



HENRY McMASTER  
ATTORNEY GENERAL

January 7, 2009

The Honorable Richard Eckstrom  
Comptroller General, State of South Carolina  
305 Wade Hampton Office Building  
1200 Senate Street  
Columbia, South Carolina 29201

Dear Mr. Eckstrom:

We received your letter expressing concern for the creation of a nonprofit organization by the Office on Aging. According to your letter, a recent newspaper article stated that "the Office on Aging has created a non-profit organization which as received state funds 'to investigate and certify "senior safe" businesses.'" Furthermore, you informed us that "[t]he Office on Aging has advised that this undertaking is based on Attorney General opinions that have set legal precedent for a governmental entity to provide public funds to a non-profit corporation." As such, you ask that we "review the legal authority for this relationship between the Office on Aging and this corporate entity and provide me your expedited opinion."

### **Law/Analysis**

The Legislature created the Division on Aging (the "Division") by enacting the provisions contained in chapter 21 of title 43 of the South Carolina Code (Supp. 2007). According to the Division's enabling legislation, the Division was created under the Governor's Office and is supported by an Advisory Council on Aging (the "Council")<sup>1</sup>. S.C. Code Ann. § 43-21-10. Thus, as a creature of statute, the Division and its Council have only that authority expressly conferred or necessarily implied from its enabling legislation for it to effectively fulfill the duties with which it is charged. S.C. Coastal Conservation League v. South Carolina Dep't of Health & Env'tl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005). Accordingly, we must look to the Division's enabling

<sup>1</sup>In the 2008 appropriations act, the Legislature amended the provisions contained in chapter 21 of title 43 by placing the Division under the Office of the Lieutenant and transferring authority previously held by the Governor to the Lieutenant Governor. 2008 S.C. Acts 3464. The amendments are effective as of July 1, 2009.

legislation to determine whether it has the authority to create a nonprofit organization to investigate and certify businesses as senior safe.

As you mentioned in your letter, on several occasions, this Office considered whether a governmental entity has the authority to create and provide funds to nonprofit organization. In a 1977 opinion, we reviewed the question of whether the State Housing Authority may create one or more nonprofit corporations for the purpose of financing low-cost rent-supplement housing facilities in connection with federal housing assistance programs. Op. S.C. Atty. Gen., February 28, 1977. Given the broad authority afforded to the State Housing Authority by the Legislature, we determined that such powers “clearly include the power to establish a not-for-profit corporation whose existence will further the purpose set forth in [its enabling legislation].” Id. In 1981, we similarly relied on the broad authority given to a municipal housing authority to determine that it may form a nonprofit corporation for purposes for financing public housing. Op. S.C. Atty., May 17, 1981. In that opinion, we stated:

it can be seen that city housing authorities have broad powers including ‘all powers necessary, proper, incidental or useful to carrying out any of the purposes or intendments of this chapter . . . .’ For this reason, it is the opinion of this Office that the Greenville City Housing Authority possesses the power to create a non-profit corporation to finance public housing.

Id.

In 1994, we addressed whether the Patriot’s Point Development Authority (the “PPDA”) could establish a nonprofit to carry out the purposes set forth in its enabling legislation. Op. S.C. Atty. Gen., November 15, 1994. We again explained that because the Legislature created the PPDA by statute, the PPDA has only the authority expressly provided by the Legislature or necessarily implied from the authority expressly given. Id. Although we found no specific authority for the PPDA to create a nonprofit corporation, we noted that the Legislature provided the PPDA with

very broad and general powers “to do and perform any act or function which may tend to or be useful toward the development and improvement of Patriot's Point.” § 51-13-760(7). Further, the PPDA has the power “to do any and all other acts and things authorized or required to be done by the article, whether or not included in the general powers mentioned in § 51-13-770(9).”

Id. Given the broad authority provided to the PPDA and the fact that we found no law specifically prohibiting state agencies or authorities from establishing nonprofit corporations, we concluded that the PPDA is permitted to create a nonprofit corporation. Id.

Subsequently, in 1997, we addressed whether the Department of Parks, Recreation and Tourism (“PRT”) had authority to create a nonprofit foundation. Op. S.C. Atty. Gen., January 16, 1997. In our review of PRT’s enabling legislation, we did not find express authority for it to establish a foundation. However, we found that the Legislature provided PRT with broad authority. Thus, relying on our 1994 and 1977 opinions cited above, we concluded that PRT has authority to establish a foundation.

