



ALAN WILSON
ATTORNEY GENERAL

March 23, 2022

W. Eric Emerson, Ph.D.
Director and SHPO
South Carolina Department of Archives & History
8301 Parklane Road
Columbia, SC 29223

Dear Director Emerson:

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

At the March 4, 2022 quarterly meeting of the SC Commission of Archives and History, the members of that body passed a motion that “the commission (SCCAH) ask for an opinion from the SC Attorney General's Office as to whether or not the WeGOJA Foundation is considered a public charity and subject to the Freedom of Information Act (FOIA).” This letter constitutes a request for an opinion regarding those issues.

As background to the first part of this request, the South Carolina African American Heritage Commission (SCAAHC) created the SC African American Heritage Foundation (SCAAHF) in 2008 as a 501(c)(3) with the goal of raising private funds to support the work of the SCAAHC. The SCAAHF rebranded itself as the WeGOJA Foundation in 2020, and that organization appears on the South Carolina Secretary of State's Charities Search Home Page <https://search.scsos.com/charities> (Public Id: P15729). That same page contains a link to a filed federal form 990-EZ (2019) as an organization exempt from income tax. ...

Concerning the second part of the request, the WeGOJA Foundation, and its predecessor organization SCAAHF, have been the recipients of both state and federal funds from the South Carolina Department of Archives and History (SCDAH) and the State Historic Preservation Office (SHPO) on behalf of the SCAAHC. In your November 15, 2019 opinion regarding the Hagood Mill Foundation, you referenced Section 30-4-20(a) and underlined language from that section of code, which states “any organization, corporation, or agency supported in whole or in part by public funds or expending public funds” falls within the definition of a public body for purposes of FOIA.

According to Section 60-11-50(6), the SC Commission of Archives and History (SCCAH) will “control the expenditure in accordance with law of such public funds as may be appropriated to the Department.” Section 60-11-110(E) states that SCDAH “shall serve in a nonvoting advisory role...” and fund the commission (SCAAHC). To meet its obligation to advise and fund the SCAAHC and to assure transparency in the expenditure of public monies, the Commission of Archives and History is seeking this opinion.

Law/Analysis

It is this Office’s opinion that a court would likely find the WeGOJA Foundation is a “public body” as defined in the S.C. FOIA. S.C. Code §§ 30-4-10 et seq. The S.C. FOIA grants a person the “right to inspect, copy, or receive an electronic transmission of any public record of a public body.” S.C. Code § 30-4-30(A)(1) (emphasis added). The primary issue presented in your letter is whether a court would find that the WeGOJA Foundation is a “public body” under the Act. Public body is defined to mean

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.

S.C. Code Ann. § 30-4-20(a) (emphasis added). In Weston v. Carolina Rsch. & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991), the South Carolina Supreme Court stated that this definition “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 Court explained there is a distinction for private entities that receive public funds in exchange for goods or services at fair market value. These entities would not fall within the definition of public body, while a private entity that receives funds in block grants with no mechanism for public oversight would.

[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 (emphasis added); see also DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com., 423 S.C. 295, 303, 814 S.E.2d 513, 517 (2018) (“The reporting and accountability provisions directly governing the expenditure of these funds control” in finding that the Chamber of Commerce was not a “public body” subject to the S.C. FOIA.).

As noted above, this Office has previously addressed a similar question regarding whether the Hagood Mill Foundation (“HMF”), which was also formed as a 501(c)(3) corporation to oversee a historic site, is considered a public body under the S.C. FOIA. See Op. S.C. Att’y Gen., 2019 WL 6445344 (November 15, 2019). The opinion concluded that HMF was a public body according to the S.C. FOIA as follows:

While HMF is organized as a nonprofit corporation, you indicated it receives funds from Pickens County. In addition, you give no indication that Pickens County receives anything in return for these funds. Likewise, HMF likely expends public funds. Accordingly, we are of the opinion that HMF is a public body for purposes of FOIA and therefore, would be subject to the provisions of FOIA.

Id. at 3. With these authorities in mind, this opinion will next consider the public funding provided to the WeGOJA Foundation as described in your letter.

The WeGOJA Foundation shares many of the same characteristics with the entities described in the Weston decision and the HMF opinion. The most significant similarities are that it is organized as a nonprofit corporation and that it receives funding from the State. Although, the Foundation also receives private support, throughout the S.C. FOIA the General Assembly expressed “its intent to ensure transparency is provided to the public with regard to the general expenditure of public funds.” Id. at 302, 814 S.E.2d at 516. This concern is why the Weston Court found that support of a private entity, “even in part,” by public funds mandates finding it is a public body. The letter contains no indication that the Foundation provides “specific goods or services on an arm’s length basis” in return for these funds. DomainsNewMedia.com, 423 S.C. at 306, 814 S.E.2d at 518. In the absence of a framework requiring oversight for the expenditure of these funds or otherwise mandating public reporting and accountability, it is this Office’s opinion that a court would hold the WeGOJA Foundation is a public body according to the S.C. FOIA.

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As a result, the Foundation is subject to the disclosure requirements concerning the public's right to inspect, copy, or receive public records. S.C. Code § 30-4-30(A)(1).

Finally, your letter asks this Office to determine whether the WeGOJA Foundation is a public charity. However, this Office cannot offer an opinion on the Foundation's status as a public charity because that determination would require findings of fact. 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").¹ Regardless of whether the WeGOJA Foundation is a public charity or not, a court would hold this status does not prevent the foundation from being characterized as a public body under the S.C. FOIA.

Conclusion

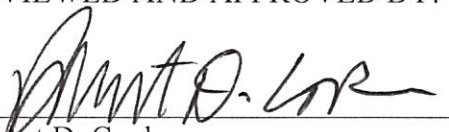
As is discussed more fully above, it is this Office's opinion that a court would likely find the WeGOJA Foundation is a "public body" as defined in the S.C. FOIA. S.C. Code Ann. § 30-4-20(a). Although the Foundation is organized as a nonprofit corporation, its receipt of state funds compels this conclusion. As described in the request letter, the Foundation receives both state and federal funds from the South Carolina Department of Archives and History and the State Historic Preservation Office. The letter provides no indication that the Foundation provides goods or services in return for these funds. Moreover, the letter does not indicate that there are parameters for public reporting and accountability for these funds. As a result, the Foundation is subject to the disclosure requirements concerning the public's right to inspect, copy, or receive public records. S.C. Code § 30-4-30(A)(1).

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

¹ We note that your letter references a 990-EZ form linked on the Secretary of State's website that indicates the Foundation filed as a public charity.