



ALAN WILSON
ATTORNEY GENERAL

August 8, 2011

The Honorable Creighton B. Coleman
Senator, District No. 17
P. O. Box 1006
Winnsboro, South Carolina 29180

Dear Senator Coleman:

You have asked whether the Jenkinsville Water Company is a public body for purposes of the Freedom of Information Act and is subject to the Act's disclosure requirements. It is our opinion that the Water Company is a public body and must meet the FOIA's requirements.

By way of background, it is noted that the Jenkinsville Water Company is a non-profit, 501(c)(3) corporation. It is our understanding the company was chartered in 1970, through a loan obtained from the U.S. Department of Agriculture. Pursuant to the Consolidated Farmers Home Administration Act of 1961, later known as the Consolidated Farm and Rural Development Act ("Con Act"), Congress authorized a number of U.S.D.A. lending programs, among them to provide financial support to rural water suppliers. As a result of this federal financial support, rural water companies were incorporated throughout South Carolina to provide water to customers in rural communities. It is our understanding that the Jenkinsville Water Company is one such non-profit corporation, and provides water to customers in the Jenkinsville community of Fairfield County. We understand that there are five such non-profit companies in Fairfield County, including the Jenkinsville Water Company.

Information has been provided to this Office concerning a number of grants from federal and state entities to the Jenkinsville Water Company. Based upon the information provided, according to the Company's 2007 Form 990, "Jenkinsville Water Company received \$34,751 in government grants. Moreover, we are informed that the Company recently received a grant of \$73,000 for a new well from the South Carolina Budget and Control Board. See, *Herald Independent*, July 27, 2011 ("Grants Suspended for Jenkinsville Water Co."). According to the February 24, 2009 Minutes of the Budget and Control Board, the Board approved a grant of \$132,500 toward eligible construction costs to the Water Company. And, you have provided us with a copy of a letter, dated March 21, 2011, from Mr. Philip Hinely, Fairfield County Administrator, to the President of the Jenkinsville Water Company Board, which requests "more accountability of those whom we provide funding." The letter asks for specific information from the Company, including documentation of the Company's tax exempt status, a copy of the Company's most recent audit and a copy "of your latest IRS filing of Form 990. Such letter concludes as follows:

[u]nfortunately, until you are able to provide the County with this information, the County will not be able to consider any funding requests from your organization; will discontinue any County funding to your organization; plus, will not be able to

act as a pass-through for you on any grants or loans from any other governmental or charitable organizations.

Law / Analysis

The Freedom of Information Act (FOIA) was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions and was amended by Act No. 118, 1987 Acts and Joint Resolutions. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

[t]he General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

On numerous occasions, in construing the Freedom of Information Act, we have emphasized the Legislature's expression of public policy as articulated in § 30-4-15. In *Op. Atty. Gen.*, Op. No. 88-31 (April 11, 1998), for example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA as follows:

[a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. *Martin v. Ellisor*, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. *South Carolina Department of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. *News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

See also, Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (2005) (FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

With respect to application of the definition of "public body" as contained in § 30-4-20(a), the seminal case is our Supreme Court's decision in *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991). In *Weston*, the Court concluded that the Carolina Research and Development Foundation, an eleemosynary corporation, is indeed a "public body" for purposes of FOIA. *Weston* rejected any argument that a "private" corporation could not constitute a "public body" under the Freedom of Information Act.. The Foundation argued that the common law distinguished "between 'public' and 'private' corporations [and that such a distinction] overrides the clear

language of the FOIA." 303 S.C. at 403. Notwithstanding the fact that under the common law a "private" corporation does not lose its private identity by virtue of the receipt of public funds, the Court concluded that such analysis was inapplicable to FOIA. The Court reasoned:

... 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. It is "well settled that a legislative body has the power within reasonable limits to prescribe legal definitions of its own language, and when an Act passed by it embodies the definition, it is generally binding upon the Courts." *Windham v. Pace*, 192 S.C. 271, 283, 6 S.E.2d 270, 275 (1939). *See also, Bell Finance v. South Carolina Dept. of Consumer Affairs*, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988) (statutory definitions should be followed in interpreting the statute); *Fruehauf Trailer Co. v. South Carolina Electric Gas Co.*, 223 S.C. 320, 75 S.E.2d 688 (1953) (lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act to which it relates and is intended to apply).

