ALAN WILSON
ATTORNEY GENERAL

November 14, 2022

Mr. Eric Shytle
General Counsel
Municipal Association of South Carolina
P.O. Box 12109
Columbia, SC 29211

Dear Mr. Shytle:

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

> I am writing to request a formal opinion interpreting a provision in the recently enacted business license legislation, 2020 Act No. 176, codified at S.C. Code §§ 6-1-400 through -420. As background, there are three statutes that address the application of the South Carolina Freedom of Information Act, S.C. Code §§ 30-4-10 et seq. (FOIA), to business license records.
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> The first statute, in the general FOIA law itself, exempts "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy [which] shall include, but not be limited to, information as to gross receipts contained in applications for business licenses ...." S.C. Code § 30-4-40(a)(2).
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> The second statute, relating to confidentiality of taxpayer information, provides that "[e]xcept in accordance with a proper judicial order or as otherwise provided by the Freedom of Information Act, it is unlawful for an officer or employee of a county or municipality, or the agent of such an officer or employee to divulge or make known in any manner the financial information, or other information indicative of units of goods or services sold, provided by a taxpayer included in a report, tax return, or application required to be filed by the taxpayer ...." S.C. Code § 6-1-120. This section specifically applies to business license taxes, see S.C. Code § 6-l-120(A)(2), but allows "sharing of data between public officials or employees in the performance of their duties," see S.C. Code § 6-l-120(B)(3).

Based on these two statutes, the Municipal Association has long advised its members that business license records are subject to request under FOIA, but that financial information about the licensee must be redacted. Our members thus routinely redact not only gross revenues reported in an application but also the amount of the license paid.

The third statute, enacted in 2020, primarily relates to standardization of business license practices in South Carolina. See S.C. Code §§ 6-1-400 and -410. It also addresses collection of business license taxes by third-party providers, see S.C. Code § 6-1-420. In brief, the third-party providers at issue would contract with local governments to identify businesses that should but do not have business licenses or that are incorrectly reporting gross income. In turn, the local governments would generally pay the third-party providers a percentage of additional business license taxes received as a result of their efforts. Based on a perception in the business community that these third-party providers were overly aggressive in their activities, the General Assembly adopted specific guidelines for the practice.

Relevant to this request, the new statute provides that "a taxing jurisdiction may not share or disclose any information relating to business license tax applications with any third party other than to acknowledge whether or not a business has paid the taxing jurisdiction's business license tax for a relevant year." S.C. Code § 6-l-420(E) (emphasis added). There is a limited exemption for "a person or entity that gathers and disseminates news."

During negotiations on the bill, the Association understood that the purpose of this provision was to limit the information provided to third-party business license tax collectors. As written, however, the section might be read as an amendment to FOIA that prohibits the disclosure of business license information to any requestor under FOIA, not just third-party business license tax collectors. This possibility has caused considerable confusion for our members, particularly given the provisions of S.C. Code § 6-l-420(H) that allow a private civil cause of action for violations.

Your letter describes scenarios in which municipalities historically provided business license information to other political subdivisions when a business operates in more than one jurisdiction, provided lists of business license holders within a given NAICS code, and published lists of businesses licensed within the municipality. Because of the potential conflicts described above, the letter requests this Office's interpretation of the restriction on providing information relating to business license tax applications to any third party in S.C. Code § 6-1-420(E).

Law/Analysis

It is this Office's opinion that a court would hold the prohibition on sharing information relating to business license tax applications with third parties in S.C. Code § 6-1-420(E) does not prohibit sharing such data between public officials or employees in the performance of their duties nor the publication of statistics as authorized in S.C. Code § 6-1-120(B). This conclusion is not free from doubt and legislative clarification may be warranted to address how broadly the exception for "a person or entity that gathers and disseminates news" is meant to apply. S.C. Code § 6-1-420(E).

The central question raised asks how the South Carolina Business License Tax Standardization Act in 2020 (the "Standardization Act"), 2020 Act No. 176, impacts disclosure of public records under the S.C. FOIA. See S.C. Code § 30-4-10 *et seq.* The S.C. FOIA establishes "[a] person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws ...." S.C. Code § 30-4-30(A)(1) (emphasis added).[1] As stated in your letter, section 30-4-40(a)(2) provides an exception from disclosure for "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy." The statute later states "information as to gross receipts contained in applications for business licenses" are included within this exception. Id. Then, the question remaining is what "information relating to business license tax applications," aside from gross receipts, remains subject to disclosure under the S.C. FOIA in light of S.C. Code § 6-1-420(E).

