



# UNDERSTANDING THE S.C. FREEDOM OF INFORMATION ACT

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# Agenda

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What is FOIA?

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South Carolina Slip Ups

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# WHAT IS FOIA?

# FOIA's General Purpose

- 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
  - Records – S.C. Code Ann. § 30-4-10-55
  - Meetings – S.C. Code Ann. § 30-4-60-90

- School districts fall under the guidelines set within FOIA, as they 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.

## Why Does it Matter?

# Who Must Comply?

- Applies to the District, the Board, committees, and subcommittees.
- Any group that is delegated decision-making authority by the District.
- Includes groups funded in whole or in part with District resources.



# MEETINGS

# What is a Meeting?

- 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, including committee meetings.

# Emergency Meetings

- May be called when immediate Board action is required for the District.
- The District must make reasonable efforts to notify the public.
- Examples:
  - Unexpected severe damage to District facilities that needs to be addressed immediately to ensure District function.
  - There is no running water at a school in the District.
- Emergency meetings are NOT the same as special called meetings.
  - Special called meetings require the posting of the notice and agenda 24 hours prior.
- Can you think of any examples of the “non-emergency” meetings?

# 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.

# Meeting 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.
- Have to be available for review during regular hours.
- Copies must be immediately available for a preceding six-month period.
- Executive session minutes are not required.

- Must also be posted 24 hours prior to regular meetings.
- Must describe District items with enough detail for the public to understand what is being considered at the meeting.
- Items may not be acted on unless they are included on the agenda, unless added by a 2/3 vote with the reason stated publicly.

## Agendas

# Staying on Track

- Stick to the agenda; it protects against FOIA violations.
- Use the Board Chair as a point of order if the conversation drifts.
- Avoid sidebar conversations during meetings.
- Focus the discussion on policy and Board action items.
- If you can't connect the discussion to a Board policy or action item, that is a good indicator that the discussion should be refocused.

# 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.

# Meeting Misstep

- A 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 (\$100,000 +).
- How could this have been avoided?

- 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.

## Does FOIA Require Public Bodies to Allow Public Participation?

# What Can Be Shared Publicly or Discussed With Third Parties?

- Votes taken in open session.
- Approved motions and resolutions.
- Factual meeting information (time, place, location).
- Official statements released by the Board.
- Board members should avoid relaying deliberations from executive session or informal conversation.
  - This could include what considerations were taken during a deliberation, who was on what “side” of the discussion, etc.



# DOCUMENTS

- FOIA allows the public to access existing District records.
- The District is not required to create a document that does not already exist.
- Records may require redaction if exempt under law.
- FOIA does not require the District to respond to questions.

## District Records

# FOIA Requests to the District

- Requests must reasonably describe the District records being sought.
- Requests can be submitting in writing, including electronically.
- The District cannot require the requester to state a reason for requesting the record(s).
- Must respond to the initial request within 10 working/business days.
  - If the records are more than two years old: 20 business days to respond.
  - The response must notify the requestor whether the office will produce the documents or the reason for withholding documents.
  - If the request is granted: 30 days (35 days, beyond the 2-year mark) after the date of determination to provide the documents.
  - The deadlines can be extended by consent or if the office requires a deposit.

# Common Exemptions

- Student record protected by federal law (FERPA).
- Personnel records affecting privacy interests.
- Attorney-client privileged communication with District counsel.
- Security plans, technology support, or investigations affecting safety.
- Listed in full in S.C. Code Ann. § 30-4-40.

- Non-exempt information must still be released.
- Redactions must cite the specific exemption permitting withholding.
- Exemptions do not justify withholding an entire District record when only part is exempt.

## Redactions

# Fees for Document Retrieval

- The District must post a written FOIA fee schedule online in order to properly charge fees.
- Fees must reflect actual costs for search, retrieval, or redaction of District records.
- Fees must be based on the hourly rate of the lowest-paid employee qualified to perform the task and may NOT exceed this rate.

# FOIA Enforcement

- Courts may order disclosure of records or void actions taken in violation of FOIA.
- Courts may issue declaratory or injunctive relief requiring compliance with FOIA.
- Attorneys' fees and costs may be awarded to the prevailing plaintiff.
- Civil penalties may apply if the court finds the violation was “arbitrary or capricious”.
- When in doubt, ask for help, and you can avoid this!



# SOUTH CAROLINA SLIP UPS

# Case Study: Behind Closed Doors

- A South Carolina school district's Board met in executive session to discuss personnel matters involving a senior administrator.
- During executive session, the Board approved and executed a settlement agreement.
- No public vote was taken at the time that the agreement was finalized.
- The agreement was implemented before any action occurred during open session, and a public vote was later taken to approve the settlement agreement after it was implemented.
- Why was this a violation of FOIA?

# Results: Be Careful Where/When You Vote

- Executing a settlement agreement constitutes official action, which is prohibited in executive session.
- FOIA requires that all final decisions and approvals occur in open session.
- A later public vote cannot retroactively legitimize any action that was unlawfully taken.

# Case Study: Termination Gone Wrong

- A South Carolina state agency, and several individual employees, were sued by its former Director for FOIA violations.
- In response to their personal feeling toward the Director, several Commission/Board members sought to vote the Director out of their role.
- In an attempt to circumvent FOIA laws, the Board members conducted "email meetings", acted on items improperly in meetings, and held meetings without adequate notice under FOIA.
  - The Board also improperly voted on several matters in executive session.
- The Board terminated the Director and sought the advice of counsel, who aided them in initiating a lawsuit and submitting a FOIA request to the state agency for a range of documents related to the Director's termination.
- What types of documents did the state agency have to produce?

# Results: Be Careful What you Email!

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



# CHECKLISTS FOR AVOIDING LIABILITY

- 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.
- Conduct FOIA PD annually.

In General

# Meetings Checklist

- Consider designating a member of the Board (or the Superintendent) as your FOIA resident expert for 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.

- 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.

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## Notice Checklist

# Document Production Checklist

- Confirm that the District has a designated FOIA officer or employee designated to handle requests.
- Ensure there is an orderly system where the District is responding to initial requests in a timely manner and meeting final production deadlines, paying careful attention to the timeline adjustments for 2+ year old documents.
- Verify that any denials or redactions were reviewed by counsel and tied to specific FOIA exemptions.
- Confirm that the District consistently documents requests and responses for a liability safeguard.



# QUESTIONS?

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