ALAN WILSON
ATTORNEY GENERAL

July 27, 2015

The Honorable Molly M. Spearman
State Superintendent of Education
South Carolina Department of Education
1429 Senate Street
Columbia, SC 29201

Dear Superintendent Spearman:

You have requested an opinion of this Office related to the South Carolina Freedom of Information Act ("the FOIA"). You question whether the South Carolina Department of Education ("SCDE") must produce either the summative score or the subcomponent ratings or both from the educator evaluation systems or whether such information would be exempt from disclosure under the FOIA's privacy exemption, codified at S.C. Code Ann. § 30-4-40(a)(2) (2007). By way of background, you provided us with the following information:

> [t]he South Carolina Department of Education . . . may become the repository for the results of various educator evaluation systems, both the composite rating and the subcomponents. In the future, ratings of schools would become 50 percent of the principal's evaluation rating. Anyone who knew the name of the school would be able to look up the principal's name and know what half of his rating would be. Teachers would be rated on student growth, district choice, and observation/professionalism on a 5-point scale. Currently a teacher's rating is only reported as "met" or "not met." In other states lawsuits have been brought for professional defamation related to disclosure of a teacher's rating on multiple-level scales.

Based on the analysis below, we believe whether requests for evaluation results, identifying an educator by name, would be exempt under the FOIA's privacy exemption must be made on a case-by-case basis, balancing the conflicting interests of the individual in privacy on the one hand with the public's right to know on the other. Our analysis follows.[1]

Law / Analysis

As a preliminary matter, we note that prior opinions of this Office have concluded that certain employee evaluations were exempt from public evaluation under the FOIA. See Op. S.C.

[1] In an opinion of this Office dated February 19, 2015, we addressed a related issue of whether a certain school district would be required under the Freedom of Information Act to provide a teacher with her own evaluation documents and classroom observation forms. See Op. S.C. Att'y Gen., 2015 WL 992702 (Feb. 19, 2015).

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., 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."). While the aforementioned opinions seem to speak directly to the question 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 Freedom of Information Act, 65 S.C. L. Rev. 795, 800-02. As such, we will discuss the requirements of the FOIA in its current form below.

I. General FOIA Provisions

The FOIA 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). Pursuant to this definition, it is clear the SCDE is a public body; we have previously concluded the same in a prior opinion of this Office. See Op. S.C. Att'y Gen., 1980 WL 81971 (Aug. 21, 1980) ("The South Carolina Department of Education is a public body under the definition of South Carolina Code of Laws Section 30-4-20(a)").

As a "public body," the FOIA requires disclosure, upon request, of "any public record" unless an exemption 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 or principal evaluations. Therefore, as you indicated that the SCDE will likely be the depository for summative scores and subcomponent ratings from the educator evaluation system, or, in other words, will be "in the possession of" such documents, it is our opinion that they would classify as public records, and an exemption would be necessary to withhold them from disclosure under the FOIA, if requested. Furthermore, in Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011), our Supreme Court indirectly held that a superintendent's 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. We believe this provides additional support that a teacher or principal's evaluation would also classify as a public record pursuant to the FOIA's public record definition.

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

[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 or principal evaluations. See 20 U.S.C. § 1232g et seq. (the Family Educational Rights and Privacy Act).

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. 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 Dep't 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 Publ'g Co. v. Berkeley County Sch. 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).

II. The FOIA Privacy Exemption

a. General Provisions

The exemption frequently claimed with regard to performance evaluations under freedom of information laws is the privacy exemption. See, e.g., Mulgrew v. Bd. of Educ. of the City Sch. Dist. 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 Info. Comm'n, 60 Conn.App. 64, 66-68, 758 A.2d 429, 431 (Conn. App. Ct. 2000); Bradley v. Bd. of Educ. of Saranac Cmty. Schs., 455 Mich. 285, 294, 565 N.W.2d 650, 654-55 (Mich. 1997); Pawtucket Teachers Alliance Local No. 920 v. Brady, 556 A.2d 556, 558-59 (R.I. 1989). Pursuant to S.C. Code Ann. § 30-4-40(a)(2) (2007) our state's 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 Comm'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 explained 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, in Burton, the Court of Appeals summarized that:

> examination [of the general privacy principles] 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.
>
> Our Supreme Court has defined the "right to privacy" as the right of an individual to be let alone and to live a life 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 606 (1956)). Indeed, the Court has held that, as a matter of law, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such occurrence is not an invasion of his right to privacy.' " *Doe v. Berkeley Publishers,* 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998) (quoting *Meetze*, 230 S.C. at 337, 95 S.E.2d at 609).

