ALAN WILSON
ATTORNEY GENERAL

December 5, 2011

Kenneth E. Gaines, City Attorney
City of Columbia
P.O. Box 667
Columbia, S.C. 29202

Dear Mr. Gaines,

We received your letter requesting an opinion of this Office concerning a Freedom of Information Act (FOIA) request that was received and responded to by the City of Columbia ("the City"). The request sought the names and addresses of those individuals and businesses who have received loans from the City's Community Development Department (CDD), and also sought information concerning whether those loans are current or in default. You seek an opinion as to whether the requested information is a matter of public record subject to disclosure and, if so, whether the so-called "privacy exemption" allowed the City to withhold or redact any of this information. In the event this information is not exempt, you ask whether there are any lending laws or regulations which would preempt FOIA and prevent the release of any such information.

By way of background, you provide us with the following information:

> Community Development administers programs allocating Federal and local funding through loans primarily benefiting the low and moderate income neighborhoods within the City of Columbia. Whether or not portions of the loan documentation would be considered a "public record" is unclear.... The City, as a "public body" within the meaning of S.C. Code § 30-4-20(a), has responded to the FOIA request with documentary materials related to the loans in question with the identities of the loan recipients and their addresses redacted....

Copies of the documents with the redacted information that were provided to the requestor have been attached for our review. The first and second documents provided concern commercial loans and Columbia Economic Renaissance Fund (CERF) loans which, it is our understanding, are both issued to private businesses or individual business owners.[1] These documents include information such as the loan number, loan balance, and the current repayment status of each loan. The name of each business or individual receiving the commercial loan is the only information redacted. Although the recipients' addresses are not in any way included, you still seek an opinion as to whether this information is subject to disclosure. The third and final document provided concerns residential loans which are issued to individual citizens. The name and address of each individual recipient has been redacted.

[1] Commercial loans and CERF loans will hereinafter be referred to jointly as "commercial loans."

It is our understanding that none of the loan programs described above are financed by funds received from the State. The commercial loans are mostly financed by federal grant money from the Community Development Block Grant (CDBG), but also in part by the City's general funds. The CERF loans are issued to private businesses and are financed by the City's general funds. The residential loans are mostly financed by federal grants such as the CDBG and the Home Investment Partnership Program (HOME), and also in part by the City's general funds. For qualified applicants, the loans offer incentives such as reduced interest rates, low down payments, or favorable loan forgiveness provisions.

For the 2011-2012 fiscal year, the City's 2011 Annual Action Plan for the CDD indicates the City anticipates receiving $1,127, 901.00 from the CDBG and $792,521.00 from HOME. The plan also indicates the CDD has five revolving loans funds, the total balance of which is $4,643,856.47.

You have also provided us with some statutes and case law relevant to the matter at hand. Although you found no South Carolina cases on point, you have provided us with two cases from other states which generally address a citizen's right to privacy in his or her identity, address, and the repayment status of loans received from a public entity. These cases, Mid-America Television Company v. Peoria Housing Authority, 417 N.E.2d 210 (Ill. 1981), and Doe v. Sears, 245 Ga. 83, 263 S.E.119 (Ga. 1980), will be discussed in our analysis.

Law/Analysis

The Freedom of Information Act provides any person the "right to inspect or copy any public record of a public body" unless a specific exemption applies. § 30-4-30(a). The purpose of FOIA is to encourage disclosure:

> The 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 report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

§ 30-4-15; *see also* Burton v. York County Sheriff's Dept., 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct.App. 2004) ("disclosure, not secrecy, is the dominant objective of the Act"). "[T]he essential purpose of the FOIA is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). "The purpose of the Act is to protect the public by providing for the *disclosure* of information." Id. The FOIA "is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 161-62, 547 S.E.2d 862, 864-65 (2001).

As you indicate, the City, acting through the CDD, is a "public body" for purposes of the FOIA, and as such its public records are subject to disclosure unless an exemption applies. *See* § 30-4-20(a) (definition of "public body" includes municipalities, or any organization supported in whole or in part by

public funds or expending public funds); *see also* Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 402, 401 S.E.2d 161 (1991) (federal grant recipients are subject to the South Carolina FOIA).

