9333 - 9883

ALAN WILSON
ATTORNEY GENERAL

February 19, 2015

The Honorable Bill Herbkersman
Representative
District No. 118
896 May River Road
Bluffton, SC 29910-5833

Dear Representative Herbkersman:

You have asked for the opinion of this office regarding two Freedom of Information Act requests made by a constituent residing within your district to her employer, the Beaufort County School District ("BCSD"). As reflected in a letter sent to you by the constituent that was provided for our review, the first request was for the constituent's own "teacher evaluation documents" and "classroom observation forms" not kept in her personnel file. The second request was for "documents and materials regarding a BCSD 'investigation'" of the constituent's complaint about her teacher evaluation performed in the 2013-2014 school year; such documents were also not included as part of the personnel file. Both requests were denied on the basis that the documents requested "were not public records," with no further specification or citation of an exemption permitting nondisclosure.

Law / Analysis

Prior to turning to the Freedom of Information Act ("the FOIA" or "the Act") for review, we note that S.C. Code Ann. § 59-26-30(B)(4) & § 59-26-30(B)(5) (Supp. 2014) state that for purposes of assisting, developing, and evaluating professional teaching, the State Board of Education acting through the State Department of Education must promulgate regulations to be used by local school districts for evaluating teachers employed under annual and continuing contracts. Importantly, § 59-26-30(B)(4) & § 59-26-30(B)(5) provide that evaluation results must be provided in writing for teachers under annual and continuing contracts, respectively. In addition, the BCSD's own policy provides that documents such as informal and formal job performance evaluations, written suggestions for corrections and improvements made by the administration, and all records kept about an employee must be kept in an employee's personnel file and made available for the employee's review.[1] While we are unaware of actual content that

[1]Specifically, the BCSD's procedure regarding the contents and viewing of personnel files reads as follows: "[t]he district office will maintain personnel files on each employee. The personnel files will include all records and documents collected by the administration concerning the employee including but not limited to, the following: informal and formal job performance evaluations; commendations for, and complaints against, the employee made by the administration; written suggestions for corrections and improvements made by the administration; teaching credentials; transcripts; pre-employment references; application records; contracts and/or letters of agreement; information, records and documents collected to handle an employee's payroll account; [and] all other records kept about an employee." Beaufort County Schools, Human Resource Services, § 14 Personnel Files, available at http://policy.microscribepub.com/cgi-

the requested documents contain, § 59-26-30(B)(4) & § 59-26-30(B)(5)'s requirement that evaluation results be provided in writing and the BCSDs own policy on the contents and viewing of personnel files provide strong support that the documents requested by the constituent should be made available for her review independent of a FOIA request. Furthermore, the constituent's review of the requested documents seems to be consistent with the purpose of the teacher evaluation process. As reflected in a message the State Board of Education wrote to our State's teachers in the *South Carolina Expanded Educator Support and Evaluation Guidelines*: "the purpose of evaluation is to help us improve our practice . . . . Reflective practices help teachers improve their teaching. Consequently, student learning improves." S.C. State Board of Edu., South Carolina Expanded Educator Support and Evaluation Guidelines (June 2014), available at http://ed.sc.gov/agency/ee/Educator-Evaluation-Effectiveness/documents/2013-14_Educator_Evaluation_Guidelines.pdf. However, as the constituent has utilized the FOIA in attempt to obtain the documents requested, we turn to the Act for review.

