



ALAN WILSON
ATTORNEY GENERAL

February 3, 2011

Marvin C. Jones, Esquire
Jasper County Attorney
Post Office Box 420
Ridgeland, South Carolina 29936

Dear Mr. Jones:

We received your letter requesting an opinion of this Office concerning the Jasper County Board of Zoning Appeals (the "Board"). In your letter, you describe the following situation:

Hearings conducted before the Jasper County Board of Zoning Appeals are conducted in open session pursuant to the Freedom of Information Act. I attend those hearings, not to represent the administration presenting the case, but as counsel to the Board of Zoning Appeals. Following the hearing, frequently I draft a proposed order which is then circulated among the members of the Board who were in attendance and participated in the hearing. When all members have reviewed the proposed order, changes have been made as may be necessary, and the order is signed by at least a majority of the members of the Board who heard the case, it is delivered to the parties by certified mail as required by law. With this background, the question is as follows: Following the reception of all evidence and arguments by the appellant and/or petitioner and by the staff in open session, may the Jasper County Board of Zoning Appeals go into executive session for the purposes of discussing the individual views of the Board members so as to attempt to find a consensus among them which can become the basis for the written decision, giving advice to me as to the findings and conclusions that individual members would like to see included in the written order and receiving legal advice from me as to the kinds of findings which are sufficient to meet all of the elements necessary or appropriate to be included in any order which they might have under consideration? No action would be taken in executive session.

Law/Analysis

The South Carolina Freedom of Information Act (“FOIA”) governs meetings of public bodies. S.C. Code Ann. §§ 30-4-10 et seq. (2007 & Supp. 2010). First, we must consider whether the Board is public body pursuant to FOIA. Section 30-4-20(a) of the South Carolina Code (2007) defines a public body as

any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

The Legislature provided for the establishment of boards of zoning appeal in article 5 of chapter 29 of title 6 of the South Carolina Code. Specifically, section 6-29-680 of the South Carolina Code (2004) allows local governing bodies to establish such boards in the enactment of their zoning ordinances. In a 1981 opinion, this Office addressed whether a zoning board is a public body pursuant to section 30-4-20(a). Op. S.C. Atty. Gen., November 16, 1981. In that opinion, we concluded that if the zoning board is supported in whole or part by public funds, it is a public body of purposes of FOIA. Id. We presume that the Board is supported by public funds. Thus, we believe a court would likely find the Board is a public body for purposes of section 30-4-20(a).

In your letter, you mentioned that pursuant to section 6-29-800 of the South Carolina Code (Supp. 2010), the Board is responsible for hearing appeals from decisions made by local zoning administrators in the enforcement of zoning ordinances. Thus, it is our understanding that you question whether or not the Board may conduct its deliberations over these matters in executive session. Section 30-4-60 of the South Carolina Code (2007) states: “Every meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter.” Section 30-4-70 of the South Carolina Code (2007) lists the following exceptions to section 30-4-70:

(a) A public body may hold a meeting closed to the public for one or more of the following reasons:

(1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

(2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

(3) Discussion regarding the development of security personnel or devices.

(4) Investigative proceedings regarding allegations of criminal misconduct.

(5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

(6) The Retirement System Investment Commission, if the meeting is in executive session specifically pursuant to Section 9-16-80(A) or 9-16-320(C).

In construing section 30-4-70 to determine whether the Board may go into executive session to deliberate over an appeal before the Board, we must keep in mind the rules of statutory interpretation, the primary of which is to ascertain and effectuate the intent of the Legislature. Davis v. School Dist. of Greenville County, 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007).

The Legislature expressed the purpose of FOIA in section 30-4-15 of the South Carolina Code (2007). This provision states:

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. From this provision, our courts determined that “[t]he essential purpose of the FOIA is to protect the public from secret government activity. South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.” Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003) (citations and quotations omitted). Given the principles of construction noted above, we must narrowly construe the exceptions to the open meeting requirement provided by the Legislature in section 30-4-70.

Initially, we note that section 30-4-70 does not specifically address deliberations by public bodies. On many occasions, our courts recognize the canon of construction “expressio unius est exclusio alterius” or “inclusio unius est exclusio alterius,” which our courts describe as “to express or include one thing implies the exclusion of another, or of the alternative.” Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (quotations omitted). Thus, given this principle of construction and the fact that our courts generally construe the exceptions provided in section 30-4-70 narrowly, we believe the Board would not be able to conduct its deliberations in an executive session.

