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CHARLIE CONDON
ATTORNEY GENERAL

December 10, 2002

George L. Schroeder, Director
Legislative Audit Counsel
1331 Elmwood Avenue, Suite 315
Columbia, South Carolina

Dear Mr. Schroeder:

You note that the General Assembly enacted Act No. 244 (H. 3436) which became effective on May 14, 2002. As you indicate, Act No. 244 amends S.C. Code Ann. Sec. 2-15-120, and requires all records and audit working papers of the Audit Council to be confidential. You have asked whether in light of the recent amendments to S.C. Code § 2-15-120, the Audit Council can disclose "records that are not confidential at their source after they become records of the Audit Council?"

LAW / ANALYSIS

Act No. 244 of 2002 amends § 2-15-120 of the Code to make "records and audit working papers" of the Legislative Audit Council permanently confidential. The only exception is the final audit report unless a court orders otherwise. The new Act provides as follows:

> Be it enacted by the General Assembly of the State of South Carolina:
>
> Records and audit working papers confidential at all time
>
> SECTION 1. Section 2-15-120 of the 1976 Code, as last amended by Act 419 of 1998, is further amended to read:
>
> "Section 2-15-120. All records and audit working papers of the Legislative Audit Council with the exception of its final audit reports provided for by Section 2-15-60 are confidential and not subject to public disclosure. The court in determining the extent to which any disclosure of all or any part of a council record is necessary shall impose appropriate safeguards against unauthorized disclosure.
>
> As used in this section, 'records' includes, but is not limited to books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials

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Request Letter

> regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by the Legislative Audit Council.
>
> Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, may be fined not more than one thousand dollars or imprisoned not more than one year. If the person convicted is an officer or employee of the State, he must be dismissed from office or employment and is ineligible to hold any public office in this State for a period of five years after the conviction."
>
> Time effective
>
> SECTION 2. This act takes effect upon approval by the Governor.

Several principles of statutory interpretation are relevant here. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, our Supreme Court has cautioned against an overly literal interpretation of a statute where such may not be consistent with legislative intent. In Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942), the Court recognized that

> [i]t is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words. Id., at 368-369.

Furthermore, it is well recognized that "[e]xecutive construction [of a statute] is entitled to additional weight where it has been impliedly indorsed by the legislature, as by the reenactment of the statute or the passage of a similar one, in the same or substantially the same terms." Op. Atty. Gen., August 9, 1995, quoting 82 C.J.S., Statutes, § 359. Deference to executive construction is enhanced if the underlying statute has been reenacted without amendment. McCoy v. U.S., 802 F.2d 762 (4th Cir. 1986).

It is well established that the Legislature is presumptively aware of opinions of the Attorney General and, absent charges in the law following the issuance thereof, has acquiesced in the Attorney General's interpretation. See, Op. Atty. Gen., April 22, 1998 (Informal Opinion). As was stated in State v. Son, 432 A.2d 947, 949 (N.J. 1981), "[t]he absence of any amendment to a statute following an Attorney General's formal opinion strongly suggests that the views expressed therein were consistent with legislative intent."

Also must be considered the impact of the Freedom of Information Act. The Act's preamble best expresses both the legislature's intent in enacting the statute, as well as the public policy underlying it. Section 30-4-15 provides:

> 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.

This Office has, on numerous occasions, stated its approach toward construing the Freedom of Information Act, consistent with the foregoing expression of public policy by the Legislature:

> As 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).

Op. Atty. Gen., Op. No. 88-31, p.99 (April 11, 1988). Thus, the FOIA's impact in tandem with any interpretation of § 2-15-120 must be considered.

Thus, with these basic principles in mind, we turn now to the question which you have posed. As you note, we construed an earlier version of § 2-15-120 in Op. Atty. Gen., Op. No. 91-4 (January 18, 1991). There, we addressed the question of whether the § 2-15-120 would prohibit the Audit Council from providing records from its files to law enforcement agencies such as SLED or the Solicitor. In response to this question, we stated:

> [o]ne additional comment is in order here, as well as in response to question VI, as to public disclosure and other questions about confidentiality of records. The statutes providing for confidentiality of records are not meant to protect records which are ordinarily public records but which appear to become imbued with confidentiality merely because the records are in the files of the Audit Council. The information or

> record should be examined as to its status as its original source; if it is not confidential there, or if the law enforcement agency could locate the document, record or information on its own initiative, a stronger case is presented for more expansive disclosure to law enforcement officials. (emphasis added).