Prior opinions of this Office have concluded that certain employee evaluations and investigative work product were exempt from public evaluation under the FOIA. See Op. S.C. Att'y Gen., 1983 WL 181995 (Sept. 8, 1983) (concluding that the Board of Examiners for Nursing Home Administrators would not be required to give applicant complete personnel file on the basis that disclosure of confidential letters of reference would constitute an unreasonable invasion of personal privacy and because the file would contain "investigative work product and conclusions of the Board"); Op. S.C. Att'y Gen., 1977 WL 24585 (Aug. 5, 1977) ("Correspondence relating to audits of individual positions, which are individually identifiable and relate to one person's level of performance or ability should not be released. Such documents relate solely to the individual employee's personal status and should be considered exempt from disclosure as a personnel record"); Op. S.C. Att'y Gen., 1975 WL 22486 (Nov. 20, 1975) ("Under the scholastic record and public interest exceptions to public record disclosure, the Citadel could under the Freedom of Information Act refuse to disclose to an individual his personnel files, including confidential faculty evaluations of the individual's teaching performance"); Op. S.C. Att'y Gen., 1973 WL 27623 (Oct. 8, 1973) ("It is my opinion that under the Freedom of Information Act, such personnel matters, relating generally as stated in your letter to strengths and weaknesses of employees, are excluded from public inspection"). Furthermore, a 1977 Supreme Court case addressing whether a proposed school budget prepared for a staff administrative briefing that contained "personnel matters such as possible job eliminations, reassignment of positions, and salary calculations" should be released under the FOIA, the Court held that: "[a]s administrative briefing material and privileged subject matter, the proposed budgets are protected by FOIA." Cooper v. Bales, 268 S.C. 270, 274, 233 S.E.2d 306, 308 (1977) (citing § 1-20.1 Code of Laws (1975 Cum. Supp)).

While Cooper and the aforementioned opinions seem to speak directly to the questions presented for our review, we do not find them dispositive. The FOIA, originally enacted in 1974, was significantly amended in 1978, 1987, and thereafter, with minor amendments, on several occasions. See generally Jennifer Jokerst, Let the Sun Shine: Reforming South Carolina's

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The policy also states that: "[e]ach employee has the right to review the contents of his/her personnel file. . . . [but] [a] staff member does not have the right to review references and recommendations provided to the district on a confidential basis." Id.

Freedom of Information Act, 65 S.C. L. Rev. 795, 800-02. Decisions by our courts have also provided clarity to the FOIA's application in its current form that we believe are relevant and helpful in answering the questions presented. And importantly, in this instance, the individual requesting the documents is the same person to whom the documents relate. Therefore, based on the analysis below, it is our opinion that a court would likely conclude that the documents requested by the constituent should be disclosed under our state's FOIA.

I. General FOIA Provisions

The FOIA currently provides any person the "right to inspect or copy any *public record* of a *public body*, except as otherwise provided by § 30-4-40." S.C. Code Ann. § 30-4-30 (2007) (emphasis added). The Legislature has identified that the purpose of the Act is to ensure "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." S.C. Code Ann. § 30-4-15 (2007). In other words, "[t]he essential purpose of FOIA is to protect the public from secret government activity." Lambries v. Saluda County Council, 409 S.C. 1, 8-9, 760 S.E.2d 785, 789 (2014) (citing Wiedemann v. Town of Hilton Head Island, 330 S.C. 532, 500 S.E.2d 783 (1998)). Our Supreme Court has also instructed that the "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001) (citations omitted).

Whether a document must be disclosed under the FOIA turns on whether the information requested (1) is held by an entity that classifies as a "public body;" (2) falls under the definition of a "public record;" and (3) is not exempt from disclosure. See S.C. Code Ann. § 30-4-30 (2007). The FOIA 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 . . . .

S.C. Code Ann. § 30-4-20(a) (2007) (emphasis added). As "school districts" and agencies "supported in whole or in part by public funds" are expressly identified within the FOIA's definition of a public body, it is without question that the Beaufort County School District is considered the same.

As a "public body," the FOIA requires disclosure, upon request, of "any public record" unless an exception applies. S.C. Code Ann. § 30-4-30(a) (2007). The FOIA defines the term "public record" as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c) (2007). However, the definition of "public record" also contains the following provision that provides examples of

certain information which "by law" is "closed to the public" and thus "not considered to be made open to the public under the provisions of this act:"

> [r]ecords such as income tax returns, medical records, hospital medical staff reports, scholastic records[2], adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act. . . .

