

**S.C. Freedom of Information Act (FOIA)
Update – October 2016**



Why do we have a FOIA in S.C.?

“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 formulation of public policy.”

Preface to South Carolina Freedom of Information Act of 1987



What does the FOIA do?

- Provides for notice of and access to government meetings
- Provides for access to public documents



What is a Meeting?

- Convening of a quorum (simple majority)
- To discuss or act upon public business
- In person or by electronic means (telephones or computers)



Recent Changes To FOIA

- Senate Bill 11 – signed Gov. Haley 6/8/15
- Established new notice and agenda requirements for public meetings
- Addresses:
 1. Public Bodies Subject to FOIA
 2. Regular meetings
 3. Special, called or rescheduled meetings
 4. Restrictions on amending an agenda
 5. Other Provisions



Public Bodies Subject to FOIA

- All public bodies, which includes:
 - City and Town Councils.
 - Public Utility Boards
 - Municipal Planning Commissions
 - Boards of Zoning Appeals
 - Architectural Review Boards
- Must comply with FOIA's public meeting notice and agenda requirements (Section 30-4-80).



What about Committees, etc.?

- All bodies, by “whatever name known,” are subject to FOIA:
 - Standing Committees
 - Ad Hoc Committees
 - Subcommittees
 - Other Advisory Groups

The bottom line is that if a committee is appointed by City Council, it is public – just like Council



FOIA can apply to Staff Committees

- *Quality Towing Co. v. City of Myrtle Beach (2001)*
- Case involved staff committee selecting a towing company for City of Myrtle Beach
- S.C. Supreme Court ruled that FOIA applies to staff committees if the committee is making a recommendation in an area that will be acted upon by the council



What About Organizations that the City Funds?

- Yes. FOIA may also apply to organizations and outside parties that:
 - Receive public funds from the city, or
 - Are supported in whole or in part by the city with public funds
 - The source (or type) of revenue matters not



Let's take a closer look at who is covered...

<u>Definitely</u>	<u>Maybe</u>	<u>Not covered</u>
<ul style="list-style-type: none"> •City/Town Councils •Council Committees •Ad Hoc Committees •Special Committees •Event Committees •Dev Corp Boards •Planning Comm •BZA (Zoning) •BAR (Design) 	<ul style="list-style-type: none"> •Chambers of Commerce •Foundations •Non-Profits •Staff Committees 	<ul style="list-style-type: none"> •Private companies doing business with public agencies •Private Utilities •Private Hospitals •Private Colleges •Federal agencies

Regular Meetings

- Written notice of regular meetings at the beginning of calendar year (dates, times, and places of all regular meetings).
- At least 24-hours before meeting, Agendas must be
 - Posted on a bulletin board in the office (City Hall)
 - or at the place of the meeting
 - **And** on the public body's website, if there is one



Special, Called or Rescheduled Meetings

- S11 contains conflicting language re: notices and agendas requirements for special meetings
- Terms *special*, *called* and *rescheduled* are not defined.
- Out of an abundance of caution, post an agenda:
 - **ASAP** but not later than 24-hours in advance of meeting
 - On a bulletin board in City Hall or at meeting place
 - **And** on public website maintained by the body if the body has one
 - Agenda must include meeting date, time and place



Restrictions on Amending Agendas

- Once agenda is posted, no items may be added without a minimum of 24-hours notice in the same manner as the original agenda.
- After the meeting begins, an action item may be added to the agenda using one of two procedures that appear similar but have important differences



Restrictions on Amending Agendas

1. If the item is **not** a final action and an opportunity for public comment has been or will be granted at a publicly noticed meeting:
 - 2/3 vote of council (members present and voting)
2. If the item **is** a final action for which there will be no opportunity for public comment at a publically noticed meeting:
 - 2/3 vote of council and a finding that exigent circumstance exists (i.e. *urgent or time-sensitive issue*) is required



Procedure to Add Items to a Meeting Agenda



Produced by the Municipal Association of SC and the SC Press Association

Other Provisions of S11

- Notice and agenda requirements do not apply to emergency meetings – but be cautious!
- S11 makes it clear that the new requirements must be met in addition to any other public hearing requirement in state law (i.e. annual budget, new fees, technical regulation, zoning, comprehensive plan, land development regulations etc.)



