THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000460

DomainsNewMedia.com, LLC, Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce, Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Bess J. DuRant (SC Bar No. 77920)
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TABLE OF CONTENTS

Table of Authorities iii

Argument 1

1. The Chamber is not a public body 1
2. The issue of whether the Chamber is a public body is preserved for review. 5
3. The Chamber should be permitted to remain private 7

Conclusion 9

TABLE OF AUTHORITIES

Cases

Burton v. York Cnty. Sheriff's Dep't, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004) 1

Disabato v. S.C. Ass'n of Sch. Adm'rs, 404 S.C. 433, 746 S.E.2d 329 (2013)...............1, 2, 3, 6, 8

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) 5

I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 7

Roche v. Young Bros., Inc. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998)...............................1

Sutler v. Palmetto Elec. Coop., Inc., 325 S.C. 465, 481 S.E.2d 179 (Ct. App. 1997)....................3

Thompson v. Cnty. of Horry, 294 S.C. 81, 362 S.E.2d 646 (1987) 2, 9

Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401 S.E.2d 161 (1991) 1

Wilder v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) 6

Woods v. Boeing Co., 841 F. Supp. 2d 925 (D.S.C. 2012)...3

Statutes

S.C. Code Ann. §§ 6-4-5 to -35 (2004)..2, 8, 9

S.C. Code Ann. § 6-4-10 (Supp. 2015)...2, 4, 8, 9

S.C. Code Ann. § 6-4-25 (2004)..2, 9

S.C. Code Ann. § 8-27-10 (Supp. 2015)...8

S.C. Code Ann. § 11-7-10 *et seq.* (2010 & Supp. 2015) 8

S.C. Code Ann. § 30-1-10 *et seq.* (2007)..8

S.C. Code Ann. § 30-4-20, -30 (2007)...7, 8

S.C. Code Ann. § 30-4-60 (Supp. 2016) 7

S.C. Code Ann. § 30-4-80 (Supp. 2016) 7

S.C. Code Ann. § 30-4-90 (2007) 7

S.C. Code Ann. §§ 30-4-100, -110 (2007) 8

Other Authorities

Op. S.C. Att'y Gen., 2015 WL 5462169 (Sept. 3, 2015) 2, 9

Proviso 39.2 of the Appropriations Act for Budget Year 2012-13 2

ARGUMENT

The Chamber submits this reply brief in response to the arguments made by Respondent in its brief. Because the circuit court erred in ruling that the Hilton Head Island-Bluffton Chamber of Commerce ("the Chamber") is a public body subject to the Freedom of Information Act ("FOIA"), the circuit court's decision should be reversed.

1. The Chamber is not a public body.

First, the statutory language defining a public body as an entity "supported in whole or in part by public funds or expending public funds" is not itself determinative of whether a private organization is a public body for purposes of FOIA. This Court has recognized the limitations of the definition, holding that FOIA does not apply to non-governmental entities that "receive[] public funds for a specific purpose," *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 456, 746 S.E.2d 329, 341 (2013), or to "business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms length basis." *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991).

Under Respondent's theory, any private entity that receives a single public dollar would be subject to FOIA. This is contrary to the Court's decisions in *Disabato* and *Weston*, and goes far beyond the purpose of FOIA "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); *see also 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.").

The limitations recognized in *Disabato* and *Weston* apply here, where the Chamber is a private, non-governmental entity, that receives public funds for the specific purpose of

promoting tourism and marketing in the Hilton Head Island and Bluffton areas. The Chamber is not affiliated with any government entity and provides the goods and services on an arm's length basis.

Further, the Chamber does not receive an *en masse* transfer of funds like the Foundation in *Weston*. With regard to the A-Tax funds, the Chamber is subject to budget and accounting requirements, S.C. Code Ann. § 6-4-10(3) (Supp. 2015); § 6-4-25 (2004), and must "manage and direct the expenditure of these tourism promotion funds" in accordance with the South Carolina Accommodations Tax Act, S.C. Code Ann. §§ 6-4-5 to -35 (2004). The local government entities, not the Chamber, retain the spending authority over the funds. *See Thompson v. Cnty. of Horry*, 294 S.C. 81, 362 S.E.2d 646 (1987) (recognizing that the local government entity has the spending authority and not the DMO); Op. S.C. Att'y Gen., 2015 WL 5462169 (Sept. 3, 2015) (stating that the local government entity is the one spending the funds). The Chamber is subject to similar reporting requirements for the grant it receives from the South Carolina Department of Parks, Recreation, and Tourism ("PRT"). Proviso 39.2 of the Appropriations Act for Budget Year 2012-13; (R. p. 224).

