

November 7, 2007

Fred Washington, Chairman
Beaufort County Board of Education
Post Office Drawer 309
Beaufort, South Carolina 29901-0309

Dear Mr. Washington:

We received your letter requesting an opinion on behalf of the Beaufort County School District (the "District") Board of Education (the "Board") concerning the South Carolina Freedom of Information Act ("FOIA"). You provided us with the following information:

[A] former employee, Laverne Libby Davis, filed a lawsuit against the District and Herman Gaither, the former Superintendent. The District's insurance carrier . . . retained legal counsel to represent both Mr. Gaither and the District in the litigation. Following mediation, the attorneys for Dr. Davis, the District, and Mr. Gaither agreed to settle the case . . . The Settlement Agreement, signed by the attorneys, included a confidentiality provision, specifically stating that "[t]he Parties and their respective Attorneys shall keep the specific terms of the Settlement Agreement confidential."

You informed us that after the settlement of the case, the District received a FOIA request from Jonathan Cribbs, a reporter, "asking for an opportunity to review the Settlement Agreement." You state:

The District does not have any objection to providing the Settlement Agreement to Mr. Cribbs in response to his request; however, the Board is concerned that if it does so, the District will be in violation of the Settlement Agreement signed by the attorneys and potentially subject to another lawsuit by Dr. Davis. Therefore, the Board is asking for the opinion of the South Carolina Attorney General as to the obligations of the District in light of the FOIA and the written Settlement Agreement.

In addition, you informed us that "the Board's attorney has informally advised that a court could conclude the Settlement Agreement is a public record and subject to disclosure under the FOIA."

Law/Analysis

In determining whether settlement documents are subject to disclosure under FOIA, we must first keep in mind the purpose of FOIA as stated by the Legislature in section 30-4-15 of the South Carolina Code (2007).

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 the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

As the Court of Appeals summarized in Burton v. York County Sheriff's Department, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004) (citations and quotations omitted):

South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government. The FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the FOIA is to protect the public by providing for the disclosure of information. The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.

Furthermore, "consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed." Id. at 348; 594 S.E.2d at 893.

Section 30-4-30(a) of the South Carolina Code (2007) indicates a public body's obligation to disclose certain information as follows:

Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

The definition of "public body" provided in section 30-4-20 of the South Carolina Code (2007) specifically makes reference to school districts. Thus, we must only determine whether a settlement agreement entered into between the District and Dr. Davis is a public record. Section 30-4-20(c) defines public records as including "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."

In an opinion dated April 11, 1988, we considered whether “out-of-court settlement documents for a lawsuit wherein public funds have been expended by a government agency are ‘public records’ subject to disclosure pursuant to the Freedom of Information Act.” Op. S.C. Atty. Gen., April 11, 1988. In that opinion, we first acknowledged that settlement documents maintained by a public agency “generally come within the expansive statutory definition of ‘public records’ provided in Section 30-4-20(c); thus, generally these documents are subject to disclosure pursuant to Section 30-4-30 unless the information contained in the settlement documents is specifically exempt from disclosure by one of the exceptions prescribed in Section 30-4-40(a).” Id. However, we noted that information contained in a settlement may be exempt from disclosure under FOIA for example if the settlement documents identify a party as a mental health patient or contain information personal in nature that if disclosed would be an unreasonable invasion of personal privacy. Id. Nonetheless, we stated “the specific statutory exemptions should be narrowly construed in order to give full effect to the general remedial purpose of disclosure” and that should some information in the settlement agreement fall under one of the exemptions, “the public custodian must separate the exemption and non-exempt material and make the non-exempt material available to the public.” Id.

Finding no cases in South Carolina dealing with settlement documents and FOIA, we looked to the law of other jurisdictions. Id. We found California and West Virginia court decisions holding that settlement documents maintained by public bodies are subject to disclosure under those states’ freedom of information acts. Id. Thus, we concluded

out-of-court settlement records maintained by a public agency, where the settlement involves the expenditure of public monies, are ordinarily ‘public records’ as that term is statutorily defined in the Freedom of information Act. Thus, these documents are generally disclosable to the public unless the information contained in the documents is exempted from disclosure by one of the specific statutory exceptions provided in the Act.

Id.

We cautioned that while non-judicial records maintained by a court are subject to FOIA, we have some reservations with regard to judicial records. Id. Ultimately, we surmised that these types of records are generally subject to FOIA, but we also recognized that “a court has an inherent authority to seal the records in an appropriate case.” However, in 2003, after the issuance of this opinion, the Supreme Court amended the South Carolina Rules of Civil Procedures dealing with the sealing of documents and settlement agreements. As part of these amendments, the Court specifically provides that “[u]nder no circumstances shall a court approve sealing a settlement agreement which involves a public body or institution.” Rule 41.1(c), SCRPC. Thus, the sealing of settlement documents in cases involving public bodies is prohibited.

Based on the analysis provided in our 1988 opinion, we remain of the opinion that settlement documents are generally public records subject to disclosure under FOIA. While certain information contained in the settlement documents may be exempt from disclosure under section 30-4-40, the

Mr. Washington
Page 4
November 7, 2007

District must keep in mind that these exemptions are narrowly construed and should some information contained in the settlement documents in question qualify for one of the exemptions, the District must separate the exempt and non-exempt information and make the non-exempt information available to the requester. Furthermore, we do not believe the fact that a settlement agreement contains a confidentiality provision gives authority to the District to ignore the provisions of FOIA. Thus, despite any such provision contained in the Settlement Agreement, the District must disclose information not exempt under section 30-4-40.

Although we are not aware of whether the settlement in question was sealed by court order, given the rule promulgated by the Supreme Court in 2003, we can imagine that in this instance a court is prohibited from sealing the Settlement Agreement because it involves the District, which is a public body. Therefore, we do not anticipate that action of the court would prevent disclosure of the settlement agreement under FOIA.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General