


## Freedom of Information Act: Advanced Topics

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## Business License Records

- SECTION 30-4-40(a)(2), unreasonable invasion of personal privacy – “information as to gross receipts contained in applications for business licenses.”
- SECTION 6-1-120: “[I]t is unlawful ... to divulge or make known in any manner the financial information, or other information indicative of units of goods or services sold, provided by a taxpayer included in a report, tax return, or application required to be filed by the taxpayer with that county or municipality.”
- SECTION 6-1-420(E): “[A] taxing jurisdiction may not share or disclose any information relating to business license tax applications with any third party other than to acknowledge whether or not a business has paid the taxing jurisdiction’s business license tax for a relevant year.”



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## Business License Records

Difficult Questions Under New Law:

- Sharing information with other governments for audit and compliance purposes
- Publishing lists of businesses with business licenses
- Requests from Chambers of Commerce or other pro-business entities
- Requests from contractors, subcontractors, or homeowners for lists of potential vendors



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## Business License Records

Attorney General Opinion, November 14, 2022:

- “It is this Office's opinion that a court would hold the prohibition on sharing information relating to business license tax applications with third parties in S.C. Code § 6-1-420(E) does not prohibit sharing such data between public officials or employees in the performance of their duties nor the publication of statistics as authorized in S.C. Code § 6-1-120(B).”



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## Business License Records

Attorney General Opinion, November 14, 2022:

- Notes exception for “a person or entity that gathers and disseminates news” in 6-1-420(E).
- Functional Approach: “Where news is gathered for dissemination to the public, it is journalism – regardless of whether it is printed on paper or distributed through the Internet.”
- “Assuming our state courts find this functional approach persuasive, the exception may be construed to allow disclosure of information on business license tax application to third parties who are gathering the information for public dissemination, if it is also permissible under section 6-1-120.”



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## Business License Records

Attorney General Opinion, November 14, 2022:

- “This conclusion is not free from doubt and legislative clarification may be warranted to address how broadly the prohibition on disclosure to third parties is intended to apply and how to construe the exception for ‘a person or entity that gathers and disseminates news.’” S.C. Code § 6-1-420(E).



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## Adding Items to Agenda

- A public body must create an agenda for all regularly scheduled and special-called meetings.
- No items may be added to the agenda within 24 hours of the meeting.
- Changes to the agenda within a meeting must be approved by a 2/3 vote of members present.
- If the item to be added is a final reading or there will not be an opportunity for public comment, the change must be approved by a 2/3 vote and it must be an "emergency or an exigent circumstance."
- "Exigency" – An urgent need or circumstance



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## Adding Items to Agenda

- North Augusta case: Agenda included an agenda packet, in which a resolution was included. At the meeting, council amended the resolution. Was this "adding an item"?
- Circuit Court Order: "Since Defendants told the public on the City website there was a complete agenda, by calling the document agenda 050718 complete, it was only reasonable for the public to rely on that document in preparing for a meeting. In fairness, and the spirit of the liberal construction required when applying FOIA, Defendants must treat what they call an 'agenda' on their website as an agenda for FOIA purposes."
- Therefore, the Court concluded that amending the resolution was "adding an item."



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## Adding Items to Agenda

- The case is on appeal and MASC has filed a brief.
- In the meantime, please be sure that you clearly label the short list of items for the meeting as the "agenda" and call everything else "supporting documentation" or some similar term.



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## Executive Session Announcement

*Donohue v. City of North Augusta (2015).*

- Agenda/Announcement: "Upon the request of the City Administrator and in accordance with Section 30-4-70 (a) (2), City Council unanimously voted to go into executive session for the purpose of discussion of negotiations incident to a proposed contract"
- Holding: The City did not satisfy FOIA's specific purpose requirement.



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## Executive Session Announcement

Suggested announcements of specific purpose:

- Employment matters: Reference the department or division.
- Contractual negotiations: Name of party, service being contracted for, or project name.
- Sale or purchase of property: Name of owner or general info such as acreage if secrecy matters.
- Attorney-client privilege: Adverse party in litigation, general description of the legal issue.
- Investigation of criminal misconduct: Alleged misconduct.
- Location of expansion of services: The service to be expanded or project name if one exists.



