

1984 WL 249848 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 27, 1984

\*1 Melvin B. McKeown, Jr., Esquire  
York County Attorney  
Spratt, McKeown & McCrae  
Post Office Drawer 299  
York, South Carolina 29745

Dear Mr. McKeown:

By your letter of February 9, 1984, you have requested the opinion of the Attorney General on two questions: (1) Does the Clover Recreation Association constitute a 'public body' so as to be subject to the Freedom of Information Act? (2) Is the request (by a resident of Clover) to inspect all books and records of the Clover Recreation Association a valid request which must be honored under the Freedom of Information Act?

While [Section 30-4-20\(a\), Code of Laws of South Carolina \(1983 Cum. Supp.\)](#), a portion of the Freedom of Information Act, Act No. 593 of 1978, contains a definition of the term 'public body,' that definition has not as yet been construed by the courts of this State. To provide a complete answer to the questions raised would necessitate the finding of fact, which this Office is not empowered to do. This Office will therefore provide guidance on the questions, responding as we believe a court would respond if faced with the questions.

Based upon facts provided to this Office, we understand the Clover Recreation Association to have been organized as a private non-profit association to provide recreation for the youth in the Clover, South Carolina, area. No funds are appropriated by the York County Council or the Town of Clover for the Clover Recreation Association. The Association is funded by voluntary contributions and various fund-raising activities conducted by parents and children. The Clover Recreation Association is not incorporated, according to the records of the Secretary of State. Furthermore, the Association is not to be confused with the new recreation program recently begun by the Town of Clover under the direction of a Recreation Director, which program is receiving funds or grants from the York County Recreation Commission.

Teams sponsored by the Clover Recreation Association compete in athletic contests which are sanctioned by the York County Recreation Commission. Each time a team from the Association engages in competition, the opposing team is one under the auspices of the Commission. Officials who officiate at these athletic contests are paid with funds appropriated by the York County Council for the York County Recreation Commission; or fees are reimbursed to the Association upon proof that such officials have been paid by the Association. The costs of electricity used at athletic fields for these athletic contests are reimbursed or paid in a like manner.

A resident of Clover, South Carolina, has requested that the Association produce all of its books and records for inspection. The Association has indicated its willingness to comply with this request when the books are closed and have been audited at the end of the year, but believes that such a request is burdensome and unwarranted at this time. Your request for an opinion on the two stated questions is the result of this citizen's request.

\*2 At the outset, it may be noted that in enacting South Carolina's Freedom of Information Act, the General Assembly made the following findings:

... it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business 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, this act is adopted, making it possible for citizens, or their representatives, to learn and report fully the activities of their public officials. [Emphasis added.]

In view of the legislative purpose, this Office has recently noted that the Freedom of Information Act 'is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly.' Ops. Atty. Gen. dated February 22, 1984 and August 8, 1983. However, we would point out that limits to the applicability of the Act do exist.

The term 'public body' is defined by [Section 30-4-20\(a\)](#) to mean any department of the State, any state board, commission, agency and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts and special purpose districts, or any organization, corporation or agency supported in whole or in part by public funds or expending public funds. . . . [Emphasis added.]

If a court were responding to your questions, its first task would be to determine whether the Clover Recreation Association is included in this definition. For the reasons following, though the answer is not free from doubt, we believe that a court probably would not find the Association to be included within the definition.

Clearly, the Association is not a department of the State, a state board, commission, agency or authority. It is not a governmental body, a political subdivision, a county, municipality, township, school district, or special purpose district. The fact that the Association was not created by a provision of the South Carolina Constitution, a statute, ordinance, or resolution supports this conclusion. Additionally, the Association does not perform exclusive governmental functions or make policy affecting citizens' fundamental rights, factors often considered in terms of the governmental bodies enumerated in the Act. See, for example, [State ex rel. Doyle v. Rapides Parish Democratic Executive Committee](#), 32 So. 2d 494 (La. Ct. App. 1947); [Accardi v. Mayor and Council of North Wildwood](#), 145 N.J. Super. 532, 368 A. 2d 416 (1976).

If at all, then, the Association must come within that portion of the definition emphasized supra: 'any organization, corporation or agency supported in whole or in part by public funds or expending public funds.' Public funds are, generally, funds belonging to a state or county or other political subdivision of a state, more especially taxes or other such moneys raised by the operation of some general law and appropriated by the government for the discharge of its obligations or for some public or governmental purpose. [Beckner v. Commonwealth](#), 174 Va. 454, 5 S.E. 2d 525 (1939); [State ex rel. St. Louis Police Relief Association v. Igoe](#), 340 Mo. 1166, 107 S.W. 2d 929 (1937). The notion of 'support' has been construed by the South Carolina Supreme Court to mean 'to maintain or aid and assist in the maintenance,' [Harris v. Leslie](#), 195 S.C. 526, 12 S.E. 2d 538, 542 (1940), or to 'uphold or sustain.' [State v. Stokes](#), 133 S.C. 67, 130 S.E. 337, 339 (1925). The term 'expend' means 'pay out, lay out, consume, use up; normally implying receiving something in return.' Black's Law Dictionary 518 (5th Ed. 1979).