The definition of "public record" includes all "documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." § 30-4-20(c). The records requested from the City are clearly used, possessed, and retained by the City. In addition, certain categories of information are specifically made public, including "information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies." § 30-4-50(A)(6). All of the loans at issue are funded by federal grants or the City's general funds. The information requested clearly concerns the disbursement of public funds in the form of loans, and the receipt of public funds, or lack thereof, in the form of loan repayments. *See* Weston, 303 S.C. at 404, 401 S.E.2d at 165 ("the only way the public can determine with specificity how [public] funds were spent is through access to the records and affairs of the organization receiving and spending the funds"). Thus, we believe the information requested is undoubtedly a matter of public record subject to disclosure unless a specific exemption applies.

Information and records that are specifically exempt from mandatory disclosure are listed in S.C. Code § 30-4-40. Such matters generally include, but are not limited to, trade secrets, law enforcement records obtained in the process of an investigation, certain contractual and proprietary data, and matters otherwise specifically exempted from disclosure by statute or law. § 30-4-40. "The determination of whether documents or portions thereof are exempt from the FOIA must be made on a case-by-case basis." City of Columbia v. ACLU of Columbia, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). "The exemptions to FOIA should be narrowly construed to ensure public access to documents." Seago v. Horry County, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008). "The exemptions impose no duty *not* to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure." S.C. Tax Comm'n v. Gaston Cooper Recycling Corp., 316 S.C. 163, 169, 447 S.E.2d 843, 846 (1994). The exempt and nonexempt material in a public record should be separated, and the nonexempt material made available. §§ 30-4-40(b).

As you provide in your letter, § 30-4-40(a)(2) also specifically exempts from disclosure "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." § 30-4-40(a)(2) indicates, by way of examples, the types of information that may be considered personal in nature in certain situations:

> Information of a personal nature shall include, but not be limited to, information as to gross receipts contained in applications for business licenses and information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation or handicapped persons solely by virtue of their handicap.

However, § 30-4-40(a)(2) "must not be interpreted to restrict access by the public and press to information contained in public records." Because the statute does not otherwise specifically identify or

describe the types of materials encompassed by the so-called "privacy exemption," we look to general privacy principles for guidance. Burton, 358 S.C. at 352, 594 S.E.2d at 895.

Our Supreme Court has defined the right to privacy as the right of a person to be let alone and free from unwarranted publicity. Sloan, 355 S.C. at 325, 586 S.E.2d at 110. "One of the primary limitations placed on the right to privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest." Society of Prof'l Journalists v. Sexton, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (quoting Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d at 606 (1956)). A balancing test is used to determine whether the "public's need to know" outweighs the individual's privacy interest in nondisclosure. Burton, 358 S.C. at 352, 594 S.E.2d at 896; *see also* Meetze, 230 S.C. at 336-37, 95 S.E.2d at 609.

Thus, the question before us is whether the public's interest in the identities and addresses of individuals and businesses receiving publicly funded loans, the repayment status of such loans, outweighs the loan recipients' privacy interests in nondisclosure. It bears noting that recipients of public assistance are not in a class generally identified by the courts as having significant privacy rights protections. *See, e.g.,* Hollman v. Woolfson, 384 S.C. 571, 578, 683 S.E.2d 495, 499 (2009) (observing "[b]oth the State and Federal Government have recognized the importance of the privacy rights of patients," and finding nonparty patients in case "have a valid and legitimate expectation that their medical information will remain confidential"). Nor has the Supreme Court of the United States recognized that the constitutional right to privacy encompasses such activities. *See* Burton at 339-40, 594 S.E.2d at 896 (noting right to privacy encompassed under Fourteenth Amendment is narrowly defined and "relates to certain rights of freedom of choice in marital, sexual, and reproductive matters").

We were also unable to find any cases specifically addressing the privacy rights of individuals and businesses with regards to the information in question under South Carolina's FOIA. Until a court specifically addresses the construction of South Carolina law with regards to your questions, we can only advise as to how we believe a court would interpret the law and rule on the matter.

