

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2016-000455

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DomainsNewMedia.com, LLC,

Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce,

Appellant.

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**INITIAL BRIEF OF APPELLANT**

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**SC SUPREME COURT**

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## **STATEMENT OF THE ISSUE**

Did the circuit court err in ruling that the Hilton Head Island-Bluffton Chamber of Commerce, a private, nonprofit, membership-based organization, is a public body subject to the Freedom of Information Act based on the fact that the Chamber receives public funds to promote tourism in Hilton Head Island, Bluffton, and Beaufort County?

## STATEMENT OF THE CASE

This is an appeal from an order ruling that the Hilton Head Island-Bluffton Chamber of Commerce (“the Chamber”), a private, nonprofit, membership-based organization is a public body subject to the Freedom of Information Act (“FOIA”) because the Chamber receives public money to promote tourism in the local areas. The Chamber seeks to have this order reversed.

On January 15, 2013, a company called DomainsNewMedia.com, LLC (“Respondent”) sued the Chamber for failing to produce certain internal documents and information to Respondent. (Compl.) The Chamber refused to produce the documents and information on the ground that the Chamber is a private organization and is not subject to the requirements of FOIA. (Answer.)

The Chamber responded to the complaint by filing a petition for original jurisdiction in this Court. (Pet. dated Feb. 15, 2013 & Aff. of William G. Miles, dated Feb. 12, 2013.) The Chamber filed the petition because the Chamber wanted the issue raised in the complaint decided as expeditiously as possible. Since 2011, the Chamber, its Board of Directors, and officers, have been under attack by Respondent, who has sent numerous emails and taken out multiple full-page newspaper advertisements accusing the Chamber of conducting itself like a private, nonprofit entity, when it is Respondent’s position that the Chamber is a for-profit entity that should be treated like a public body under FOIA. (*Id.*)

In addition to filing the petition for original jurisdiction, the Chamber answered the complaint, denying that it was a public body subject to FOIA. (Answer.)

The petition for original jurisdiction was denied, and the case proceeded in circuit court. (Order, dated May 2, 2013.) Following discovery, the circuit court issued a Case Management Order stating “[t]he parties believe that the material facts are not in dispute and that the case primarily presents legal issues that will be ripe for decision by the Court.” (Order, dated June 14, 2015.) Accordingly, on September 30, 2015, the parties filed cross motions for summary judgment on the legal issue of whether the Chamber is a public body subject to FOIA. (Mot. for Summ. J, dated Sept. 30, 2015; Def’s Mot. for Summ. J., dated Sept. 30, 2015.)

On January 27, 2016, the circuit court conducted a hearing. (Tr.) At the end of the hearing, the court requested proposed orders from the parties, and eventually signed the order submitted by Respondent. (Order, filed Feb. 22, 2016) The order granted summary judgment in favor of Respondent, finding that the Chamber was a public body subject to FOIA. *Id.*

On March 3, 2016, the Chamber served and filed a Notice of Appeal. (Notice of Appeal.) At the same time, the Chamber moved to transfer the case to this Court on the grounds that the case involves an issue of significant public interest and a legal principle of major importance. Respondent filed a return stating it did not oppose the motion to transfer. On June 16, 2016, this Court granted the Chamber’s motion to transfer. This appeal follows.

## STATEMENT OF FACTS

This case presents the question of whether a Chamber of Commerce, which is a private, membership-based organization, is subject to the requirements of the Freedom of Information Act (FOIA), simply because it receives money from state and local government entities for the purpose of promoting tourism in the local areas where the Chamber's members conduct business.

### DomainsNewMedia.com LLC

This case arose out of a request for documents and information submitted by a company called DomainsNewMedia.com LLC (Respondent) and its CEO and Founder, Skip Hoagland. Respondent's business is owning website addresses or "domain names." (Email from Skip Hoagland, dated May 3, 2012, Ex. I to Aff. of William G. Miles.)

Since 2012, Hoagland has been on a mission to uncover what he believes are "abuses" by the Chamber. Hoagland has carried out the mission by purchasing multiple newspaper advertisements, some full-page size, criticizing various aspects of the Chamber. (Aff. of William G. Miles ¶¶ 13-17, Exs. E-N.) The ads typically bear the heading, "StopChamberAbuse.com." *Id.*

In one of the ads, which ran on Sunday, January 13, 2013, two days before the present case was filed, Hoagland said that the Chamber is a "hoax" and a "self-serving empire" that "take[s] huge chunks of money from public funds" and does so "at the expense of local media companies." He then stated, "I will not stop until every rock is turned over . . . every abuse brought to light." *Id.*

Approximately two weeks later, Hoagland ran another ad, this one titled, "Chamber Lawsuit Filed." *Id.* Hoagland states that "being a person of stubborn upbringing, I have

pushed forward into the court with a formal request as is my right under South Carolina Law and its Freedom of Information Act (FOIA).” *Id.* He again concludes by stating he “will not stop until every rock is turned over, and every abuse brought to light.” *Id.*

In addition to purchasing newspaper ads, Hoagland has sent several emails to the Chamber, the Hilton Head Island town council, and others, attacking the Chamber and challenging its status as a nonprofit organization. For example, on November 7, 2011, approximately one year before Respondent submitted the FOIA request that sparked the present case, Hoagland wrote:

It seems those in Charge [sic] have easy choices and that is simply do whats [sic] right, if not all we will see is more problems and conflict, more full page ads in the Island Packet, HHI Monthly, TV prime news, coverage in surrounding city newspapers etc. . . . This will not stop until I and others are convinced the abuse has ended on all fronts for all of us.

(Miles Aff., Ex. L.)

Later, on May 3, 2012, Hoagland sent an email to the Director for the South Carolina Department of Parks, Recreation & Tourism stating:

Duane can you call to discuss Southcarolina.Com. . . .

