

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO. 2013-CP-07-0080

DOMAINSNEWMEDIA.COM, LLC,

Plaintiff,

vs.

HILTON HEAD ISLAND - BLUFFTON
CHAMBER OF COMMERCE,

Defendant.

ORDER GRANTING SUMMARY
JUDGMENT FOR PLAINTIFF AND
DENYING SUMMARY JUDGMENT
FOR DEFENDANT

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SC Court of Appeals

This matter came before the Court on cross motions for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The parties stipulated that all discovery done in this matter, including the depositions filed of record, constituted the factual record of this case and that the Court may dispose of this case as a matter of law concerning the Plaintiff's request for declaratory judgment under the South Carolina Freedom of Information Act, S.C. Code Ann. Section 30-4-10 et. seq. The Court held a hearing on these motions in Beaufort, South Carolina on January 27, 2016. Robert E. Stepp and Bess J. DuRant appeared on behalf of Defendant Hilton Head Island-Bluffton Chamber of Commerce ("Defendant" or "Chamber") and Taylor M. Smith, IV appeared on behalf of Plaintiff DomainsNewMedia.com, LLC ("Plaintiff"). The Court took this matter under advisement and has carefully considered the issues presented by Plaintiff's and Defendant's motions, the arguments of counsel, and the applicable legal theories. The Court finds that Plaintiff is entitled to summary judgment in its favor because Defendant is a public body under the Freedom of Information Act ("FOIA").

FACTS

The Chamber is a 501(c)(6) non-profit corporation organized under the laws of the State of South Carolina. The Chamber's stated purpose is to advance the common interests of its membership, stimulate the expanding regional economy, and enhance the quality of life for all.

(Affidavit of William G. Miles ¶ 2.) The Chamber also operates a Visitor & Convention Bureau (“VCB”) within the Defendant’s organizational structure. The parties have stipulated that the VCB is not a separate jural personality distinct from that of the Chamber. The Chamber has been appointed as the Designated Marketing Organization (“DMO”) for the Town of Hilton Head Island, the Town of Bluffton, and Beaufort County pursuant to S.C. Code Ann. § 6-4-10(3), for approximately 33, 16, and 8 years, respectively. (Thomas Dep. 12:16 – 12:20, Feb. 23, 2015.) As the DMO, the Chamber receives public funds under the Accommodations Tax Act (“ATAX”),¹ S.C. Code Ann. §§ 6-1-500, *et. seq.*, and under a grant from the South Carolina Department of Parks, Recreation, and Tourism (“PRT”). Both ATAX and PRT funds provided to Defendant are required to be used for the purpose of promoting tourism. There is no dispute that both ATAX and PRT funds are public funds, pursuant to S.C. Code Ann. § 30-4-20(a).

On November 28, 2012, Plaintiff requested that the Chamber provide it with the following information pursuant to FOIA:

- All documents pertaining to a proposed Welcome Center for the Hilton Head Island-Bluffton Chamber of Commerce on any property owned by the Town of Hilton Head;
- The names, sex, race, title and dates of employment of all employees and officers of the Hilton Head Island-Bluffton Chamber of Commerce;
- All administrative staff manuals and written instructions to staff that affect a member of the public;
- All statements of policy and interpretations of policy, statutes and the constitution that have been adopted by Hilton Head Island-Bluffton Chamber of Commerce;

¹ ATAX allows a county or municipality to impose a local accommodations tax that is a “tax on the gross proceeds derived from the rental or charges for accommodations furnished to transients” S.C. Code Ann. § 6-1-510(A). All of the proceeds from the Tax “must be kept in a separate fund segregated from the imposing entity’s general fund.” § 6-1-520(B). The revenue generated from the Tax must be used for tourism purposes. § 6-1-530.

- All written planning policies and final planning decisions;
- All information in or taken from all accounts, vouchers, or contracts dealing with the receipt or expenditure of public or other funds of the Hilton Head Island-Bluffton Chamber of Commerce, including all bank accounts and contracts pertaining to the receipt and use of any accommodation tax funds or state or local grants received and/or used by the Hilton Head Island-Bluffton Chamber of Commerce, including any funds allocated to or used by the Hilton Head Island Visitor and Convention Bureau; and
- The minutes of all meetings, including Board of Director meetings, and all votes taken at such meetings, except as exempted pursuant to S.C. Code § 30-4-70.

On December 17, 2012, the Chamber declined Plaintiff's FOIA request on the ground that the Chamber was not subject to FOIA because: (a) the Chamber's status as a DMO did not convert a private, non-profit organization into a public body for purposes of FOIA; and (b) the Chamber's operating funds were accounted for separately from any public funds that it may receive.

