

Foiled by FOIA?

Understanding South Carolina's Freedom of Information Act

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Background



Freedom of Information Act (FOIA):
intent is to protect the public from secret
government activity. South Carolina Tax
Comm'n v. Gaston, 316 S.C. 163, 447
S.E.2d 843 (1994).



School boards are considered public
bodies under § 30-4-20(a) and are subject
to the Act.



Under its provisions, a public body must
make its records available to the public
and cannot take formal actions in closed
session. S.C. Code Ann. §§ 30-4-30, 30-4-
70(b).

A person has a right to inspect, copy, or
receive electronically any public record of the
body except for matters exempt under FOIA.

Purpose of FOIA

The Freedom of Information Act (FOIA) was enacted to:

- Promote transparency in government;
- Ensure public access to governmental records;
- Allow citizens to observe public decision making;
- Prevent secret governmental action.

Matters Covered by FOIA

FOIA covers 2 things:

Public records

- Books;
- Papers;
- Documentary materials regardless of physical form;
 - A public body is not required to create a document or create an electronic version of a record when one does not exist. S.C. Code Ann. § 30-4-30(A)(2).

Meetings

- There is a presumption that meetings of the body are open to the public.
- Agenda requirements

Matters Covered by FOIA

Pursuant to FOIA, certain information is declared public information:

- Written planning policies, goals, and final planning decisions;
- District budgets and any other information relating to the expenditure or receipt of public funds must also be disclosed;
- Identities of District employees and officers;
- Minutes of meetings for the preceding six months must be readily available to anyone requesting them in person during normal business hours.

S.C. Code Ann. § 30-4-20(c).

Matters Covered by FOIA

Documents excepted from FOIA:

- Items that are not considered public record include: (1) data prepared by board members in anticipation of a meeting; (2) proposed budgets prior to a board meeting; and (3) legal advice to the Board. *Cooper v. Bales*, 268 S.C. 270, 233 S.E.2d 30 (1977).

Exceptions

FOIA contains several “permissive exemptions,” which allow the governmental body the option of choosing to disclose or withhold information from public access:

1. Data affecting personal privacy rights;
2. Documents in contemplation of a contract that have not been executed;
3. Compensation of certain employees; and
4. Materials gathered in search of high-level employees, except the final three candidates.

The exemptions do not provide for blanket prohibition against disclosure, but rather, allow the exempt material to be separated from the non-exempt material.



Hypothetical #1

A parent submits a FOIA request seeking emails between board members regarding school rezoning; copies of consultant reports; and text messages sent during board meetings. The school district produces the consultant reports but refuses to produce text messages because they were sent from personal cell phones.

Are the text messages subject to FOIA?

