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April 28, 1992

The Honorable Fred R. Sheheen
Commissioner
South Carolina Commission on
Higher Education
1333 Main Street, Suite 650
Columbia, South Carolina 29201

Dear Commissioner Sheheen:

You have advised that the Commission on Higher Education now administers the Proprietary School Act, Chapter 59 of Title 59, South Carolina Code of Laws. As part of the Application for License, applicant schools submit financial reports to help establish financial stability. You have asked whether such financial reports would be subject to disclosure under the Freedom of Information Act.

Background

The Proprietary School Act, Act No. 246 of 1991, codified at S.C. Code Ann. § 59-59-10 et seq.(1991 Cum. Supp.), places responsibility for licensing proprietary schools with the Commission on Higher Education. The authority of the Commission is provided in § 59-59-30, which states in relevant part:

> (A) The commission may license proprietary schools meeting the necessary standards and shall administer and enforce the provisions of this chapter. These standards include, but are not limited to course offerings, adequate facilities, financial stability, competent personnel, and legitimate operating practices.

> (B) The commission shall formulate the criteria and standards for the approval of proprietary schools, provide for adequate investigation of all schools applying for licenses, issue licenses to those applicants meeting the standards, and maintain a list of schools which have been issued licenses. ... [Emphasis added.]

The Commission is authorized by § 59-59-110 to promulgate regulations to administer and enforce the requirements of Chapter 59 of Title 59. Until such time as those regulations are promulgated, regulations promulgated by the State Department of Education, which formerly licensed proprietary schools, are to remain in effect. See § 2 of Act No. 246 of 1991.

The forerunner of the 1991 act was Act No. 405 of 1971; present § 59-59-30(A) and (B) are virtually identical to § 3(A) and (B) of the 1971 Act, and § 11 of the 1971 act is virtually identical to § 59-59-110. The 1971 act contains legislative findings which offer insight into what the legislature hoped to accomplish with the original "Proprietary School Act":

> Whereas, the General Assembly recognizes and declares that the provisions of this act are enacted in the exercise of the police powers of this State for the protection of the health, peace, safety, and general welfare of the people of this State; for the general improvement of educational programs available to the residents of this State; to prevent misrepresentation, fraud, and collusion in offering such educational programs; to establish standards for, and to protect, preserve, foster, improve, and encourage the educational programs offered to the public. ...

Licensure of proprietary schools is covered by regulations in Article 9 of Chapter 43 of the State Regulations (volume 24 of the Code). Of relevance here are the following regulations:

R.43-114 details the basic information required to be submitted as part of the application for licensure. Item 8 of that list is "financial resources available to maintain and operate the school; as a minimum and where appropriate, an applicant must submit audited financial reports for the most recent two year period consisting of a balance sheet, and statement of profit and loss[.]"

R.43-116 outlines the licensing criteria to be met for an entity to be granted a license as a proprietary school. Item 8 requires that "[t]he school is financially sound and capable of fulfilling its commitments for training."

R.43-120 lists various reasons why a school's license might be revoked or not renewed or suspended. Item 7 includes the failure "to maintain financial resources adequate for the satisfactory conduct of courses of instruction offered...."

Clearly, financial stability of a proprietary school is of paramount importance to many parties, including students, potential students, and parties with whom the proprietary school may enter into contracts, not to mention the licensing body itself (now the Commission on Higher Education). 1/ None of these statutes or regulations pertain to disclosure or promise confidentiality of the financial records presented to the Commission in the licensure process, however; thus, it is necessary to consider the Freedom of Information Act.

Freedom of Information Act

The Freedom of information Act, codified at § 30-4-10 et seq., unquestionably applies to the Commission on Higher Education as a "public body." See § 30-4-20(a) (definition of "public body"). The records or documents in the possession of the Commission relative to licensure of proprietary schools would fall within the broad definition of "public record" as defined in § 30-4-20(c). It must then be decided whether the type of record about which you inquire would be subject to some other part of the Freedom of Information Act which might tend to exempt or compel disclosure.

1/ See, for examples of the current interest in the financial stability of proprietary schools, an article in The State entitled "Victims pay when schools go under," on page 1B on March 25, 1992, and an article in the May 1992 issue of Consumer Reports, "Schools for Scandal," pages 303-306.

In examining the Freedom of Information Act, it is important to keep in mind the legislative intent behind the Act. Adams v. Clarendon Co. School Dist. No. 2, 270 S.C. 266, 241 S.E.2d 897 (1978). South Carolina's Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government (here, the Commission's licensure of proprietary schools). Martin v. Ellisor, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is remedial in nature and must be construed in order to carry out the purpose mandated by the General Assembly. See South Carolina Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exceptions to the Act's applicability must be narrowly or strictly construed. News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake County, 223 S.E.2d 580 (N.C. 1976). Finally, the legislative findings of Act No. 405 of 1971 should be kept in mind in applying the Freedom of Information Act.

We have located no statute which specifically exempts these financial records from disclosure or declares that they be made available. The only portion of the Freedom of Information Act which appears to be applicable is § 30-4-40, which provides:

> (a) The following matters are exempt from disclosure under the provisions of this chapter: ...
>
> > (2) Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy, including, but not limited to, information as to gross receipts contained in applications for business licenses. ...
>
> (b) If 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.

Of course, it would be the prerogative of the Commission to evaluate a freedom of information request which asks for financial information on a particular proprietary school in light of § 30-4-40(a)(2) and disclose whatever information may be disclosed in light of the legislative findings and purposes of the acts described above. To assist in making the determinations as to invasion of privacy, the following discussion may be helpful.

Discussion

The terms of § 30-4-40(a)(2) permit (but do not absolutely require) nondisclosure of documents which, if disclosed, might constitute an unwarranted invasion of personal privacy. Information as to gross receipts contained in an application for a business license is one example given in the Act; we note that the license sought here is not a business license but is a license to operate a proprietary school. Financial stability is only one of many criteria to be satisfied if licensure to operate a proprietary school is to be granted.

Any invasion of personal privacy must be unreasonably invaded. In terms of the federal Freedom of Information Act, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), corporate privacy is not protected. Robertson v. Department of Defense, 402 F.Supp. 1342 (D.D.C. 1975). Similarly, in 62A Am.Jur.2d Privacy § 29, as to corporations and other entities, is the following:

> Since the right of privacy is primarily designed to protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests, the courts have denied this right to corporations and institutions, organized groups or associations which solicit funds or memberships, and partnerships....

It is also generally noted that the right to privacy does not prohibit the publication of matters which are of legitimate public or general interest. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984), quoting from Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1972).

The foregoing suggests that, should a freedom of information request be received about a particular applicant or licensee, the nature of the applicant or licensee be examined. If such be a corporation, association, or similar group, rather than an individual, it may well be that disclosure of financial data would not be considered an invasion of personal privacy. Given the legislative findings of the original Proprietary School Act and the need to protect consumers, it may well be that any arguable invasion of privacy (if there be any) is overidden since disclosure would involve a matter of legitimate general or public interest, that the disclosure is not unreasonable.

Whether to disclose any portion of an application for licensure as a proprietary school, upon receipt of a request under the Freedom of Information Act, is of course a decision to be made by the Commission on Higher Education, on a case-by-case basis. If any doubts exists as to whether some material should be disclosed, we generally advise that such doubt should be resolved in favor of disclosure. While a blanket statement to disclose or not cannot be made without reviewing an individual application, we hope the foregoing considerations will provide sufficient guidance. If we may provide additional assistance as a particular situation arises, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

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