303 S.C. at 404. Accordingly, the *Weston* Court made it clear that for purposes of whether or not an entity is a "public body" under FOIA, the fact that the entity or organization may be characterized as "private" is not controlling. Instead, the question is simply one of whether or not the entity or organization is "supported in whole or in part by public funds or [is] expending public funds."

As to that issue, the *Weston* Court determined that the Foundation had met the definition of a "public body" under FOIA in a number of ways. First, the Foundation accepted funds from the sale of the Wade Hampton Hotel by the University of South Carolina. Secondly, the Foundation accepted \$16,300,000 in federal grant money on behalf of the University and managed the expenditure of these funds for the development of the Swearingen Engineering Center. Thirdly, the Foundation accepted a conveyance of land and a cash grant from the City of Columbia and a cash grant from Richland County, all for the development of the Koger Center. Finally, the Foundation accepted funds paid by private third parties in exchange for research performed by University employees. Examining these, the Court concluded:

[e]ach 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. (emphasis added).

Weston's comments concerning the grant obtained for the Swearingen Engineering Center are especially instructive. The Foundation argued that the "grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center at the University." Thus, the Foundation contended that it did not "directly" benefit from the public funds. Notwithstanding this fact, however, the Supreme Court concluded that the Foundation did benefit indirectly because "... the Foundation used University personnel on University payroll in conjunction with the construction project. In addition, the Foundation clearly directed the expenditure of the funds it received." 305 S.C. at 402. Thus, *Weston* makes clear that the definition of a "public body" contained in FOIA - requiring an organization to be "supported in whole or in part by public funds or expending public funds" - does not necessitate a direct transmittal of public funds for the benefit of an entity. Indeed, *Weston* concludes that indirect support of the organization such as through the organization's use or the assistance of government resources (e.g. use of public employees on the governmental payroll whose primary task is their government responsibility) is sufficient to meet the "public body" requirement of FOIA.

Our opinions are in accord with *Weston's* analysis. As we have consistently noted, "... if the entity in question comes within the definition of 'public body,' the Freedom of Information Act is applicable." *Op. S.C. Atty. Gen.*, Op. No. 93-63 (September 10, 1993). In determining whether a particular entity is supported in whole or in part by public funds, or is expending public funds, we have rejected any argument that there is a certain threshold level of support of an entity by public funds. Likewise, we have concluded that there exists no "*de minimis*" exception to the Act's applicability for public funding which is indirect or insignificant. In our view,

[w]hile 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. Stoker*, 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 to bring that committee under the FOIA. *Op. Atty. Gen.* dated July 11, 1983. An ad hoc citizens' 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 See also *Op. Atty. Gen.* dated March 27, 1984 as to additional comments on "support" by public funds.

Op. S.C. Atty. Gen., Op. No. 92-01 (January 16, 1992) (emphasis added). In that same Opinion, we commented that "[p]ublic funds provided 'in kind' or via grants may well be sufficient to bring the entity under the FOIA." And, on March 17, 1995, in another Opinion, we stated that "[d]ue to the broad definition of 'public body' contained in the [Freedom of Information] Act, it is entirely possible that an entity could be subject to the Act without its members being public officers." What is important to keep in mind here is our statement in Op. No. 92-01 that FOIA simply does not attempt to delineate "[w]hat kind of support or how much, is needed to bring an entity under the FOIA"

Opinion No. 89-96 (September 21, 1989) is particularly instructive with respect to application of FOIA's "public body" definition. Such Opinion employs the same kind of broad reading of the "public

body" definition as does *Weston*, and illustrates how so-called indirect or "in kind" use or provision of governmental resources can trigger the "public body" definition. "There, we addressed the question of the applicability of FOIA to the Charleston Harbor Estuary Citizens Committee, "an ad hoc group of individuals including representatives of state regulatory agencies, private businesses, municipal and county governments, and private citizens." Such organization was originally convened under the auspices of the South Carolina Sea Grant Consortium and Congressman Ravenel, using one time federal grant funds "to identify priority issues and concerns related to the Charleston Harbor Estuary." The Consortium provided meeting space and assisted with organizational aspects of the Committee's meetings. A staff member of the Consortium worked with the group. Expenses related to postage, printing, transportation, and accommodation were provided by the federal funds. We concluded that the Committee was supported in whole or in part by public funds, stating as follows:

