



ALAN WILSON  
ATTORNEY GENERAL

July 19, 2013

Henry E. Kodama, State Forester  
S.C. Forestry Commission  
P. O. Box 21707  
Columbia, South Carolina 29221

Dear Mr. Kodama:

Attorney General Alan Wilson has referred your letter of March 26, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

**Issues:** As quoted from your letter:

- 1) *Whether any of the planned actions in the MOU [memorandum of understanding between the American Forest Foundation and the S.C. Forestry Commission] or scope of work constitute "commercial solicitation" as defined in the Family Privacy Protection Act [found in S.C. Code Section 30-2-50] or otherwise violates this law.*
- 2) *The SCFC [S.C. Forestry Commission] and AFF [American Forest Foundation] prefer to implement the Opt-out messaging strategy as it has proven to yield the best results in other states. Are there legal liabilities associated with this strategy? Does the opt-in strategy effectively mitigate any of the legal liabilities?*
- 3) *Are there any other State laws that would impact the implementation of this project?*

**Short Answers:**

- 1) With respect to your first question, this Office believes it is likely a court would find that at least initial communication with landowners currently enrolled in the S.C. Forestry's Commission's Forest Stewardship Program regarding the further benefits and advantages of an opportunity for free enrollment in the American Forest Foundation would be acceptable as a part of authorization for the S.C. Forestry Commission pursuant to S.C. Code Section § 48-23-90, et al. (1976 Code, as amended) rather than commercial solicitation in S.C. Code Section 30-2-10, -50, et al. as long as the S.C. Forestry Commission ensures such communications are in accord with its statutory authorization.<sup>1</sup>
- 2) - 3) While the S.C. Forestry Commission may have authorization to enter into contracts and other legal agreements, your questions regarding legal liabilities and review of your memorandum of

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<sup>1</sup> Additionally, any such communication from the S.C. Forestry Commission would be exempt separately if the Commission is exempt as a local governmental entity of a subdivision of this state or local government (pursuant to S.C. Code § 30-2-50 (E)).

understanding and scope of work involve questions of legal advice more than the request of a legal opinion and would be outside the scope of an opinion request.

**Law/Analysis:**

Your letter states that the S.C. Forestry Commission met concerning third party certification systems and determined an increase in the amount of wooded acres certified in South Carolina would be of benefit to South Carolina. By way of background, it is this Office's understanding there are only three primary national woodland certification systems currently recognized in the United States: the Forest Stewardship Council, the Sustainable Forestry Initiative, and the American Tree Farm System®. See Wikipedia, Tree Farm, <http://en.wikipedia.org/wiki/Treefarm> (American Tree Farm System) (as of June 27, 2013); S.C. Code § 48-23-205(B)(3) (1976 Code, as amended). South Carolina Forestry Commission has a Forest Stewardship Program (FSP) which assists qualified private landowners in managing their forests. In regards to the primary woodland certification systems across the United States, as quoted from your letter, you say:

*One such certification system is the American Tree Farm System (ATFS) which is a program of the American Forest Foundation (AFF), a 501(c) (3) nonprofit organization. Other states have successfully partnered with AFF [American Forest Foundation] to certify large amounts of private forestlands in their states using landowners enrolled in their Forest Stewardship Program as a pool of potential candidates. The [S.C.] Forestry Commission has met with AFF [American Forest Foundation] and wishes to promote the certification of landowners within our Forest Stewardship Program via the ATFS [American Tree Farm System] program. A scope of work and a draft memorandum of understanding (MOU) between the organizations have been created.... However, during our review of legal responsibilities associated with the privacy of personal information collected by the Forestry Commission, it became unclear as to what liabilities and limitations the Family Privacy Protection Act of 2002 (Title 30, Chapter 2) places upon the agency and/or AFF in regard to the distribution and use of "personal information" related to this endeavor. Specifically, we are unclear as to how SC Code 30-2-50 may apply to authorized uses as outlined in the MOU. It should be noted that currently AFF does not charge for certification under the ATFS program. However, they do request donations periodically, and they are considering future membership fees. ...*

1) According to the Family Privacy Protection Act, South Carolina Code Section 30-2-50 states that:

(A) A person or private entity shall not knowingly obtain or use any personal information obtained from a state agency for commercial solicitation directed to any person in this State.

(B) Each state agency shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

(C) All state agencies shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.

(D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both.

(E) This chapter does not apply to a local governmental entity of a subdivision of this state or local government.

(emphasis added). “Commercial solicitation” is defined as:

contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service. “Commercial solicitation” does not include contact by whatever means for the purpose of:

- (a) offering membership in a credit union;
- (b) notification of continuing education opportunities;
- (c) selling or marketing banking, insurance, securities, or commodities services provided by an institution or entity defined in or required to comply with the Federal Gramm-Leach-Bliley Financial Modernization Act, 113 Stat. 1338; or
- (d) contacting persons for political purposes using information on file with state or local voter registration offices.

S.C. Code § 30-2-30 (3).

Any such communication from the S.C. Forestry Commission would be exempt from the Family Privacy Protect Act if the Commission is exempt as a “local governmental entity of a subdivision of this state or local government” (pursuant to S.C. Code § 30-2-50 (E)). As this Office previously opined:

With respect to your question as to whether the Family Privacy Protection Act of 2002 applies only to state agencies, it is my opinion that the Act is so limited. Section 30-2-20 makes reference to “[a]ll state agencies, boards, commissions, institutions, departments and other entities....” (emphasis added). Under the doctrine of ejusdem generis, when general words follow the enumeration of particular classes or subjects, the general words should be construed as limited only to those of the general nature or class enumerated. State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980). It is evident that the “other entities” referenced in the foregoing passage refers to “state entities.” Indeed, the definition of “legitimate public purpose,” contained in § 30-2-30(2), makes reference to “other state entity.”