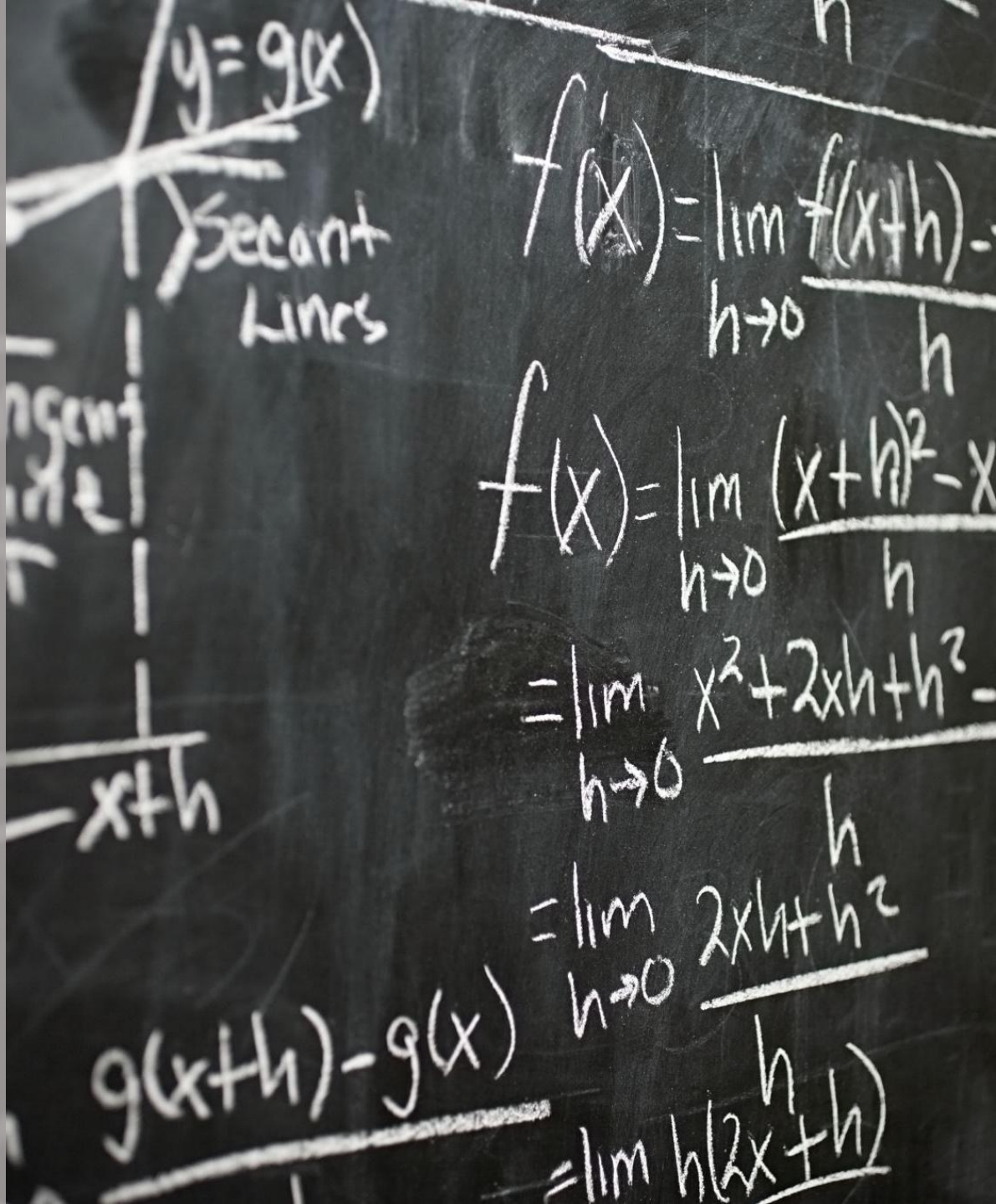
Citizen submitted a FOIA request to the City seeking personal addresses, phone numbers, and email addresses for final three applicants for city manager position. The Court ruled the personal information was exempt from FOIA under the privacy exemption.

Glassmeyer v. City of Columbia, 414 S.C. 213, 777 S.E.2d 835 (Ct. App. 2015).

Hypothetical #2

A School Board receives a FOIA request asking for the home addresses, personal telephone numbers, and personal emails of the three finalists for the superintendent's position.

Can the information be withheld?



Time to Respond

- Within ten (10) days, excluding weekends and public holidays, from receipt of the request, the public body must provide its determination regarding the availability regarding the request and the reasons. *See* S.C. Code Ann. § 30-4-30(c);
 - If the record is more than twenty-four (24) months old, twenty (20) days to provide determination.
- Determinations must constitute the final opinion of the body.
- The records must be provided within thirty (30) calendar days from the date the final opinion is provided.
 - For a record more than twenty-four (24) months old, the record must be provided within 35 days

Fees

- The public body may establish and collect reasonable fees to fulfill a request S.C. Code Ann. 30-4-30(b).
- The fee schedule must be posted online.
- The fees can not exceed the actual cost of the search, retrieval, and redaction of records.
 - The public body may charge for staff time to transfer documents to electronic format.
- The public body may require a deposit, not more than 25% of the anticipated cost of production.
- Records must be furnished at the lowest possible cost and in a form that is both convenient and practical for use.

Meetings

Statute defines “meeting” as “the convening of a quorum of the constituent membership of a public body, 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.”

- Every meeting must be open to the public, unless properly closed.
- The district must keep written minutes.
 - Date; time; place; attendance; the substance of matters proposed, discussed, or decided; vote
 - Board member may request that any other information be included in the minutes

S.C. Code Ann. §§ 30-4-20(d); 30-4-90

Other interactions that could be classified as meetings:

- Conference calls;
- Emails; and
- Advisory Committee Meetings.

Hypothetical #3



Two School Board Members are speaking on the phone when the topic of who should be awarded the renovation contract for the high school comes up. After reaching a consensus between the two of them, they decide to connect the other three members of the Board in a conference call to try and win them over to their choice.

Is this permissible under the statute?

Executive Session

“Prior to going into executive session, the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the specific purpose of the executive session.”

S.C. Code Ann. § 30-4-70(b).

Is executive session required to be listed on the agenda?

Executive Session

30-470(a) allows a public body to hold a closed meeting (executive session) for any one of five reasons. The “specific purpose” must be announced in the open session prior to going into closed session.

