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HENRY MCMASTER
ATTORNEY GENERAL

May 19, 2006

The Honorable James H. Merrill
House Majority Caucus Leader
South Carolina House of Representatives
518-B Blatt Building
Columbia, South Carolina 29211

The Honorable J. Todd Rutherford
Member, House of Representatives
432-A Blatt Building
Columbia, South Carolina 29211

Dear Representatives Merrill and Rutherford:

You have each, by separate letter, raised several issues regarding the applicability of the Freedom of Information Act (FOIA) to a political party caucus of the South Carolina House of Representatives. Your questions are as follows:

1. Is the Majority Caucus of the South Carolina House of Representatives a public body pursuant to the South Carolina Freedom of Information Act?

2. Does the Majority Caucus constitute a public body only when it gathers in sufficient numbers to constitute a quorum of the entire House of Representatives?

3. Are planned meetings of the Majority Caucus subject to the Freedom of Information Act's requirements of advance notice and posting?

4. Are Majority Caucus records subject to the Freedom of Information Act?

Representative Merrill, as House Majority Caucus Leader, argues in his 5 page letter that the Majority Caucus is not a "public body," as defined in the FOIA's S.C. Code Ann. Section 30-4-20(a). Such provision in pertinent part states that a "public body" is "any public or governmental body or political subdivision of the State ... 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 ...." (emphasis added).

Request Letters

Of course, the determination of whether or not a particular entity is a "public body" for purposes of the FOIA is crucial because § 30-4-60 provides that "[e]very meeting of all public bodies shall be open to the public ...." Moreover, § 30-4-30(a) mandates that "[a]ny person has a right to inspect or copy any public record of a *public body*, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." (emphasis added).

To summarize, Representative Merrill sets forth in his request letter the following reasons why he believes the Majority Caucus is not a "public body" for purposes of FOIA:

> [i]n the matter at hand, there is considerable evidence to show that the House Majority Caucus is not supported by public funds and is thus not a public body. First, the Caucus exists as a dues-paying organization, with 100% of its operating funds raised through private donation. Second, none of the Caucus employees are compensated with public funds. Third, and perhaps most importantly, the Caucus officers – who are all members of the House of Representatives – occupy the same office space and use the same phone lines, computers, and furniture that is allocated to any other House member. Though the Majority Caucus does use state office buildings to conduct its official meetings, there is a multitude of other organizations – many which are not subject to the FOIA – that routinely use the state buildings for meeting space as well. Thus, in essence, the Caucus exists almost exclusively as a result of its ability to raise private funds.
>
> Perhaps the only argument one could make that the Caucus is supported by public funds and is therefore a public body is grounded in the fact that Caucus employees occupy state office space in the Blatt Building. In *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), the South Carolina Supreme Court ruled that a private foundation which accepted federal grant funding in connection with construction of a university building received public funds and thereby became subject to FOIA, despite the claim that the grant money did not directly support the foundation. *Id.* at 402-03. In the present case, the Majority Caucus has three staff assistants who are currently stationed in the Blatt Building. The Caucus in not currently paying rent to the state for the office space used by these individuals, despite the fact that they are not state employees. In light of the Supreme Court's holding in *Weston*, one might argue that the Caucus is indirectly receiving public funds as a result of this free use of office space and is thus subject to FOIA. See also 1989 S.C. Op. Atty. Gen. 96 (finding that otherwise private association receiving staff support and office space from another public body is receiving public funds and therefore subject to FOIA). The Caucus believes this argument is without merit, however, as the office space currently being occupied is nothing more that a *de minimis* use of public funds. In addition to the fact that it operates almost exclusively on private funds, the Caucus should likewise not be

considered a public body based on a strict interpretation of Section 30-4-20 of FOIA. Here it is instructive to note that although the term "legislative caucus" is separately enumerated and defined elsewhere in the South Carolina Code, *see* S.C. Code § 2-17-10(11) (defining a legislative caucus as *inter alia*, "a party or group of either 'a party or group of either house of the General Assembly based upon racial or ethnic affinity, or gender"), the term is altogether ignored in FOIA. The omission of legislative caucuses from the list of entities designated as public bodies under FOIA indicates that the General Assembly never intended to make organizations such as the Majority Caucus subject to FOIA. See generally *Penn. Natl. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554, 320 S.E.2d 458, 463 (1984) (holding that "[a] well-established rule of statutory construction is "*expressio unius est exclusio alterius*,' which means that the enumeration of particular things excludes the idea of something else not mentioned").

As a final note, the argument that caucus meetings should be open to the public pursuant to FOIA is contrary to the law in place in a majority of other states across the country. Currently, approximately thirty (30) out of fifty (50) states have established that their Sunshine laws do not apply either to meetings of their legislative caucuses or to meetings of their legislatures as a whole. As such, it is clear that a large number of states recognize the critical need for legislative caucuses to meet on occasion behind closed doors. Moreover, by doing so, these states implicitly recognize that the decisions reached during these caucus meetings are nonbinding on individual members and have no force and effect until such members actually register their vote in public on the House floor.

