

Document No. _____
SOUTH CAROLINA HUMAN AFFAIRS COMMISSION
CHAPTER 65
Statutory Authority: 1976 Code Section 1-13-70

65-3. Investigation and Production of Evidence

Preamble:

Regulation 65-3 governs procedures for Agency investigations based on complaints of unlawful conduct under the Human Affairs Law.

Notice of Drafting was published in the *State Register* on August 25, 2017.

Section by Section Discussion

B.(10)(d)(i) Amendment would permit Charging Party to receive a copy of the Respondent's 'position statement' during the course of an investigation.

Notice of Public Hearing and Opportunity for Public Comment:

A Public Hearing will be held on November 16, 2017, at 2:00 PM in the Board Room of the Human Affairs Commission, 1026 Sumter Street, Suite 101, Columbia, SC 29201. The South Carolina Human Affairs Commission proposes to amend Regulation 65-3. Investigation and Production of Evidence.

Written comments should be submitted in writing to SC Human Affairs Commission – Legal Division, P.O. Box 4490, Columbia, SC 29240. To be considered, all comments must be received no later than 5:00 p.m. on October 23, 2017.

Preliminary Fiscal Impact:

No additional state funding is requested. The Agency estimates that no additional costs will be incurred by the state in complying with the proposed amendments to 65-223.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: 65-3. Investigation and Production of Evidence

Purpose: The regulation governs the procedures for the agency to investigate complaints of unlawful conduct as defined by the Human Affairs Law. Explains the mechanisms for obtaining relevant information from parties in an Agency investigation. Guides the Agency on disclosure of file contents.

Legal Authority: 1976 Code Section 1-13-70.

Plan for Implementation: The proposed amendments will take effect upon approval by the S.C. General Assembly and publication in the State Register. This regulation will also be published on the S.C. Legislature website in the S.C. Code of Regulations.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION
BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The proposed amendment to Regulation 65-3(B)(10)(d)(i) is reasonable because it will provide Charging Party with a copy of the Respondent's 'position statements' during the course of an employment discrimination investigation. Charging Party may then provide additional information to rebut the Respondent's defenses. This amendment parallels the Equal Employment Opportunity Commission's (EEOC) practice of releasing 'position statements'.

DETERMINATION OF COSTS AND BENEFITS:

There will be no increased cost to the state or its political subdivisions, nor will the proposed amendments result in any increased cost to the business community.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to the cost to the state or its political subdivisions.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

The proposed amendments have no effect on the environment or on public health.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

There will be no detrimental effect on the environment or public health if the regulation is not amended.

Statement of Rationale:

The proposed amendment will grant Charging Party the opportunity to receive a copy of a Respondent's 'position statement' during the course of an investigation so that the Charging Party can rebut the Respondent's defenses.

Text:

65-3 Investigation and Production of Evidence.

A. Investigation.

(1) Investigator. The investigation of complaint shall be conducted by one or more investigators from the Commission's staff who shall be appointed by the Commissioner. If more than one investigator is appointed, one of the investigators shall be designated the "investigator in charge" and shall direct the investigation.

(2) Duties of the Investigator. Investigators shall do those things necessary and proper to thoroughly investigate a complaint, but shall limit their investigations to their proper scope as described in Subsection 65-3A(5) herein. Investigators assigned to investigate complaints filed pursuant to Section 1-13-90(c) of the Act (State agencies or departments and their local subdivisions) shall upon completion of their investigations submit to the supervisory commission member a statement of the facts disclosed by their investigations and recommend to the supervisory commission member that the complaint be dismissed or that a panel of commission members be designated to hear the complaint. In complaints arising under Section 1-13-90(d) of the Act (employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts and local governments), investigators shall upon completion of their investigation submit to the Commissioner a statement of the facts disclosed by the investigation and recommend either that the complaint be dismissed or that the Commission endeavor to formally conciliate the matter.