**\*3** Thus, a court would decide whether, given the above definitions, the Association is supported by or is expending public funds. A court would probably consider such factors as sources of the Association's funding, purposes for which moneys provided by the York County Recreation Commission are spent, the fact that the Association is not the actual beneficiary of any public funds, and such other factors as the court would deem relevant. In effect, we believe the court would consider the totality of the circumstances.

We believe that a court, after appropriate fact-finding proceedings, would probably conclude that the Association is not supported in whole or in part by public funds.<sup>1</sup> A finding that the Association expends public funds is possible, though there is support for the idea that merely because an agency or other organization receives or administers grants of public funds, that fact does not make the agency or organization into a public agency or organization. [Kentucky Region Eight v. Commonwealth](#), 507 S.W.2d 489 (Ky. Ct. App. 1974).

Courts of other jurisdictions have found that certain private, nonprofit, voluntary associations or organizations were subject to that state's equivalent of the Freedom of Information laws. We believe, however, that those cases are distinguishable from the Clover Recreation Association. See, for example, [North Central Association of Colleges and Schools v. Trout Brothers, Inc.](#), 261 Ark. 378, 548 S.W.2d 825 (1977) (Association was voluntary, nonprofit corporation; 90 percent of funding was public money; chairman was state employee who conducted Association business in this state office; office secretary worked for and was paid by state; organization affected accreditation of public schools in Arkansas and thus affected all parents and students); [Cape Coral Medical Center, Inc. v. News-Press Publishing Co., Inc.](#), 390 So. 2d 1216 (Fla. Ct. App. 1980) (nonprofit, private lessee from government; created by legislature; required by statute to disclose records); [Fritz v. Norflor Construction Company](#), 386 So. 2d 899 (Fla. Ct. App. 1980) (corporation performed services for the city as City Engineer, basically taking on the characteristics of a city department or agency); [Schwartzman v. Merritt Island Volunteer Fire Department](#), 352 So. 2d 1230 (Fla. Ct. App. 1977) (nonprofit volunteer fire department; county paid \$850.00 per month to support and supplied all fire fighting equipment; department acted on behalf of a public agency and was entrusted with sole stewardship over fire fighting; court limited holding to this organization and facts of the case); [Westchester Rockland Newspapers, Inc. v. Kimball](#), 50 N.Y. 2d 575, 408 N.E. 2d 904 (1982) (volunteer fire department; village relied upon department to perform essential governmental function, so that department became 'governmental arm'); and [Board of Trustees of Woodstock Academy v. Freedom of Information Commission](#), 181 Conn. 544, 436 A. 2d 266 (1980) (academy performed governmental function of education; academy was 95 per cent funded by public moneys; operations of the academy were regulated by the state board of education; academy was created by statute; state court here used the 'functional equivalent' test utilized in determining applicability of the Federal Freedom of Information Act).<sup>2</sup> Compared to the organizations in these cases, we believe that a court in South Carolina could probably conclude that the Clover Recreation Association is not a public body.

\*4 Because we believe it would be possible that a court would find the Clover Recreation Association not to be a public body subject to the Freedom of Information Act, it is therefore unnecessary to address the second question raised by you concerning the validity of the request.

We emphasize that our guidance herein is not completely free from doubt since our courts have not addressed the issues raised by you. In offering guidance, too, we certainly have not intended to usurp the powers and functions of the judicial system. In the event that the citizen of Clover is not satisfied by the guidance offered by this Office, it is respectfully suggested that she pursue remedies under the Freedom of Information Act (Particularly [Section 30-4-100 of the Code](#)) or under the Uniform Declaratory Judgment Act (Section 15-53-10 *et seq.* of the Code) against the Association, to have judicially determined the question of whether the Association is a 'public body' and thus subject to the requirements of the Freedom of Information Act.

Sincerely,

Patricia D. Petway  
Staff Attorney

#### Footnotes

- 1 This Office has noted previously that the definition of 'public body' does not give guidance as to what kind of support is required to bring an entity within its terms. See, *Op. Atty. Gen.* dated July 11, 1983. We cannot over-emphasize the need for factual determination by a court, the existence of some doubt as to the conclusion, and that we may only offer guidance as to the conclusion which a court might reach.
- 2 We believe that if our courts should adopt the 'functional equivalent' test to determine whether Clover Recreation Association is a public body, it would be possible for a court to find the Association not to be a public body. The factors to be considered are: (1) whether the entity performs a governmental function; (2) what level of governmental funding is present; (3) what is the extent of governmental involvement or regulation; and (4) whether the entity was created by the government. The Association, as noted above, was not created and is not regulated by the government. Recreation is certainly not exclusively reserved as a governmental function. The most critical factor to be considered in this instance would be the level of funding, if any.

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