For these reasons, the Caucus asserts that it is not a public body under S.C. Code Section 30-4-20 and is therefore not subject to the open-meeting provision of FOIA.

In our opinion, the FOIA contains no "*de minimis*" threshold that an entity must meet in order to constitute a "public body." Thus, in our view, even though the support by public funds received by the Majority Caucus may be characterized as indirect, or even insignificant, it is, nevertheless, a "public body" for purposes of FOIA. Accordingly, the Caucus is subject to the FOIA.

Law / Analysis

The Freedom of Information Act (FOIA) was adopted in its present form by Act No. 593, 1978 Acts and Joint Resolutions and was amended by Act No. 118, 1987 Acts and Joint Resolutions. The Act's preamble best expresses both the Legislature's intent in enacting the statute, as well as the public policy underlying it. The preamble, set forth in § 30-4-15, provides as follows:

> [t]he General Assembly finds 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. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and fully report the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

On numerous occasions, in construing the Freedom of Information Act, we have emphasized the Legislature's expression of public policy as articulated in § 30-4-15. In *Op. Atty. Gen.*, Op. No. 88-31 (April 11, 1998), for example, we summarized the rules of statutory construction which this Office follows in interpreting FOIA as follows:

> [a]s with any statute, the primary objective in construing the provisions of the Freedom of Information Act is to ascertain and give effect to the legislature's intent. *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980). South Carolina's Freedom of Information Act was designed to guarantee to the public reasonable access to certain information concerning activities of the government. *Martin v. Ellisor*, 266 S.C. 377, 213 S.E.2d 732 (1975). The Act is a statute remedial in nature and must be liberally construed to carry out the purpose mandated by the General Assembly. *South Carolina Department of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). Any exception to the Act's applicability must be narrowly construed. *News and Observer Publishing Co. v. Interim Bd. of Ed. for Wake Co.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976).

See also, Evening Post Publishing Co. v. City of North Charleston, 363 S.C. 452, 611 S.E.2d 496 (2005) (FOIA exemptions are to be narrowly construed to fulfill the purpose of FOIA to guarantee the public reasonable access to certain activities of government).

By way of background, we note that a number of cases and other authorities elsewhere have addressed the question of whether a political party caucus is subject to that jurisdiction's Freedom of Information Act or its equivalent. *See*, *Cole v. State of Colorado*, 673 P.2d 345 (Colo. 1984); *Difanis v. Barr*, 83 Ill.2d 191, 414 N.E.2d 731 (1980); *News Journal Co. v. Boulden*, 1978 WL 22024 (Del. 1978) [unreported]; *Sciolino v. Ryan*, 103 Misc.2d 1021, 431 N.Y.S.2d 664 (1980); *Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 (1981); *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987). See also *Op. Mich. Atty. Gen.*, Op. No. 5298 (May 2, 1978); *Op. Va. Atty. Gen.*, Op. No. 03-063 (January 6, 2004). These have reached a variety of conclusions, based upon differing legal analyses. We will first briefly recount these authorities and their holdings.

In *Cole*, the Supreme Court of Colorado, in an *en banc* decision, concluded that legislative caucus meetings are "meetings" within the meaning of the Colorado Open Meetings Act. The Court noted that in Colorado, unlike a number of other states, "legislative caucuses have not been exempted from the Colorado Open Meetings Law." 673 P.2d at 348. Moreover, in the view of the Court,

> [w]hile a legislative caucus is not an official policy-making body of the General Assembly, it is, nonetheless, a "de facto" policy-making body which formulates legislative policy that is of governing importance to the citizens of this state. The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests. A citizen does not intelligently participate in the legislative decision-making process merely by witnessing the final tallying of an already predetermined vote. As a rule, these types of statutes should be interpreted most favorably to protect the ultimate beneficiary, the public .... We hold that legislative caucus meetings are "meetings" of policy-making bodies within the meaning of the Colorado Open Meetings Law and are therefore subject to the Open Meetings Law's requirement that "meetings" be "public meetings open to the public at all times."

Id. at 348-349. Thus, *Cole* held that a legislative caucus is a "de facto policymaking body" and is subject to Colorado's Open Meetings Law.

