



ALAN WILSON
ATTORNEY GENERAL

October 12, 2012

John E. James, III, Esquire
Fairfield County Attorney
P. O. Drawer 329
Winnsboro, South Carolina 29180

Dear Mr. James:

Attorney General Alan Wilson has referred your letter of September 27, 2012 to me for a response. The following is my understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Does the current method of voting for replacements on boards and commissions by Fairfield County Council using a voice vote by each council member to designate a number for a vote instead of a candidate's name violate the South Carolina Freedom of Information Act ("FOIA")?

Short Answer: Yes, based on the information given, the current method of voting would likely violate the FOIA if a member of county council requested that a record of the individual votes be taken in the council's minutes. Furthermore, a violation would likely occur if the names of the candidates receiving votes were not disclosed in response to a request for such from a member of the public.

Law/Analysis: As a background on the FOIA, exemptions to FOIA should be "narrowly construed to ensure public access" to information, including, by implication, the record of each councilman's vote. Seago v. Horry County, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) (citing Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011)). Any government agency in South Carolina bears the burden of proving an exception to FOIA exists when challenged. Id. The agency must make a case-by-case determination of whether information is subject to FOIA. Evening Post Pub. Co., 392 S.C. at 82, 708 S.E.2d at 748. The FOIA is "remedial in nature and should be liberally construed to carry out its purpose." Id.

As a background on statutory interpretation, the cardinal rule in statutory interpretation is to ascertain the intent of the Legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the legislature controls the literal meaning of a statute. The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942). Statutes are to be interpreted with a "sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a

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reasonable application can be given consistent with the legislative purpose.” U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950).

County Council is a public body pursuant to the definition of a public body in S.C. Code of Laws § 30-4-20(a) (Supp. 2003) (“‘Public body’ means ... any public or governmental body or political subdivision of the State, including counties”). All meetings of public bodies must be opened unless the meeting meets an exception listed in § 30-4-70. § 30-4-60. (Supp.1978). Based on your letter, this office is going to assume these meetings are not closed to the public because they do not qualify for any exception pursuant to § 30-4-70 and, as such, must be open to the public pursuant to § 30-4-60.

As you are likely aware, § 30-4-90 (Supp. 2001) requires public bodies to keep written minutes of all public meetings. The minutes must include, *inter alia*, “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.” § 30-4-90(a)(3). Those minutes must be available within a reasonable period after the meeting. § 30-4-90.

The simple answer would be if any member of council requests to see a record of the votes, then the current system of voting would not comply with FOIA based on § 30-4-90(a)(3) because county council would not be able to produce a record of individual votes as required by the statute. The record would need to reflect both the name of the councilman and the name of the person they voted for in regards to each office, and based on the information given in your letter, it does not appear town council’s record would contain the required information.

However, the more complicated question posed by your letter is whether this method would comply with an individual’s request under the FOIA. This office has received many FOIA questions in the past. This office previously opined a signed written ballot required disclosure of the individual votes of a public body. Op. S.C. Atty. Gen., 2008 WL 41460006 (Aug. 14, 2008). That same opinion held a written ballot did not violate the SC FOIA, but that the ballot becomes a part of the public record once it is recorded. Id. This office also opined individual votes of all members of a parole board required public disclosure. See Op. S.C. Atty. Gen., May 22, 2001 (2001 WL 790250). Additionally, this office has consistently advised the rule of thumb is “when in doubt disclose.” Ops. S.C. Atty. Gen., 2008 WL 41460006 (Aug. 14, 2008); 2011 WL 6959371 (Dec. 5, 2011); 2011 WL 1740747 (April 29, 2011). This office specifically advised public disclosure in regards to all votes at the time the vote is made. Ops. S.C. Atty. Gen., 2008 WL 41460006 (Aug. 14, 2008).

Furthermore, the legislative intent behind the FOIA is clear:

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.

§ 30-4-15 (Supp. 1987).

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Based on the legislative intent of the statute as well as the opinions and cases cited above, this office believes a court would likely interpret the current voting method as violative of the FOIA if a member of the public were to request a record of how each member of county council voted.

Conclusion: As discussed above, the current method of voting would appear to violate the FOIA if a member of county council or a member of the public requested a record of the individual votes taken. However, this office is only issuing a legal opinion. Until a court specifically addresses the issues presented in your letter in regards to the FOIA, this is only an opinion on how this office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let me know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General