



ALAN WILSON  
ATTORNEY GENERAL

October 29, 2019

The Honorable Bill Woolsey, Mayor  
Town of James Island  
Post Office Box 12240  
James Island, South Carolina 29422

Dear Mayor Woolsey:

We received your letter requesting an opinion of this Office regarding the South Carolina Freedom of Information Act. Specifically, you ask us to address: (1) Whether the Town Council for the Town of James Island ("Town Council") can go into executive session during a meeting when "executive session" is not included on the agenda, but is related to an agenda item; (2) Whether the Town Council can add an executive session as an item to the agenda by a two-thirds vote to change the agenda; and (3) If the Town Council votes to amend the agenda to add an executive session, but then takes no action on the original agenda item, you question if this violates FOIA.

#### Law/Analysis

#### **Must an executive session related to an agenda item be included on the agenda?**

Section 30-4-60 of the South Carolina Code (2007) requires all public bodies to hold open meetings. Section 30-4-70 of the South Carolina Code (2007) provides exceptions to this rule. This provision allows public bodies to hold closed meetings for six limited reasons including the discussion of personnel matters, contract negotiations, and to receive legal advice. S.C. Code Ann. § 30-4-70.

In your first question, you describe three scenarios in which the Town Council goes into an executive session for purposes allowed under section 30-4-70 to discuss items that are on the agenda, but the agenda does not list the executive session. You question whether these scenarios violate FOIA's notice provision.

Section 30-4-80 of the South Carolina Code (Supp. 2018) requires public bodies to provide notice of meetings. Section 30-4-80(A) specifically requires public bodies to post an agenda for all regular and special meetings.

(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 . . . .

S.C. Code Ann. § 30-4-80.

In Herald Publishing Co. v. Barnwell, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986) the Court of Appeals determined FOIA does not require an agenda for an executive session. That Court stated:

The Act does not require that an agenda for an executive session be posted or that the news media be notified of the agenda of an executive session. Instead, the Act requires that the presiding officer of a public body which has voted to go into executive session shall announce the purpose of the executive session. Section 30-4-70(a)(5). Practically speaking, it is easily foreseeable that public bodies might not know what will be taken up in executive session until they are meeting in an open session. The Act recognizes this by providing that an executive session can only follow an open session, where the public body must vote in public to meet in executive session. Id.

Id. at 11-12, 351 S.E.2d at 883.

In Brock v. Town of Mount Pleasant, 415 S.C. 625, 785 S.E.2d 198 (2016), our Supreme Court considered a town taking unnoticed action following executive sessions. Citing to Herald Publishing Co., the Supreme Court reiterated that FOIA does not require an agenda for an executive session. Id. at 630, 785 S.E.2d at 201. The Court explained:

We recognize, and Petitioner does not dispute, that unnoticed items may be added to an executive session discussion at the time of a meeting. However, after the executive session concludes and the public body reconvenes in open session, any action taken or decision made must be properly noticed and, in the case of special meetings, such items may not exceed the scope of the purpose for which the meeting was called. In so ruling, we do not suggest that

an agenda must specifically state the action to be taken; rather, it is sufficient for the agenda to reflect that, upon returning to open session, action may be taken on the items discussed during the executive session.

Id. at 631, 785 S.E.2d at 202 (citations omitted).

Neither Herald Publishing Co. nor Brock, addressed whether notice of an executive session must be provided on the agenda. In Brock, notice of the executive session was included on the agenda. Id. at 631, 785 S.E.2d at 201. However, at issue was the fact that the town took unnotified action after the executive session. Id. The Court explained that under Lambries v. Saluda County Council, 409 S.C. 1, 760 S.E.2d 785 (2014), action cannot be taken that is beyond the scope of a special meeting. Id. at 631, 785 S.E.2d at 202. Because the action was not within the scope of the special meeting, it violated FOIA. Id.

In the scenarios you describe, notice of an executive session was not included in the agenda. While we do not find a provision of FOIA or case law mandating that a planned executive session must be included as part of the agenda, we believe that including this information furthers the purposes of FOIA. The Legislature explicitly stated in section 30-4-15 of the South Carolina Code (2007), with regard to FOIA

[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 report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

As such, our courts have opined that “[t]he essential purpose of the FOIA is to protect the public from secret government activity.” Burton v. York Cty. Sheriff’s Dep’t, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004). Furthermore, in a 1989 opinion, this Office advised in regard to section 30-4-80, this provision “must be liberally construed to carry out their legislative purpose to adequately inform the public.” Op. Att’y Gen., 1989 WL 406201 (S.C.A.G. Oct. 11, 1989).

