



FOIA: CHECKLIST TO PREVENT LAWSUITS FOR BOARD MEMBERS AND SUPERINTENDENTS

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The S.C. Freedom of Information Act

- Premise – FOIA’s intent is for public bodies to “operate in the sunshine”.
 - With limited exceptions, all meetings of public bodies are open to the public.
 - Allows media and citizens to obtain copies of public records, with exceptions, of course.
- FOIA Statute – S.C. Code Ann. § 30-4-10
 - Meetings – S.C. Code Ann. § 30-4-60-90
 - Records – S.C. Code Ann. § 30-4-10-55



FOIA BASICS

Why Does FOIA Matter to School Boards and Superintendents/School Districts?

- School districts fall under the guidelines set within FOIA as their boards are defined as “public bodies”.
- FOIA provides government transparency that promotes public trust in and communication with public bodies.
- FOIA is not restricted to documentation – it includes meetings, too.

- Any convening of a quorum (majority of members) of a public body to discuss or act upon the business of the public body.
- Applies to both in-person and electronic gatherings.
- Includes work sessions, email conversations, and texts between a quorum of members, and may be a meeting even if personal technology is used.

What is a Meeting?

Case Study

- In 2022, the South Carolina Department of Disabilities and Special Needs (DDSN), and several individual employees, were sued by its former Director for FOIA violations.
- In response to their personal feelings toward the Director, several Commission members sought to vote the Director out of her role.
- In an attempt to circumvent FOIA laws, several Commission members conducted "email meetings", acted on items improperly in meetings , and held meetings without adequate notice under FOIA.
 - The Commission also improperly voted on several matters in executive session.
- The Commission terminated the Director, who sought the advice of counsel, and aided her in initiating a lawsuit and submitting a FOIA request to DDSN for a range of documents related to the Director's termination.

Results – Be Careful What you Email!

- The DDSN had to produce several documents, including the very same email exchanges where Commission members planned to terminate the Director.
- The case went on for 3 years with findings of fact issued stating that the Commission violated several FOIA laws.
- Ultimately, the case was settled, likely resulting in a substantial award to the Director at the cost of DDSN, all because of the Commission's improper conduct and failure to comply with FOIA laws.





Does FOIA Require Public Bodies to Allow Public Participation?

- No, the public DOES NOT have a right under FOIA to participate in public body meetings.
- However, public forums are helpful in promoting effective communication with the local constituency.
- Public participation guidelines are formalized under board policies.

Notice of Meetings

- Regular Meetings
 - Written notice must be given at the beginning of the year; notice with agenda posted 24 hours prior; notify local media of all meetings.
- Called or Special Meetings
 - Notice and Agenda Posted 24 hours prior; written notice to local media.
- Emergency Meetings
 - Make a reasonable effort to give notice.

What is an Emergency for S.C. FOIA

- Is a hurricane coming?
- Did the ceiling cave in?
- Is there no running water at a facility?
- Did the air conditioner unit go out at a facility and the temperature outside is 103 degrees?
- Can you think of examples of the “non-emergency” meeting?

Executive Session

Prior to going into executive session, boards must state the specific reason, which can only fall under one of the following:

1. Personnel or consumer matters;
2. Contract negotiations/contractual matters;
3. Legal matters related to a pending, threatened, or potential claim; settlement of a claim; or the position of another agency in other adversary situations;
4. Security and safety measures; and/or
5. Investigative proceedings related to potential criminal conduct.

Minutes

- Must be written and available to public.
- Must include:
 - Date, time, and place of meeting;
 - Members present and absent;
 - Substance of all matters proposed, discussed or decided; and
 - Request for recording individual member votes.
 - Available for review during regular hours.
 - Copies immediately available for preceding six- month period.
 - Executive session minutes not required.

Handling Records Under FOIA

- FOIA also permits the public to obtain copies of “public records”.
 - FOIA does not require a public body to create a record where one does not exist.
- FOIA does not require a public body to generate electronic records or to make records electronic.
- Must respond within 10 working/business days to the initial request.
- Can charge a fee if there is a posted fee schedule.
- The fee must not be higher than the hourly rate of the lowest compensated employee who has the necessary skills to respond to the request.
- Can charge for gathering, copying, and redacting records.
- Disclosable records must be produced within 30 calendar days (if less than 24 months old).



Common Records Issues

- Federal law instructs that student records and privacy related to the same outweighs the public's interest in obtaining student records covered by the Family Educational Rights and Privacy Act.
- For personnel records, consider balancing the public's interest and promotion of transparency with the FOIA privacy exemption and the applicable personal records protection laws.