Burton, 358 S.C. at 352, 594 S.E.2d at 895. Also, when applying the privacy exemption, the privacy rights of the individual are considered rather than the privacy rights of the agency holding the information. See, e.g., Id. (examining the privacy interests of the four deputy sheriffs at issue for purposes of whether the privacy exemption applied, not the privacy interests of the Sheriff's Department).

b. Applicable Case Law

i. South Carolina Cases

Although we have not found South Carolina authority speaking directly to your question, two cases are helpful to our analysis. In Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 78-79, 708 S.E.2d 745, 746 (2011), the issue before the Supreme Court was whether the circuit court erred in granting summary judgment in favor of the Berkeley County School District on the basis that the District could withhold evaluations of the District's superintendent completed by members of the District's Board of Education from disclosure under the attorney-client privilege exemption to the FOIA.[3] Among other things, the evaluations were the basis for

[3] Although the privacy exemption was used by the Board in response to Evening Post's third request for the evaluation documents, only the attorney-client exemption was raised in the District's answer as an affirmative defense to the Evening Post's suit brought pursuant to the Uniform Declaratory Judgment Act. Evening Post Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 79-80, 708 S.E.2d 745, 747 (2011).

determining whether the superintendent would receive a pay increase. Id. at 79, 708 S.E.2d at 746.

In its ruling reversing the circuit court's grant of summary judgment, the court found that a genuine issue of material fact existed as to whether attorney involvement was necessary during the superintendent's evaluation process. Id. at 83-84, 708 S.E.2d at 749. Furthermore, it backed its holding by the FOIA's policy concerns, stating as follows:

> policy considerations involved in this case support our decision that summary judgment was improper at this early stage in the proceedings. The General Assembly by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records. The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know at this juncture.

Id. at 84, 708 S.E.2d at 749.

In addition to indirectly confirming that superintendent performance evaluations are public records that must fall within an exemption to be withheld from disclosure pursuant to a FOIA request, this case, in the specific context of whether a school district was required to release its superintendent's performance evaluations, emphasizes that policy considerations promote a liberal construal of the FOIA in favor of the public's access to public records.

Next we highlight Burton v. York County Sheriff's Dep't, 358 S.C. 339, 351-53, 594 S.E.2d 888, 895 (Ct. App. 2004), where the Court of Appeals discussed the applicability of the privacy exemption to documents pertaining to a sheriff's department's internal investigation involving alleged illegal and unethical conduct of four deputy sheriffs. The court found "the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye." Id. at 352, 594 S.E.2d at 895. In addition, concluding that "the access to information [the reporter and newspaper] sought and the trial court granted was focused *on the performance of public duties* by the Sheriff and his deputies and the response of the Department to allegations of misconduct by the deputies," the Court found the newspaper "had a legitimate need to access the records . . . requested." Id. (emphasis added). The court further distinguished, by way of example, that the reporter and the newspaper "did not seek information regarding the off-duty sexual activities of the deputies involved." Id. This comparison shows the court's reasoning that, unlike information about off-duty sexual activities, the internal investigation documents requested were not of a personal nature where disclosure would constitute an unreasonable invasion of personal privacy, as the privacy exemption requires. Because the court found that internal investigation documents related to the *performance of public duties* were not exempt from disclosure under the privacy exemption, it is our opinion that Burton further strengthens the argument that a court would find the privacy exemption to be inapplicable to an educator's performance evaluations.

However, we reiterate that whether an exemption applies to a particular record must be determined on a case-by-case basis. We also point out that the requested documents in both Evening Post and Burton involved a specific matter of public concern: the superintendent's

evaluations in Evening Post were linked to whether the superintendent would receive a salary increase, and in Burton, the internal investigation documents involved specific allegations of misconduct. As such, it is unclear whether our courts require that a specific matter concerning public performance or a specific instance of misconduct be present to deem a document concerning a particular individual, such as a performance evaluation, a matter of public interest.

Regardless of whether the privacy exemption would apply to an individual's performance evaluations requested under the FOIA, "exemptions to the FOIA found in § 30-4-40, and specifically subsection (a)(2), create no duty of confidentiality." S.C. Tax Comm'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)). Put differently, 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).

Furthermore, in regards to possible claims that could be brought against the SCDE in response to disclosure, a prior opinion of this Office addressing a similar concern provided as follows:

> [e]ven assuming this type of information is exempt from disclosure under FOIA, our courts recognize FOIA does not impose a duty of confidentiality on a public body. . . . Thus, a [public body] has the responsibility to comply with the mandated disclosures pursuant to FOIA regardless of possible claims that may be made by its employees.