Id.; see also Beattie v. Aiken County Dep't of Social Services, 319 S.C. 449, 454, 462 S.E.2d 276, 279(1995) ("[T]hose records which are required by law to be closed to the public are not subject to the FOIA") (citing S.C. Code Ann. § 30-4-20(c) (1991); S.C. Code Ann. § 30-4-40(4) (1991)). Our research does not reveal that South Carolina, by law, generally precludes the disclosure of teacher evaluations or internal investigations conducted by a school district regarding a teacher's complaint about an evaluation. We point out that recently in Evening Post Publishing Company v. Berkeley County School District our Supreme Court implicitly held that superintendent performance evaluations prepared by members of the Berkeley County Board of Education would have to fall under an applicable exemption to prevent their disclosure thereby indicating that the documents in question were public records. Evening Post Publishing Company v. Berkeley County School District, 392 S.C. 76, 708 S.E.2d 745 (2011) (specifically holding the trial court's grant of summary judgment permitting nondisclosure of superintendent evaluations under the attorney-client privilege exemption was inappropriate at that stage of the proceedings). As the documents requested appear to have been prepared, owned, used, and are in the possession of the school district and are not, by law, closed to the public, it is our opinion that the documents requested would classify as public records. Accordingly, we believe that an exemption would be necessary for the school district to withhold the documents from disclosure.

The FOIA contains several categories of information that are exempt from disclosure. See S.C. Code Ann. § 30-4-40(a) (2007 & Supp. 2014). Such matters include, but are not limited to, personal information that would constitute an unreasonable invasion of personal privacy if disclosed; protected attorney-client communications and work product; trade secrets; law enforcement records obtained in the process of an investigation; privileged communications, protected information, or a protected identity as defined by Section 23-50-45; certain contractual and proprietary data; and matters specifically exempted from disclosure by statute or law. Id. Although the constituent's letter states that the BCSD did not claim an exemption in response to the documents requested, an exemption enumerated in § 30-4-40 cannot be waived despite not

[2] We recognize that "scholastic records" are included within the public record definition as documents which by law are not considered to be made open to the public under the provisions of the FOIA. However, scholastic records protected from release by law do not appear to be inclusive of teacher evaluations or an internal investigation regarding the same. See 20 U.S.C. § 1232g et seq. (the Family Educational Rights and Privacy Act).

being claimed within the 15 day response period. See Litchfield Plantation Co. v. Georgetown Water and Sewer Dist., 314 S.C. 30, 443 S.E.2d 574 (1994) ("We decline to hold these exemptions [under § 30–4–40] can be waived by the public body's failure to respond within fifteen days.").

If material is exempt under the FOIA, an exemption does not provide a blanket prohibition of disclosure of the entire record containing exempted material. See Beattie v. Aiken County of Social Services, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995) (citations omitted). The Legislature has made clear that any nonexempt information should be separated from exempt material and made available to the requesting party. See S.C. Code Ann. § 30-4-40(b) (2007). Whether a record is exempt from disclosure under the FOIA must be made on a case-by-case basis. Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011) (citations omitted). Furthermore, an exemption to disclosure under the FOIA does not mean the government has a duty of non-disclosure; rather, exemptions, at most, simply allow the public agency the discretion to withhold the record or release it. Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

When a request is granted or denied, section 30-4-30(c) specifies that the reason for such determination must be made. S.C. Code Ann. § 30-4-30(c) (2007) ("Each public body, upon written request for records made under this chapter, shall within fifteen days. . . of the receipt of any such request notify the person making such request of its determination and the reasons therefor"). Recourse, by way of declaratory judgment and injunctive relief, can be applied for with the circuit court to enforce the provisions of the FOIA but must be made no later than one year following the date on which the alleged violation occurred. See S.C. Code Ann. § 30-4-100 (2007). Should the applicant prevail, the court can award equitable relief as it considers appropriate, reasonable attorney fees, and other costs of litigation. Id. Furthermore, a willful violation of the FOIA is a misdemeanor pursuant to S.C. Code Ann. § 30-4-110 (2007).