The Colorado Supreme Court in the *Cole* case also rejected the argument that the "long-standing practice of closing legislative caucus meetings is, in effect, a 'rule' ..." for purposes of the Colorado Constitution's provision that "[e]ach house shall have power to determine the rules of its proceedings ...." Thus, *Cole* disagreed with the contention that the Open Meetings Act could not constitutionally require caucus meetings to be subjected to the Act. In response to such argument, the Court reasoned as follows:

> [t]he Colorado Open Meetings Law is an initiated law adopted pursuant to Colo. Const. art. V, § 1. The Colorado General Assembly has amended the law as originally adopted. For example, in 1977, the Colorado General Assembly added section 24-6-402 (2.1), C.R.S. 1973 (1982 Repl. Vol. 10), which expressly exempts social meetings at which discussion of public business is not the central purpose. The Colorado General Assembly has, however, at no time sought to exempt legislative caucus meetings from the requirements of the Open Meetings Law, ... nor has either chamber of the General Assembly adopted a rule purporting to allow closure of caucus meetings. Both the Senate and the House of Representatives have accepted the Open Meetings Law's requirements as "rules' for governing their

> internal affairs We hold, therefore, that the Open Meetings Law does not conflict with Article V, section 12 of the Colorado Constitution.

Id at 349.

In *Difanis v. Barr, supra* the Supreme Court of Illinois held that a party caucus consisting of a majority of members of a city council constituted a violation of the Open Meetings Act. The Court concluded that the Act "is not intended to prohibit bonafide social gatherings of public officials, or truly political meetings at which party business is discussed. On the other hand, according to the Court, simply designating the gathering as "informal" or "nonlegislative," did not permit the Act to be circumvented when public business was discussed.

The New York Court's decision in *Sciolino v. Ryan, supra*, also involved the question of the applicability of the Open Meetings Law to meetings by a party caucus constituting the majority of a city council. A statute expressly exempted meetings of a "political caucus" from the State's Open Meetings Law. Because the Open Meeting's Law was involved, the Court interpreted the term "political caucus" narrowly as "a meeting for the purpose of conducting purely 'political,' as opposed to 'public' business." In the New York Court's view, "[i]f the majority members of a public body could turn a 'work session' or an 'agenda' session into a political caucus by the simple expedient of excluding the minority members, then the declared purpose of the legislature would be frustrated." 431 N.Y.S.2d at 668.

In *Abood v. League of Women Voters, supra*, the Alaska Supreme Court held that the question of whether members of the state legislature violated the Open Meetings Act by holding closed committee and caucus meetings was a nonjusticiable political question. In the Court's opinion, the State Constitution reserved to each house of the legislature the power to determine its own rules of procedure and thus placed the issue of whether or not the meetings of a legislative caucus should be open or closed exclusively in the hands of the Legislature. In the Alaska Supreme Court's view, [t]he question whether legislative business should be conducted in open or closed session which has traditionally been the subject of legislative rules. 743 P.2d at 337. Similarly, in *News Journal Co. v. Boulden, supra*, the Delaware Court of Chancery, in an unpublished decision, held that one legislature did not bind another, and thus "one General Assembly, by statute, [cannot] ... vest this Court with the authority to control the manner in which a subsequent General Assembly exercises the lawmaking power reposed solely in its by the Constitution."

In *Britt v. County of Niagara, supra*, the Court determined that "the contention of respondents that, the meetings of the Democratic legislators were not subject to the Open Meetings Law because they did not constitute meetings of the 'public body for the purpose of conducting public business' is without merit." In the Court's opinion, "[t]he statutory requirement of a quorum is paramount because the existence of a quorum at an informal conference or agenda session 'permits the crystallization of secret decisions to a point just short of ceremonial acceptance.'" 440 N.Y.S.2d

at 793. However, the Court concluded that in the instance in question, since a quorum of the Legislature was not present, the Act had not been violated.

With this body of case law from other jurisdictions in mind, we turn now to an examination of the South Carolina FOIA. Section 30-4-60 provides that [e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." A "meeting" is defined by § 30-4-20(d) as

> ... the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

See also, § 30-4-40 (records of "public body" open to the public unless exempted from disclosure). As noted above, § 30-4-20(a) defines a "public body" in pertinent part as

> ... 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, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known ....

With respect to application of the definition of "public body" as contained in § 30-4-20(a), the seminal case is our Supreme Court's decision in *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991). In *Weston*, the Court concluded that the Carolina Research and Development Foundation, an eleemosynary corporation, is indeed a "public body" for purposes of FOIA. *Weston* rejected any argument that a "private" corporation could not constitute a "public body" under the Freedom of Information Act.. The Foundation argued that the common law distinguished "between 'public' and 'private' corporations [and that such a distinction] overrides the clear language of the FOIA." 303 S.C. at 403. Notwithstanding the fact that under the common law a "private" corporation does not lose its private identity by virtue of the receipt of public funds, the Court concluded that such analysis was inapplicable to FOIA. The Court reasoned:

> ... the 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. It is "well settled that a legislative body has the power within reasonable limits to prescribe legal definitions of its own language, and when an Act passed by it embodies the definition, it is generally binding upon the Courts." *Windham v. Pace*, 192 S.C. 271, 283, 6 S.E.2d 270, 275 (1939). *See also, Bell*

> *Finance v. South Carolina Dept. of Consumer Affairs*, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988) (statutory definitions should be followed in interpreting the statute); *Fruehauf Trailer Co. v. South Carolina Electric Gas Co.*, 223 S.C. 320, 75 S.E.2d 688 (1953) (lawmaking body's construction of its language by means of definitions of the terms employed should be followed in the interpretation of the act to which it relates and is intended to apply).

