



The South Carolina Freedom of Information Act: Government in the Sunshine or in a Fishbowl

Presented by:

David Lyon

Meredith L. Seibert

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FINDINGS & PURPOSE

“The 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.”

S.C. Code Ann. § 30-4-15



Sources of Legal Authority

- S.C. Code Sec. 30-4-10, et seq.
- Court opinions (primarily state)
- Opinion Letters from the Attorney General's Office

FOIA – PURPOSE

“FOIA serves a ‘vital’ purpose in our democratic society by ensuring that public business is performed in an ‘open and public manner.’ S.C. Code SS 30-4-15. FOIA thus protects the public from ‘secret government activity.’ . . . In doing so, FOIA promotes transparency and accountability in our system of government. For decades, in order for public bodies and entities to fully comply with FOIA, this Office has advised that ‘when in doubt, disclose.’ Disclosure is thus generally not only a good idea, it is the law.”

August 16, 2022 – Letter from Alan Wilson

Enforcing FOIA

“Generally speaking, [the Attorney General’s] Office does not possess the resources to enforce FOIA, except through the issuance of advisory opinions, leaving to private citizens the ability the enforce FOIA through court actions. However, where necessary, this Office can and will bring suit against public bodies, who flout their duties under FOIA. Moreover, a consistent pattern of FOIA violations can lead to possible criminal prosecutions for misconduct in office, which carry stiff criminal penalties. In short, FOIA cannot be ignored or circumvented, and this Office will work to ensure that the law is upheld.”

August 16, 2022 – Letter from Alan Wilson

Major Components of FOIA

- Ability to inspect and/or copy public records of a public body
 - Typically, administration assumes responsibility for this
- Notice of and conduct of meetings of the public body
 - Typically handled by Board, with assistance from administration

“Public body” means any . . . public or governmental body or political subdivision of the State including . . . school districts . . . including committees, subcommittees, advisory councils, and the like of any such body by whatever name known . . .

S.C. Code Ann. § 30-4-20(a)

"Meeting" means the convening of a quorum . . . 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.

S.C. Code Ann. § 30-4-20(d)

Types of Meetings (contemplated by § 30-4-80(A))

Regular Meeting

Called Meeting

Special Meeting

Rescheduled Meeting

Emergency Meeting



Notice of & Agendas for Public Meetings

Regular Meeting

- **Written Public Notice** – Public bodies must give written public notice of their regular meetings at the beginning of each calendar year. Must include the dates, times, and places of such meetings.
 - District/Board policy often addresses some portion of these meetings.
- **Post Agenda** – “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.”
- **Other Notifications** – Public bodies shall notify persons, organizations, or news media as may request notification of the times, dates, places, and agenda of all public meetings (whether scheduled, rescheduled, called). Efforts made to comply with this requirement must be included in the minutes of the meeting.



Notice of & Agendas for Public Meetings

Called, Special, or Rescheduled Meeting

- **Written Public Notice With Agenda** – Public notice 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. Public Notice must include the agenda, date, time, and place.
- Must be posted “as early as is practicable but not later than twenty-four hours before the meeting.”
- **Other Notifications** – Public bodies shall notify persons, organizations, or news media as may request notification of the times, dates, places, and agenda of all public meetings (whether scheduled, rescheduled, called). Efforts made to comply with this requirement will be noted in the minutes of the meeting



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Notice of & Agendas for Public Meetings

Emergency Meeting

- Emergency meetings are the exception: they can be held on a moment's notice, but the purpose must be clearly of an emergency nature.
- Make reasonable effort to give notice



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Committees and Subcommittees

Committees created to provide advice to the board or perform gov't function *must comply* with FOIA—including *the notice requirements*.

Takeaway:

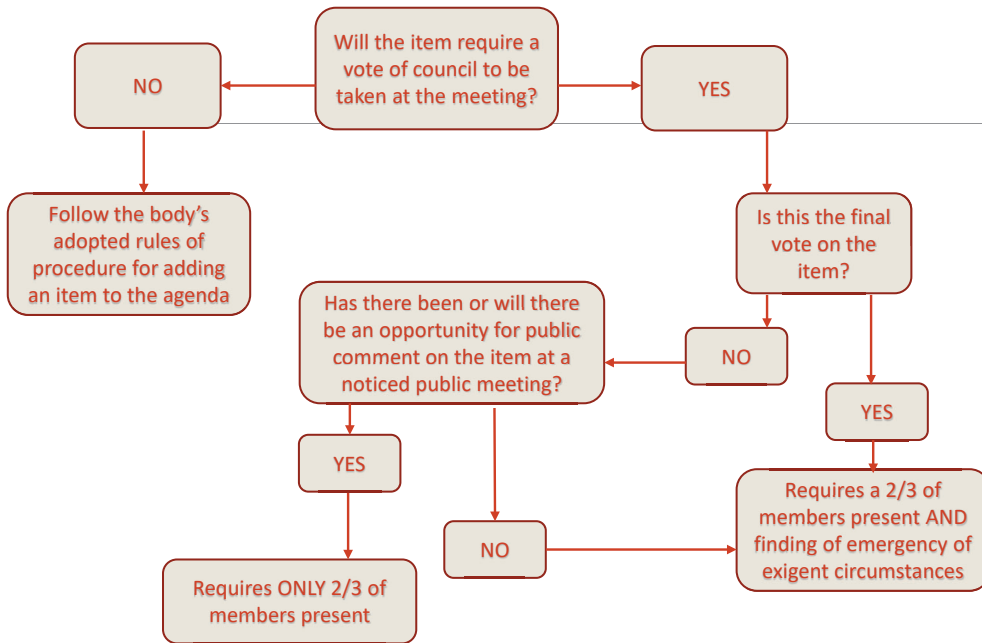
Treat committee meetings, work sessions, and retreats where board business is discussed as public meetings and thus, required to post notice and agenda