II. First FOIA Request

The FOIA exemption often claimed with regard to performance evaluations is the so-called "privacy exemption." See, e.g., Mulgrew v. Board of Edu. of the City School District of the City of New York, 31 Misc.3d 296, 302, 919 N.Y.S.2d 786, 790 (N.Y. Sup. Ct. 2011); First Selectman of the Town of Ridgefield v. Freedom of Information Com'n, 60 Conn.App. 64 (Conn. App. Ct. 2000); Bradley v. Saranac Community Schools Bd. of Edu., 455 Mich. 285, 294, 565 N.W.2d 650, 655 (Mich. 1997); Pawtucket Teachers Alliance Local No. 920 v. Brady, 556 A.2d 556 (R.I. 1989). In fact, the 2013-2014 *South Carolina Expanded Educator Support and Evaluation Guidelines* approved by the South Carolina State Board of Education contains a provision titled "Privacy Statement," which reads as follows:

> [t]hough the purpose of the South Carolina Freedom of Information Act is to create an affirmative duty on the part of public bodies to disclose information, the Act enumerates fifteen categories of public records that may be exempt from mandatory disclosure. See S.C. Code Ann. § 30-4-40(a)(2), which allows a public body to exempt from public disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of

> personal privacy." Individual educator evaluation scores fall within the purview of this exemption and will remain private, free from unwarranted publicity."

S.C. State Board of Edu., South Carolina Expanded Educator Support and Evaluation Guidelines (June 2014), available at http://ed.sc.gov/agency/ee/Educator-Evaluation-Effectiveness/documents/2013-14_Educator_Evaluation_Guidelines.pdf. While we only know the general categories of the information requested and are unaware of the contents of the documents, the privacy exemption appears to be the only exemption of relevance that requires discussion. Pursuant to S.C. Code Ann. § 30-4-40(a)(2) (2007) the privacy exemption permits nondisclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." This section identifies types of information, by way of example, that may be considered personal in nature including: "gross receipts contained in applications for business licenses and information relating to public records which include the name, address, telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation or handicapped persons solely by virtue of their handicap." S.C. Code Ann. § 30-4-40(a)(2) (2007). However, the Act clarifies that § 30-4-40(a)(2) "must not be interpreted to restrict access by the public and press to information contained in public records." Id. Our Supreme Court has also clarified that "exemptions to the FOIA found in § 30-4-40, and specifically subsection (a)(2), create no duty of confidentiality." S.C. Tax Com'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994) (citing Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991)).

The Court of Appeals has noted that because the FOIA does not specifically identify or describe the types of materials the FOIA's privacy exemption encompasses, other than the limited examples provided within § 30-4-40(a)(2), we must resort to general privacy principles in determining the exemption's application. Burton v. York County Sheriff's Dep't, 358 S.C. 339, 352, 594 S.E.2d 888, 895 (Ct. App. 2004); see also See Op. S.C. Att'y Gen., 2011 WL 6959371 (Dec. 5, 2011). Specifically, the Court summarized that

> examination [of the general privacy principle] involves a balancing of conflicting interests-the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other.
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> . . .
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> Our Supreme Court has defined the right to privacy as the right of a person to be let alone and free from unwarranted publicity. Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 586 S.E.2d 108 (2003). However, 'one of the primary limitations placed on the right to privacy is that it does not prohibit the publication of matter which is of a legitimate public or general interest. Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d at 606 (1956)).

Burton, 358 at 352, 594 S.E.2d at 895.

As pointed out in the constituent's letter, the FOIA requests we have been asked to consider are unique in that the individual making the requests is the same individual whose

privacy interests would be affected by the release of the documents. Specifically, the constituent indicated that "[i]t seems to me that the position of the BCSD is that I cannot have public records written about me because it would invade my own privacy, and that is, of course, absurd and unlawful." Although referencing the federal FOIA, we stated in a May 18, 2005 opinion of this Office that "[t]he courts have concluded that where personal privacy interest are implicated, only the individual who owns such interest, may validly waive it. . . . The privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information." Op. S.C. Att'y Gen., 2005 WL 1383358 (May 18, 2005) (citing Sherman v. United States Dep't of the Army, 244 F.3d 357 (5th Cir. 2001) ("The Supreme Court has explained that the privacy interest at stake in FOIA exemption analysis belongs to the individual, not the agency holding the information")). When applying the privacy exemption, South Carolina courts have similarly analyzed the privacy rights of the individual rather than the agency holding the information. See, e.g., Burton v. York County Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) (examining the privacy interests of the four deputy sheriff's at issue for purposes of whether the privacy exemption applied, not the agency). As release of the constituent's own teacher evaluation documents and classroom observation reports could not possibly be an unreasonable invasion of her own personal privacy, it is our opinion that the privacy exemption would not be applicable to the constituent's request for teacher evaluations and classroom observation forms if it were to be claimed.

