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HENRY MCMASTER
ATTORNEY GENERAL

December 28, 2006

The Honorable Glenn F. McConnell
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

We received your letter requesting an opinion of this Office on the issue of "whether the St. Johns Water Company is a 'public body' subject to the Freedom of Information Act (FOIA) requirements." In your request, you informed us that "St. Johns Water Company was incorporated as a non-profit on May 29, 1975 . . . and is currently in good standing with the South Carolina Secretary of State." You also informed us that:

> In 1975, St. Johns Water Company received a $100,000 grant from the state to help form the company. Subsequently, the company received a $500,000 loan (for installation of water lines) and has been approved for another $9,200,000 loan from the United States Department of Agriculture (USDA). The loans received from the USDA were at a rate of about 4.5% and were in exchange for the water company providing services to the rural areas for customers that wanted to tie into the water line.

You also point to several facts that you believe "weigh in favor of the St. Johns Water Company being a 'public body' subject to FOIA requests." These factors are as follows:

1. Provision of water through water lines is commonly considered to be a government service.

2. If St. Johns Water Company has the power of eminent domain, then it would have one of the sovereign powers enjoyed only by public bodies.

Request Letter

3. St. Johns Water Company has a monopoly on providing water through water lines which ultimately gives it the power to control growth in the area and might be considered a sovereign power enjoyed only by public bodies.

Based on our analysis as set forth below, we believe because the St. Johns Water Company (the "Company") received grant funds from the State of South Carolina, a court would find it is supported, at least in part, with public funds. Therefore, we opine that the Company is a public body and is subject to the South Carolina Freedom of Information Act's requirements.

Law/Analysis

Chapter 4 of title 30 of the South Carolina Code contains South Carolina's Freedom of Information Act ("FOIA"). Section 30-4-30 of the South Carolina Code (1991) affords individuals the "right to inspect or copy any public record of a public body, except otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." Thus, as you stated in your letter, whether or not the Company is subject to this provision depends upon whether it is considered to be a public body. Section 30-4-20(a) of the South Carolina Code (Supp. 2005) defines "public body" as

> any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or <u>any organization, corporation, or agency supported in whole or in part by public funds or expending public funds</u>, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

(emphasis added).

In <u>Weston v. Carolina Research and Development Foundation</u>, 303 S.C. 398, 401 S.E.2d 161 (1991), the South Carolina Supreme Court considered whether the Carolina Research and

Development Foundation (the "Foundation") was a public body as described in section 30-4-20(a). The Foundation was a registered nonprofit corporation operating exclusively for the benefit of the University of South Carolina. The Court considered four specific transactions in an effort to determine whether the Foundation was supported by public funds and thus, met the definition of a public body. These transactions included the Foundation's receipt of part of the proceeds from the sale of a hotel by the University, the receipt and management of a federal grant money in connection with the construction of a building, the receipt of real estate and grants from the City of Columbia and Richland County, and routing of contracts related to research and development performed by University employees through the Foundation, resulting in the Foundation receiving a percentage of the contract amount. Id. at 401-03, 401 S.E.2d at 163-64. Based on its consideration of these transactions, the Court concluded:

> Each of the above transactions alone would bring the Foundation within the FOIA's definition of "public body". Taken together, they lead to the unavoidable conclusion that the Foundation is a "public body". This conclusion is mandated by the clear language of the FOIA. The Foundation's argument that the FOIA only applies to governmental and quasi-governmental bodies would rewrite the statutory definition of "public body" by deleting the phrase, "or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds." According to the Foundation's position, a corporation that cannot be labeled governmental or quasi-governmental would be exempt from the FOIA, regardless of whether it received support from public funds or expended public funds. Such a construction would obliterate both the intent and the clear meaning of the statutory definition.

Id. at 403, 401 S.E.2d at 164. The Foundation contended a common law distinction existed between public and private corporations, allowing private corporations to be exemption from the FOIA. Id. However, the Court stated: "the unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body. The common law concept of 'public' versus 'private' corporations is inconsistent with the FOIA's definition of 'public body' and thus cannot be superimposed on the FOIA" Id.

