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The State of South Carolina

OPINION NO. 91-42

T. Travis Medlock
Attorney General

803-734-3970
Columbia 29211

Attorney General

June 28, 1991

The Honorable Glenn F. McConnell
Senator, District No. 41
27 Bainbridge Drive
Charleston, South Carolina 29407

Dear Senator McConnell:

By your letter of June 23, 1991, you have asked for the opinion of this Office on two questions:

1. Whether or not the Freedom of Information Act applies to a search committee of a state university, which committee is searching for or interviewing candidates to fill a "public figure" type office. Your question relates specifically to the search committee seeking a new head basketball coach for the University of South Carolina.

2. Whether the Freedom of Information Act can be properly construed to allow recessing and reconvening of executive sessions between cities or across the continent without giving additional notice.

Following a discussion on the spirit and intent of the Freedom of Information Act generally, each of your questions will be discussed. Because this Office is not empowered to make factual findings, Op. Atty. Gen. dated December 12, 1983, our discussions herein must necessarily be confined to examination of general principles of law.

Background

South Carolina's Freedom of Information Act, codified at § 30-4-10 et seq., S.C. Code Ann. (1991), was enacted in its present form by Act No. 593 of 1978, as amended by Act No. 118 of 1987 and others. In the 1978 act's preamble, now codified as § 30-4-15, the General Assembly made these findings:

> ... 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.

The Freedom of Information Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. See, S.C. Dep't of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exceptions to the Act's applicability must be narrowly or strictly construed. News and Observer Pub. Co. v. Interim Bd. of Ed. for Wake County, 223 S.E.2d 580 (N.C. 1976).

Question 1

Your first question concerns the applicability of the FOIA to a search committee of a state university. The Freedom of Information Act is applicable to meetings and records of public bodies; therefore, the relevant inquiry is whether a search committee would come within the definition of "public body."

The term "public body" is defined in § 30-4-20(a) to mean

> any department of the State, 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 ....

Clearly, a state university such as the University of South Carolina is subject to the requirements of the Freedom of Information Act. Knight Publishing Co. v. University of South Carolina, 295 S.C. 31, 367 S.E.2d 20 (1988). In addition, a university-supported foundation has been found to have been supported in whole or in part by public funds and thus subject to the Act. Weston v. Carolina Research and Development Foundation, _____ S.C. _____, 401 S.E.2d 161 (1991). The Act itself envisions that committees of public bodies be embraced within the definition of "public body." While this Office does not make a specific finding of fact, we find it inescapable that a search committee screening candidates to fill a "public figure" type of position of a university would be supported by or expending public funds and thus subject to the Act.

This Office has concluded on numerous occasions that a committee of a public body would be subject to requirements of the Act, even before § 30-4-20(a) was amended to expressly include

committees. See, as examples, Ops. Atty. Gen. dated April 11, 1988; October 26, 1984; December 17, 1985; January 14, 1988; and other opinions. In addition, this Office concluded in an opinion dated June 1, 1984, that the Tenure Committee of Lander College would probably constitute a public body subject to the Act; significantly, the Act was subsequently amended specifically to include committees within its reach, thus strengthening our earlier conclusion. See also Arkansas Gazette Co. v. Pickens, 522 S.W.2d 350 (Ark. 1975) (university's Student Affairs Committee was a public body subject to the Arkansas freedom of information act) and Carl v. Bd. of Regents of Univ. of Oklahoma, 577 P.2d 912 (Okla. 1978) (University's Admissions Board was a public body for purposes of Oklahoma's FOIA).

In addition, a search committee screening applicants for the position of dean of a university's college of law was found to be within the purview of the Florida Sunshine Law, equivalent of our Freedom of Information Act. Rejecting the notion that the search committee was too remote from the decision-making process, the court stated in Wood v. Marston, 442 So.2d 934 (Fla. 1983):

> The search-and-screen committee had an admitted "fact-gathering" role in the solicitation and compilation of applications. It had an equally undisputed decision-making function in screening the applicants. In deciding which of the applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university through the faculty as a whole ....

442 So.2d at 938. The court also stated:

> No official act which is in and of itself decision-making can be "remote" from the decision-making process, regardless of how many decision-making steps go into the ultimate decision. Neither can the fact that members of the committee were staff shelter its official acts from public scrutiny.
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> > [When] a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is delegated authority normally within the governing body, he loses his identity as staff while operating on

> that committee and is accordingly included within the Sunshine Law.

News-Press Publishing Co., 410 So.2d at 548.

442 So.2d at 941. 1/

Based on the foregoing, we are of the opinion that a search committee of a state university, formally seeking or screening candidates to fill a "public figure" type of position at the university, would be subject to the requirements of the Freedom of Information Act as would any committee of a public body. In so concluding, we note our understanding that counsel for the affected university had previously advised that the search committee would be subject to the Act; our conclusion is in accord with that previously-rendered advice.

Question 2

Your second question involves the issue of notice to be given when a public body, having recessed a meeting during which an executive session was called, resumes or reconvenes the executive session at a later date and in another place. 2/ You specifically

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1/ We do not mean to suggest that every gathering of staff members of a public body is a committee subject to the Act. This situation is closely analogous to that addressed by the court in Wood v. Marston, supra. In other instances, however, all indicia must be examined before such a conclusion may be reached: whether the committee has been formally established and convened, whether it is formally charged with a mission or goal, its role or function in the operation or functioning of its parent entity or in the decision-making process; and so forth.

