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STATE of SOUTH CAROLINA

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Office of the Attorney General
Columbia 29211

February 25, 1998

The Honorable G. Ralph Davenport, Jr.
Member, House of Representatives
323B Blatt Building
Columbia, South Carolina 29211

Dear Representative Davenport:

You have asked for an opinion as to whether certain documents related to the recruitment of industry, but created after a business has decided to locate in South Carolina, are subject to the Freedom of Information Act? As we understand it, such documents concern so-called "special schools" and "team building concepts" for employees of industries which have located in South Carolina. Expenditure of monies for these programs is apparently authorized by S.C. Code Ann. Section 59-53-57 ("monies appropriated for special schools must be retained at the state level and expended upon recommendation of the [Technical Education] Board.") See also, Sections 59-53-20; 59-53-50. We are further advised that a "team training" program for industry employees is often put together as part of an incentive package for the recruitment of a particular industry by the State of South Carolina but the documents relating to the program may concern training after the industry has located here. Such package is evidently made confidential by agreement with the State as part of the recruitment process.

Reference has been made particularly to § 30-4-40(a)(9) of the Freedom of Information Act which provides an exemption for:

> (a) memoranda, correspondence, documents and working papers relative to efforts or activities of a public body to attract business or industry to invest within South Carolina.

Moreover, § 30-4-40(a)(1) exempts trade secrets.

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Law / Analysis

South Carolina's Freedom of Information Act was adopted in present form by Act No. 593, 1978 Acts and Joint Resolutions, as 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. 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). To these basic tenets of construction, we would add here that the Freedom of Information Act, as with any statute, must be construed in common-sense fashion, consistent with its purpose. Hay v. South

Carolina Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). We would also note that those things which fall within the intention of the makers of a statute are as much within the statute as if they were within the letter, and words ought to be subservient to the intent and not the intent to the words. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). Moreover, what is required to be done by law directly cannot be circumvented through indirect means. Cf. State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940). We must also keep steadfast in our minds that "the essential purpose of the [Freedom of Information Act] is to protect the public from secret government activity." Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219 (1991).

In addition, this Office has consistently cautioned that where particular records relate to and concern how public monies or taxpayer funds are spent, there is "all the more reason for public disclosure." Op. Atty. Gen., April 10, 1995. And in Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 404, 401 S.E.2d 161 (1991), our Supreme Court stated that "... the only way that 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." Further, the Court noted that the Freedom of Information Act "mandates that the public be provided with information regarding the expenditure of public funds." Similarly, in State ex rel. Stephan v. Harder, 230 Kan. 573, 641 P.2d 366, 376 (1982), the Supreme Court of Kansas concluded that

> ... the public's right to know how and for what purposes public funds are spent is a matter of legitimate public concern, far outweighing any personal privacy right of these providers to whom public funds are disbursed.

And this Office, in the context of whether telephone records should be disclosed, stated that "[w]here an agency is public and the public supports its use of a telephone, it makes no sense that the public cannot see how and when that telephone is used." Op. Atty. Gen., No. 93-17, p. 44, 46 (March 18, 1993).

Moreover, another portion of the Freedom of Information Act, § 30-4-50(6), [without limiting other portions of the Act], expressly makes public "[i]nformation in or taken from any account, voucher or contract dealing with the receipt or expenditure of public or other funds by public bodies ...."

Section 30-4-40(a)(9) exempts from disclosure documents "relative to efforts or activities of a public body to attract business or industry to invest within South Carolina." (emphasis added) On its face, the statutory exemption is written in terms of documents which are generated "to attract" a particular industry rather than documents created after the industry has already located in this State. Typically, the use of the infinitive "to"

connotes future events as opposed to past. See, State v. Henderson, 1991 WL 281444 (Ohio App. 10th Dist. 1991).

It should also be remembered that § 30-4-40(b) requires that

> [i]f any public record contains material which is not exempt under subsection (a) of this section, the public body shall separate the exempt and nonexempt material and make the nonexempt material available in accordance with the requirements of this chapter.

