



A WRONG TURN COULD COST YOU \$44,402.50:
FAQs to Help You Navigate the FOIA Landscape

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Does a request made under FOIA have to mention "FOIA" or otherwise reference the applicable statute(s)?

It would completely run contrary to the spirit of [FOIA] to require the citizen to recite the FOIA Code provision or make reference to the "Freedom of Information Act" in order to make the request valid under the FOIA.

The Freedom of Information Act provides the citizen with a remedy for access to records, but it does not then impose a hypertechnical formula upon him in order to employ that remedy. The custodian cannot engage in a game of "gotcha" merely because the citizen does not recite certain magic words.

Source: S.C. Attorney General's Office (June 23, 1997 Opinion)

2

What is FOIA's so-called "privacy exemption"?

A public body may but is not required to exempt from disclosure . . . [i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy.

Source: S.C. Code § 30-4-40(a)(2)

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What have courts interpreted the "privacy exemption" to include?

home addresses¹

personal e-mail addresses¹

personal telephone numbers¹

names of South Carolina Lottery winners²

Source: S.C. Court of Appeals (¹Glassmeyer v. City of Columbia - Sept. 2, 2015;
²S.C. Lottery Commission v. Glassmeyer - July 31, 2019)

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Does the privacy exemption apply to a request for records about a current or former employee who was disciplined?

[W]e find 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.

Source: S.C. Court of Appeals (Burton v. York Co. Sheriff's Dept. - April 5, 2004)

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Does the privacy exemption apply to a request for teacher evaluations?

Under South Carolina's FOIA, we believe a court would find educator evaluations are public records. . . .

[W]hether 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.

[I]t is this Office's continued recommendation that when in doubt, a public body should disclose the information requested.

Source: S.C. Attorney General's Office (July 27, 2015 Opinion)

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Does the privacy exemption apply to a settlement agreement?

[S]ettlement documents are generally public records subject to disclosure under FOIA.

Source: S.C. Attorney General's Office (Nov. 7, 2007 Opinion)

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What if the settlement agreement provides that your organization is required to keep the terms of the agreement confidential?

[W]e do not believe the fact that a settlement agreement contains a confidentiality provision gives authority to the District to ignore the provisions of FOIA. Thus, despite any such provision contained in the Settlement Agreement, the District must disclose information not exempt under [FOIA].

Source: S.C. Attorney General's Office (Nov. 7, 2007 Opinion)

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Does the privacy exemption apply to a request for records about a current or former employee who (1) was the subject of a complaint but was not investigated or (2) was investigated but not disciplined?

If the complaints against [the employee] allege that he violated the law or used his authority to perform activities which constitute "conduct unbecoming" an officer, the public has a right to know why the Department failed to investigate the allegations or discipline [the employee].

[E]ven if Plaintiff's complaint appeared to implicate private or personal information regarding [the employee], there exists a significant public interest regarding [his] activities and the Department's response that substantially outweighs his right to privacy.

Source: S.C. Circuit Court ([Glassmeyer v. City of Columbia](#) - Order issued July 23, 2014)

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You received a request for a summary or analysis of records – do you have to create such a document?

The public body is not required to create a record where the record does not otherwise exist by extracting information from other documents which are in the possession of the public body. On the other hand, the public body may create such a document for a requestor if it chooses. . . .

Source: S.C. Attorney General's Office (March 5, 1996 Opinion)

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What if someone requests records in electronic format?

If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format.

Source: S.C. Code § 30-4-30(B)

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You received a request under FOIA about a matter that is currently in litigation - does the fact that there is a pending court case provide a blanket reason to deny the request?

In sum, we decline to depart from precedent by imposing a blanket prohibition on disclosure whenever the person seeking public records is simultaneously being sued by the public body in possession.

If the government . . . seek[s] protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record.

Source: S.C. Court of Appeals ([Pope v. Wilson](#) - June 19, 2019)

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You received a request (not a judicial order or subpoena*) from a law enforcement agency for FERPA-protected information about a student – can you provide it?