2/ The statutory requirements for convening in executive session may not be ignored by a public body. Section 30-4-70(a)(6) details the procedure to be followed to convene in executive session; as stated in an opinion dated May 1, 1986:

> ... Section 30-4-70(a)[6] requires a vote on the question of going into executive session, and when such vote is favorable, the presiding officer shall announce the purpose of the executive session ....

With respect to interviewing candidates for a "public figure" type of position, this Office advised in an opinion dated February 27, 1991 that

> the school board would be required to interview candidates for the position of superintendent in an open or public meeting unless the school board voted to do so in executive session.

mentioned the reconvened meeting as being held in another city or across the continent; for purposes of this opinion, we are of the view that the locality of the reconvened meeting is not a factor to be considered, as locality of a meeting does not confer or negate a public body's jurisdiction.

Notice requirements of the Freedom of Information Act are found in § 30-4-80. This Office has exhaustively opined on notice in opinions dated February 22, 1984 and October 11, 1989; left unaddressed by those opinions, however, was the question of notice to be given when a meeting is recessed or adjourned to a later date. Noting that § 30-4-15 recognizes the importance of the public's being able to learn of the activities of their public officials, we have stated:

> ... there must also be ample notice to the public of public meetings. For, it is generally recognized that if no steps are taken to make the public aware that a public meeting is taking place, the fact that the meeting is open is rendered "virtually meaningless." Bensalem Tp. Sch. Dist. v. Gigliotti Corp., (Pa.), 415 A.2d 123, 125 (1980). As the Pennsylvania Supreme Court stated in Consumers Education and Protection Assn. v. Nolan, 470 Pa. 372, 384, n. 4, 368 A.2d 675, 681, n. 4 (1977),
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> > ... adequate notice to the public at large is an integral part of the public-meeting concept; a meeting cannot be deemed to be public merely because its doors are opened to the public if the public is not properly informed of its time and place.
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> ....
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> ... And, without doubt, these notice requirements may not be simply ignored by the public body; they are mandatory. ... The section requires overt and affirmative action by the public body to fulfill the notice requirements ....

Op. Atty. Gen. No. 84-20, dated February 22, 1984.

While our Act does not specifically address the issue of notice for recessed meetings, judicial decisions from other jurisdictions permit the inference that, in the absence of an emergency, the same

notice requirements covering regular, called, or rescheduled meetings should be applied to the meeting of a public body to be reconvened after a recess. In Dunn v. Mayor and Council and Clerk of Borough of Laurel Springs, 163 N.J. Super. 32, 394 A.2d 145 (1978), the court rejected the notion that a meeting in recess and resumed the next day could be held without new notice to the public. The court stated:

> The clear intent of the [Sunshine Law] is to allow adequate notice of all public meetings .... Where no emergency exists, adequate notice in conformity with the statute ... must be given.
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> ....
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> We cannot accept the suggestion that anything less than the statutorily defined "adequate notice" may be given in a nonemergency situation.

394 A.2d at 146. The court noted that the Sunshine Law was silent as to notice problems of an adjourned meeting and analogized an adjourned or recessed meeting to a special meeting, applying the notice requirements accordingly.

Similarly, in Turner v. Town of Speedway, 528 N.E.2d 858 (Ind. Ct. App. 1988), a meeting of the police commissioners appeared to have been adjourned or recessed to a later date to discuss applicants for a promotion in the police department. No public notice was given for the subsequent meeting. The court stated:

> Meetings remain subject to the Open Door Law even though a subsequent hearing on the same subject matter is conducted.... "The very purpose of the Open Door Law is to prevent secret hearings and 'Star Chamber' proceedings which shield the nature of testimony, the identity of witnesses and issues, and becloud the attitude of the triers." ... However, the inquiry does not end with the determination that meetings subject to the Open Door Law were not in compliance with the requirements of statutory provisions.
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> ....
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> The basic purpose of the Indiana Open Door Law is that deliberations of public agencies be conducted openly "in order that the citizens may be fully informed." ... The faulty procedures followed by the Commissioners in this case

> thwarted the sunshine effect contemplated by the Open Door Law. While the October 7 meeting at which the vote was taken was a meeting in full compliance with the law, such compliance is not an umbrella providing sufficient cover to validate the earlier meetings.

528 N.E.2d at 862. Following the notice requirements for meetings generally would be the preferable way to handle such a situation apparently.

See also South Harrison Tp. v. Glouchester County, 213 N.J. Super. 179, 516 A.2d 1140 (1985) and Cooper v. Arizona Western College, etc., 125 Ariz. 463, 610 P.2d 465 (1980).

Based on the foregoing and in keeping with the spirit and intent of the Freedom of Information Act, it is our opinion that a "recessed" or "adjourned" meeting of a public body, wherever to be reconvened, in executive session or otherwise, would be subject to the same requirements as would any special rescheduled or called meeting of a public body. The fact that the public body recessed or adjourned the original meeting while properly in executive session would not, in our view, relieve the public body of the obligation to follow the notice requirements for the subsequent meeting. Thus, § 30-4-80(a) should be followed as to providing appropriate notice of such meetings.

Conclusions

1. While the statute does not expressly address the question, and while the courts have not yet faced the issue, we believe the Freedom of Information Act would be applicable to a search committee of the University of South Carolina, which committee is searching for or interviewing candidates to serve as the head basketball coach of the University.

2. We also believe that notice requirements of the Freedom of Information Act should be followed by a public body which will reconvene from a "recessed" or "adjourned" meeting wherever such reconvened meeting will be held, anticipated to be held in executive sessions or otherwise. Even though the public may not have the legal right to be present at every part of every meeting, still, the public generally does have the right to know where that meeting is and when it will be.

With kindest regards, I am

Sincerely,

T. Travis Medlock
Attorney General

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