Most recently, in 2004, we were asked to opine as to the Hunley Commission’s authority to create a nonprofit organization to further its efforts for the recovery, excavation, and conservation of the Hunley without express authority in the Hunley Commission’s enabling legislation. Op. S.C. Atty. Gen., October 22, 2004. We cited prior opinions of this Office concluding that governmental entities may contract with private entities for the performance of a public function. Id. (citing Ops. S.C. Atty. Gen., June 23, 1993; June 27, 1988; August 8, 1985). Moreover, we looked to the intent of the Legislature in delegating authority to the Hunley Commission and determined “it is evident that the General Assembly intended the Hunley Commission to possess sufficient authority to carry out the functions relating to the recovery, preservation, curation, display and exhibition of the Hunley as a historic artifact of the State of South Carolina.” Based on our view of the intent of the Legislature and prior opinions of this Office, we concluded as follows:

it is our opinion that the Hunley Commission possesses the power to create the nonprofit corporation known as the Friends of the Hunley to further its statutory duties to provide for the recovery, excavation and conservation of the Hunley. The authority of the Commission to implement the Legislature’s purpose in preserving and displaying the Hunley carries with it the authority to create a nonprofit corporation to raise funds and assist in that effort.

Id.

In our review of the Division’s enabling legislation, we did not find a provision specifically giving the Division or its Council the authority to create a nonprofit organization. Thus, we must determine if such authority is necessarily implied to enable the Division fulfill its statutory duties. Section 43-21-40 of the South Carolina Code explains the Division’s powers and duties. This provision states as follows:

The division shall study, investigate, plan, promote, and execute a program to meet the present and future needs of aging citizens of the State, and it shall receive the cooperation of other state departments and agencies in carrying out a coordinated program.

It shall also be the duty of the division to encourage and assist in the development of programs for the aging in the counties and

municipalities of this State. It shall consult and cooperate with public and voluntary groups, with county and municipal officers and agencies, and with any federal or state agency or officer for the purpose of promoting cooperation between state and local plans and programs, and between state and interstate plans and programs for the aging.

S.C. Code Ann. § 43-21-40. In addition, the section 43-21-40 specifically authorizes the Division to

(a) Initiate requests for the investigation of potential resources and problems of the aging people of the State, encourage research programs, initiate pilot projects to demonstrate new services, and promote the training of personnel for work in the field of aging.

...

(g) Engage in any other activity deemed necessary by the division to promote the health and well-being of the aging citizen of this State, not inconsistent with the purposes of this chapter or the public policies of the State;

...

(i) award grants and contracts to public and private organizations for the purpose of planning, coordinating, administering, developing, and delivering aging programs and services;

...

Id. § 43-21-40.

From these provisions, we understand that the intent of the Legislature is to provide broad authority to the Division in developing and initiating programs to aid the aging population of this State. We have limited information regarding the activities of the proposed nonprofit. Thus, we cannot conclusively determine whether its operations will serve the Division's purposes as this determination would involve resolving issues of fact, which is beyond the scope of an opinion of this Office. Op. S.C. Atty. Gen., July 17, 2007 ("[T]his office does not have the jurisdiction of a court to investigate and determine facts."). However, from the information you provided to us, the nonprofit will be charged with investigating and certifying businesses to protect senior citizens from scams. These activities appear to fall under the purposes of the Division. Based on our prior opinions and finding no prohibition on the Division's authority to create a nonprofit, if the nonprofit

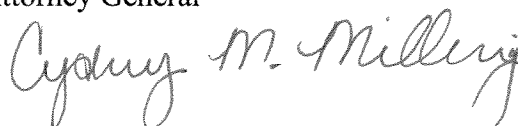
acts to further the purposes of the Division, we believe a court would likely find that the Division has the authority to create a nonprofit entity to carry out its functions. Furthermore, as noted above, section 43-21-40(i) specifically allows for the Division to award grants and contracts to private organizations. Thus, we believe the Legislature expressly contemplated the Division's ability to transfer State funds to non-governmental entities. Accordingly, we conclude that the Division may both create and fund a nonprofit organization so long as the nonprofit acts in furtherance of the Division's statutory purpose.

### **Conclusion**

In our review of the Division's enabling legislation, we do not find any express authority allowing the Division to create a nonprofit organization to investigate and certify businesses to protect senior citizens from scams. However, presuming the nonprofit organization acts to further the purposes of the Division, based on the broad authority given to the Division under its enabling legislation and prior opinions of this Office addressing a similar issue, we are of the opinion that such authority is implied and thus, the Division may establish a nonprofit organization. Moreover, the Division's enabling legislation appears to allow for the Division to provide State funds to the nonprofit.

Very truly yours,

Henry McMaster  
Attorney General



By: Cydney M. Milling  
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REVIEWED AND APPROVED BY:



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