\*\*\*

The lawyers are now involved as well as many others watching this case nationwide. It is very possible all of this is headed for litigation, major press coverage, IRS investigations, legal rules and even [p]erhaps many lawsuits nationwide. Supreme Court is even a possibility.

(Miles Aff., Ex. I.)

Similarly, on September 12, 2012, Hoagland wrote an email to several people, with a copy to Governor Haley, stating:

Headline news today in papers across America including our local Island Packet on latest Whistle Blower case for avoiding taxes. Headline news in Wall Street Journal as well. Chambers and CVBs could easily reach and exceed 1 billion with back taxes owed and violations of 501-c6 IRS tax codes. This does not even include unfair competition damages to all local media and past media forced out of business, excessive salaries and abuse to local tax payers, violation of its mission statement and bylaws, abuse and possible violations to all members and local tax payers for misuse of funds with self serving interest and excessive salaries.

...

The HHI Chamber and Bill Miles has [sic] hired two lawyers to deal with me [sic] Why what reason? . . . The Hilton Head case is important because it will set the stage to expose the abuse in other cities across America.

(Miles Aff., Ex. M.)

On September 26, 2012, Hoagland sent an email to the Chamber's board, stating:

Those who continue to sit on this board will lose business and credibility for themselves and the companies they represent as the abuse is allowed to continue and gets exposed in the press. It seems lawsuits are inevitable as well.

(Miles Aff., Ex. N.)

Finally, in an undated email with a subject line stating, "Today's letter to the editor," Hoagland wrote:

What I have been forced to do now is take this litigation and [sic] the SC Supreme Court if necessary. I will continue full Page ads educating and updating those who are interested. Will launch a direct mail piece to be sent out.

(Miles Aff., Ex. G.)

## Documents and Information Requested

Against this backdrop, on November 26, 2012, Respondent, through its lawyer, sent a letter to the Chamber seeking the production of the following information and documents pursuant to FOIA:

1. 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.
2. The names, sex, race, title and dates of employment of all employees and officers of the Hilton Head Island-Bluffton Chamber of Commerce.
3. All administrative staff manuals and written instructions to staff that affect a member of the public.
4. All statements of policy and interpretations of policy, statutes and the constitution that have been adopted by Hilton Head Island-Bluffton Chamber of Commerce.
5. All written planning policies and final planning decisions.
6. 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.
7. 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.

(Letter from Dean Bell to Jay Davis, dated Nov. 26, 2012, Miles Aff., Ex. A)

On December 28, 2012, the Chamber received a request from *The Island Packet* seeking (1) the sources of revenue for the Chamber and the VCB, (2) the names of all Chamber and VCB employees whose compensation exceeds \$50,000, along with the compensation amount, and (3) a copy of the Chamber's bylaws, including any revisions made over the last three years. (Letter from Fitz McAden to Bill Miles, dated Dec. 28, 2012, Miles Aff., Ex. B.)

The Chamber responded to both requests, declining to produce the documents and information requested on the ground that the Chamber is not a public body subject to FOIA. (Letter from Bobby Stepp to Dean Bell, dated Dec. 17, 2012 and letter from Bobby Stepp to Fitz McAden, dated Jan. 14, 2012, Miles Aff., Exs. C&D.) Additionally, in response to the request from *The Island Packet*, the Chamber explained that it routinely accounts to public bodies for the receipt and expenditure of public funds, and gave *The Island Packet* the same information that it gives to the public bodies, including financial audits for fiscal years 2010, 2011, and 2012, as well as marketing budgets for fiscal years 2010, 2011, 2013, and 2013. (Miles Aff., Ex. D.)

### **The Chamber**

The Hilton Head Island Chamber of Commerce is a 501(c)(6) non-profit corporation established in 1957 under the laws of the State of South Carolina. (Aff. of William G. Miles ¶ 2; Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011 p. 6, attached to Ex. D of Miles Aff.) The purpose of the Chamber is to represent, serve, and promote the common interests of its membership and the business community, to stimulate the expanding regional economy, and to enhance the quality of life for all. *Id.* Among other things, the Chamber conducts various training, educational

seminars, and promotions for its members. (Financial Statement and Audit Years Ended June 30, 2012 p. 8, attached to Ex. D of Miles Aff.)

The Visitor and Convention Bureau (VCB) is a division of the Chamber. The purpose of the VCB is to promote tourism and marketing. (Thomas Dep. 6:8-24, Feb. 23, 2015.)

The Chamber is funded by contributions from its members. For the fiscal year ended June 30, 2012, the Chamber received approximately \$1.6 million from membership dues and events. (Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011 p. 17, attached to Ex. D of Miles Aff.) The Chamber also receives money from the private sector for purposes of marketing. (Deal Dep. 14:15-25, Feb. 23, 2015.) For example, a major hotel may approach the VCB to engage in a joint marketing effort to attract people to Hilton Head. (Deal Dep. 29:9-18.) For the fiscal year ended June 30, 2012, the Chamber received approximately \$1 million for projects like this. (Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011 p. 17, attached to Ex. D of Miles Aff.)

In addition to money received from members and the private sector, the Chamber receives funds from the Town of Hilton Head Island, the Town of Bluffton, and Beaufort County through the local accommodations tax ("A-Tax"), a creature of state statutory law. *Id.* For the fiscal year ended June 30, 2012, the Chamber received approximately \$1 million in A-Tax funds from the Town of Hilton Head Island, \$300,000 from Beaufort County, and \$80,000 from the Town of Bluffton. *Id.*

The Chamber has also received grant money from the South Carolina Department of Parks, Recreation, and Tourism ("PRT"). (Aff. of William G. Miles ¶ 3.) For the fiscal

year ended June 30, 2012, the Chamber received approximately \$1.1 million from this grant. (Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011 p. 17, attached to Ex. D of Miles Aff.)