Moreover, the Chamber does not recognize the funds as revenue until services are provided. (R. pp. 86; 104; 122.) If the Chamber received the funds *en masse* and had unfettered discretion to spend the funds as desired, the Chamber could recognize the funds as revenue the day the funds are received. Instead, the Chamber does not recognize the funds as revenue until goods or services are provided in exchange for the funds. *Id.*

Additionally, the receipt of a large sum of money does not transform a private entity into a public one. As this Court recognized in *Disabato*, a private organization that receives public money to operate a childcare center or a healthcare clinic—a service that would presumably cost

hundreds of thousands of dollars—would not be subject to FOIA. 404 S.C. at 456, 746 S.E.2d at 341. This is because something is being provided in exchange for the funds.

A South Carolina federal district court reached a similar conclusion in a case involving Boeing. The court ruled that Boeing was not a public body for purposes of the Whistleblower Act, which uses the same definition for "public body" as FOIA, even though Boeing received "a massive amount of public money" to build a plant in North Charleston. *Woods v. Boeing Co.*, 841 F. Supp. 2d 925 (D.S.C. 2012). The rationale behind the court's decision was that Boeing provided something—jobs—in exchange for the funds, which satisfied the *quid pro quo* condition set forth in *Sutler v. Palmetto Elec. Coop., Inc.*, 325 S.C. 465, 481 S.E.2d 179 (1997) (holding that an electric cooperative that received discounted interest rates from a federal agency was not a public body because the cooperative provided electricity to rural areas in exchange for the lower rates).

Second, the fact that the General Assembly did not expressly exclude designated marketing organizations ("DMOs") like the Chamber from FOIA does not mean that the General Assembly intended for DMOs to be subject to FOIA. An entity does not have to be expressly excluded from FOIA for a court to determine that FOIA does not apply. If that were true, then numerous entities would be subject to FOIA even though they are not public bodies. For example, nonprofits that receive public grant money would be subject to FOIA because they are not specifically exempted, as would other private entities that provide goods and services in exchange for public funds.

Third, the Chamber does not receive public funds from the local government entities simply because of the Chamber's status as the DMO. The Chamber receives the funds because of the goods and services provided in its capacity as DMO. The Chamber must do something

and provide something in exchange for the funds. Status alone is not enough. The budgets, accountings, and annual audit reports in the record showing the goods and services provided undermine Respondent's argument that the Chamber receives the funds based on status alone. (R. pp. 68 - 144.)

Fourth, the public has access to how the funds are spent, and may even have broader access than what is discoverable under FOIA. The budgets and accountings the Chamber provides to the local government entities outline in detail how much money is spent on various marketing campaigns, print media versus digital media, and so on. *Id.* Additional information is the annual audit reports. *Id.* Citizens are free to request copies of these documents from the local government entities and to inquire about the information provided. They are also free to participate in the town and county meetings and to provide input as to how the funds are used.

Fifth, the relationship between the Chamber and the local government entities is arm's length. The relationship is a matter of public record, the parties are not related to one another, and the parties have equal bargaining power. Respondent fails to cite any authority for the proposition that there is an absence of negotiations, or that the relationship "has been understood for years." (Br. p. 12.) Although it is true that the Chamber has served as the DMO for several years, each year the local government entities have the right to choose any "one or more organizations" with an "existing, ongoing tourism promotion program" to "manage and direct the expenditure of the[] tourism funds." S.C. Code Ann. § 6-4-10(3). The government entities do not have to choose the Chamber and do not have to choose the Chamber alone, nor does the Chamber have to agree to be the DMO.

Because the Chamber provides goods and services on an arm's length basis in exchange for the public funds it receives, the circuit court erred in concluding that the Chamber is a public body subject to FOIA.

2. The issue of whether the Chamber is a public body is preserved for review.

Contrary to what Respondent argues, the sole issue before this Court—whether the Chamber is a public body under FOIA—is preserved for review.