Op. S.C. Att'y Gen., 2006 WL 1574915 (May 23, 2006). Also with respect to potential civil liability, we offered generally that "the South Carolina Tort Claims Act protects governmental entities from claims arising out of their compliance with the law." Id. at *5, *n1 (quoting S.C. Code Ann. § 15-78-60 ("The governmental entity is not liable for a loss resulting from:. . . (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited, to any charter, provision, ordinance, resolution, rule, regulation, or written policies. . . .")).

ii. Foreign Jurisdiction Cases

Although we rely on the South Carolina authority addressed above to reach our conclusion to this opinion, many cases decided outside of our jurisdiction illustrate the controversy of this issue and that courts are divided as to whether educator evaluations should be disclosed. Examples of these cases follow. In Mulgrew v. Bd. of Educ. of the City Sch. Dist. 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 ("TDRs") 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 Cmty. Schs. Bd. of Educ., 455 Mich. 285, 294-95, 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 required that two elements be met: the requested material must be of a personal nature and the disclosure of such information must be a clearly unwarranted invasion of privacy. Id. at 294, 565 N.W.2d at 654.[4] 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.[5] 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 "[n]o exemption provides for a public body to bargain away the requirements of the FOIA." Id. at 303, 565 N.W.2d at 658.

Other courts have found that educator evaluation documents are not subject to disclosure under freedom of information laws. In Brown v. Seattle Pub. Schs., 71 Wash. App. 613, 615, 860 P.2d 1059, 1060 (Wash. Ct. App. 1993), the personnel records of an elementary school principal, including "documents relat[ing] to the evaluation of, and efforts to improve, [principal's] effectiveness and performance of her duties as a principal of an elementary school . . . ." were requested. Holding that the documents were not subject to disclosure under Washington's Public Disclosure Act, the court first determined that the records sought classified as "public records." Id. at 617, 860 P.2d at 1061. The court then analyzed whether its state's privacy exemption was applicable, discussing whether disclosure would be highly offensive to the reasonable person and whether the information sought was of a legitimate concern to the public. Id. at 618-19, 860 P.2d at 1061-62. First, the Court emphasized the presumption strongly favoring nondisclosure of performance evaluations because disclosure would likely be highly offensive to a reasonable person. Id. at 617, 860 P.2d at 1061. It quoted its Supreme Court precedent as follows:

> [t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.

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[4] Similar requirements are set by our state's FOIA privacy exemption.

[5] 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 & Sch. Related Personnel v. Univ. of Mich., 481 Mich. 657, 675-76, 753 N.W.2d 28, 39-40 (Mich. 2008).

> . . . This sensitivity goes beyond mere embarrassment, which alone is insufficient grounds for nondisclosure ... Employee evaluations qualify as personal information that bears on the competence of the subject employees. We hold that disclosure of performance evaluations, which do not discuss specific instances of misconduct, is presumed to be highly offensive within the meaning of RCW 42.17.255.[6]

Id. at 617-18, 860 P.2d at1061 (quoting Dawson v. Daly, 120 Wash.2d 782, 797, 845 P.2d 995, 1004 (Wash. 1993), overruled on other grounds by Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wash.2d 243, 261 n.7, 884 P.2d 592, 602 n.7 (Wash. 1994)). Pursuant to this precedent, the Court found the documents at issue, which did not relate to a specific instance of misconduct, would be highly offensive to the reasonable person. Id. at 618, 860 P.2d at 1061.

Next, the Court analyzed whether disclosure of the documents would be of a legitimate concern to the public. Id. at 618-19, 860 P.2d at 1061-62. It found that it would not. Id. The court clarified that its state's privacy exemption, "does not allow a balancing of the employee's privacy interest against the public interest;" rather, application turned on whether the concern of the public was legitimate, which "contemplates some balance of the public interest in disclosure against the public interest in the 'efficient administration of government.' " Id. at 618, 860 P.2d at 1061-62. The Court concluded that public disclosure of evaluations would harm the public interest in efficient government by undermining employee morale, resulting in a reduction of the quality of performance, and also by making supervisors reluctant to give candid evaluations. Id. at 619 n.4, 860 P.2d at 1062 n.4. Because "the harm outweighs the public interest in disclosure in cases where a review reveals that the evaluations do not discuss specific instances of misconduct or public job performance," the court held the privacy exemption applied and the school district was enjoined from disclosing the requested documents under Washington's Public Disclosure Act. Id. at 620, 860 P.2d at 1063.

The court in Connolly v. Bromery, 15 Mass. App. Ct. 661, 664-65, 447 N.E.2d 1265, 1266-67 (Mass. Ct. App. 1983) held that university faculty evaluations completed by students would be categorized as personnel files and therefore fell within the exemption providing that personnel or medical files or information were exempt from disclosure, an exemption analogous to one contained in the Federal Freedom of Information Act[7]. The Court explained that:

> [r]aw data appraising the job performance of individuals- which is what we are dealing with here- is particularly personal and volatile. In light of the cases discussed, we have no difficulty concluding that the student evaluations of teachers are personnel information and, as such, outside the category of a public record.

