

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) CIVIL ACTION NO. 16-CP-40-1651

Sisters of Charity Providence Hospitals,
Plaintiff,

v.

Palmetto Health,
Defendant.

ORDER

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SC Court of Appeals

2017 JUL 12 4:10:00 PM
JEANETTE W. JONES
COPPA OCS
RICHLAND COUNTY

THIS MATTER came before the Court for a bench trial on February 7, 2017. Present at the trial were James G. Carpenter, Esq., for Plaintiff; and Celeste Jones, Esq., for Defendant. The Court heard testimony and received documentary evidence. Based on the evidence presented, the arguments of counsel, and the applicable law, the Court makes the following findings of facts and conclusions of law:

Factual Background

On February 8, 1998, Richland Memorial Hospital merged with Baptist Health Care System of South Carolina to form Defendant Palmetto Health. The two entities continue to exist as component parts of Palmetto Health.

Plaintiff served Defendant two requests for “public records” under the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 ff. (“FOIA”). Defendant refused to produce the requested public records. Plaintiff filed this civil action to enforce FOIA.

The central controversy is a mixed question of fact and law: whether Defendant is a “public body” as defined by FOIA.

(a) “Public body” means 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, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

S.C. Code Ann. § 30-4-20(a) (emphasis added).

The central fact in controversy is whether Defendant is an “organization . . . supported in whole or in part by public funds or expending public funds.” *Id.* A related factual issue is whether Defendant has a history of complying with FOIA.

Findings of Fact and Conclusions of Law

I. Defendant Is Supported by Public Funds.

Several documents demonstrate that Palmetto Health has been receiving millions of dollars in government grants each year for many years. Each year, Defendant is required to file a federal tax Form 990. The IRS Instructions for Form 990 state the following with regard to line 1.e. of Part VIII. Statement of Revenue:

Enter the total amount of **contributions** in the form of grants or similar payments from local, state, or federal government sources, as well as foreign governments. Include grant amounts from **U.S. possessions**.

Whether a payment from a **governmental unit** is labeled a “grant” or a “contract” does not determine where the payment should be reported on part VIII. Rather, a grant or other payment from a governmental unit is reported here if its primary purpose is to enable the organization to provide a service to, or maintain a facility for, the direct benefit of the public rather than to serve the direct and immediate needs of the governmental unit. In other words, the payment is recorded on line 1e if the general public receives the primary and direct benefit from the payment and any benefit to the government unit is indirect and insubstantial as compared to the public benefit.

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The following are examples of governmental grants and other payments that are treated as contributions and reported on line 1.e.

- Payments by a governmental unit for the construction or maintenance of a library or museum facilities open to the public.
- Payments by governmental unit to nursing homes to provide care to the residents (but not Medicare/Medicaid or similar payments made on behalf of the residents).
- Payments by governmental unit to child placement or child guidance organizations under government programs to better serve children in the community.

Id., pp. 37-38 (emphasis in original).

Defendant's Form 990, filed from 2008 to 2014, reported the following on Part VIII line

1.e., entitled "government grants (contributions):"

2008: \$4,183,656.
2009: \$5,910,902.
2010: \$5,695,423.
2011: \$4,021,062.
2012: \$1,861,225.
2013: \$1,728,643.
2014: \$3,266,825.

In addition, the Palmetto Health Consolidated Statements of Changes in Net Assets show

"contributions and grants" as follows:

2009: \$7,121,000.
2010: \$7,727,000.
2011: \$8,648,000.
2012: \$8,946,000.
2013: \$9,953,000.

Defendant produced two pages of information, SCPH_001750-51, including a detailed chart of the source of government grants for the year ending September 30, 2015. It shows twenty-three separate government grants totaling \$2,068,401. These pages demonstrate that these government grants are for the general benefit of the public and not for the benefit of the governmental unit. They are grants, and Defendant is an "organization, corporation, or agency supported in whole or in part by public funds or expending public funds." S.C. Code Ann. § 30-

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4-20(a). Accordingly, the Court finds that Defendant is supported by public funds.