303 S.C. at 404. Accordingly, the *Weston* Court made it clear that for purposes of whether or not an entity is a "public body" under FOIA, the fact that the entity or organization may be characterized as "private" is not controlling. Instead, the question is simply one of whether or not the entity or organization is "supported in whole or in part by public funds or [is] expending public funds."

As to that issue, the *Weston* Court determined that the Foundation had met the definition of a "public body" under FOIA in a number of ways. First, the Foundation accepted funds from the sale of the Wade Hampton Hotel by the University of South Carolina. Secondly, the Foundation accepted $16,300,000 in federal grant money on behalf of the University and managed the expenditure of these funds for the development of the Swearingen Engineering Center. Thirdly, the Foundation accepted a conveyance of land and a cash grant from the City of Columbia and a cash grant from Richland County, all for the development of the Koger Center. Finally, the Foundation accepted funds paid by private third parties in exchange for research performed by University employees. Examining these, the Court concluded:

> *[e]ach of the above transactions alone would bring the Foundation within the FOIA's definition of "public body".* Taken together, they lead to the unavoidable conclusion that the Foundation is a "public body". This conclusion is mandated by the clear language of the FOIA. The Foundation's argument that the FOIA only applies to governmental and quasi-governmental bodies would rewrite the statutory definition of "public body" by deleting the phrase, "or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds." According to the Foundation's position, a corporation that cannot be labeled governmental or quasi-governmental would be exempt from the FOIA, regardless of whether it received support from public funds or expended public funds. Such a construction would obliterate both the intent and the clear meaning of the statutory definition.

Id. at 403. (emphasis added).

Weston's comments concerning the grant obtained for the Swearingen Engineering Center are especially instructive. The Foundation argued that the "grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center at the University." Thus, the Foundation contended that it did not "directly" benefit from the public funds.

Notwithstanding this fact, however, the Supreme Court concluded that the Foundation did benefit indirectly because "... the Foundation used University personnel on University payroll in conjunction with the construction project. In addition, the Foundation clearly directed the expenditure of the funds it received." 305 S.C. at 402. Thus, *Weston* makes clear that the definition of a "public body" contained in FOIA - requiring an organization to be "supported in whole or in part by public funds or expending public funds" – does not necessitate a direct transmittal of public funds for the benefit of an entity. Indeed, *Weston* concludes that indirect support of the organization such as through the organization's use or the assistance of government resources (e.g. use of public employees on the governmental payroll whose primary task is their government responsibility) is sufficient to meet the "public body" requirement of FOIA.

Our opinions are in accord with *Weston's* analysis. As we have consistently noted, "... if the entity in question comes within the definition of 'public body,' the Freedom of Information Act is applicable." *Op. S.C. Atty. Gen.*, Op. No. 93-63 (September 10, 1993). In determining whether a particular entity is supported in whole or in part by public funds, or is expending public funds, we have rejected any argument that there is a certain threshold level of support of an entity by public funds. Likewise, we have concluded that there exists no "*de minimis*" exception to the Act's applicability for public funding which is indirect or insignificant. In our view,

> [w]hile the notion of "support" is not defined in the FOIA, the South Carolina Supreme Court has construed "support" 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. Stoker*, 133 S.C. 67, 130 S.E. 337, 339 (1925). What kind of support, or *how much, is needed to bring an entity under the FOIA is likewise not found in the FOIA*. Payment of incidental expenses of a committee established by a county legislative delegation to oversee an audit of the county school system from public funds, was arguably enough to bring that committee under the FOIA. *Op. Atty. Gen.* dated July 11, 1983. An ad hoc citizens' committee apparently totally supported (actually or "in kind") by public funds of some kind was felt to be subject to the FOIA. *Op. Atty. Gen.* dated September 21, 1989 .... See also *Op. Atty. Gen.* dated March 27, 1984 as to additional comments on "support" by public funds.

Op. S.C. Atty. Gen., Op. No. 92-01 (January 16, 1992) (emphasis added). In that same Opinion, we commented that "[p]ublic funds provided 'in kind" or via grants may well be sufficient to bring the entity under the FOIA." And, on March 17, 1995, in another Opinion, we stated that "[d]ue to the broad definition of 'public body' contained in the [Freedom of Information] Act, it is entirely possible that an entity could be subject to the Act without its members being public officers." What is important to keep in mind here is our statement in Op. No. 92-01 that FOIA simply does not attempt to delineate "[w]hat kind of support or how much, is needed to bring an entity under the FOIA ...."

