ALAN WILSON
ATTORNEY GENERAL

May 17, 2016

The Honorable Lisa C. Scott
Mayor, Town of Duncan
153 W. Main Street
Duncan, SC 29334

Dear Mayor Scott:

Attorney General Alan Wilson has referred your letter dated December 2, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

**Issue:**
You have asked for a legal opinion by this Office as to whether a referendum held by the Town of Duncan on November 3, 2015 is valid. Specifically, you provide as follows: "whether the legality of a referendum [held] November 3, 2015 is valid. This issue comes into question as a result of Governor Nikki Haley signing in to law an amendment that all public bodies must post the agendas on the website if they do have one. (FOIA 30-4-80). For Duncan, we were under the assumption that our Town website had been taken down, but to our surprise it was not. ... Without further fore thought, Duncan Town council had [the] first and second reading on the referendum July 14, 2015 and September 8, 2015. The election was then held on November 3, 2015 and was certified on November 6, 2015 by Spartanburg County. The people voted overwhelmingly in favor of this referendum. ... The Town's question is, do we just move forward or do we have to hold the election again. An opinion on this matter would greatly be appreciated."

**Law/Analysis:**
As you reference in your question, South Carolina Code Section 30-4-80 states:

> (A) All public bodies, except as provided in subsections (B) and (C) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board or website, if any, public notice for any called, special, or rescheduled meetings. Such notice must include the agenda, date, time, and place of the meeting, and must be posted as early as is practicable but not later than twenty-four hours before the meeting. This requirement does not apply to emergency meetings of public bodies. Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the

> public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda. Nothing herein relieves a public body of any notice requirement with regard to any statutorily required public hearing.

S.C. Code Ann. § 30-4-80(A) (1976 Code, as amended). The Town of Duncan would be considered a public body pursuant to the definition of a public body in South Carolina 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, municipalities, townships, ..."). The South Carolina Freedom of Information Act requires all meetings of public bodies to be open to the public unless the meeting meets an exception listed in § 30-4-70. S.C. Code § 30-4-60. As you are likely aware, in 2014 the South Carolina Supreme Court ruled that the South Carolina Freedom of Information Act's notice statute "does not require an agenda to be issued for a regularly scheduled meeting, and FOIA contains no prohibition on the amendment of an agenda for a regularly scheduled meeting." Lambries v. Saluda County Council, 409 S.C. 1, 760 S.E.2d 785 (2014). However, after the Court ruled, the General Assembly passed Act No. 70 of 2015 which amended Section 30-4-80 to require public bodies to post an agenda for all meetings at least twenty-four hours in advance of a meeting. Act No. 70, 2015 S.C. Acts 320. Thus, as of June 8, 2015, South Carolina law requires an agenda to be posted at least twenty-four hours in advance on a bulletin board "and on a public website maintained by the body, if any." S.C. Code § 30-4-80.[1]

By way of background, this Office has written previous opinions on the South Carolina Freedom of Information Act ("FOIA"). In one opinion we explained that:

> it is important to emphasize that South Carolina's Freedom of Information Act ("FOIA") was adopted in its present form in 1978 S.C. Acts No. 593. A number of amendments have been made to FOIA over the years. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble to FOIA, set forth in S.C. Code Ann. § 30-4-15, provides as follows:
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> > [t]he 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 fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

[1] Please read the full statute for a detailed description of its requirements, as this is just a simplified summary of its specifications.

> On numerous occasions, in construing FOIA, we have emphasized the Legislature's expression of openness in government, as articulated in § 30-4-15. In an opinion of this Office dated April 11, 1988, for example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA, as follows:
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> > [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to give effect to the legislature's intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Op. S.C. Att'y Gen., 2012 WL 3875118 (S.C.A.G. Aug. 28, 2012). South Carolina Code § 30-4-60 states that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-1-70 of this chapter." South Carolina Code § 30-4-20(d) defines a meeting as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." This Office has previously stated regarding FOIA that:

> "each situation would have to be judged on its own facts." Ops. S.C. Att'y Gen., 2014 WL 3965780 (August 5, 2014); 2004 WL 2451475 (October 7, 2004); 2002 WL 31341811 (August 19, 2002). In a previous opinion this Office has suggested asking in regards to an illegal meeting: was there any prejudice to anyone as a result of the action; was the violation of FOIA only a technical violation; has the body taken any action to rectify the action; and what relief might a court provide to remedy the alleged violation? Op. S.C. Att'y Gen., 1997 WL 569093 (August 20, 1997). However, if you feel there is a SC FOIA violation, "[a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases ..." S.C. Code § 30-4-100 (1976 Code, as amended).

