ALAN WILSON
ATTORNEY GENERAL

June 4, 2024

James Graham Padgett, III
Bacot & Padgett, LLC
414 Monument Street, Ste. C
Greenwood, SC 29646

Dear Mr. Padgett:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> I represent the City of Greenwood, S.C (the "City"). The City seeks this Attorney's General opinion as to the applicability of the South Carolina Freedom of Information Act to the Uptown Greenwood Local Development Corporation ("UGLDC") directly, to its Manager, and to its Board of Directors as a result of the receipt of accommodations tax funds under S.C. Code § 6-4-10.
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> ...
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> The City questions whether the UGLDC is "public body" under the FOIA as it is supported in part by public funds and expends public funds thereby possibly triggering the full panoply of FOIA requirements. In the alternative, does the distribution of A-Tax funds under the more specific accommodations tax statute provide the required level of oversight, transparency, and accountability to avoid the more general South Carolina FOI Act?
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> Based on the facts as given below, the City is usure how to apply the "*en masse*" test verses the "*de minimus*" test in the particular circumstance of the UGLDC. The following are facts specific to the UGLDC:

1. It is a 501(c)(6) formed in 1980 for the purposes of furthering economic development in the central business district of the City.

2. In 1984, the properties in the Greenwood Uptown area received a special tax assessment to fund maintenance of property constructed via a UDAG grant. This tax was established via City ordinance.

3. In 2024, the tax is estimated to generate approximately $70,000.00 in revenue for the Uptown area. While the Uptown Manager is an employee of the City and reports to the City Manager, he is also responsible to an Advisory Board.

4. UGLDC has annual budget (2024) of $227,000.00.

5. Of this $227,000 for 2024, 31% is funded through taxes, 60% is funded from event fees and sponsorships.

6. UGLDC receives direct funding from the City of $20,000-$25,000 (on average) in accommodation tax distribution for Festival of Discovery. This is not payment from the City in return for supplying specific goods or services on an arm's length basis.

7. UGLDC hosts the annual SC Festival of Discovery. This event brings approximately 50,000.00 people to the City over 3 days and an economic impact of over $2,500,000.00 to the City. In order to host this event, the City provides staff support.

8. The Uptown Manager is an employee of the City (through the salary/benefits are paid by the special tax). This employee receives staff support from all Departments (Finance, HR, etc).

9. UGLDC has its own federal identification number, and it files its own federal tax 990 return each year with the IRS.

10. Uptown also purchases its own insurance policy for its board members.

Law/Analysis

It is this Office's opinion that, according to the South Carolina Supreme Court's holding in DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com., 423 S.C. 295, 814 S.E.2d 513 (2018), receiving Accommodations Tax ("A-Tax") revenues as a designated marketing organization ("DMO") does not render Uptown Greenwood Local Development Corporation (the "Corporation ") a "public body" under the S.C. Freedom of Information Act

("FOIA"). However, because the Corporation receives additional public funds and support from the City, a court may well hold that qualifies it as a public body. This opinion cannot determine with finality whether the Corporation is a public body subject to the FOIA as that would require findings of fact which are beyond the scope of our authority. See Op. S.C. Att'y Gen., 2006 WL 1207271 (April 4, 2006) ("Because this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions.").

The FOIA requires public bodies to comply with public records requests and open meetings requirements. See S.C. Code §§ 30-4-10 *et seq*. The FOIA broadly defines "public body" to mean:

> [A]ny 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.

S.C. Code § 30-4-20 (emphasis added). The South Carolina Supreme Court explained in Weston v. Carolina Research & Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991), how receipt of public funds can support finding an otherwise private entity is a public body subject to the FOIA.

> [T]he unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body. The common law concept of "public" versus "private" corporations is inconsistent with the FOIA's definition of "public body" and thus cannot be superimposed on the FOIA.

Id. at 403, 401 S.E.2d at 164. The Court cautioned that the nature of a transaction can be determinative of whether an entity is a public body due to receipt of public funds.

> [T]his decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent. However, when a block of public funds is diverted

> en masse from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. at 404, 401 S.E.2d at 165. In Disabato v. S.C. Association of School Administrators, 404 S.C. 433, 456, 746 S.E.2d 329, 341 (2013), the Court further emphasized the nature of the transaction as determinative of the receipt of public funds makes a private entity subject to FOIA.

> The dissent would read the FOIA as applying to a private organization that receives even a negligible amount of public funding for a discrete purpose. We made clear in Weston that the FOIA only applies to private entities who receive government funds *en masse*. See Weston, 303 S.C. at 404, 401 S.E.2d at 165. The FOIA would not apply to a private entity that receives public funds for a specific purpose. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or healthcare clinic. However, the FOIA does apply to any private organization that is generally supported by public funds.