The manner in which the A-Tax money is awarded and spent is controlled by statute. The A-Tax represents 2% of the 7% tax charged to people who stay overnight in hotels and other accommodations in the area. S.C. Code Ann. § 12-36-2630(3) (2014). The proceeds of this tax "must be remitted quarterly to the county or municipality in which it is collected." *Id.* Local government entities receiving A-Tax money must spend the money in accordance with the South Carolina Accommodations Tax Act. S.C. Code Ann. §§ 6-4-5 to -35 (2004).

For example, when a county or municipality collects more than \$50,000 from the tax, the first \$25,000 must be allocated to the county or municipality's general fund. S.C. Code Ann. § 6-4-10(1) (2004). Of the remaining balance, 5% must be allocated to the general fund and 30% "must be allocated to a special fund and used only for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity." S.C. Code Ann. § 6-4-10(2) (2004) and (3) (Supp. 2015). The remaining 65% plus earned interest must be allocated to a special fund for tourism-related expenditures defined by statute. S.C. Code Ann. § 6-4-10(4)(a) and (b) (Supp. 2015).

With respect to the 30% that must be used for advertising and the promotion of tourism, the government entity must select "one or more organizations, such as a chamber of commerce" with an "existing, ongoing tourist promotion program" to "manage and direct the expenditure of these tourism promotion funds." S.C. Code Ann. § 6-4-10(3)

(Supp. 2015). The selected organization is referred to as the Designated Marketing Organization, or “DMO.”

The Hilton Head Island-Bluffton Chamber of Commerce has been the DMO for the Town of Hilton Head Island each year since 1983, the Town of Bluffton since approximately 2001, and Beaufort County since 2009. (Thomas Dep. 12:9-20.)

Before the beginning of each fiscal year, the Chamber is required to submit a budget to the local government entities of planned expenditures. S.C. Code Ann. § 6-4-10(3) (Supp. 2015). Then, at the end of each fiscal year, the Chamber is required to render an accounting of the expenditures to the local government entity. *Id.* Both the budget and the accounting are available to the public through the local government entity.

In addition to meeting these statutory requirements, the Chamber provides the local government entities with a copy of its annual Independent Auditors’ Report prepared each year by a third party. (Miles Aff., Ex. D.)

#### **STANDARD OF REVIEW**

“Declaratory judgments are neither legal nor equitable.” *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015). “The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue.” *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). “Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.” *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

“The Court’s primary function in interpreting a statute is to ascertain the intent of the legislature.” *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311,

314 (1998). “A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *Id.* “Generally, statutes are to be construed with reference to the whole system of law of which they form a part.” *Id.* “In construing a statute, this Court is constrained to avoid an absurd result.” *Id.*

“When the circuit court grants summary judgment on a question of law, [the appellate court] review[s] the ruling de novo.” *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 634-35, 776 S.E.2d 434, 437 (Ct. App. 2015).

In the case at hand, the parties agreed that the facts are not in dispute and that the circuit court decided a question of law. Accordingly, the standard of review is de novo.

## ARGUMENT

The circuit court’s decision should be reversed. The Hilton Head Island-Bluffton Chamber of Commerce is a private, nonprofit, membership-based organization that is not a public body subject the Freedom of Information Act. Although the statutory definition of “public body” is broad, there are limits to how it is applied. The definition should not be applied in a manner that converts private organizations into public bodies simply because they receive public money to provide goods and services to a public body, particularly when the public has access to how the money is spent through the public body.

Here, the circuit court erred in ruling that the Chamber is a public body. The Chamber is not a government entity, is not related to a government entity, and does not perform government functions. The Chamber is the organization selected by the local government entities each year to purchase advertising and promote tourism in the local

areas. The Chamber provides identifiable goods and services in exchange for the money it receives, does so pursuant to a budget approved by the local government entities, and publicly accounts for the expenditures each year.

Because the Chamber is not a public body and should be permitted to remain private, the circuit court order should be reversed, and judgment should be entered in favor of the Chamber.

**I. The Chamber of Commerce is not a public body.**

The circuit court erred in ruling that the Chamber is a public body subject to the South Carolina Freedom of Information Act.

The South Carolina Freedom of Information Act defines a public body 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).

**South Carolina Supreme Court Decisions**

This Court has recognized the overly broad nature of the definition of “public body,” and particularly the phrase “any organization, corporation, or agency supported in whole or in part by public funds or expending public funds.” *See Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991) (limiting the application of

FOIA to private entities); *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 442, 746 S.E.2d 329, 333 (2013) (recognizing the limits of the “public body” definition). Because this language is so broad and could be read to capture any organization that receives public dollars, the dissent in *Disabato* found that the language could not be constitutionally applied and should be severed from the statute. *Id.* at 457, 746 S.E.2d at 457.

Accordingly, when determining whether a private entity is subject to FOIA, the Court does not simply look to see whether the entity receives public funds. Instead, the Court examines various factors, including the purpose of the private entity, the relationship between the private entity and the public body, the manner in which the public funds are disbursed to the entity, the control the public body has over the funds, and whether the public has access to how the funds are spent. *Weston*, 303 S.C. at 404, 401 S.E.2d at 165. The more control the public body has over the expenditure of the funds, the less likely the private entity is a public body, because the public body is making the spending decisions, and the public can access information regarding how the funds are spent through the public body. Additionally, the public can have input into how the money is spent through meetings of the public body. Further, if the private entity exists solely for the purpose of serving the public entity, and uses employees of the public body to perform its functions, the less likely it is that the entity is private.