As the Court of Appeals noted in its opinion in Brock v. Town of Mount Pleasant, 411 S.C. 106, 119-20, 767 S.E.2d 203, 209-10 (Ct. App. 2014), aff’d as modified, 415 S.C. 625, 785 S.E.2d 198 (2016), listing the executive session in the agenda gives the public and the press notice that “Town Council desired to confer with its attorney in closed session regarding certain matters . . . .” Thus, including notice of an executive session in the agenda furthers the purpose of section 30-4-80 to adequately inform the public. We acknowledge, just as the Supreme Court in Brock acknowledged, unforeseen events often occur during the course of public meetings. Town

Council may reach an item on the agenda that requires an unforeseen executive session. However, this Office will continue to advise public bodies to include executive sessions on their agendas to provide the public with notice of the contents of the meeting.

**Can Town Council vote to amend the agenda to include an executive session?**

As explained in a prior opinion,

[f]ollowing the Supreme Court’s decision in Lambries, the General Assembly amended § 30-4-80 by Act No. 70 of 2015. The purpose of this Act, as expressed in its Title, was to “provide [that] public bodies shall post agendas for all regularly scheduled meetings” and to “provide for the manner in which these agendas subsequently may be amended.”

Op. Att’y Gen., 2018 WL 3326902 (S.C.A.G. June 28, 2018). Section 30-4-80(A), as amended, states that

[o]nce 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.

The language used in section 30-4-80(A) makes clear that any amendment of the agenda requires a two-thirds vote. Because a vote to enter into an executive session is final, in the sense that once it is taken the matter will not come again before the body, you question whether a vote to go into executive session is a “final vote” under section 30-4-80(A) requiring both a two-thirds vote and a finding that an emergency or exigent circumstances exist. We do not believe this was the intent of the Legislature.

Section 30-4-70 of the South Carolina Code, providing the circumstances under which a public body may hold a closed meeting, also provides the procedure for entering into an executive session. Section 30-4-70(b) states:

Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, “specific purpose” means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.

(emphasis added). According to this provision, no action can be taken in an executive session except to adjourn or return to public session. See also Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 165, 547 S.E.2d 862, 866 (2001) (“FOIA prohibits any formal action to be taken in an executive session.”). Because no action can be taken, we believe the vote to go into executive session cannot invoke the “final action” contemplated in section 30-4-80(A). Accordingly, if Town Council chooses to amend its agenda to add a listing for an executive session, we believe this amendment requires a vote of two-thirds of the members present and voting, but not a finding of an emergency or exigent circumstances.

**Does voting to amend the agenda to include an executive session, but not taking action on the agenda item related to the executive session violate FOIA?**

As we stated above, the purpose of FOIA is to “is to protect the public from secret government activity.” Burton, 358 S.C. at 347, 594 S.E.2d at 892. FOIA seeks to prohibit public bodies taking unnoticed action in secret meetings. By listing an item on the agenda, we presume Town Council aims to meet its notice obligations under section 30-4-80. However, we did not find a mandate in this provision, or any other provision under FOIA, requiring Town Council to act on the items listed in the agenda.

Unless otherwise provided by statute or ordinance, under the open meeting law a public body is free to remove an item from its meeting agenda at any time. Generally, there is no statutory provision requiring public bodies to discuss, or take action on, all agenda items. The agenda requirement merely prohibits a public body from considering or taking action on items without providing proper notice. Because the removal of agenda items does not equate to taking action on those items, the court holds that public bodies are free to remove agenda items at any time.

The Honorable Bill Woolsey  
Page 6  
October 29, 2019

4 Eugene McQuillin, The Law of Municipal Corporations § 13:11 (3d ed.) (citations omitted). Therefore, we do not believe Town Council violates FOIA if it lists an item on its agenda, but does not take action in reference to that item.

**Conclusion**

In our review of FOIA, we did not find a provision requiring Town Council to list executive sessions on its agendas. However, we advise that including executive sessions on its agendas furthers both the purpose and the spirit of FOIA. Should Town Council desire to amend its agenda to add an executive session, it must comply with section 30-4-80(A) requiring a two third's vote of the members present and voting. Because Town Council cannot take action in an executive session, we do not believe this constitutes a "final vote" under section 30-4-80(A), requiring a finding of an emergency or exigent circumstances. We also do not believe failing to act on an agenda item results in a FOIA violation.

Sincerely,



Cydney Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General