In other words, even if there is a legitimate exemption applicable, "[t]he burden is on the agency to justify its claim that there is no segregable material in a document that is largely exempt, and this burden should not be transferred to the court in making a generalized claim of exemption ... ." 37A Am.Jur.2d Freedom of Information Acts, § 79.

Thus, the literal language of the exemption, as well as the spirit of the FOIA, dictates that the referenced exemption must be very narrowly construed here. This is particularly so in light of the fact that documents relating to expenditures of public funds may well constitute a major portion of the information in question. Thus, the Freedom of Information Act requires that the exemption in question must be applied to include only those documents which actually relate to the activities of a public body "to attract" business or industry to South Carolina. Any and all doubt regarding the applicability of the exemption should be resolved in favor of public disclosure, particularly if the records in question involve the expenditure of public monies or taxpayer dollars. Where a public body makes a claim that the exemption contained in § 30-4-40(a)(9) is applicable to a particular document, it possesses the burden of demonstrating that the exemption is indeed applicable.

It should be added here that even instances where the exemption contained in § 30-4-40(a)(9) may be applicable to a particular document or portion thereof, such exemption is not a mandatory requirement placed upon the public body. Accordingly, that body is free to disclose the records notwithstanding the exemption. As our Supreme Court recognized in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991),

> [t]he FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exceptions from disclosure contained in Secs. 30-4-40 and -70 do not create a duty not to disclose. These exemptions, at most, simply allow the public

> agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentiality can be found in the language of the Act. We hold, therefore, that no special duty of confidentiality is established by the FOIA.

The conclusion in Bellamy was reaffirmed by the Court in S.C. Tax Commission v. Gaston, ___ S.C. ___, 447 S.E.2d 843 (1994).

The exemption in the FOIA with respect to industrial recruiting, efforts to attract industry or trade secrets cannot serve as a shield for the entire file relating to special schools or "team building" programs. In our opinion, applying the presumption of disclosure, the records described in your letter would generally be open to the public. Certainly, those documents contained in these files appertaining to the expenditure of public funds should be disclosed. Moreover, § 30-4-40(a)(9) could well be construed by a court according to its literal language as being applicable only to documents created prior to any particular industry locating in South Carolina, rather than documents relating to an industry after it has already located in this State. Of course, in this regard, if the General Assembly should find it necessary to include all records of the programs at issue here within the exemption, it may do so by amendment. Moreover, as the Tax Commission did in the Gaston case, the agencies in possession of these records could seek a declaratory judgment regarding this issue.

This Office consistently supports economic development and industrial recruitment. See, e.g. Op. Atty. Gen., February 1, 1996. However, documents generated in the process of industrial recruitment or containing trade secrets is one thing, but documents relating to how public monies are spent with respect to the training of employees of industries already located in South Carolina is something else entirely.

In conclusion, the exemptions contained in § 30-4-40(a)(9) may thus be applied to include only those documents which relate to the activities "to attract" business or industry to South Carolina. In an Opinion dated as recently as September 11, 1996, we cautioned in a related context that the doctrine of trade secrets could not be used to prevent from disclosure documents where no such proprietary information is actually involved. As applied to any particular document or portion thereof, the exemption must be applied narrowly with all doubts being resolved in favor of disclosure. The public body seeking to use the exemption as applied to a particular situation possesses the burden of showing document-by-document and line-by-line the applicability of that exemption. See, Op. Atty. Gen., October 15, 1986 [agency is mandated to separate public information from exempt material document-by-document and line-by-line]. Even where the exemption does clearly apply in a given instance, the public body is still free to disclose that

document because the FOIA does not require nondisclosure of a record but only authorizes certain exemptions. The rule of thumb which must be applied here, in other words, is plainly: when in doubt, disclose.

Sincerely,

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Attorney General

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