The leading case in South Carolina on this issue is *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991). In *Weston*, the Court held that the Carolina Research and Development Foundation (Foundation), a foundation associated with the University of South Carolina, was a public body subject to FOIA. To begin, the Court found that the Foundation “operates exclusively for the benefit of the

University of South Carolina.” 303 S.C. at 400, 401 S.E.2d at 162. The Court then examined four different transactions in which the Foundation received large sums of public money. In doing so, the Court examined whether the money went directly to the Foundation or passed through the university, presumably because if the money passed through the university, the public would have access to how the funds were spent. The Court also looked at the control the university had over the funds, that is, whether the university directed how the funds were spent or whether the Foundation was free to make the spending decisions.

The four transactions are as follows. First, the Foundation directly received over \$2,000,000 from the sale of university property. *Id.* at 401, 401 S.E.2d at 163. The money never went through the university or any other public body. *Id.* Second, the Foundation received over \$16,000,000 from a federal grant, which was originally directed to the university, but redirected to the Foundation at the request of the university’s general counsel, who described the Foundation as the “agent” for and acting “on behalf” of the university. *Id.* In addition, the Foundation used university employees to administer the grant. *Id.* at 402, 401 S.E.2d at 163. Third, the Foundation received title to public property and nearly \$6,000,000 in public grant funds to build the Koger Center for the university. *Id.* at 402, 401 S.E.2d at 164. Fourth, the university assigned contracts to the Foundation allowing the Foundation to retain a large percentage of the revenue originally to be provided to the university. *Id.*

These transactions and the manner in which they were carried out were enough to persuade the Court that the Foundation was a public body subject to FOIA. The Foundation was receiving money directly from public entities without having to account for how the

money was spent, and without the public having access to this information. At times, the Foundation was stepping into the shoes of the university with no accountability to the public. In addition, the Foundation used university employees (and therefore public resources) to do its work. These findings led the Court to conclude that the Foundation was more like a public entity than a private one, and that without FOIA, the public would have no way of knowing how these large sums of money were spent.

As the Court explained:

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.*

In concluding that the Foundation was a public body subject to FOIA, the Court was careful to point out that there are circumstances where the receipt of public funds alone would not lead to the conclusion that a private entity is a public body. For example, the Court's "decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods and services on an arms length basis." *Id.* at 404, 401 S.E.2d at 165. This is because "there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent." *Id.* This exception was reiterated by the Court in *Disabato*. 404 S.C. at 456, 746 S.E.2d at 340. In that case, the Court stated that "FOIA would not apply to a private organization that receives public funds to operate a childcare center or a healthcare clinic." *Id.*

Applying the holding in *Weston*, a South Carolina federal district court ruled that The Boeing Company, which received millions of dollars in economic bonds from the State of South Carolina to build a plant in North Charleston, was not a public body under the South Carolina Whistleblower Act.<sup>1</sup> *Woods v. Boeing Co.*, 841 F. Supp. 2d 925 (D.S.C. 2012). The district court reasoned as follows: (1) although Boeing receives a massive amount of public money, it is not a “related organization” to the State; (2) Boeing does not act as the State’s agent nor does it operate for the sole benefit of the State; (3) Boeing manages and spends the money it receives on behalf of its investors, not the State, and uses the money to carry out its business of manufacturing planes, not the business of the State; and (4) Boeing provides a service to the State in return. In sum, the court held the mere receipt of public funds (even millions of dollars) does not transmute a private corporation into a public body.

### **South Carolina Circuit Court Decision**

Although no South Carolina appellate court has held that a Chamber of Commerce is a public body for purposes of FOIA, a South Carolina circuit court has directly addressed the issue of whether a Chamber of Commerce is converted into a public body because it receives A-Tax funds. *Sun Publishing Co., Inc. v. The Bd. of Directors of the Myrtle Beach Area Chamber of Commerce*, C/A No. 1988-CP-26-1851. In that case, the circuit court ruled that the Myrtle Beach Chamber of Commerce was not a public body. Using the circuit court decision in *Weston* as a guide, the circuit court found as follows:

1. Under the Accommodations Tax Act, more than one organization may compete for the funds.

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<sup>1</sup> The definition of “public body” under the South Carolina Whistleblower Act is the same as the definition of “public body” under the South Carolina Freedom of Information Act.

2. The organization selected must demonstrate to the municipality or county that it has an existing, ongoing tourism program.
3. The General Assembly clearly recognized that the activities of a Chamber of Commerce are not those within the normal government function and that such services are to be properly contracted out to those who are qualified to handle such matters.
4. The Act imposes a rigid business procedure which mandates that all information that is relevant and of public interest be deposited with the county or municipality.
5. By reviewing and approving the budget, the municipality or county is effectively exercising its discretion as to how the funds are to be spent.
6. At the end of each fiscal year, the organization selected must render an accounting of the expenditure of the funds.
7. The money received is not a grant, gift, or subsidy. The Chamber is required to perform certain services and would be liable for not doing so.
8. The Chamber must agree on the terms and conditions of the expenditures, which terms and conditions include payment for services rendered by the organization.
9. The Chamber receives no profit for its services, which is demonstrated by the financial documents, budgets, and accountings provided.
10. The Chamber segregates its operating funds from the A-Tax funds.
11. The Chamber is a contractor performing advertising and promotional services for local governments.
12. Upon completion of the work, the Chamber must provide an accounting to the government. This proposal / budget / acceptance / payments / services / accounting process is absolutely contractual in nature.
13. The local governments and the Chamber conduct an arms' length bidding/acceptance exercise and the Chamber must

work in exchange for payment. Should the Chamber fail to perform as agreed upon, it would be liable for damages for breach of contract.

*Id.*

### **Other Jurisdictions**

Moreover, appellate courts in other jurisdictions have held that chambers of commerce are not public bodies. For example, the Supreme Judicial Court of Maine held that the Caribou Chamber of Commerce was not a public body. *Dow v. Caribou Chamber of Commerce & Indus.*, 884 A.2d 667, 672 (Me. 2005). In doing so, the court considered the following factors: “(1) whether the entity is performing a governmental function; (2) whether the funding of the entity is governmental; (3) the extent of governmental involvement or control; and (4) whether the entity was created by private or legislative action.” *Id.* at 670.