Id. at 456, 746 S.E.2d at 341. Generally, arm's length transactions or transfers of public funds for an identifiable purpose will not subject a private entity to FOIA's records and open meetings requirements. In contrast, transferring public funds in a block transfer to a private entity or providing general support to a private entity with public funds will, in many cases, require the private entity to comply with FOIA. The difference in treatment between the two types of transfers is primarily designed to satisfy the FOIA's basic purpose that "public business be performed in an open and public manner." S.C. Code § 30-4-15. In most cases, the latter category of block transfers does not ensure sufficient transparency to allow citizens to be informed in regard to how public funds are being spent by public officials. See Weston, supra.

Following the decisions above, the South Carolina Supreme Court recognized an exception to Weston and Disabato for payments of accommodation tax revenue to a private entity as a designated marketing organization ("DMO").[1] In DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce, 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018), the Court reasoned that the reporting and oversight requirements for A-Tax funds address the concerns of lack of transparency typical of block transfers.

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[1] "FOIA is a general statute; the A-Tax statute is a specific statute. 'Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.'" DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com., 423 S.C. 295, 304, 814 S.E.2d 513, 518 (2018).

> Significantly, in [Weston], there was not a statute or proviso governing the procedure and oversight for the expenditure of the specific funds at issue or mandating the public reporting and accountability as exists with respect to A-Tax funds and the PRT Grant.
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> Here, as noted, there is a specific statute (or proviso) that directs the local governments to select a DMO to manage the expenditure of certain tourism funds and requires the governments to maintain oversight and responsibility of the funds by approving the proposed budget and receiving an accounting from the DMO. Thus, this is not the situation found in Weston wherein the funds were intended to be given to a public body and, instead, were diverted to a private organization to be spent without oversight. Through the A-Tax statute (and Proviso 39.2) there are accountability measures in place and the public has access to information regarding how the funds are spent. Therefore, the concern in Weston regarding the lack of a legislatively sanctioned process mandating oversight, reporting, and accountability is not present in the expenditure of these funds.

Id. at 305–06, 814 S.E.2d at 519.

While the South Carolina Supreme Court has not recognized additional exceptions to the Weston and Disabato analysis for transfers of public funds, the South Carolina Court of Appeals has held that the South Carolina Educational Credit for Exceptional Needs Children Fund did not qualify as a public body due, in part, to legislatively imposed reporting and accountability safeguards. See Davis v. S.C. Educ. Credit for Exceptional Needs Child. Fund, 441 S.C. 187, 893 S.E.2d 330 (Ct. App. 2023).

> [T]he Fund is not a public body for the purposes of the FOIA. That outcome is dictated by the majority opinion in DomainsNewMedia.com because (1) the legislative enactment discussed in that opinion is similar enough in nature to the legislative enactment concerning the Fund in the present case in that both have independent reporting and accountability requirements, which was a key factor in the majority's analysis in DomainsNewMedia.com; and (2) the legislative enactment concerning the Fund expressly states that the funds are not public funds. The occasional and relatively minor activities undertaken by the Department's employees do not represent the *en masse* diversion of state resources required by DomainsNewMedia.com to hold otherwise.

Id. at 206–07, 893 S.E.2d at 340–41. Because the legislation concerning the Fund stated its funds "are not public funds," the public support the Court considered was the time and efforts of persons at the Department of Revenue.

> The support that the Fund receives in the form of likely fleeting assistance from state officials and use of the state fundraising platform is *de minimis* rather than the

> diversion of "a block of public funds ... *en masse*" or "the management of the expenditure of public funds." Weston, 303 S.C. at 404, 401 S.E.2d at 165.

Id. at 204–05, 893 S.E.2d at 339. This Office does not read the Davis decision to establish a new *"de minimus"* test, rather the Court merely described the level of support to be something less than required by Weston to qualify a private entity as a "public body" under FOIA.

With these principles in mind, the opinion will next assume the facts as described in your letter to determine whether a court would hold the Corporation is a public body. As discussed above, DomainsNewMedia.com held that a DMO does not become a public body subject to the FOIA due to receipt of A-Tax funds as the A-Tax statute is an exception to the FOIA. Supra. The Corporation receives additional public support beyond these A-Tax revenues. Your letter states the Corporation receives approximately $70,000 of revenue, or over thirty percent of its annual budget, that is generated from a special tax assessment established via a City ordinance.[2] A court would hold this revenue constitutes public funds. Further, a city employee serves in a role titled "Uptown Manager" and "is also responsible" to the Corporation's advisory board. This level of support from the city employee is unlikely to be characterized as "fleeting" as the essential job functions are primarily supportive of the Corporation and its board of directors. Davis, supra. Based solely on the facts provided in the request letter, a court would likely hold the Corporation is "generally supported by public funds," the public funds are not allocated according to a statutory program that has been recognized as an exception to the FOIA, and, therefore, the Corporation would be a public body. Disabato, 404 S.C. at 456, 746 S.E.2d at 341.

Nevertheless, this Office was provided with additional documentation which presents a more ambiguous scenario. In 1984, the City of Greenwood adopted Ordinance No.73 "establishing Improvement Plan and Improvement District known as the Great Greenwood Square under the

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[2] Based on additional materials provided, this Office understands the ordinance was adopted in accordance with the Municipal Improvement Act.