II. Defendant Expends Public Funds and Manages Their Expenditure.

David F. Lee, Palmetto Health's director for financial forecasting, testified that his department provides financial record management for the expenditures of monies from governmental grants. Lee testified as follows:

1. That "[o]ne of my responsibilities was reporting -- documentation reporting of grants and other services that we do back to the funding source."¹
2. That he and his department use a record-keeping system to "report expenditures related to this grant . . . To make sure that the grant obligations are met, . . . and the expenditures have been spent in order for us to release the funds and record them as revenue."²
3. That the documentation provided by his department is "a requirement of the funding. When we receive the funding, we're required to keep the documentation of those expenditures and then report them back."³
4. That he and his staff "oversee those expenditures to make sure they comply with the purposes of the grant."⁴
5. That "it is fair to say that [he] manage[s] and oversee[s] the financial justifications for the expenditures."⁵
6. That the Sexual Assault Nurse Examiner (or "SANE") program is a grant or program that has been going on since 1999.⁶
7. That his department would have the responsibility for all the financial paperwork, and to make sure that the financial documentation matches up to the budget and the purposes of the grant.⁷
8. That his department oversees the expenditure of the money to make sure it spent as was intended . . . "[a]nd before we request reimbursement for it[.]"⁸
9. That his office would make sure that the expenditures are in keeping with the budget

¹ Tr. of R., February 8, 2017, 2016-CP-40-01651 ("Tr."), page 86, lines 2-5.

² Tr., p. 91, lines 12-22.

³ Tr., p. 94, lines 16-18.

⁴ Tr., p. 94, lines 19-23.

⁵ Tr., p. 97, lines 9-11.

⁶ Tr., p. 97, line 22—p. 98, lines 1-3.

⁷ Tr., p. 98, line 21—p. 99, lines 1-2.

⁸ Tr., p. 103, lines 8-11.

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narrative and the purposes.⁹

10. That Palmetto Health has been receiving money under a grant from The Health Resources and Services Administration in the United States Department of Health and Human Services from July 1, 2001 up through May 31, 2019. They receive about \$1.2 million a year.¹⁰
11. That if his office did not "meet obligations," Palmetto Health would, "at some point in time, need to refund the money to the government."¹¹
12. That Palmetto Health also receives a grant from the Department of Veterans' Administration, equal to the expenditures they incur, to supply the Veterans' Administration and the Veterans' Hospital with residents, and his office makes sure that the documentation is there to validate those expenditures and those actions being taken.¹²
13. That Palmetto Health also receives funds from the State of South Carolina each year for the expansion of Palmetto Health's family practice residents, and his office oversees financial aspects or the accounting for the distribution of those funds, amounting to "[a]bout \$800,000 a year."¹³

The Court finds that Defendant has expended and managed the expenditure of millions of dollars of public grant funds for a variety of public grantors for many years.

III. Defendant Has a History of Complying with FOIA.

Palmetto Health is a combination of Richland Memorial Hospital and Baptist Hospital. Paul Duane, Defendant's CFO of sixteen years, testified that Palmetto Health is an "alliance:" it carries out the function of Richland Memorial Hospital and the function of Baptist Hospital as a unified entity. Defendant has a history of complying with FOIA, both in requests for public records and in the open meetings law sections of FOIA.

Duane testified that for as long as he had been attending board meetings in his sixteen years as CFO, Palmetto Health has conducted its board meetings as public meetings and gives public

⁹ Tr., p. 103, lines 22-25.

¹⁰ Tr., p. 105, line 16—p. 106, line 16.

¹¹ Tr., p. 107, lines 1-5.

¹² Tr., p. 107, line 19—p. 108, line 9.

¹³ Tr., p. 110, ll. 5 – p. 111, l. 1.

notice, which would be in compliance with the open meetings provisions of FOIA, S.C. Code Ann. § 30-4-60.¹⁴ Duane testified that, from time to time, there would be a motion and a vote to go into “executive session” to discuss contracts, strategies, legal matters, and to obtain legal advice from lawyers, in accord with S.C. Code Ann. Section 30-4-70.¹⁵ The most recent executive session was within the last quarter.¹⁶

Plaintiff’s Exhibits 20 and 21 demonstrate that Defendant has responded to requests under FOIA in the past. Exhibits 20 and 21 are letters from March and April of 2002, in which Palmetto Health responds to FOIA requests from Plaintiff, and copies its outside counsel on the letter.¹⁷ The Court finds that Palmetto Health properly believed itself subject to FOIA, and conducted itself accordingly.

IV. Defendant’s Defenses Are Unavailing.

Defendant contends it is not a “public body” under FOIA because FOIA does not apply “to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm’s-length basis.” *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991). The Court finds that the arm’s length transaction exception does not exempt Defendant.

a. The Arms’ Length Transaction Exception Does Not Apply to Defendant.

The *Weston* court explained:

In that situation, 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. However, 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

¹⁴ Tr., p. 46, lines 7-19.

¹⁵ Tr., p. 47, lines 1-16.

¹⁶ Tr., p. 48, lines 2-9

¹⁷ Tr., p. 48, line 20—p. 56, line 23.

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specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. Defendants contend this exception applies to them.