On January 15, 2013, Plaintiff commenced this action seeking a determination that the Chamber is a "public body" as that term is defined in FOIA and seeking an order declaring that the Chamber, or its division, the Visitor and Convention Bureau, is a "public body" as defined under section 30-4-20(a). Additionally, Plaintiff seeks an order requiring the Chamber to produce the previously requested records. Plaintiff further contends that it is entitled to an order declaring the rights and legal relations of the parties pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 *et seq.* and FOIA. The Chamber filed an Answer denying that the Chamber is subject to FOIA. Plaintiff served written discovery on the Chamber, to which the Chamber responded. Additionally, Plaintiff deposed two 30(b)(6) witnesses of the Chamber and a 30(b)(6) witness of the Tourism Expenditure Review Committee. The parties then filed cross

motions for summary judgment and supported their positions through memoranda in support and in opposition to the other's motion.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings and other supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. Under South Carolina law, "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." *Folkens v. Hunt*, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

In determining whether to grant summary judgment, a court must view the evidence and its reasonable inferences in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 438 (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in favor of that party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). At the summary judgment stage, "the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883

(Ct. App. 2001) (citing case). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

LAW/ANALYSIS


By applying the summary judgment standard to the instant case, I find that there are no genuine issues of material fact that must be submitted to a fact finder, and that the undisputed evidence establishes as a matter of law that the Chamber is a public body as defined in section 30-4-20(a) of the South Carolina Code and thus, must comply the provisions of the FOIA.

"The essential purpose of the FOIA is to protect the public from secret government activity." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004) (citing cases). "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 241 S.E.2d 563 (1978). When adopting FOIA, the legislature stated "it is vital in a democratic society that public business be performed in an open and public manner." S.C.Code Ann. § 30-4-15 (Supp.2000).

To be subject to FOIA, an entity must be a "public body." S.C. Code Ann. § 30-4-30(a).


Under FOIA, a public body is defined as follows:

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



S.C. Code Ann. § 30-4-20(a) (emphasis added). In *Disabato v. S.C. Association of School Administrators*, the South Carolina Supreme Court held that “a private corporation supported by public funds within the definition of a public body” can subject the private entity to the provisions of FOIA. *Id.* at 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013). It was in the case of *Weston v. Carolina Research and Development Foundation*, where the South Carolina Supreme Court provided guidance as to when a private organization will be subject to FOIA. *Weston* at 401 S.E.2d 161, 303 S.C. 398 (S.C. 1990).

In *Weston*, the Supreme Court analyzed whether the Carolina Research and Development Foundation, a nonprofit corporation, would be subject to FOIA by analyzing four principal transactions². *Id.* The Court said that “[e]ach of the [footnote 2] transactions alone would bring the Foundation within FOIA’s definition of ‘public body’. Taken together, they lead to the unavoidable conclusion that the Foundation is a ‘public body’.” *Id.* at 164. Consequently, the Court held that “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 165. The Court said that the trial judge in that case noted correctly that FOIA would not apply to “business enterprises that receive payment from public bodies in return for supplying goods and services on an arms-length basis.” *Id.* In such a situation, the Court said, “there is an exchange of money for identifiable goods or services and



² 1) The Foundation’s receipt of sale proceeds from the Wade Hampton Hotel sale, 2) the Foundation’s acceptance of federal funds to develop of the Swearingen Engineering Center, 3) the Foundation’s acceptance of real estate and cash grants from the City of Columbia and County of Richland, and 4) the Foundation’s retention of a portion of development contract proceeds funneled to it from the University.

access to the public body's records would show how the money was spent." *Id.* To apply *Weston* to the facts of the present case therefore requires the Court to consider five separate factors:

1. Has there been a diversion of public funds?
2. To a related organization?
3. By means of an *en masse* transfer?
4. With no public access to information regarding how the funds were spent?
5. Does the private entity supply goods or services on an arm's length basis?

When applying these five factors to the present matter, I find that the Chamber is a public body for purposes of FOIA. First, there is a diversion of public funds to the Chamber by the local governments. Second, the Chamber is a related organization to all of the local governments which it serves as a DMO. Third, the Chamber receives an *en masse* transfers of funds quarterly. Four, the public has no access to information as to how the funds were spent because the Chamber only submits a proposed budget prior to the expenditure of public funds and a summary accounting to the local governments after each fiscal year. Finally, the Chamber does not supply goods and services to the local governments it serves on an arm's-length basis. The Chamber is therefore a public body for purposes of FOIA. Accordingly, Plaintiff is entitled to summary judgment, and Plaintiff's motion for summary judgment is denied.

