



ALAN WILSON
ATTORNEY GENERAL

June 21, 2018

Director Leesa M. Aiken
South Carolina State Library
1500 Senate Street
Columbia, SC 29201

Dear Director Aiken:

We received your request seeking an opinion on certain questions related to the disposition of funds collected by a local "Friends of the Library" nonprofit organization and control over the construction of a local library. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your extensive letter describes a series of events in great detail, and you included several additional attachments which expand upon that description. Based on these materials, we understand that the essential background facts may be summarized in this way:

You were contacted in 2016 by the director of the Allendale-Hampton-Jasper Regional Library concerning the completion of new public library in Hardeeville, SC. A certain nonprofit organization, Friends of the Library, Inc. (hereinafter the "Friends"), had raised funds with the apparent intent that the funds benefit the public library.¹ Questions arose concerning the disposition and management of those collected funds, but the Friends declined to produce an accounting to the director. Shortly thereafter, the Friends announced that it voted to distribute what it represented to be all available funds (together with title to a tract of land) to the City of Hardeeville and also announced that it had voted to disband.²

We reiterate that the factual synopsis set out above is a summary of the facts presented in your letter. This Office consistently has recognized that, unlike a court, our Office cannot adjudicate factual disputes or make independent findings of fact in an opinion. *See, e.g., Op. S.C. Att'y Gen.*, 2003 WL 21108489 (May 5, 2003).

¹ It appears that dozens of such organizations exist throughout South Carolina. *See* www.foscl.org/Groups.html.

² As of this writing it appears that Friends of the Library, Inc. is still organized as a South Carolina Nonprofit Corporation and listed as in "Good Standing" on the website of the South Carolina Secretary of State. <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/89eee81f-b0c9-4309-a81e-4e15ad8f70c4>.

In light of this factual background, you ask us to opine on three questions, which we have edited slightly for clarity:

1. Whether funds and property collected on behalf of the public library by the Friends nonprofit organization belong solely to the public library for which they were collected and should be turned over to the public library directly.
2. Whether the Chief Librarian can request at any time a balance of accounts held by the Friends nonprofit organization, to include a transaction history.
3. Whether decisions regarding purchases and furnishings for the public library are at the sole discretion of the Chief Librarian, and should not be dictated by anyone else including other public officers or political subdivisions.

This opinion will address your questions in turn.

Response:

1. Whether funds and property collected on behalf of the public library by the Friends nonprofit organization belong solely to the public library for which they were collected and should be turned over to the public library directly.

Due to the fact-specific nature of this question, our Office cannot answer it definitively without examining the articles of incorporation and bylaws of the nonprofit organization, and any such undertaking likely would exceed the proper scope of an opinion of this Office. As noted above, this Office consistently has recognized that, unlike a court, our Office cannot adjudicate factual disputes or make independent findings of fact in an opinion. *See, e.g., Op. S.C. Att'y Gen.*, 2003 WL 21108489 (May 5, 2003) (internal citations omitted). However, in order to be as responsive as possible to your question we will discuss certain provisions of South Carolina law which appear to be relevant to its resolution.

Nonprofit corporations are governed both by general law, such as the South Carolina Nonprofit Corporation Act, and by their articles of incorporation and bylaws. *See Op. S.C. Att'y Gen.*, 2017 WL 569543 (January 3, 2017). These articles and bylaws may set out any number of provisions which are not contrary to state law. *Op. S.C. Att'y Gen.*, 2006 WL 2593078 (August 2, 2006).

Generally, donations made to a charitable nonprofit corporation may be used in any way consistent with state law and not contrary to a provision its articles or bylaws. *Op. S.C. Att'y Gen.*, 2006 WL 2593078 (August 2, 2006); *see also* S.C. Code Ann. § 33-31-302(13) (2006) (setting out the power of a nonprofit corporation to make donations for certain particular purposes); *cf. Turbeville v. Morris*, 203 S.C. 287, 26 S.E.2d 821, 825 (1943) ("[I]f a donation is made to a charitable or religious institution by which there is created no trust inconsistent with

that in general use, it will be presumed that the grantor intended the property to be applied to the usual use and to the usual trust.") (citing *Wilson v. Presbyterian Church of John's Island*, 19 S.C.Eq. 192, 2 Rich.Eq. 192). We hasten to note here that factual differences can result in substantially different outcomes in cases challenging the propriety of a particular action by a nonprofit organization. *Op. S.C. Att'y Gen.*, 2006 WL 2593078 (August 2, 2006). As an example, we quote here from our August 2, 2006 opinion where we were asked to opine on the propriety of a donation by a nonprofit, the Optimist Club, to an organization referred to as Security Blanket:

We presume a court would look to the nonprofit corporation's articles and bylaws to determine its purpose. We do not have access to this information for the Optimist Club. In addition, we do not have information as to Security Blanket's purpose. Therefore, we cannot comment on whether the Optimist Club's decision to allocate its funds to Security blanket serves the Optimist Club's purpose. However, presuming the donation of funds to Security Blanket serves the purpose of the Optimist Club, under the general provisions of the Nonprofit Corporation Act such a donation is within the Optimist Clubs powers. However, if the Optimist Club's articles of incorporation limit or exclude this power or if by donating such funds to Security Blanket, the Optimist Club is acting outside of the scope of its purpose, a court may deem the Optimist Club's actions as ultra vires.

Id. Other prior opinions of this Office also have declined to provide specific answers to questions similar to this one while also setting out relevant points of law. *See, e.g., Op. S.C. Att'y Gen.*, 2010 WL 440994 (January 11, 2010). In order to be as responsive as possible to your question, however, we have included with this opinion two other prior opinions of this Office (including the opinion quoted above) which set out general principles of law which might be relevant to a court faced with the question you present: *Ops. S.C. Att'y Gen.*, 2006 WL 2593078 (August 2, 2006); 2010 WL 440994 (January 11, 2010).

2. Whether the Chief Librarian can request at any time a balance of accounts held by the Friends nonprofit organization, to include a transaction history.

Because this question also requires fact-specific determinations, our Office cannot answer this question definitively for the reasons set out in response to Question 1 above. As above, however, we will set out general principles of law which likely would be relevant in the resolution of this question before a court. Of course, while any person may make a request of a nonprofit organization, we understand the question is whether a chief librarian may compel an accounting of funds as an inherent power of the position.

The powers and duties of a chief librarian are set out in Section 4-9-36(1) of the South Carolina Code. Our Office has opined in the past on the responsibilities of the chief librarian, and we quote at length from that opinion here for its summary of the law:

[S]ections 4-9-35 *et seq.* of the South Carolina Code (1986 & Supp. 2007) govern the establishment and operation of county public library systems. Section 4-9-35 of the South Carolina Code (1986) allows counties to create a public library system by ordinance, but provides that these systems are to be controlled and managed by a board of trustees and that the ordinance creating the system must be "consistent with the provisions of this section" Section 4-9-36 of the South Carolina Code (1986) governs the duties of the boards of trustees. This provision states, in pertinent part:

The board as provided for in § 4-9-35 shall be authorized to exercise powers as to the policies of the county library which shall not be inconsistent with the general policies established by the governing body of the county, and pursuant to that authority shall be empowered to:

(1) Employ a chief librarian whose qualifications and credentials shall meet the certification requirements of the State Library Board, and who shall be responsible to the county library board for the administration of the program and the selection of library staff members required to carry out the functions of the library system.

Op. S.C. Att'y Gen., 2008 WL 3198122 (July 11, 2008) (quoting S.C. Code Ann. § 4-9-36 (1986)). In summary, a chief librarian has two express responsibilities under South Carolina law: "administration of the [library] program and the selection of library staff members." *Id.* While the chief librarian clearly is charged with the authority to administer the county library program, we do not see any indication in the text of that statute that the Legislature intended for a chief librarian to have any authority beyond that program. *See* § 4-9-36. For this reason, we believe that a court most likely would conclude that a chief librarian does not derive from Section 4-9-36(1) any statutory authority over a nonprofit corporation where the corporation operates independently of the county library and as a separate legal entity. *Cf. Creech v. S.C. Public Service Authority*, 200 S.C. 127, 20 S.E.2d 645, 653 (1942) ("[Courts] cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself."). Accordingly, any statutory authority of a chief librarian to obtain an accounting would have to be derived from some other provision of the South Carolina Code.