If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Sources: 34 C.F.R. § 99.36(c); S.C. Attorney General's Office (Feb. 12, 2012 Opinion)

*Different statutory/regulatory provisions apply to complying with judicial orders and subpoenas. See 20 U.S.C. § 1232g(b)(2)(B) and 34 C.F.R. § 99.31(a)(9)(ii).

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Before going into executive session, is it sufficient to announce the purpose of doing so is "a personnel matter," "to discuss a proposed contract," or other general terms?

FOIA is clear in its mandate that the "specific purpose" of the session "shall be announced."

Therefore, FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. As evidenced by the minutes, the presiding officer did not announce the specific purpose of the executive session. This was a violation of FOIA.

Source: S.C. Supreme Court (Donohue v. City of N. Augusta - June 17, 2015)

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What are common "specific purposes" for going into executive session?

A public body may hold a meeting closed to the public for one or more of the following reasons:

(1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. . . .

(2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

Source: S.C. Code § 30-4-70(a)

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Do minutes have to be taken during executive session?

S.C. Attorney General's Office (Sept. 21, 1984 Opinion):

FOIA deals specifically only with minutes of public sessions and does not expressly address minutes of executive sessions. However, even though such minutes are not expressly required, a close reading of [S.C. Code §] 30-4-90(b) reveals an anticipation of minutes of executive sessions being kept.

Municipal Association of S.C. (Handbook for Municipal Officials, Dec. 2017):

The municipality must keep minutes for all meetings except executive sessions. If minutes of executive sessions are kept, they are not subject to public disclosure under the Freedom of Information Act. However, they may be discoverable in a court action.

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Do minutes have to be taken during executive session? (Continued)

S.C. Association of Counties (Handbook for County Govt., Fifth Ed.):

Executive sessions, which are limited to a few specific purposes, allow frank discussions about sensitive matters. Discovery of such information defeats the purpose of executive sessions; for this reason, taking of minutes of executive sessions is not recommended. Furthermore, minutes — once taken — are public records and must be maintained as required by the FOIA. Even if the minutes are not discoverable under present law, a future amendment to the FOIA could open up the information in these old minutes.

S.C. Association of Counties (FOIA Handbook, 2018):

The Act is not clear on whether written minutes of executive session are required. While the Association of Counties has traditionally advised that written minutes of executive session are not required by the Act, there are differences of opinion in the legal community.

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What action, if any, can be taken in executive session?

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.

Source: S.C. Code § 30-4-70(b)

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Can agenda items be moved around during a meeting without a 2/3 vote?

[W]e believe the purpose of the 2015 [FOIA amendment] was to require a two-thirds vote in order to “amend” an agenda during the meeting.

Construing FOIA broadly, as we must, it is our opinion that the statute required a two-thirds approval to return consideration of [a particular matter] to its former location on the agenda. This was not done in accordance with [S.C. Code] § 30-4-80(A). A court could conclude that Council played “musical chairs” with the public.

Source: S.C. Attorney General's Office (June 28, 2018 Opinion)

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Can a "catch-all" agenda entry be used to allow a public body to address issues which do not otherwise appear on a meeting agenda?

The request letter additionally asks whether a catchall agenda entry, such as “Other Administrative Business,” could be used to allow a public body to address issues which are not otherwise noticed on an agenda. It is this Office's opinion that a court would likely find such a practice violates the S.C. FOIA.

Source: S.C. Attorney General's Office (July 30, 2019 Opinion)

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If my organization is sued for violating FOIA and loses, will it have to pay the opposing party's legal fees?

[T]his Court finds that the Plaintiff prevailed in the underlying matter and is entitled to attorney['s fees and costs as provided by [FOIA].

[T]he Court finds that the Plaintiff is entitled to \$43,693.00 for . . . fees and \$709.50 for costs for a total recovery of \$44,402.50.

Source: S.C. Circuit Court ([Glassmeyer v. City of Columbia](#) - Order issued Oct. 4, 2018)