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To: SC Municipal Attorney's Association members

From: Tiger Wells

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Re: FOIA Questions

During this week's FOIA calls, there were two particularly interesting questions raised about how the new FOIA law (H.3352) might be applied. While those questions were briefly addressed on several of the conference calls, here are some additional points for local legal counsel to consider.

Question 1:
In light of the new law, how should municipalities handle FOIA requests for documents or PowerPoint slides that members of the public distribute to councilmembers during a public meeting?

Points for Consideration:
The Freedom of Information Act, both prior to and as amended by H.3352, defines public records as "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." The new FOIA law requires that "all documents produced by the public body or its agent that were distributed to or reviewed by a member of the public body during a public meeting for the preceding six-month period" must be made available for inspection and copying during the hours of operations of the public body without a written request.

The public record definition above suggests that documents handed out by a member of the public during a public meeting may, in fact, become a public document. This transformation would depend on a determination of whether the documents are "in possession of, or retained by the public body."

Despite the possibility that these documents may be public records, it does not appear, based on the plain language of the new law, that such documents must be made available to the public without a written FOIA request. Although such documents are reviewed or distributed to council during a public meeting, the key point appears to be whether such documents were produced by or on behalf of the public body.

Question 2:
How should public bodies respond to requests seeking records that include the addresses and telephone numbers of local businesses, some of which may be home businesses? May such requests be denied or redacted on the basis that they are being requested relative to a commercial purpose?

Points for Consideration:
In addition to changes to the Freedom of Information Act, H.3352 also made a notable change to the Family Privacy Protection Act, which is found at Chapter 2 of Title 30 of the S.C. Code of Laws. Previously, FPPA made it illegal to knowingly acquire personal information from the state government or

one of its agencies for the purposes of commercial solicitation. H.3352 expands that offense to include local governments and political subdivisions, and requires municipalities to not only provide notice of the prohibition to requesting parties, but also take reasonable measures to ensure that no individual or entity "obtains or distributes" such information for commercial solicitation.

Section 30-2-30 of the S.C. Code of Laws defines commercial solicitation to mean "contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service." Personal information is defined as "information that identifies or describes an individual including, but not limited to, an individual's photograph . . . name, home address, home telephone number, medical or disability information, education level, financial status, bank account numbers, account or identification number issued by or used, or both, by any federal or state governmental agency or private financial institution, employment history, height, weight, race, other physical details, signature, biometric identifiers, and any credit records or reports." The law excludes from the definition of personal information "names and addresses from any registration documents filed with the Department of Revenue as a business address which also may be a personal address."

In determining how to respond, the public body should first determine whether the requested records exist, and whether those records include protected personal information. While the definition of personal information seems aimed at protecting home addresses and home telephone numbers, there also seems to be some acknowledgement that, at least relative to DOR documents, the legislature might distinguish between home addresses and home telephone numbers that are purely personal and those that double as business information. This should be considered carefully when deciding whether to share or redact information.

If it is determined that personal information is included in the requested records, it may be advisable for the responding municipality to make an attempt to determine whether the records are being requested for or might be distributed in a way that will lend the information to commercial solicitation. If it is determined that the requesting party intends to use or distribute in this way, then such information should, at the very least, be redacted from the records before being shared with the requesting party. Also, the reasons for the redaction should be shared with the requesting party in writing. Regardless of the requesting party's stated reason for requesting the records, the municipality should be sure to provide notice of the new law's prohibition against using or distributing such information for commercial solicitation. It may also be wise to put the party on notice that someone knowingly violating this prohibition faces up to a $500 fine or one year of imprisonment.

Considering the issues discussed above, municipalities may want to seek legal counsel when determining how to respond to such requests, as subtle differences from request to request may have significant meaning. If a municipality is unable to make a good faith determination, note that the new law specifically also allows it to request a hearing with a circuit court so that a determination may be made.

As always, it is our pleasure to be of assistance.