As to the first factor, the court noted that “Chambers of Commerce are traditionally nongovernmental entities that are in the business of promoting economic development.” *Id.* at 671. Although it “may be in the interest of the City to promote economic development, it is also in the interests of the members of [the chamber], many of whom are business owners and none of whom are governmental bodies, to do so.” *Id.*

As to the second factor, the court found that the “[t]he fact that an entity receives a substantial amount of government funding is . . . not sufficient to render that entity a public agency.” *Id.* “If [that] were so, any private organization that received grant money, for example, could arguably be deemed a public agency.” *Id.* The court further noted that the city retained the power to reduce or cease altogether the annual funding provided to the

chamber. Moreover, the city would never become obligated to pay any debts of the chamber.

As to the third factor, the court found that the city's ability to control the chamber was limited. Although the chamber's board reserved two ex officio positions for city officials, the ex officio members are not counted toward a quorum, and only when a quorum is present are the ex officio members permitted to vote. *Id.*

Finally, as to the fourth factor, the court found that the chamber was a private corporation created by private action and private individuals. *Id.* at 671-672.

**A. The Chamber is a private organization that operates for the benefit of its members and does not perform government functions.**

The first reason the trial court's decision should be reversed is that the Hilton Head Island-Bluffton Chamber of Commerce is a private entity that exists for the purpose of serving its members and the local area where they conduct business. It does not exist exclusively for the benefit of the local government entities, is not related to any government entity, and does not perform government functions.

The Chamber is a 501(c)(6) non-profit corporation founded in 1957 by private individuals and organized under the laws of the State of South Carolina. (Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011 p. 6, attached to Ex. D of Miles Aff.) The Chamber operates for the benefit of its members and the local areas where members conduct business. (Aff. of William G. Miles ¶ 2.) Unlike the Foundation in *Weston*, which operated exclusively for the benefit of the university, the Chamber does not operate exclusively for the benefit of any governmental entity. The Chamber operates to represent, serve, and promote the common interests of its membership and the business

community, to stimulate the expanding regional economy, and to enhance the quality of life for all. *Id.*

In addition to being private, the Chamber is not related to any government entity. As the trial court correctly found, the Chamber “has a separate and independent existence from the local governments it serves,” and “provides services to its membership that are completely separate and apart from the services it provides in its capacity as DMO.” (Order, filed Feb. 22, 2016, at 9.)

As the DMO (designated marketing organization), the Chamber independently selects and contracts with vendors to provide various goods and services. The Chamber is responsible for fulfilling its obligations under these contracts and does not have the ability to bind the government entity. Indeed, the Chamber may be liable to the local government entities if it does not do what it says it is going to do in the marketing plan submitted each year.

Further, the Chamber is not controlled by any government entity. It is governed by its own bylaws and the Nonprofit Corporation Act. (Aff. of Miles ¶ 7.) The Chamber does not use any public employees to perform its work, and no public officials serve on the Chamber’s board. The local government entities are free at any time to choose another organization to provide the services that the Chamber provides. The government entities are not “acting through” the Chamber like the Foundation was for the university in *Weston*. *Id.* at 401, 401 S.E.2d at 163.

Contrary to the trial court’s ruling, the fact that the goods and services the Chamber provides benefit the local government entities does not mean that the Chamber is related to those government entities. If that were true, then any private contractor providing goods

or services to the local government entities would be deemed to be related to a government entity, when that is not correct. Private entities often engage in activity that benefits the communities in which they do business. This does not transform them into public bodies.

Further, the Chamber does not perform government functions. The marketing and tourism promotion services the Chamber provides through its Visitor and Convention Bureau are not services traditionally associated with normal government functions. The services are provided by commercial entities that have expertise in these areas. Indeed, the A-Tax statutory scheme contemplates that the local government entities will not perform the services themselves but will work or contract with a selected organization to provide the goods and services contemplated under the Act. *See* S.C. Code Ann. § 6-4-10(3).

Because the Chamber is an independent, standalone private entity that is not related to any government entity and does not perform government functions, the Chamber is not a public body subject to FOIA.

**B. The Chamber provides identifiable goods and services in exchange for the public funds it receives.**

Another reason the Chamber is not a public body is because the Chamber provides identifiable goods and services in exchange for the public funds it receives.

As explained in *Weston*, a private entity receiving public funds pursuant to a *quid pro quo* agreement does not convert the private entity into a public body. 303 S.C. at 404, 401 S.E.2d at 165. In other words, FOIA does not “apply to a private entity that receives public funds for a specific purpose.” *Disabato*, 404 S.C. at 456, 746 S.E.2d at 340. “For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or a healthcare clinic.” *Id.* *Cf. Sutler v. Palmetto Elec. Co-Op., Inc.*, 325 S.C. 465, 468-69, 481 S.E.2d 179, 180-81 (Ct. App. 1997) (holding electrical co-

op is not a public body for purposes of the Whistleblower Act, even though it receives loans with beneficial interest rates because co-op provides electrical services in rural areas, and therefore satisfies the *quid pro quo* requirement).

This exception has also been embraced by other jurisdictions. In one case, the Supreme Court of North Dakota held that the North Dakota State Chamber of Commerce was not subject to the state's open records law because the Chamber published a magazine in exchange for the funds it received. *Adams Cnty. Record v. Greater North Dakota Ass'n*, 564 N.W.2d 304, 307 (N.D. 1997). In another case, the court explained that "[i]f the relationship is, in fact, a fee-for-services (or goods) agreement then, clearly, an entity is not [supported in whole or in part] by public funds." *Indianapolis Convention Ctr. & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208, 212-13 (Ind. 1991). See also *State Defender Union Employees v. Legal Aid & Defender Ass'n*, 584 N.W.2d 359, 432-33 (Mich. 1998) ("[A]n otherwise private organization is not 'funded by or through state or local authority' merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue."). "Otherwise, any entity who performed any service or provided any good for any governmental entity would find its business records available for public inspection under the Public Records Act." *Indianapolis Convention Ctr.*, 577 N.E.2d at 213.