Moreover, as you noted in your request letter, several prior opinions of this Office came to similar conclusions with regard to other public bodies. In 1985, we issued an opinion discussing whether the South Carolina Department of Parole and Community Corrections Board may meet in executive session to discuss or deliberate on matters relating to pardons and paroles. Op. S.C. Atty. Gen., October 30, 1985. After concluding that the Parole Board is a public body subject to FOIA, we determined the exceptions to the open meeting laws found in section 30-4-70(a) “are to be narrowly construed.” Id. Relying on an earlier opinion issued by this Office in 1979, finding that a state regulatory agency could not go into executive session to deliberate on matters of public record, we concluded that the Parole Board is prohibited under FOIA from conducting deliberations in a closed meeting. Id.

In 1994, we considered whether the South Carolina Real Estate Commission could deliberate in executive session over matters such as disciplinary proceedings, eligibility for licensing, and other

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matters. Op. S.C. Atty. Gen., March 31, 1991. Initially, we determined the Real Estate Commission is a public body for purposes of FOIA. Then, relying on past opinions, we stated:

This Office has opined on several occasions that when a public body has been charged with adjudicatory functions, the Freedom of Information Act does not authorize such a public body to enter executive session for purposes of deliberation on matters of public record. Ops. Atty. Gen. dated May 26, 1988; October 30, 1985; October 2, 1985; February 8, 1979, copies enclosed. While the opinions were felt to be not free from doubt, such opinions were in accordance with court decisions from other jurisdictions as Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973) (a board exercising quasi-judicial functions is not part of the judicial branch of government; its meetings must be open to the public generally); Citizens Action Coalition of Indiana, Inc. v. Public Service Commission of Indiana, 425 N.E.2d 178 (Ind. Ct. App. 1981) (agency was not vested with judicial powers and thus must deliberate at meetings open to the public); Appeal of Emmanuel Baptist Church, 364 A.2d 536 (Pa. Cmwlth. 1976) (zoning hearing board is quasi-judicial, not judicial, and must reach its decisions in an open meeting). If the Real Estate Commission is characterized as an appellate, quasi-judicial body, as it appears to this Office, then there appears to be no authorization for the Commission to convene in executive session to deliberate on a publicly held hearing which is a matter of public record. Of course, convening in executive session for other reasons authorized by § 30-4-70 would be permissible (though not mandatory).

Id.

Based on our interpretation of section 30-4-70 and in accordance with the opinions above, we believe that generally the Board is prohibited under FOIA from conducting its deliberations in closed meetings. However, in your letter, you mentioned that you give the Board legal advice during its deliberations. We note that section 30-4-70(a)(2) specifically allows public bodies to hold a closed meeting to receive legal advice “where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.” S.C. Code Ann. § 30-4-70(a)(2). Our Court of Appeals clarified in Herald Publishing Co., Inc. v. Barnwell, 291 S.C. 4, 10, 351 S.E.2d 878, 882 (Ct. App. 1986) that “[t]he exemption does not require that a public body actually be engaged in litigation, only that legal advice be rendered.” Accordingly, we believe that a court would most likely find any legal advice you render to the Board in a closed session permissible under section 30-4-70(a)(2). Nonetheless, we

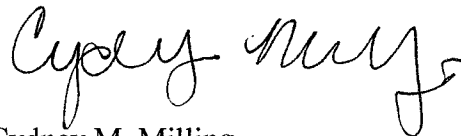
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caution that the Board is limited in its use of an executive session to the receipt of legal advice. The Board cannot use the executive session to discuss other matters.

Conclusion

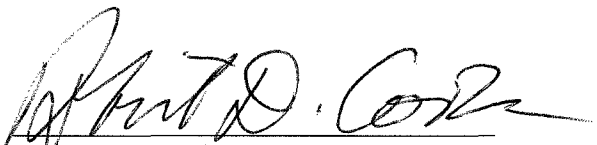
Because we believe a court would likely find that the Board is a public body pursuant to FOIA, the Board must comply with the open meeting requirement found in section 30-4-60 of the South Carolina Code unless one of the exceptions under section 30-4-70 apply. In our review of section 30-4-70, we did not discover an exception that would allow the Board to go into executive session for purposes of conducting deliberations over appeals presented to the Board. Furthermore, this Office concluded in past opinions that public bodies are generally not permitted to enter into an executive session for the purposes of deliberating on matters of public record. Therefore, we are of the opinion that the Board is prohibited under FOIA from deliberating matters coming before it in executive session. However, we believe that a court would likely find that Board could receive legal advice from you in executive session pursuant to section 30-4-70(a)(2) so long as the executive session is limited to that purposes or one of the other purposes listed in section 30-4-70.

Sincerely,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General