As noted in prior opinions, we occasionally look to similar federal case law interpreting the Federal FOIA[2] to interpret our State's FOIA where a purported privacy interest is involved. *See* Op. S.C. Atty. Gen., May 18, 2005. Where the disclosure of personal or private information is at issue, federal courts generally balance "the individual's right of privacy against the preservation of the basic purpose of [FOIA] to open agency action to the light of public scrutiny." U.S. Dept. of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 496, 114 S.Ct. 1006, 1013 (1994) (quoting Dept. of Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592 (1976)).

The weight afforded to the "public interest in disclosure" looks to the extent to which disclosure serves the FOIA's purpose of "contribut[ing] significantly to public understanding *of the operations or activities of the government.*" Id. (quoting U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 109 S.Ct. 1468 (1989)). As the Supreme Court of United States has further explained:

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[2] Pursuant to 5 U.S.C. § 552(b)(6), the Federal FOIA exempts from disclosure "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

> [FOIA's] basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language," indeed focuses on the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duty falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Id. at 495-496, 114 S.Ct. at 1012-13 (citations omitted).

The disclosure of a list of names and addresses is not always a significant threat to the privacy of individuals on the list. U.S. Dept. of State v. Ray, 502 U.S. 164, 176, 112 S.Ct. 541, 548 n.12 (1991) (disclosure of names significant invasion of privacy where it would subject individuals "to possible embarrassment and retaliatory action"). "[W]hether disclosure of a list of names is a significant or *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." Id. (quotations omitted). An individual's home address may be afforded significant protection under certain circumstances. *See* U.S. Dept. of Defense v. FLRA, 510 U.S. at 501, 114 S.Ct. at 1015 ("We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions"). Courts have generally observed that an individual's privacy interest is afforded more weight when disclosure involves the combination of his name, address, and financial information. *See* Aronson v. U.S. Dept. of Housing and Urban Dev., 822 F.2d 182 (1st Cir. 1987) (noting although Court has not hesitated in past to allow disclosure of names and addresses where strong public interest favors disclosure and significant privacy interest was lacking, "[t]he privacy interest becomes more significant...when names and addresses are combined with financial information").

The competing interests in the disclosure of information concerning individuals who accept certain forms of public aid were addressed in News-Press v. U.S. Dept. of Homeland Security, 489 F.3d 1173 (11th Cir. 2007). In News-Press, the Eleventh Circuit held the Federal Emergency Management Agency (FEMA) was required to disclose the addresses of households that received disaster relief, but exempted from disclosure the names of the individual recipients. The Court found a "powerful public interest in learning whether, and how well," FEMA had complied with its statutory responsibility of preparing for and responding to natural disasters. Id. at 1178. The Court quoted a lower court's analysis evaluating the extent the public interest would be served by disclosure:

> As the district court in *Sun* explained, "[w]hereas the addresses go to the heart of whether FEMA improperly disbursed funds to property that sustained no damage, the names of the disaster claimants are not as probative. In the vast majority of cases where the name and address accurately reflect the property where the disaster claimant resides, the name of the disaster claimant would provide no further insight into the operations of FEMA."

Id. at 1205 (quoting Sun-Sentinel Co. v. U.S. Dept. of Homeland Security, 431 F.Supp.2d 1258 (S.D.Fla.2006)). In agreeing with the district court, the Eleventh Circuit found the addresses would help the public learn whether the agency had complied with its statutory duty "by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars in the wake of several natural disasters across the country." Id. at 1178; *see also* Multi Ag Media LLC v. Dept. of Agriculture, 515 F.3d 1224,

1232 (D.C. Cir. 2008) (finding public has significant interest in information agency uses to monitor subsidy program compliance so public can determine whether agency "is catching cheaters and lawfully administering its subsidy and benefit programs").

With regards to the recipients' names, the Court in News-Press concluded disclosure would constitute an unwarranted invasion of personal privacy:

> [T]he convenience to News of a ready list of names from which to research the extent of fraud against FEMA is outweighed by the increased privacy risks to those individuals of having the same ready list of names and addresses available to commercial solicitors, members of the press seeking quotes, and others....