The Court noted a limitation on the FOIA's application in certain circumstances.

> As the trial judge correctly noted, this decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent.

Id. at 404, 401 S.E.2d at 165. Nonetheless, the Court found such an exception not applicable here, stating

> when a block of public funds is diverted en masse from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id.

Subsequent to the Weston decision, the South Carolina Court of Appeals considered whether the Palmetto Electric Cooperative was a public body under the Whistleblower Act. Sutler v. Palmetto Elec. Coop., Inc., 325 S.C. 465, 481 S.E.2d 179 (Ct. App. 1997). According to the Court's opinion, the Cooperative received its main source of funding through the sale of electricity to its members, but also received loans from the Rural Utility Service at an advantageous interest rate. Id. at 466, 481 S.E.2d at 179. The Court noted the Cooperative did not receive any financial assistance from the State or any political subdivision. Id.

Because the Whistleblower Act's definition of public body is the same as the definition provided under the FOIA, the Court of Appeals looked to the Supreme Court's holding in Weston and the limitation the Court set on its holding with regard to the exchange of money for goods or services. Id. at 468, 481 S.E.2d at 180. With that decision in mind, the Court determined: "to find that [the Cooperative] is a public body we must find that it is (partially) supported by the loans and interest rate it receives." Id. at 468, 481 S.E.2d at 181. Ultimately, the Court concluded: "Just as the FOIA does not apply to enterprises that accept payment from public bodies in exchange for services, the Whistleblower Act does not apply to [the Cooperative], who provides electricity to rural areas in exchange for loans with beneficial interest rates." Id. at 469, 481 S.E.2d at 181. Thus, the Court declined "to hold these loans constitute the 'support' that would transform Respondent into a public body under the Whistleblower Act." Id.

This Office, in several opinions, also addressed issues of whether a particular entity constitutes a public body under the FOIA. In a 1992 opinion, we considered whether the Family Counseling Center of Greenville was a public body for purposes of the FOIA. Op. S.C. Atty. Gen., January 16, 1992. The Family Counseling Center of Greenville was a private nonprofit organization, which received funding from a variety of sources including private contributions, program fees, and public monies. We cited to Weston and noted "the FOIA is not limited, in its application, to governmental bodies, for to do so would render meaningless [that portion of section 30-4-20(a) encompassing organizations, corporations, and agencies supported in whole or in part by public funds or expending public funds.]" Id. We also commented on court decisions and other opinions of this Office providing insight into the concept of "support."

> While the notion of "support" is not defined in the FOIA, the South Carolina Supreme Court has construed "support" to mean "to maintain or aid and assist in the maintenance," Harris v. Leslie, 195 S.C. 526, 12 S.E.2d 538, 542 (1940), or to "uphold or sustain." State v. Stokes, 133 S.C. 67, 130 S.E. 337, 339 (1925). What kind of support, or how much, is needed to bring an entity under the FOIA is likewise not found in the FOIA. Payment of incidental expenses of a committee established by a county legislative delegation to oversee an audit of the county school system from public funds, was arguably enough support to bring that committee under the FOIA. Op.Atty.Gen. dated July 11, 1983. An ad hoc citizen' committee apparently totally supported (actually or "in kind") by public funds of some kind was felt to be subject to the FOIA. Op.Atty.Gen. dated September 21, 1989.

Id. Nonetheless, we were unable to conclude whether or not the Family Counseling Center of Greenville is supported by public funds, because this question "remains a question of fact which may require resolution by the judicial system."

Recently, in an opinion issued in May of 2006, we considered whether the Majority Caucus of the South Carolina House of Representatives is a public body under the FOIA. Op. S.C. Atty. Gen., May 19, 2006. In our opinion, we relied Weston and other cases decided in South Carolina and in other jurisdictions. Id.

