



HENRY McMASTER
ATTORNEY GENERAL

August 14, 2008

The Honorable Nikki G. Setzler
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Setzler:

We understand you desire an opinion of this Office concerning voting procedures for the State Health Planning Committee (the "Committee"). Specifically, you inquire as to whether the Committee "violated the South Carolina Freedom of Information Act in the conduct of a June 27, 2008 public meeting by utilizing a written ballot procedure with ballots not being available at the meeting and by counting a proxy vote from a member not present at the meeting." In addition, you provided us with the following information:

It is my understanding that on June 27, 2008, the State Health Planning Committee held its final meeting to review the recommendations of the Department staff and of the public and to adopt a draft Plan to be submitted to the Department of Health and Environmental Control Board. The meeting was publicly noticed and was attended by numerous members of the public, including providers, consumers and other interested persons. I am informed that, at the meeting, the Committee announced that, for some sections of the proposed draft Plan, voting would be by written ballot vote that would allow members to vote on certain controversial issues without having to take a public position on those issues. Non-controversial issues would be voted on by acquiescence or by show of hands.

During the course of the meeting all but one issue was voted on by acquiescence or a show of hands. For one section of the draft Plan, however, the Committee chose to employ a process whereby the question was voted on through the use of a written ballot on which the member checked either "yes" or "no", depending on his or her agreement with the offered amendment to the Plan. Each member signed his or her written ballot, which was passed to a Department staff member for counting and announcement of the final vote tally.

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I am informed that the Committee did not indicate how a particular member voted on the issue and the ballots were not available for inspection by the public either during or immediately after the meeting. The Department eventually released the ballots on July 16, some nineteen days after the members of the public demanded knowledge of the vote.

After release of the ballots, it became apparent that, in addition to the members in attendance at the meeting, a written ballot on the controversial issue was submitted on behalf of a member who was not present at the meeting. This negative vote by proxy of a member not present at the meeting broke a tie vote on the proposed amendment.

Based upon this information, you request an opinion answering the following questions:

- (1) Does the Freedom of Information Act allow the use of written balloting by a public body during a public meeting instead of voting by voice and/or a show of hands?
- (2) If so, when must the public body make the results of the vote as to each individual member available to the public? Does this have to be done at the meeting?
- (3) Does the Freedom of Information Act allow members of a public body absent from a public meeting to vote on matters raised at the meeting through the use of proxies?

Law/Analysis

In interpreting South Carolina's Freedom of Information Act ("FOIA"), we must keep in mind its purpose as provided by the Legislature:

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.

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S.C. Code Ann. § 30-4-15 (2007). 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. 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).

As you indicated in your letter, the Legislature established the Committee pursuant to section 44-7-180 of the South Carolina Code (2002). Section 30-4-20 of the South Carolina Code (2007) defines “public body” for purposes of FOIA, which includes

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 .

...

Pursuant to this definition, we believe the Committee is a public body and therefore, is subject to the provisions under FOIA.

Several prior opinions of this Office discuss the use of paper or written ballots by public bodies. Most recently, in 2001, we considered whether the Board of Probation, Parole, and Pardon Services may conduct votes in private that determine whether individuals receive parole. Op. S.C. Atty. Gen., May 22, 2001. After determining that this board is a public body and thus, subject to FOIA, we looked to section 30-4-90(a)(3) of the South Carolina Code, which governs the requirement that public bodies keep written minutes of all public meetings. According to this provision:

(a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:

...

(3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken.

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S.C. Code Ann. § 30-4-90 (2007) (emphasis added). Our 2001 opinion cites this provision and references a 1984 opinion of this Office. Quoting our 1984, we determined:

“secret ballots may be used; but if a member of council asks that a vote be recorded, then a secret ballot could not be used in that instance. Further, . . . if votes taken by secret ballot should be recorded by name, then such votes would become a matter of public record subject to disclosure, after the votes are submitted and tabulated.”

Op. S.C. Atty. Gen., May 22, 2001 (quoting Op. S.C. Atty. Gen., January 17, 1984). Based on this understanding of the law pursuant to FOIA, we ultimately determined that “the Freedom of Information Act requires the votes of individual members of the Parole Board to be public information.” Id.

According to your letter, during the Committee meeting, members of the Committee took a vote pertaining to a section of the draft Plan by written ballot. Furthermore, you indicate that each member signed his or her ballot. Because the vote was taken by written ballot with each member’s name recorded on the ballot, we believe these ballots would become part of the public record subject to disclosure pursuant to FOIA. Thus, to answer your question, we believe FOIA does allow the use of written ballots. However, when the votes are recorded by name, as was the case in the situation described in your letter, the ballots become public information and these ballots must be made available to the public after they are submitted and tabulated.

Next, you inquire as to the ability of a member of the Committee to vote on matters raised at the meeting through the use of a proxy. This Office has issued several previous opinions concluding that “in the absence of specific statutory authorization as to a particular board or office, proxy voting is not authorized.” Op. S.C. Atty. Gen., August 5, 2005. See also Ops. S.C. Atty. Gen., November 20, 1991; May 6, 1986; May 10, 1984; May 27, 1981; June 26, 1979.

In our review of the enabling legislation establishing the Committee, we did not find any reference to proxy voting by an absent member. Accordingly, we do not believe a member of the Committee has authority to vote by proxy.

Conclusion

According to our analysis above, we believe the Committee, as a public body, is subject to the provisions contained in FOIA. Furthermore, we believe that while FOIA does not prohibit the use of written ballots in the situation described in your letter, because these written ballots contain the names of the members and their votes, we believe the ballots are a matter of public record and subject to disclosure after they are submitted and tabulated. See Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 630 (1996) (referencing section 30-4-70 of the South Carolina Code, prohibiting any

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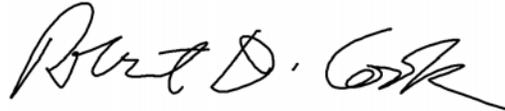
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formal action in executive session, to conclude that “[s]o long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted, there is no FOIA violation.”). Obviously, the practice most in accordance with the rule of thumb that this Office consistently advises to be followed - when in doubt disclose - would be to publicly reveal any and all votes at the time the vote is taken. This would insure that the public attending the meeting is made aware of each individual’s vote when the vote is made. Moreover, we do not believe members of the Committee have authority to vote by proxy or in absentia.

Very truly yours,

Henry McMaster
Attorney

A handwritten signature in black ink, appearing to read "Robert D. Cook". The signature is written in a cursive, somewhat stylized font.

By. ROBERT D. COOK
Assistant Deputy Attorney General