News-Press, 489 F.3d at 1205. However, the Court also rejected the argument that the disclosure of the addresses would still constitute an invasion of privacy because the aid recipients could be identified through a public records search, and further research might reveal that some recipients had insufficient insurance or were renters as opposed to homeowners. Id. at 1202, 1205. Although noting the publication of such matters could cause some recipients to "feel some stigma," the Court observed that the federal FOIA's privacy exemption "*disfavors privacy claims by those who receive a governmental benefit.*" Id. at 1202 (emphasis added).

Here, the purpose of the CDD under State law is to "implement the provisions of Title I of the Housing and Community Development Act of 1974 ('Title I')." S.C. Code § 6-1-30. The primary objective of Title I and of each community development program supported by federal funds is "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."[3] 42 U.S.C. § 5301(c).[4] As previously discussed, the CDD is responsible for the allocation of millions of dollars in public funds. Consistent with News-Press, we believe the public has a significant interest in learning the extent to which the CDD has complied with its statutory purpose and properly disbursed extensive amounts of public funds.

On the other hand, the individuals and businesses arguably have some privacy interest in the disclosure of information which may identify them as recipients of loans issued by the CDD which are primarily intended to benefit lower income individuals.[5] Although these loan recipients may "feel some

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[3] This purpose is also reflected in the City's 2011 Annual Action Plan for the CDD, available at http://www.columbiasc.net/communitydevelopment.

[4] 42 U.S.C. § 5301(c) also states that federal funds provided to local entities for community development programs under Title I must be directed toward nine specific objectives which include, among other things: elimination of slums and blight; reduced isolation of income groups within certain areas; and the stimulation of private investment and community revitalization in areas with population outmigration or a stagnating tax base. In addition, the purpose of HOME is to generally provide persons of low and very low-income with decent, safe, sanitary, and affordable housing. 42 U.S.C. §§ 12722, 12741, 12742.

[5] For example, not less than seventy percent of federal funds provided to local entities for community development programs must be used to benefit persons of low and moderate income. 42 U.S.C. § 5301(c). HOME requires that one hundred percent of federal funds used for homeownership assistance must be used "with respect to dwelling units that are occupied by households that qualify as low-income families." 42 U.S.C. § 12744(2).

stigma" from the disclosure of this information, News-Press indicates privacy claims from those who accept a public benefit—such as publicly funded loans with reduced interest rates, low down payments, or advantageous repayment plans—may be disfavored under the law.

Several courts in other states have addressed similar issues. One case that is instructive here, particularly with regards to the commercial loans issued by the CDD, is Parsons v. Urban Redevelopment Authority of Pittsburgh, 893 A.2d 164 (Pa. Cmwlth. 2006). In Parsons, the Commonwealth Court of Pennsylvania found the payment histories of businesses having loans with the redevelopment authority were subject to disclosure, but also endorsed the proposed redaction of information "personal and confidential to individuals involved in the business" such as bank account numbers, home addresses, and social security numbers. Id. at 169-70. The court explained:

> The programs at issue here involve the loaning of millions of dollars in public funds for urban redevelopment projects that are intended to produce a public benefit.... [T]he public has a very strong interest in knowing to whom such public funds are being loaned and in what manner the loans are being repaid. Public disclosure and oversight will provide protection against malfeasance, misfeasance and the waste of public funds. Borrowers of public funds must expect public oversight, as contrasted with borrowers from private sources, and the benefits of such oversight outweigh their privacy interests.

Id. at 169. *See also* Union Leader Corp. v. New Hampshire Housing Finance Authority, 705 A.2d 725 (1997) (requiring disclosure of numerous documents containing identifying and financial information of private developer responsible for housing developments financed by state housing authority).

The commercial loans involved here are seemingly identical in nature to those in Parsons and, as previously discussed, the public's interests in monitoring government activities and overseeing the use of public funds are present here as well. Parsons suggests the identities of individuals and businesses that receive loans from the CDD and the manner in which those loans are repaid would shed light on the CDD's activities and expenditures and promote the reasonable and efficient use of public funds. Because those who borrow public funds should expect more public oversight than those who borrow private funds, the privacy interests of such individuals and businesses are outweighed by the benefits of disclosure.

