

1977 S.C. Op. Atty. Gen. 134 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-164, 1977 WL 24506

Office of the Attorney General

State of South Carolina

Opinion No. 77-164

May 30, 1977

**\*1** A county council cannot pass an ordinance or resolution restricting public records from discovery under the Freedom of Information Act. Failing to release the contents of a proposed county ordinance, emergency ordinance or resolution until such item is brought up for a vote would violate the Freedom of Information Act, where such items are prepared and available prior to the meeting.

TO: Representative Irene Rudnick

QUESTION PRESENTED:

Does Resolution 77-44-4, passed by the Aiken County Council, violate the Freedom of Information Act?

STATUTES, CASES, ETC.

Code of Laws of South Carolina, 1962, as amended, Section 14-3709;

Code of Laws of South Carolina, 1962, as amended, Sections 1-20.1, et seq.;

Cooper, et al. v. Bales, et al., Opinion No. 20387, filed March 17, 1977;

1973 Op. Atty. Gen. 3493.

DISCUSSION OF ISSUES:

Aiken County Council passed Resolution No. 77-4-44, which provides in pertinent part:

. . . prior to the introduction of proposed ordinances and resolutions in regular public session, the content of such resolutions and ordinances will be considered private in nature until it is formally introduced.

. . . that the official Agenda of the Council contain only title of such resolutions and ordinances until the manner of implementation and details of same be made public at a public session of Council.

The question has been raised whether Aiken County Council can pass a resolution or ordinance making certain documents or information exempt from the Freedom of Information Act (FOIA). If this is valid, concern has been expressed that the public will have no opportunity to make input on proposed ordinances, emergency ordinances, or resolutions before they are made public and voted on.

Under Section 14-3709, Code of Laws of South Carolina, 1962, as amended, all county councils must give all ordinances three public readings at public meetings, with not less than seven days between the second and third reading. Therefore a county council cannot pass an ordinance on one reading. However resolutions and emergency ordinances can be passed with one reading.

The Freedom of Information Act excludes from its definition of public records those records 'which by law are required to be closed to the public.' This phrase 'which by law' means a statute of general application. Otherwise, a county or city would avoid the application of the FOIA entirely by making all of its records privileged. This would clearly defeat the intention of the Act. Therefore, the Aiken County Council would not have authority to make a public record privileged per se by passing an ordinance. See 1973 Op. Atty. Gen. 3493, copy attached.

However, the question remains as to whether or not the documents in question could be kept confidential prior to the first reading without the benefit of Resolution No. 77-44-4. The Council wishes to release only the title of proposed ordinances, emergency ordinances and resolutions, and keep the context thereof private until formally introduced for a vote at a public session of the Council.

\*2 In the recent South Carolina Supreme Court case of Cooper, et al. v. Bales, et al., supra, the issues of non-disclosure of certain agenda items prior to a public meeting was presented. The items under consideration in the Cooper case were not proposed public ordinances, but the Court's treatment of such materials is of value in considering the instant case. Cooper involved the release of statements of school board members concerning matters to be brought before the Board at its next meeting, and incomplete working papers and administrative briefings. The important holding of Cooper is that Section 1-20.3 and 1-20.1 of the FOIA must be read in pari materia. That is, all items subject to discussion in executive session are not to be considered as constituting public records.

Cooper, in dicta, partially based its decision denying disclosure upon the fact that the public had adequate notice of the matter in question before final action was taken:

. . . and the public is notified of the items scheduled for discussion. #8, '77 Smith's Reports, p. 19.

. . . published agenda advises the public of the items to be discussed. #8, '77 Smith's Reports, p. 19.

Most items affecting substantial public interest require two readings before any action is taken on them. #8, '77 Smith's Reports, p. 20.

Also, in Cooper, the trial Court made a finding that the public had advance notice of the subject to be discussed. In the instant case, the public is not advised of the nature of the proposed ordinance, emergency ordinance or joint resolution until the first public reading.

Based on Cooper's reliance upon the fact that the public would have some meaningful notice of matters to be discussed by an administrative agency, it is doubtful that this case can be read to allow county council to keep from public view the contents of a proposed ordinance, emergency ordinance or resolution until the matter is brought up for a vote.

Because of the three-reading requirement, the public will have ample opportunity to know the contents of an ordinance before it can be enacted. In that case the delay in public awareness of the resolution is minimal. However, the intent of the FOIA needs to be kept in mind:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business 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, this act is adopted, making it possible for citizens, or their representative to learn and to report fully the activities of their public officials. 1972 Acts and Joint Resolutions 2585.

Therefore, to deny citizens the right to know the content of proposed ordinances until after the first reading thereof, is to conflict with the intent of the FOIA.

\*3 In the case of emergency ordinances or resolutions there would be not prior notice or opportunity for public awareness until the matter is brought to a vote. This precludes any opportunity for public awareness prior to the time the matter is put to vote, and conflicts directly with the legislative intent of the FOIA.

CONCLUSION:

A county council cannot pass an ordinance or resolution restricting public records from discovery under the Freedom of Information Act. Failing to release the contents of a proposed county ordinance, emergency ordinance, or resolution until such item is brought up for a vote would violate the Freedom of Information Act, where such items are prepared and available prior to the meeting.

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