AGENDA AMENDMENTS

- **If made at least 24 hours in advance of meeting:** must be made/noticed in *same* manner as original notice
- **Within 24 hours or At the meeting:**
 - Discussion-only item: follow district policy
 - Action item: 2/3 vote
 - Final action item: 2/3 vote **AND** finding of emergency/exigent circumstance





Adding item to agenda within 24 hours of meeting



MEETING MINUTES

Meeting minutes must include:

- Date, time, place;
- Members recorded as present/absent;
- Substance of matters proposed/discussed/decided
- Any other info that *any* member of public body requests be included/reflected

Copies for past 6 months should be available for inspection – no FOIA document request required



EXECUTIVE SESSION

- Before going into executive session, the public body *shall* vote in open session to go into executive session
- The motion must announce the specific purpose of the executive session
- No action can be taken in exec. session (i.e., members may not commit to a course of action by polling votes in exec. Session)



EXECUTIVE SESSION – Allowable Purposes

S.C. Code Ann. § 30-4-70(b)

- Employment discussion: hiring/firing/demotion/discipline of employees;
- Student discipline hearings;
- Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property;
- Receipt of legal advice where the advice relates to “pending, threatened, or potential claim” or other matters covered by the attorney/client privilege;



EXECUTIVE SESSION – Allowable Purposes

S.C. Code Ann. § 30-4-70(b)

- Discussion of development of security devices/personnel;
- Investigative proceedings involving allegations of criminal misconduct;
- Matters relating to proposed location/expansion/provision of services encouraging the location or expansion of industries in area served;



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Public Records



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Public Records

"Public record" includes 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.

- Ex: Emails between and among staff, committee members, and among board members



Requests for Public Records

Initial Response/reply - Public bodies must respond to a written FOIA request in a timely fashion but no longer than 10 business days

- *20 business days if the record is more than 24 months old*

Production of Documents - public body must produce the requested records within 30 calendar days from the date it initially responds that the request will be fulfilled/requests a fee.

- *35 days for records that are more than 24 months old*

“The various response, determination, and production deadlines . . . are subject to extension by written mutual agreement of the public body and the requesting party at issue, and this agreement shall not be unreasonably withheld.”



Fees for Public Records

A public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records.

- The fee schedule is to be posted online.
- The fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request.
- A deposit not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records.



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Matters Exempt from Disclosure

A public body may but is not required to exempt from disclosure the following information:

- Information of a personal nature;
- Applicant information/materials (with exception for not less than final three candidates);



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Matters Exempt from Disclosure

- Trade Secrets;
- Materials re: proposed contractual relations;
- Correspondence or work product of legal counsel;
- Matters exempt under other laws

FAQs

Q: Does the FOIA apply to committees that the Board may name, even if they are *only advisory*?

A: Yes. If the Board names a committee, that committee is subject to the FOIA and *must properly provide notice* of meetings. These meetings must be open to the public and minutes must be kept.

FAQs

Q: Does the FOIA apply to committees that the Board may name, even if they are *only advisory*?

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FAQs

Q: Can minutes be withheld from release to the public *until they are approved*?

A: No. Once records are created, FOIA says they are *public records*. FOIA provisions do not differentiate between “approved” or “nonapproved” records. If releasing unapproved minutes, mark them “Draft”



FAQs

Q: Can the Board take a straw poll in executive session?

A: No. members may not commit the Board/District to a course of action by polling members in executive session



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27

FOIA Lawsuits – Equitable Remedies

S.C. Code Ann. § 30-4-100

(A) A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases

(B) If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees.



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FOIA Lawsuits

S.C. Code Ann. § 30-4-100 -110

- Declaratory judgment
- Injunctive relief
- Actual or compensatory damages
- Reasonable attorney's fees or other costs of litigation
- "If the court finds that the public body has arbitrarily and capriciously violated the provisions of this chapter by refusal or delay in disclosing or providing copies of a public record, it may, in addition to actual or compensatory damages or equitable relief, impose a civil fine of five hundred dollars."



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29



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30