We find Parsons's reasoning persuasive. Thus, we believe a court could reasonably conclude that names of the individuals and businesses receiving commercial loans from the CDD are subject to disclosure. Furthermore, if no invasion of privacy results from the disclosure of the payment histories of individuals or businesses having loans financed by public funds, it logically follows that no privacy rights are invaded by the additional disclosure of information indicating whether those loans are current or in default. Therefore, we believe Parsons also provides support for the disclosure of the repayment status of the loans involved in this case which, in any event, has already been disclosed. However, Parsons also endorsed the redaction of the home addresses of individuals involved in the businesses as information of a personal nature. Accordingly, we also find support for the exclusion of individuals' home addresses from records concerning commercial loans issued by the CDD.

Particularly relevant to the residential loans issued by the CDD, several state courts have also addressed the disclosure of information concerning federal rent subsidy programs. *See, e.g.,* Mid-

America Television Company v. Peoria Housing Authority, 417 N.E.2d 210 (Ill. 1981). In Mid-America, the Illinois Court of Appeals held the housing authority was required to disclosure the names of landlords receiving federal housing funds, the amount of monthly payments they received, and the addresses of subsidized properties. Id. at 213. The court explained that "clarification as to where and how" public money is spent is necessary to determine "whether the agency acted properly." Id., 417 N.E.2d at 212. The court further observed that "people who receive [public funds] for services rendered forfeit some privacy interests," and found "no reason why people benefitting from public funds will have their right of privacy invaded simply by disclosing records showing they receive public funds." Id., 417 N.E.2d at 213. Although the public tenants' names were not specifically requested, the argument was presented that their privacy may be indirectly invaded because their identities could be deduced from the disclosure of the locations involved in the subsidy program. Id. at 318. In rejecting this argument, the court responded:

> The crux of this argument is that the tenants' receipt of public aid is a private fact and if the PHA released the requested information...people who know the tenants of these buildings would know they are receiving public aid. The flaw in this argument is that it assumes that the receipt of public aid is a private fact, the publication of which would be an invasion of privacy. We do not believe it is such a fact.

Id. at 213-14; *see also* Rhode Island Fed. Of Teachers v. Sundin, C.A. No. 91-1697 (R.I.Super. 1991) (receipt of public funds "invites a finding of implied waiver" as to individual's privacy interests).

Likewise, one other state case found the names of landlords receiving federal funds and the addresses of subsidized properties were subject to disclosure. *See* Lakewood Residents Ass'n, Inc. v. Township of Lakewood, 682 A.2d 1201 (N.J. Super. Ct. Law Div. 1994). The Lakewood court also found, however, that the public tenants' social security numbers, financial information, and the subsidy levels paid on behalf of each should be excluded for privacy reasons.[6] Id. at 1205. With regards to the subsidy levels, the court's concern was that this information would allow the public to calculate the gross income of each tenant. Id. Even though the loan amounts have already been disclosed in the instant case, we believe this concern is inapplicable here as we are unaware of how the amount of money an individual is loaned by a public entity could be used to calculate the loan recipient's gross income.

Although at least one state case found any information identifying public tenants was exempt from disclosure, the instant case is distinguishable. *See* Jones v. Housing Authority of Kansas City, 174 S.W.3d 594 (Mo. Ct. App. 2005) (holding public tenants' names, addresses, birth dates, and social security numbers exempt from disclosure). The reasoning in Jones centered on a provision in Missouri's Sunshine Law which specifically exempted "welfare cases of identifiable individuals." Id. at 596. The court found that provision expressed a clear legislative intent to exclude from disclosure all identifying information of public tenants. Id. at 597. We are aware of no equivalent provision in the South Carolina Code of Laws. Thus, we believe Jones is inapposite here.