- “Specific Purpose” is defined as:
 - A description of the matter to be discussed as identified in items (1) through (5) of subsection (a). However, when the executive session is held pursuant to Sections 30-470(a)(1) or 30-470(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.
 - General statements will likely be insufficient.

Donohue v. City of N. Augusta, 412 S.C. 526, 773 S.E.2d 140 (2015);
Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d
862 (2001),

S.C. Code Ann. § 30-4-70(a)(1)-(5)

(a) 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 or the appointment of a person to 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. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing.

(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.

(3) Discussion regarding the development of security personnel or devices.

(4) Investigative proceedings regarding allegations of criminal misconduct.

(5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.

Executive Session

When can meetings be closed?

- Receipt of confidential legal advice;
- Discussions of hiring, firing, discipline of employees;
- Discussion of contract negotiations (not actual negotiations);
- Certain industrial development matters;
- Security personnel and devices;
- Investigations of criminal misconduct;
- Employment interviews; and
- When complaints against an officer are unspecific and the Board wishes to glean more information from witnesses.

Hypothetical #4

During a properly noticed School Board meeting, the Board enters executive session to discuss a student disciplinary matter. While in executive session, several board members begin discussing budget reductions and possible staffing cuts unrelated to the student matter listed on the agenda.

Does this create a FOIA issue?

“No action may be taken in executive session except to (a) adjourn or (b) return to public session.” S.C. Code Ann. § 30-4-70(b).

“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.”

S.C. Code Ann. § 30-4-70(b).

Hypothetical #5



During executive session, your fellow Board Member asks how everybody is going to vote on the issue of terminating the elementary school principal when the Board returns to open session.

How should you (Board Member) respond?

Executive Session

Common Executive Session Problems to Avoid/Watch For:

- Failing to state specific reason for closing a meeting;
- Closing a meeting merely because legal counsel is present;
- Discussing subjects other than those stated in the closing of the meeting;

FOIA and how it relates to discussions and documents from legal counsel

- A board member cannot independently review or release attorney-client privileged documents.
- The privilege belongs to the board, and the board must authorize the release of the information.
- The board must waive the privilege before an individual member can review privileged documents.

Agenda

- All school boards must publish written notice of their regular meeting schedule at the beginning of each calendar year.
 - The notice must include the dates, times, and places of such meetings.
- An agenda must be posted for all regularly scheduled, called, rescheduled, and special meetings.
 - This includes committee meetings.
 - Emergency meetings are the only type of meetings exempted from the notice and agenda requirements.
- The agenda must also be posted in the typical physical location where notice is provided and on the district's website as early as practicable but **at least 24 hours prior to the meeting.**

Hypothetical #6

You (Board Member) wake up on Tuesday morning and realize that the approval of a real estate contract was not put on the agenda for Tuesday night's meeting. The closing is the next morning.

What should you (Board Member) do?



Amendments to the Agenda

- Once an agenda has been posted, an item may not be added without providing the public with an additional 24-hour notice period.
- The revised agenda must be published in the same manner as the initial agenda, to include posting in the typical physical location where notice is provided and on the district website.
 - To amend the agenda, the Board must obtain a 2/3 vote approving the agenda change. If final action will be taken on the agenda item and there has not been an opportunity for public comment with prior public notice, in addition to the 2/3 vote, the board must find that an *emergency or exigent circumstance* exists and should clearly state the reason the agenda item cannot be postponed until the next meeting.
 - Reserve any at-meeting agenda changes to true district emergencies.

Effect of FOIA Violations

- FOIA by its terms, empowers a circuit court to order injunctive relief it deems appropriate to rectify FOIA violations, and FOIA violations must be an irreparable injury for which no adequate remedy at law exists. S.C. Code Ann. § 30-4-100(A) (2007 and Supp. 2022); *Miramonti v. Richland Cnty. Sch. Dist. One*, 438 S.C. 612, 885 S.E.2d 406 (2023).
 - The court could not order the school district to take a specific legislative act.
- A trial court can enjoin a public body from future FOIA violations. *See Business License Opposition Comm. v. Sumter Cnty.*, 311 S.C. 27, 426 S.E.2d 747 (1992).
- Reversal of school district action— action deemed void
- Attorney's fees and costs

Takeaways

- ❖ Transparency First
 - Public bodies should presume openness.
- ❖ Ask Before Acting
 - When uncertain, consult legal counsel.
- ❖ Public Trust Matters
- ❖ FOIA Compliance Protects
 - The organization
 - Public confidence
 - Decision-making integrity

QUESTIONS? THANK YOU!

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