Following the issuance of this Opinion in 1991, the Legislature amended § 2-15-120 in 1998. That amendment made only minor, non-substantive changes, but provided no alteration in the relevant portions of the confidentiality requirements of § 2-15-120. Likewise, for purposes here, Act No. 244 of 2002 imposed no meaningful change in § 2-15-120 except to clarify that all "audit working papers" as well as "records" of the Audit Council are confidential. While the most recent amendment modified the length of time Audit Council records and audit working papers remain confidential, mandating that such materials are shielded from public view even after the issuance of the final audit, (previously, Audit Council "records" remained confidential "prior to the publication of the final audit report"), the confidentiality requirements themselves were reenacted in almost identical form to the law as it existed when our 1991 opinion was issued.[1]

Thus, we must apply the principle of statutory construction which presumes the General Assembly was indeed aware of our 1991 opinion, and yet did not alter the applicable wording of § 2-15-120 in light of that opinion's language regarding records which are public at their "original source." Accordingly, we are of the opinion that the 1991 still governs any interpretation of § 2-15-120. While clearly, the General Assembly did indeed substantively change § 2-15-120 by Act No. 244 of 2002 in the sense that Audit Council records and audit working papers now are permanently confidential, the Legislature left the statute's language relevant here virtually untouched. Thus, it must be presumed that the Legislature deemed our 1991 opinion's conclusion that Audit Council records and materials which are public information at their original source are unaffected by § 2-15-120, to be correct and binding.

A wealth of support for the foregoing conclusion may be cited. Cases elsewhere have concluded that even where the records of certain agencies are confidential, the acquisition by such agencies of materials which are public information, does not impose secrecy upon such materials. See, In re Grand Jury Proceedings. 196 F.R.D. 57 9S.D. Ohio, Western Div. 2002) [public records

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[1] You note in your letter that "[m]ost of the information in the Audit Council files is contained in audit working papers which are specifically mentioned in the act." We do not believe that the Legislature's specific mention of "audit working papers" is legally significant for purposes of this opinion. The term "records" as contained and defined in previous versions of the Act is, in our view, sufficiently broad to encompass "audit working papers" in the context of Audit Council "records." See, definition of "records" in § 2-15-120 which includes "papers;" see also, §§ 30-1-10(A) and 30-4-20(c) ["public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body."] (emphasis added).

or documents in possession of grand jury were not subject to grand jury secrecy rule]; Guard Publishing Co. v. Lane Co. School Dist. No. 4J, 774 P.2d 494 (Or. Ct. App. 1989), revd., on other grounds 791 P.2d 854 (1990) [a public body cannot make otherwise public information confidential by placing it in a personnel file]; Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 453 S.E.2d 631 (1994) [fact that document falls within law enforcement exception of FOIA does not automatically exclude it from public view]; A & T Consultants, Inc. v. Sharp, 904 S.W.2d 668 (Tex. 1995) [confidentiality provisions of tax code do not preclude disclosure of otherwise public information]; Newberry Pub. Co. v. Newberry Co. Commission on Alcohol and Drug Abuse, 308 S.C. 352, 417 S.E.2d 870 (1992) [documents contained in criminal investigation report otherwise available to public as public records were not exempt from disclosure under FOIA merely because they were incorporated into South Carolina law enforcement division report].

CONCLUSION

Accordingly, we are of the opinion that the 1991 opinion remains in effect notwithstanding the latest amendment to § 2-15-120 by virtue of act No. 244 of 2002. We do not perceive that in enacting Act No. 244 of 2002, the General Assembly intended to make public information at the original source confidential in the hands of the Legislative Audit Council. All doubt should be resolved by the Legislature's policy of openness expressed in the Freedom of Information Act. Moreover, the changes in § 2-15-120, by the latest amendments, do not appear to be significantly substantial to have effectuated any change in interpretation. Our advice is that the 1991 opinion remains in effect and should continue to be followed.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

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