The purpose of issue preservation is to give the trial court a fair opportunity to rule on the issue presented. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Accordingly, "[a]t a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Id.*

Here, the issue of whether the Chamber is a public body under FOIA was raised and ruled upon by the circuit court. The parties briefed the issue, presented arguments at the hearing, and submitted proposed orders. At each stage, the circuit court had a full and fair opportunity to consider the issue presented. The court explained its ruling in a 13-page order outlining the court's analysis and conclusions. (R. pp. 1 - 13.)

Contrary to what Respondent contends, the Chamber is not making new arguments on appeal. The Chamber has consistently maintained that it is not a public body subject to FOIA for a variety of reasons, including that the Chamber provides identifiable goods and services to the local government entities in exchange for payment on an arm's length basis; the local government entities retain the spending authority and oversight over the funds; and the public has access to how the funds are spent through the budget and accounting providing to the public bodies. (R. pp. 240 – 305; 343 – 347.)

In making these arguments on appeal, the Chamber is not constrained to use the exact same language as it did below. If that were true, then no new briefing would be permitted. Respondent does not cite any authority for the proposition that a party must make the identical arguments on appeal that it makes below. The case relied upon by Respondent, *Wilder v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998), does not say that "an *argument* must have been both raised to and ruled upon by the trial court." (Br. p.13.) Instead, the case states "that *an issue* cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Id.* at 76, 497 S.E.2d at 733. In any event, the thrust of the Chamber's arguments has been the same throughout this case: the Chamber is a private entity and should be permitted to remain private.

The Chamber is not, as Respondent contends, arguing that the "public body" definition of FOIA should be deemed unconstitutional. The Chamber agrees this would be a new issue that was not raised to and ruled upon by the circuit court. But the Chamber did not raise this issue. Instead, the Chamber merely highlighted that the dissent in *Disaboto* found that the statute was so broadly written that the language could not be constitutionally applied and should be severed from the statute. 404 S.C. at 457, 746 S.E.2d at 341.

At the same time that Respondent contends new arguments cannot be made on appeal, Respondent makes new arguments. Respondent argues for the first time that the Chamber is subject to FOIA because the A-Tax statutory scheme was enacted after the FOIA statute, and the General Assembly did not exempt DMOs. (Br. p. 7.) Respondent also argues for the first time that the Chamber receives A-Tax money for being something (the DMO) rather than for doing something (providing goods and services). (Br. p. 12). In any event, these new arguments fail on the merits as explained above.

Further, given the novel nature of the issue presented and the fact that review is *de novo*, the Chamber is free, and indeed it is incumbent upon the Chamber, to present case law from other jurisdictions showing what courts in other jurisdictions have decided and to make policy arguments outlining the practical effect an adverse ruling would have not only on the Chamber, but on entities like it. The remaining arguments in the Chamber's brief relate to the analysis and considerations set forth in *Weston*, which were before the trial court and which the trial court considered in making its ruling.

Finally, the Chamber did not need to file a Rule 59(e) motion to preserve the issue before this Court for review. As explained above, the issue of whether the Chamber is a public body was raised to and ruled upon by the circuit court, and therefore a Rule 59(e) motion was not required. *See I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (explaining that the purpose of a Rule 59(e) motion is to ask the Court to reconsider its decision or to ask the Court to rule on an issue that was not ruled upon in the first instance).

Accordingly, because the issue of whether the Chamber is a public body for purposes of FOIA was raised and ruled upon, the issue is preserved for review.

3. The Chamber should be permitted to remain private.

A finding that the Chamber is subject to FOIA will end the private, membership-based nature of the Chamber.

Among other things, the Chamber will be required to open its member meetings to the public, S.C. Code Ann. § 30-4-60 (2007); post the meeting agenda 24 hours in advance, S.C. Code Ann. § 30-4-80 (Supp. 2015); make the meeting minutes publicly available, S.C. Code Ann. § 30-4-90(a) (2007); and permit attendees to record the meeting. S.C. Code Ann. § 30-4-90(c) (2007). The Chamber will be required to disclose information about its members, donors,

sources of private revenue, and salaries. *See* S.C. Code Ann. §§ 30-4-20(c), -30(a) (2007). The Chamber will need to hire and train new staff on how to comply with FOIA to avoid civil and criminal liability. S.C. Code Ann. §§ 30-4-100, -110 (2007).

These are more than "mild inconveniences," as Respondent contends. (Br. p. 17.) They are requirements that will undermine the Chamber's ability to keep its internal affairs private and to associate with members who share the Chamber's mission. *See Disabato*, 404 S.C. at 446, 746 S.E.2d at 335 (explaining that "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").