In the case at hand, the Chamber provides identifiable advertising and promotional goods and services in exchange for the public money it receives. With regard to the A-Tax money, the Chamber is required to submit a proposed budget at the beginning of each fiscal year showing how the funds will be spent. S.C. Code Ann. § 6-4-10(3). The Chamber also provides a detailed marketing plan. (Thomas Dep, Ex. 1.) The budget shows the costs for

digital marketing, social media, print advertising, and video production. *Id.* The budget identifies publications by name, such as *Oprah Magazine*, showing where advertising will be purchased. *Id.* The budget is presented to the A-Tax advisory committee and then to the town or county council for input and approval. (Thomas Dep. 16:16 – 17:1.) Because this process is public, the public has access to the information and has the opportunity to provide input through the public meetings of the local government entities.

At the end of the fiscal year, the Chamber is required to submit an accounting showing how the funds were spent. Even the trial court acknowledges that this gives citizens the opportunity to learn how the funds are spent. (Order, filed Feb. 22, 2016, at 11.)

The Chamber also provides the local government entities with copies of the Chamber's annual financial audit report. This third-party review of the Chamber's finances provides additional assurances as to the accuracy of the Chamber's financials and accounting.

Further, the Chamber spends every dollar it receives from the local government entities to provide the goods and services outlined in the budget. (*See, e.g.,* Financial Statements and Auditor's Report Years Ended June 30, 2012 & 2011, attached to Ex. D of Miles Aff.) The Chamber separately accounts for the revenues and expenses associated with these funds. *Id.* The Chamber's auditors do not account for the funds received by the Chamber as a DMO until the services are actually performed. *Id.*

Additionally, the Chamber keeps track of the funds spent on each marketing campaign. (Deal Dep. 19:7 – 21:21.) At the end of the fiscal year, the Chamber provides a detailed accounting to the local government entities showing how the money was spent.

Deal Dep. 21:22 – 22:25.) If the Chamber does not provide the goods and services promised, the Chamber may be liable to the local governments.

Moreover, if the local government entities are not satisfied with the work performed, they are free to choose another organization to provide the services. Year to year, there is no guaranty that the Chamber will be selected as the DMO. In other words, the Chamber must effectively and satisfactorily provide its marketing and tourism services to keep the business of the local governments. Because of this, the Chamber is like any other contractor providing goods and services to local government.<sup>2</sup>

Likewise, with regard to the PRT grant, the Chamber must spend the grant money as directed by the grant. The Chamber separately accounts for the revenues and expenses associated with the grant. (*See, e.g.*, Financial Statements and Auditor’s Report Years Ended June 30, 2012 & 2011, attached to Ex. D of Miles Aff.) Further, the Chamber provides “an annual report by November first, to the Chairman of the Senate Finance Committee and the House Ways and Means Committee and the director of the Department of Parks, Recreation and Tourism on the expenditure of the grants funds and on the proposed outcome measures.” Proviso 39.2 of the Appropriations Act for Budget Year 2012-13; (Aff. of Miles ¶ 6). Just as with the A-Tax money, the Chamber provides

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<sup>2</sup> Throughout this litigation, Respondent has argued that the Chamber is a public body subject to FOIA because it is not a contractor of the local governments and is not providing goods and services in exchange for the funds received. Recently, however, Respondent sent a letter to the Town Manager for Hilton Head Island acknowledging the contractual relationship between the Chamber and the Town of Hilton Head Island and arguing that the contract should be subject to the procurement code because it is an agreement for the provision of services by the Chamber. (Letter from Taylor Smith to Stephen Riley, Town Manager, May 17, 2016.) Because this letter was sent after the circuit court issued its decision in this case, the circuit court was not able to consider it.

identifiable goods and services in exchange for the money it receives and does not have *carte blanche* to spend the money as desired.

These circumstances are very different from the circumstances in *Weston*, where the Foundation had no accountability to the university or to the public, did not have to publicly report how the funds were spent, did not have to submit a budget or an accounting, and did not appear to have any liability for failing to use the money for a particular purpose. The Foundation was free to manage and expend the public funds as desired, exercising complete discretion over how the funds were spent, with no input from the public or the university. Moreover, the public had no means to determine how the public funds were spent.

Because the Chamber is providing identifiable goods and services in the exchange for the money it receives, the circuit court erred in concluding the Chamber is a public body.

**C. The Chamber spends the public funds it receives as directed by the government entities it serves and publicly accounts for how the funds are spent.**

Finally, the Chamber does not have unfettered discretion to expend public funds. The Chamber spends the public funds it receives as directed by the government entities and accounts to the government entities each year. In doing so, the Chamber is carrying out ministerial functions rather than exercising discretion over how public money is spent. By the time the money reaches the Chamber, the government entity has already determined how the money will be spent. It is the Chamber's job to carry out those wishes and to use

the money as directed by the government entity.<sup>3</sup> Accordingly, because the public body retains the control over how the funds are spent and the public has access to the government entity's documents, the Chamber is not a public body.