As described in your letter, section 6-1-420 was adopted as part of the Standardization Act in 2020. Because this appears to be a matter of first impression, this opinion will analyze the statute according to the rules of statutory construction. It should be emphasized that the General Assembly's intent is the primary consideration in interpreting the terms of a statute. See Kerr v. Richland Mem'l Hosp., 383 S.C. 146,148, 678 S.E.2d 809, 811 (2009) (The primary rule of statutory construction is to "ascertain and give effect to the intent of the legislature."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015). Where statutes deal with the same subject matter, it is well established that they "are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Penman v. City of Columbia, 387 S.C. 131, 138,691 S.E.2d 465, 468 (2010);

[1] The statutory definition of "public record" similarly states that records which are closed to the public by law are not subject to disclosure according to the provisions of the act. See S.C. Code Ann. § 30-4-20(c).

see also Op. S.C. Atty. Gen., 2000 WL 1347162 (Aug. 25, 2000) (The meaning of related statutes and their effect must be determined with reference to each other so as to "construe them together into one integrated system of law."). With these principles in mind, this opinion will next examine the text of section 6-1-420 and related statutes to ascertain legislative intent.

Subsection 6-1-420(E) states:

> (E) Except as needed for a third party to assess and collect business license taxes collected pursuant to Article 20, Chapter 9, Title 58 and Chapters 7 and 45, Title 38, a taxing jurisdiction may not share or disclose any information relating to business license tax applications with any third party other than to acknowledge whether or not a business has paid the taxing jurisdiction's business license tax for a relevant year. Nothing in this section should be construed as prohibiting a person or entity that gathers and disseminates news, as defined in Section 19-11-100, from obtaining the information not protected by Section 6-1-120 found on the business license tax application from the taxing jurisdiction.

S.C. Code § 6-1-420(E) (emphasis added). The underlined portion in subsection (E) emphasizes the broad language chosen by the General Assembly to restrict such disclosures to third parties. The restriction applies not only to the business license tax applications, but also to related information. See id. When the first sentence of this subsection is read in isolation, the plain language appears to demonstrate legislative intent to prohibit nearly all disclosures to third parties except those operating to assess and collect business license taxes. However, the second sentence establishes an exception for "a person or entity that gathers and disseminates news, as defined in Section 19-11-100" and directly refers to "information not protected by Section 6-1-120." Id. In order to identify which persons are permitted to receive disclosures and of what information, this opinion will address sections 6-1-120, 19-11-100, and other relevant subsections of 6-1-420 to construe them together into one integrated system of law.

Section 6-1-120 makes it unlawful "to divulge or make known" certain financial information provided by a taxpayer in a report or application required to be filed with a municipality or county. Subsection (A)(2) specifies this prohibition applies to financial information required to be filed pursuant to municipal or county business license tax ordinances. However, subsection (B) lists three exceptions.

> (B) Nothing in this section prohibits the:
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> (1) publication of statistics classified to prevent the identification of particular reports, returns, or applications and the information on them;

> (2) inspection of reports, returns, or applications and the information included on them by an officer or employee of the county or municipality, or an agent retained by an officer or employee, in connection with audits of the taxpayer, appeals by the taxpayer, and collection efforts in connection with the tax or fee which is the subject of the return, report, or application;
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> (3) sharing of data between public officials or employees in the performance of their duties, including the specific sharing of data as provided in Article 8 of this chapter, the Fairness in Lodging Act.

S.C. Code § 6-1-120 (emphasis added). These exceptions in section 6-1-120(B) would inevitably conflict with a broad reading of section 6-1-420(E)'s prohibition on disclosure to any third parties.[2] Yet, the exception in the second sentence of section 6-1-420(E) specifically states that the statute should not be read to "prohibit[] a person or entity that gathers and disseminates news, as defined in Section 19-11-100, from obtaining the information not protected by Section 6-1-120." Therefore, at least for a certain category of third parties, persons that gather and disseminate news, disclosure for any of the three uses authorized in section 6-1-120(B) is still permitted by section 6-1-420(E).

This exception for "a person or entity that gathers and disseminates news" is not limited to persons employed by a traditional newspaper or broadcast news station. S.C. Code § 19-11-100(A). Subsection 19-11-100(A) reads in full:

> A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding.

Id. (emphasis added). The statute lists several traditional media and also a catchall category of "other medium." One Federal District Court quoted with favor several commentators who advocated for a functional analysis to determine whether a person falls within the protections of section 19-11-100.