While our Courts have not spoken on the issue, we point out that cases outside of our jurisdiction have found their state's privacy exemption inapplicable to certain teacher evaluations and data reports even when requested by a third party. In Mulgrew v. Board of Edu. of the City School District of the City of New York, 31 Misc.3d 296, 302, 919 N.Y.S.2d 786, 790 (N.Y. Sup. Ct. 2011) the Supreme Court for New York County ruled the Department of Education's release of Teacher Data Reports containing the names of individual teachers was authorized, holding in part that "the DOE could have reasonably determined that releasing the unredacted TDRs would not be an "unwarranted" invasion of privacy since the data at issue relates to the teachers' work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives." The court also rejected the argument that the reports were exempt from disclosure because the DOE assured teachers that the TDRs would remain confidential, stating that "as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records." Id. at 303, 919 N.Y.S.2d at 791 (internal quotations omitted) (citation omitted).

Similarly, in Bradley v. Saranac Community Schools Bd. of Edu., 455 Mich. 285, 294, 565 N.W.2d 650, 655 (Mich. 1997), the Supreme Court of Michigan found that a teacher's personnel file containing "documents pertaining to corrective or disciplinary actions, complaints filed, and performance evaluations" were not exempt from disclosure under its state's FOIA privacy exemption. The Court noted that its state's privacy exemption contained two elements: the first being that the requested material must be of a personal nature and second that disclosure of such information must be a clearly unwarranted invasion of privacy. Id. at 294, 565 N.W.2d at 654. After finding that the documents were not of a "personal nature" because "none of the documents contain[ed] information of an embarrassing, intimate, private, or confidential nature, such as medical records or information relating to the plaintiffs' private lives," whether their release would be a clearly unwarranted invasion of privacy was not necessary. Id. at 295, 565

N.W.2d at 655.[3] The Court reached the same conclusion in its analysis of whether administrative performance reviews of principals would also be exempt under Michigan's FOIA privacy exemption. Id. Furthermore, in response to the argument that a collective bargaining agreement established that administrator evaluations would only be reviewed by appropriate administrative personnel within the school district, the court stated that "no exemption provides for a public body to bargain away the requirements of the FOIA." Id. at 303, 565 N.W.2d at 685.

As was highlighted in Bradley's concurring opinion, several cases have reached the opposite conclusion that performance evaluations are of a highly personal nature and disclosure would be highly offensive in the individual's right to privacy. Bradley, 455 Mich. At 306- 313, n.6, 565 N.W.2d at 659- 62, n.6; see, e.g., Brown v. Seattle Public Schools, 71 Wash.App. 613, 860 P.2d 1059 (Wash. Ct. App. 2005). Our opinion of whether a court would determine disclosure of teacher evaluation documents and classroom observation reports as an unreasonable invasion of personal privacy is not necessary here because the requestor and the individual with the privacy interest are one in the same. Thus, it is our opinion that a court would find the privacy exception inapplicable in this instance.

III. Second FOIA Request

Whether an exemption would apply to the constituent's second FOIA request for documents and materials regarding "a BCSD 'investigation' of my complaint about my teacher evaluation performed in the school year 2013-2014" is also difficult to address without further knowledge of the investigation, who was a part of the investigation, and what documents were prepared as a result. However, from the information we have been provided, the privacy exemption appears to be the only exemption necessitating discussion.[4] The same reasoning applied to the first FOIA request that the privacy exemption would not apply because the individual requesting the documents is the same person whose privacy rights would be affected, also seems to apply in this instance. As we know of no other applicable exemption, it is our opinion that the documents requested in the second FOIA request should also be disclosed.