The above state cases concerning the privacy rights of public tenants provide considerable support for the disclosure of the addresses of the individuals receiving residential loans from the CDD. A

[6] The party seeking disclosure had no interest in the identities of the public tenants and thus consented to the redaction of their identities. Lakewood, 628 A.2d at 1204.

reasonable interpretation of Mid-America and Lakewood is that the disclosure of the addresses of properties benefitting from federal subsidy programs would shed light on the activities of housing authorities and allow the public to monitor the use of public funds by those entities. As Mid-America indicates, the public's right to know "where and how" public funds are used outweighs the privacy rights of individuals who accept public assistance. Consistent with the above, we believe a court could reasonably conclude the addresses of individuals who accept residential loans from the CDD are subject to disclosure.

Although we find less support for the disclosure of the names of the residential loan recipients, Mid-America expressed considerable indifference as to the possibility the identities of public tenants could be discovered through information otherwise disclosed. In fact, the court in Mid-America even went so far as to express its belief that the privacy of the public tenants would not be invaded if information disclosed identified them as recipients of public aid. Moreover, while News Press, discussed *supra*, held the names of disaster relief recipients were exempt for privacy reasons, the Fifth Circuit also expressed considerable indifference as to whether the recipients' identities could be otherwise discovered through a public records search. *See* News Press, 489 F.3d at 1202 (noting the Federal FOIA "disfavors privacy claims by those who receive a governmental benefit"). Therefore, we cannot say with confidence whether a court would conclude the names of the residential loan recipients are subject to disclosure or exempt for privacy reasons.

Finally, at least two cases, one state and one federal, have addressed the disclosure of the payment status of certain financial obligations individuals and businesses receiving public assistance owe to public entities. These cases also discuss the privacy interests of individuals and businesses who fail to meet such financial obligations with regards to their personal and financial information.

In Doe v. Sears, 245 Ga. 83, 263 S.E.119 (Ga. 1980), the Supreme Court of Georgia held the names, addresses, and sources and amounts of income of all public tenants whose rental accounts were in arrears were subject to disclosure. The court found the public has an interest in knowing whether public housing tenants pay their rent when due, and concluded each tenant who failed to do so "impliedly waived whatever constitutional, statutory or common law rights of privacy he may have had" in this information. Id., 263 S.E.2d at 122-23.

Likewise, in Miami Herald Pub. Co. v. U.S. Small Business Administration, 670 F.2d 610 (5th Cir. 1982), the Fifth Circuit came to similar conclusions regarding the privacy interests of businesses receiving loans or advances from the Small Business Administration (SBA). The Court held records containing the names of such businesses whose loans or advances were classified as delinquent or in default, the loan or advance amounts they received, and the outstanding balances were not exempt for privacy reasons. Id. at 615-16. The Court observed:

> No privacy interest or confidential character attaches to the records of loans classified as "delinquent," "in liquidation," or a "charge off," because the delinquent or defaulting borrower's only legitimate expectation is that the lender...will proceed against him with

> the full force of law. So proceeding, the lender will publicly disclose precisely that data which the SBA here seeks to withhold.[7]

Id. at 615-16. The Court also concluded that the status of advances which had been liquidated or were being repaid in due course were subject to disclosure. Id. at 616. Noting the SBA was "ready to provide the Herald with a list of firms that have received 8(a) advances, the amounts of the advances, and the dates the advances were made," the Court observed: "Whatever privacy interest or confidential character might attach to the fact that a business has received an 8(a) advance in a specified amount, no such privacy interest or confidential character attaches to the additional fact that the business has met its financial obligations." Id. at 616.

We find these two cases, in addition to Parsons, discussed *supra*, provide support for the disclosure of the repayment status of the loans involved in this case. While Doe suggests the public has a right to know whether public tenants pay rent when due, the public's interest is arguably stronger where an individual or business is obligated to make payments on a loan financed with public money. As previously discussed, Parsons also suggests the public has a strong interest in knowing the manner in which public loans are repaid. With regards to those loans which are current in repayment, we believe these loans are similar to the business advances that were subject to disclosure in Miami Herald despite the fact they were being repaid in due course. In light of the fact the City has already disclosed the loan balances, and considering our above conclusions that a court could reasonably find additional information subject to disclosure, we see no reason why the privacy rights of an individual or business would be invaded by the additional disclosure of information showing these loan recipients have met their financial obligations. To the extent some loan recipients have failed to meet their financial obligations, Doe and Miami Herald indicate such individuals and businesses have no privacy interest in records of loans which are delinquent or in default. Therefore, we believe a court would likely conclude the repayment status of each loan, whether residential or commercial, is subject to disclosure.