(3) Supervisory Commission Members. If the complaint under investigation is brought pursuant to Section 1-13-90(c) of the Act, the Chairman of the Commission, or upon the request of the Chairman, the Commissioner shall designate a member of the Commission to supervise the processing of the complaint who shall be known as the supervisory commission member. The supervisory commission member shall review the results of the investigation conducted by the investigator and review the investigator's recommendations for dismissal or other action.

(4) Commencement of the Investigation. The investigation shall commence immediately upon service by the Commission of a copy of the complaint or notice of complaint upon the respondent.

(5) Scope of Investigation. Insofar as practicable, the investigation shall be limited to a determination of the facts relating to the unlawful employment practice or practices under investigation or in question before the commission.

(6) Conduct of the Investigation.

(a) The investigator shall make a prompt and complete investigation of the allegations in the complaint which meet the standards of R. 65-2.

(b) As part of each investigation the investigator:

(i) Will accept as evidence any statement of position and/or evidence concerning the allegations of the complaint which the complainant or respondent wishes to voluntarily submit.

(ii) Shall require the complainant or respondent to provide any evidence, including statements and documents which are relevant to the complaint, as well as, any information which is necessary to establish actual damages or to establish the date on which the alleged damages occurred.

(c) The investigator may require the complainant to provide a detailed statement which includes, but is not limited to:

(i) a statement of each specific harm that the complainant has allegedly suffered, and the date on which each alleged harm occurred;

(ii) for each alleged harm, a statement specifying the act, policy or practice of the respondent which is alleged to be unlawful; and

(iii) for each act, policy or practice alleged to have harmed the complainant a statement of the facts which lead the complainant to believe that the act, policy or practice is unlawfully discriminatory.

(d) During the investigation of a complaint, the investigator may conduct a fact-finding conference with the parties. The purpose of the conference shall be to clearly define the issues to determine which elements of the matter under investigation are undisputed, to resolve those issues that can be resolved and to determine whether there is any likelihood for a negotiated no-fault settlement of the complaint as described in Section 65-5A. Discussions during a fact-finding conference are confidential. Any conciliation efforts during the conference are also confidential and are considered conciliation attempts within the meaning of the Act.

B. Production of Evidence.

(1) Investigator's Formal Request for Information. An investigator may, at any reasonable time after service of complaint, formally request access to or production of records and documents in the possession of any person being investigated which are relevant to the complaint for purposes of inspection and copying. The investigator shall make the formal request for documents in writing by certified mail, transmitted to the person being investigated. The written demand shall notify the person that the investigator may apply to the Commission for a subpoena if access to or production of the documents and records is not permitted within thirty (30) days from the receipt of the investigator's written demand.

(2) Investigator's Application for Subpoena Duces Tecum. If any person fails to comply with an investigator's formal demand for information within thirty (30) days after receipt of the written demand, the investigator may apply to the Commission for a subpoena duces tecum by presenting to the Commission the investigator's written demand and the response of the person to whom the demand was made denying access to the information requested or, if no response was made, the investigator's affidavit that no response was received from the party to whom the demand for information was sent.

(3) Issuance of Subpoena Duces Tecum. To effectuate the purpose of the Act, upon a showing by an investigator that a person has not complied with a written demand for information relevant to the complaint

which was transmitted to the person by certified mail, the Chairman of the Commission and the Commissioner shall acting jointly have the authority to sign and issue a subpoena requiring:

- (a) the production of evidence including but not limited to books, papers, records, correspondence or documents in the possession or under the control of the person subpoenaed;
- (b) access to evidence for purposes of examination and the right to copy; and
- (c) under Section 1-13-90(c) of the Act, attendance at hearings or at prehearing depositions.

(4) Form and Content of Subpoenas.

- (a) A subpoena issued by the Commission shall:
 - (i) state the name and address of its issuer;
 - (ii) briefly and clearly state the cause of issuance;
 - (iii) identify the person to whom and the place, date and time at which the subpoena is returnable;
 - (iv) identify the person or evidence subpoenaed with reasonable clarity, specificity and particularity to readily enable the person receiving the subpoena to identify the named person or evidence;
 - (v) state the date and time access is requested if a subpoena duces tecum is issued.
- (b) A subpoena shall only be returnable to a duly authorized investigator of the Commission of the Commissioner.