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[2] Because the "Standardization Act" did not repeal section 6-1-120, but rather section 6-1-420(E) makes direct reference to it, these statutes must be construed together. See Penman, supra. "[S]ubsequent legislation is not presumed to effectuate a repeal of existing law in the absence of expressed intent." Busby v. State Farm Mut. Auto. Ins. Co., 280 S.C. 330, 334, 312 S.E.2d 716, 719 (Ct. App. 1984); see also Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998), *aff'd as modified sub nom.* Justice v. The Pantry, 335 S.C. 572, 518 S.E.2d 40 (1999) ("It is presumed that the Legislature [is] familiar with prior legislation, and that if it intend[s] to repeal existing laws it would ... expressly [do] so ...").

Several states, including South Carolina, have journalist "shield" laws, which protect reporters from compulsory disclosure of news sources. *See* S.C. Code § 19-11-100 (2005). South Carolina's shield law, however, does not define the terms "journalist" or "reporter."

A functional analysis is recommended by some commentators and legislators:

> Gregg Leslie, legal defense director for the Reporters Committee for Freedom of the Press, says that asking whether bloggers are journalists is the wrong question. "'Bloggers' is a vague, amorphous term like 'telephone users,'" he says. "Just like some telephone users are journalists and some are not; the same thing with bloggers. The medium doesn't answer the question. It has to do more with the function that the person is performing. That's how we have approached the shield law question. If the bloggers' involvement is to report information to the public and to gather information for that purpose openly then they should be treated like a journalist."
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> "There should be a functional analysis in addition to or instead of the current analysis of what medium you are writing in," Leslie said.
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> "As the courts have confirmed what makes journalism journalism is not the format but the content," says [Kurt] Opsahl [staff attorney for the Electronic Frontier Foundation]. "Where news is gathered for dissemination to the public, it is journalism - regardless of whether it is printed on paper or distributed through the Internet."

Blogging at 3 (noting instances where bloggers scooped the mainstream media on major news stories).

BidZirk, LLC v. Smith, No. CV 6:06-0109-HMH-WMC, 2006 WL 8443267, at *4 (D.S.C. Mar. 21, 2006), report and recommendation adopted, No. CV60600109HMHWMC, 2006 WL 8443250 (D.S.C. Apr. 10, 2006). Assuming our state courts find this functional approach persuasive, the exception may be construed to allow disclosure of information on business license tax application to third parties who are gathering the information for public dissemination, if it is also permissible under section 6-1-120. "[P]ublication of statistics classified to prevent the identification of particular reports, returns, or applications and the information on them" authorized in section 6-1-120(B)(1) is the use that appears most consistent with public dissemination. In contrast, the uses in S.C. Code § 6-1-120(B)(2) and (B)(3) do not neatly comport with public dissemination, and would not seem to fall within the exception for persons and entities that gather and disseminate news.

Subsection (B)(2) addresses providing information in furtherance of "collection efforts in connection with the tax or fee which is the subject of the return, report, or application." Generally, all of section 6-1-420 may be understood to further clarify when and how the information on or related to business license tax applications is permitted to be disclosed specifically to third parties as "agents" of the county or municipality as described in subsection (B)(2). In addition, subsection (B)(2) makes clear officers and employees of the county or municipality are authorized to access information on or related to business license tax applications in furtherance of collection efforts; such disclosures would be consistent with section 6-1-420(E) as its restrictions only apply to third-party disclosures.

Finally, S.C. Code § 6-1-120(B)(3) permits "sharing of data between public officials or employees in the performance of their duties." While this use is generally incompatible with public dissemination, a court would likely hold disclosing business license tax data to public officials or employees, even those in other jurisdictions, remains permissible. The common understanding of the words "third-party" means a person or entity "other than the principals involved in a transaction." American Heritage College Dictionary 1409 (3d. ed. 1993). If interpreted in this manner, section 6-1-420(E) could be read to prohibit the practice of sharing this data between public officials authorized by subsection 6-1-120(B)(3). Again, the Standardization Act did not repeal section 6-1-120, so these statutes must be harmonized. See Busby, supra.