Even if the constituent was not the requestor, our Supreme Court has held that personally identifying information alone does not make requested reports from an internal investigation of a law enforcement agency per se exempt; alternatively the contents of the report would have to be examined to determine if it qualified for an exception under the FOIA. See City of Columbia v. ACLU of South Carolina, 323 S.C. 384, 385-86, 475 S.E.2d 747, 748 (1996). We find it reasonable to believe that the same application would be extended to an internal investigation of a complaint regarding a teacher evaluation. We also note that the Court in ACLU rejected the argument that the internal investigation report could be withheld from disclosure because it

[3] The test applied in Bradley for what constitutes as a "personal nature" was expanded from the "succinct test" of "intimate or embarrassing" details of a person's life to include "intimate, embarrassing, private, or confidential information" in Michigan Federation of Teachers & School Related Personnel v. Univ. of Mich., 481 Mich. 657, 675-76, 753 N.W.2d 28, 39-40 (Mich. 2008).

[4] The FOIA exempts certain materials related to criminal investigations as well as the identity of an individual who in good faith discloses information alleging a violation or potential violation of law or regulation to a state regulatory agency, however neither exemption appears to relate to an internal investigation of a teacher's performance evaluation as was conducted here. See S.C. Code Ann. § 30-4-40(a)(3); § 30-4-40(a)(15).

memorialized a discussion that was closed to the public pursuant to S.C. Code Ann. § 30-4-70(a) (to discuss among other things, the employment, demotion, or discipline of an employee). Id. at 387-88, 475 S.E.2d at 749. Thus, because the plain language of S.C. Code Ann. 30-4-70(a)(1) only permitted certain "discussions," and not a "public record," from disclosure, the question of exemption of the report had to be resolved by reference to § 30-4-40 (*i.e.* "matters exempt from disclosure"). Id.at 388, 475 S.E.2d at 749.

Conclusion

From the limited information we have been given, we find no provision in our law that would prevent the BCSD from providing the constituent documents related to her teacher evaluation results and the internal investigation of her complaints concerning a certain evaluation. To advance the purpose of teacher evaluations – being to improve teachers' practice – it is our opinion that the requested documents could be provided to the constituent independent of a FOIA request. S.C. Code Ann. § 59-26-33, providing in part that annual and contractual teacher evaluation results must be provided in writing, as well as the BCSD's own policy listing documents that should be contained in an individual's personnel file and available for review, both provide support for disclosure of the documents requested to the constituent in this instance.

Nonetheless, as the FOIA has been utilized to obtain the documents requested by the constituent, it is our opinion that the BCSD, as a public body, must disclose public records unless the material requested is closed to the public by law or an exemption applies. As set forth above, it is our opinion that the documents requested would classify as a public record that are not closed to the public by law. Therefore, we believe an exemption must exist to prevent the school district from disclosing the requested documents.

Although the privacy exemption is often claimed in response to requests for teacher evaluations and internal investigations, disclosure of the documents in this case would appear to be to the same individual whose privacy interests would be affected. Therefore, it is probable that such exemption would not be applicable to either request. Because no other exemption seems to apply from the information we have been provided, it is our belief that the documents requested should be disclosed to the constituent under our state's FOIA[5]. This conclusion is consistent with this office's longstanding view that an agency should, when in doubt, disclose information to the public. We do stress that review of the requested documents would be necessary to make a final determination as to whether an exception under the FOIA would apply and our opinion stated herein is only an interpretation of how a court would likely rule pursuant

[5] We note that Exemption 6 under the Federal FOIA contains a specific exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). However, the Federal FOIA guarantees the right to gain access to one's own records or to any information pertaining to oneself that is contained in a system of records unless exempted from review. 5 U.S.C.A. § 552a(d)(1). Such exemptions are listed in 5 U.S.C.A. § 552a(k)(1)-(7), § 552a(j)(2), § 552a(q), and § 552a(d)(5). While exceptions to viewing one's own records exist under the Federal FOIA, our Supreme Court has recognized "the exemptions contained in the federal FOIA are more expansive than those contained in South Carolina's FOIA." Newbery Pub. Co. v. Newberry County Com'n on Alcohol and Drug Abuse, 308 S.C. 352, 354, n.4, 417 S.E.2d 870, 872, n.4 (1992). We believe it is reasonable to conclude a court would apply the same reasoning to the Federal FOIA's exceptions to an exemption as our State's FOIA contains no such provisions.

to the limited information we have been given. Should you have any additional questions, please do not hesitate to contact our office.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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