Moreover, a finding that the Chamber is a public body for purposes of FOIA may lead to the conclusion that the Chamber is a public body for purposes of other statutes that define public body the same way, such as the South Carolina Whistleblower Act, S.C. Code Ann. §§ 8-27-10 *et seq.* (Supp. 2015), the Public Records Act, S.C. Code Ann. §§ 30-1-10 *et seq.* (2007), and the statutory provisions applicable to the State Auditor, *see* S.C. Code Ann. §§ 11-7-10 *et seq.* (2010 & Supp. 2015).

The Chamber should not, as Respondent argues, be forced to form a separate corporate form to operate as a DMO. The A-Tax statutory scheme contemplates the exact opposite, which is that the government entity will select "one or more organizations, such as a chamber of commerce" with an "*existing, ongoing tourist promotion program*" to provide the desired goods and services of the local government entity. S.C. Code Ann. § 6-4-10(3) (emphasis added).

Further, it is not the very essence of a DMO to expend public funds as Respondent contends. The essence of a DMO is to "manage and direct the expenditure of these tourism promotion funds" in accordance with the South Carolina Accommodations Tax Act, S.C. Code

Ann. §§ 6-4-5 to -35 (2004), and as presented to and approved by the local government entity through the budget and accounting process. S.C. Code Ann. § 6-4-10(3) (Supp. 2015); § 6-4-25 (2004); *see also Thompson v. Cnty. of Horry*, 294 S.C. 81, 362 S.E.2d 646 (1987) (recognizing that the local government entity has the spending authority and not the DMO); Op. S.C. Att'y Gen., 2015 WL 5462169 (Sept. 3, 2015) (stating that the local government entity is the one spending the funds).

Finally, the record does not contain any evidence of any wrongdoing on the part of the Chamber. The Chamber has nothing to hide. The Chamber puts in writing how it intends to use the public funds it receives and publicly accounts for its spending at the end of each fiscal year. Additionally, the Chamber's books are audited annually by a third party, and although not required, the audit reports are provided to the local government entities. (R. pp. 68 - 144.) Indeed, Respondent's counsel conceded at the summary judgment hearing that any misuse of funds would be revealed through the record of the public entity. (R. pp. 380; 382 – 383.)

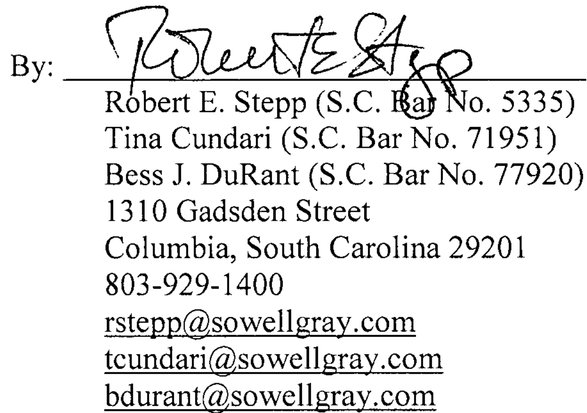
The people of Hilton Head Island and Beaufort County have full and complete access to how the funds are spent. To the extent they want more information, they are free to inquire of the local government entities that serve and represent them.

Because the application of FOIA to the Chamber will transform the way the Chamber operates and end its status as a private, membership-based organization, the circuit court's decision should be reversed.

CONCLUSION

The circuit court's decision concluding that the Chamber is a public body and subject to FOIA should be reversed, and judgment should be entered in favor of the Chamber.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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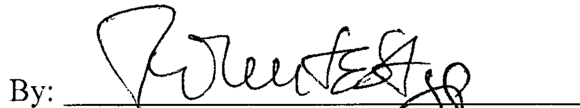
By: 

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PROOF OF SERVICE

I certify that I have caused the Final Brief and Final Reply Brief of Appellant to be served upon Respondent by hand delivering a copy of it on June 15, 2017, addressed to its attorney of record, Taylor M. Smith, at his office at Harrison & Radeker, PA, 923 Calhoun Street, Columbia, South Carolina, 29201.

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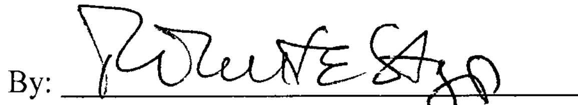
By: 

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