Opinion No. 89-96 (September 21, 1989) is particularly instructive with respect to application of FOIA's "public body" definition. Such Opinion employs the same kind of broad reading of the "public body" definition as does *Weston*, and illustrates how so-called indirect or "in kind" use or provision of governmental resources can trigger the "public body" definition. "There, we addressed the question of the applicability of FOIA to the Charleston Harbor Estuary Citizens Committee, "an ad hoc group of individuals including representatives of state regulatory agencies, private businesses, municipal and county governments, and private citizens." Such organization was originally convened under the auspices of the South Carolina Sea Grant Consortium and Congressman Ravenel, using one time federal grant funds "to identify priority issues and concerns related to the Charleston Harbor Estuary." The Consortium provided meeting space and assisted with organizational aspects of the Committee's meetings. A staff member of the Consortium worked with the group. Expenses related to postage, printing, transportation, and accommodation were provided by the federal funds. We concluded that the Committee was supported in whole or in part by public funds, stating as follows:

> ... the Committee does not have a treasury, receives no direct monetary support, and does not expend funds. *"In kind" support is being furnished by means of the time of a staff member of the Sea Grant Consortium*, which entity also provides meeting space. Funds from EPA/NOAA are being used on behalf of the Committee by the Sea Grant Consortium to pay for postage, printing, and transportation and accommodations for speakers for Committee meetings. These expenditures of grant (i.e. public) funds on behalf of the Committee, while not expended by the Committee itself, do aid in the support of the Committee. Indeed, no other funds of which we are aware are expended by or on behalf of the Committee. It thus appears to this Office that the Committee is probably totally supported (actually or "in kind") by public funds of same kind. *Thus, the Committee probably would be subject to the terms of the Freedom of Information Act, though only a court could determine this issue conclusively.*

(emphasis added).

Other cases elsewhere are supportive of the conclusion reached in the 1989 Opinion. For example, in *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (2003), the Kansas Court of Appeals concluded that the use of state employees assigned to the Governor-Elect's Transition Office (GETO) was sufficient to trigger the "supported in whole or in part by public funds" requirement. The Court stated that

> [t]he stipulated facts indicate that BEST [Budget Efficiency Savings Team] volunteers received no compensation or reimbursement for their time, mileage, or anything else, other than minor refreshments. However, there were 12 state employees assigned to BEST pursuant to K.S.A. 75-134. The state employees

> continued to receive their salary while assisting BEST. This evidence is sufficient to establish the public funding requirements of ... [the Kansas Open Meetings Act] ....

78 P.3d at 492. Thus, employing the same analysis as *Weston* and the 1989 Opinion, the Court in *Sebelius* found that "indirect" support, through the use of government resources, was sufficient to trigger the "supported in whole or in part by public funds" requirement.

Moreover, in *Delaware Solid Waste Authority v. News Journal Company*, 480 A.2d 628 (Del. 1984), the Delaware Supreme Court concluded that the language "supported in whole or in part by public funds" contained no "*de minimis*" exception. There, the Court responded to the Solid Waste Authority's argument that the FOIA excused from coverage entities with *de minimis* public funding as follows:

> [t]he Authority's argument, that the appropriations received were *de minimis*, ignores the plain language of the Act. Section 10002(a)(1) specifically states "'public body' means any ... entity ... which: (1) is supported in whole or in part by public funds" .... This is an express provision conceived by the legislature to promote the policy interests underlying the Act and precludes specious *de minimis* arguments.

480 A.2d at 633. *See also, Op. S.C. Atty. Gen.*, November 3, 1980 ("If an organization is determined to be a 'public body' within the meaning of the act, then any meeting held by that body so long as it is a convening of a quorum of the constituent membership must be opened to the public unless the topic of the meeting fits within one of the statutory exceptions as defined in Section 30-4-70 ...."; members of Drug Formulary Advisory Committee are reimbursed for mileage and are paid a *per diem* and the Committee is thus a "public body" under the Act.); *Op. S.C. Atty. Gen.*, No. 91-42 (June 28, 1991) ("... we find it inescapable that a search committee screening candidates to fill a 'public figure' type of a position of a university would be supported by or expending public funds and thus subject to the Act."); *Del. Op. Atty. Gen.*, 02-IB-19, 2002 WL 31867895 (August 19, 2002) ("The host school district pays for the costs of the hotel conference room and food with public funds. It does not matter if these costs are *de minimis*. FOIA applies if the public body is supported 'in whole or in part by public funds.'").