The South Carolina Nonprofit Corporation Act contains several provisions related to access to records; however, with the exception of the Office of the Attorney General, it appears that each of these statutes speaks to the rights of members, not third parties. For example, Section 33-31-1601 (titled "Corporate records") requires that a corporation keep a copy of certain specific records at its principal office, which include "the financial statement furnished for the past three years under Section 33-31-1620." S.C. Code Ann. § 33-31-1601(e)(5) (2006). Section 33-31-1602 establishes the right of a member of the nonprofit corporation "to inspect and copy" those statements and other "accounting records of the corporation." S.C. Code Ann. § 33-31-1602 (2006). However that Section does not extend that right to anyone other than a member of the nonprofit, or their agent or attorney pursuant to Section 33-31-1603. *Id.*; S.C. Code Ann. § 33-31-1603 (2006). The Nonprofit Corporation Act takes a similar approach in Section 33-31-1620 which mandates that "a corporation upon written demand from a member or the Attorney General shall furnish the demanding party its latest annual financial statements." S.C. Code Ann. § 33-31-1620(a) (2006) (emphasis added). We are not aware of any provision in the Nonprofit Corporation Act which expressly gives the intended beneficiary of charitable funds the right to review the accounting records of the nonprofit corporation raising those funds when the beneficiary is a "legal stranger" to the corporation. We reiterate that the question here requires a fact-specific determination because of the flexibility that a nonprofit corporation has in writing its bylaws, and this opinion should not be construed to say that bylaws could not be written so as to give an intended beneficiary the right to some accounting. *See* S.C. Code Ann. § 33-31-206(b) (2006) ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.").

In summary, as of the date of this opinion this author's research has not identified any statutory provision that would give, solely by virtue of the position alone, a county-level chief librarian the power to compel a private nonprofit corporation to produce an accounting of funds collected. Additionally, a hypothetical power of a public employee to compel the production of an accounting of funds collected and held by a private entity likely would be an exercise of the police power, which is one of the sovereign powers traditionally exercised by officers of the state. *Cf. Op. S.C. Att'y Gen.*, 2004 WL 1297823 (June 7, 2004) ("[A]fter reviewing the specific job description for the position of Investigator II, it is the opinion of this Office that the investigator performs actual investigative work on behalf of the state and thus exercises a portion of the state's police power."). Conversely, in 1983 a prior opinion of this Office concluded that a county-level Chief librarian most likely was an employee only and not a public official because "the duties given a chief librarian do not require the exercise of the sovereign power of the State." *Op. S.C. Att'y Gen.*, 1983 WL 181800 (March 16, 1983). For these reasons, we believe that a court faced with this question would conclude that the powers of a county-level chief

librarian do not include an inherent power to compel an accounting of funds by a private nonprofit corporation.

However, Section 33-31-1030 does expressly empower the South Carolina Attorney General to investigate nonprofit corporations organized under the Nonprofit Corporation Act. S.C. Code Ann. § 33-31-1030 (2006); *see also Op. S.C. Att'y Gen.*, 2017 WL 569543 (January 3, 2017) (discussing the extent and use of the power of the Attorney General to investigate nonprofit corporations). A copy of this opinion and the documents you sent to us have been referred to our Civil Division for review and consideration.

3. Whether decisions regarding purchases and furnishings for the public library are at the sole discretion of the Chief Librarian, and should not be dictated by anyone else including other public officers or political subdivisions.

It is the opinion of this Office that a court faced with the question presented in your letter most likely would conclude that yes, general decisions regarding purchases and furnishings for a county public library are properly within the sound discretion of the chief librarian, who answers to the county library board. While this author's research has not identified a reported South Carolina case construing Section 4-9-36(1), our Office consistently has concluded that the General Assembly intended for the chief librarian to answer to the county library board alone, and not to other local government officials. *See, e.g., Op. S.C. Att'y Gen.*, 2008 WL 3198122 (July 11, 2008). While you no doubt are aware of at least some of these opinions, we summarize a couple of those prior opinions here for your reference here.

In 1983, our Office considered whether certain proposed amendments to a county ordinance were consistent with the role of the chief librarian and the county library board. *Op. S.C. Att'y Gen.*, 1983 WL 181894 (May 23, 1983). That opinion described the proposed county ordinance in this way:

the Library Board [would] merely make a recommendation to the County Council for the employment of a chief librarian and the chief librarian will be responsible to the County Council, not the Board, for the administration of the library program and hiring of staff. Section 3(a) of the proposed amendment would only permit the Board of Trustees to recommend to County Council the geographical placement of a headquarters library and branches. The establishment or discontinuance of library branches and the operation hours of libraries [would] be at the discretion of county council.