(c) Neither the complainant nor the respondent shall have the right to demand that an investigative subpoena be issued.

(5) Petitions to Revoke Subpoena. Within fourteen (14) days after a subpoena is issued, the person served with the subpoena may petition the Commission by mail to revoke or modify the subpoena and shall serve a copy of the petition upon the investigator who originally demanded the information. The petition shall separately identify the portion of the subpoena with which the petitioner does not intend to comply and shall state with respect to each portion, the grounds upon which the petitioner relies. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A". Within ten (10) days after receipt of the petition or as soon thereafter as practicable, the Commission shall review the petition and make a written determination upon the petition stating in detail the reasons for the Commission's determination and shall serve a copy of the determination upon the petitioner and the investigator demanding the information. When a petition to revoke a subpoena is served upon the Commission, no enforcement of a subpoena shall be sought until the Commissioner has made a determination on the petition and served the petitioner with the determination.

(6) Applications For Enforcement.

(a) Failure to Comply and Enforcement. A person who receives a subpoena may refuse to comply by failing to respond to the subpoena or by affirmatively stating that he/she will not respond; it is not necessary for the person to serve a petition to revoke the subpoena. If a person fails to comply with a subpoena, the Commission may, after fourteen (14) days, apply to any state court of competent jurisdiction for an order requiring the person to comply with the subpoena as provided by the Act.

(b) Notice of Hearing. Any person against whom an order is sought shall be given at least four (4) days notice (excluding Saturdays, Sundays, and state holidays) of the time and place of the hearing, and may oppose the granting of the order.

(7) Interrogatories and Depositions.

(a) A party or witness may be required to answer written interrogatories relevant to a complaint under investigation under Section 1-13-90(c) and (d) of the Act at any time after such complaint is served.

(b) At least ten (10) days written notice (excluding Saturdays, Sundays and state holidays) shall be furnished to any party or witness sought to be deposed.

(c) The scope of discovery shall be governed by the relevance to the content of the complaint under investigation as described in Subsection 65-3A(5) of these Regulations.

(8) Petitions to Revoke Interrogatories and Depositions. If a person refuses to have his/her deposition taken or refuses to answer interrogatories, the person may petition to revoke the notice to take deposition or revoke the interrogatories within five (5) days after receipt of the notice to take deposition or within thirty (30) days after receipt of interrogatories. The petition shall be mailed to the Commission and shall be served upon the investigator who originally demanded the information. The petition shall separately

identify each portion of the interrogatories with which the petitioner does not intend to comply and shall state, with respect to each such portion, the grounds upon which the petitioner relies. A copy of the notice to take deposition or the interrogatories, as the case may be, shall be attached to the petition and designated as "Attachment A". Within five (5) days after receipt of the petition or as soon thereafter as practicable, the Commission shall make a determination upon the petition stating in detail the reasons for its determination and shall serve a copy of its determination upon the petitioner. When a petition to revoke is served upon the Commission, no enforcement of a notice to take deposition or interrogatories shall be sought until the Commission has made its determination on the petition and served the petitioner.

(9) Applications for Enforcement.

(a) Failure to Comply and Enforcement. A person who receives interrogatories or a notice to take deposition may refuse to comply by failing to respond or by affirmatively stating that he/she will not respond; it is not necessary for the person to serve a petition to revoke. If a person fails to comply with the notice to take deposition, the Commission may after ten (10) days apply to any state court of competent jurisdiction for an order requiring the person to comply as required by the Act. If a person fails to answer interrogatories the Commission may apply to any state court of competent jurisdiction for an order requiring the person to answer the interrogatories as provided by the Act.

(b) Notice of Hearing. Any person against whom an order is sought shall be given at least four (4) days notice (excluding Saturdays, Sundays and state holidays) of the time and place of the hearing, and may oppose the granting of the order.