Our Supreme Court's decision in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) also represents a good example of the Court's broad reading of the "public body" requirement of FOIA and is in keeping with the requirement that the Act must be liberally construed to effectuate the legislative purpose. In *Quality Towing*, the City Manager of Myrtle Beach created a review committee, consisting of City employees, but not City Council members, having prior experience with the local towing companies and knowledge of the procurement process. The Committee's purpose was to evaluate and assist the City Manager in determining which towing company should be awarded the bid to provide towing services to the City.

One of the questions before the Court in *Quality Towing* was whether the Committee was a "public body" and thereby subject to FOIA. It was argued that the fact that the City Manager, rather than City Council, formed the Committee and that no member of City Council served on the Committee was controlling and that the Committee thus was not a "public body." The Court rejected this distinction, however. In the words of the Court,

> [t]he fact that the City Manager, and not the City Council, created the Committee, and no council member served on the Committee, is not enough to remove the Committee from the definition of "public body" as stated in FOIA. First, it does not matter that members of the Committee are not members of the parent body. See 1984 S.C. Op. Atty. Gen. No. 84-281. Second, the Committee was set up to give advice to the City Manager, and ultimately the City Council. It is clear from the minutes of the City Council meeting and the testimony of Thomas Leath, City Manager, the Committee's selection process and recommendation went directly to the City Council. ...
>
> Furthermore, the legislature amended the definition of "public body" in 1987 by adding the phrase "including committees, subcommittees, advisory committees, and the like of any such body by whatever name known." Clearly, the legislature intended for "advisory" bodies, such as the Committee set up by the City Manager to advise him and the City Council, to be covered by the definition.
>
> Finally, the Committee was formed to help determine the award of a City contract. This contract entailed the expenditure of public funds. Because the Committee was not open to the public, Quality was unable to learn its bid had been termed non-responsive and to respond to the Committee's concerns. The Committee made its decision to recommend Auto Body Works to the City in secret. FOIA was enacted to prevent the government from acting in secret. *South Carolina Tax Comm'n. v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994). In addition, the City has advanced no valid reason to hold the meetings and discussions of the Committee concerning a public contract in private. This kind of secret determination is exactly what FOIA was designed to prevent.
>
> The City also argues the Committee was not performing a "government function," but rather a proprietary or business function", and therefore is not subject to FOIA. See 1984 S.C. Op. Atty. Gen. No. 84-64 (only a committee performing a governmental function [is] subject to FOIA). The special referee agreed with the City, finding the function performed by the Committee was proprietary in nature. We find a committee formed to give advice to a public body or official is performing a government function. See *MFY Legal Services, Inc. v. Toia*, 93 Misc.2d 147, 402

> N.Y.S.2d 510 (N.Y. Sup. Ct. 1977) (the giving of advice to a public body or official is a government function).
>
> We hold the plain language of section 30-1-20(a) clearly includes an "advisory committee" such as the one set up in the instant case.

345 S.C. at 162-163.

We turn now to the specific situation of FOIA's applicability to the House Majority Caucus. Majority Leader Merrill argues in his letter that the House Majority Caucus "is not supported by public funds and is thus not a public body." He notes that the Caucus is a "dues-paying organization" whose operating funds are all "raised through private donation." He further urges that "the Caucus officers ... (who are House members) occupy the same office space and use the same phone lines, computers, and furniture that is allocated to any other House members." In his view, "the Caucus exists almost exclusively as a result of its ability to raise private funds." At most, it is argued, based on the fact that the three staff assistants employed by the Caucus and who are stationed in the Blatt Building and have their office space provided by the State free of charge, the Caucus is "receiving public funds as a result of this free use of office space ...." Representative Merrill contends, however, that "the office space currently being occupied is nothing more than a *de minimis* use of public funds."

We must respectfully disagree. As noted above, we have previously concluded that FOIA contains no provision exempting support of an entity through public funds when such support might be characterized as "*de minimis*" or insignificant. Indeed, the language of the statute is phrased "in whole or *in part* ...." Based upon the literal text of the statute, *any expenditure of public funds* is sufficient to meet the requirement of "in part" support or the "expend[ing] public funds" portion of the statute. Here, Majority Leader Merrill notes that three staff members of the Caucus are receiving office space in the Blatt Building rent-free. That, in itself, in our view, meets the requirements of the Act. Moreover, according to Representative Merrill's letter, the Caucus is using space, equipment and other resources provided to those members generally. While it is true that these are resources received as a result of House membership, the fact that the Caucus is also obtaining access to these resources is a further indicia of the "support" the Caucus receives from public funds. Finally, it is our understanding that other House staff personnel from time to time assist the Caucus. The salaries of these employees are not paid by Caucus funds, but by the State. This was a basis for the conclusion that there existed public funds "support" in *Weston*, our 1989 opinion, and *Sebelius*. We do not believe the Freedom of Information Act attempts to draw a quantitative line between "insignificant" or "*de minimis*" support and substantial or significant support from public funds. Accordingly, we are of the opinion that the House Majority Caucus is supported in whole or in part by public funds and is expending public funds. Thus, the Caucus is, in our view, a "public body" and is, therefore, subject to the South Carolina Freedom of Information Act.