Id. That 1983 opinion "concluded that the proposed ordinance [was] not consistent with" applicable state law, including Section 4-9-36(1) which "vests with the Board of Trustees of the

County Library the authority to employ a chief librarian who shall be responsible to the Board for the administration of the library services program." *Id.* That opinion also observed that "[t]here is ample evidence that the General Assembly intended county library systems to be uniform throughout the State," and to that end the Legislature "provided that such libraries would be managed by a board of trustees whose duties were further delineated by the General Assembly." *Id.* (citing, *inter alia*, S.C. Code Ann. § 4-9-35(A)).

In a 2008 opinion our Office examined the role of a chief librarian again when asked to opine on whether a chief librarian could be required to "report to both the Library Board of Trustees (the "Board") and the Division Director of Administration for the County." *Op. S.C. Att'y Gen.*, 2008 WL 3198122 (July 11, 2008). That particular question arose in the context of county personnel policies and hiring practice developed pursuant to Section 4-9-30(7), where "the Legislature gave broad authority to counties with regard to their ability to regulate their own employees." *Id.* (citing S.C. Code Ann. § 4-9-30(7)). That 2008 opinion relied in part upon our prior 1983 opinion and the rules of statutory construction to conclude that under Section 4-9-36(1) the chief librarian was only required to report to the library board. *Id.* There we opined:

Based upon our interpretation of the provisions contained in section 4-9-35 et seq. and our prior [1983] opinion, we remain of the opinion that chief librarians are under the supervision and responsible to their respective library boards, rather than to their counties. Accordingly, we do not believe the Chief Librarian must report to the County However, in accordance with section 4-9-38, the Chief Librarian continues to be subject to county personnel policies and must abide by these policies.

Id. That opinion went on to discuss certain particular county personnel policies which appeared to be "inconsistent with the provisions contained in [S]ections 4-9-35 et seq." *Id.*

In summary, our Office consistently has interpreted Sections 4-9-35 *et seq.* such that the General Assembly intended to create a uniform library system throughout the State that is overseen and administered at the local level by the county library board, which hires the chief librarian to administer the program. *See also Op. S.C. Att'y Gen.*, 2018 WL 1443716 (March 7, 2018) (discussing regional library boards). Our Office also has interpreted these statutory sections such that chief librarians are responsible to their local library board, and that they have the latitude to fulfill their responsibilities without supervision by local government officials. *See also Ops. S.C. Att'y Gen.*, 2014 WL 3886690 (July 28, 2014); 2014 WL 4382449 (August 22, 2014).


Turning to the question of decisions regarding purchases and furnishings for the public library, it appears that such decisions typically would fall squarely within the duties of the chief librarian. As discussed throughout this opinion, a chief librarian is "responsible to the county library board for the administration of the [county library] program." S.C. Code Ann. § 4-39-36(1). The administration of a county library necessarily includes making certain decisions regarding purchases and furnishings in order to ensure it continues to fulfill its mission. Section 4-9-36(1) vests responsibility for such a routine administrative function in the chief librarian. *Id.* Accordingly, we believe that a court generally would conclude that the chief librarian has the authority to make decisions regarding purchases and furnishings which are typical in the context of a county library, and that the chief librarian is answerable to the library board for those decisions. While local government officials might suggest preferences, the chief librarian ultimately remains solely under the supervision of the library board.

Conclusion:

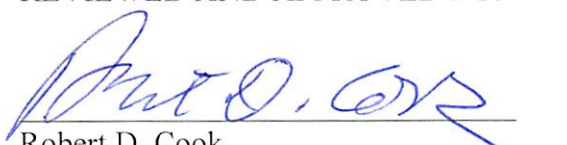
In conclusion, for the reasons set forth above, it is the opinion of this Office that the decisions of a county chief librarian regarding purchases and furnishings are supervised solely by the county library board of trustees pursuant to the statutory authority set out in Section 4-9-36(1). *See Op. S.C. Att'y Gen.*, 1983 WL 181894 (May 23, 1983). We must decline to answer your other questions because they require an investigation and determination of facts, which this Office cannot do in an opinion. We do hope that that statutes and other legal authorities we discussed in response to those questions is helpful in providing some insight into relevant South Carolina law.

As noted above, a copy of this opinion and the documents you sent to us has been referred to our Civil Division for review and consideration.

Sincerely,


David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
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