However, before the *Weston* Court articulated the exception, it also described four separate holdings that it found were sufficient to subject the Defendant Foundation to the application of FOIA. In what the Court called the “second transaction,” the Foundation had received \$16,300,000 in federal grant money “in connection with” the construction of the Swearingen Engineering Center. The Defendant Foundation had managed the expenditure of these funds in the construction of the engineering center. The Supreme Court found that, in so doing, the Foundation had “received support from public funds and [had] expended public funds.” *Id.* 303 S.C. at 402, 401 S.E.2d at 163.

Just as the Foundation in *Weston* received and expended funds for the construction of an engineering center, so has Palmetto Health received and expended funds for various purposes, and is thereby subject to FOIA. In *Weston*, the Supreme Court ruled, “[e]ach of the above transactions alone would bring the Foundation within the FOIA’s definition of ‘public body.’” *Id.* 303 S.C. at 403, 401 S.E.2d at 164.

In *Weston*, the Defendant Foundation argued “that the grant did not support the Foundation, but that the money went towards the cost of constructing the Swearingen Engineering Center.” *Id.* 303 S.C. at 402, 401 S.E.2d at 163. The Supreme Court ruled, “[T]he Foundation clearly directed the expenditure of the funds it received.” *Id.*

The Defendant Foundation made a similar argument regarding the receipt of two million dollars from the City of Columbia and \$3.75 million from Richland County to help develop the Koger Center. The Foundation argued that those funds were given to it “pursuant to a contractual agreement and that once the City and County transferred the property and performance of their

contractual agreement, the expenditure of public funds ended.” *Id.* 303 S.C. at 402, 401 S.E.2d at 164. The Supreme Court rejected this argument as well. “This argument is not persuasive. Funds from the public coffer were given to the Foundation which managed the expenditure of the funds and the development of the real estate. By these actions, the Foundation received support from and expended public funds.”

The Foundation’s argument in *Weston* is the same argument made by Palmetto Health. Defendant has received millions of dollars in public funds over many years and expended the public funds, thereby subjecting itself to the provisions of FOIA.

In the *Weston* case, all the transactions addressed by the Court were in the past, and yet the Supreme Court ruled that these transactions were sufficient to make the Foundation subject to FOIA in the present. Similarly, Palmetto Health has been receiving government grants since 2001, and for at least the last eight years, the evidence demonstrates that Palmetto Health has received millions of dollars each year in government grants from state and federal sources. Although Defendant contends that these grants are for a particular purpose and are not transferred *en masse*, the Court finds that the beneficiaries of these grants are the public at large, and that no benefit is going back to the granting authority. They do not amount to a *quid pro quo*. Accordingly, these are grants and not arm’s-length transactions by which a private body sells goods or services to the government. The government does not benefit from these grants; the public does.

b. A Corporate Citizen May Enforce FOIA.

Defendant argues that FOIA does not allow Plaintiff, a corporate citizen, to bring a FOIA enforcement action. Defendant relies on selections from FOIA to support its argument.

The Court finds that the plain language of FOIA authorizes this action by this Plaintiff. Under FOIA, a “person” is defined as “any individual, corporation, partnership, firm, organization or association.” S.C. Code Ann. § 30-4-20(b) (emphasis added). Under FOIA,

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“**Any person** has a right to inspect or copy any public record of a public body.” S.C. Code Ann. § 30-4-30(a) (emphasis added). If a “public body” refuses to provide a “public record,” “**any citizen of the State** may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter.” S.C. Code Ann. § 30-4-100(a) (emphasis added).

Defendant argues that although a corporate citizen has a right to *request* a public record, it has no right to *enforce* FOIA in court. Such a result would be absurd, and cannot be the intention of the General Assembly. Furthermore, S.C. Code Ann. Section 30-4-100(b) disposes of such a notion quite firmly: “If **any person or entity** seeking such relief prevails, **he or it** may be awarded reasonable attorney fees and other costs of litigation.” The General Assembly clearly intended that corporate citizens, such as Plaintiff, could enforce FOIA.

Corporations and other organizations have used FOIA extensively, and enforced it in the courts of South Carolina. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984) (journalists’ society); *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991) (newspaper company); *S.C. Tax Comm’n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 447 S.E.2d 843 (1994) (County Administrator); *City of Columbia v. Am. Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996) (ACLU); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001) (corporation that bid unsuccessfully for a public contract); *Burton v. York County Sheriff’s Dep’t*, 358 S.C. 339, 594 S.E.2d 888 (2004) (newspaper company); *Seago v. Horry Cnty.*, 378 S.C. 414, 663, S.E.2d 38 (2008) (electronic mapping company); *Evening Post Publ’g Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011) (newspaper company); and *Perry v. Bullock*, 409 S.C. 137, 761 S.E.2d 251 (2014) (newspaper company). The South Carolina Supreme Court has never suggested that corporate citizens or other organizations were precluded from enforcing FOIA.