Id. at 664, 447 N.E.2d at 1267.

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[6] Wash. Rev. Code § 42.17.255 has since been recodified at § 42.56.050.
[7] See 5 U.S.C.A. § 552(b)(6).

Recently, in Los Angeles United Sch. Dist. v. Superior Court, 228 Cal. App. 4th 222, 230-31, 175 Cal. Rptr. 3d. 90, 95 (Cal. Ct. App. 2014), the California Court of Appeal considered whether a school district was required to release the names of teachers associated with "Academic Growth Over Time" ("AGT") teacher evaluation scores under the California Public Relations Act ("CPRA") or whether its state's privacy or catch-all exemptions applied. When analyzing the CPRA's catch-all provision – permitting a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest in nondisclosure outweighs the public interest in disclosure – the Court placed emphasis on the superintendent's concerns regarding disclosure. Id. at 244-45, 175 Cal. Rptr. 3d at 105-06. Noting that some predictions may be more compelling than others, the court nevertheless found that overall the concerns:

> clearly demonstrate a legitimate concern for what may occur if the names of teachers are released along with their AGT scores. It seems logical that the unredacted scores could spur unhealthy comparisons among teachers and breed discord in the workplace, discourage recruitment of quality candidates and/or cause existing teachers to leave the District, disrupt the balance of classroom assignments. . ., and adversely affect the disciplinary process.

Id. at 245, 175 Cal. Rptr. 3d at 106.

Emphasizing these reasons as well as common sense and human experience in predicting the likely effect of disclosure, the court found a substantial public interest in nondisclosure of the names of the District's teachers tied to their individual AGT scores. Id. at 246, 175 Cal. Rptr. 3d at 107. Further, it found that this substantial interest in nondisclosure outweighed the public's interest in disclosure, being that, if the public's interest in disclosure existed at all, it was minimal or hypothetical. Id. at 246-53, 175 Cal. Rptr. 3d at 107-13. It recognized that while parents have an interest in the effectiveness of the teacher who their child is or may be assigned to, that interest it did not necessarily translate into an interest that concerned the public at large. Id. at 247, 175 Cal. Rptr. 3d at 108. Also, it failed to see how unredacted AGT scores would shed any more light on the agency's performance, or inform the public of what their government was up to, than the release of redacted scores. Id. at 249, 175 Cal. Rptr. 3d at 109. Therefore, concluding the documents were exempt from disclosure under the CPRA's catch-all provision, the court declined to address the applicability of the privacy exemption and whether disclosure of teacher evaluation scores would constitute an unwarranted invasion of teacher privacy. Id. at 253-54, 175 Cal. Rptr. 3d at 113-14.

The cases discussed above illustrate the divisiveness on this issue and the variation of requirements and application of privacy exemptions from state to state. They also convey persuasive arguments both for and against disclosure.

Conclusion

Under South Carolina's FOIA, we believe a court would find educator evaluations are public records and therefore must fall within an applicable exemption for the public body at issue to withhold the requested documents from disclosure. In determining the applicability of the

privacy exemption, whether disclosure of certain documents would be considered of a personal nature where disclosure would constitute an unreasonable invasion of personal privacy must be made on case-by-case basis. In Burton, the Court of Appeals instructed that in determining the privacy exemption's application, examination involves a balancing of the conflicting interests of the individual in privacy on the one hand with the public's right to know on the other.

While it is our opinion that Evening Post and Burton provide support that the privacy exemption would not apply to an educator's evaluations, regardless of whether an exemption applies, an exemption to disclosure under the FOIA creates no duty of confidentiality and does not impose a duty of non-disclosure on behalf of the government. Rather, exemptions, at most, simply allow the public agency the discretion to withhold the record or release it. As a result, it is this Office's continued recommendation that when in doubt, a public body should disclose the information requested. See, e.g., Op. S.C. Att'y Gen., 2011 WL 1740747 (April 29, 2011).

Finally, as the cases decided outside of our jurisdiction discussed above illustrate, the release of individual educator evaluations has caused great debate across the nation.[8] Because this debate continues, we encourage you to seek judicial resolution through the Uniform Declaratory Judgment Act. We also note that many state legislatures have passed legislation addressing this issue in recent years;[9] similar action from our own Legislature would also provide great clarity to this contentious issue.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[8] See also Stephen Sawchuk, Access to Teacher Evaluations Divides Advocates, Education Week, March 28, 2012.
[9] See, e.g., Tenn. Code Ann. § 10-7-504(a) (2012); N.Y. Education Law § 3012-c (2015); Mass. Gen. Laws ch. 69, § 1I (2012); N.J. Stat. Ann. § 18A:6-121 (2012); N.J. Stat. Ann. § 18A:6-120 (2012).