1. Public Funds Have Been Diverted

The first factor to be considered under *Weston* is whether there has been a "diversion" of public funds. The parties agree that the ATAX and PRT grant funds used by the Chamber are not funds created by the activities of the Defendant. Both sets of funds are generated by the mechanisms established by the General Assembly. The parties agree that in particular, the ATAX funds are then allocated by the state of South Carolina to the particular town, city, or

county pursuant to the statutory scheme. At this stage in the statutory process, the ATAX funds would be in the possession of the particular public entity and not Defendant. But when the particular public entity designates an organization to serve as its DMO, the public funds then must leave the entity and go to its DMO so it may spent for the promotion of tourism. The PRT grant works similarly in that the funds are possessed by the State of South Carolina before they are awarded to Defendant as a recipient of the grant. In both instances, it is clear the public funds are diverted from either the local entity or the State to Defendant.

In *Weston*, all four of the transactions scrutinized possessed similar origins to the ATAX and PRT funds at issue in this case. In every instance, the related public entity to the Foundation in *Weston* had the exclusive right to possess the public funds generated from transactions identified. *Weston*, 303 S.C. at 401, 401 S.E.2d at 163. In each instance though the related public entity did not spend the funds generated internally, but instead diverted the funds to the Foundation for its use. *Id.* It was completely appropriate for the *Weston* court to construe these transfers as a diversion of public money from a public entity to a private organization and it is directly analogous to facts of this case. The *Weston* Court did not specify any requirement that for a private company to be considered a public body for FOIA, the public funds had to be diverted with the intention to avoid transparency. Therefore, Defendant's contention that its open and transparent process makes it different from the Foundation in the *Weston* is simply irrelevant. The public funds at issue in this case have been "diverted" from the local governments to the Chamber.


2. The Chamber is a Related Organization of the Local Governments

The second factor underlying the court's decision in *Weston* was the relationship between the University and the Foundation. The Chamber's receipt of public funds is premised on its

status as the DMO for the public entities it serves. But for Defendant's status as DMO, it would not receive ATAX funding from its related public entities. The Defendant is correct that the Chamber has a separate and independent existence from the local governments it serves. It also correct that the Chamber provides services to its membership that are completely separate and apart from the services it provides in its capacity as DMO. But the Defendant may not avoid FOIA compliance by simply organizing as a hybrid Chamber-CVB structure. Furthermore, there is no requirement that the Chamber be as connected to its public entities as the Foundation was to its in *Weston*. See *Id.* at 400, 401 S.E.2d at 162. The Chamber may not work for the exclusive benefit of its public entities as the Foundation did for its in *Weston*, but it certainly works for the benefit of the Town of Hilton Head, the Town of Bluffton, and Beaufort County and is therefore a related organization.

3. There is an en masse transfer of public funds


Approximately every three months the Town of Hilton Head presents Defendant with a "lump sum" of cash, derived from ATAX revenue. (Deal Dep. 16:11 – 16:13, Feb. 23, 2015.) "En Masse" and "Lump Sum" are synonymous. "En masse – In a mass; in a large group all at once; all together." *Black's Law Dictionary* 610 (9th ed. 2009). "Lump sum payment – A payment of a large amount all at once, as opposed to a series of smaller payments over time." *Black's Law Dictionary* 1244 (9th ed. 2009). In *Weston*, the Foundation received public funds in bulk payments from its public entities. "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," an otherwise private organization will be subject to FOIA as a public body. *Id.* at 165. The Court in *Weston* explained its purpose for holding that such private organizations will be subject to FOIA in its next sentence: "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. The purpose for the *Weston* Court’s holding cannot be read as an additional requirement for the definition of a “public body” under FOIA. It simply is irrelevant here that the public entities whom Defendant serves approve a budget for the expenditure of public funds before they are received en masse by the Chamber. The *Weston* Court was rightly concerned with the discretion provided to an entity when it receives en masse public funds. Simply because a public entity provides guidance to the Chamber in the form of a budget, this does not change the quantifiable nature of the transfer of the funds nor the discretion being afforded by this kind of transfer. Therefore, there is an en masse transfer of public funds to the Defendant.

