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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 11, 1996

The Honorable John E. Courson
Senator, District No. 20
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Courson:

You have asked that we revisit an opinion of this Office, dated July 20, 1979. In that Opinion, we addressed a provision contained in the South Carolina Atomic Energy and Radiation Control Act, codified at S.C. Code Ann. Sec. 13-7-10 et seq. That provision, which is part of Section 13-7-40 of the Act, deals with the confidentiality of information obtained by DHEC in investigating radiation sources. The question presented in the Opinion was whether, pursuant to the Freedom of Information Act, Section 30-4-10 et seq., all inspection reports were exempted from disclosure pursuant to Section 13-7-40, or whether, as you argue, the exemption provision "should be limited to inspection reports containing genuine 'trade secrets'." The Opinion interpreted the Section as intending the former, concluding that "Sec. 13-7-40 of the S.C. Atomic Energy and Radiation Control Act specifically exempts investigation and inspection reports from public disclosure, except as may be necessary for the performance of the functions of the Department, in accordance with the exceptions set out in Section 5 of the Freedom of Information Act."

You note that, pursuant to this 1979 Opinion, DHEC "is declining to release, to members of the public, reports of inspections conducted by the Department of the Interstate Nuclear Services facility located in the City of Columbia." You further write in your request letter that

> [t]his facility is currently the subject of a permit renewal review by the Department's Bureau of Radiological Health. Residents of the community near the facility are justifiably interested in information contained in such inspection reports in order to meaningfully participate in the permitting process. In refusing to disclose such inspection reports the Department

> has relied upon ... [the] July 20, 1979 opinion letter ... "until and unless this opinion is superseded." Because I believe the refusing to disclose such inspection reports is contrary to the spirit of our Freedom of Information Act as well as detrimental to the effective functioning of the Department's permitting process, I request that you reconsider your office's earlier opinion.

LAW / ANALYSIS

Section 13-7-40(I) provides in pertinent part as follows:

> [t]he department or its authorized representatives may enter at all reasonable times upon private or public property for the purpose of determining whether or not there is compliance with or violation of the provisions of this article and regulations promulgated under it. A report of investigation or inspection or information concerning trade secrets or secret industrial processes obtained under this article must not be disclosed or opened to public inspection except as necessary for the performance of the functions of the department. (emphasis added).

The issue, as stated in the 1979 Opinion, is the scope of this exemption. Either the General Assembly intended the phrase "concerning trade secrets or secret industrial processes" to modify only the immediately antecedent word "information", thereby resulting in all "report[s] of investigation or inspection" being deemed confidential pursuant to this Section; or, in the alternative, such phrase modifies all precedent words and, thus, only investigation or inspection reports "concerning trade secrets or secret industrial processes" are exempt. While a credible argument can be made either way, it is my opinion that the latter interpretation is the better one, considering this State's and this Office's policy favoring public disclosure.

The 1979 Opinion, however, applied the so-called "last antecedent" rule of statutory construction. This rule states that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." [quoting Sutherland, Statutory Construction § 47.33]. Thus, the qualifying and limiting phrase, "concerning trade secrets or secret industrial processes", was deemed in the Opinion to apply only to the immediately preceding word, "information", thereby rendering all "reports" confidential whether or not such reports contained trade secrets.

Several rules of statutory construction are pertinent here. First and foremost, the cardinal rule of statutory interpretation is to ascertain legislative intent whenever possible. Bankers Trust of S. C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). The primary function of courts is to ascertain and give effect to the intention of the Legislature. Belk v. Nationwide Mut. Ins. Co., 271 S.C. 24, 244 S.E.2d 744 (1978). The statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The statute must also be construed in light of the evil which it seeks to remedy. Warr v. Darlington Co., 181 S.C. 254, 186 S.E. 920 (1936). And legislation is not to be construed in derogation of common law rights, if another interpretation is reasonable. Hoogenboom v. City of Beaufort, 433 S.E.2d 875, 885, n.5 (Ct. App. 1992). A statute purporting to alter the common law must be strictly construed to preserve vested rights. Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968).

The Freedom of Information Act, codified at Section 30-4-10 et seq., was enacted after the Atomic Energy and Radiation Control Act (and its Section 13-7-40) and must be considered together therewith. Op. Atty. Gen., No. 92-43 (August 5, 1992). Pursuant to the FOIA, Section 30-4-15, the General Assembly has determined 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. (emphasis added).

In accord with Section 30-4-30(a) of the FOIA, "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by Section 30-4-40, in accordance with reasonable rules concerning time and place of access." Section 30-4-40 provides that certain matters are exempt from disclosure under the FOIA. Section 30-4-40(a)(4) specifically excepts "[m]atters specifically exempted from disclosure by statute or law." Exceptions to the Act's applicability are to be narrowly or strictly construed. Op. Atty. Gen., No. 92-43, supra; Section 30-4-15. As our Supreme Court has recognized, the purpose of the FOIA is to protect the public from secret government activity.

Moreover, the public's right of access to public records existed at common law. Nixon v. Warner Communication, Inc. 435 U.S. 589, 98 S.Ct. 1306, 55 L.E.2d 570 (1978); 76 C.J.S., Records, § 60. It is generally noted that "[t]he public has a right of

access to public records" and that "public policy [is] in favor of access to records." 76 C.J.S., Records, § 60, supra. The presumption is in favor of disclosure of public records. Chambers v. Birmingham News Co., 552 So.2d 854 (Ala. 1989). Indeed, in that vein, it has been stated that the

> " ... general presumption of our law is that the public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential."

