



ALAN WILSON
ATTORNEY GENERAL

October 23, 2019

The Honorable Thomas E. Pope
Speaker Pro Tempore
South Carolina House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211

Dear Representative Pope:

We received your request for an opinion of this Office concerning the board of directors created under section 58-36-50 of the South Carolina Code (2015). As you stated in your letter, section 58-36-50 is part of the Underground Facility Damage Prevention Act. You ask whether the board of directors created by this provision “is a public body for purposes of the Freedom of Information Act SC Code 30-4-10 et seq.?”

Law/Analysis

In 2011, the Legislature passed the Underground Facility Damage Prevention Act (the “Act”). S.C. Code Ann. §§ 58-36-10 et seq. (2015). The Act creates a centralized system allowing companies and homeowners to make one call to notify utility companies (referred to as “operators” under the Act) of a planned excavation or demolition and provide a mechanism by which operators can protect their facilities from damage during demolitions and excavations. The Act requires all operators in the State become members of an association (the “Association”). Under section 58-36-50(F), the Association is charged with operating a notification center to receive notices from homeowners and companies intending to perform excavations or demolitions. According to section 58-36-50(E), the notification center then transmits that information to the operators. Under section 58-36-70, operators are required to supply the homeowners or companies with information on the location of their facilities. In regard to funding the notification center, section 58-35-50(D) states “[t]he association shall provide for a reasonable way of apportioning the cost of operating the notification center among its members.” Section 58-36-50(F) requires the notification center maintain records with regard to the notices it receives and the operators’ responses to those notices. In addition, under section 58-36-50(K), the notification center must provide annual reports to the Chairman of the House of Representatives Labor, Commerce and Industry Committee and the Chairman of the Senate Judiciary Committee.

The Honorable Thomas E. Pope
Page 2
October 23, 2019

As you mention in your letter, section 58-36-50(A) calls for the establishment of a board of directors (the “Board”) to govern the notification center. According to section 58-36-50(A), the Board shall consist of various representatives of public and private utility providers, governmental agencies, and companies who are likely to provide demolition and excavation services. Board members are selected by nomination from the Association’s membership. Id.

You question whether this Board is a “public body” for purposes of the South Carolina Freedom of Information Act (“FOIA”). Section 30-4-20(a) of the South Carolina Code (2007) defines “public body” for purpose of FOIA as

any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, 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, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

Because the Board is not specifically listed in section 30-4-20(a), we must employ the rules of statutory interpretation in order to answer your question. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (citations omitted) (internal quotations omitted). However, “[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (quoting State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010)).

As our Supreme Court explained in Perry v. Bullock, 409 S.C. 137, 141, 761 S.E.2d 251, 253 (2014),

[t]he FOIA was enacted based on the General Assembly's finding "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." S.C. Code Ann. § 30-4-15 (2007). Accordingly, the FOIA's essential purpose is to protect the public from secret government activity. Bellamy v. Brown, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because the FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. Campbell v. Marion Cnty. Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct.App.2003).

Section 30-4-20(a) includes state boards among the list of public bodies for purposes of FOIA. Section 30-4-20(a) does not elaborate further on what constitutes a state board. Based on the Legislative intent of FOIA and the Board's enabling legislation, we believe the Legislature intended to treat the Board as a state board for purposes of FOIA. The Legislature created the Board through enactment of the Act. The Board is responsible for overseeing a vital service for not only companies and residents of the State, but also utility providers. Thus, we believe the Board oversees a governmental function and is the type of entity the Legislature intended to bring within the provisions of FOIA. This opinion is further supported by the fact that section 58-36-50(F) requires the notification center to maintain its records for a period of at least three years and section 58-36-50(K) requires the notification center to make regular reports to members of the Legislature. These provisions indicate the Legislature's intent to treat the Board like any other state board, requiring accountability and oversight.

Conclusion

Based on our interpretation of section 30-4-20(a), we believe the Legislature intended for the Board to be classified as a state board for purposes of this provision. Therefore, we are of the opinion that the Board is a public body for purposes of FOIA.¹

¹ We note the Association receives public funds by way of its municipal and other publicly funded members. The receipt of these funds also supports our belief that the Board is a public body. We acknowledge that a court could view these funds as for a specific purpose and therefore, not indicative of the Board's status as a public body under FOIA. See Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 456, 746 S.E.2d 329, 341 (2013) (finding "FOIA would not apply to a private entity that receives public funds for a specific purpose."). However, we are of the opinion that the Board is a public body due not solely to the receipt of public funds, but due to its status as a legislatively created board. As such, we believe any funds received by the Board or the Association, would become public funds upon receipt. See Op. Att'y Gen., 2019 WL 5290862 (S.C.A.G. Oct. 8, 2019) (stating public funds are those held by the government regardless of the source from which they were derived).

The Honorable Thomas E. Pope
Page 4
October 23, 2019

Sincerely,



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Assistant Attorney General

REVIEWED AND APPROVED BY:



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