Donohue v. City of North Augusta (2015)

- Clarified requirements of FOIA related to Executive Sessions
- S.C. Supreme Court held that describing the purpose of an executive session as a "proposed contractual matter" is not specific enough to comply with FOIA.



Donohue v. City of North Augusta (2015)

- Section 30-4-70 (a) allows a public body to hold a closed meeting for any one of five reasons, provided that its "specific purpose" is announced in open session.
- Section 30-4-7 (b) defines "specific purpose" as: "a description of the matter to be discussed as identified in items (a) (1) through (a) (5)."



Donohue v. City of North Augusta (2015)

Section 30-4-70 (a) breakdown:

- 1) Personnel Matters
- 2) Contractual, Real Estate and Legal
- 3) Security Personnel and Devices
- 4) Investigative Proceedings
- 5) Economic Development



Donohue v. City of North Augusta (2015)

Section 30-4-70 (a) (1) – “Personnel Matters”

- 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
- *The court concluded that the identity of the individual or entity being discussed is not required to be disclosed*
- *List department or division on agenda instead*



Donohue v. City of North Augusta (2015)

Section 30-4-70 (a) (2) – “Contractual, Real Estate and Legal Matters”

- Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice or other matters covered by attorney-client privilege.
- *The specific purpose must be listed on the agenda and read aloud when entertaining a motion to enter executive session*



Donohue v. City of North Augusta (2015)

- **Section 30-4-70 (a) (3) – “Security Matters”**
- Discussion regarding the development of security personnel or devices.
- *The specific purpose must be listed on the agenda and read aloud when entertaining a motion to enter executive session*



Donohue v. City of North Augusta (2015)

- **Section 30-4-70 (a) (4) – “Investigative Matters”**
- Investigative proceedings regarding allegations of criminal misconduct
- *The specific purpose must be listed on the agenda and read aloud when entertaining a motion to enter executive session*



Donohue v. City of North Augusta (2015)

- **Section 30-4-70 (a) (5) – “Economic Development Matters”**
- Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or businesses in the area served by the public body.
- *The court concluded that the identity of the individual or entity being discussed is not required to be disclosed*
- *Be generic or list project name on agenda instead*



Donohue v. City of North Augusta (2015)

- Due to the fact there are still many questions outstanding after this Court ruling, councils should discuss any questions regarding executive session with their city attorney.
- MASC will continue engaging with local government organizations, the SC Press Association, and attorneys specializing in FOIA related matters to determine whether more specific guidance is needed.



Brock v. Town of Mt. Pleasant (2016)

- S.C. Supreme Court determined that Town Council violated FOIA by taking action on an item discussed in executive session without providing notice on the agenda that it intended to take action on executive session matters following the executive session.
- The court concluded that notice that action may be taken following executive session must be provided
- However, the notice is not required to be specific



Brock v. Town of Mt. Pleasant (2016)

- A simple indication on the agenda that action may be taken following executive session on matters discussed in executive session is sufficient
- The court made a distinction in their ruling between the requirements for regular and special meetings
- That distinction is valid in *Brock* because the lawsuit pre-dates the 2015 changes to FOIA
- **However**, going forward cities must include the generic listing on agendas without regard to type of meeting



Resources



PUBLIC OFFICIALS
GUIDE TO COMPLIANCE
WITH
SOUTH CAROLINA'S
FREEDOM OF INFORMATION ACT

S.C. Code of Laws Title 30,
Chapter 4

Municipal Association of SC
www.masc.sc
Keyword: foia

South Carolina Press
Association
www.scpres.org



Any Questions?