State ex rel. Richards v. Foust, 477 N.W.2d 608 (Wis. 1991), quoting Hathaway v. Green Bay School Dist. 342 N.W.2d 682 (1984). It is also recognized that in construing a statute which purports to create exceptions to public disclosure, "[a]ny doubt must be resolved in favor of disclosure." State ex rel Jones v. Myers, 581 N.E.2d 629 (Ohio Com. Pl. 1991).

With these principles in mind, we turn to the 1979 Opinion in question. As noted above, the Opinion relied principally upon the so-called "last antecedent" rule of statutory construction - that "referential and qualifying words and phrases, where no contrary intention appears refer solely to the last antecedent." However, it is also recognized in the same paragraph of the Treatise cited in the Opinion that this rule of construction

> ... is another aid to discovery of intent or meaning and is not inflexible or universally binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several proceedings or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.

Sutherland, Statutory Construction, § 47.33. Moreover, a pertinent portion of another treatise on statutory construction reads:

> [t]his rule [last antecedent] is, however, merely an aid to construction to be applied only where there exists uncertainties and ambiguities in the statute, and when other and more important rules of construction fail; and the clear intent of the legislature takes precedence as a canon of construction. Accordingly, the doctrine of "last antecedent" will not be adhered to where extension to a more remote antecedent is clearly required by a consideration of the entire act. Slight indication of legislative intent so to extend the relative form is sufficient. Where several words are followed by a clause

> as much applicable to the first and other words as to the last, the clause should be read as applicable to all.

My reading of the Legislature's purpose in enacting the disputed provision of Section 13-7-40(I) is to protect from public view the "trade secrets or secret industrial processes" of businesses which are inspected and provide information to DHEC. Trade secrets have traditionally been exempted from public disclosure and, of course, are exempted pursuant to the FOIA. See, Section 30-4-40(1); 76 C.J.S., Records, § 62, n.57. It is generally understood that "matters of public knowledge ... cannot be protected as a trade secret." 20 S.C. Jurisprudence, § 74. Moreover, a number of South Carolina statutes and rules recognize "the special status of trade secrets ... ." Id. at § 72 n.1. The author of the foregoing treatise on trade secrets has deemed Section 13-7-40(I) to be one such statute and has described that statute as providing that "... no report concerning trade secrets obtained by the Department of Health and Environmental Control ("DHEC") pursuant to the Atomic Energy Radiation and Control Act may be disclosed except as necessary for the performance of DHEC functions ... ." (emphasis added). Thus, it is apparent that the thrust of Legislature's action in enacting this phrase was to leave no doubt that trade secrets were protected from public disclosure in any DHEC investigation or examination of facilities pursuant to the Act.

In a previous opinion of this Office, we concluded that records of inspection involving the Department of Labor under the Occupational Health and Safety Act were generally considered public information. Op. Atty. Gen., No. 3655 (October 31, 1973). I am advised by you that other DHEC inspection reports have been treated as open to public inspection. There seems no logical or apparent reason why reports in this situation would be treated differently where no trade secrets are involved.

Of course, this Office has long maintained the policy of not superseding its prior opinions unless such opinion is considered, upon reflection, to be "clearly erroneous". If the question was merely one of interpretation of the statute as it is written, I could not say that the 1979 Opinion fits into that category. The "last antecedent" rule is well-recognized. Moreover, the 1979 Opinion noted that the statute was written in the disjunctive, using the word "or" several times to separate other words employed in the enactment.

An overly literal interpretation of a statute, however, will not always suffice, and may times, is not in accord with the Legislature's intent. Our Supreme Court has had these cautionary words to say when construing a statute too literally in certain instances where legislative intent may be otherwise:

> [a] statute must be construed in the light of its intended purpose; and if such purpose can be reasonably discovered in

> its language, the purpose will prevail over the literal import of the statute, for the dominant factor in the rule of construction is the intent, not the language of the legislature.

Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548 (1956).

That being the case, I believe the rule of the "last antecedent" is overridden here by both legislative intent as well as the principles which favor the public disclosure of records. The State's policy regarding the disclosure of public records, as expressed in the FOIA, together with the common law presumption that records be open to the public unless a statute clearly mandates otherwise convinces me that disclosure represents the better reading of the law. Since the 1979 Opinion was written, the importance of public disclosure of information has taken on heightened importance, as the overhaul of FOIA in 1987 readily attests. At the time the Opinion was authored, this Office had not yet adopted the clearly established policy that ambiguity and doubt should be resolved in favor of public disclosure. Now it has.

Accordingly, although the 1979 Opinion may not be clearly erroneous in its reading of the statute in a vacuum, public policy has changed since that time, and thus the Opinion does not now reflect the spirit of construction which this Office applies to the disclosure of records. Thus, it is my opinion that the Legislature intended that the confidentiality required by Section 13-7-40 extend no further than those reports or investigations or information containing "trade secrets or secret industrial processes ... ." To that extent, the 1979 Opinion is superseded. In view, however, of the ambiguity of this statute, I would suggest judicial or legislative clarification to resolve this matter with finality.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

Reviewed and Approved By:

Zeb C. Williams, III
Deputy Attorney General