> [W]e have previously concluded that FOIA contains no provision exempting support of an entity through public funds when such support might be characterized as "de minimis" or insignificant. Indeed, the language of the statute is phrased "in whole or in part ...." Based upon the literal text of the statute, any expenditure of public funds is sufficient to meet the requirement of "in part" support or the "expend[ing] public funds" portion of the statute. Here, Majority Leader Merrill notes that three staff members of the Caucus are receiving office space in the Blatt Building rent-free. That, in itself, in our view, meets the requirements of the Act. Moreover, according to Representative Merrill's letter, the Caucus is using space, equipment and other resources provided to those members generally. While it is true that these are resources received as a result of House membership, the fact that the Caucus is also obtaining access to these resources is a further indicia of the "support" the Caucus receives from public funds. Finally, it is our understanding that other House staff personnel from time to time assist the Caucus. The salaries of these employees are not paid by Caucus funds, but by the State. This

> was a basis for the conclusion that there existed public funds "support" in Weston, our 1989 opinion, and Sebelius. We do not believe the Freedom of Information Act attempts to draw a quantitative line between "insignificant" or "de minimis" support and substantial or significant support from public funds. Accordingly, we are of the opinion that the House Majority Caucus is supported in whole or in part by public funds and is expending public funds. Thus, the Caucus is, in our view, a "public body" and is, therefore, subject to the South Carolina Freedom of Information Act.

Id.

In your letter, you indicated although the Company is a private nonprofit corporation, it received and has been approved to receive loans from the USDA. Although, the Court of Appeals decision in Sulter dealt with whether the electric cooperative was a public body under the Whistleblower Act, because the Legislature used the same definition of "public body" in both pieces of legislation, we believe this decision is instructive as to what a court would hold should the same question arise under the FOIA. In that decision, the Court of Appeals clearly indicated its view that a loan from a governmental agency does not constitute support under the definition of a public body contained in the Whistleblower Act, regardless of the favorablility of the interest rate. The Court put such loans on par with a payment by a public body in exchange for goods and services, which the Supreme Court determined did not qualify as support under the FOIA definition of a public body. Thus, considering Sulter, we do not believe a court would find the USDA loans to the Company qualify as support for purposes of the FOIA, regardless of a favorable interest rate.

However, the fact that the Company received a $100,000 grant from the State of South Carolina presents a more difficult question with regard to whether the Company is supported with public funds. Two of the transactions considered in Weston involved the receipt of grant funds from federal and local governmental bodies. In that case, although the Court considered all four transactions in question to determine if the Foundation was supported by public funds, the Court emphasized each of those transactions "alone would bring the Foundation within the FOIA's definition of "public body." Weston, 303 S.C. at 403, 401 S.E.2d at 164. Thus, the Court in Westson clarified that the receipt of grant funds constitutes public funding under the FOIA's definition of a public body.

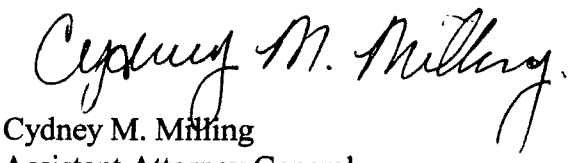
From your letter, we gather that the Company only received one grant in 1975, when the Company incorporated. Thus, we imagine one could argue the one time receipt of public funds over thirty years ago is not sufficient to subject the Company, a private entity, to the FOIA today. However, as we noted in our opinion issued in May of this year, based on a plain reading of the FOIA provision defining a public body, "[w]e do not believe the Freedom of Information Act attempts to draw a quantitative line between 'insignificant' or 'de minimis' support and substantial or significant support from public funds." Op. S.C. Atty. Gen., May 19, 2006. Therefore, we believe

a court would find the receipt of the grant funds by the Company evidences it is supported, at least in part, with public funds. Accordingly, it is our opinion that the Company is a public body and is subject to the FOIA.

Conclusion

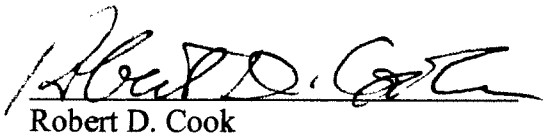
We believe the Company's receipt of a grant from the State of South Carolina sufficiently evidences the support of the Company with public funds. Thus, we find the Company meets the definition of a public body provided in section 30-4-20(a) of the South Carolina Code. Because we find the Company is covered under this definition, it is subject to the FOIA requirements found in article 4 of title 30 of the South Carolina Code.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General