ALAN WILSON
ATTORNEY GENERAL

April 08, 2021

The Honorable Shane Massey
Member
South Carolina Senate
District No. 25
P.O. Box 142
Columbia, SC 29202

Dear Senator Massey:

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

> On August 11, 2020, the Richland County School District Two Board of Trustees adopted a policy concerning the availability of the School District's records and other information to members of the Board. According to the policy, a board member who requests information shall be provided with the requested information if the Superintendent determines that the request falls within "normal circumstances." If the Superintendent determines that the request is "unusual in nature," then the request is forwarded to the full Board of Trustees for consideration. In order for the requesting board member to receive the requested information, the full Board of Trustees must vote in favor of its release. Finally, the policy allows a member of the Board to utilize the South Carolina Freedom of Information Act to request information if he or she does not want to submit a request to the Superintendent.
>
> I believe that the policy was written to circumvent the South Carolina Supreme Court's holding in Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008). Both the majority and the dissenting opinions in Wilson support the proposition that an elected official has the ability to access financial documents possessed by the body to which he or she is elected. In dissent, Justice Beatty goes further, stating:
>
>> "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."

> Under "normal circumstances," the Richland County School District Two policy appears to comport with the holding in Wilson. However, the policy's board approval requirement for requests that are "unusual in nature" is at odds with the holding in Wilson because the Board could deny access to school district records or other information requested by a board member. I understand that the holding in Wilson was confined to a board member's right to inspect financial records. The Court simply addressed the issue presented to it: whether a board member has the right to review the financial records of the Board upon which he or she serves. The principle upon which that decision was reached should, and does, extend to all records and information maintained by the governing board of a governmental entity. It is my understanding that the Richland County School District Two Board of Trustees disagrees with this reading of Wilson. Therefore, please provide me with your opinion concerning the following:

> 1. Do members of a board governing a governmental entity have a right to access all of the board's records and information? Or does a board member only have a right to access financial records?
> 2. Does the Richland County School District Two Board of Trustees' policy violate Wilson v. Preston in part or in whole?

Law/Analysis

It is this Office's opinion that the South Carolina Supreme Court's holding in Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008) should be read broadly to grant elected officials access to all records and information maintained by the body to which they are elected, rather than only granting access to financial documents. As your letter notes, the Court's references to financial documents can be fairly attributed to fact that they were the documents at issue in the subject litigation. See id. at 353, 662 S.E.2d at 582 ("Specifically in regard to this appeal, Wilson sought vendor files where legal expenditures were described, an annual financial report, weekly copies of the general ledger report, and records containing information concerning details of transfers between accounts in excess of $2,500."). This Office has not identified any portion of the Wilson opinion which would categorically limit an elected official's access to other types of documents. In fact, as noted above, Justice Beatty wrote in dissent that in his 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." Id. at 361,

662 S.E.2d at 580 (emphasis added).[1] There may be limitations on disclosure of specific information depending on the facts in a given case; for instance, where documents are subject to attorney-client privilege, confidentiality, or otherwise restricted by law. See Wilson, 378 S.C. at 357, 662 S.E.2d at 584 (affirming denial of writ of mandamus for release of "attorney-client privileged information without authorization by the client County"). However, as a general matter, it continues to be this Office's opinion that elected officials "need[] access to … records to be able to do the job he or she was elected to do." Ops. S.C. Att'y Gen., 1995 WL 803345, at 1 (March 24, 1995) (discussing right of county council members to access personnel records of county employees); 1983 WL 181974 (August 18, 1983) ("[L]imitation of the general public's right to inspect and copy information in a personnel file pursuant to the Freedom of Information Act does not affect a council member's right to view and copy such information for legitimate and official purposes."); 1977 S.C. Op. Att'y Gen. 304 (1977).

While the school district policy may be applied in a way that violates the Court's opinion in Wilson, it is this Office's opinion that the policy does not facially conflict with Wilson. The attached policy reads:

> Since the board assumes a leadership role in maintaining a system of public education and functions primarily as a legislative body to formulate and adopt policy, individual board members are extended special consideration in obtaining information. Under normal circumstances, requests to inspect and/or receive copies of records should be made by individual board members to the superintendent who may refer such requests to the communications department. These particular requests will be processed whenever possible in a more expeditious manner than otherwise required by law and at no cost to the individual board members. All board members will be appropriately advised of all requests, as well as the responses.
>
> If, on the other hand, the requests are determined by the superintendent to be unusual in nature, by reason of their content, subject matter, or volume/size, then they should be referred by the superintendent to the board. The superintendent will require that such requests be made in writing. Upon affirmative action by the board, all requested information and available written documents, once again, will be provided to board members as expeditiously as possible.
>
> Individual board members may request information as a member of the general public in accordance with the provisions of the Freedom of Information Act.

---

[1] This Office has previously opined that the Wilson majority and dissenting opinions only "differed on how swiftly access must be granted" to an elected official rather than disagreeing about which documents are available to an official. Op. S.C. Att'y Gen., 2019 WL 3243863, 2 (June 28, 2019).

The policy states it is designed to give board members "special consideration in obtaining information." In "normal circumstances" requests from members are processed "in a more expeditious manner than otherwise required by law and at no cost to the individual board members." (emphasis added). If the superintendent determines a request does not present normal circumstances, the request is presented to the school board for a determination. The policy states that if the board votes in favor of the request, the requested information and documents "will be provided to [the requesting member] as expeditiously as possible." (emphasis added). The concern expressed in the request letter is that if the board does not vote in favor of the request, the board member would not be provided access to the requested information. However, on its face, the policy does not deny access to the requested information, but instead would not prioritize the request. Because the policy's final sentence states that members may request information "as a member of the general public in accordance with the provisions of the Freedom of Information Act," presumably, declined requests would be processed within the time provided by the act. See S.C. Code § 30-4-30(C). Justice Beatty's dissent in Wilson explained that if a request is made according the S.C. FOIA, the statute "removes any discretion on the part of the public body. … If the request is granted (in this case it must be) the information must be available for review." Id. at 362, 662 S.E.2d at 587. Therefore, if the policy is construed to require production of requested documents within the time frame provided in the S.C. FOIA even when the school board declines the request, a court would likely hold it does not violate the holding in Wilson.

Nonetheless, it should be stressed that that an outright denial of access to relevant documents would violate the holding in Wilson. Even though the Court found a writ of mandamus could not be issued to compel the delivery of documents "in a particular time frame or manner," both the majority and dissenting opinions agreed that elected officials cannot categorically be denied access to documents held by the public body to which they are elected. Id. at 356, 662 S.E.2d at 583-84. Certainly, board members' requests which are relevant to their duties and are determined to be "usual in nature" solely because of the potential "volume/size" of the response could not be denied indefinitely.

Conclusion

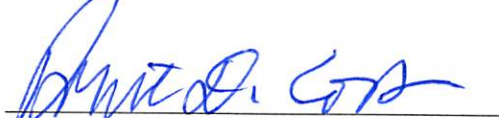
As discussed more fully above, it is this Office's opinion that the South Carolina Supreme Court's holding in Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008) should be read broadly to grant elected officials access to all records and information maintained by the body to which they are elected, rather than only granting access to financial documents. Moreover, while the school district policy may be applied in a way that violates the Court's opinion in Wilson, it is this Office's opinion that the policy does not facially conflict with

Wilson. The concern expressed in the request letter is that if the board does not vote in favor of the request, the board member would not be provided access to the requested information. However, on its face, the policy does not deny access to the requested information, but instead would not prioritize the request. Nonetheless, it should be stressed that that an outright denial of access to relevant documents would violate the holding in Wilson.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General