obtaining personal information for commercial solicitation, Act 67 of 2017 amended several of the statutes in the S.C. FOIA including section 30-4-30 which addresses requests to inspect public records. As stated in the editor’s notes to the 2020 Code Supplement, section 30-4-30 was amended to “revis[e] requirements concerning records request fulfillment fees, permit[] public bodies to charge certain deposits before searching and copying public records in response to records requests, and revis[e] the time limits and manner for responding to records requests.” Section 30-4-30 only allows a public body to delay notifications or furnishing of records when there is “written mutual agreement of the public body and the requesting party.” S.C. Code 30-4-30(C). If a public body does not provide notifications regarding availability to public records unless a requestor provides an affidavit, it could potentially fail to meet the statutory deadlines and the request would be considered approved. See id. (“[T]he request must be considered approved as to nonexempt records or information.”). Because section 30-4-30(c) contains deadlines, mandates approval for failure to meet the deadlines, and only expressly authorizes extensions by written mutual agreement, it would be reasonable to interpret that the General Assembly intended this statutory scheme to preclude other reasons or methods for extension. See Hodges v. Rainey, 341 S.C. at 86, 533 S.E.2d at 582 (The rule of statutory 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 the alternative.’”).

The request letter also mentions that the S.C. FOIA does not establish a specific form for public records requests as support for its affidavit requirement. S.C. Code 30-4-30(A)(1). Presumably, the idea is that the statute’s silence regarding the form of public records requests allows a local government to fill the gap in the law. However, the plain language of the statute authorizes a public body to establish “reasonable rules” regarding “time and place” of access to public records. Id. Again, because the General Assembly authorized public bodies to establish rules regarding a finite set of issues related to inspection of public documents, this suggests General Assembly did not intend to authorize additional rules related to public record inspection. See Hodges, supra. Therefore, it is this Office’s opinion that a public body does not have authority to require an affidavit from a requestor before honoring a request for public records. See Seago, supra; see also Soc’y of Prof’l Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (holding a regulation which “alters or adds to” the S.C. FOIA must fall.).

Finally, the letter asks whether a government entity can satisfy its notice and reasonable measures duty by specifying when the records subject to the FPPA are produced that they may not

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be used for commercial solicitation. As stated above, this Office has concluded that the FPPA requirement to take “reasonable measures” go[es] beyond giving notice and involve[s] some sort of action on behalf of the local government to ensure the information will not be used for commercial solicitation.” Op. S.C. Att’y Gen., 2020 WL 4730382, at 2 (August 3, 2020). Specifying that public records are subject to the FPPA and may not be used for commercial solicitation appears to only satisfy the requirement to “provide notice.” S.C. Code § 30-2-50(B). A court would likely hold that a local government must do more to satisfy the “reasonable measures” requirement in S.C. Code § 30-2-50(C).

### Conclusion

For the reasons discussed more fully above, it is this Office’s opinion that a court likely would hold the S.C. Freedom of Information Act (“S.C. FOIA”), S.C. Code § 30-4-10 *et seq.*, does not authorize a public body to require that a requestor provide an affidavit before it furnishes public records. A prior opinion of this Office found ambiguity in the directive to “take reasonable measures” to protect personal information in the Family Privacy Protection Act (“FPPA”), S.C. Code § 30-2-10 *et seq.* See Op. S.C. Att’y Gen., 2020 WL 4730382, at 2 (August 3, 2020). However, this Office has not found support to conclude the General Assembly intended this directive to authorize affidavits as a precondition to comply with a S.C. FOIA public records request. S.C. Code § 30-4-30.

Sincerely,



Matthew Houck  
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REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General