Changes to the Freedom of Information Act from H3352

H3352 became law on May 19, 2017. It makes a number of changes to the process for requesting documents under the Freedom of Information Act.

General

- Specifies that an individual has the right to request and receive a public record by electronic transmission. However, the law now expressly states that a public body is not required to create an electronic version of a public record where one does not exist.
- Bars incarcerated individuals from submitting FOIA requests.

Fees

- Limits a deposit to no more than 25 percent of the reasonably anticipated cost for reproduction of the records. The law specifically requires that any balance must be paid at the time of production. Before H3352 passed, a records custodian could charge a "reasonable" deposit before searching for and making copies of records.
- Requires public bodies to develop a schedule of the fees for fulfilling FOIA requests, including the fees for searching, retrieving, redacting and copying records.
- Limits the copy rate not to exceed the prevailing commercial rate for producing copies. The law does not define "prevailing commercial rate." However, the legislative intent was that the public body would not charge more than its actual costs and would treat the rate charged by local commercial copiers (i.e. Kinko's, Office Depot, etc.) as a gauge for capping fees.
- Limits the rates charged for searching, retrieving and redacting records not to exceed the hourly wage of the lowest paid employee on the public body's staff who has the skill and training to fulfill the request.

Timeline

- Reduces from 15 to 10 business days the time a public body has to respond to a written FOIA records request. If a requested record is more than 24 months old, the deadline is 20 business days. The public body is not required to make decisions about not providing notice of how a record may need to be redacted within this response period.
- Requires the public body to produce the requested records within 30 calendar days from the date it initially responds that the request will be fulfilled. When the public body requires a deposit, it must produce the records within 30 days of receiving the deposit. That deadline is 35 days for records that are more than 24 months old.
- Specifies automatic approval of a request only applies to nonexempt records or information, not those exempted by 30-4-40 or other state or federal law. Previously, a public body's failure to provide its determination in writing within the allotted time meant approval of the request.
- Allows production and response/determination timelines to be extended by written mutual consent. The requesting party may not unreasonably withhold such consent.
- Adds to the list of records that must be made available without a written request documents distributed to or reviewed by members of a public body during a public meeting within the last six months. While providing access to these records on a publicly available website complies with this requirement, a public body is still required to produce the documents upon request.

For additional information, contact Tiger Wells at 803.933.1270/twells@masc.sc

Changes to the Freedom of Information Act from H3352

Law Enforcement Specific Exemptions

- Expands the list of law enforcement-related exemptions to include records, video or audio recordings or other information compiled for law enforcement purposes where production would 1) interfere with law enforcement proceedings, 2) deprive someone of a right to a fair trial, 3) constitute an unreasonable invasion of privacy, or 4) disclose techniques and procedures for investigations or prosecutions where the disclosure would "risk circumvention of the law."
- Adds dashcam video to the list of public documents subject to disclosure under FOIA, and outlines how a law enforcement entity may apply to the circuit court for an order preventing disclosure. A court may only order a video not be disclosed if there is clear and convincing evidence that the recording is 1) exempt, and 2) its exemption outweighs the public's interest in disclosure.
- Exempts from FOIA audio recordings of a victim's dying statements over a 911 call, and requires that they be redacted from any audio recording before production unless a victim's next of kin waives privacy.

Procedures and Penalties

- Preserves an individual's ability to apply for a declaratory judgment or injunctive relief. The circuit court's chief administrative judge is additionally required to schedule an initial hearing within 10 days of service on all parties. If the court determines it cannot reach a final decision at that initial hearing, that court may establish a scheduling order to conclude the action within six months and may extend that timeline further for good cause.
- Allows a public body to request a hearing with the circuit court for relief from unduly burdensome, overly broad, vague, repetitive or otherwise improper requests.
- Allows a public body to request a hearing when it is unable to make a good faith determination regarding information's exemption from disclosure.
- Allows a third party to request a hearing if it has an interest in exempt information or records that may be released as part of a FOIA request.
- Allows a court to order equitable relief, actual or compensatory damages, or reasonable attorney's fees and costs to the prevailing party.
- Creates a good faith finding if the court conducting the initial hearing determines that records requested are not subject to disclosure. This good faith finding protects the public body and officials from being required to pay attorney's fees and costs if the initial court's ruling is subsequently overturned on appeal.
- Eliminates a violation of FOIA as a crime punishable by jail time. However, if a court finds that the violation was arbitrary or capricious, it may assess a civil fine of $500.

Other Expansions and Requirements

- Expands the crime of knowingly obtaining personal information for commercial solicitation to include information received from local governments and political subdivisions in addition to state agencies already covered by the law.
- Requires local governments and political subdivisions to provide notice of the prohibition against using the personal information for commercial solicitation. They must take reasonable steps against improper access. The law does not specify what steps must be taken, but the public body's attorney should determine how this required notice should be given to those requesting information. This statement could, for example, be included in the public body's initial response or included in a form the requesting party completes when the request is fulfilled.
    - Sample language: "S.C. law provides that it is a crime to knowingly obtain or use personal information from a public body for commercial solicitation."