Moreover, § 30-2-40(A) refers to “[a]ny state agency, board, commission, institution, department or other state entity....” (emphasis added). Subsection (C) states that “[a]ll state agencies shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.” (emphasis added). While it is true that subsection (B) requires “[e]very public body” to “provide a notice to all requestors of records under this chapter....,” such language must be read consistently with the other referenced provisions each of which applies only to “state” agencies, departments, etc. Thus, it is my opinion that the “Family Privacy Protection Act of 2002” applies only to State agencies and entities.

That being the case, the Act clearly would not apply to RMC offices or clerks of court offices which maintain deeds and other title information. Such are county offices. See, Op. Atty. Gen., Op. No. 87-58 (June 11, 1987) [RMC is a county office]; Op. Atty. Gen., August 2, 2002 [clerk of court is a county officer]. In fact, the Act does not apply to political subdivisions at all.

Op. S.C. Atty. Gen., 2002 WL 31341817 (September 17, 2002). S.C. Code § 30-2-40(A) says:

(A) Any state agency, board, commission, institution, department, or other state entity which hosts, supports, or provides a link to page or site accessible through the world wide web must clearly display its privacy policy and the name and telephone number of the agency, board, commission, institution, department, or other state entity person responsible for administration of the policy.

Based on the delineation as “any state agency, board, commission...” under the Family Privacy Protection Act of 2002, the S.C. Forestry Commission would most likely be considered a subdivision of a state agency and therefore would not likely be exempt from the Family Privacy Protection Act. Id.

However, even if the S.C. Forestry Commission is not exempt from the Family Privacy Protection Act of 2002 as a state commission, it is likely a court may still find the communication is authorized otherwise. Therefore, let us look to the enabling statute of the Forestry Commission. Specifically, the duties of the S.C. Forestry Commission read:

The Commission shall inquire into and make an annual report to the General Assembly upon the forest conditions in the State, with reference to the preservation of forests, the effect of the destruction of forests upon the general welfare of the State and other matters pertaining to the subject of forestry and tree growth, **including recommendations to the public generally as to reforestation.**

It shall take such action and afford such organized means as may be necessary to prevent, control and extinguish fires, including the enforcement of any and all laws pertaining to the protection of the forests and woodlands of the State.

**It shall give such advice, assistance and cooperation as may be practical to private owners of land and promote, so far as it may be able, a proper appreciation by the public of the advantages of forestry and the benefits to be derived from forest culture and preservation.**

It shall cooperate with the Federal Government in the distribution of funds allotted to the State for forestry purposes and shall assist in the enforcement of all laws pertaining thereto. It shall have the control of the expenditure of all funds received by it.

S.C. Code § 48-23-90 (1976 Code, as amended) (emphasis added). As stated above, this Office believes a court would be likely to find initial communication with landowners currently enrolled in the S.C. Forestry's Commission's Forest Stewardship Program regarding further benefits and advantages of an opportunity for free enrollment in the American Forest Foundation would be acceptable as a part of authorization for the S.C. Forestry Commission pursuant to S.C. Code Section § 48-23-90, et al. (1976 Code, as amended) rather than commercial solicitation in S.C. Code Section 30-2-10, -50, et al. as long as



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the S.C. Forestry Commission ensures such communications are in accord with its statutory authorization. Nevertheless, please be aware that based on the definition of commercial solicitation (as quoted above), it is possible engaging in such enterprise via a private corporation or having the corporation use your mailing lists (regardless of how charitable the purpose is) could fit under commercial solicitation, especially if the private corporation gives out its mailing list to third parties, as the information attached to your letter suggests is possible. S.C. Code § 30-2-30 (3) & § 30-2-50 (A).

2) As far as the other issues in your letter, this Office would urge caution. The State Forester and the chairman of the Forestry Commission also have authorization to enter into contracts, deeds and mortgages in order to carry out any provisions in Chapter 23, where it states:

Whenever it shall become necessary to execute deeds, mortgages or contracts to carry out any of the provisions of this chapter the Commission may, by resolution duly adopted, delegate the execution and delivery of any such documents to the chairman of the Commission and the State Forester. Such instruments shall be executed in the name of the State Commission of Forestry, shall be signed by the chairman and by the State Forester and, in case of deeds or mortgages, shall be witnessed and probated as required by law. Such instruments, when so authorized by resolution of the Commission, executed as above set out and delivered, shall be in all respects the acts of the State Commission of Forestry and shall be binding upon it as fully as if executed by the members of the Commission themselves.

S.C. Code § 48-23-170. However, your questions regarding legal liabilities and review of your memorandum of understanding and scope of work involve questions of legal advice more than the request of a legal opinion and would be outside the scope of an opinion request. This agency is not a fact-finding agency. This Office only issues legal opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)); et al.

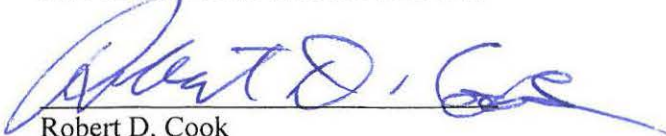
**Conclusion:** While it is likely the S.C. Forestry Commission may be authorized by statute to contact members of its programs while remaining outside the scope of commercial solicitation, this Office would urge caution in doing so. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General