Clearly, the privacy interests Doe and Miami Herald suggest an individual or business lacks, waives, or otherwise forfeits with regards to publicly funded loans that are characterized as delinquent or in default are not limited to information concerning the payment status of such loans. With regards to the personal or financial information, Doe held public tenants waive any and all privacy interests when they fail to pay rent when due, while Miami Herald held businesses simply have no privacy interests in records pertaining to delinquent loans. Thus, where individuals or businesses having loans with the CDD, whether residential or commercial, have allowed such loans to go into default, we believe these cases provide strong support for the disclosure of all the information requested from the City.

However, we again take this time to reiterate that only a court can decide whether this information is subject to disclosure under South Carolina's FOIA. In light of our State FOIA's mandate

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[7] The Fifth Circuit rejected the SBA's argument that the loan and the delinquency were exempt from disclosure in situations where the lender and borrower "work out an arrangement to liquidate the loan without resort to public legal proceedings" because this information is not publicly disclosed in such situations. Miami Herald, 670 F.2d at 616. The Court found "Congress cannot have intended the personal or confidential nature of information within [the privacy exemption] to be determined by the whim of officers of the agency invoking the exemption," and concluded the information was subject to disclosure "since a delinquent SBA borrower's only legitimate expectation is that his loan and the outstanding balance will be publicly disclosed." Id.

of liberal construction in favor of disclosure, and the fact that the law imposes no duty on public entities to withhold exempted materials, we have consistently advised public bodies concerning FOIA requests that, "when in doubt, disclose the information to the public." Op. S.C. Atty. Gen., April 29, 2011. We have also advised that "where records show the manner of expenditure of public monies, there is no applicable exception in the law, nor, in our view, any valid basis for why those expenditures should not be disclosed." Op. S.C. Atty. Gen., May 12, 2010. Consistent with these prior opinions, our advice to the City is to err on the side of disclosure.

As to your last question, we were unable find any federal or state laws or regulations, whether pertaining to lending or otherwise, which would preclude the disclosure of this information. We note that the Title I does not discourage the disclosure of information concerning the use of federal funds associated with community development programs. 42 U.S.C. § 5304(a)(2)(D) provides that, "to enhance the public accountability of grantees," entities receiving federal grant money must timely provide citizens with certain types of information including "records regarding the past use of funds received." Likewise, federal regulations provide that recipients of CDBG funds "shall provide citizens with reasonable access to records regarding the past use of CDBG funds, consistent with applicable State and local laws regarding privacy and obligations of confidentiality." 24 CFR § 570.508.

Moreover, we note that the City and/or the CDD are not "agencies" subject to the federal FOIA, 5 U.S.C. § 552, or the federal Privacy Act, 5 U.S.C. § 552a. Pursuant to 5 U.S.C. §§ 551(1) and 552(f), the definition of an "agency" subject to these federal laws does not extend to state and local governing bodies. *See* Forsham v. Harris, 445 U.S. 169, 100 S.Ct. 977 (1980) (privately controlled organization funded by federal grants is not an "agency" for purposes of FOIA absent extensive, detailed, and day-to-day supervision by federal government); Lakewood Residents Ass'n, Inc. v. Township of Lakewood, 682 A.2d 1232 (N.J. Super. Ct. Law Div. 1994) (definition of "agency" for purposes of federal FOIA and Privacy Act does not extend to state and local governments); *and* St. Michael's Convalescent Hospital v. State of Cal., 643 F.2d 1369 (9th Cir. 1981) (state agencies or bodies are not "agencies" for purpose of federal FOIA or Privacy Act). Thus, any disclosure requirements these laws impose on federal agencies are not applicable to the City.

Very truly yours,

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Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General