When the Standardization Act is considered as a whole, it appears that the General Assembly did not intend for the terms "third party" or "third party entity" in section 6-1-420 to include a county or municipality. Although section 6-1-420 refers several times to a "third party" or "third-party entity," those terms are not statutorily defined. Subsection 6-1-420(A) authorizes taxing jurisdictions to "contract by ordinance" with third parties to "assist ... in collecting property or business license taxes." Prior to the initial reference to a "third-party entity" in subsection (A), the statute lists "an individual, firm, or organization" as those persons that may be authorized to assist in the collection of property or business license fees. Subsection (B) clarifies that it is "unlawful" to contact a business in this State regarding noncompliance with a business license ordinance except when "the contact is made pursuant to a contract with a taxing jurisdiction." Notably, subsection (B) does not use the term "third party." Instead, it similarly states, "It is unlawful for any individual, firm, or organization to contact a business in this State regarding noncompliance with a business license ordinance unless the contact is made pursuant to a contract with a taxing jurisdiction in accordance with this section." S.C. Code § 6-1-420(B) (emphasis added). It seems the phrases "third-party entity" and "third party" are used interchangeably with "individual, firm, or organization" throughout section 6-1-420. Municipalities and counties do not fall within the listed categories as they are political subdivisions of the State.[3] Rather, a municipality or county that levies a business license tax is statutorily defined as a "taxing jurisdiction." S.C. Code § 6-1-400(A)(2)(b). When a business applies for a business license in

[3] Op. S.C. Att'y Gen., 1982 WL 189264 (April 21, 1982) ("The words 'political subdivision' are a generic term which means any constitutionally or statutory established area within the State which has been given authority to exercise limited sovereignty within a defined area. In this State the principal political subdivisions are: counties, municipalities, school districts, special purpose districts ...").

more than one jurisdiction, all municipalities and counties to which it applies are taxing jurisdictions, not third parties.

Other statutes relevant to the collection of business license taxes include S.C. Code § 5-7-30, authorizing municipalities to implement a business license tax, and S.C. Code § 4-9-30(12), authorizing counties to implement a business license tax. Both statutes require reducing the amount of gross income used to compute the tax in one jurisdiction by the amount taxed in another county or municipality. See S.C. Code § 5-7-30 ("If the person or business taxed pays a business license tax to a county or to another municipality where the income is earned, the gross income for the purpose of computing the tax must be reduced by the amount of gross income taxed in the other county or municipality."). Except for using the term "any third party," there is no textual support in the Standardization Act demonstrating the General Assembly intended to prevent municipalities and counties from disclosing data to public officials and public employees in furtherance of verifying the amount of gross income taxed in their respective jurisdictions. Interpreting "third party" in a manner which excludes municipalities and counties that levy business license taxes and instead recognizing they are "taxing jurisdictions" avoids inconsistency between the Standardization Act and S.C. Code §§ 4-9-30(12) and 5-7-30.

Conclusion

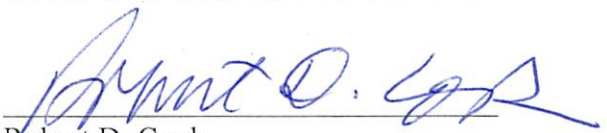
It is this Office's opinion that a court would hold the prohibition on sharing information relating to business license tax applications with third parties in S.C. Code § 6-1-420(E) does not prohibit sharing such data between public officials or employees in the performance of their duties nor the publication of statistics as authorized in S.C. Code § 6-1-120(B). Section 6-1-420(E) prohibits sharing or disclosing "any information relating to business license tax applications with any third party other than to acknowledge whether or not a business has paid the taxing jurisdiction's business license tax for a relevant year." The determination of what particular information beyond that on the application falls within the prohibition as "information relating to" an application will depend on the facts in a given case. Id.; See Evening Post Pub. Co., 363 S.C. 452, 456–57, 611 S.E.2d 496, 499 (2005). As this relates to disclosure under the S.C. FOIA, the Act requires exceptions to disclosure to be narrowly interpreted. Evening Post Pub. Co. v. City of N. Charleston, supra. Generally, then, more tangential information that does not identify an applicant or gross income amounts is unlikely to fall within the prohibition on disclosure. The second sentence of section 6-1-420(E) provides an exception stating that the statute should not be read to "prohibit[] a person or entity that gathers and disseminates news, as defined in Section 19-11-100, from obtaining the information not protected by Section 6-1-120." As is discussed more fully above, this exception may be construed to allow disclosure of information on business license tax application to third parties who are gathering the information for public dissemination if it is also permissible under S.C. Code § 6-1-120(B). In light of these permitted uses, it is this Office's

opinion that a court may well find other disclosures are prohibited. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (The rule of statutory construction "'*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' ... holds that 'to express or include one thing implies the exclusion of another or the alternative.'"). This conclusion is not free from doubt and legislative clarification may be warranted to address how broadly the prohibition on disclosure to third parties is intended to apply and how to construe the exception for "a person or entity that gathers and disseminates news." S.C. Code § 6-1-420(E).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



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