> Under the Municipal Improvement Act of 1999, the governing body of a municipality may impose assessments within an improvement district "based on assessed value, front footage, area, per parcel basis, the value of improvements to be constructed within the district, or any combination of [these methods]." "The apportionment of benefits received from a special assessment is a legislative function and, if reasonable persons may differ as to whether the land assessed is benefited by the improvement, the finding of the legislative body that it does must stand." "Included within the broad discretion accorded to a special assessment commission [or governing body] is the discretion to choose the method used to determine the benefits and apportion the costs to individual properties within the improvement district."

Livingston v. Town of Mt. Pleasant, 356 S.C. 354, 361–62, 588 S.E.2d 630, 634–35 (Ct. App. 2003) (footnotes omitted).

Municipal Improvement Act of 1973." Under section 4 of the ordinance, the City paid the proceeds generated from the special assessments on the property within the district

> ... to the Uptown Greenwood Local Development Corporation on a monthly basis to pay for all of the costs and expenses incurred by the Corporation of managing and operating the improvements within the District, including the costs and expenses incurred to employ one (1) or more persons and to carry out the promotional activities and endeavors as may be provided by the Uptown Greenwood Local Development Corporation within the said District, and for such other uses as may be provided in § 5-37-90 of the South Carolina Code of laws, 1976, as amended.

Section 5-37-90 referenced above states "[t]he improvements as defined in Section 5-37-20 are to be or become the property of the municipality, State, or other public entity and may at any time be removed, altered, changed, or added to, as the governing body may in its discretion determine."[3] During maintenance of the improvements, "the special assessments on property therein may be utilized for the preservation, operation, and maintenance of the improvements and facilities provided in the improvement plan, and for the management and operation of the improvement district as provided in the improvement plan, and for payment of indebtedness incurred therefor." S.C. Code § 5-37-90. Under this ordinance, one could interpret the transfer of public funds to the Corporation as occurring for supplying specific goods and services to the city for the maintenance and improvement of City property. In such a case, these transfers begin to appear like arm's-length transactions described in Weston.

Unfortunately, a subsequent document obscures this classification. In 1997, the City entered an agreement with the Uptown Development Corporation in which the City agreed to employ "an individual who will be assigned to the position of Manager of the Uptown Development District." The paragraph number 3 of the agreement also states, "The Corporation will adopt an annual budget prior to December 1 each year and said budget will specify approved costs for which the City shall be reimbursed for all costs incurred on behalf of the Uptown Development Corporation. Reimbursement is due upon expenditure and will be completed on a periodic basis by the City Clerk and Treasurer." The emphasized language demonstrates a reversal of roles occurred at some point after Ordinance No.73. The Corporation no longer appears to incur costs for managing the district nor does the City reimburse it. Instead, the City is reimbursed for "approved costs" incurred on behalf of the Corporation. The Corporation's annual budget specified those costs for which the City will be reimbursed. If the City Clerk & Treasurer reimburse the City from the special assessment authorized by Ordinance No.73, does the

[3] The governing body is defined as the municipal council or "other governing body in which the general governing powers of the municipality are vested." S.C. Code § 5-37-20(5).

Corporation, in fact, receive those funds? Suffice it to say, there remain questions of fact which this Office cannot resolve in an opinion regarding the public funds allocated to the Corporation.

Conclusion

Based on the analysis discussed more fully above, it is this Office's opinion that, according to the South Carolina Supreme Court's holding in DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com., 423 S.C. 295, 814 S.E.2d 513 (2018), receiving Accommodations Tax ("A-Tax") revenues as a designated marketing organization ("DMO") does not render Uptown Greenwood Local Development Corporation (the "Corporation ") a "public body" under the S.C. Freedom of Information Act ("FOIA"). However, because the Corporation receives additional public funds and support from the City, a court may well hold that qualifies it as a public body. This Office does not read the South Carolina Court of Appeals decision in Davis v. South Carolina Educational Credit for Exceptional Needs Children Fund, 441 S.C. 187, 893 S.E.2d 330 (Ct. App. 2023), to establish a new *"de minimus"* test, rather the Court merely described the level of support to be something less than required by Weston to qualify a private entity as a "public body" under FOIA. See Weston, supra, see also Disabato 404 S.C. at 456, 746 S.E.2d at 341. ("We made clear in Weston that the FOIA only applies to private entities who receive government funds *en masse*."). Based solely on the facts provided in the request letter, a court would likely hold the Corporation is "generally supported by public funds," the public funds are not allocated according to a statutory program that has been recognized as an exception to the FOIA, and, therefore, the Corporation would be a public body. Disabato, supra. However, there remain questions of fact which this Office cannot resolve in this opinion regarding the nature of the public support the Corporation actually receives. A court would likely apply the analysis in Weston and Disabato to establish whether the public can ascertain how public funds are spent based on the transactions from the City to the Corporation, or whether the public must also be granted access to the records and affairs of the Corporation as a public body under FOIA.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General