


## An Introduction to the Freedom of Information Act

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## SC Freedom on Information Act

Codified at Chapter 4 of Title 30 of SC Code of Laws of 1976 (S.C. Code §§ 30-4-10 to -165).

FOIA provides rules for two functions of government:

- Disclosing public records.
- Conducting public meetings.



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## Applicability of FOIA

- “Public body” means . . . any public or governmental body or political subdivision of the State, including . . . Municipalities . . . or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known.”
- *Quality Towing, Inc. v. City of Myrtle Beach* (2001): Review committee composed of city employees created by the city manager to evaluate bids by towing companies was an “advisory committee” and thus a “public body.”



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## Applicability of FOIA

“Public record” includes 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.

Definitely a public record:

- Documents and records in hardcopy and electronic formats.
- Emails on city servers.
- Text messages on phones provided by the public body.

More difficult questions:

- Documents provided to the public body and taken back up.
- Text messages on phones not provided by the public body.
- Emails from personal email accounts.




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## Applicability of FOIA

“Meeting” means 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.

*Lambries v. Saluda County Council (2014):* “Meetings are not limited to instances where action is taken.... Deliberative gatherings are included as well, and deliberation in this context connotes not only collective decision-making but also the collective acquisition and exchange of facts in preparation for the final decision.”




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## Public Records

S.C. Code §30-4-30

- Public bodies must respond to any written request for public records.
- Public bodies are almost never required to create a public record or an electronic version of a hardcopy record.
- Certain records must be made available for inspection during business hours without the need for a written request: (1) minutes of meetings held during the preceding six months; (2) law enforcement incident reports for the preceding fourteen day period; (3) documents identifying persons detained for the preceding three months; (4) documents produced by a 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 months.




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## Response Times and Formats

- 10 business days to respond to a request (20 business days for records over 24 months old).
- Public record must be provided within 30 calendar days from the date of response (35 calendar days for records over 24 months old).
- Request is considered granted if no response is received within the set limits (only for nonexempt records or information).
- Timetables may be extended by mutual consent.




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## Fees

- S.C. Code §30-4-30(B): "The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records."
- Records must be furnished at the lowest possible cost (hourly salary of lowest-paid employee capable of fulfilling request). Different employees may be required for different requests.
- Fees may not include time to determine if an exemption applies, including legal fees, but may include legal fees necessary to redact records.
- Public body may require a deposit of not more than 25% of anticipated costs before copies of documents are made.
- Public body must adopt a fee schedule and post it on its website.




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## Exemptions

S.C. Code § 30-4-40 lists records that a public body may exempt from disclosure.

- Most exemptions are not mandatory.
- Records that contain both exempt and non-exempt material must be redacted and the non-exempt part disclosed.
- Many other exemptions are located elsewhere in State and federal law.




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### Exemptions

Personal privacy. Information of a personal nature where public disclosure would constitute an unreasonable invasion of personal privacy.

- *Burton v. York County Sheriff's Dept. (2004)*: Employment records of sheriff's deputies who had been suspended for misconduct were not exempt.
- *Glassmeyer v. City of Columbia (2015)*: Home addresses, personal telephone numbers, and personal email addresses for applicants to the position of city manager were exempt.




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### Exemptions

Contracts and documents related to contractual negotiations. Exempt until the contract has been entered into or the property had been sold or purchased.

Compensation. Disclosure is based on total compensation:

- For employees making \$50,000 and up, as well as department heads, the law requires disclosure of the "exact amount" of compensation
- For employees making less than \$50,000, the law allows disclosure of salary ranges or classes in \$4,000 increments.




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### Exemptions

Records subject to attorney-client privilege.

- Must be careful to maintain attorney-client privilege for exemption to attach

Economic development. Records related "to efforts or activities of a public body . . . to attract business or industry to invest within South Carolina."

- Documents become subject to disclosure when (1) the offer has been accepted, and (2) the project has been announced.

Job searches. Materials gathered by a public body during a search to fill an employment position.

- Materials related to the finalists for a position must be disclosed (no fewer than 3, but can be more)




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### Other Exemptions: Commercial Solicitation

- SECTION 30-2-50. (A) A person or private entity shall not knowingly obtain or use personal information obtained from a [public body] for commercial solicitation directed to any person in this State.
- (B) Each [public body] shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.
- (C) All [public bodies] shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.




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### Commercial Solicitation

Under S.C. Code § 30-2-50, commercial solicitation means contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service.

What requests are covered under this provision?

- Names and addresses of new business license applicants for the past year by a company that sells copiers.
- Names and addresses of all water and sewer customers by a company that provides sewer line insurance.
- Building permit information, including property owner names and addresses, for residential construction over the past year by a trade publication that compiles residential construction costs.




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### Other Exemptions: 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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### Other Exemptions: 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.”



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### Best Practices for FOIA Requests

- Adopt a comprehensive FOIA Policy.
- Include a fee schedule and deposit requirements, and put it on the website.
- Assign a specific position the responsibility to coordinate FOIA responses.
- Ask requestors to use an approved form, but respond to all “written requests.”
- Adopt all possible exemptions, but keep in mind that typically the decision to apply an exemption is up to the local government.
- Respond to FOIA requests as quickly and completely as possible.
- Include a “completion form” with all FOIA responses that includes a commercial solicitation warning.



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### What is a Public Meeting?

- Convening of a quorum
- To discuss or act upon public business
- In person or by electronic means



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### Chance Meetings or Social Gatherings

S.C. Code § 30-4-70(c): No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

How does this provision impact:

- Social media?
- Email?
- Text messages?
- The annual Christmas party?




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### Public Meetings

S.C. Code § 30-4-80: Notice of Meetings

- The schedule of regular meetings must be posted at the beginning of each calendar year.
- Agendas for regular and special meetings must be posted at least 24 hours prior to the meeting.
  - Must be posted at the main office and on your website if you have one.
  - Notice must include the agenda, date, time and place of the meeting.
- An agenda must also be given to media and any person who requests receipt of notice.




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### Agendas for Public Meetings

- 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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### Executive Sessions

Meetings must be open to the public unless closed as an "executive session." S.C. Code § 30-4-70: allows executive sessions for:

- 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;
- 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;
- Discussion regarding the development of security personnel or devices;
- Investigative proceedings regarding allegations of criminal misconduct; or
- 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.




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### Executive Sessions

S.C. Code § 30-4-70(b): Before going into executive session, the presiding officer shall announce the specific purpose of the executive session.... "specific purpose" means a description of the matter to be discussed.... However, when the executive session is held [for personnel matters or economic development], 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.




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### Executive Sessions

*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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### 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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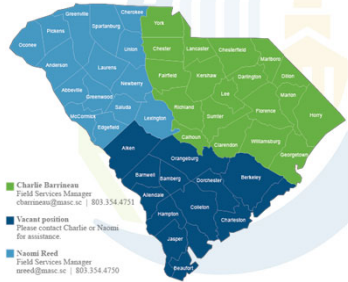
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### Questions; Contact Information



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