Op. S.C. Att'y Gen., 2015 WL 4497735 (S.C.A.G. July 6, 2015) (emphasis added). Therefore, while we are not making any factual determinations in this opinion, we encourage you to examine the four questions listed in the 1997 opinion and as stated above. Furthermore, the South Carolina Court of Appeals has previously stated concerning the Freedom of Information Act that "substantial compliance with the Act will satisfy its requirements where a technical violation has no demonstrated effect on a complaining party." Multimedia, Inc. v. Greenville Airport Com'n, 287 S.C. 521, 525, 339 S.E.2d 884, 887 (1986) (citing City of Flagstaff v. Bleeker, 123 Ariz. 436, 600 P.2d 49 (1979); Karol v. Board of Education Trustees, 122 Ariz. 95, 593 P.2d 649 (1979)). Based on the information you provided in your letter, we will presume the Town substantially complied with the Freedom of Information Act in posting

notice of the meetings without knowledge of a website that was supposed to have been removed. Certainly, if the Town had no website, there should not be a question of compliance.

The Court in South Carolina serves as interpreter and enforcer of the statutes and the rights of the people in elections. See, e.g., Hyde v. Logan, 113 S.C. 64 (1919). Regarding elections, our State Supreme Court is traditionally reluctant to overturn an election. See, e.g., Smoak v. Rhodes, 201 S.C. 237, 22 S.E.2d 685 (1942). As the Court stated in Smoak, "[e]rrors which do not appear to have affected the result will not be allowed to overturn an election, and every reasonable presumption will be indulged to sustain it." Smoak v. Rhodes, 201 S.C. 237, 22 S.E.2d 685 (1942) (quoting Hyde v. Logan, 113 S.C. 64, 101 S.E. 41, 44 (1919)). The Court distinguished the case of a technical violation versus fraud. Id. (quoting Killingsworth v. State Committee, 125 S.C. 487, 118 S.E. 822, 824 (1922)). The Court in Killingsworth stated that:

> [t]he rules of the primary elections (part in the rules of the party and part in the statutes) are elaborate and minute in detail, and comprise regulations for the size of the booths, the length of the curtain that screens the booth, the distance of the rail from the ballot box, etc. It will not be contended that a few inches one way or the other in these matters would vitiate an election. If these rules and regulations are held to be mandatory, and a variation from any one of them fatal to an election, it would be almost impossible to hold a valid election. They must be held to be directory, and in order for a failure to comply with them to be fatal it must be shown that the error was prejudicial or liable to produce prejudice. We have seen that there is nothing in the record to show that the secrecy of the ballot was impaired.
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> There is in this case no question of want of good faith or fraud. The objection is to what, in this case, is a mere technical violation of the law.

Killingsworth v. State Executive Comm. of Democratic Party, 125 S.C. 487, 118 S.E. 822, 824 (1921). Thus, for purposes of this opinion and based on your letter, this Office will presume the omission of notice on the website was not due to bad faith or fraud and that the website was not being used or updated otherwise. Moreover, "[a]ny protest or contest [to an election] must be filed in writing with the chairman of the board, together with a copy for each candidate in the race, by noon Wednesday following the day of the declaration by the board of the result of the election." S.C. Code § 7-17-30. Since your letter was dated December 2, 2015 and you did not mention an appeal or protest to the vote on the referendum, we will presume any such deadline to file a protest has passed. Furthermore, the South Carolina General Assembly has charged the South Carolina Elections Commission through its director to ensure each county election complies with the law. S.C. Code § 7-3-20(C)(1)-(2). While the Elections Commission advises counties on elections, you mentioned in your letter that Spartanburg County certified the election. Thus, we advise consultation with the South Carolina Elections Commission to ensure compliance with all laws and regulations.

**Conclusion:**
Without making any factual determinations, this Office believes if all of the aspects of the South Carolina Freedom of Information Act were substantially complied with in good faith in giving notice to the public of two upcoming meetings regarding a vote on a referendum except for notice on a website when the Town understood the website to have been removed, it is likely a court will find such error was technical

and did likely did not affect the result of the election on the referendum.[2] Furthermore, it is this Office's understanding no one filed a protest to the vote on the referendum within the applicable deadlines. Therefore, unless and until a court or the South Carolina Elections Commission orders you to hold a new vote on the referendum, this Office, like a court, will give every reasonable presumption that any such technical error in the Freedom of Information Act notification of the election process would not warrant overturning the election process and that the election where the citizens voted should be upheld. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[2] This Office is relying on the information as presented to be accurate and complete. Thus, if there have been any material facts or circumstances that were not presented, our opinion could be subject to change.