... the Committee does not have a treasury, receives no direct monetary support, and does not expend funds. *"In kind" support is being furnished by means of the time of a staff member of the Sea Grant Consortium, which entity also provides meeting space. Funds from EPA/NOAA are being used on behalf of the Committee by the Sea Grant Consortium to pay for postage, printing, and transportation and accommodations for speakers for Committee meetings. These expenditures of grant (i.e. public) funds on behalf of the Committee, while not expended by the Committee itself, do aid in the support of the Committee. Indeed, no other funds of which we are aware are expended by or on behalf of the Committee. It thus appears to this Office that the Committee is probably totally supported (actually or "in kind") by public funds of same kind. Thus, the Committee probably would be subject to the terms of the Freedom of Information Act, though only a court could determine this issue conclusively.*

(emphasis added).

Other cases elsewhere are supportive of the conclusion reached in the 1989 Opinion. For example, in *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), the Kansas Court of Appeals concluded that the use of state employees assigned to the Governor-Elect's Transition Office (GETO) was sufficient to trigger the "supported in whole or in part by public funds" requirement. The Court stated that

[t]he stipulated facts indicate that BEST [Budget Efficiency Savings Team] volunteers received no compensation or reimbursement for their time, mileage, or anything else, other than minor refreshments. However, there were 12 state employees assigned to BEST pursuant to K.S.A. 75-134. The state employees continued to receive their salary while assisting BEST. This evidence is sufficient to establish the public funding requirements of ... [the Kansas Open Meetings Act]

78 P.3d at 492. Thus, employing the same analysis as *Weston* and the 1989 Opinion, the Court in *Sebelius* found that "indirect" support, through the use of government resources, was sufficient to trigger the "supported in whole or in part by public funds" requirement.

Moreover, in *Delaware Solid Waste Authority v. News Journal Company*, 480 A.2d 628 (Del. 1984), the Delaware Supreme Court concluded that the language "supported in whole or in part by public

funds" contained no "*de minimis*" exception. There, the Court responded to the Solid Waste Authority's argument that the FOIA excused from coverage entities with *de minimis* public funding as follows:

[t]he Authority's argument, that the appropriations received were *de minimis*, ignores the plain language of the Act. Section 10002(a)(1) specifically states "'public body' means any ... entity ... which: (1) is supported in whole or in part by public funds" This is an express provision conceived by the legislature to promote the policy interests underlying the Act and precludes specious *de minimis* arguments.

480 A.2d at 633. *See also*, *Op. S.C. Atty. Gen.*, November 3, 1980 ("If an organization is determined to be a 'public body' within the meaning of the act, then any meeting held by that body so long as it is a convening of a quorum of the constituent membership must be opened to the public unless the topic of the meeting fits within one of the statutory exceptions as defined in Section 30-4-70"; members of Drug Formulary Advisory Committee are reimbursed for mileage and are paid a *per diem* and the Committee is thus a "public body" under the Act.); *Op. S.C. Atty. Gen.*, No. 91-42 (June 28, 1991) ("... we find it inescapable that a search committee screening candidates to fill a 'public figure' type of a position of a university would be supported by or expending public funds and thus subject to the Act."); *Del. Op. Atty. Gen.*, 02-IB-19, 2002 WL 31867895 (August 19, 2002) ("The host school district pays for the costs of the hotel conference room and food with public funds. It does not matter if these costs are *de minimis*. FOIA applies if the public body is supported 'in whole or in part by public funds.'").

Our Supreme Court's decision in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) also represents a good example of the Court's broad reading of the "public body" requirement of FOIA and is in keeping with the requirement that the Act must be liberally construed to effectuate the legislative purpose. In *Quality Towing*, the City Manager of Myrtle Beach created a review committee, consisting of City employees, but not City Council members, having prior experience with the local towing companies and knowledge of the procurement process. The Committee's purpose was to evaluate and assist the City Manager in determining which towing company should be awarded the bid to provide towing services to the City.

One of the questions before the Court in *Quality Towing* was whether the Committee was a "public body" and thereby subject to FOIA. It was argued that the fact that the City Manager, rather than City Council, formed the Committee and that no member of City Council served on the Committee was controlling and that the Committee thus was not a "public body." The Court rejected this distinction, however. In the words of the Court,

[t]he fact that the City Manager, and not the City Council, created the Committee, and no council member served on the Committee, is not enough to remove the Committee from the definition of "public body" as stated in FOIA. First, it does not matter that members of the Committee are not members of the parent body. *See* 1984 S.C. Op. Atty. Gen. No. 84-281. Second, the Committee was set up to give advice to the City Manager, and ultimately the City Council. It is clear from the minutes of the City Council meeting and the testimony of Thomas Leath, City Manager, the Committee's selection process and recommendation went directly to the City Council. ...