While Representative Merrill argues in his letter that the term "caucus" is not enumerated as one of those entities included in the definitions of "public body" in the FOIA, such omission by the Legislature is not significant, in our view. The Supreme Court has made clear (in cases such as *Quality Towing, supra*) that the Freedom of Information Act must be broadly construed to effectuate the Legislature's purpose of openness in government. Thus, the Legislature's failure to enumerate political caucuses does not mean that such entities were not intended to be included within the term "public body." In other words, in our view, the rule of construction *expressio unius est exclusio alterius* (the enumeration of particular things excludes the idea of other things not mentioned) is inapplicable here. To the contrary, inclusion within the FOIA's reach could well be one reason other state legislatures have expressly exempted caucuses from those states' version of the Freedom of Information Act.

Indeed, the Supreme Court of Illinois, in *Difanis, supra*, noted that the legislative policy of openness dictated that the omission of caucuses from the exemptions required the Court to construe the Act as including such entities. The Court reasoned that "[t]his clearly enunciated public policy [of openness] would be poorly served were we to carve out exceptions other than those expressly stated in the Act ... for political caucuses where, as here, public business was deliberated and it appears that a consensus was reached outside of public view." 414 N.E.2d at 734. Our own General Assembly has, over the years, expressly exempted certain entities and organizations from the applicability of the FOIA when such an exclusion was deemed warranted by public policy. See, e.g. § 20-7-5960 (State Child Fatality Advisory Committee's records acquired are exempt from FOIA); § 42-3-195 (information and statistics provided pursuant to this section are exempt from disclosure pursuant to FOIA); § 46-25-210 ("For homeland security purposes, identifying information relating to the holder of a general or restricted fertilizer permit is exempt from disclosure under the Freedom of Information Act.") Thus, we do not view those items listed in the definition of a "public body" in § 30-4-20(a) of the FOIA to be exclusive or all-encompassing. See, *Baker v. Chevis*, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991) (Legislature's use of word "including" or "includes" is not a limitation to those items listed in the statute).

Further, while the argument that other states (30 out of 50) "have established that their Sunshine laws do not apply either to meetings of their legislative caucuses or to meetings of their legislatures as a whole [makes it] ... clear that a large number of states recognize the critical need for legislative caucuses to meet on occasion behind closed doors" may well be true, it also illustrates the need for such express exemption in order to accomplish making FOIA inapplicable to a particular entity. As stated above, exceptions to FOIA must be construed very narrowly. *Evening Post Publishing Co. v. City of Chas., supra.* And even where such express exception exists, some courts have interpreted the exception as being inapplicable when the caucus discusses public business. See e.g. *Sciolino v. Ryan, supra* (the term "political caucus" is interpreted as a "meeting for the purpose of conducting purely 'political' as opposed to public business.").

In addition, the fact that any decision reached in such caucus meetings is purely advisory and is "non-binding on individual members" when they vote on the floor likewise has been rejected. In *Quality Towing, supra*, our Supreme Court held that the giving of advice "to a public body or official is performing a governmental function." 345 S.C. at 163. Moreover, in *Cole v. State, supra*, the Colorado Supreme Court noted that "[w]hile a legislative caucus is not an official policy-making body of the General Assembly," and its members are not "compelled to vote on the floor in conformity with the vote of the majority at caucus," such caucus, nevertheless, performs a governmental function, by exercising the power of persuasion upon fellow members.

It is also noted in Representative Merrill's letter that although the term "legislative caucus" is separately defined elsewhere in the South Carolina Code, see S.C. Code § 2-17-10(11) (defining a legislative caucus as "a party or group of either house of the General Assembly based upon racial or ethnic affinity or gender"), such term is "altogether ignored in FOIA." We have already addressed the omission of legislative caucuses in the FOIA as not being significant. However, it is also instructive that the definition of "legislative caucus" contained in § 2-17-10(11) is applicable for purposes of South Carolina's laws regulating lobbyists. The term (as defined by § 2-17-10(11)) is used in § 2-17-90(A). Such provision prohibits a lobbyist principal from offering, soliciting, facilitating or providing a public official with food, meals, beverages, etc. and also prohibits the public employee from acceptance thereof. An exception is contained in § 2-17-90(A)(1) which reads in pertinent part as follows:

> (1) as to members of the General Assembly, a function to which a member of the General Assembly is invited if the entire membership of the House, the Senate, or the General Assembly is invited, or one of the committees, subcommittees, joint committees, *legislative caucuses* or their committees or subcommittees, or county legislative delegations of the General Assembly of which the legislator is a member is invited.