LOCAL EXAMPLES

Local Examples

- In 2024, a South Carolina school district faced litigation for the District/Board's failure to abide by FOIA when it (1) did not properly notice a meeting; (2) failed to announce a specific purpose when entering executive session to discuss an agenda item; and (3) took official action in executive session on the Executive Session Items.
 - The Court issued a judgment against the District, requiring the Board to nullify the actions taken in the improperly noticed meeting and executive session.
 - The District was also ordered to pay the plaintiff's attorney's fees.
- In 2022, Attorney General Alan Wilson issued a letter to a different South Carolina School board demanding compliance with FOIA laws for failing to adequately notice meetings in a similar manner.

Local Examples

- There is an ongoing lawsuit against another South Carolina school district for failing to abide by FOIA laws as they relate to requesting and producing records.
 - In pursuit of a judgment, the Plaintiff has appealed this case multiple times, certainly resulting in costly litigation expenses on behalf of the District and Board.
- It is clear that implementing FOIA laws may come with certain legal risks, so let's develop a way to cover ourselves ...



FOIA CHECKLISTS

FOIA Compliance Checklist – In General

- ☐ Designate a FOIA officer.
- ☐ Ensure your school district has adopted and implemented a FOIA policy.
- ☐ Publish the fee schedule so you may properly charge for burdensome requests.
- ☐ Maintain a FOIA log of each request and its completion.
- ☐ Conduct FOIA PD annually.
- ☐ Consider designating a member of the Board (or the Superintendent) as your FOIA resident expert for meetings.

FOIA Compliance Checklist – Requests for Records

- ☐ Date-stamp and log the request upon receipt.
- ☐ Verify that the format of submission is proper.
- ☐ Calendar all deadlines IMMEDIATELY.
- ☐ Conduct the records search.
- ☐ Begin preparing the appropriate responses.
- ☐ Review for any applicable exemptions
- ☐ Prepare cost estimate (if needed).
- ☐ Send the initial response by the calendared deadline.
- ☐ Timely produce records in a final determination.
 - ☐ Contact your school district's attorneys if you have doubts about whether you should produce something.
 - ☐ Provide explanations for any necessary withholdings.
- ☐ Close the request and log its completion.

FOIA Compliance Checklist – Notice and Meetings

☐ Notice:

- ☐ Post the yearly schedule of regular meetings.
- ☐ Give at least 24 hours notice for special called meetings.
- ☐ Make reasonable efforts for emergency meeting notice.
- ☐ Post the agenda at least 24 hours before each meeting.

☐ Meetings:

☐ Executive Session

- ☐ State the specific FOIA-permitted purpose before entering.
- ☐ Do not make any votes or formal actions.
- ☐ Minutes – Record minutes and make them available within a reasonable time, including any votes taken in open session.
- ☐ Public Access – Allow attendance by the public except for lawful executive sessions.



MITIGATING CUMBERSOME REQUESTS

Available Relief for Cumbersome Requests

- As previously mentioned, if the request is cumbersome, you may charge a fee for the records search if the fee schedule is appropriately posted.
- S.C. Code Ann. § 30-4-110
 - A school district may petition the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request, but it is unable to make a good faith determination as to whether the information is exempt from disclosure.
 - If the school district prevails, the court may order equitable relief as considered appropriate, actual compensatory damages, or even delay in disclosing copies of a public record.



POP QUIZ!

Pop Quiz! – Public Participation

- True or False? **The public has a right to comment during meetings of a public body.**
- True or False? **FOIA requires public body members to interact with the public during a meeting.**

Pop Quiz! – Executive Session

- True or False? **The Board can vote in executive session.**
- True or False? **When the Board's attorney is present during executive session, the Board can discuss whatever it wants because its "receipt of legal advice" is protected under FOIA.**

Pop Quiz! – Handling Records

- True or False? **FOIA requires that requestors use a specific form to obtain records under FOIA.**
- True or False? **FOIA requires public entities to create documents when the requestor seeks a record the entity does not possess.**
- True or False? **Text messages from a Board member's personal phone are not subject to FOIA.**
- True or False? **FOIA requests are FOIA-able.**

Pop Quiz! – Common Records Issues

- True or False? **Student records are disclosable under FOIA.**
- True or False? **Personnel records are disclosable under FOIA.**



QUESTIONS?



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