Furthermore, the legislature amended the definition of "public body" in 1987 by adding the phrase "including committees, subcommittees, advisory committees, and the like of any such body by whatever name known." Clearly, the legislature intended for "advisory" bodies, such as the Committee set up by the City Manager to advise him and the City Council, to be covered by the definition.

Finally, the Committee was formed to help determine the award of a City contract. This contract entailed the expenditure of public funds. Because the Committee was not open to the public, Quality was unable to learn its bid had been termed non-responsive and to respond to the Committee's concerns. The Committee made its decision to recommend Auto Body Works to the City in secret. FOIA was enacted to prevent the government from acting in secret. *South Carolina Tax Comm'n. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). In addition, the City has advanced no valid reason to hold the meetings and discussions of the Committee concerning a public contract in private. This kind of secret determination is exactly what FOIA was designed to prevent.

The City also argues the Committee was not performing a "government function," but rather a proprietary or business function", and therefore is not subject to FOIA. See 1984 S.C. Op. Atty. Gen. No. 84-64 (only a committee performing a governmental function [is] subject to FOIA). The special referee agreed with the City, finding the function performed by the Committee was proprietary in nature. We find a committee formed to give advice to a public body or official is performing a government function. See *MFY Legal Services, Inc. v. Toia*, 93 Misc.2d 147, 402 N.Y.S.2d 510 (N.Y. Sup. Ct. 1977) (the giving of advice to a public body or official is a government function).

We hold the plain language of section 30-1-20(a) clearly includes an "advisory committee" such as the one set up in the instant case.

345 S.C. at 162-163.

Importantly, in an Opinion, dated December 28, 2006, we concluded that the St. Johns Water Company, a non-profit company similar in purpose and creation to the Jenkinsville Water Company is a "public body" for purposes of FOIA. We recognized therein that the South Carolina Court of Appeals, in *Sutler v. Palmetto Elec. Coop. Inc.*, 325 S.C. 465, 481 S.E.2d 179 (Ct. App. 1997) had found that the Cooperative's receipt of loans from the Rural Utility Service at an advantageous rate was insufficient to make it a "public body" for purposes of the Whistleblower Act, which employed the same definition of a "public body" as FOIA. Thus, in our view, based upon *Sutler*, we did not deem loans to the St. Johns Water Company sufficient to deem it a "public body" for FOIA.

However, we also noted that the Water Company had received a \$100,000 grant from the State of South Carolina. We took cognizance of the fact that "[t]wo of the transactions considered in *Weston* involved the receipt of grant funds from federal and local governmental bodies." *Weston* recognized that each of the four transactions considered there would alone make the Foundation a public body. Thus, we stated, "the Court in *Weston* clarified that the receipt of grant funds constitutes public funding under the FOIA's definition of public body." Accordingly, in our Opinion,

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... 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 the definition, it is subject to the FOIA requirements found in article 4 of title 30 of the South Carolina Code.

Conclusion

The reasoning of these various authorities apply here as well. Both *Weston*, and our December 28, 2006 opinion, dictate that the Jenkinsville Water Company is a "public body" for purposes of FOIA and is subject to the requirements of the Act. There is considerable evidence, based upon the information which you have provided, that the Jenkinsville Water Company has received and currently receives both federal and state grant funding. The documentation provided by you indicates that in 2009, the South Carolina Budget and Control Board approved a grant toward eligible construction costs to the Water Company. Another grant to the Company was recently approved. Moreover, as noted above, Fairfield County has in the past served as "the administrator/pass through agent for grants" and has recently written to the President of the Company requiring it to provide the county with certain financial information before it will provide such service in the future. This past support of the Company by the county is particularly persuasive that the Company is a "public body" for purposes of FOIA.

Weston makes clear that the purpose of the FOIA definition of "public body" serves to inform the public as to how its government operates. As the Court recognized

... 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.

303 S.C. at 404, 401 S.E.2d at 165.

Accordingly, it is our opinion that the Jenkinsville Water Company is a public body and is required to comply with the Freedom of Information Act.

Sincerely,



Robert D. Cook
Deputy Attorney General

RDC/an