(emphasis added). In our opinion, it is noteworthy that the General Assembly has, by statute, treated legislative caucuses similarly to legislative committees, subcommittees, joint committees or county legislative delegations for purposes of these lobbying provisions. Even more striking is the fact that § 2-17-10(11) defines a legislative caucus in part as "*a committee* of either house of the General Assembly controlled by the caucus of a political party or a caucus based upon racial or ethnic affinity, or gender...." (emphasis added). Thus, it would appear that the Legislature itself recognizes a legislative caucus in certain instances to be a "committee of either house...."

For all these reasons, we believe the House Majority Caucus is a "public body" for purposes of FOIA and is thus required to comply with FOIA.

Of course, if it so desires, the General Assembly may do as many other state legislatures have done, by enacting legislation to exempt political party caucuses from FOIA. Such exemptions may

well be narrowly construed, however, as was the case in *Sciolino, supra*, in order to insure that if the majority membership of either house is present and discusses public business in a political caucus meeting, FOIA will be deemed applicable.

We point out also that courts in other jurisdictions have concluded that a legislative rule exempting caucuses from FOIA is within the power of either branch of the Legislature pursuant to its authority to make rules under the Constitution. *See also, Culbertson v. Blatt*, 194 S.C. 105, 9 S.E.2d 218, 220 (1940) ("... it is not within the power of this Court to impinge upon the exercise by the Legislature of a power vested in that body ...."); *Op. S.C. Atty. Gen.*, November 15, 1976 ("The South Carolina courts have recognized that the power of the House of Representatives to determine the rules of procedure is absolute and beyond challenge of any other body or tribunal if the rule adopted does not ignore constitutional restraints or violate fundamental rights, and there is a reasonable relation between mode or method of procedure established by rule and result which is sought to be obtained."). Citing *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936). Based upon these authorities, if such a rule exempting caucuses from FOIA were to be adopted by the House, it is probable that our courts would defer to such rule pursuant to Art. III, § 12 of the South Carolina Constitution ("Each house shall ... determine its rules of procedure. ...").

Conclusion

It is our opinion that the Majority Caucus is subject to the Freedom of Information Act. In our view, the Majority Caucus is supported in whole or in part by public funds and is expending public funds. Thus, the Majority Caucus is a "public body" for purposes of FOIA and is governed by the requirements of the Act.

Such a conclusion is not dependent upon the Majority Caucus gathering in sufficient numbers to constitute a quorum of the entire House of Representatives. While in this situation, the Majority Caucus members constitute a majority of the House, and we have concluded that a social gathering of a majority of membership in certain circumstances may constitute a "meeting" of the "public body," *Op. S.C. Atty. Gen.*, Op. No. 83-55, (August 8, 1983), it is our opinion that the Majority Caucus is itself a "public body" for purposes of FOIA. *See, Weston v. Carolina Research and Development Foundation, supra.*

The Freedom of Information Act requires that the Act be broadly construed and that any exceptions be narrowly interpreted. *Evening Post Publishing Co. v. City of North Charleston, supra.* We have concluded on numerous occasions in the past that this rule of liberal interpretation is controlling in any interpretation of FOIA. In this same regard, we have construed FOIA as having no "*de minimis*" requirement, such that a certain minimum level of public funds must support or be expended by an entity before FOIA is applicable. Our Supreme Court, in the *Weston* case, as well as decisions in other jurisdictions, and our own opinions, have recognized that "indirect" or "in kind" public funding, such as by virtue of an entity's use of public employees or governmental resources,

is sufficient to invoke FOIA. In our view, the Freedom of Information Act does not draw a quantitative line between "insignificant" or *de minimis* support and substantial or significant support from public funds.

In this instance, as Representative Merrill's letter indicates, the employees of the Majority Caucus are using office space rent free. Moreover, the Caucus is supported by publicly funded equipment and space. Any argument that there is no support by public funds in the Caucus' use of this equipment and space because these resources may be used by House members in their capacity as members is unavailing. Use of this same equipment and space for Caucus purposes, as opposed to legislative purposes, must necessarily be considered as additional "support" by public funds. Inasmuch as FOIA contains no "*de minimis*" public funding requirement, we conclude herein that such funding, as indicated above, triggers applicability of the Freedom of Information Act.

As discussed herein, the Legislature may, if it so desires, provide for an exemption for caucuses by statute as other states have done. Furthermore, courts have deferred to such exemptions by rule of either house pursuant to that house's constitutional power to make rules. Cases decided by our Supreme Court indicate that our Court would so defer to a legislative rule as well.

Accordingly, we believe FOIA is applicable here, thereby subjecting the Majority Caucus to the Act in its entirety.

Yours very truly,

Henry McMaster

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