With regard to A-Tax money, this Court has already determined that the local government entity (and not the designated marketing organization) has the spending authority. *See Thompson v. Cnty. of Horry*, 294 S.C. 81, 362 S.E.2d 646 (1987). In *Thompson*, community associations sued Horry County claiming that A-Tax funds were not being spent “primarily in the geographical area of the county in which the proceeds of the tax were collected.” *Thompson*, 294 S.C. at 83, 362 S.E.2d at 647-48. The Court disagreed, and as a part of its ruling, held that the county had reasonably exercised its spending discretion. *Id.* at 85, 362 S.E.2d at 649. In doing so, the Court stated:

We do not mean to suggest that a county has unbridled discretion in spending [A-Tax] funds. Clearly, it must follow the statutory guidelines which govern such expenditures. However, we are satisfied that in this case the County exercised its discretion in good faith and that its [A-Tax] fund expenditures substantially complied with the statute.

*Id.* *Cf. City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 304, 755 S.E.2d 425,428 (2014) (“Here the Legislature has created a complex statutory scheme for the expenditure of accommodation tax revenues, and we must do our best to construe and apply the Act as intended by the Legislature.”).

The Attorney General's Office has reached a similar conclusion. In a recent opinion, the Attorney General's Office examined the question of whether the Tourism

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<sup>3</sup> In fact, there are three levels of review of the expenditures: the local A-Tax Committee, the town council, and the Tourism Expenditure Review Committee. All of the entities are subject to FOIA.

Expenditure Review Committee (“TERC”) must oversee the expenditure of A-Tax funds given to an organization to promote tourism. See Op. S.C. Att’y Gen., 2015 WL 5462169 (Sept. 3, 2015). In the opinion, the Attorney General states that it is the local government that is spending the funds. *Id.* at \*5

The Attorney General also outlined the “administrative checks on the local government’s spending of the money.” *Id.* at \*5. The opinion describes the control the local government has over the funds, and explains that it is the local government, and not the selected organization, that must answer to the TERC. *Id.* at \*6 (citing S.C. Code Ann. § 6-4-35(B)). Similarly, it is the local government entity, and not the selected organization, that must submit reports each year to the South Carolina Accommodations Tax Oversight Committee detailing how the money is spent. See S.C. Code Ann. § 6-4-25(D).

Here, because the Chamber is spending public money as directed by the local government entities, the Chamber is not a public body. Instead, the Chamber is providing goods and services as instructed by the public body and serves at the pleasure of the local government entity. In doing so, the Chamber must comply with numerous provisions set forth by statute. By statute, the Chamber must prepare and submit a budget showing how the planned expenditures. S.C. Code Ann. § 6-4-10(3). The budget is subject to the review and approval of the local government entity, as well as the advisory committee appointed by the local government entity. S.C. Code Ann. § 6-4-25 (2004). Once the budget is approved, the Chamber must spend the money as provided in the budget, and must account for the funds at the end of the fiscal year. *Id.* This process ensures that the local government entity retains control over how the funds are spent.

Moreover, the process of reporting to the local government entities would be unnecessary if the legislature intended for the DMO (designated marketing organization) to be subject to FOIA. By including these reporting requirements, the legislature keeps the control and accountability over the funds with the local government entities.

In addition to the budget and year-end reporting requirements, the local municipality or county holds public meetings with an A-Tax advisory committee present. These meetings give the public the opportunity to review and provide comments on the proposed budget before it is approved. (Thomas Dep. 40:11-41:2.) The public also has the opportunity to review the accounting submitted at the end of the fiscal year to see how the money was actually spent. In the event members of the public do not like how the funds are being spent, they are free to raise those concerns to the governmental entities that represent them.

Even if the expenditures change from the proposed budget, the spending authority and discretion still lies with the local governments. For example, if it appears that expenditures are going to vary materially from the budget, the Chamber seeks the approval of the local government's representatives. (Thomas Dep. 19:25 – 22:16; Deal Dep. 60:13-18.) If it appears that expenditures will vary slightly (\$10,000 or less), the Chamber uses its professional judgment to address the variance, but still reports the variance and actually dollars spent at year-end. (Thomas Dep. 54:16-22.)

The local government entity also retains control over whether to select the Chamber as the designated marketing organization. Each year, the local government entity is free to choose another organization that has an existing, ongoing tourism program.

Likewise, with regard to the PRT grant, the Chamber must spend the grant money as directed by the grant and must provide an annual report to the Chairman of the Senate Finance Committee, the House Ways and Means Committee, and the director of the Department of Parks, Recreation, and Tourism. This reporting requirement ensures that the ultimate accountability for how the funds are spent remains with the government entity providing them.

This is contrary to how the Foundation in *Weston* operated. The Foundation managed and expended the money it received with no input from the public or the university. Further, the Foundation was not required to account to a public body for how the money was spent. This course of conduct allowed the Foundation to spend large sums of public money with no public oversight whatsoever.

Because the Chamber does not have unfettered discretion to expend public funds and is accountable to the government entities it serves, the circuit court decision finding that the Chamber is a public body should be reversed.

## **II. The Chamber should be permitted to remain private.**

The Chamber should be permitted to remain private. The Chamber is not engaged in government business and no public purpose is served by converting this private organization into a public one.

The overall purpose of FOIA is to ensure that government business is conducted 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.” S.C. Code Ann. § 30-4-15. FOIA’s essential purpose “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) (emphasis added). *See also Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996) (“South Carolina’s FOIA was designed to guarantee the public reasonable access to certain activities of the government.”). “The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in the government.” *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 450, 746 S.E.2d 329, 338 (2013).

Here, the Chamber is a private, nonprofit, membership-based organization that is not engaged in government activity. Rather, the Chamber is engaged in commercial activity aimed at benefiting its members and promoting tourism in the areas where its members reside and conduct business. The Chamber’s receipt of public money alone should not convert this private organization into a public one, particularly when there is complete accountability at the government level regarding how the money is spent.

With regard to the A-Tax money, the public has access to the budget and the year-end accounting. In addition, the Chamber submits a third party audit to the local government entity at the end of each fiscal year, which is also publicly available. Any misuse of the funds—none of which has been found here—would be revealed through the records of the public entity, a point Respondent’s counsel conceded at the hearing on summary judgment. (Hr’g Tr. 32:2-16.)