4. There is No Public Access to Information as to How the Funds Were Spent.


A primary concern of the *Weston* Court was whether the public could obtain information about how public money was spent through the records of private entity being considered as a public body. *Weston*, 303 S.C. at 404, 401 S.E.2d at 165 (holding that FOIA may apply if funds are diverted to a related organization and “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.”) Defendant does submit a budget and plan at the beginning of the fiscal year, and it submits an accounting at the end of each fiscal year pursuant to S.C. Code Ann. § 6-4-10(3). Because the Defendant presently claims it is not subject to FOIA, a citizen must request information relevant to the Chamber through the public entity. According to the parties, the information that will be provided by the public entity will be entity’s approved budget for the Chamber and then the fiscal year-end accounting submitted by the Chamber to the public entity. Plainly the Chamber’s approved budget will not provide the public access to



information as to how the ATAX and PRT funds are spent. At best, the budget can only do what all other budgets do: forecast how money is expected to be spent. Consequently, the only time a citizen would hopefully be able to learn how the money was spent would be to request a copy of the year-end accounting. A copy of such an accounting was attached to the Deposition of Ray Deal as Plaintiff's Exhibit 4. The document provides information regarding how the Chamber spent money generally. Unfortunately the accounting fails to describe "with specificity how those funds were spent" pursuant to the *Weston* Court's holding. *Id.* at 165. The accounting provides very little, if any, information on, for instance, the particular vendor chosen for a certain expenditure in furtherance of a stated tourism purpose. Without the Chamber being subject to FOIA, the residents of the areas the Chamber serves will not be able to learn how Defendant manages the expenditure of public funds.

5. The Chamber Does Not Supply Goods and Services to the Local Governments on an Arm's Length Basis.

The record before the Court fails to establish that the Chamber is providing identifiable advertising and promotional goods and services in exchange for payment from ATAX and the PRT grant. In *Weston*, the Supreme Court took care to analyze the individual transactions of the Foundation as I applied to University and other public bodies it had benefited from. It was through understanding what the Foundation got from the transactions that seemed to inform the Court of whether the Foundation was working at arm's length or not. The Court provided the test for when a private organization may be considered a public body for FOIA, but it then said the trial judge in that case noted correctly that FOIA would not apply to "business enterprises that receive payment from public bodies in return for supplying goods and services on an arms-length basis." *Weston* at 165. The Court did not go further in defining what they meant by "an arms-



length basis”, but fortunately a definition does exist. “Arm’s length” is defined as “of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship.” *Black’s Law Dictionary* 88 (8th ed. 2005).

While the facts of this case do not support the idea that the relationship the Chamber has with this public entities is confidential, the relationship is one that is close and not at arms-length. As previously stated, the Chamber has been the DMO for the public entities mentioned for several years. The record does not include a written agreement to be the DMO for any of the entities. The record does though include a thorough examination of the process by which the Chamber works to meet the demands as set for it in its agreed-upon annual budget every year. This examination included the procedure by which the Chamber must notify the public entity and seek its agreement with a change in a vendor. *See Thomas Dep. 20:5-21:4* (“ ... If it’s under \$10,000, no, typically we would not go back and have any consult with – within the, you know, scope of our overall budget, that’s well less than one percent.”). The depositions of both Thomas and Deal represent that these unwritten agreements that define the DMO relationship are seen through the hundreds of vendors that the Chamber works with promote tourism among its public entities. Because this relationship is defined by the Chamber’s work with all of these vendors it is impractical to enter into an individual analysis of individual transactions to determine it acts at arms-length distance with each public entity. From the statutory relationship that is created by designating the Chamber as a DMO before a proposed budget is even discussed to other facts listed above, the Court finds the Chamber does not operate at arms-length to its public entities.

SUMMARY JUDGMENT IS DENIED AS TO DEFENDANT



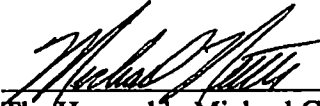
This Court denies Defendant's Motion for Summary Judgment for the same reasons that support the grant of summary judgment to the Plaintiff.

CONCLUSION

"The essential purpose of the FOIA is to protect the public from secret government activity." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004) (citing cases). By designating the Chamber as a DMO the public entities that are subject to this case agreed to provide the Chamber public funds to be used for the purpose of tourism. While some information about how the funds are spent can be given by the public entity, no citizen can learn specifically how the money was spent, as the Supreme Court said in *Weston*, unless the Chamber is subject to FOIA. Furthermore, the parties are correct that the CVB is not a separate legal entity from the Chamber so this Court cannot fashion a remedy that will bring only the CVB into compliance with FOIA. Consequently and by function of the facts stated on the record of this matter, the Defendant Hilton Head Island – Bluffton Chamber of Commerce as a matter of law is a "public body" for purposes of S.C. Code Ann. § 30-4-20(a).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that (a) Defendant's Motion for Summary Judgment is denied; (b) Plaintiff's Motion for Summary Judgment is granted; and, (c) judgment shall be entered for Plaintiff on its causes of action related to a declaration that Defendant is a public body, as set forth in Plaintiff's Complaint.

IT IS SO ORDERED.



The Honorable Michael G. Nettles
Circuit Court Judge

Beaufort, South Carolina
2-22-, 2016