(10) Confidentiality.

(a) Public Access to Commission Files or Information Gathered During an Investigation. As provided in Sections 1-13-90(c)(1) and 1-13-90(d)(2) of the Act, information gathered during an investigation conducted under Section 1-13-90 of the Act, shall not be made public by the Commission, its officers or employees, unless and until that information is offered or received into evidence at a Commission hearing or court proceeding brought in accordance with the Act. In view of the prohibitions against making information public contained in Sections 1-13-90(c)(1) and 1-13-90(d)(2) of the Act, information gathered by the Commission during investigations and internal memoranda assessing evidence, discussing complaints or recommending action on complaints shall not be deemed "public records" within the meaning of the Code of Laws of South Carolina Section 30-40-20. The provisions of this Subsection apply whether the Commission's investigative file is open for an ongoing investigation or closed after a matter is completely concluded.

(b) Public Access to Final Opinions and Orders and Determinations. The public shall have access to the Commission's final opinion and order concerning a complaint under Section 1-13-90(c) of the Act or the Commission's determination on whether to dismiss a complaint or sue in the state circuit court under Section 1-13-90(d) of the Act.

(c) Commission Requests for Information from Investigators. If the Commission requires reports on investigations or on the progress of investigations, the investigator's report shall be given to the Commission while the Commission sits in executive session with member of the public excluded.

(d) Access to Information by Complainant and Respondent.

(i) Information Provided by the Parties Themselves. The complainant may at all times have access to any information which the complainant has furnished the Commission. The respondent may at all times have access to any information which the respondent has furnished the Commission. The Commission will provide the respondent's position statement and non-confidential attachments to the complainant upon request and allow the charging party an opportunity to respond within ten (10) business days. The Commission may redact confidential information as necessary prior to releasing the position statement to a complainant or complainant's legal representative. However, neither the complainant nor the respondent shall have any additional information furnished by the other party, except that this Subsection does not apply to disclosure to the parties or their attorneys where the disclosure is limited to matters necessary for determining appropriate relief and/or negotiating settlements or making conciliation offers and except that this Subsection does not apply to the complainant's or respondent's access to Commission files after a complaint against the respondent has been served as provided in sub item (ii), following.

(ii) Information Available to the Parties in a Proceeding. If an action is brought against a respondent in accordance with the Act, either before the Commission pursuant to Section 1-13-90(c) of the Act or in a court of competent jurisdiction pursuant to Sections 1-13-90(c) and (d) of the Act, the respondent shall from the time the complaint is served be granted access to the investigative file of the Commission which shall include access to statements, affidavits or depositions of the complainant and witnesses, whether or not the complainant and the witnesses are employees of the respondent at the time the request for access is made. The complainant and respondent shall also have access to all other facts and data gathered by the Commission during its investigation, provided however that neither shall have access to deliberative memoranda, working papers, drafts and other work products of the Commission relating to a complaint and further provided that deletions may be made where necessary to protect the personal privacy of an affiant or an individual named in a document to insure the anonymity of confidential sources or information, and to protect the confidentiality of trade secrets, confidential financial information and the like.

(iii) Copy of the Complaint. A copy of the complaint will be served in all cases upon the respondent unless a complaint received pursuant to a federal contract expressly requires that the original complaint not be served. In the event that a copy of the complaint is not provided, the respondent shall be served with a notice of the complaint within ten (10) days of receipt. The notice of complaint shall include the place, circumstances and identity of the person filing the complaint, a description of the violations of the Act alleged to have been committed by the respondent and the date of the alleged violation.

(e) Reports and Compilations. The Commission may publish abstracts of data derived from its closed investigative files in a form which does not reveal the identity of the parties, trade secrets, financial information or competitive commercial information or processes.

(f) Sharing Information Between Agencies. The Commission shall not provide information to any state or federal agency which does not have written regulations providing essentially the same protection against unauthorized disclosure as provided in these regulations.