Similarly, with regard to the PRT grant, the Chamber is required to provide an annual report to the chairpersons of the Senate Finance Committee and the House Ways and Means Committee, along with the department’s director, showing how the funds received were spent. (Proviso 39.2 of the Appropriations Act for Budget Year 2012-13.)

Members of the public, including Respondent, are free to review these annual reports for purposes of reviewing how funds are spent. (Aff. of Miles ¶ 6; *see also* Thomas Dep.26:18-29:22; 31:19-25; 59:15-60:8 & Ex. 2 to Thomas Dep.)

This is not a case of trying to uncover secret government activity or fraud or corruption in government. The public already has access to information regarding the receipt and expenditure of A-Tax money, and how the PRT grant money is spent. Nor is this a case to ensure that public business is conducted in an open and public manner. The allocation of A-Tax money is a matter of state statutory law and the manner in which the money is disbursed and spent is available to the public.

Instead, this is a case about a private entity pursuing a private agenda. It is about a private entity trying to use FOIA for a private purpose. The numerous newspaper advertisements and emails show an entity (Respondent) that is on a mission to harm the Chamber and is determined to “leave no stone unturned” until “misconduct” is discovered. Respondent has even gone so far as to alert the Internal Revenue Service to alleged misconduct, and yet nothing has happened as a result of the alleged reports. Indeed, there is no evidence whatsoever in this record of misconduct by the Chamber.

Further, the information Respondent is seeking shows that this case has nothing to do with uncovering secret government activity. The names, sex, race, title, and dates of employment of all employees and officers of the Chamber are not matters of public importance. Likewise, staff manuals and written instruction to staff, statements of policy and interpretations of policy, statutes, and the constitution, and written planning policies and final planning decisions have no public importance. These requests show that Respondent’s motive has nothing to do with FOIA and transparency in government.

Most importantly, a finding that the Chamber is a public body will severely undermine the nature and purpose of the Chamber, to the point that the Chamber will lose its utility as a membership-based organization. As this Court recognized in *Disabato*, subjecting a private entity to FOIA impacts the entity's right to associational privacy. 404 S.C. at 446, 746 S.E.2d at 335. The Court explained:

Among the protections afforded by the freedom of association are the rights to not associate, to privacy in one's associations, and to be free from governmental interference with the internal affairs and organization of one's associations.

*Id.*

Subjecting the Chamber to FOIA will require the Chamber to open its meetings and doors to the public, to people who are not members, who do not pay membership dues, and whose interests may not be aligned with the Chamber's. This opening of meetings completely undermines the membership-based nature of the organization and the benefits that come with the members' ability to associate with like-minded people who share the Chamber's mission and goals. Making the meetings public will chill communications among members and impact their ability to discuss matters openly and freely.

Further, if the Chamber is deemed a public body, documents and information having nothing to do with government activity or the expenditure of public funds will be subject to disclosure. The Chamber would have to disclose information about its members, donors, sources of private revenue, and salaries. *See* S.C. Code Ann. §§ 30-4-20(c), -30(a). Because of this, members may no longer want to be members. Donors and private sector partners may no longer want to contribute.

Subjecting the Chamber to the requirements of FOIA would not only transform the nature of the organization but also would place a significant administrative burden on the Chamber. (Miles Aff. ¶ 8.) The Chamber would have to hire someone to respond to FOIA requests and to determine what is required to be disclosed and what is exempt. The staff would have to be trained on how the law works so as to avoid civil and criminal liability. S.C. Code Ann. §§ 30-4-100, -110.

This is not the aim of FOIA. FOIA is meant to regulate government activity and to provide transparency in government. It is not intended to transform private organizations that also happen to provide valuable services to government entities into public ones. Private entities have a right to keep their business private, and to maintain their private mission and purpose. They should not be transformed into public bodies simply because they receive money to provide goods and services to a governmental entity. Further, government entities should be able to use private organizations to carry out functions that the government entities are not equipped to perform, without putting the private organizations at risk of being converted into public ones.

For these reasons, the Chamber should be permitted to remain private and the circuit court order should be reversed.

### **CONCLUSION**

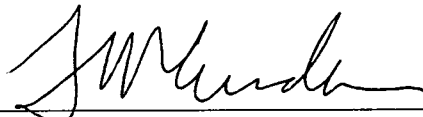
The circuit court order should be reversed. The Chamber is a private, membership-based organization that has a right to remain private. The fact that the Chamber also happens to be the organization selected each year to purchase advertising and promote tourism in the local areas should not convert the Chamber into a public body. In performing these services, the Chamber is not engaged in government activity and does not expend

public funds. The government entities determine how the funds will be spent, and the Chamber merely carries out those directives. The Chamber is accountable to the government entities through the annual budget and year-end accounting. The public has access to this information and the process.

If a member of the public does not like how the A-Tax statutory scheme works, or how the money collected is spent, he or she is free to raise the issue with government representatives, either at the state or local levels. Transforming the Chamber into a public body is not the solution and is not appropriate under the law.

For these reasons, the circuit court order should be reversed and this Court should enter an order declaring that the Hilton Head Island-Bluffton Chamber of Commerce is not a public body subject to the Freedom of Information Act.

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August 24, 2016

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Appellate Case No. 2016-000455

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AUG 24 2016

**SC SUPREME COURT**

DomainsNewMedia.com, LLC,

Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce,

Appellant.

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**PROOF OF SERVICE**

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I certify that I have caused the service of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal upon Respondent by hand delivery on August 24, 2016, addressed to its attorney of record, Taylor M. Smith, Harrison & Radeker, P.A., 923 Calhoun Street, Columbia, South Carolina 29201.

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