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Both the statutes and the case law of South Carolina authorize corporations to use and enforce FOIA.

c. *Disabato* Did Not Change the Law.

Finally, Defendant quoted from *Disabato v. S.C. Ass'n. of Sch. Admin.*, 404 S.C. 433, 746 S.E.2d 329 (2013), arguing that it represented a “new holding” from the Supreme Court that hospitals are exempt from FOIA, even if they met the definition of a “public body.” Defendant’s reliance on this case is misplaced. The plain language of FOIA provides no support for Defendant’s assertion.

FOIA lists very clearly those “Matters exempt from disclosure.” Under S.C. Code Section 30-4-40, the legislature provided the exclusive list of exceptions to the public disclosure requirements found at S.C. Code Section 30-4-30. There is nothing in Section 30-4-40 that says “hospitals” are exempt from FOIA. Defendants have cited no language in FOIA that exempts “hospitals” from FOIA.

Disabato addressed the policies of FOIA competing with the First Amendment rights of school administrators to be a part of a school administrators’ advocacy group, supported by public funds. The Supreme Court ruled that FOIA would affect First Amendment rights only in a minor way, because FOIA applies only to “public bodies.” At the end of a lengthy opinion, the Court offered a summary of the applicable rule, not a change in the law:

The FOIA would **not** apply to a private entity that receives public funds for a **specific purpose**. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or healthcare clinic. **However**, the FOIA **does** apply to any private organization that is **generally supported** by public funds.

404 S.C. 433, 456, 746 S.E.2d 329, 341 (2013) (emphasis added)

Again, this “holding” is nothing more than a summary of multiple prior holdings, and may be properly called *dicta*. The remark about a “healthcare clinic” was not a holding of the Court

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(there was no healthcare clinic involved in the case), and it did not represent any change in policy or interpretation of FOIA. It does not mean that all hospitals are exempt from FOIA. The clause upon which Defendants rely begins with the introductory phrase, “For example.” This sentence is an unremarkable articulation of the general rule that FOIA applies to an entity generally supported by public funds, or that receives public funds *en masse*, but FOIA does not apply “to a private entity that receives public funds for a specific purpose.” This explanatory statement does not break any new ground, or portend any shift in the interpretation of FOIA.

“Public body” means . . . 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).

To read *Disabato* as Defendant has suggested would mean that the Supreme Court, in *dicta*, intended to create a new common law exemption to FOIA that is not found in the plain language of FOIA. Further, Defendant is a hospital, not a healthcare clinic; accordingly, even if the Supreme Court had intended to create a new common law exemption to FOIA, it did not do so for hospitals.

A hospital can be a “public body” just like any other organization supported by public funds. See *Campbell v. Marion Cnty. Hosp. Dist., d/b/a the Mullins Hosp.*, 354 S.C. 274, 580 S.E.2d 163 (2003). Defendant Palmetto Health is not merely “a private organization that receives public funds to operate a childcare center or healthcare clinic.” Instead, it is a combination of public and private organizations, “that is generally supported by public funds.” *Id.*

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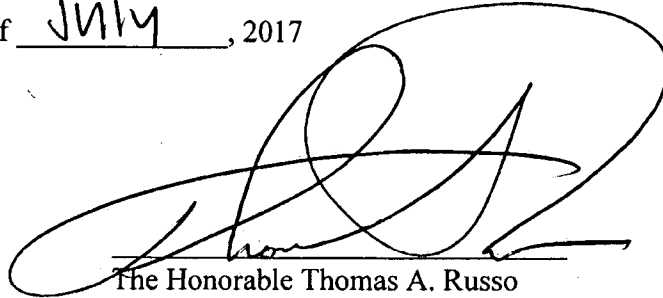
CONCLUSION

Based upon trial testimony, exhibits, and submissions of the parties, the Court finds that Defendant is a "public body." By its denial of its status as a "public body" and its failure to produce the requested "public records," Defendant violated FOIA.

WHEREFORE, the Court:

1. Declares that Defendant is a "public body" under FOIA;
2. Declares that Plaintiff's requests are deemed approved;
3. Enjoins Defendant to provide Plaintiff a copy of all requested "public records;"
4. Grants Plaintiff its attorneys' fees and costs pursuant to S.C. Code Ann. Section 30-4-100(b); and directs Plaintiff to submit an affidavit of attorneys' fees and costs.

SO ORDERED, this 5th day of JULY, 2017



The Honorable Thomas A. Russo
Circuit Judge, Presiding

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4001651

Sisters Of Charity Providence Hospitals

Palmetto Health

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of July, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Celeste Tiller Jones

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

AUG 15 2017

Clerk of Court _____

Jeanette W. McBride