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## Actions Taken in Executive Session

- SC Code § 30-4-70(b): "No action may be taken in executive session except to (a) adjourn or (b) return to public session. 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."
- See *Miramonti v. Richland Cnty. Sch. Dist. One*, 2023 WL 28307 (S.C. Ct. App. Jan. 4, 2023)
- School District received a complaint from a parent. "At their next meeting, the Board went into executive session. [After executive session, the Chairman] stated, 'The Board has responded' to the parent's complaint, and the parent 'will get something in writing from the Board tomorrow.'"



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## Actions Taken in Executive Session

- Policy required the Board to “dispose” of complaints “according to its best judgment.”
- Court found a violation of FOIA, because the Chairman “had no authority to send the letter without a majority vote permitting him to do so. Absent constitutional or legislative authority, an individual member of a public body has no authority to act. In general, a public body may act only after the action has been approved by a majority vote of a quorum of its members.”



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## E-Mail Discussions as a Meeting

- “Example 1: A member of the public sends an email to all members of a professional licensing board regarding a matter over which the board has advisory power. Members of the board ‘reply all’ and begin to provide input on the matter through email correspondence.”
- “Example 2: An employee of the agency sends an email to all members of a professional licensing board seeking to ascertain a mutually agreeable date for the board members to convene for a board meeting. Board members ‘reply all’ to the employee with dates of availability.”
- “Example 3: A member of the public or a professional association communicates with an individual member of the board, in his or her capacity as a board member, seeking the board member’s input or opinion over a matter within the board’s jurisdiction and control or otherwise providing information on a matter within the board’s jurisdiction and control outside of an open meeting.”
- 2021 WL 1832297 (S.C.A.G. Feb. 18, 2021)



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## E-Mail Discussions as a Meeting

- “It is this Office’s opinion that a court may well hold an email chain in which at least a quorum of a public body’s membership discusses or takes action upon a matter over which the public body has supervision, control, jurisdiction or advisory power constitutes a ‘meeting’ according to the S.C. Freedom of Information Act.”
- But to be a “meeting,” there must be some intent “to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.”
- Therefore, Example #1 is a meeting; Examples #2 and #3 are not.



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## Sequential Sub-Quorum Meetings

- *Croft v. Town of Summerville* (2019) found no violation when a town split the public body into smaller groups for workshops in order to avoid having a quorum.
- The AG disagreed: "This Office disagrees with the conclusion in *Croft*, and instead finds that the General Assembly did not intend the S.C. FOIA to require such a formulaic construction of quorum requirements and the prohibition of violations of the open meeting requirements. Other jurisdictions have rejected such a strict interpretation of quorum requirements in their state open meeting laws."
- The S.C. Supreme Court vacated.



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## Mandatory Exemption for PII

- SECTION 30-2-310. A public body may not "make available to the general public an individual's social security number or a portion of it containing six digits or more or other personal identifying information."
- SECTION 16-13-510. Personal identifying information includes (1) social security numbers; (2) driver's license numbers or state identification card numbers; (3) checking account numbers; (4) savings account numbers; (5) credit card numbers; (6) debit card numbers; (7) personal identification (PIN) numbers; (8) electronic identification numbers; (9) digital signatures; (10) dates of birth; (11) current or former names, but only when linked to other identifying information provided in this section; (12) current or former addresses, but only when linked to other identifying information provided in this section; or (13) other numbers, passwords, or information that may be used to access a person's financial resources or will uniquely identify an individual.



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## Dealing with Burdensome or Improper Requests

- A public body may file a request for a hearing in circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or improper requests.
- Allows the public body to request a hearing if it is unable to make a good faith determination regarding information's exemption from disclosure.



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### Best Practices for Public Meetings

- Provide notice of executive sessions and include the statement of purpose where possible, however, a public body may enter into executive session to discuss an issue regardless of whether it is noticed on the agenda.
- Notice a general executive session on every agenda, regardless of whether you need one.
- Notice that “action may follow executive session” on every agenda, regardless of whether an executive session is planned.
- The presiding officer should state the purpose in executive session even where it is included on the agenda.



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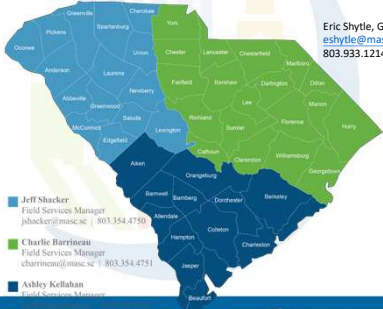
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